Nos. 18-1277 & 18-1280

United States Court of Appeals

for the Seventh Circuit

Annie Laurie Gaylor, *et al.*,
Plaintiffs-Appellees,
v.
Steven T. Mnuchin, Secretary of the United States Department of Treasury, *et al.*,
Defendants-Appellants,

and

Edward Peecher, *et al.*,
Intervenors-Defendants-Appellants.

Brief of *Amici Curiae* Pacific Justice Institute, Congressional Prayer Caucus Foundation, National Legal Foundation, Forcey Bible Church, and International Conference of Evangelical Chaplain Endorsers, *in support of Appellants and urging reversal.*

Steven W. Fitschen
James A. Davids
(*Counsel of Record*)
The National Legal Foundation
2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, Virginia 23454
(757) 463-6133; nlf@nlf.net

David A. Bruce
205 Vierling Drive
Silver Spring, Maryland 20904
(757) 463-6133

Frederick W. Claybrook, Jr.
Claybrook LLC
1001 Pa. Ave., NW, 8th Floor
Washington, D.C. 20004
(202) 250-3833
rick@claybrooklaw.com

Counsel for *Amici Curiae*

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-1277 & 18-1280

Short Caption: Gaylor v. Mnuchin

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(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):

Pacific Justice Institute, Congressional Prayer Caucus Foundation, National Legal Foundation, Forcey Bible Church, and International Conference of Evangelical Chaplain Endorsers

(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 National Legal Foundation, Claybrook LLC, David Bruce, Esq.

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

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

No Amicus has a parent corporation.

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

N/A

Attorney's Signature: s/ James A. Davids Date: April 26, 2018

Attorney's Printed Name: James A. Davids

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

Address: 2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, VA 23454

Phone Number: (757) 463-6133 Fax Number: (757) 463-6055

E-Mail Address: nlf@nlf.net

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Attorney's Signature: s/ Steven W. Fitschen Date: April 26, 2018

Attorney's Printed Name: Steven W. Fitschen

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Address: 2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, VA 23454

Phone Number: (757) 463-6133 Fax Number: (757) 463-6055

E-Mail Address: swf@nlf.net

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Address: 205 Vierling Drive
Silver Spring, MD 20904

Phone Number: (757) 463-6133 Fax Number: (757) 463-6055

E-Mail Address: dabruce762gmail.com

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Address: 1001 Pa. Ave., NW, 8th Floor
Washington, D.C. 20004

Phone Number: (202) 250-3833 Fax Number: N/A

E-Mail Address: rick@claybrooklaw.com

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STATEMENT OF INTERESTS OF *AMICI CURIAE*[1]

The Pacific Justice Institute (PJI) is a non-profit legal organization established under Section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. As such, PJI has a strong interest in the development of the law in this area. In 2011 PJI represented a pastor who intervened in a case on the same challenge before the Court. *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836 (9th Cir. 2011).

The Congressional Prayer Caucus Foundation (CPCF) is an organization established to protect religious freedoms (including those related to America's Judeo-Christian heritage) and to promote prayer (including as it has traditionally been exercised in Congress and other public places). It is independent of, but traces its roots to, the Congressional Prayer Caucus that currently has over 100 representatives and senators associated with it. CPCF has a deep interest in the right of people of faith to speak, freely exercise their religion, and assemble as they see fit, without government coercion. CPCF reaches across all denominational, socioeconomic, political, racial, and cultural dividing lines. It has an associated national network of citizens, legislators, pastors, business owners, and opinion

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *Amici* state that no party's counsel authored this brief either in whole or in part, and that no party or party's counsel, or person or entity other than *Amici*, *Amici's* members, and their counsel, contributed money intended to fund preparing or submitting this Brief..

leaders hailing from thirty-three states.

The **National Legal Foundation** ("NLF") is a public interest law firm dedicated to the defense of First Amendment liberties, including our First Freedoms of speech, assembly, and religion. The NLF and its donors and supporters, in particular those from Wisconsin, are vitally concerned with the outcome of this case because of its effect on the proper understanding of the Establishment Clause.

Forcey Bible Church ("FBC") is a non-denominational, Bible-believing and -teaching church in Silver Spring, Maryland. FBC's vision is that its parishioners "all grow to love God and people with head, heart, and hands, like Jesus," and that people to whom it ministers commit passionately to following Jesus Christ "in how we serve other believers, the community, and the world." FBC's five ministers encourage congregants to put the teachings of Christ into practice through many ministries of the church that serve others in the community. All of FBC's ministers receive a housing allowance exempt from taxation under § 107(2). Without it, either the number of staff or church ministries would have to be curtailed.

The **International Conference of Evangelical Chaplain Endorsers** ("ICECE") has as its main function to endorse chaplains to the military and other organizations requiring chaplains that do not have a denominational structure to do so, avoiding the entanglement with religion that the government would otherwise have if it determined chaplain endorsements. ICECE safeguards religious liberty for chaplains and all military personnel. ICECE's member organizations employ retired chaplains as their officers, and some provide housing allowances as compensation

for their duties. Losing the housing allowance exception would make it much more difficult for these organizations to perform their important role in providing qualified chaplains for the military services and other restricted institutions requiring chaplains.

SUMMARY OF THE ARGUMENT

The Supreme Court's Establishment Clause jurisprudence leaves no one happy, including the justices themselves.[2] *Amici* do not submit this brief to argue for a repudiation of any particular precedent, although the continuing validity of some is questionable due to later decisions by the Supreme Court itself. But neither the text of the Establishment Clause nor existing precedent supports the "strict separationist" interpretation of the clause that the Freedom from Religion Foundation ("FFRF") has pushed in this case and which, in large part, the district court adopted. The Religion Clauses of the First Amendment, including the Establishment Clause, are not hostile to religion; they recognize the unique importance of religion in our national community and that religion serves a critical, *secular* purpose of undergirding our democracy and fulfilling many social needs. Nor does the Establishment Clause forbid an evenhanded exemption of religious organizations and adherents from general government regulation.

Amici identify several propositions foundational to the proper application of the

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[2] *E.g., Edwards v. Aguillard*, 482 U.S. 578, 639 (1984) (Scalia, J., dissenting); *ACLU of Ky. v. Mercer Cty.*, 432 F.3d 624, 634 nn.7, 8 (6th Cir. 2005); Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 Tex. L. Rev. 955, 956 (1989) (noting almost universal agreement in academia critical of the Supreme Court's Establishment Clause jurisprudence).

Establishment Clause, using analysis of the language of the clause itself, the history of its application, and Supreme Court precedent. These propositions demonstrate that IRC § 107(2) does not violate the Constitution.

ARGUMENT

The district court, at FFRF's urging, adopted a theory of the Establishment Clause that outlaws any legislation from which it could be reasonably construed that the government favors religion. Under FFRF's theory, the clause requires all legislation to be oblivious to religion and, if a legislature excludes religious leaders from generally applicable regulation like taxation, it must do so incidentally by having the religious leaders part of a group not defined by religion, such as non-profit executives. FFRF considers even nondiscriminatory, indirect benefits to all religious organizations and adherents the same as direct aid that must be eliminated.

This theory of the Establishment Clause is inconsistent with its language, its history, and Supreme Court precedent. The Establishment Clause is not hostile to religion, but protective of it; it guards against the government's encroachment on religion, not vice versa. Moreover, the motivating spirit of the Establishment Clause, like the rest of the First Amendment, is not parental, but, instead, recognizes that our citizenry is adult enough not to be swayed by every wind of doctrine. Finally, the Establishment Clause reinforces that our Federal Government is one of limited, enumerated powers. This principle is antithetical to the underlying assumption of the district court that our citizens' property is given by the State and, thus, any amount that is not taxed is the equivalent of a direct

"benefit" or "preference" bestowed by it.

I. The Establishment Clause Is Pro-Religion and Does Not Prohibit All Laws Respecting Religion

The First Amendment is pro-freedom of speech, pro-freedom of press, and pro-freedom of assembly. It accomplishes those purposes by providing that "Congress shall make no law . . . abridging" those freedoms. Similarly, the First Amendment in the Religion Clauses is pro-religion, not hostile to it, prohibiting Congress from establishing religion or restricting its free exercise.

As elaborated below, the Establishment Clause in particular protects religion by keeping government out of church doctrine and prohibiting the government from favoring one religion or sect over another. This protects minority sects from being marginalized, and it makes sure that citizens can define and practice doctrine without fear of government interference. It enforces a one-way "wall" of separation, restraining government interference with religion and its practice; it does not attempt to keep religion out of public life. [3]

A. The Text of the Clause Allows Laws About Religion, Other Than Those Establishing Religion

Canvassing FFRF's arguments, one would think that the Establishment Clause read that "Congress shall make no law respecting religion," period. The district

[3] A better analogy than a wall is the tire-puncture strip commonly embedded in car rental lots—it allows travel one way, but not in reverse. In *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971), the Court remarked that the Establishment Clause's "line of separation, far from being a 'wall,' is blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." Better stated, the separation is a one-way barrier.

court fell into this trap, finding § 107(2) presumptively improper because it specifically mentions ministers of religion.

Of course, the clause does not read as FFRF would have it. It reads that "Congress shall make no law respecting *an establishment* of religion."[4] It obviously does not prohibit any legislation dealing with or mentioning religions or their organizations or adherents. If it did, the Constitution would be inconsistent with itself, as the next phrase of the First Amendment deals with the "free exercise" of religion, and the Constitution prohibits a religious test for officeholders[5] and thrice allows affirmation instead of oaths to accommodate Quakers and others who had religious objections to oaths.[6]

B. The Founders Passed Laws Encouraging Religion

The Founders showed by their conduct that they did not understand the Establishment Clause to prohibit them from enacting laws that encouraged religion and religious activity.[7] For example,

- as noted by the Supreme Court in *Marsh v. Chambers*[8] and *Town of Greece v. Galloway*,[9] the First Congress paid for a chaplain, a tradition

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[4] U.S. Const. amend. I (emphasis added).

[5] *Id.* art. VI, cl. 3.

[6] *Id.* art. I, § 3, cl. 6; art. II, § 1, cl. 8; art. VI, cl. 3. *See generally* Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 Utah L. Rev. 489, 593-96 (hereinafter, "Esbeck, *Uses and Abuses*").

[7] *See generally* Esbeck, *Uses and Abuses* at 615-20; Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 23-24, 53-55 (1982).

[8] 463 U.S. 783, 787-88 (1983).

[9] 134 S. Ct. 1811, 1818 (2014).

that has continued uninterrupted to this day;

- the First Congress, on the very day it approved the Establishment Clause, reenacted the Northwest Ordinance of 1787, which set aside territory for religious worship and instruction;[10] and
- Congress approved use of the Capitol building for regular church services.[11]

Why would the Founders enact these laws to support the practice of religion by themselves and other citizens? The simple answer is that the Founders understood that religious beliefs and ethical principles provided a foundation for, and helped the preservation of, the type of government that they had set up in the Constitution. In this way, these enactments served a critical, *secular* purpose.

Many of the Founders articulated this,[12] perhaps most famously President Washington in his Farewell Address:

> Of all the dispositions and habits which lead to political prosperity, Religion and Morality are indispensable supports. . . . Let it simply be asked where is the security for prosperity, for reputation, for Life, if the sense of religious obligation *desert* the oaths, which are the instruments in the Courts of Justice? And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.[13]

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[10] 1 Stat. 50.

[11] 1 Debates and Proceedings 797, 6th Cong., 1st Sess. (Dec. 4, 1800).

[12] *See generally* Esbeck, *Uses and Abuses* at 615; Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 1385, 1431; Michael W. McConnell, *Establishment and Disestablishment at the Founding*, 44 Wm. & Mary L. Rev. 2105 (2003).

[13] 1 *A Compilation of the Messages and Papers of the Presidents*, *1789-1897*, at 220 (James D. Richardson, ed., 1899).

President John Adams made the same point in his address to the Massachusetts Militia in 1798:

> We have no government armed with power capable of contending with human passions unbridled by morality and religion. Avarice, ambition, revenge, or gallantry [sexual licentiousness], would break the strongest cords of our Constitution as a whale goes through a net. Our Constitution was made for a moral and religious people. It is wholly inadequate to the government of any other.[14]

And the First Congress in the Northwest Ordinance of 1787 provided, "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, . . . shall forever be encouraged."[15] The positive influence of religion on society and our system of government, as noted repeatedly by the Founders, has not been eroded by time.[16] As discussed further below, it continues to this day.

C. Supreme Court Precedent Does Not Contradict the Clause's Text and History

The district court used as its working proposition that any law that demonstrates "religious favoritism" violates the Establishment Clause.[17] While some language from *Lemon* and, in particular, *Everson v. Board of Education*,[18]

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[14] https://founders.archives.gov/documents/Adams/99-02-02-3102 (last visited Mar. 28, 2018); *see also Van Orden v. Perry,* 545 U.S. 677, 727-28 n.29 (2005) (Stevens, J., dissenting, quoting Justice Story: "Christianity is indispensable to the true interests and solid foundations of all free governments.").

[15] 1 Stat. 50.

[16] *See generally* Steven W. Fitschen, *Religion in the Public Schools After* Santa Fe Independent School District v. Doe: *Time for a New Strategy,* 9 Wm. & Mary Bill of Rts. J. 433, 446-49 (2001) (noting that the Framers distinguished between acknowledgment, accommodation, encouragement, and establishment of religion and only the last was forbidden).

[17] *See, e.g.*, *Gaylor v. Mnuchin*, 278 F. Supp. 3d 1081, 1095, 1102 (W.D. Wis. 2017).

[18] 330 U.S. 1 (1947).

taken out of context, would seem to support that view, it is an overreading of those cases and inconsistent with text, history, and other precedent of the clause.

Everson contains the unfortunate phrase on which FFRF and other "strict separationists"[19] have built their arguments: that the Establishment Clause prohibits "laws which aid one religion, aid religions, or prefer one religion over another."[20] Obviously, neither the text of the clause itself nor its history prohibit a law that aids all religions in a nondiscriminatory way, or the Free Exercise Clause would violate the Establishment Clause.[21] What is forgotten is that this language in *Everson* was *dicta*, as the Court in that case upheld New Jersey's providing direct aid for transporting students to private religious schools.[22] This has been reinforced in multiple other cases with similar fact patterns to *Everson*, including *Mitchell v. Helms*,[23] in which the Court in 2000 upheld government payments to religious organizations involved in prisoner rehabilitation; *Zelman v. Simmons-Harris*,[24] in which the Court in 2002 validated government payments to parents who could use them for education in sectarian schools; *Zobrest v. Catalina Foothills School*

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[19] They are more appropriately dubbed "double separationists," as all understand the Establishment Clause to require a strict separation of the State from interference with religion.

[20] *Everson,* 330 U.S. at 15.

[21] *See Esbeck*, *Uses and Abuses* at 601-12 (explaining the linguistic and practical impossibility that the Religion Clause are in tension with each other).

[22] 330 U.S. at 17-18.

[23] 530 U.S. 793 (2000).

[24] 536 U.S. 639 (2002).

District,[25] in which the Court in 1993 upheld government payments for transportation to take children to religious schools; and *Witters v. Washington Department of Services for the Blind*,[26] in which the Court in 1986 validated government funding of assistance services for a blind student at theological school. The Supreme Court has made clear in these and other decisions that the Establishment Clause does not dictate hostility to religion or religion's place in our common life. In *Zorach v. Clauson*, it elaborated,

> We are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. . . . To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. [27]

As Justice Scalia summarized in *Lamb's Chapel v. Center Moriches Union Free School District*, "indifference to 'religion in general' is not what our cases, both old

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[25] 509 U.S. 1 (1993).

[26] 474 U.S. 481 (1986).

[27] 343 U.S. 306, 313-14 (1952); *see also Ill. ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 211-12 (1948) ("A manifestation of [governmental hostility to religion or religious teachings] would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion."); *Epperson v. Ark.*, 393 U.S. 97, 103-04 (1968).

and recent, demand."[28]

This includes, of course, the *Lemon* decision and its threefold test. Although almost uniformly criticized and not used by the Supreme Court itself for over a decade and counting,[29] the Supreme Court has never formally renounced it. *Amici* here do not urge this Court to ignore it, but to apply it consistently with the Supreme Court's other precedent and this Court's own interpretation of it, which the district court did not.

The *Lemon* test for whether a law violates the Establishment Clause is to review (1) whether the law has a secular purpose, (2) whether its primary effect advances or inhibits religion, or (3) whether it fosters an excessive entanglement with religion.[30] The strict separationist view espoused by FFRF and adopted by the district court unhooks this test from the overarching purpose of the Establishment Clause to prevent the government from interfering with religious institutions and their doctrines and interprets the first two prongs in isolation to require legislatures to ignore the salutary, secular benefits to society that religious organizations

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[28] 508 U.S. 384, 400 (1993) (Scalia, J., concurring); *see also Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) (noting "an unbroken history of official acknowledgment . . . of the role of religion in American life").

[29] *E.g.*, *Cutter v. Wilkinson,* 544 U.S. 709, 726 n.1 (2005) (Thomas, J., concurring) (describing the *Lemon* test as "discredited"); *Lamb's Chapel,* 508 U.S. at 398 (Scalia, J., concurring). The Supreme Court's last substantive discussions of *Lemon* were in *Van Orden*, 545 U.S. at 685-86, in which the plurality opinion of Chief Justice Rehnquist noted that, within two years of its announcement, the tri-part test was being described as "no more than helpful sign posts" (quoting *Hunt v. McNair,* 413 U.S. 734, 741 (1973)) and finding it "not useful" in the particular case before the Court; and in *McCreary County v. ACLU of Kentucky,* 545 U.S. 844, 859-60 (2005), which described the test as "a common, but seldom dispositive, element of our cases."

[30] 403 U.S. at 612-13.

provide.

As recounted above, the Founders understood the secular benefits to our system of government that fostering religion, in a nondiscriminatory manner, engenders. This benefit has continued throughout our country's history and is as simple to understand as the Golden Rule: "Do unto others as you would have them do unto you." Religions inculcate their adherents not to look primarily to their own, individual interests, but to those of others. It is no accident, therefore, that religious principles and motivations have fueled the great social advances of our country, from the abolition of slavery in the 1800s, to provision of voting rights for women in the early 1900s, to protection of civil rights in the latter half of the Twentieth Century. Religious beliefs of those active in those causes bonded together people of different races, incomes, and ethnicity in a shared purpose for the common good of justice for all, even though it might, as an individual matter, dilute their heretofore privileged place in society or deplete their savings. Of course, it is religion that motivates many individuals to donate both time and money to improve the plight of their fellow citizens and immigrants in hospitals, prisons, detention centers, and slums, relieving the public at large from these obligations.[31] *Lemon*, properly understood, does not require a court to ignore that religion is a powerful social force that motivates individuals to put the common good before their own interests. This

[31] *See generally* James A. Davids, *Putting Faith in Prison Programs, and Its Constitutionality Under Thomas Jefferson's Faith-Based Initiative*, 6 Ave Maria L. Rev. 341 (2008) (discussing faith-based initiatives to support and rehabilitate prisoners and analogous historical examples).

motivation serves important secular goals.

Amicus FBC as a representative example illustrates the essential and positive impact that churches and similar organizations have on their communities in areas that otherwise would be the responsibility of the government or go unaddressed. FBC operates a pre-school and K-8 school with over 500 students enrolled. Based on U.S. Census Bureau data,[32] this single ministry alone relieves local public school districts of approximately $6 million in costs they otherwise would incur. Other FBC ministries include English as a second language classes helping recent immigrants, programs for mothers of young children, an after-school care program, summer day camp for community children, a fund administered by the pastors to aid congregants and neighbors in need, and special projects such as hurricane relief.

A 2016 study[33] presented findings that monetized the annual contribution of religion to the socio-economic well-being of the country. Its authors noted that these contributions "range from the basic economic drivers of any business—staff, overhead, utilities—to billions spent on philanthropic programs, educational institutions and health care services." The study resulted in a conservative estimate

[32] In FY2015, Maryland spent an average of $14,162/student across its public elementary-secondary school systems. U.S. Census Bureau, *Public Education Finances: 2015* (June 2017), table 8 at 20, available at https://www.census.gov/content/dam/Census/library/publications/2017/econ/g15-aspef.pdf (last visited Mar. 28, 2018).

[33] Brian J. and Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis*, 12 Interdisciplinary J. of Research on Rel., art. 3 (2016), available at http://www.religjournal.com/pdf/ijrr12003.pdf (last visited Mar. 28, 2018).

of $378 billion annually (based only on revenues of faith-based organizations).[34] The authors suggest that a more realistic estimate, which includes the fair market value of goods and services provided by religious organizations and businesses with religious roots, is in excess of $1 trillion annually.

In this study, the authors also present data[35] on the types of social issues addressed by religious congregations and the number of programs that religious congregations conduct to address them. They include parenting assistance, alcohol/drug abuse recovery, marriage improvement, unemployment assistance, veteran and veteran family support, mental illness care, food for the poor, home building and repair, race relations, voter registration, support to immigrants, HIV/AIDS prevention, environmental education, disaster relief, visitation of shut-ins and the incarcerated, and many more.

By whatever metric, religious organizations and other faith-based enterprises in the United States have a profoundly positive impact on society, which makes the task of governing easier and more effective. It is a rational, secular purpose for the government to take reasonable and constitutionally legitimate steps to encourage this high level of contribution that ministers inculcate to the benefit of millions of people, directly and indirectly.

This Court recognizes that *Lemon* should not be read to require blinders to the

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[34] The authors note, "By way of economic perspective, this is more than the *global* annual revenues of tech giants Apple and Microsoft *combined*." *Id*. at 2.

[35] *Id*. at 16-19, table 11.

important secular benefits provided by religion. As it reads *Lemon*, the key issue is whether the law exhibits endorsement of a particular religion or creed.[36] If applied correctly, that test can put the focus directly in line with the historical purpose of the Establishment Clause to prevent the government from dictating to religious denominations and not discriminating between them. It must also be read in harmony with the ruling of the Supreme Court in *Corporation of the Presiding Bishop v. Amos*,[37] in which the Supreme Court held that the Establishment Clause does *not* require government to be hostile, or even indifferent, to religion, but only stops the government from acting "with the intent of promoting a particular point of view in religious matters."[38]

In summary, the Supreme Court decisions regarding the Establishment Clause require neither antagonism nor agnosticism toward religion in legislation. As our country's history demonstrates, from its founding to the present, religious organizations and individuals serve important public purposes that help us bind together and assist the most needy among us when, otherwise, the State would have to step in and do so. The Establishment Clause as interpreted by the Supreme Court recognizes that religion in unique ways serves these important secular interests and protects religion from the interference of the State in accomplishing

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[36] *See, e.g., Milwaukee Deputy Sheriffs' Ass'n v. Clarke,* 588 F.3d 523, 527-29 (7th Cir. 2009). The "endorsement test" is generally ascribed to Justice O'Connor and her opinions in *Lynch v. Donnelly,* 465 U.S. 688, 691 (1984), and *Wallace v. Jaffree,* 472 U.S. 38, 69 (1985) (O'Connor, J., concurring).

[37] 483 U.S. 327 (1987).

[38] *Id*. at 335.

those purposes, while allowing the State to help facilitate this practical exercise of religion in a non-preferential way. Properly understood, the "wall of separation" of the Religion Clauses is a one-way barrier, preventing the State from interfering with how religious adherents, and those motivated by morality taught by religions, fulfill their missions, while allowing the salubrious flow of religion to enrich, preserve, and protect the State and its inhabitants.

II. The Establishment Clause Is Pro-Marketplace of Ideas

Another error of interpretation by FFRF and other strict separationists is that they magnify the alleged dangers of acknowledgement of religion in the public sphere. It seems that, if they had their way, they would not only crush every crèche on public lands, but also would uproot every cross and deface every Star of David in the Arlington National Cemetery.[39] The underlying assumption is that our country's citizenry is so thin-skinned and adolescent that any recognition of religion in a public place, by either symbolic or explicit speech, will be of such force as to coerce the recipient to accept all the precepts of that religion. As a result, any such existing speech must be extirpated, and any such future speech, banned.

This underlying assumption of the strict separationists is antithetical to that of the First Amendment. The Founders believed that adults were not will-of-the-wisps, but rational beings who could sift through competing truth claims for themselves. Thus, the Founders established, as part of our nation's organic law, an open

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[39] *See American Humanist Ass'n v. Md.-Nat'l Cap. Park and Planning Comm'n,* No. 15-2597, slip op. at 15 (4th Cir. Mar. 2, 2018) (Niemayer, J., dissenting from denial of rehearing en banc) (available in PACER).

marketplace of ideas, making sure that the government could not dictate what people, including in the press, said, or with whom they assembled. In the same manner, they prohibited the government from interfering with the private practice and belief systems of religion or from taking sides in any such discussion.

The Supreme Court has frequently sounded this theme. While recognizing that greater care must be taken with children and adolescents who are not yet ready for full participation in the marketplace of ideas and may more naturally associate speech in school with government-endorsed speech,[40] in adult situations, the Court has repeatedly provided that the First Amendment protections work together to require access to the public marketplace of all ideas, including religious ones.[41] Indeed, the Supreme Court has underscored that religious speech cannot be discriminated against when government benefits are provided.[42]

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[40] *See Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *McCollum*, 333 U.S. at 210-11. All these decisions also involved determining whether the speech involved was private, voluntary speech (which does not involve the Establishment Clause) or was so closely controlled and associated with the government as to be considered government speech (which does). *See, e.g.*, *Santa Fe*, 530 U.S. at 302.

[41] *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (Establishment Clause does not forbid, and the Free Speech Clause requires, equal access for religious club in elementary school); *Widmar v. Vincent*, 454 U.S. 263 (1981) (same for religious speech in public university setting).

[42] *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (holding that the Establishment Clause did not forbid, and the Free Speech Clause required, a student religious newspaper equal access to a limited public forum supported by a university subsidy); *see also Trinity Lutheran Church of Col., Inc. v. Comer*, 137 S. Ct. 2012 (2016) (finding unconstitutional the State's refusal to grant a benefit solely because of the organization's religious character).

III. The Establishment Clause Is Pro-Limitation of Powers

Our Constitution established a Federal Government with limited, enumerated powers, with all residual powers retained by the States and the people.[43] This was so clearly the foundational assumption of the document that there was resistance by many of the Founders to incorporation of amendments that became the Bill of Rights because it was not thought necessary.[44] However, ratification became conditioned by several of the founding States on the prompt consideration and adoption of such amendments, including the Tenth Amendment that made explicit that very presupposition.[45] The preamble to Congress's submission of the slate of amendments to the States specified that they were presented because the "Conventions of a Number of the States having, at the Time of their adopting the Constitution, expressed a Desire, in order to prevent misconstruction or abuse of its Powers, that further declaratory and restrictive Clauses should be added . . . ."[46]

This is a point forgotten by strict separationists. The underlying assumption of FFRF, adopted by the district court, is that the Federal Government is the bestower of all rights to the people, rather than *vice versa*. For example, the district court brushes aside the difference between direct aid to a particular sect and an exemption from generally applicable government regulation as of no account,[47]

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[43] *See generally* Esbeck, *Uses and Abuses* at 603.

[44] *Id.* at 603-05.

[45] U.S. Const. amend X. *See generally* Richard Labunski, *James Madison and the Struggle for the Bill of Rights* 178-255 (2006).

[46] Sen. J., 1st Cong., 1st Sess. 163 (Sept. 25, 1789).

[47] *See Gaylor*, 278 F. Supp. 3d at 1101-02.

when it is often dispositive. Our constitutional system does not assume that the Federal Government owns everything and what it does not tax is the equivalent of a direct "benefit" to the people. It is based on the assumption that the Federal Government has no inherent powers or property and may only collect from the people what the people themselves, through their elected representatives, allow it to collect.

Unlike FFRF and the district court, the Supreme Court has consistently been mindful of the distinction between direct aid and exemptions from generally applicable legislation. The particular application to tax law in *Walz v. Tax Commission*[48] will be discussed below. But the Supreme Court, in case after case, has rejected Establishment Clause challenges to exemptions for religious organizations and individuals from generally applicable regulation. For example, the Supreme Court has upheld an exemption in the Civil Rights Act for religious organizations as employers,[49] an exemption for prisoners exercising their religion,[50] an exemption for students voluntarily to attend religious classes off school grounds,[51] and an exemption for conscientious objectors to the draft.[52] This uniform interpretation of the Establishment Clause by the Supreme Court is consistent with

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[48] 397 U.S. 664 (1970).

[49] *Amos*, 483 U.S. at 334-40.

[50] *Cutter*, 544 U.S. at 719-26.

[51] *Zorach v. Clauson*, 343 U.S. 306 (1952).

[52] *Gillette v. United States*, 401 U.S. 437 (1971); *Selective Draft Law Cases*, 245 U.S. 366 (1918). *See generally* Carl H. Esbeck, *Do Discretionary Religious Exemptions Violate the Establishment Clause?* 106 Ky. L.J. no. 4 (forthcoming May 2018), http://ssrn.com/abstract=2952370.

our founding constitutional principle that the Federal Government is not the source of rights and property, but only given limited, enumerated rights to regulate for the common weal.

IV. These Foundational Principles Demonstrate the Constitutionality of the Tax Exemption for Ministers

Section 107(2), as the district court noted and FFRF concedes, has been interpreted in a non-preferential manner by the IRS, applying to all ministers of every religion or sect. The district court, though, held it was defective because it focuses on religion *qua* religion, and could only be saved from constitutional infirmity if Congress would somehow broaden the exemption to cover, for example, the executives of all non-profit organizations.[53] This rationale is inconsistent with the principles of the Establishment Clause as outlined above.

A. Section 107(2) Is a Permissible Exemption from General Taxation

Section 107(2) exempts from gross income of a minister any "rental allowance paid to him as part of his compensation." This is no different in kind than the property tax exemption upheld in *Walz*, and it is controlled by that case.[54]

In particular, *Walz* lances the district court's assumption here that a tax exemption is the same as a direct benefit bestowed by the government. Whatever the utility in economic terms of equating an exemption in the tax laws to a "subsidy" or "direct aid," it is not good constitutional law: "The grant of a tax

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[53] *Gaylor*, 278 F. Supp. 3d 1081 at 1104.

[54] *See* Richard T. Ely, *Taxation in American Cities and States* 122-23 (1888) (identifying states that at the time of adoption of the Establishment Clause exempted ministers from taxes on trades and professions and poll taxes).

exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. . . . There is no genuine nexus between tax exemption and establishment of religion."[55] Justice Brennan elaborated in a concurring opinion as follows:

> Tax exemptions and general subsidies, however, are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer.[56]

In other words, whether the state gives someone funds collected from others or declines to take someone's own funds is significant constitutionally; the two may not properly be conflated.[57]

The district court blurs this distinction and suggests Congress, to save the ministerial exemption, must broaden it to include others.[58] The IRS, to meet this suggestion, has argued that the ministerial exception is already part of a statutory scheme for housing exemptions available to many others. This was to no avail below, as the district court distinguished away other IRC housing exemptions, one by one. But this exercise, when viewed in light of the founding principles of the Establishment Clause, is unnecessary. The clause does not require Congress to be neutral to religion as a whole; it is allowed to see religion as a positive force in our

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[55] 397 U.S. at 675.

[56] *Id.* at 690 (Brennan, J., concurring).

[57] *See Ariz. Chr. Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1447 (2011) (finding that only direct government aid, not tax credits, "implicate[s] individual taxpayers in sectarian activities").

[58] *Gaylor*, 278 F. Supp. 3d at 1104.

society for a great number of secular reasons, not the least of which is that ministers inculcate their congregants with a moral sensibility to put the needs of others and the whole community ahead of one's own interests, manifested in part by putting that ethical norm to practical work in the community through social welfare projects. It is perfectly acceptable for Congress to decide not to tax any part, or even all, of the income of ministers—just as it is perfectly acceptable for localities not to tax church property—and doing so does not require Congress to act similarly for any other class of persons. The Establishment Clause, acting in concert with the Free Exercise Clause, is a constitutional warrant for the Federal Government to be pro-religion. It does not give non-religionists a heckler's veto.

This is not to say that the State, consistently with the Establishment Clause, may align itself with a *particular* doctrine or adherent in the public square and give that person or organization essentially the powers of the State no matter what the effect on third parties. That type of religious preference is unconstitutional. For instance, in *Estate of Thornton v. Caldor, Inc.*,[59] Connecticut passed a law that unyieldingly weighed in on the side of the doctrine of seventh-day Sabbath observance by giving an employee an absolute right against his employer to take that day off of work. In *Larkin v. Grendel's Den, Inc.*,[60] an ordinance gave churches within a certain radius an absolute right to veto an application for a liquor license.

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[59] 472 U.S. 703 (1985).

[60] 459 U.S. 116 (1982).

In both these instances, the legislation violated the Establishment Clause because it weighed in on the side of religion in a private dispute.[61]

Such a preference is not the same as an exemption from generally applicable laws. The Supreme Court has made that clear repeatedly, most pointedly in *Amos*, in which the Court distinguished the exemption for religious employers in the Civil Rights Act of 1964 from the situation in *Caldor*, noting that the exemption did not itself impose the discrimination about which the employee complained, but simply allowed the church to apply its own beliefs without interference from the State.[62] As the unanimous Court stated in *Cutter*, alleviating government-created burdens by means of an exemption is consistent with the Establishment Clause.[63]

Of course, the historical record fully supports this conclusion.[64] The States, from colonial times forward, have consistently provided for tax exemptions for religious

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[61] *See also Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224-27 (1962) (ruling that government-led and imposed classroom prayer and Bible reading violated the Establishment Clause and that the Free Exercise Clause "has never meant that a majority could use the machinery of the State to practice its beliefs").

[62] 483 U.S. at 337 n.15.

[63] 544 U.S. at 720; *see also Hobbie v. Unemp't Appeals Comm'n of Fla.*, 480 U.S. 136 (1987) (finding *Caldor*'s preference principle inapplicable when employee sought unemployment benefits after being discharged for refusing to continue to work on her new Sabbath); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet,* 494 U.S. 872 (1990) (in which all nine justices in various opinions agreed that religious exemptions in general legislation are constitutional).

[64] *See generally* Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1795-98, 1808-30, 1842 (2006) (showing with multiple examples that, at the time of the enactment of the Constitution, statutory religious exemptions were not regarded as an "establishment").

organizations and their ministers.[65] Thus, § 107 cannot be viewed as some sort of a unique or aberrational phenomenon of exemption from taxation for religion. Of course the exemption has its own particularities, including that it is part of a federal income tax system that itself needed explicit constitutional warrant, but it is but one exemption woven into the cloth of the many—indeed, customary—exemptions from the tax laws in our country for religious entities and individuals. As Justice Brennan summarized in *Walz*, "History is particularly compelling . . . because of the undeviating acceptance given religious tax exemptions from our earliest days as a Nation. Rarely if ever has this Court considered the constitutionality of a practice for which the historical support is so overwhelming."[66]

This history repudiates any argument that, by providing such general exemptions, the purpose of the Establishment Clause has been compromised. Likewise, § 107(2) is general enough in its application that no such dangers lurk. No objective observer of § 107(2), as interpreted by IRS, would be led to believe that the Federal Government is endorsing any particular religion or is interfering with its

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[65] *See generally* Justin Butterfield, Hiram Sasser & Reed Smith, *The Parsonage Exemption Deserves Broad Protection*, 16 Tex. Rev. L. & Pol. 251, 254-55 (2012) (collecting tax exemptions for religious organizations from the colonial period forward); James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407 (1992) (discussing survey done 25 years ago cataloguing about 2,000 then-current statutory religious exemptions in federal and state codes).

[66] 397 U.S. at 681 (Brennan, J., concurring). As discussed extensively by Petitioners and other *amici*, the decision in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), mainly relied upon by the district court, is not controlling here. Eight of the justices in *Texas Monthly* expressed their adherence to *Amos*, and the other, Justice White, authored the majority opinion in *Amos* and wrote the controlling opinion in *Texas Monthly* based on the Freedom of Press Clause. *See also Emp't Div. v. Smith*, 494 U.S. 872 (1990) (in which all justices joined opinions giving express approval of nondiscriminatory religious exemptions).

doctrine or practice, rather than leaving individuals and religions to make all those decisions for themselves. No objective observer is going to feel any pressure from § 107(2) to join any religion.

B. The History of § 107 Itself Speaks to Its Constitutionality

As the Intervenors and other *amici* amply demonstrate, invalidating § 107(2) will upset years of reliance on its terms by ministers of various religions and their supporting religious organizations. As they also elucidate, the section was added to eliminate an inconsistency with respect to how ministers were treated that could have been criticized as favoring longer-established denominations. This history supports, rather than undermines, the constitutionality of the section. It stands in a long line of evenhanded exemptions for religious organizations and individuals from generally applicable legislation.

CONCLUSION

Section 107(2) is a non-preferential exemption for ministers from general taxation legislation. It does not violate the Establishment Clause, as illuminated by the clause's text, history, and precedent.

Respectfully submitted,

Frederick W. Claybrook, Jr.
Claybrook LLC
1001 Pa. Ave., NW, 8th Floor
(202) 250-3833
rick@claybrooklaw.com

Counsel for *Amici Curiae*

Steven W. Fitschen
James A. Davids
(*Counsel of Record*)
The National Legal Foundation
2224 Virginia Beach Blvd., St. 204
Virginia Beach, VA 23454

David A. Bruce
205 Vierling
Silver Spring, MD 20904

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1. This brief complies with the type-volume limitation of Circuit Rule 29 because it contains 6,906 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by the word counting function of Microsoft Word 2016.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) and Circuit Rule 32(b) because this brief has been prepared in a proportionally-spaced typeface, Century Schoolbook, with 12-point type for text and 11-point type for footnotes.

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/s/James A. Davids
James A. Davids
The National Legal Foundation
2224 Virginia Beach Blvd., Suite 204
Virginia Beach, VA 23454
(757) 463-6133; nlf@nlf.net

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2018, I electronically filed the attached Brief *Amici Curiae* of Concerned Women for America in the case of *Gaylor, et al., v. Mnuchin*, *et al*, Nos. 18-1277 & 18-1280, with the clerk of the court by using the CM/ECF system. I further certify that all counsel of record are registered CM/ECF users and have been served via that system.

/s/Steven W. Fitschen
Steven W. Fitschen
The National Legal Foundation
2224 Virginia Beach Blvd., Suite 204
Virginia Beach, VA 23454
757-463-6133; nlf@nlf.net