Nos. 18-1277, 18-1280

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ANNIE GAYLOR, ET AL,

Plaintiff-Appellees,

v.

STEVEN T. MNUCHIN, SECRETARY OF THE UNITED STATES DEPARTMENT OF TREASURY, ET AL,

Defendant-Appellants.

and

EDWARD PEECHER, ET AL,

Intervening Defendant-Appellants.

On Appeal from
the United States District Court for the Western District of Wisconsin
No. 3:16-CV-00215-BBC
Honorable Barbara B. Crabb

AMICUS CURIAE **BRIEF OF TAX LAW PROFESSORS IN SUPPORT OF APPELLANTS**

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Appellate Court No: 18-1277, 18-1280

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STATEMENT OF INTEREST OF THE AMICI CURIAE

Amici are professors of tax law. Amici include:

- **Lloyd Mayer,** Professor of Law, Notre Dame Law School;
- **Philip Oliver**, Byron M. Eiseman Distinguished Professor of Tax Law, University of Arkansas Little Rock's William H. Bowen School of Law;
- **Edward Zelinsky**, Morris and Annie Tachman Professor of Law, Cardozo School of Law

They join this brief as individuals.[1]

Amici have no financial interest in the outcome of this litigation. Amici reserve any opinions on the merits of Section 107, in whole or in part, as a matter of tax policy. Instead, Amici are interested in contributing to the sound and principled interpretation of the First Amendment. In particular, Amici wish to ensure that errant understandings of the First Amendment religion clauses do not unnecessarily limit elected policymakers' constitutional choices in managing the inevitable entanglement between church and state under a modern tax system. Because Section 107 is one such constitutional choice, Amici respectfully submit this brief pursuant to Federal Rule of Appellate Procedure 29(a).[2]

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[1] Institutional associations are for informational purposes only and do not reflect institutional endorsement of any position taken in this brief.

[2] All parties consent to the filing of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel, or any

BACKGROUND

The Defendants-Appellants' briefs, both of the Government and of the Intervenors, outline in detail the historical development of the "convenience of the employer" from the inception of the income tax in 1913 to the codification of Sections 107 and 119 in 1954. There is no need to replicate it in full here.

Instead, Amici wish to emphasize four points—by reference to Defendant-Appellants' pre-codification history and the below post-codification history. First, that the convenience of the employer doctrine is one part of a broader scheme to equitably tax economic output whose benefits are split between multiple tax payers.

Second, that Section 107, in turn, is one consistent part of a broader scheme to tailor a general convenience-of-the-employer doctrine to a wide variety of "employer-employee" relationships. Put differently, Section 107 is properly viewed as one part in a family of similar exemptions, not a special rule applying only to religious ministers.

Third, that Section 107(2), specifically, was not designed to confer special benefits on religion but rather to remove arbitrary distinctions in the taxation of ministerial housing—distinctions between in-kind and cash

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person, other than Amici or their counsel contributed money intended to fund the preparation or submission of this brief.

housing allowances that had already been removed for the other major *per se* housing exclusions. Section 107(2) merely held that clergy cash housing allowances should be treated the same. This modest adjustment cannot fairly be called an attempt to prefer religion over irreligion.

Fourth, that the tax code is full of the kind of overlap between general standards, like Section 119(a), and more specific provisions mandating a particular result for all cases within their scope, like Section 107. Such overlaps always create disparities between taxpayers that can seem inequitable at the boundaries, but it is the legislative branch's prerogative to decide where to draw those lines, and the resulting inconsistencies do not normally warrant judicial interference. *See e.g., Regan v. Taxation With Representation*, 461 U.S. 540, 547 (1983) (''Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes.'').

1954: Congress passed Section 107, formalizing the holdings of several federal courts[3], that the convenience of the employer doctrine applied to ministers' in-kind and cash housing allowances. 26 U.S.C. § 107; See also S. Rep. No. 1622-2 (1954), quoted in *Warnke v. United States*, 641 F. Supp. 1083, 1087 n.2 (E.D. Ky. 1986) (stating that exemptions limited to the value of in-kind housing allowances was "unfair to those ministers who

[3] *See MacColl v. United States*, 91 F. Supp. 721 (N.D. Ill. 1950); *Conning v. Busey*, 127 F. Supp. 958 (S.D. Ohio. 1954); *Williamson v. Comm'r*, 224 F.2d 377, 380 (8th Cir. 1955) (applied to pre-1954 tax return); *see also Saunders v. Comm'r*, 215 F.2d 768 (3d Cir. 1954) (applying the convenience of the employer doctrine could apply to cash allowances).

are not furnished a parsonage, but who receive larger salaries (which are taxable) to compensate them for expenses they incur in supplying their own home.”).

On the same day, in part motivated by inconsistent administrative rulings applying the Treasury’s formulation of the doctrine to standard employee-employer relationships, see M.L. Cross, Annotation, *Exclusion of Meals and Lodging from Gross Income Under “Convenience of the Employer” Rule,* 84 A.L.R.2d 1215 (Originally published in 1962), Congress enacted Section 119(a), exempting the value of any employer-provided housing to any employee who could show that the housing (1) is located “on the business premises of the employer,” (2) “is furnished for the convenience of the employer,” and (3) must be “accept[ed]” by the employee as “a condition of his employment.” 26 U.S.C. § 119(a); I.R.C. § 1.119-1.

1963-76: Several appellate courts applied Section 119 to cash allowances. See *United States v. Barrett*, 321 F.2d 911 (5th Cir. 1963); *United States v. Morelan*, 356 F.2d 199 (8th Cir. 1966); *United States v. Keeton*, 383 F.2d 429 (10th Cir. 1967); *Kowalski v. Comm’r*, 544 F.2d 686 (3d Cir. 1976), *rev’d*, 434 U.S. 77 (1977).

1976: Congress encourages the IRS to interpret Section 119 broadly to cover workers in construction camps (despite uncertainty about whether such workers’ lodging is on, rather than merely near, the business premises).

1977: Supreme Court limits Section 119 to in-kind benefits and confirms that it reversed prior administrative position that parties' treatment of benefits as compensation would make the benefits taxable even where "convenience of the employer" standard was met. See *Comm'r v. Kowalski*, 434 U.S. 77, 91-95 (1977).

1978: Noting the limitations of Section 119 and the away-from-home travel expenses deduction as applied to foreign workers, Congress passed a new deduction for excess housing costs of U.S. citizens working abroad. This was later modified to become the partial exclusion of such housing costs now found in Section 911(a)(2).

1981: Congress enacts Section 119(c), extending exclusion to workers at foreign remote sites where satisfactory housing is not available nearby.

1984: Out of concern that judicial decisions about when various fringe benefits are taxable compensation could erode the tax base, Congress indicates that fringe benefits will be included in income unless expressly excluded.

Pre-1986: Judicial precedent confirms that housing provided to university professors does not qualify for exclusion, because they do not perform duties in their campus housing. *See, e.g., Bob Jones Univ. v. United States*, 670 F.2d 167 (Ct. Cl. 1982).

1986: Congress passes Section 119(d), providing a partial exclusion for near-campus housing provided to university professors at below-market rates. Congress also passes Section 134, codifying various military benefits,

including the pre-existing administrative rulings growing out of *Jones v. United States*, 60 Ct. Cl. 552 (1925) (that military officers' cash housing allowance are not taxable income).

In context, it becomes apparent that Section 107 is not an extension or deviation from a definitive formulation of the convenience of the employer doctrine under Section 119(a)—as the District Court suggests. Rather, Section 107 developed organically as a specific application of the general convenience of the employer doctrine, an application fitted to the unique relationship existing between religious organizations and their clergy.

ARGUMENT

The Internal Revenue Code is less offensive to the First Amendment with Section 107 than it would be without it. Section I explains how the government entanglement motivating the District Court's rejection of Section 107 would actually increase were the Court to strike Section 107. Section II explains how the errant reasoning striking Section 107 would threaten the validity of other well-established tax provisions.

I. Striking Section 107 Would Increase Government Entanglement.

FFRF complains that Section 107 creates government entanglements with religion that violate the Establishment Clause of the First Amendment. This section explains that (A) government entanglement is inevitable under any system of taxation, and that (B) the government entanglement would actually increase under Section 107's alternative, Section 119(a).

A. Some degree of government entanglement with religion is inevitable with every tax.

When a government raises a tax it has two initial choices vis-à-vis religious organizations: tax them, or exempt them. Either option entangles the government with religion. *Walz v. Tax Comm'n. of City of New York*, 397 U.S. 664, 674 (1970). Professor Edward Zelinsky has established a useful framework to distinguish the entanglements arising from taxes and the entanglements arising from exemptions. Edward A. Zelinsky, *Do Religious Tax Exemptions Entangle in Violation of the Establishment Clause?*, 33 Cardozo L. Rev. 1633 (2012).

"Enforcement entanglements" are the government entanglements with religion arising whenever a government imposes a tax. To be effective, taxes require government *enforcement*. And government *enforcement* of taxes on religious organizations inevitably entangles government with religious organization. For example, to *enforce* the New York property tax discussed in *Walz*, New York tax officials would have required "tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes," Walz, 397 U.S. at 674—all government entanglements with religion.

"Borderline entanglements" are the government entanglements with religion arising whenever a government provides an exemption to a tax. Exemptions require the government to define the *borderline* between those who qualify for the exemption and those who do not. For example, to apply

the sales tax exemption at issue in *Texas Monthly*, Texas officials had to determine which religious magazines "consist[ed] wholly of writings promulgating the teaching of the [distributing religion's] faith." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 5 (1989). To make this determination, Texas officials had to entangle themselves with religion—inquiring into "the teaching of the [distributing religion's] faith" and policing which magazines "consist[ed] wholly of writings promulgating the teaching." *Id.* at 5, 14.

In sum, government entanglement with religion and taxation are inevitable. But governments can, and must, chose which combination of "enforcement" and "borderline" entanglements it will endure under any given tax. In choosing whom to tax, government chooses the "enforcement" entanglements it will endure. In choosing the qualifications for an exemption, the government chooses the "borderline" entanglements it will endure.

B. The entanglements arising under Section 119(a) and the Income Tax are greater than the entanglement arising under Section 107.

Because any option involves some entanglement, the relevant question for the Court's Establishment Clause analysis is whether the government's entanglement is greater with Section 107 *on* or *off* the books. If the Court takes it off the books, churches and ministers will try to avail themselves of the convenience of the employer doctrine under Section 119(a)'s generalized formulation. But not as many will qualify under the

provision's stiffer requirements and limitation to in-kind allowances. Thus, if the Court takes Section 107 off the books, the government will exchange Section 107's "borderline entanglements" for Section 119(a)'s "borderline entanglements" *and* the "enforcement entanglements" arising from the clergy no longer qualifying to use the convenience of the employer exemption.

1. Section 119(a) and the Income Tax's entanglements are intrusive and discriminate among religions.

The general formulation of convenience of the employer doctrine under Section 119(a) states in complete part relevant to housing:

> There shall be excluded from gross income of [1] *an employee* the value of any . . . lodging furnished to him, his spouse, or any of his dependents by or on behalf of his employer [2] *for the convenience of the employer*, but only if . . . the employee is [3] *required to accept such lodging* on [4] *the business premises* of his employer *as a condition of his employment*.

26 U.S.C. § 119 (emphasis added). Thus, church and clergy must show (1) that the clergy are "employees," (2) that their parsonages have been provided "for the convenience of the [church]," (3) that the clergy are "required to accept [the parsonage] . . . as a condition of his [or her] employment," and (4) that the parsonage is on the church's "business premises." 26 U.S.C. § 119(a); see also I.R.C. § 1.119-1. These entanglements cause government to (a) discriminate among religions, and (b) intrude in internal church affairs.

a. Entanglements causing discrimination among religions

Section 119(a)'s limitation exempting only in-kind housing allowances discriminates among religions. Although facially neutral, limiting minister's housing exemption to in-kind benefits had the effect of treating religious organizations differently depending on their polity. Federal courts and Congress found this distinction to be untenable more than fifty years ago.

The courts, for their part, seemed initially concerned about horizontal equity—a doctrine related to due process requiring that similarly situated people be taxed similarly. *See* Adam Chodorow, *The Parsonage Exemption*, 51 U.C. Davis L. Rev. 849, 904 (2018) (defining horizontal equity).[4] In *Williamson v. Comm'r*, a superintendent of the Church of the Nazarene challenged the Tax Court of the United States' decision that his 1949 income tax was deficient by $166.00. 224 F.2d at 377–78 . The deficiency arose, the government argued, because the superintendent had failed to include his housing allowance in his taxable income. In reversing the Tax Court, the Eight Circuit first observed that there was no practical, i.e., principled, difference between the superintendent's cash housing allowance and other ministers' in-kind housing benefits. *See id.* at 379 ("[The superintendent]

[4] Although Professor Chodorow correctly defines "horizontal equity," he misapplies it to the parsonage exemption because, among other reasons, he assumes that the church-minister relationship is a normal employer-employee relationship, and thus, should be treated "normally."

was paid in lieu of furnishing a house, which apparently his employer recognized as its obligation. He was simply paid $1,000.00 for the use and occupancy of his home in lieu of furnishing him a home in kind. It was not intended to be nor did it in fact become any part of his income"). The Eighth Circuit then held that if the government was going to recognize the "convenience of the employer rule," then "the rationale of the rule as stated in Saunders v. Commissioner of Internal Revenue [a Third Circuit case allowing a state trooper to exclude his meal allowance from his income] should apply whether the house is furnished in kind or cash is paid in lieu thereof." *Id.* at 380.

Congress, for its part, seemed more concerned about the Establishment Clause's bar on discriminating among religions. The House sponsor, Peter Mack, quoted correspondence by state Baptist organizations and individual ministers protesting the "iniquity and discrimination resulting from the present situation," where newer, smaller, and more evangelical churches could not enjoy the benefits of the in-kind exemption because "half of our ministers are not provided with Parsonages," but instead rent houses with their already meager incomes. See 99 Cong. Rec. A5372–73 (1953) (statement of Rep. Mack). The Senate Finance Committee Report explained the following when it passed Section 107(2):

> Under present law, the rental value of a home furnished a minister of the gospel as part of his salary is not included in his gross income. This is unfair to those ministers who are not furnished a

> parsonage, but who receive larger salaries (which are taxable) to compensate them for expenses they incur in supplying their own home.
>
> Both the House and your committee has (sic) *removed the discrimination in existing law* by providing that the present exclusion is to apply to rental allowances paid to ministers to the extent used by them to rent or provide a home.

S. Rep. No. 1622-2 (1954), p. 16 (emphasis added). The District Court's decision to strike only sub-Section 107(2) resurrects Establishment Clause concerns that Congress had already extinguished.

Section 107(2) is not the only example in the current tax code where Congress implemented provisions so that the tax code would apply neutrally among denominations:

- **ERISA**: Under 26 U.S.C. § 414(e) Congress broadly defined the class of employees qualifying for ERISA-exempt church benefit plans. Senator Talmadge explained, Congress was looking "[t]o accommodate the differences in beliefs, structures, and practices among our religious denominations." *Miscellaneous Pension Bills: Hearings before the Subcommittee on Private Pension Plans and Employee Fringe Benefits of the Committee on Finance*, 96th Congress 368 (Dec. 4, 1979) (Statement of Sen. Talmadge).
- **Annuity exemptions:** Under 26 U.S.C. § 403(b)(1)(A)(iii) Congress made sure that all ministers qualify for an annuity exemption even if they are not separately considered a 501(c)(3) employee.

- **Organizations providing insurance:** Under 26 U.S.C. § 501(m)(3)(C)-(D) Congress made sure that churches who happened to provide "commercial-type" insurance did not lose their tax exempt status.
- **Social Security:** Under 26 U.S.C. § 3121(b)(8)(A) Congress characterized all ministers as "self-employed" so that even ministers satisfying the common law definition of "employee" could qualify for the social security "self-employment" exemption. *See also* H.R. Rep. No. 83-2679 (1954).

It would be sad irony if Congress's conscious attempt to avoid an establishment clause violation a half century ago was itself found to be an establishment clause violation today. Furthermore, striking 107(1) along with 107(2) is no solution. Doing so would exacerbate the intrusive entanglements arising under Section 119.

b. Entanglements causing intrusions in internal church affairs

Intrusive entanglements would arise in two places were Section 119 allowed to replace Section 107 as clergy's only access to the convenience of the employer exemption.

First, "borderline entanglements" would arise where the government is forced to determine whether a minister qualifies under Section 119(a). Each of the four requirements is considered in turn:

(1) Is the minister an "employee"? Perhaps a straightforward question in the marketplace for goods and services, the question is complicated when applied to religious organizations. The government of course can categorize ministers as "employees" by analogy, but such an analysis would require the government to collect significant information and develop standards for evaluating it.

(2) Did the church provide the housing "for the convenience of the employer"? The government would have to, first, evaluate what the church sees at its mission and, second, judge whether the minister's use of the housing furthers that mission.

(3) Is the minister "required to accept such lodging . . . as a condition of his employment"? The government would have to insert itself at the most intimate level of the church-minister relationship to evaluate whether the respective offer and acceptance of the housing is part of the consideration binding church and minister together. *See Stone v. Comm'r*, 32 T.C. 1021, 1024 (T.C. 1959); M.L. Cross, Annotation, *Exclusion of Meals and Lodging from Gross Income Under "Convenience of the Employer" Rule,* 84 A.L.R.2d 1215 (Originally published in 1962) ("[W]hether meals and lodging have been furnished 'for the convenience of the employer,' is primarily a question of fact to be resolved from a consideration of all the surrounding facts and circumstances.").

(4) Is the minister's housing "on the business premises" of the church? The government would have to, first, determine what the church's "business" is, and, second, evaluate whether the internal-goings-on of the house are advancing that "business."

A common trend emerges from the four inquiries: applying Section 119 to the church-minister relationship would require the government to enmesh itself in and speculate on sensitive areas of church doctrine and polity. As governmental standards evolve, churches will be pressured to comport themselves in accordance with those standards.

Second, "enforcement entanglement" would arise everywhere a church and minister fails to qualify under Section 119(a). Every minister who before received a housing allowance and every minister who before received an in-kind parsonage that does not qualify under Section 119(a) will have to be burdened by additional taxes and all the attendant government entanglements with its enforcement. The new taxes on religious organizations and individuals will directly burden religious organizations' and individuals' exercise of religion. Every dollar spent, either directly or in compliance costs, is one less dollar a religious organization can spend on its religious mission.

In addition to the financial burden, the new tax opens government up to more entanglement because conflict will inevitably arise in its enforcement. Not only will some churches and ministers be subjected to audits, every church and minister will have to satisfy the government that it

has properly valued each parsonage—first, so that each minister can fill out his or her Form 1040, and, second, so that each church can include it in the base on which it pays employment taxes. Valuations are always debatable. Disagreements will manifest themselves in court battles with churches and ministers, liens and levies on church property, and strained church-state relations.

Again, it is no solution to strike only sub-Section 107(2). In addition to the discrimination addressed above, limiting Section 107 to in-kind housing allowances will also likely force churches to change their behavior: creating a powerful incentive to restructure property ownership so that ministers' homes owned or rented by their church, making them more dependent on the church and unable to build home equity; requiring the church to control activity on the property to curtail its liability risk; and complicating the ability of churches to hire pastors with widely varying housing needs. This would have potentially far-reaching impact on the relationship between the minister and the church. It could also have indirect impacts on local governments, encouraging more property ownership by churches and an attendant decrease in the amount of taxable property on the rolls of local government.

2. Section 107's entanglement is constitutionally permitted.

In complete part, Section 107 provides:

> In the case of a ***minister of the gospel***, gross income does not include-
>
> (1) the rental value of a home furnished to him as part of his compensation; or
>
> (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home and to the extent such allowance does not exceed the fair rental value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities.

26 U.S.C. § 107 (emphasis added). Thus, the requirements for clergy to avail themselves of the convenience of the employer doctrine are reduced to a single showing: that he or she is a "minister of the gospel" (a term the Treasury Department defines broadly to encompass clergy of all faiths, e.g., Rev. Rul. 78-301, 1978-2 C.B. 103). In turn, the "borderline entanglements" are limited to distinguishing between applicants who qualify as such and those who do not. Although Plaintiffs argue that this itself is a significantly entangling inquiry, it is one the government already has to face.

First, the IRS already has to make this determination under other tax provisions. Treasury Regulations that instructs officials on how to determine which taxpayers are "minister[s] of the gospel," simply states that, "the rules provided in § 1.1402(c)–5 will be applicable to such determination." 26

C.F.R. § 1.107-1. Section 1.1402(c)–5 outlines how officials are to determine which taxpayers are "minister[s] of the gospel" for purposes of Social Security exemptions.

Second, this determination is not constitutionally prohibited, it is constitutionally mandated. Just six years ago the Supreme Court held that the religion clauses require the government to make that very borderline determination—determining whether an employee is a "minister"—when a church seeks an exemption from an otherwise applicable rule that interferes with the church's authority to select and control who will minister to the faithful. *See Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171 (2012).

In sum, government entanglement would increase were the Court to strike Section 107. Striking Section 107 would replace a constitutionally-mandated inquiry with intrusive and discriminatory "borderline entanglements" under Section 119(a) and gratuitous "enforcement entanglements" under a more broadly enforced income tax. Scrapping 107—in whole or part—simply cannot be justified on the grounds that it reduces government entanglement.

II. Striking Section 107 Would Threaten Other Tax Provisions.

The danger of the District Court's reasoning extends beyond Section 107. The District Court's main objection to Section 107(2) is that it provides ministers with a tax treatment different from that accorded to other employees. That is by no means unique, and any holding that such

differences are impermissible would likely upset many other aspects of Congress's finely calibrated treatment of ministers under the Code.

A. Like Section 107, other tax provisions treat the church-minister relationship differently than other employer-employee relationships.

The district court opinion focuses on section 1402(e), which allows individual ministers not to participate in the Self-Employment Contributions Act (SECA) tax regime if they are religiously opposed. However, the Code's unique treatment of ministers goes far deeper than providing an accommodation for that specific religious objection.

Wage withholding. First, all ministers (religious objections or no) are treated as self-employed in the exercise of their ministry, and their remuneration is not considered "wages."[5] This means that those paying them do not have to withhold social security or Medicare taxes or pay the employer's share of such taxes; nor are they required to withhold income taxes on the ministers. Instead, ministers are responsible to pay self-employment taxes as if they were independent sole proprietors. This blanket rule applies to all ministers, even if they clearly qualify as employees under the general common-law test.

Unemployment insurance exemptions. While the federal tax code requires states to provide unemployment insurance schemes for most employees, it exempts ministers and certain church employees from these

[5] 26 U.S.C. §§ 3121(b)(8)(A), 3401(a)(9), 1402(c)(2)(D), 1402(c)(4).

requirements, and as a result, states can choose not to require payments with respect to these religious workers. The First Circuit upheld this exemption against an Establishment Clause challenge in *Rojas v. Fitch*, 127 F.3d 184, 188 (1st Cir. 1997), concluding that the statute served a permissible purpose of "reducing difficulties in administering an unemployment insurance program" by "eliminat[ing] the need for the government to review employment decisions made on the basis of religious rationales."

Changes to control group rules for employee benefits and insurance. Most employers can provide benefits only to their own employees or to employees of other entities within a control group. However, churches can provide employee benefit plans for employees not only within their control group but also to employees of other entities exempt under Section 501(c)(3) that share "common religious bonds and convictions" with the church.[6]

Allowing churches to provide employee benefits to non-employee ministers. A church can always treat its ministers as employees eligible for its plans whenever they are exercising their ministry, even if they are self-

[6] 26 U.S.C. § 414(e)(3)(B)(ii), (D). This is designed "[t]o accommodate the differences in beliefs, structures, and practices among our religious denominations." *See Miscellaneous Pension Bills: Hearings before the Subcommittee on Private Pension Plans and Employee Fringe Benefits of the Committee on Finance*, 96th Cong. 368, (1979) (Statement of Sen. Talmadge). *See also Church Plan Parity and Entanglement Prevention Act of 1999*, Pub. Law 106-244, 114 Stat. 499 (requiring these church plans to be treated the same as single-employer plans for certain state law purposes as well).

employed or employed by noncharities or entities with no religious connection (for instance, as chaplains).[7]

Retirement benefits. Ministers are also treated differently under a number of provisions governing tax-deferred retirement accounts and annuities under Section 403 of the Code. In general, these accounts can only be offered by certain tax-exempt entities, and function similarly to the more-familiar 401(k) plans provided by for-profit employers. They allow elective pre-tax salary-reduction contributions to such plans as well as additional employer contributions. The tax code modifies the general application of these rules for ministers, in several ways:

- A minister exercising his or her ministry is always treated as an employee eligible for coverage by his church, regardless of whether he or she satisfies the common law test.[8]
- A self-employed minister's annual aggregate contribution limit is set using total income from the exercise of his or her ministry, not employer compensation.[9]
- A minister not employed by a church or associated 501(c)(3) organization can make contributions to a retirement income account

[7] 26 U.S.C. § 414(e)(5).

[8] 26 U.S.C. 403(b)(1)(A)(iii).

[9] 26 U.S.C. § 414(e)(5)(B).

and deduct up to the annual employee contribution limit on the minister's tax return.[10]

- Ministers and other church employees can take advantage of special rules increasing their annual contribution limits in low-income years.[11]
- Years of service and total contributions from an employer are calculated treating a church and other institutions under common control or having common religious bonds and convictions as a single employer; a self-employed minister can count years as a self-employed minister.[12]
- Certain ministers and lay employees serving outside the United States (e.g., missionaries) are allowed a minimum contribution of $3,000, even though their lack of U.S. taxable income would typically keep them from being able to contribute.[13]
- A church plan is by default not subject to minimum participation, minimum vesting, and minimum funding standards applicable to qualified plans generally, and is generally exempt from ERISA.[14] Church-sponsored 403(b) plans are also exempted from

[10] 26 U.S.C. §§ 403(b)(1)(A)(iii), 404(a)(10)

[11] 26 U.S.C. § 415(c)(7)(A).

[12] 26 U.S.C. §§ 415(c)(7)(B), 414(e)(5)(B).

[13] 26 U.S.C. § 415(c)(7)(C).

[14] 26 U.S.C. § 410(d); the Tenth Circuit upheld the church-plan exemption in *Medina v. Catholic Health Initiatives*, 877 F.3d 1213 (10th Cir. 2017).

many of the rules requiring 403(b) plans to avoid discrimination in favor of highly compensated employees.[15]

As the foregoing list indicates, Congress has frequently modified the treatment of its general tax provisions to strike a balance between the need to avoid undue interference in a church's internal affairs and the need to apply the general statutory scheme to churches in an evenhanded way. In particular, the Code regularly makes the following kinds of adjustments:

- It loosens rules about required relationships among church affiliates to avoid creating differences between hierarchical and non-hierarchical churches.
- It recognizes that some churches have an obligation to care for their ministers regardless of whether or how the ministers provide services to the church, ensuring that benefits eligibility is not made contingent on a church's relationship with its ministers conforming to the traditional common law employer-employee relationship, or to traditional models for how employees should be paid.
- In some cases, it accounts for unique situations arising because of unusual patterns of employment and payment common among religious workers (for instance, years of foreign missionary service, or patterns of moving from church to church within a single denomination).

[15] 26 U.S.C. § 403(b)(1)(D), (12).

In all these cases, the Code is not impermissibly advancing religion. Rather, it is simply serving the permissible secular purpose of "respect[ing] the religious nature of our people and accommodat[ing] the public service to their spiritual needs." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

The parsonage allowance in Section 107(2) is no different from other provisions making allowances for differences in how economic responsibilities are allocated within the church's polity: just as other rules allow variation in whether a minister is paid by the church providing benefit plans or in whether the minister or the church makes contributions to the minister's retirement account, Section 107(2) allows for differences in whether the property is purchased by the church or by the minister. But under the District Court's analysis, all of these benefits are suspect merely because they result in differential treatment for ministers and churches.

B. Like Section 107, these other tax provisions are "permissible accommodations" of religion.

The Supreme Court has held that in-between the Free Exercise Clause's bar on unduly burdening religion and the Establishment Clause's bar on excessively entangling itself with religion, "there is room for play in the joints." *Walz*, 397 U.S. at 669 . "In the joints" between the two Religion Clauses Congress if free but not obligated to grant "permissible accommodations" to religion. *See e.g. Texas Monthly*, 489 U.S. at 39. Each of the above provisions, as well as Section 107, fall within these joints—maintaining a "benevolent neutrality which will permit religious exercise to

exist without sponsorship and without interference." *Walz*, 397 U.S. at 669. As Professor Zelinsky has identified, Congress's response to the Supreme Court's decision in *United States v. Lee*, 455 U.S. 252 (1982) is an instructive example of this principle—especially as Section 107 is concerned. *Zelinsky*, 33 Cardozo L. Rev. at 1672.

In *Lee*, the Supreme Court rejected an Amish man's claim that the Free Exercise Clause entitled him to an exemption from social security taxes. *Lee*, 455 U.S. 252, 261. The Court reasoned that Congress's grant of the same exemption [to the self-employed under 1402(g)] was an "effort toward accommodation," but that the Free Exercise Clause did not command that Congress's beneficence be automatically extended to objecting employers such as Mr. Lee. *Id.* Concluding the opinion of the Court, Justice Burger held: "The tax imposed on employers to support the social security system must be uniformly applicable to all, *except as Congress explicitly otherwise*."

Well, Congress did "provide[] explicitly otherwise," by passing Section 3127. Under Section 3127, employers like Mr. Lee can claim exemptions from Social Security taxes if they can show that they are (1) "members[s] of a recognized religious sect" who, (2) by reason of their adherence to the "established tenants or teaching of such sect," are (3) "conscientiously opposed to acceptance of the benefits of any private or public insurance." *See* 26 U.S.C. 3127; I.R.C. § 1402(g).

With these three inquiries, Professor Zelinsky points out, Section 3217 "requires similar determinations of religious practice and belief to ascertain if that section applies" as the other Social Security exemptions and Section 107 discussed above. *See Zelinsky*, 33 Cardozo L. Rev. at 1670–73. Thus, the reasoning goes, if Section 107's "borderline entanglements" were to constitute Establishment Clause violations, so would the "borderline entanglements" arising under Section 3127 and the other Social Security exemptions. *Id.*

Fortunately, no court has even found the "borderline entanglements" under the Social Security exemptions to violate the Establishment Clause. *See e.g., Droz v. Comm'r*, 48 F.3d 1120, 1121 (9th Cir. 1995) (holding that § 1402 is permissible accommodation because it is "a religious exemption narrowly drawn to maintain a fiscally sound Social Security system and to ensure that all persons are provided for, either by the Social Security system or by their church"). So too, the "borderline entanglements" under Section 107 must withstand Religion Clause scrutiny as "permissible accommodations."

CONCLUSION

For more than half a century Section 107 has reasonably applied the convenience of the employer doctrine to the unique church-minister relationship. If the Court were to strike Section 107, government entanglement would increase. And any reasoning striking Section 107 would threaten other well-established tax provisions. Fortunately, as neither Section 107 nor its sister tax provisions offend either Religion Clause, Amici join Defendant-Appellants in requesting the Court reverse the District Court's opinion below.

DATED this 26th day of April, 2018.

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CERTIFICATE OF COMPLIANCE

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I hereby certify that the foregoing brief of *amicus curiae* was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the appellate CM/ECF system on April 26, 2018. All participants in the appeal are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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