UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

ANNIE LAURIE GAYLOR; DAN BARKER; IAN GAYLOR, PERSONAL REPRESENTATIVE OF THE ESTATE OF ANNE NICOL GAYLOR; and FREEDOM FROM RELIGION FOUNDATION, INC.;

Plaintiffs,

v. Case No. 3:16-cv-00215-bbc

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

Defendants,

and

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

Intervenor- Defendants.

PLAINTIFFS' COMBINED BRIEF OPPOSING SUMMARY JUDGMENT IN FAVOR OF THE GOVERNMENT AND INTERVENOR-DEFENDANTS

I. INTRODUCTION.

The Defendants, both the Government and the Intervenors, are studiedly silent on the key issue before the court: Does § 107(2) of the Internal Revenue Code provide an exemption from taxation for religious clergy that is not neutrally provided to employees of secular employers, in this case, the nation's largest freethought organization? The ultimate issue is one of

discriminatory preference for religion, which violates the Establishment Clause of the United States Constitution.

The Defendants try to justify the preference for religion on grounds of inter-denominational neutrality. They argue that if the value of in-kind housing provided by churches is not treated as income, then cash payments designated as housing allowances by other churches necessarily should also be exempt in order to avoid denominational preference. From this reasoning, the Defendants conclude that preferential across-the-board benefits for religion pass constitutional muster vis-à-vis non-religious taxpayers because they avoid alleged denominational discrimination. This turns the Establishment Clause prohibition against religious preferences on its head by ignoring the disadvantage to non-religious taxpayers.

The Defendants also incorrectly argue that § 107(2) was intended by Congress to eliminate a government imposed burden on the free exercise of religion. The taxation of income earned by employees of religious organizations, however, does not constitute an impermissible burden on religion and has never been so construed. Paying income taxes is an obligation common to all taxpayers, rather than a burden on the free exercise of religious beliefs.

Contrary to Defendants' insinuation, moreover, this is not a case involving the taxation of churches or even the taxation of church property. Section 107(2) also is not simply a Congressional determination that all clergy housing, whether provided in-kind or paid for by employees, is essentially inhabited for the convenience of the employing religious organization. The historical evidence indicates that § 107(2) was actually intended to provide a financial benefit to religious clergy without regard to any "unique" housing relationships. Section 107(2), moreover, was not adopted as part of a comprehensive enactment of similar benefits for a wide range of taxpayers, without regard to religious affiliation. By contrast, § 119 of the Internal

Revenue Code provides an exemption only for in-kind housing, while generally excluding exemptions for cash housing allowances.

Finally, the Defendants argue unpersuasively that Congress intended § 107(2) to minimize governmental entanglement with religion. Again, nothing in the history of § 107(2) remotely supports the conclusion that Congress acted for that purpose. Despite the Defendants' lip service to historical context, the evidence simply does not support the conclusion that Congress intended to minimize entanglement. Equally significant, however, is the Defendants' implausible claim that § 107(2), as administered by the IRS, minimizes entanglement.

In the end, the Defendants' administrative convenience arguments miss the point that § 107(2) constitutes a religious preference, vis-à-vis employees of non-religious organizations, like the Freedom From Religion Foundation. As the Supreme Court recognized in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14-15, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989), administrative convenience does not justify governmental preferences that are determined on the basis of religious affiliation and that are not part of a comprehensive scheme providing benefits neutrally to religious and non-religious alike. Here, the issue of such religious preferences cannot be avoided by side-stepping.

The Intervenors ultimately abandon any pretense of neutrality and fairness by arguing simply that clergy who receive cash housing allowances need the money saved by the exemption. Need, however, is not a recognized standard for conferring a religious preference under the Constitution. On the contrary, as this court has explained, non-clergy employees "need" tax exclusions just as much as ministers of the gospel - - and that is the constitutional problem with §107(2) which the Defendants fail to grasp.

II. STATEMENT OF ADDITIONAL FACTS.

The Plaintiff, Dan Barker, is a federal taxpayer who objects to the allowance of preferential and discriminatory tax benefits under § 107 of the Internal Revenue Code ("IRC"), including income tax exemptions for cash housing allowances paid as part of compensation to ministers of the gospel. (Barker Decl., ¶2.) The Plaintiff, Annie Laurie Gaylor, is Barker's wife, and they are the co-Presidents of The Freedom from Religion Foundation ("FFRF"). Barker is also the son-in-law of Anne Nicol Gaylor, deceased in 2015, whose estate is also a Plaintiff in this matter. (Barker Decl., ¶3.)

Ms. Gaylor and Barker have each received a designated housing allowance from their employer, FFRF, designated by the FFRF Executive Council (Board), FFRF's governing body, for each and every year since 2011. Anne Gaylor also received designated housing allowances during her lifetime, including for tax year 2013. (Barker Decl., ¶4.)

The FFRF Executive Council (Board) first designated housing allowances for Ms. Gaylor, Mr. Barker, and Anne Gaylor, president emerita, in August of 2011. The Executive Council (Board) designated the amount of $4,500 from each of our salaries yet to be paid in 2011. (Barker Decl., ¶5.) In addition, FFRF designated the amount of $13,200 from each of the salaries of Ms. Gaylor and Barker to be paid in 2012 as a housing allowance. The designated housing allowances were established for each month at $1,100. (Barker Decl., ¶6.) On October 12, 2012, the FFRF Executive Council (Board) renewed its prior housing allowance resolution, designating the amount of $15,000 to be paid in 2013 as a designated housing allowance. (Barker Decl., ¶7.) Additional annual housing allowances have been designated for each of the tax years 2014-2017. (Barker Decl., ¶8.)

The housing allowances designated by FFRF for Ms. Gaylor and Barker have been intended to approximate their minimal housing expenses for each year, including taxes and mortgage. (Barker Decl., ¶9.) For example, the housing expenses for Ms. Gaylor and Barker for 2012 totaled approximately $26,072, including $14,522 as mortgage payments and $7,767 as property taxes. (Barker Decl., ¶10.) Housing expenses for Ms. Gaylor and Barker for 2011 totaled approximately $26,136, including $14,552 as mortgage payments and $7,444 as property taxes. (Barker Decl., ¶11.)

Barker has long considered the exemption allowed only to ministers to be discriminatory and unfair. (Barker Decl., ¶12.) In 2011, therefore, he joined in a lawsuit with Annie Laurie Gaylor and Anne Nicol Gaylor, challenging the preference allowed under Internal Revenue Code for cash housing allowances provided to ministers of the gospel, or other religious clergy, contending that this discriminatory and unfair preference violated the Establishment Clause of the United States Constitution. (Barker Decl., ¶13.) This court subsequently held that § 107(2) of the Internal Revenue Code is indeed unconstitutional, but the Seventh Circuit Court of Appeals reversed that decision on the basis of standing considerations. The Court of Appeals concluded that the Plaintiffs needed to actually be denied exemption for their housing allowances under § 107(2), in order to have standing. (Barker Decl., ¶14.)

Ms. Gaylor and Barker, accordingly, filed an amended U.S. Individual Income Tax Return for tax year 2013. This amended tax return was mailed to the Internal Revenue Service in January of 2015. The amended return claimed the designated housing allowances for Ms. Gaylor and Barker as exclusions from income and they sought a partial refund of taxes paid. (Barker Decl., ¶15 and Ex. 1.) On March 2, 2015, the IRS actually allowed their refund in the amount of $7,220. (Barker Decl., ¶16 and Ex. 2.)

Ms. Gaylor and Barker then filed an amended income tax return for tax year 2012. This amended return was sent to the IRS on or about March 15, 2015. (Barker Decl., ¶17 and Ex. 3.)

The IRS subsequently disallowed this claim for a housing allowance exemption, by letter dated July 16, 2015. (Barker Decl., ¶18 and Ex. 4.) Ms. Gaylor and Barker then responded to the IRS on July 21, 2015, citing § 107(2) of the Internal Revenue Code as the basis for their claim. (Barker Decl., ¶19.) Ms. Gaylor and Barker thereafter received communications from the IRS on August 20, 2015, November 25, 2015, and January 12, 2016, indicating that the IRS was still working on their request to be allowed a housing allowance. (Barker Decl., ¶20 and Ex. 5.)

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

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

(Barker Decl., ¶22 and Ex. 6.)

In the meantime, since its letter of June 27, 2016, the IRS has never advised the Plaintiffs that it has changed its position with regard to Plaintiffs' qualification for a cash housing allowance exemption, including throughout the present proceedings. (Barker Decl., ¶23.) Barker is aware, nonetheless, that the Intervenors contend that Ms. Gaylor and Barker lack standing to seek prospective relief because it is allegedly speculative whether they will be denied subsequent exemption requests for their housing allowances. (Barker Decl., ¶24.)

Contrary to the Intervenors' claims, the IRS's most recent communication with Ms. Gaylor and Barker, dated June 27, 2016, clearly implies that they will be denied subsequent refund requests, including for housing allowances that have been designated for tax years 2014, 2015, 2016, and 2017. (Barker Decl., ¶25.)

Ms. Gaylor and Barker have been awaiting the outcome of the present litigation before filing any further amended returns, but it has always been their intent to seek equal treatment for tax years subsequent to 2012 and 2013, which is a purpose of this suit. (Barker Decl., ¶26.) Accordingly, Ms. Gaylor and Barker have now filed amended returns for 2014 and 2015, in which they seek a refund of income taxes previously paid on their designated housing allowances for those years. They also intend to seek exemption for their housing allowances for 2016 and all future years for which they receive a designated housing allowance. (Barker Decl., ¶27 and Exs. 7 and 8.)

In addition, Anne Gaylor filed an amended tax return for tax year 2013, before her death in 2015, in which she also sought a refund of taxes paid on her designated housing allowance. (Barker Decl., ¶28 and Ex. 9.) On or about April 13, 2015, Ms. Gaylor received a letter from the IRS indicating that her amended return, received on March 4, 2015, was being sent to the Ogden Customer Service Center to process. (Barker Decl., ¶29 and Ex. 10.) The IRS, however,

apparently has never taken any action on Anne Gaylor's refund request. Ms. Gaylor died on June 14, 2015. (Barker Decl., ¶30.)

As co-Presidents of FFRF, Ms. Gaylor and Barker have extensive responsibilities, including responsibilities that require them as a practical matter to live in close proximity to the offices of FFRF. Ms. Gaylor and Barker, in fact, live within walking distance of FFRF's offices, and they respond to any emergencies that may arise, including fire alarm activation, or other situations requiring immediate attention, and they meet with FFRF members who visit the building on the weekend, etc. (Barker Decl., ¶31.) Ms. Gaylor and Barker also work extensively on FFRF matters while at home. (Barker Decl., ¶32.)

Barker cannot help but recognize the unfairness that religious clergy are allowed to exempt designated housing allowances, while Ms. Gaylor and Barker, co-Presidents of the nation's largest freethought organization, are denied similar treatment of their housing allowances. The unfairness is brought home to Barker by the Intervenors' argument that "they need the money." (Barker Decl., ¶33.) The Intervenors contend that the exemption of their housing allowances are necessary and desirable in order to effectively increase their compensation, which allows them to provide more religious services. The same reasoning of "need," however, applies as well to Ms. Gaylor and Barker, and their employer, FFRF. Exempting the designated housing allowances for Ms. Gaylor and Barker would have a positive financial effect on them, thereby increasing their ability to engage in the activities to which FFRF is committed. (Barker Decl., ¶34.)

III. DISCRIMINATORY TAXATION IS REDRESSABLE BY EXTENSION OR WITHDRAWAL OF BENEFITS.

At the outset, the Intervenors argue incorrectly that Plaintiffs' Complaint neither states a claim for past refunds nor an appropriate claim for prospective injunctive relief. The Intervenors base this argument on an unreasonable reading of Plaintiffs' Complaint, as well as disingenuous

uncertainty about the IRS' current position with regard to Plaintiffs' entitlement to an exemption for their housing allowances under § 107(2) of the Internal Revenue Code.

The Plaintiffs, in fact, do ask for prospective injunctive relief, but not necessarily as an exclusive remedy. Paragraph 1 of the Complaint, for example, states that "Plaintiffs request the Court to enjoin the allowance or grant of tax benefits exclusively to ministers of the gospel under § 107." Paragraph 52 of the Complaint further states that the Plaintiffs would be entitled to claim a housing allowance exclusion from income but for their religious criteria applied by the IRS and Treasury Department in administering and applying § 107. Paragraph 54 of the Complaint also states that "the individual Plaintiffs have suffered actual injury, including the payment of taxes on their housing allowances, as a result of their discriminatory treatment by the IRS and Treasury Department, pursuant to §107 and implementing regulations." Finally, paragraph 55 alleges that as a result of alleged discriminatory treatment by the Defendants, "the individual Plaintiffs seek appropriate relief as a result of this suit, including mandated equal treatment as by also denying benefits to the favored group of ministers." The relief paragraphs of the Complaint then demand judgment "enjoining the Defendants, including the IRS and Treasury Department, from continuing to grant or allow preferential and discriminatory tax benefits under § 107 of the Internal Revenue Code exclusively to religious clergy." The Complaint finally concludes by requesting such further relief as the court deems just and equitable. Based on these allegations of the Complaint, the Intervenors' argument is unpersuasive that the Plaintiffs have requested only relief in the form of statutory nullification.

Nullification is certainly a remedy within the discretion of the Court, but so is extension of benefits to the Plaintiffs. The Complaint requests that the Defendants be enjoined from continuing to grant preferential and discriminatory tax benefits exclusively to religious clergy.

This most certainly does not foreclose a remedy for the damages previously caused by the Defendants' actions.

In the event that the court determines again that § 107(2) of the Internal Revenue Code does unlawfully discriminate, moreover, then prospective relief in the form of an injunction is wholly within the discretion of the court, including discretion as to whether to nullify the statute or extend benefits under the statute to those excluded. *See Davis v. Michigan Department of Treasury*, 109 S.Ct. 1500, 1509 (1989).

The District Court for the Northern District of Illinois also recently considered the issue of nullification versus extension in *Anheuser-Busch, Inc. v. Schnorf*, 738 F. Supp. 2d 793 (N. D. Ill. 2010). The Court discussed the "extension" versus "nullification" dichotomy as analyzed by the Supreme Court in *Heckler* and concluded that the deciding court should "measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." 738 F. Supp. 2d at 811, quoting *Heckler*, 465 U.S. at 739, n. 5.

On the merits in *Anheuser-Busch*, the court concluded that nullification was the most appropriate remedy because that course would least impact the regulatory scheme of which the underinclusive statute was a part. 738 F. Supp. 2d at 815. Similarly, in the present case, nullification of § 107(2) would be less disruptive to the Government's tax collection scheme than extending the housing allowance to all similarly situated taxpayers, thereby suggesting that nullification is warranted.

The Intervenors further argue implausibly that the individual Plaintiffs, Annie Laurie Gaylor and Dan Barker, might not in the future be denied a housing allowance exemption. The most recent communication from the IRS, in denying Ms. Gaylor and Barker's refund request for

tax year 2012, however, suggests very definitely that future requests will be denied. In the IRS's final denial letter, dated June 27, 2016, the Appeals Officer states that "I.R.C. Section 107 specifically requires that to exclude a housing allowance from income you must be a minister of the gospel. The IRS does not have the authority to interpret this to include anyone other than those who meet this definition." (Barker Decl., Ex. 6.)

The Intervenors' supposed uncertainty as to future IRS decisions on requests for equal treatment is finally resolved by the IRS's position in this litigation. The IRS has made clear that religious clergy should be allowed an exclusion from income for designated housing allowances while non-clergy, including the Plaintiffs Ms. Gaylor and Barker, are not entitled to such an exemption without qualifying as ministers of the gospel. The stage is set, therefore, and contrary to the Intervenors' claim, the Plaintiffs have standing to seek both retroactive and prospective relief.

IV. SUMMARY OF MERITS ARGUMENT.

This court's prior decision in *Freedom From Religion v. Lew*, 938 F.Supp.2d 1051 (W.D. Wis. 2013), provides a thorough and thoughtful analysis of virtually all the issues raised by the parties again in this action. The Defendants' arguments, in particular, are essentially reruns of those previously addressed. The court's earlier reasoning, therefore, should continue to meaningfully inform the result herein.

In a nutshell, preferential tax benefits provided only to religious clergy violate the Establishment Clause. Neutrality is a necessary requirement of the Establishment Clause, which means that tax benefits cannot be preferentially provided to support religion. The Supreme Court has refused to allow government to preferentially favor religion with tax breaks that are not generally available to other taxpayers, as recognized in *Texas Monthly v. Bullock*, 489 U.S. 1

(1989).

Tax-free housing for ministers is not justifiable as an accommodation of religion, nor is there any historical evidence that Congress enacted such tax break to abate government imposed burdens on the free exercise of religion. The contemporaneous evidence indicates that Cold War advocacy of religion prompted the exclusion of cash housing allowances for clergy.

Section 107(2) also creates government entanglement with religion, rather than minimizing entanglement. In order to ensure that this preferential tax benefit is limited to religious officials, §107(2) requires complex determinations relating to the tenets, principles and practices of those churches that provide their clergy with cash housing allowances. Section 107(2) is not self-executing or otherwise made applicable merely by self-identifying oneself, and the determinations to be made are not trivial or incidental. Section 107(2), as a result, requires government entanglement with religion in order to restrict its preferential tax benefits to the "truly religious" -- which Plaintiffs and FFRF are not.

Questioning tax-free housing for ministers is controversial because it is valuable to clergy and churches. From the perspective of financial self-interest, ministers and churches are understandably concerned, as the Intervenors attest, but not because of interference with religious beliefs. Financial self-interest is at the root of the controversy. Judging from the perspective of the Establishment Clause, however, preferential tax breaks for ministers clearly violate the fundamental principle of neutrality.

V. SECTION 107(2) VIOLATES THE ESTABLISHMENT CLAUSE BECAUSE IT IS NOT NEUTRAL AND PROVIDES SIGNIFICANT TAX BENEFITS EXCLUSIVELY TO MINISTERS OF THE GOSPEL.

The absence of neutrality is patently evident in §107(2). It only allows ministers to exclude from their income the full amount of any designated cash housing allowance provided by

their church. This exemption for cash payments is available only to ministers; other taxpayers cannot deduct similar cash allowances, even if provided for the "convenience of the employer." The §107(2) exemption, therefore, confers a substantial financial benefit to ministers, by lessening the burden of housing costs, which is not neutrally available to other taxpayers.

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

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

effect." *Id.*

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

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

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

Intervenors argue incorrectly that income tax exemptions for religious housing have a long historical legacy. The fallacy in the Intervenors' argument is their equation of tax exemptions for

church property, including parsonages, with income tax exemptions for the value of a parsonage provided. While tax exemptions for church property do have some historical legacy, income tax exemptions for housing do not have such historical precedent. The distinction is important because this is not a case about the taxation of church property.

The Defendants' false historical patina notwithstanding, what remains crucial in evaluating a tax exemption afforded to ministers is whether some "overarching secular purpose justifies like benefits for non-religious groups." *Texas Monthly* at 15, n.4. "In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter." *Id.* at 17, quoting *Walz*, 397 U.S. at 696.

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

The Supreme Court concluded in *Texas Monthly* that the tax exemption at issue there was not mandated, or even favored, by the Establishment Clause in order to avoid excessive entanglement. "Not only does the exemption seem a blatant endorsement of religion, but it appears on its face, to produce a greater state entanglement with religion than the denial of an exemption." *Id.* at 19. The risk of entanglement existed under the exemption statute, according

to the Court, because of the need to determine that a publication qualified as being religious. *Id*.

The Defendants' attempt to limit *Texas Monthly* to publications involving religious speech, moreover, is not persuasive, nor is it a distinction that favors the Defendants. Here, §107(2)'s exclusion for ministers is available only when a minister receives a cash housing allowance as compensation for services performed "in the exercise of" his or her ministry. Services performed by a minister in the exercise of his or her ministry include: (1) the administration of sacerdotal functions; (2) the conduct of religious worship; and (3) the control, conduct and maintenance of religious organizations under the authority of a religious body constituting a church or church denomination. In effect, the §107 tax break for ministers constitutes "preferential support for the communication of religious messages," every bit as much as in *Texas Monthly*. *Id.* at 28 (Blackmun, J. Concurring).

VI. A MAJORITY OF THE SUPREME COURT AGREED ON THE ESTABLISHMENT CLAUSE PRINCIPLES IN *TEXAS MONTHLY*.

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

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

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

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

Whittier Law Review 707, 715-716 (2003).

The requirement of neutrality and general applicability, particularly after *Texas Monthly*, also has consistently prevailed in judicial analysis of tax preferences. This conclusion is well-described by Donna Adler in *The Internal Revenue Code, the Constitution and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 Wake Forest L.Rev. 855 902 (1993), concluding that "the one factual distinction that seems to be the determinative issue is the breadth of the class benefited by the tax exemption."

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

VII. SECTION 107(2) PROVIDES GREATER BENEFITS TO MINISTERS THAN SECTION 119 PROVIDES TO NON-CLERGY TAXPAYERS.

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

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

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

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

The Intervenors themselves recognize that the housing allowance they covet has a tenuous relationship to the delivery of religious services for the convenience of the employer. The Intervenors make this interesting point as follows:

> "Here, of course, the parsonage allowance applies to housing, not religious literature [as in *Texas Monthly*]. And it applies regardless of whether the minister who lives there is involved in spreading a religious message. In that sense, because it is tied to property, the parsonage allowance is much more like the property-tax exemption upheld in *Walz*. Indeed, while some ministers certainly use their homes to teach and counsel their congregations, the connection between homes and religious messages here is even weaker than the connection between actual church buildings and religious messages in *Walz*." (Intervernors' Brief at p. 20.)

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

> Section 107's blatant favoritism for religion can be seen by comparing it with other provisions of the Internal Revenue Code that provide a benefit to ministers on the same terms as others in similar situations in secular institutions. For example, Section 119 of the Internal Revenue Code allows an income exclusion for the value of meals and lodging that are provided on the business premises of an employer as a convenience to the employer and as a condition of employment. Thus, a minister who is required to live on the church's premises is allowed an exclusion under this provision, but so is the head of a school who lives on the premises, or any other employee who is required to live in housing provided at the workplace. Section 107 is unique in that it provides a benefit to religion -- to "ministers of the gospel" -- that no one else receives.

Chemerinsky, 24 Whittier Law Review, at 712-713 (2003). Professor Adam Chodorow more recently notes the Treasury Department calculations of the cost of the housing allowance exemption to be $9.3 billion in foregone taxes over the next ten years. Chodorow, Adam, The Parsonage Exemption, (January 28, 2017), p. 103, specifically (available at SSRN: https://ssrn.com/abstract=2907418).

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

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

Section 119 applies only where the employer desires to have a continuous presence of the employee at the job site and to have him or her within reach at all times. As the Supreme Court held in *Kowalski*, 434 U.S. at 93, the convenience of the employer requires that the employee must accept housing in order to properly perform his duties. This requirement, however, is not imposed as a condition of the §107(2) exemption, including as to tax-free payments made directly to ministers. Section 107(2) provides for tax-free compensation to ministers in circumstances that are not available to other taxpayers, including under §119, despite the Government's unsupportable claim that all clergy housing is inhabited "for the convenience of the employer." In fact, the Government's own evidence indicates that both large and small churches use the housing allowance as a method of compensation, rather as a means of ensuring job performance. The Intervenors' evidence also suggests simply that living in one's community is preferable for a minister, but this is not unique to clergy.

Section 107(2) creates a false incentive for churches to designate a minister's compensation as a housing allowance in order to increase the minister's net income, while reducing the church's wage payments correspondingly. "The effect is a significant financial benefit to religion because churches and synagogues and mosques can pay their clergy much less because of the tax-free

dollars. Without the parsonage exemption, religious institutions would have to pay clergy significantly more to make up this difference." Chemerinsky, 24 Whittier Law Review at 713. The Intervenors herein acknowledge this very point. Non-church employers, by contrast, cannot increase the net-compensation of their employees by designating an amount to cover their housing costs -- and therefore, they cannot correspondingly reduce their wage payments. On the other hand, the housing allowance exemption is not limited to low-income clergy or churches, as an estimated 87% of all ministers receive cash allowances as a form of pay and without regard to the exigencies of the job. *See* Chodorow at 117.

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

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

Professor Adam Chodorow, in his recent article “The Parsonage Exemption,” Chodorow,

Adam, The Parsonage Exemption (January 28, 2017) (Available at SSRN: https://ssrn.com/abstract=2907418), provides a very useful analysis of why § 107 is not part of a broad neutral policy that exempts housing allowances from taxation. For example, he explains that § 911 of the Internal Revenue Code provides a housing exemption for expatriates in order to address issues of double taxation, rather than employer convenience factors. *Id*. at 135-137. Other provisions relating to government employee housing provisions constitute terms of employment, which Professor Chodorow describes as "again quite distinct from other housing provisions found in the Code." *Id.* at 137. In the end, Professor Chodorow finds that "such allowances [in sections of the Internal Revenue Code other than § 107] cannot be characterized as part of a coherent practice or broad, neutral policy, justifying an arguably similar allowance for ministers." *Id.* at 135. In short, as this court previously determined, § 107(2) does not satisfy the requirement of *Texas* that religious tax exemptions must be generally available on the basis of neutral and non-religious criteria linked by an overarching conceptual and principled heritage. (A true and correct copy of Professor Chodorow's article is attached to the Declaration of Rich Bolton as Exhibit 2, for the convenience of the court.)

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

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

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

In the end, money motivates the defense of § 107(2). The Intervenors acknowledge this simple fact, noting that "imposing additional taxes on ministers' housing allowances would interfere with the ability of churches to carry out their religious missions by diverting scarce resources away from their core First Amendment activities." (Intervenors Brief at p. 14-15.) The Intervenors do not contend, however, that taxing ministers' incomes interferes with theological principles, but rather simply that more resources are desirable. The same, of course, could be said for any church expense, but that is not the test for a constitutionally impermissible burden on religion. As the Supreme Court recognized in *Regan v. Taxation With Representation of Washington*, 103 S. Ct. 1997, 2000 (1983), "although TWR does not have as much money as it

wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." The income tax, moreover, has never been construed to be a prohibited burden on religion as the Supreme Court recognized in *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 700, 109 S. Ct. 2136, 104 L.Ed.2d 766 (1989), that religious belief in conflict with the payment of incomes taxes affords no basis for resisting the tax. *See also United States v. Lee*, 455 U.S. 252, 258-61, 102 S. Ct. 1051, L.Ed.2d 127 (1982) (holding that religious objection to social security tax was not a basis for resisting the tax). In short, it is not the Government's constitutional responsibility to consider the financial means of churches as a government responsibility.

VIII. SECTION 107(2) DOES NOT ELIMINATE DISPARITY OF TREATMENT BETWEEN RELIGIOUS AND SECULAR EMPLOYEES.

The Defendants argue unpersuasively that the original in-kind parsonage exclusion, enacted in 1921, and currently codified in §107(1), was merely intended to give ministers an exclusion equivalent to the recognized "convenience of the employer" exemption. The Government's historical analysis is suspect, but more importantly, it does not explain the exemption of cash housing allowances, as provided by §107(2). Such cash exclusions from taxation are not available to secular employees at all. The Government counters, however, by arguing that reducing the burden of housing costs only for ministers who receive in-kind housing is "unfair" to those ministers who have to pay cash for housing -- and so Congress supposedly enacted §107(2) in order to give an equivalent benefit to all religious ministers. The Defendants' claimed rationale, however, does not change the fact that the burden of housing costs for non-religious employees is equally great, but only ministers who receive cash allowances benefit from the §107(2) relief program.

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

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

The Treasury Department in 1921 did not refuse to recognize "the convenience of the employer" doctrine as it applied to ministers. The "convenience of the employer" exemption was not claimed or explained in O.D. 862, which merely refused to recognize an exemption for housing provided as part of the salary paid to a minister. The Treasury Department, in reaching its conclusion in O.D. 862, did not address the "convenience of the employer" doctrine as applied to ministers. There was no analysis of the convenience of the employer doctrine, but rather the Department focused on the value of the parsonage as part of clergy compensation, in circumstances where a minister is "permitted" to use the parsonage -- but not required to use it. In similar circumstances, secular employees also could not claim a "convenience of the employer" exclusion.

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

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

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

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

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

broader privileges.

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

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

> Certainly, in these times when we are being threatened by a godless and anti-religious world movement we should correct this discrimination against certain ministers of the gospel who are carrying on such a courageous fight against this. Certainly this is not too much to do for these people who are caring for our spiritual welfare. (Hearings on General Revenue Revisions before the House Committee on Ways and Means, 83d Cong., 1st Sess., pt. 3, at 1576 (1953)).

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

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

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

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

The Defendants' argument is even more perverse in the present case. The Defendants first argue that the in-kind parsonage allowance for ministers was enacted in order to give ministers an exclusion similar to the "convenience of the employer" exclusion provided generally to taxpayers. The Defendants proceed, however, to conclude that if ministers are provided with an exclusion for in-kind housing that creates parity with non-clergy employees, then the exclusion should be extended preferentially to all religious clergy without regard to the in-kind limitation and the requirements of the "convenience of the employer."

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

The "discrimination" that §107(2) supposedly addresses is based on faulty reasoning. The Defendants presume that no logic justifies distinguishing between ministers who receive in-kind lodging and those who receive cash allowances. Whether such a distinction makes sense, as Professor Chodorow concludes, it is not a distinction in any event that is unique to the housing needs of ministers. What the Defendants deem to be unfair to ministers is just as "unfair" for non-clergy --the only difference being that ministers were thought to be "caring for our spiritual welfare in the courageous fight against a godless and anti-religious world movement." That is not a distinction that justifies preferential benefits for ministers, nor is it a valid constitutional distinction.

IX. SECTION 107(2) IS NOT AN ACCOMMODATION IN RESPONSE TO A SUBSTANTIAL GOVERNMENT-IMPOSED BURDEN ON FREE EXERCISE RIGHTS.

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

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

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

Chemerinsky, 24 Whittier Law Review at 724-25.

The Government's church-equity argument also has nothing to do with government imposed burdens on free exercise rights. The Supreme Court's decision in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 43 U.S. 327 (1987), in particular, does not support the Government's argument. In *Amos*, the Supreme Court upheld

the constitutionality of an exemption from anti-discrimination hiring laws as applied to religious organizations. In reaching its decision with regard to employment discrimination laws the Supreme Court said that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* at 335. "Where, as here, the government acts for the proper purpose of lifting a [government] regulation that burdens the exercise of religion, then an accommodation may be justified." *Id.* at 338. The Court recognized in *Amos*, however, that "at some point, accommodation may evolve into an unlawful fostering of religion." *Id.* at 334-335.

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

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

(1986)(denial of tax benefits does not burden religious practices). That being the case, the taxation of income also does not afoul of the ministerial exception limitations of *Hosanna Tabor*.

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

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

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

The Intervenors, for their part, unconvincingly try to analogize the income tax exemption for housing allowances to exemptions related to the delivery of core religious services. (Intervenors Brief at p. 13.) Similarly, the Government equates the income tax exemption for housing allowances to other exemptions that go to core religious beliefs, such as draft exemptions. Such comparisons provide false analogies because taxing income simply does not place a recognized burden on free exercise rights.

In the absence of a government-imposed burden on the free exercise of religion, the Government cannot preferentially bestow benefits exclusively on religion as an accommodation. In such cases, even a purported accommodation impermissibly advances religion if it provides a benefit to religion without providing a corresponding benefit to a large number of non-religious groups or individuals, as described in *Texas Monthly*.

X. THE DEFENDANTS' ATTEMPT TO DISTINGUISH TAX EXEMPTIONS FROM SUBSIDIES IS UNPERSUASIVE.

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

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

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

The false dichotomy between tax exemptions and cash grants urged by the Defendants exposes a fatal weakness in their argument, particularly the Government's argument that § 107(2) does not advance religion by creating incentives for religious activity. (Government Brief at p. 23.) This argument is both legally and factually flawed as the Intervenors themselves contradict the Government by touting §107(2) as desirable public policy because it increases the capacity for religious activity. In fact, the purpose of a tax scheme that includes tax exemptions and taxability, like the purpose of any subsidy, is precisely to promote the activity subsidized; such a scheme "seeks to achieve the same basic goal of encouraging the development of certain organizations through the grant of tax benefits." *Bob Jones University v. United States*, 461 U.S. 574, 587, n. 10, 103 S. Ct. 2017, 76 L.Ed.2d 157 (1983). Here, § 107(2) accomplishes this goal with respect to religious entities, and it is that preference for religion that constitutes the problem.

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

XI. SECTION 107(2) CREATES GOVERNMENT ENTANGLEMENT WITH RELIGION.

The Defendants' final argument, that inquiries under §107(2) are not entangling, is implausible and contrary to reality. Section 107(2) excludes from the gross income of a minister the cash rental or housing allowance paid as compensation, which requires the IRS to first determine whether an individual qualifies as a "minister of the gospel." Administrative regulations implementing §107 further require that ministers of the gospel perform specific duties, such as sacerdotal functions, conduct of religious worship, administration and maintenance of religious organizations and their integral agencies, and performance of teaching and administrative

duties at theological seminaries. T. Reg. 1.1402(c)-5. What constitutes "religious worship" and "the administration of sacerdotal functions," in turn, depends on the tenets and practices of the particular religious body at issue. T. Reg. 1.1402(c)-5(b)(2)(i). Finally, in addition, a minister must be ordained, commissioned, or licensed by a "church," a requirement involving at least fourteen factors to consider.

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

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

Similarly, in *Salkov v. Commissioner*, 46 T.C. 190, 198-199 (1966), the court considered whether a full-time cantor in the Jewish faith was a minister of the gospel entitled to exclude a rental allowance from his gross income under §107. The court concluded that "from the thicket

of our factual and legal exploration of this issue, we emerge with the conclusion that in these particular circumstances the petitioner, a full-time cantor of the Jewish faith, qualifies as a 'minister of the gospel' within the spirit, meaning and intendment of Section 107."

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

Questions regarding church hierarchy also must be addressed frequently when applying §107(2), as in *Mosley v. Commissioner*, 68 T.C. Memo 1994-457, where the court considered whether a particular religious organization operated under the authority or control of a church or church denomination. According to the court, this "can only be determined after reviewing all the facts and circumstances surrounding the relationship between the church denomination and the organization." The court concluded that "a religious organization is deemed under the authority of a church or church denomination if it is organized and dedicated to carrying out the tenets and principles of a faith in accordance with either the requirements or sanctions governing the creation of institutions of the faith."

The necessary and intrusive inquiries under §107(2) remain ubiquitous. In *Good v. Commissioner*, T.C. Memo 2012 -- 323 (2012), for example, the IRS recently denied a housing

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

The IRS must regularly make purely religious determinations in administering §107(2). The difficulty of resolving these religious questions, and the potential for inconsistent conclusions, give rise to far more entanglement than the purely secular inquiries that underlie "convenience of the employer" determinations or business expense verification. For example, another difficult religious determination that the IRS has had to make is whether a Christian college is an "integral agency of a church." This is the subject of many private letter rulings by the IRS, prompting one commentator to conclude that "the Service has consistently ruled that ordained ministers who teach at schools that are integrally related to churches are performing services within the exercise of their ministry, no matter what they teach." Newman, *On Section 107's Worst Feature: The Teacher-Preacher*, 93 TNT 260-20 (emphasis added). College administrators, and even basketball coaches, as well as teachers, can thus qualify for the benefits of §107 if they happen to be ordained ministers. It is often difficult, however, to determine whether the criteria for "integral part of a church" are satisfied. The IRS uses the criteria listed in Rev. Rul. 72-606 and Rev. Rul.

70-549, in making these determinations. Typical rulings in this area highlight the intrusiveness of the determination. *See* LTR 9608027, 96 TNT 39-49; LTR 200002040, 2000 TNT 11-24; and LTR 200925001, 2009 TNT 117-28.

The applicability of § 107(2) to so many disparate church employees, moreover, also debunks the Defendants' argument that the § 107(2) housing allowance is simply the cash equivalent of the parsonage exemption for performing clergy. Professor Chodorow notes that even a basketball coach at a Christian college has qualified for the § 107(2) housing allowance, as well as other "integral" church employees, thereby creating the need for even more complex determinations. Chodorow at 114. Such examples confound the Defendants' argument that § 107(2) merely codifies for the sake of administrative ease an implied "convenience of the employer" test for religious clergy.

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

XII. SECTION 107 VIOLATES THE ESTABLISHMENT CLAUSE UNDER THE *LEMON* TEST.

Section 107(2) clearly violates the Establishment Clause under the controlling test announced in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), which the Government correctly identifies as the correct legal standard. In the first place, tax breaks for ministers that are not neutral and available generally to other taxpayers do not have a secular purpose. The exclusion

for cash housing allowances paid to ministers is provided only to the clergy and it was never intended to abate any substantial government-imposed burden on religion. On the contrary, the Defendants acknowledge that §107(2) was enacted to provide additional tax benefits exclusively to ministers, who did not receive in-kind housing from their churches. Section 107(2), therefore, by all accounts was intended to benefit religion.

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

Finally, §107(2) also has the effect of fostering governmental entanglement with religion. In order to limit the tax break provided by §107(2) to religious clergy, the IRS must make complex, intrusive and subjective inquiries into religious matters. Unlike the situation in *Walz*, therefore, the exemption provided by §107 actually increases the Government's entanglement with religion.

The Supreme Court's holding in *Texas Monthly* ultimately represents the controlling application of the *Lemon* test to the present case: Preferential tax benefits to religion, that are not

neutral and generally available to other taxpayers on the basis of secular criteria, violate the Establishment Clause. While all taxpayers would like to have exclusions and deductions to cover their housing costs, the reality is that only ministers of the clergy now get this break. Section 107(2), therefore, violates the Establishment Clause in a most obvious way by conditioning tax benefits on religious affiliation.

XIII. CONCLUSION.

The court should deny the Defendants' motions for summary judgment and instead grant judgment in favor of the Plaintiffs. Section 107(2) undisputedly excludes from taxation housing allowances that are based on religious affiliation. Section 107(2) is not a benefit that is neutral and generally available without regard to religion, as required by *Texas Monthly*. Section 107(2) is unconstitutional.

Dated this 5th day of April, 2017.

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CERTIFICATE OF SERVICE

I certify that, on April 5, 2017, service of the foregoing was made upon all parties by filing it with the Clerk of Court using the CM/ECF system.

/s/ Richard L. Bolton

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