No. 14-1152

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

Plaintiffs-Appellees

v.

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

Defendants-Appellants

ON APPEAL FROM THE JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN (No. 11-cv-0626; Honorable Barbara B. Crabb)

BRIEF FOR THE APPELLANTS

KATHRYN KENEALLY
Assistant Attorney General

TAMARA W. ASHFORD
Principal Deputy Assistant Attorney General

GILBERT S. ROTHENBERG (202) 514-3361
TERESA E. MCLAUGHLIN (202) 514-4342
JUDITH A. HAGLEY (202) 514-8126
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

Of Counsel:

JOHN W. VAUDREUIL
United States Attorney

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GLOSSARY

APA	Administrative Procedure Act
The Code	Internal Revenue Code
Commissioner	Commissioner of Internal Revenue
FFRF	Freedom from Religion Foundation, Inc.
IRS	Internal Revenue Service
Plaintiffs	FFRF, Annie Gaylor, and Dan Barker
Secretary	Secretary of the Treasury

STATEMENT REGARDING ORAL ARGUMENT

In this case, the District Court struck down the longstanding exclusion for a parsonage allowance under § 107(2) of the Internal Revenue Code as a violation of the Establishment Clause, at the behest of plaintiffs, an atheist advocacy organization and two of its members. Issues of great administrative importance regarding the constitutionality of the exclusion and plaintiffs' standing to sue are presented. Counsel for the appellants respectfully inform the Court that they believe that oral argument is essential to the disposition of this appeal.

STATEMENT OF JURISDICTION

Freedom from Religion Foundation, Inc. (FFRF) and its co-presidents Annie Gaylor and Dan Barker (together, plaintiffs) brought this suit for declaratory and injunctive relief against the Secretary of the Treasury and the Commissioner of Internal Revenue. (Doc1,13.)[1] FFRF, a Wisconsin corporation, has its principal place of business in Madison, Wisconsin. (*Id.*) The gravamen of the complaint was that § 107 of the Internal Revenue Code, which excludes from federal income taxation certain housing benefits provided to ministers, violates the Establishment Clause of the First Amendment to the United States Constitution and the Equal Protection component of the Constitution's Due Process Clause. Plaintiffs sought (i) a declaration that § 107 is unconstitutional and (ii) an injunction against the continued allowance of the exclusion. Although plaintiffs invoked the District Court's jurisdiction under 28 U.S.C. § 1331, the Government maintains that the court lacked subject matter jurisdiction. Because they failed to seek the

[1] "Doc" references are the documents in the original record, as numbered by the Clerk of the District Court. "A" and "App" references are to appellants' separately bound record appendix and the appendix bound with this brief, respectively. Unless otherwise indicated, all "§" references are to the Internal Revenue Code, as currently in effect. Pertinent statutes are set forth in the Statutory Addendum.

exclusion provided by § 107, plaintiffs lack standing to challenge it. *See* Argument I, below.

The District Court rendered a final judgment on November 26, 2013, disposing of all claims of all parties. (App44-45.) The Government filed its notice of appeal on January 24, 2014, within the 60 days allowed by Fed. R. App. P. 4(a)(1)(B). (Doc58.) *See* 28 U.S.C. § 2107(b). This Court's jurisdiction over the appeal rests upon 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether plaintiffs have standing to challenge the constitutionality of the exclusion for a parsonage allowance under § 107(2), when they have neither sought nor been denied the exclusion.

2. If plaintiffs have standing, whether § 107(2) violates the Establishment Clause.

STATEMENT OF THE CASE

A. Procedural overview

Plaintiffs brought this suit against the Secretary and the Commissioner, seeking (i) a declaration that § 107 violates the Establishment Clause and (ii) an injunction barring the allowance of the exclusion. Because plaintiffs did not themselves seek the benefits of

§ 107, the Government moved to dismiss the case, contending that plaintiffs lacked standing. The District Court denied the motion. (A1-20.) The Government later moved for summary judgment, renewing its argument that plaintiffs lacked standing and contending that § 107 does not violate the Establishment Clause. Plaintiffs did not contest the motion insofar as it concerned their standing to challenge the exclusion under § 107(1) for housing furnished in kind. But they opposed the motion insofar as the exclusion under § 107(2) for a cash parsonage allowance was concerned. The court granted the Government summary judgment regarding § 107(1). After concluding that plaintiffs had standing to challenge the latter exclusion (App1-15), the court granted plaintiffs summary judgment *sua sponte* regarding § 107(2), striking down the statute as unconstitutional (App15-42). The Government now appeals.

B. Background: § 107

Section 107 is one of several statutory exclusions from gross income for employment-connected housing benefits. Taxpayers who are furnished housing by their employers may exclude the value of that housing from their gross income where (among other things) the

housing is furnished for the "convenience of the employer." § 119. Taxpayers who furnish their own housing, but use it for business purposes for the "convenience of [the] employer," may deduct from income expenses related to that housing. § 280A(c)(1). In addition, certain federal employees may exclude from gross income cash provided to them for housing purposes. § 134 (military housing allowance); § 912 (foreign housing allowance for Foreign Service, the CIA, etc.).

Section 107 provides an analogous exclusion for housing or its cash equivalent provided to a "minister of the gospel" by his employing church.[2] Specifically, when furnished or paid to him "as part of his compensation," a minister's gross income does not include "(1) the

[2] Although § 107 "is phrased in Christian terms" to apply to a "minister of the gospel," "Congress did not intend to exclude those persons who are the equivalent of 'ministers' in other religions." *Salkov v. Commissioner*, 46 T.C. 190, 194 (1966) (holding that a Jewish cantor was a "minister of the gospel"). The Commissioner interprets "religion" to include "beliefs (for example, Taoism, Buddhism, and Secular Humanism) that do not posit the existence of a Supreme Being." Internal Revenue Manual § 7.25.3.6.5(2) (Feb. 23, 1999). Moreover, the employer need not be a church or religious organization, as long as the minister is compensated for ministerial services. Treas. Reg. § 1.1402(c)-5(c)(2) (26 C.F.R.).

rental value of a home" or "(2) the rental allowance paid to him . . . 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," plus utilities. § 107.

Section 107 has its origins in the Revenue Act of 1921, which created an exclusion for "[t]he rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of his compensation." Pub. L. No. 98, sec. 213(b)(11), 42 Stat. 227, 239. This exclusion was carried forward in successive revenue acts and was incorporated into the Internal Revenue Code of 1939 without substantive change. *See* Section 22(b)(6) of the 1939 Code, 53 Stat. 10. When the exclusion was reenacted as § 107(1) of the Internal Revenue Code of 1954, the addition of § 107(2) allowed ministers to exclude "rental allowance[s]."

Although the legislative history of the 1921 Revenue Act does not explain why the in-kind exclusion was introduced, the treatment of clergy housing under prior law sheds light on Section 213(b)(11)'s purpose. Immediately before its enactment, the Treasury Department had allowed some employees — but not clergy — to exclude the value of

employer-provided housing from income pursuant to the "convenience of the employer" doctrine. *See Commissioner v. Kowalski*, 434 U.S. 77, 84-90 (1977) (describing history of exclusion for such employer-provided housing). Those benefiting included seamen living aboard ships, workers living in "camps," cannery workers, and hospital employees. *Id.* In 1921, the Treasury announced that ministers would be taxed on the fair rental value of parsonages provided as living quarters, O.D. 862, 4 C.B. 85 (1921), even though ministers traditionally resided in parsonages for the church's convenience (A37-51). Shortly thereafter, Congress changed that treatment by enacting Section 213(b)(11), thereby placing ministers on an equal footing with other employees who already enjoyed an exclusion for housing provided for the employer's convenience.

When the parsonage exclusion was enacted, churches had differing traditions and practices that influenced how they provided parsonages to their ministers. (A37-65,68-73.) Older or more hierarchical churches tended to furnish church-owned parsonages to ministers; newer churches favored providing ministers cash housing

allowances. (*Id.*) But either way, the minister's housing was generally used for the church's religious purposes. (A37-39,41-42,50-51,70-71,73.)

When churches that did not own parsonages provided ministers with cash housing allowances in lieu of in-kind housing, the Treasury ruled that the statutory exclusion was limited to in-kind housing and that housing allowances were includable in gross income. I.T. 1694, C.B. II-1, at 79 (1923). The Treasury noted, however, that the allowance would be deductible by the minister as a business expense, to the extent it was used for "expenses attributable to the portion of the parsonage which is devoted to professional use." *Id.* Several courts disagreed. They held that, in order to treat similarly situated ministers equally, cash allowances must also be considered excludable under the statutory parsonage exclusion. *E.g., Williamson v. Commissioner*, 224 F.2d 377, 380 (8th Cir. 1955); *Conning v. Busey*, 127 F. Supp. 958 (S.D. Ohio 1954); *MacColl v. United States*, 91 F. Supp. 721 (N.D. Ill. 1950). Whether paid in cash or in kind, the benefits were considered provided for the church's "convenience" and therefore excludable. *Williamson*, 224 F.2d at 380.

In 1954, Congress resolved the dispute by codifying the prevailing judicial view in § 107, which excludes compensatory housing furnished to ministers in cash as well as in kind. In doing so, Congress sought to remove "discrimination" against ministers who were paid cash allowances, as the House and Senate Reports explained. H.R. Rep. No. 1337, at 15 (1954); S. Rep. No. 1622, at 16 (1954).

In 2002, Congress amended § 107(2) to clarify that the exclusion was limited to the fair rental value of the parsonage. Pub. L. No. 107-181, 116 Stat. 583. The bill that introduced the proposed amendment reiterated that one of the purposes of § 107 was to "accommodate the differing governance structures, practices, traditions, and other characteristics of churches through tax policies that strive to be neutral with respect to such differences." Clergy Housing Allowance Clarification Act, H.R. 4156, 107th Cong. § 2(a)(4) (as introduced April 10, 2002). In addition to preventing discrimination, § 107 was also designed, according to this legislative history, to avoid "intrusive inquiries by the government into the relationship between clergy and their respective churches" entailed by the generally available convenience-of-the-employer doctrine codified elsewhere in the Code.

Id. at § 2(a)(5). Section 107 avoids such potential church-state entanglement by eliminating any need for the minister to demonstrate that the parsonage or allowance therefor is being used for the church's convenience under § 119 or § 280A(c)(1), respectively.

C. FFRF

FFRF is a nonprofit membership corporation that promotes the separation of church and state and educates on matters of "non-theism." (A3.) Gaylor and Barker, FFRF's co-presidents, are "nonbeliever[s]" who are "opposed to government preferences and favoritism towards religion."[3] (Doc13 at 3.) FFRF provides Gaylor and Barker (formerly an ordained minister) with housing allowances not exceeding housing-related expenses. Plaintiffs complained that the § 107 exclusion, being

[3] Although Gaylor and Barker also alleged that they were "federal taxpayers," they did not attempt to maintain suit as taxpayers under *Flast v. Cohen*, 392 U.S. 83 (1968). (A5.) In a previous attempt to invalidate § 107 brought by FFRF and others, the district court held that the plaintiffs had standing as taxpayers to sue under the Establishment Clause. *FFRF v. Geithner*, 715 F. Supp. 2d 1051, 1059-1061 (E.D. Cal. 2010). But after the Supreme Court held that taxpayers lacked standing to challenge tax benefits under the Establishment Clause unless they personally have "been denied a benefit on account of their religion," *Ariz. Christian School Tuition Org. v. Winn*, 131 S. Ct. 1436, 1440 (2011), the parties stipulated to dismissal without prejudice. (A29-30.)

limited to "ministers of the gospel," subsidizes, promotes, and endorses religion in violation of the Establishment Clause. (Doc13 at 5.) Although they complained of unequal treatment, neither Gaylor nor Barker had personally sought or been denied the exclusion before filing suit, either by claiming it on their income tax returns or by filing claims for refund with the IRS challenging the statute as unconstitutional unless it applied to them. (A22-23,30.)

D. The proceedings below

The Government moved to dismiss for lack of subject matter jurisdiction. (Doc12,16-17.) It contended that plaintiffs lacked standing to sue under Article III of the Constitution. The Government contended that there was no injury-in-fact because neither Gaylor nor Barker had personally sought or been denied the exclusion, and it was insufficient merely to allege that it is illegal for third parties to enjoy it. (Doc12 at 17-22.) The Government further contended that entertaining plaintiffs' claims, and recognizing a waiver of sovereign immunity under the Administrative Procedure Act, 5 U.S.C. § 702, would also be at odds with the highly articulated structure of tax litigation, which generally precludes the issuance of declaratory and injunctive relief and confines

disputes regarding tax treatment to deficiency actions and suits for refund brought by the affected taxpayers. (Doc27 at 4-7.)

In response, plaintiffs contended that they had standing to challenge § 107(2). They argued that, having received housing allowances, they were similarly situated to clergy enjoying the exclusion. (Doc20.)

The District Court denied the Government's motion. (A1-20.) The court considered it "clear" that plaintiffs are not entitled to the exclusion and that there was no reason to require them to undergo the "futile" exercise of seeking the exclusion. (A2.)

The Government moved for summary judgment. (Doc44,54.) Besides renewing its jurisdictional arguments (Doc44 at 5-25), the Government defended the constitutionality of § 107 (*id.* at 25-52). It contended that § 107 does not violate the Establishment Clause because it has the secular purpose and effect of eliminating discrimination against, and among, ministers, and of limiting government entanglement with religion. (Doc44 at 3.)

Plaintiffs opposed the motion, but only as it related to § 107(2). They argued that the District Court had jurisdiction and that § 107(2) violates the Establishment Clause. (Doc52.)

The District Court granted the Government summary judgment regarding § 107(1). Respecting § 107(2), however, the court granted summary judgment to plaintiffs *sua sponte*. (App1-3.) The court reaffirmed its conclusion that plaintiffs had standing to challenge § 107(2), finding it "clear from the face of the statute that plaintiffs are excluded from an exemption granted to others." (App2.) The court further held that § 107(2) violates the Establishment Clause because it "provides a benefit to religious persons and no one else, even though doing so is not necessary to alleviate a special burden on religious exercise." (App2.) The court held that the case was controlled by the plurality opinion in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), striking down a sales tax exemption for religious periodicals. (App2.) The court rejected the Government's argument that § 107(2) was enacted for the secular purpose of avoiding discrimination among ministers. Although the court observed that other Code provisions provide tax benefits for employer-provided housing, it did not consider

whether § 107(2) avoids the potential church-state entanglement posed by ministers being forced to rely upon generally available tax benefits for housing used for an employer's convenience. (App29-37.)

SUMMARY OF ARGUMENT

Plaintiffs — an advocacy organization promoting atheism and the separation of church and state, and its co-presidents — challenge the constitutionality of § 107(2), a longstanding exclusion for a cash parsonage allowance paid by a church to its minister. Plaintiffs do not themselves seek the exclusion, but only to nullify its enjoyment by ministers who are not parties to this action. The District Court held that plaintiffs had standing to challenge § 107(2) and that the statute violates the Establishment Clause. Both rulings are flawed.

1. Under Article III, a plaintiff lacks standing to sue unless he alleges a personal injury fairly traceable to the defendant's alleged unlawful conduct. A mere interest in a problem or a grievance shared in common with the public does not suffice. Where, as here, a plaintiff alleges an injury from unequal treatment, he lacks standing unless and until he personally seeks and is denied the benefit at issue. Without the personal denial of equal treatment, the plaintiff raises only a

generalized grievance, not a case or controversy. Plaintiffs here have not personally asked for the § 107(2) exclusion, nor are they litigating their own tax liabilities. Because they seek only to deprive others of the exclusion, they have suffered no actual personal injury at the hands of the Government.

Prudential concerns and statutory limitations under the APA also counsel dismissal. Congress has erected a highly articulated structure that confines tax litigation to suits by taxpayers contesting their *own* tax liabilities in Tax Court deficiency actions or suits for refund in the district courts and Court of Federal Claims. Injunctive and declaratory relief is generally precluded where federal taxes are concerned. To recognize a plaintiff's standing to challenge the tax liability of third parties not before the court would disturb this carefully crafted statutory scheme.

2. If the Court were to reach the merits, it should uphold § 107(2) as constitutional. Section 107(2) has a secular purpose and effect and avoids excessive church-state entanglement. The clergy have long been provided with homes at or near their places of worship and use them in connection with their ministries. Just as it has done for lay employees

furnished housing for the employer's convenience under § 119, Congress has merely exercised the discretion that accompanies its taxing power to exempt the value of such professionally used parsonages from taxation. Extension of this "refusal to tax" to the cash equivalent of in-kind housing under § 107(2) merely "eliminates the discrimination," in the words of the drafters, that would otherwise exist against ministers, and between churches that have historically provided parsonages in kind and those that do not. Permitting ministers to exclude parsonage allowances under § 107(2), rather than forcing them to rely on the generally available deduction for the business use of the home under § 280A(c)(1), may also prevent more intrusive Government inquiries into the church-minister relationship, and avoid the need to evaluate whether activities in a minister's home are secular or religious. These statutory purposes comport fully with the restraints of the Establishment Clause.

In striking down the law, the District Court erred. It failed to come to grips with the reasons Congress enacted § 107 in the first place. It also disregarded the fact that the housing exclusions provided to ministers are merely part of a larger Congressional design providing

exclusions or deductions for certain employer-provided housing benefits for all taxpayers. Given the unique history and context of § 107(2), the plurality opinion in *Texas Monthly* by no means "controls" this case, as the District Court erroneously assumed (App19). That case concerned a distinctly different tax exemption that lacks the redeeming features present here.

ARGUMENT

I

Plaintiffs lack standing to sue

Standard of review

A plaintiff's standing to sue presents a question of law reviewable *de novo*. *Love Church v. Evanston*, 896 F.2d 1082, 1085 (7th Cir. 1990).

A. Introduction

The standing doctrine has both constitutional and prudential aspects. The "core component" of standing, derived directly from the "cases" or "controversies" requirement of Article III of the Constitution, is grounded on the separation of powers. *Allen v. Wright*, 468 U.S. 737, 750-752 (1984). It requires the plaintiff to "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id.* at 751. The injury, moreover,

must be "concrete, particularized, and actual or imminent (instead of conjectural or hypothetical)." *Am. Fed'n of Gov't Employees v. Cohen*, 171 F.3d 460, 466 (7th Cir. 1999). "[G]eneralized grievances" "do not present constitutional 'cases' or 'controversies.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, __ S. Ct. __, 2014 WL 1168967, at *6 n.3 (Mar. 25, 2014).

In addition to these constitutional requirements, there are also certain prudential limitations on the exercise of federal jurisdiction. This inquiry includes "whether the constitutional or statutory provision" in question "properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

In this case, the District Court struck down § 107(2), which has been on the statute books for some 60 years, at the behest of plaintiffs who have not been injured by the statute, though they object to § 107(2) as a matter of principle. There is no dispute that the individual plaintiffs, Gaylor and Barker, have never sought the very tax benefit

about which they complain. Nor do they seek to litigate their own tax liabilities.[4]

The Supreme Court has "always insisted on strict compliance with [the] jurisdictional standing requirement," because the "'law of Art. III standing is built on a single basic idea — the idea of separation of powers.'" *Raines v. Byrd*, 521 U.S. 811, 819-820 (1997) (citation omitted). The Court also has repeatedly "[w]arn[ed] against premature adjudication of constitutional questions." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997). In our tripartite system of government, a court does not act as a "constitutional check" on a Congressional enactment unless a bona fide dispute involving an actually injured litigant requires the court to pass on the validity of a statute.

As demonstrated below, the District Court's ruling is at odds with settled law regarding constitutional standing. In contravention of prudential standing limitations, moreover, the ruling also bypasses the proper channels for tax litigation enacted by Congress that confine tax

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[4] Because FFRF alleges no injury to itself, its standing depends on that of its members, the individual plaintiffs. The District Court recognized as much. (A4.)

litigation to suits by taxpayers contesting their own tax liabilities, after the taxpayer first seeks the tax benefit in question from the Internal Revenue Service. These restrictions are by no means "arbitrary" rules (A15) that "waste" time (A8). They are critical components of a constitutional design that ensures that courts are the "'last'" — not the first — "'resort.'" *Allen*, 468 U.S. at 752 (citation omitted).

B. Plaintiffs lack standing under Article III

Here, although they contend that they are similarly situated to the ministers who enjoy it, plaintiffs do not seek to enjoy the parsonage exclusion themselves. Instead, they seek to deprive the ministers of the benefit, even though the clergy are not before the court. Because plaintiffs do not seek to improve their own economic situation, the apparent gravamen of their claim is that they have been stigmatized by the Government's failure to provide them with equal treatment on account of their atheism. The Supreme Court has held, however, that an injury of this type "accords a basis for standing *only* to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *Allen*, 468 U.S. at 755 (emphasis added) (quoting *Heckler v. Mathews*, 465 U.S. 728, 739-740 (1984)). Without

the personal denial of equal treatment, the plaintiff raises only a "generally available grievance about government," which "does not state an Article III case or controversy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-574 (1992). Insisting on a personalized injury, the Supreme Court "has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction in federal court." *Allen*, 468 U.S. at 754.

In *Allen*, the Supreme Court held that the parents of African-American children lacked standing to sue Treasury officials to challenge the tax-exempt status of racially discriminatory schools, because they had not been "personally denied equal treatment" by the Government, but were merely seeking to litigate another person's tax liability. 468 U.S. at 754-756. Similarly, in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-167 (1972), the Court held that an African-American plaintiff lacked standing to challenge a racially discriminatory membership policy because he "never sought to become a member."

In *Heckler*, by contrast, a widower was found to have standing to challenge a law requiring his spousal Social Security benefits to be offset against his Civil Service pension unless he demonstrated that he

had been his late wife's dependent, where no such showing was required for a widow to escape the offset. The Court stressed, however, that the plaintiff "personally has been denied benefits that similarly situated women receive." 465 U.S. at 740 & n.9. Given that personal denial, the Court explained, "there can be no doubt about the direct causal relationship between the Government's alleged deprivation of appellee's right to equal protection and the personal injury appellee has suffered — denial of Social Security benefits solely on the basis of his gender." *Id.*

Applying these principles, the Fifth Circuit, sitting *en banc*, held that plaintiffs lacked standing to pursue an "injury of unequal treatment," based on their ineligibility for special transition rules extended to other taxpayers that temporarily preserved certain repealed tax benefits. *Apache Bend Apartments, Ltd. v. United States*, 987 F.2d 1174, 1177-1178 (5th Cir. 1993). The court held that "plaintiffs have not suffered any direct injury in the sense that they personally asked for and were denied a benefit granted to others."[5] *Id.*

[5] The Fifth Circuit framed its decision in terms of prudential standing. It nevertheless observed that its prudential concerns about allowing the plaintiffs to litigate "generalized grievances" outside the

In so ruling, the court distinguished the injury in *Heckler*, emphasizing that the plaintiff there had constitutional standing because he "specifically sought benefits for himself," was "*personally*" denied those benefits, and raised "his equal protection argument in the context of litigating *his* right to receive Social Security benefits." *Id.* at 1178 n.3. Unlike the plaintiff in *Heckler*, the plaintiffs in *Apache Bend* "were not *personally denied* benefits" under the tax provision at issue, and "never even sought such benefits." *Id.* Consequently, the asserted harm was no more than a "generalized grievance" that could not support standing. *Id.* at 1178.

These principles apply no less in the Establishment Clause context. The "Establishment Clause does not exempt clergy or lay persons from Article III's standing requirements." *In re U.S. Catholic Conference*, 885 F.2d 1020, 1024 (2d Cir. 1989). In *Winn*, for example, the Supreme Court held that the plaintiffs lacked standing to challenge

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normal channels of litigating their own tax liabilities were "closely related to the constitutional requirement of personal 'injury in fact,' and the policies underlying both are similar." 987 F.2d at 1176. Decisions such as *Allen* and *Heckler* confirm that the matter likewise affects constitutional standing in the first instance. As the Supreme Court recently opined, "generalized grievances" do not pass muster under Article III. *Lexmark*, 2014 WL 1168967, at *6 n.3.

a tax benefit under the Establishment Clause because they had not personally "been denied a benefit on account of their religion," but were merely complaining in their capacity as taxpayers that the challenged provision unlawfully benefited religious groups. 131 S. Ct. at 1440, 1449. Similarly, in *Catholic Conference*, certain clergy plaintiffs alleged that the Government's failure to revoke the tax exemption of the Catholic Church for electioneering against abortion violated the Establishment Clause. The Second Circuit held that the plaintiffs lacked standing because they "do not complain about their own tax status" and had "neither been personally denied equal treatment under the law nor in any way prosecuted by the IRS." *Id*. at 1022, 1024-1026. As the court emphasized, it is "not enough to point to an assertedly illegal benefit flowing to a third party that happened to be a religious entity." *Id*. at 1025.

As these decisions make clear, a plaintiff alleging unequal treatment lacks the requisite personal injury unless and until the person seeks — and is denied — equal treatment. Until that point, he complains only of a generalized grievance. Put another way, a person does not have standing to ask that *another* person's tax benefit be *taken*

away without first seeking and being denied the benefit himself. Any injury would otherwise be too abstract and diffuse.

Although a would-be litigant lacks standing to deprive others of a tax benefit he eschews, he indubitably would have standing, by contrast, to challenge the exaction of an unconstitutional tax from himself, which results in a direct and personal "economic injury." *Hein v. FFRF*, 551 U.S. 587, 599 (2007). But in order to have standing to challenge a tax benefit as unconstitutional, the taxpayer must actually seek the tax benefit himself, placing his own liability in suit. *E.g.*, *Texas Monthly,* 489 U.S. at 8 (recognizing the standing of a general-interest magazine to raise an Establishment Clause challenge to a tax exemption limited to religious periodicals, where it "paid" the tax and sought a "refund"); *Droz v. Commissioner*, 48 F.3d 1120, 1122 & n. 1 (9th Cir. 1995) (recognizing that taxpayer had standing to raise Establishment Clause challenge to a religious exemption from the self-employment tax under § 1402(g) for sects opposed to certain insurance, where he claimed, and was denied, the exemption); *Moritz v. Commissioner*, 469 F.2d 466, 467 (10th Cir. 1972) (addressing Equal Protection challenge brought by a single male who claimed a

dependent-care expense deduction that the statute limited to married or widowed men, but allowed to women regardless of marital status); *Warnke v. United States*, 641 F. Supp. 1083 (E.D. Ky. 1986) (addressing Establishment Clause challenge to regulations under § 107 by taxpayer who claimed, and was denied, the § 107(2) exclusion). In these cases, the taxpayers actually sought the tax benefit from the taxing authority and then litigated their own tax liability, either by way of a deficiency proceeding in Tax Court (as in *Droz* and *Moritz*) or by filing a refund suit (as in *Texas Monthly* and *Warnke*).

So, too, here, Gaylor and Barker could have sought the § 107(2) exclusion by claiming it on their returns and then petitioning the Tax Court if the IRS were to disallow the exclusion. § 6213(a). Alternatively, they could have paid the resulting taxes due, claimed refunds from the IRS, and then sued for refund if their claims were rejected or not acted upon for six months. §§ 6511, 6532(a)(1), 7422; 28 U.S.C. §§ 1346(a)(1), 1491. Either way, plaintiffs would have standing to litigate their entitlement to the exclusion and to raise an Establishment Clause challenge in that regard. But perhaps preferring

to wreak a greater impact — wresting the benefit from ministers nationwide — Gaylor and Barker did neither. (A22-23,30.)

Although plaintiffs "identify their injury as the alleged unequal treatment they have received from" the IRS and Treasury (A6), they, in fact, have received *no* treatment from those agency-defendants. As plaintiffs concede, they have not contacted the IRS or Treasury about their housing allowances. They have neither personally sought nor been denied equal treatment. (A24,27,31.) Without that critical step, plaintiffs' claim is reduced to the allegation that § 107(2) violates the Establishment Clause. But as the Supreme Court has emphasized — and the District Court ignored — plaintiffs have "no standing to complain simply that their Government is violating the law." *Allen*, 468 U.S. at 755.

Plaintiffs' suit suffers from the same flaw that precluded standing in *Allen*, *Winn*, *Apache Bend*, and *Catholic Conference*. Plaintiffs contend that the Government violates the Establishment Clause by permitting ministers to claim the § 107(2) exclusion. But just as in those cases, plaintiffs here are not litigating their own tax liabilities. They are merely suing to have the Government act in accordance with

their view of the law. Because plaintiffs have not sought, and been denied, the § 107(2) exclusion, they have not suffered an actual, concrete, and particularized injury. Without such an injury, plaintiffs lack Article III standing.

This Court recently made a like point when FFRF sought to challenge the constitutionality of a federal statute creating the National Day of Prayer as violating the Establishment Clause. *FFRF v. Obama*, 641 F.3d 803 (7th Cir. 2011). The Court held that FFRF lacked standing because — even if the statute violated the Establishment Clause — FFRF was not personally "injure[d]" by the statute, explaining that FFRF's "offense at the behavior of the government, and a desire to have public officials comply with (plaintiff's view of) the Constitution, differs from a legal injury." *Id*. at 805, 807. A legal injury, the Court emphasized, requires "an invasion of one's own rights to create standing." *Id*. at 806. Similarly, in *FFRF v. Zielke*, 845 F.2d 1463 (7th Cir. 1988), the Court held that FFRF lacked standing to challenge a Ten Commandments display because FFRF failed to allege an actual, concrete injury. As the Court explained, FFRF's commitment

"to the principle of separation of church and state . . . alone does not satisfy the standing doctrine." *Id.* at 1468 n.3. The same is true here.

C. Plaintiffs' lawsuit also runs afoul of other limitations on standing

Plaintiffs' complaint also runs afoul of other limitations on standing. To surmount the prudential principles that limit standing in a suit brought (as here) under the APA, plaintiffs must show not only that they fall within the zone of protected interests, but that there is no "evidence that Congress intended to preclude the plaintiff from suing," such as "'the structure of the statutory scheme.'" *City of Milwaukee v. Block*, 823 F.2d 1158, 1166 (7th Cir. 1987) (citation omitted). These limitations counsel against the exercise of jurisdiction and disclose that the APA does not waive sovereign immunity here.

To begin with, although a person who actually claims a tax benefit might arguably fall within the zone of interests protected by the statute conferring it, plaintiffs here fall short. Eschewing any claim to the § 107(2) exclusion they seek to nullify, they likewise cede any claim to being within the statute's penumbra. To say, moreover, that they fall within the zone of interests protected by the Establishment Clause, merely because of their interest in the separation of church and state,

would not meaningfully set them apart from masses of other citizens who also wish the Government to abide by the law.

In any event, the intent of Congress *not* to allow plaintiffs to contest the tax liability of third parties is manifest. As we explain below, "Congress has created a highly articulated and exclusive structure of federal tax litigation that limits judicial review of tax matters to precisely defined channels." (Doc27 at 5.) Plaintiffs are attempting to litigate outside of those established channels.

Congress has authorized taxpayers to bring deficiency actions in the Tax Court to obtain review of asserted deficiencies in income, gift, estate and certain excise taxes without first having to pay the amount in dispute. §§ 6211, 6212, 6213(a). Alternatively, Congress has permitted taxpayers to sue for a refund in a federal district court or in the Court of Federal Claims after the taxpayer has duly filed an administrative refund claim and the claim either has been denied or not acted upon for six months. §§ 6511, 6532(a)(1), 7422(a). These remedies are adequate and specific remedies under 5 U.S.C. §§ 703 and 704 that foreclose review under the APA.

Congress has otherwise generally precluded "any person, whether or not such person is the person against whom such tax was assessed," from maintaining a suit "for the purpose of restraining the assessment or collection of any tax" (§ 7421(a)), and has likewise generally barred declaratory relief in all actions "with respect to Federal taxes" (28 U.S.C. § 2201(a)). To be sure, the Anti-Injunction Act may not apply of its own terms here, because the effect of plaintiffs' suit would be to increase tax collections. *Cf. Hibbs v. Winn*, 542 U.S. 88, 104 (2004) (construing Tax Injunction Act, 28 U.S.C. § 1341). Nevertheless, taken as a whole, this concerted structure generally confines tax disputes to challenges by taxpayers in deficiency actions and refund suits. It expressly — or at least impliedly — forecloses review. 5 U.S.C. §§ 701(a)(1), 702(1), (2).

Against this backdrop, "[i]t is well-recognized that the standing inquiry in tax cases is more restrictive than in other cases." *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995). The standing inquiry becomes particularly "restrictive" (*id.*) where a plaintiff seeks to litigate the tax liability of third parties who are not before the court. In that context, the courts have recognized

"the principle that a party may not challenge the tax liability of another." *United States v. Williams*, 514 U.S. 527, 539 (1995). As this Court has observed, "[o]rdinarily a person does not have standing to complain about someone else's receipt of a tax benefit." *Flight Attendants Against UAL Offset v. Commissioner*, 165 F.3d 572, 574 (7th Cir. 1999).

These principles apply with special force where, as here, a plaintiff seeks to increase the tax liabilities of third parties who are not before the court. It would be passing strange to allow plaintiffs, who have not sought the exclusion for themselves, to harness the injunctive power of the court to require the IRS to deny the exclusion to other persons. The better view is that Congress intended no such thing. *See Louisiana v. McAdoo*, 234 U.S. 627, 632 (1914) (declining to adjudicate third-party challenge to favorable tax treatment for another taxpayer, because the maintenance of such actions "would operate to disturb the whole revenue system of the government").

Tellingly, the Fifth Circuit, sitting *en banc*, denied standing in a similar situation in *Apache Bend*. There, as noted above, the plaintiffs challenged preferential transition relief granted to other taxpayers not

before the court. But they did not "seek transition relief for themselves" or "to litigate their own tax liability." 987 F.2d at 1177. Instead, they "asked only that transition relief be denied to the favored taxpayers." *Id.* The Fifth Circuit held that prudential concerns counseled dismissal, explaining that "Congress has erected a complex structure to govern the administration and enforcement of tax laws, and has established precise standards and procedures for judicial review of tax matters." *Id.*

Those same concerns counsel dismissal here. As the Fifth Circuit pointed out in *Apache Bend*, the highly articulated structure of federal tax litigation painstakingly designed by Congress counsels dismissal of a case of this ilk. It is unquestionably "evidence that Congress intended to preclude the plaintiff[s] from suing" outside of that structure. *Block*, 823 F.2d at 1166. By respecting Congress's structure, the Fifth Circuit declined to expand its judicial power. The District Court should have exercised the same restraint here.

D. The District Court's standing analysis cannot withstand scrutiny

The District Court relaxed the standing requirements described above because — in its view — those requirements were "arbitrary" (A15) and a "waste" of "time" (A8). The court considered it "clear" that

plaintiffs could not qualify for the exclusion and saw "no reason" to put them through the "futile" exercise of seeking the benefits themselves. (A2.) This approach is flawed for several reasons.

1. As we have already explained, a plaintiff making an unequal-treatment claim has not been injured for standing purposes unless he has sought, and been denied, the benefit at issue. The District Court's contrary ruling is at odds with this established principle. In *Heckler*, the Supreme Court held that the plaintiff had standing precisely because he "personally has been denied benefits that similarly situated women receive," and therefore was not merely asserting a generalized grievance. 465 U.S. at 740 n.9. In *Allen*, by contrast, the Court held that a plaintiff did not have standing to challenge another's tax liability. It distinguished *Heckler* on the basis that the plaintiff there was "'personally denied equal treatment.'" 468 U.S. at 755 (citation omitted). Where, as here, a plaintiff makes an unequal-treatment claim without contesting his own tax liability, the plaintiff, by definition, is attempting to contest the tax liability of another taxpayer. As the courts held in *Allen*, *Winn*, *Catholic Conference*, and *Apache Bend*, he lacks standing to do so. Far from being an "arbitrary" step, presenting

a "formal claim" to the IRS regarding one's own tax liability (A2,15), and then having that personal claim denied, provides the concrete and personal injury that Article III requires.

There is no basis for the District Court's attempt to excuse plaintiffs from seeking and being denied the exclusion by the IRS on the theory that it would be "futile." (A2.) To begin with, the court was speculating in concluding that the IRS would deny such a claim. But in any event, Article III's standing requirements must be "strict[ly] compli[ed] with," *Raines*, 521 U.S. at 819-820. Moreover, there is no "futility" exception in federal tax litigation, as it was long ago established in the analogous situation regarding the requirement of filing an administrative refund claim under § 6511 before suit. *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 273 (1931). Applying this fundamental principle, this Court has held that it lacks the "authority to excuse [the taxpayer's] failure to make a claim as required by section 7422(a), notwithstanding our certainty that the IRS ultimately will reject her claim." *Bartley v. United States*, 123 F.3d 466, 469 (7th Cir. 1997). Similarly, here, the court lacked the authority to excuse plaintiffs from personally seeking, and being denied, the § 107(2)

exclusion, and to have allowed the plaintiffs to litigate their claims outside the structure that Congress has designed for tax litigation, on grounds of futility.

Other taxpayers whose challenges to the constitutionality of the tax laws have been heard have first sought the tax benefit at issue, even where doing so was arguably futile. For example, in *Texas Monthly*, a nonreligious magazine sought the exemption provided for "religious" periodicals by paying the tax "under protest" and then suing "to recover those payments in state court." 489 U.S. at 6. Similarly, in *Moritz*, the taxpayer claimed the dependent-care expense deduction available to all women regardless of marital status, notwithstanding that he was ineligible for it as an unmarried man, and then brought suit in Tax Court to contest the resulting deficiency determined against him. 469 F.2d at 467. In both cases, seeking the tax benefit may have been futile. But once the benefit was denied, the taxpayer had sustained the requisite injury concerning his own tax liability that gave rise to his standing to sue.

The District Court's reliance (App7) on *Finlator v. Powers*, 902 F.2d 1158 (4th Cir. 1990), is misplaced. That decision is both incorrect

and distinguishable. There, the court concluded that taxpayers had standing to challenge a state tax exemption, notwithstanding that they had not taken any "minimal steps" to allow the State to "preclude or redress their injuries *ab initio*," such as contesting the liability, refusing to pay, paying under protest or suing for refund. *Id*. at 1161. The court "decline[d] to read such an implicit requirement into" *Texas Monthly*, "absent a clear statement by the Supreme Court to that effect." *Id*. at 1162. This ruling was misconceived. As the court explained in *Fulani v. Brady*, 935 F.2d 1324, 1328 (D.C. Cir. 1991), standing was recognized in *Texas Monthly* because the plaintiff there "petitioned for a refund of its own taxes," and therefore "sought to litigate . . . its own liability." As we have already explained, the Supreme Court has made it clear, in cases such as *Heckler* and *Allen*, that the plaintiff must seek from the defendant (and personally be denied) the benefit at issue in order to have standing to litigate an unequal-treatment claim. Moreover, the court in *Finlator* concluded that there were no "prudential concerns" that militated against finding standing in that state tax case. 902 F.2d at 1162. By contrast, there *are* prudential concerns that counsel

against recognizing standing in this federal tax case. *See* Section I.C, above.

2. The District Court's conclusion that following the formal rules of standing would be a "waste" of "time" (A8) fails to appreciate the importance of those rules. Article III is "not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 476 (1982). "In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be *more* careful to insist on the formal rules of standing, not *less* so." *Winn*, 131 S. Ct. at 1449 (emphasis added). In its eagerness to entertain the suit, the District Court disregarded these important constitutional principles and erroneously engaged in "premature adjudication of constitutional questions." *Arizonans for Official English*, 520 U.S. at 79.

The District Court's exercise of jurisdiction in this federal tax case, where the plaintiffs did not first present the issue to the IRS, is

particularly troubling. Whether the § 107 exclusion extends to atheists presents a question of statutory interpretation of apparent first impression. Notably, this Court has held that "atheism" is a "religion" for "Establishment Clause" purposes. *Kaufman v. McCaughtry*, 419 F.3d 678, 684 (7th Cir. 2005). Although the District Court had its own views regarding the matter (App8-14), it is the Secretary and the Commissioner, not the courts, who are charged with the responsibility for enforcing the tax laws in the first instance. The court should have allowed them the opportunity to determine whether an atheist could qualify. The court's arrogation of this Executive Branch prerogative raises serious constitutional concerns.

3. The District Court's rationales for relaxing the standing requirements are unfounded. The court's reliance (A7-9) on cases permitting preenforcement challenges is misplaced. "To satisfy the injury-in-fact requirement in a preenforcement action, the plaintiff must show 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution thereunder.'" *ACLU*

v. Alvarez, 679 F.3d 583, 590-591 (7th Cir. 2012) (citation omitted). Plaintiffs cannot satisfy that standard.

To begin with, unlike the situations presented in the cases cited by the District Court (A7-9), no conduct is proscribed by § 107(2), nor do plaintiffs face a "credible threat of prosecution" under it. And the court's concern that plaintiffs might be "vulnerable to civil sanctions" (A9) for seeking the exclusion does not excuse a taxpayer from seeking a tax benefit from the IRS first.[6] A taxpayer whose position has colorable merit need not fear that a penalty will be imposed against him. Moreover, the District Court's reservations in this regard are fundamentally at odds with its ultimate conclusion that plaintiffs are similarly situated to the ministers reaping the benefit, but for an invidious and unconstitutional restriction (according to the court) that the compensation so excluded be earned in a religious endeavor.

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[6] To be sure, a taxpayer may be liable for a penalty for making a "frivolous" submission to the IRS. § 6702. The accuracy-related penalty under § 6662 with which the court was apparently concerned (A9), however, applies only to underpayments, § 6662(a), not to refund claims, and even then only to positions taken without reasonable cause and good faith, § 6664(c)(1).

Similarly lacking in merit is the District Court's suggestion that the plaintiffs would lack "standing to challenge § 107(2) in the context of a proceeding to claim the exemption." (App6 (citing *Templeton v. Commissioner*, 719 F.2d 1408 (7th Cir. 1983), among others).) That aspect of *Templeton* has since been overruled. In *Templeton*, this Court held that a taxpayer lacked standing to challenge the underinclusiveness of a tax exemption under the Establishment Clause because the injury was not redressable: if the taxpayer did not qualify, the most he could achieve was to deprive the favored class of the benefit, rather than improve his own situation. *Id*. at 1412. That rationale, however, was later "rejected" by the Supreme Court in *Texas Monthly*, because it would "'effectively insulate underinclusive statutes from constitutional challenge.'" 489 U.S. at 8 (citation omitted). But the plaintiff in *Texas Monthly* had standing to challenge the underinclusive tax exemption at issue there precisely because it had paid the tax and sought a "refund," thereby presenting a "live controversy" for the Court to adjudicate. *Id*. The District Court erred in allowing plaintiffs here to bypass that route.

II

Section 107(2) does not violate the Establishment Clause

Standard of review

The District Court's grant of summary judgment to plaintiffs on their Establishment Clause claim is reviewed *de novo*. *Books v. Elkhart County, Ind.*, 401 F.3d 857, 863 (7th Cir. 2005).

A. Introduction

1. The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I, cl. 1. Generally speaking, the First Amendment's Free Exercise Clause prohibits Congress from interfering with religious practices and institutions, while the Establishment Clause prohibits Congress from inappropriately advancing religion. Between the "two Religion Clauses," there is a middle ground — "room for play in the joints" — within which Congress may accommodate religion "without sponsorship and without interference." *Walz v. Tax Commission*, 397 U.S. 664, 668-669 (1970).

The Supreme Court has "'long recognized that the government may (and sometimes must) accommodate religious practices and that it

may do so without violating the Establishment Clause.'" *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (citation omitted); *see Cutter v. Wilkinson*, 544 U.S. 709, 719-720 (2005) (upholding Religious Land Use & Institutionalized Persons Act as a "permissible legislative accommodation of religion," even though it was not "compelled by the Free Exercise Clause"); *Gillette v. United States*, 401 U.S. 437, 450 (1971) (upholding religion-specific exemption from military draft).

2. To determine whether the Government's accommodation of religion is permissible under the Establishment Clause, courts generally apply the three-pronged test set forth by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which "'remains the prevailing analytical tool for the analysis of Establishment Clause claims.'" *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 849 (7th Cir. 2012) (*en banc*) (citation omitted), *petition for cert. filed*, No. 12-755 (Sup. Ct. Dec. 20, 2012). In order to comport with the Establishment Clause, (i) "the statute must have a secular legislative purpose," (ii) "its principal or primary effect must be one that neither advances nor inhibits religion," and (iii) it "must not foster 'an excessive government

entanglement with religion.'" *Lemon*, 403 U.S. at 612-613 (citation omitted).

A comparison of *Amos* and *Walz* (upholding religious exemptions) to *Texas Monthly* (invalidating such an exemption) illustrates the contours of permissible accommodation of religion. In *Amos*, the Supreme Court addressed whether the exemption for religious organizations from the prohibition against religious discrimination under Title VII violates the Establishment Clause. The Court upheld the exemption as a permissible accommodation, even though it was not required by the Free Exercise Clause. 483 U.S. at 336. The Court concluded that the exemption satisfied the *Lemon* test. First, it served the secular purpose of minimizing governmental interference "with the decision-making process in religions." *Id*. Second, it did not advance religion but merely removed a regulatory burden imposed thereon. *Id*. at 338. Third, it avoided excessive entanglement by "effectuat[ing] a more complete separation" of church and state. *Id*. at 339. The Court expressly rejected the complaint "that [the exemption] singles out religious entities for a benefit." *Id*. at 338. As the Court explained, "[w]here, as here, government acts with the proper purpose of lifting a

regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities." *Id.*

In *Walz*, the Supreme Court held that exempting religious organizations from a generally applicable property tax did not violate the Establishment Clause. The Court emphasized that the tax exemption served the permissible purpose of "sparing the exercise of religion from the burden of property taxation." 397 U.S. at 673-674. The exemption, moreover, by no means sponsored religion, but "simply abstains from demanding that the church support the state." *Id.* at 675. And it "create[d] only a minimal and remote involvement between church and state and far less than taxation of churches." *Id.* at 676. Although the Court observed that the property tax exemption was also available to other nonprofit organizations, its conclusion that the exemption was a "permissible state accommodation to religion" did not depend on that fact. *Id.* at 673. As the Court explained, the Establishment Clause prohibits government "sponsorship" of "religious activity," and a property-tax exemption — unlike a "direct money subsidy" — does not run afoul of that prohibition because the

"government does not transfer part of its revenue to churches." *Id.* at 675.

Finally, in *Texas Monthly*, the Supreme Court addressed a state sales-tax exemption for periodicals distributed by a "religious faith" that promoted the "teachings of the faith." 489 U.S. at 5-6. A divided majority of the Court held that this differentiation of literature based upon religious content violated either the Establishment Clause (all but White, J.) or the Press Clause of the First Amendment (White, J.). *Id.* at 17-25 (Brennan, J., joined by Marshall and Stevens, JJ.); *id.* at 25-26 (White, J., concurring in the judgment); *id.* at 26-29 (Blackmun, J., joined by O'Connor, J., concurring in the judgment). Justice Blackmun's concurrence provides the rationale for the Court because it provides the narrowest grounds on which the decision is based. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (observing that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds'") (citation omitted). Justice Blackmun believed that, although "some forms of

accommodating religion are constitutionally permissible" (citing *Amos* as an example), the Texas sales-tax exemption was not, because it entailed "preferential support for the communication of religious messages" without any secular justification for doing so. 489 U.S. at 28.

3. As demonstrated below, § 107 is a permissible accommodation of religion under *Lemon*. Like the exemptions in *Amos* and *Walz*, § 107 lifts a burden on religious practice by eliminating governmental discrimination against (§ 107(1)) — and between (§ 107(2)) — religions, and by minimizing governmental interference with a church's internal affairs, without burdening third parties. Unlike the exemption in *Texas Monthly*, § 107 does not endorse a religious message. It merely adapts the Code's general exemptions for certain types of employer-provided housing to the unique context of a church and its minister. *See* Legg, *Excluding Parsonages from Taxation: Declaring a Victor in the Duel between Caesar & the First Amendment*, 10 Georgetown J. of Law & Public Policy 269, 271 (2012) (concluding that "the parsonage exclusions are constitutional when (necessarily) viewed as one element of a larger congressional plan to extend tax relief to recipients of employer-provided housing as a principal feature of their employment").

4. Before turning to those arguments, however, we first highlight three aspects of § 107(2) that are crucial to an understanding of its constitutional soundness. First, § 107(2) involves an exemption from tax, rather than the grant of a direct subsidy. As a general rule, the "grant of a tax exemption is not sponsorship" prohibited by the Establishment Clause, despite the "indirect economic benefit" that goes with it. *Walz*, 397 U.S. at 674-675. Unlike a "direct money subsidy," the "government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Id.* at 675. Moreover, the Government's refusal to "impose a tax" on religion does not impose a burden on third parties. *Winn*, 131 S. Ct. at 1447.

Second, § 107(2) provides an exclusion from gross income for employment benefits provided by a church to its minister. The courts have been particularly solicitous of governmental accommodation regarding the "employment relationship between a religious institution and its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 705 (2012). In *Hosanna-Tabor*, the Supreme Court held that "there is a ministerial exception grounded in

the Religion Clauses of the First Amendment" that precludes the government from applying generally applicable anti-discrimination laws to a church's minister, even though such laws may be applied to the church's other employees. *Id.* at 707. As the Court explained, the church-minister relationship concerns "the internal governance of the church," given that the minister "personif[ies] its beliefs," and a church's decisions regarding its ministers "affects the faith and mission of the church itself." *Id.* at 706-707. Indeed, this Court refers to the "ministerial exception" as the "internal affairs" doctrine because the exception is designed to prohibit governmental interference "in the internal management of churches." *Schleicher v. Salvation Army*, 518 F.3d 472, 474-475 (7th Cir. 2008) (applying doctrine to reject ministers' claim that church violated minimum-wage laws).

Third, § 107(2) is but a single provision in a larger Congressional scheme that exempts qualifying employer-provided housing from taxation. As noted above (at pp. 3-4), and described more fully below, the Code contains several tax benefits for housing used by a taxpayer in the business or for the convenience of his employer, including §§ 119 and 280A(c)(1). Section 107 merely adapts those provisions to the

unique church-minister context, so as to avoid the entanglement problems that could arise if ministers had to rely on those provisions to exclude or deduct the value of church-provided housing. "When viewed in the context of other employer-provided housing provisions — both historic and currently-existing — [§ 107(2)] hardly singles out religion for an exclusive benefit in violation of the Constitution." Legg, above, at 297.

B. Section 107 is a permissible accommodation of religion

As demonstrated below, § 107(2) does not violate the Establishment Clause because it satisfies each part of the *Lemon* test.

1. Section 107(2) has a secular legislative purpose

In reviewing an Establishment Clause challenge, it is critical to consider the historical context of the statute and the specific sequence of events leading to its passage. *See Salazar v. Buono*, 130 S. Ct. 1803, 1816 (2010) (reversing determination that law violated Establishment Clause where the "District Court took insufficient account of the context in which the statute was enacted and the reasons for its passage"). The legislative history and context of § 107(2) demonstrates that the manifest purpose of the statute is to achieve parity among clergy and

denominations, irrespective of a minister's housing arrangements, and to avoid interference in a church's internal affairs.

a. The history and context of § 107

Church-provided housing is a tradition that dates back at least to the 13th century. Savidge, *The Parsonage in England* 7-9 (1964). The patterns of housing members of the clergy in America have deep histories in the churches of Western Europe. The most common feature of this long-held tradition is that clergy lived in housing (called a parsonage) on the church grounds or nearby on church-owned property. (A68-69.) The parsonage system provided a critical means for churches to ensure that the spiritual needs of their congregations were met by housing the clergy in a place available to the congregation that could accommodate the church business conducted there. (A73.)

In 1921, when Congress first enacted the parsonage exclusion, most religious denominations in the United States furnished parsonages to ministers in kind. (A72.) The denominations that did not do so were generally very small or were newer sects. (A72,76.) The latter denominations found it more convenient or feasible to furnish

parsonages for their ministers by providing them with cash in lieu of the use of a church-owned building. (A72,76.)

Whether provided by means of cash or in kind, parsonages are furnished to ministers for the church's "convenience." *Williamson*, 224 F.2d at 380. Since a minister "will personify" his church, *Hosanna-Tabor*, 132 S. Ct. at 706, his residence is traditionally more than mere housing (A70). It is an extension of the church itself and is typically used for "religious purposes such as a meeting place for various church groups and as a place for providing religious services such as marriage ceremonies and individual counseling." *Immanuel Baptist Church v. Glass*, 497 P.2d 757, 760 (Okla. 1972); *see* Brunner, *Taxation: Exemption of Parsonage or Residence of Minister, Priest, Rabbi or Other Church Personnel*, 55 A.L.R.3d 356, 404 (1974) (observing that "[m]ost ministerial residences can be expected to be incidentally used to some considerable extent as an office, a study, a place of counseling, a place of small meetings, such as boards or committees, and a place in which to entertain and lodge church visitors and guests").

Against this historical backdrop, Congress enacted an exclusion from gross income for parsonages in 1921, just eight years after the

modern federal income tax was authorized by the 16th Amendment to the Constitution. *See* Revenue Act of 1921, Section 213(b)(11). Section 213(b)(11) — the precursor to § 107(1) — excluded from income "[t]he rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of his compensation." 42 Stat. 227, 239. Immediately before the enactment of Section 213(b)(11), the Treasury Department had allowed some employees — but not clergy — to exclude the value of employer-provided housing from income under the "convenience of the employer" doctrine.[7] *See*, above, pp. 5-6. In response, Congress enacted Section 213(b)(11). Ministers were thereby placed on an equal footing with other types of employees who were already enjoying the Treasury's recognition of an exclusion for housing provided for the employer's convenience. It also spared them the prospect of undergoing an intrusive inquiry regarding the church's convenience.

[7] The convenience-of-the-employer rationale for excluding housing furnished in kind was at first recognized only in Treasury rulings and regulations, but was ultimately codified by Congress in 1954 as § 119. *See Kowalski*, 434 U.S. 77.

Ministers whose churches chose to furnish them with parsonages by way of providing cash allowances for that purpose sought to exclude the parsonage allowance under Section 213(b)(11). The Treasury determined that Section 213(b)(11) "applies only to cases where a parsonage is furnished to a minister and not to cases where an allowance is made to cover the cost of a parsonage." I.T. 1694. The Treasury advised, however, that such ministers could deduct their payments for the parsonage to the extent that the parsonage was used for "professional" rather than personal reasons.[8] *Id.*

Several courts, however, rejected the Treasury's determination and permitted ministers to exclude from income the value of parsonages furnished to them in cash as well as in kind. *See*, above, p. 7. As the Eighth Circuit explained, when a church provides a minister a parsonage allowance in lieu of a parsonage, it was "manifestly for the

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[8] Prior to 1976, the costs associated with the business use of the taxpayer's residence were deductible on the same terms as any other "ordinary and necessary" business expense. *E.g.*, Revenue Act of 1921, § 214(a)(1); § 162. In 1976, however, Congress enacted § 280A, which must be satisfied, in addition to § 162, in order to deduct such expenses. Section 280A(c)(1) requires the residence to be used "for the convenience of [the] employer," just as the employer-furnished housing must be so used in order to qualify for the coordinate exclusion under § 119.

convenience of the employer," and such housing should be excluded from income, whether furnished in cash or in kind. *Williamson*, 224 F.2d at 380.

In 1954, Congress codified those decisions by enacting § 107(2) as an additional exclusion to the existing one, which was redesignated as § 107(1). The statute as a whole leaves it to churches to determine how to provide parsonages — in cash or in kind — free from any influence from the tax laws. As the House and Senate Reports explained (using identical language), the rationale for the new provision was as follows:

> Under present law, the rental value of a home furnished a minister of the gospel as a 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 large salaries (which are taxable) to compensate them for expenses they incur in supplying their own home.
>
> Your committee has *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.

H.R. Rep. No. 1337, at 15 (emphasis added); S. Rep. No. 1622, at 16 (emphasis added). Congress had been alerted to the discrimination in existing law by officials from various religious denominations who complained that the existing "discriminatory" tax provision benefited some clergy and churches but not others. Hearings on Forty Topics

Pertaining to the General Revision of the Internal Revenue Code at 1574-1575 (Aug. 1953) (Statement of Hon. Peter Mack). Section 107(2) was enacted "to equalize the disparate treatment among religious denominations." Legg, above, at 275.

Those purposes of preventing discrimination and preserving neutrality were confirmed in 2002, when Congress amended § 107(2) to clarify that the exclusion is limited to the fair rental value of the parsonage. 116 Stat. 583. The bill introducing the proposed amendment explained that § 107 was designed to "accommodate the differing governance structures, practices, traditions, and other characteristics of churches through tax policies that strive to be neutral with respect to such differences." H.R. 4156, 107th Cong. § 2(a)(4). The bill further confirmed that § 107 was also intended to minimize "intrusive inquiries by the government" into a church's internal affairs by obviating the convenience-of-the-employer inquiry required by §§ 119 and 280A(c)(1). *Id*. at § 2(a)(3), (5).

b. The statute's history and context disclose the secular purpose of eliminating discrimination against, and among, ministers and of minimizing interference with a church's internal affairs

Far from seeking to provide religion a *special* benefit, Congress enacted § 107(1) and its statutory predecessors to ensure that ministers received the *same* tax benefit that similarly situated secular employees had received pursuant to the convenience-of-the-employer doctrine (now codified in § 119). All employees — religious or lay — are entitled to exclude from gross income the value of "lodging furnished to him" by his "employer for the convenience of the employer." § 119. When the convenience-of-the-employer doctrine was initially developed, the Treasury applied it to many secular employees, but not to ministers. By allowing secular employees, but not ministers, to exclude employer-provided housing from income, the Treasury's 1921 ruling raised serious constitutional concerns. *E.g., McDaniel v. Paty*, 435 U.S. 618, 629 (1978) (determining that law permitting all persons, except for "ministers," to participate in political conventions violated the First Amendment). Congress quickly reacted to that ruling by enacting Section 213(b)(11) of the Revenue Act of 1921, the predecessor of

§ 107(1). Consequently, § 107(1) simply levels the playing field between ministers and other types of employees. It is manifestly constitutional.[9]

After eliminating discrimination *against* ministers who were furnished housing in kind by their churches, Congress next eliminated discrimination *among* ministers. It addressed the problem that some churches furnished parsonages by providing parsonages in kind, while others did so by providing cash for that purpose. Congress enacted § 107(2) to ensure that all ministers who were similarly situated were treated equally by the Government, tax-wise. Because § 107(2) has the permissible secular purpose of avoiding governmental discrimination among religions, it furthers one of the core purposes of the Establishment Clause. *See Larson v. Valente*, 456 U.S. 228, 246 (1982) (determining that law that applied to some, but not all, religions violated the Establishment Clause by running afoul of the "principle of denominational neutrality").

Moreover, by enacting § 107(2), Congress removed tax-related impediments to a church's decision whether to furnish a parsonage to

[9] Due to plaintiffs' uncontested lack of standing, § 107(1) is not even challenged here.

its minister in cash or in kind, thereby avoiding interference in the church's internal affairs. *See* H.R. 4156, 107th Cong. § 2(a)(3) (observing that one purpose of § 107 is to "minimize government intrusion into internal church operations and the relationship between a church and its clergy"). "Under the *Lemon* analysis, 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." *Amos*, 483 U.S. at 335. Section 107(2) allows each church to decide whether and how best to furnish a parsonage to its ministers.

Finally, § 107 also serves the secular purpose of avoiding problems of entanglement between church and state that could result from administering the convenience-of-the-employer doctrine where ministers are concerned. As Congress and the courts have recognized, the minister's home is used for the "convenience of the employer," whether the home is owned by the church or its minister. *Williamson*, 224 F.2d at 380; 148 Cong. Rec. 4671 (Apr. 16, 2002) (observing that § 107 recognizes "that a clergy person's home is not just shelter, but an essential meeting place for members of the congregation"). By

providing an exclusion for housing provided by churches to ministers, regardless of the form in which it is furnished, § 107 avoids the intrusive convenience-of-the-employer inquiry required by § 119 (when taxpayers seek to exclude employer-provided housing) or § 280A(c)(1) (when taxpayers seek to deduct the cost of housing used in the employer's business). *See* H.R. 4156, 107th Cong. § 2(a)(5) (observing that one purpose of § 107 is to accommodate the fact that "clergy frequently are required to use their homes for purposes that would otherwise qualify for favorable tax treatment, but which may require more intrusive inquiries by the government into the relationship between clergy and their respective churches with respect to activities that are inherently religious"). Avoiding entanglement is a secular purpose. *See Amos*, 483 U.S. at 336.

c. The District Court ignored the statute's history and context

In concluding that § 107(2) lacked a "secular purpose" (App31), the District Court ignored the statute's history and context, including Congress's articulation of its anti-discrimination purpose in the 1954 House and Senate reports quoted above. That primary purpose has been recognized by the courts and commentators. *E.g., Warnke*, 641 F.

Supp. at 1087 (observing that § 107(2) was enacted "to eliminate discrimination"); 1 Mertens Law of Fed. Income Taxation § 7:196 n.71 (2013) (same). For purposes of the first prong of the *Lemon* test, the District Court should have deferred to Congress's articulation of its secular purpose, unless it determined that purpose to be a "sham." *McCreary County v. ACLU*, 545 U.S. 844, 865 (2005). The District Court did not — and could not — find that Congress's articulated purpose here was a "sham."

The District Court's error in disregarding the secular purpose asserted by Congress is magnified by the fact that the law in question is a tax statute. The Supreme Court has emphasized that, even in Establishment Clause cases, "'[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes,'" and that courts must give "substantial deference" to a legislative "judgment" regarding a "tax" provision that is challenged under the Establishment Clause. *Mueller v. Allen*, 463 U.S. 388, 396 (1983) (citation omitted).

The District Court nevertheless opined that § 107(2) was intended "to assist disadvantaged churches and ministers" and held that doing so could not be considered a secular purpose when like benefits were

withheld from secular organizations and employees. (App34.) In so holding, the court lost sight of the fact (i) that Congress created the exclusion for cash parsonage allowances to "remove[ ] the discrimination in existing law" *among* ministers, H.R. Rep. No. 1337, at 15; S. Rep. No. 1622, at 16, and (ii) that the original parsonage exclusion was intended to alleviate discrimination *against* ministers, who had not been accorded the favorable treatment extended to other, secular employees who had also been furnished lodging for the employer's convenience.[10]

There is no merit to the District Court's further suggestion (App32) that any concern about discrimination was unfounded because § 119 treats "secular" employees who purchase their own housing differently than secular employees who receive employer-provided housing. Treating secular employees differently does not raise First Amendment concerns, while treating churches and their ministers

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[10] Moreover, whether any particular legislator might actually have wished to grant a particular advantage to churches would not have undermined Congress's legitimate anti-discrimination purpose. *See Sherman v. Koch*, 623 F.3d 501, 510 (7th Cir. 2010) (observing that "'what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law'") (citation omitted).

differently *does*. The "principle of denominational neutrality," which applies to legislation that may "effectively" distinguish between "well-established churches" that own parsonages and "churches which are new" that do not, *Larson*, 456 U.S. at 246 & n.23, has no parallel with regard to secular organizations and their employees.

By enacting § 107(2), Congress intended to lift the burden of discriminatory tax treatment that had been imposed on churches and ministers by allowing *all* ministers to exclude the value of the parsonage from income, no matter how each church chooses to provide that housing. In providing that equal treatment, the statute by no means "discriminates against those religions that do not *have* ministers," as the District Court protested. (App33.) If a religion has no ministers, then, *a fortiori*, there is no taxation of a minister's housing that needs to be accommodated. *See* Legg, above, at 292 (observing that "religions without clergy have no leaders needing the benefit of the exclusion"). Nor does § 107(2) create an "imbalance" between ministers who receive housing in kind and those who receive a housing allowance, as the court posited. (App33.) The fact that a minister who uses his housing allowance to buy a home may also benefit from the Code's

deductions available to homeowners is not a consequence of § 107(2), but flows from the minister's independent decision to use the housing allowance to purchase, rather than rent, a home.

2. Section 107(2) does not have the primary effect of advancing or inhibiting religion

To determine whether a law has the primary effect of advancing or inhibiting religion, this Court considers whether "'irrespective of government's actual purpose,'" the "'practice under review in fact conveys a message of endorsement or disapproval.'" *Sherman*, 623 F.3d at 517 (citation omitted). A "reasonable observer" would not "view § 107(2) as an endorsement of religion," as the District Court assumed. (App37.) To the contrary, a reasonable observer, *i.e.*, one who is familiar with "'the text, legislative history, and implementation of the statute,'" *McCreary*, 545 U.S. at 862 (citation omitted), would understand that § 107(2) is a tax exemption, not a subsidy, and that it was designed not only to eliminate discrimination among religions, but also to further separate church and state.

a. Section 107 does not endorse religion, but merely minimizes governmental influence on, and entanglement with, a church's internal affairs

In ruling that § 107(2) lacked a secular effect, the District Court failed to appreciate that § 107(2) minimizes governmental interference with a church's internal affairs. The limited nature of the exclusion in § 107 — which applies only to ministers and not to all religious employees — confirms that its primary effect is not to advance religion, but to preserve the autonomy of churches. Section 107 preserves the "autonomy" of churches by permitting them to determine how best to furnish parsonages to their ministers (whether with cash or in kind) "under the ecclesiastical doctrine of each church," free of discriminatory tax laws and without any adverse tax consequences hinging on that determination. Legg, above, at 291. In this regard, the § 107 exclusion is similar to the "ministerial exception," or "internal-affairs doctrine," that the courts have applied to generally applicable employment laws. Like that doctrine, which minimizes governmental interference "in the internal management of churches," *Schleicher*, 518 F.3d at 475, § 107 minimizes both governmental influence on a church's decision regarding

how to furnish a parsonage, and governmental evaluation of church activities that take place in the parsonage.

The effect of the § 107 exclusion must also be judged in the context of other housing-related exclusions and deductions provided in the Code. *See* Zelinsky, *The First Amendment & the Parsonage Allowance*, Tax Notes 5-8 (Dec. 2013) (critiquing District Court's opinion for analyzing "section 107 in isolation from other code provisions," and explaining how applying § 119 to religious employers creates church-state entanglement problems). Section 107 is "similar to other housing provisions in the Tax Code offered to workers who locate in a particular area for the convenience of their employers, and military personnel who receive a tax exclusion for their housing." 148 Cong. Rec. 4670 (Apr. 16, 2002). All taxpayers may exclude certain employer-provided housing from income. § 119. Likewise, all taxpayers may deduct the cost of their housing to the extent that it is used for their employer's business and convenience. § 280A(c)(1); I.T.1694. In addition, certain employees of the federal government are entitled to exclude their housing allowance without first demonstrating that the housing was being used for the employer's convenience. *See* § 134 (military members); § 912

(civil servants on foreign postings). Section 107 provides similar tax benefits to ministers, but does so in a way that avoids the intrusive inquiries implicit in the employer's convenience and business exigency requirements inherent in §§ 119, 162, and 280A(c)(1).

Ministers who are furnished parsonages in kind could rely on the Code's exclusion for housing furnished "for the convenience of the employer" that "the employee is required to accept . . . on the business premises of his employer as a condition of his employment." § 119. Similarly, ministers who receive parsonage allowances could rely on the Code's deduction for housing used for the employer's business and convenience. §§ 162, 280A(c)(1); I.T. 1694. Ministers' claims of the exclusion or deduction, as the case may be, would raise questions regarding the church's "convenience," the scope of the church's "business premises," and the terms of the minister's employment. It has been argued that the "blanket exclusion" under § 107 "does not 'prefer' religion but merely reduces the administrative burden of applying § 119 to clergymen." Bittker, *Churches, Taxes & the*

Constitution, 78 Yale L. J. 1285, 1292 n.18 (1969);[11] *see* Legg, above, at 292 (explaining that § 107 prevents "entanglement" problems under § 280A(c)(1) by "avoid[ing] the need to have the IRS make case-by-case determinations of whether the parsonage was truly granted 'for the convenience of the employer' based on the church's ecclesiastical doctrine or instead granted as a form of compensation not directly for the benefit of the church"); Note, *The Parsonage Exclusion under the Endorsement Test*, 13 Va. Tax Rev. 397, 418-419 (1993) (comparing § 107(2) to § 119). If it were necessary for such questions to be answered, it might "require[e] the Government to distinguish between 'secular' and 'religious' benefits or services, which may be 'fraught with the sort of entanglement that the Constitution forbids.'" *Hernandez v. Commissioner*, 490 U.S. 680, 697 (1989) (citation omitted). By obviating the resolution of such questions, § 107 has a salutary effect. Each prong of § 107 removes the potential for entanglement by eliminating the intrusive inquiries that could arise if ministers were forced to rely upon

[11] Although Professor Bittker adverted only to § 119 at this point, the same logic would also apply to claims of deductions for the minister's use of the home for church business under § 280A(c)(1), which is likewise infused with the convenience-of-the-employer doctrine.

§ 119 or § 280A(c)(1). The statute therefore has an indisputably secular effect.

b. Section 107(2) does not subsidize religion, as the District Court erroneously concluded

Besides having a secular effect, § 107(2) does not provide government funding for any religious activity, but only a tax exemption for housing. The Supreme Court has made it clear that the "grant of a tax 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." *Walz*, 397 U.S. at 675. Indeed, observing the long history in the United States of exempting church property from taxation, the Court concluded that "[n]othing" in the "two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religious belief." *Id*. at 678.

Ignoring the analysis of tax exemptions in *Walz*, the District Court instead based its decision on the proposition that "'[e]very tax exemption constitutes a subsidy.'" (App18 (quoting *Texas Monthly*, 489 U.S. at 14-15).) The court's reliance on this statement from *Texas*

Monthly is misplaced. The quoted language, endorsed only by Justices Brennan, Marshall, and Stevens, did not overrule the majority opinion in *Walz*, where the Court held that a "tax exemption" is not a "subsidy," and does not advance religion because there "is no genuine nexus between tax exemption and establishment of religion." 397 U.S. at 675. The Supreme Court continues to recognize the ruling in *Walz* that, for "Establishment Clause" purposes, "there is a constitutionally significant difference between subsidies and tax exemptions." *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 590 (1997). In disregarding that critical difference, the District Court erred.

3. Section 107(2) does not produce excessive entanglement

Section 107 does not produce excessive entanglement with religion. Indeed, the District Court did not find otherwise. (App41.) To "constitute excessive entanglement, the government action must involve 'intrusive government participation in, supervision of, or inquiry into religious affairs.'" *Vision Church v. Village of Long Grove*, 468 F.3d 975, 995 (7th Cir. 2006) (citation omitted). As a tax exemption, § 107(2) does not raise this concern. As the Court noted in *Walz,* a tax "exemption

creates only a minimal and remote involvement between church and state and far less than taxation of churches." 397 U.S. at 676.

Moreover, by adapting the tax benefits generally available to taxpayers in §§ 119 and 280A(c)(1) to the unique circumstances of ministers, § 107 prevents the entanglement that would ensue if the tax benefit were contingent on whether the minister acts for the "convenience of the employer" in using his home. By making such scrutiny unnecessary, the exclusion provided in § 107(2) avoids entanglement and promotes the statute's secular purposes.

Because § 107(2) satisfies each part of the *Lemon* test, it does not violate the Establishment Clause. For the same reasons, § 107(2) does not violate the Equal Protection component of the Fifth Amendment's Due Process Clause, an issue raised by plaintiffs but not reached by the District Court (App2). *See Amos*, 483 U.S. at 338-339 & n.16 (rejecting equal-protection claim for the same reasons that the Court rejected Establishment Clause claim).

4. *Texas Monthly* is not controlling because it is distinguishable in crucial respects

In concluding that § 107(2) violates the Establishment Clause, the District Court relied almost solely on the *Texas Monthly* plurality

opinion. (App19.) Far from being "control[ling]" (*id.*), *Texas Monthly* is readily distinguishable.

First, in contrast to the situation in *Texas Monthly*, where only religious publications could avoid the tax on periodical sales, here, all taxpayers are permitted to exclude, or deduct, the costs of housing provided by the employer for its convenience (§ 119) or by the employee for the employer's convenience (§ 280A(c)(1)). Section 107 provides tax benefits similar to those provided in §§ 119 and 280A(c)(1), but tailors the benefit to avoid entanglement with the church-minister relationship. Section 107's "exclusions are similar to the property tax exemption at issue in *Walz* because the exclusions flow to ministers as a part of a larger congressional policy of not taxing qualifying employer-provided housing." Legg, above, at 288. And "[u]nlike *Texas Monthly*'s narrowly tailored religious publication exemption, the parsonage exclusions in § 107 are part of a larger scheme that more closely aligns with the employer discrimination exception at issue in *Amos*." *Id.* at 290. When § 107(2) is examined as merely one component of a larger, integrated tax code, Congress has by no means provided a tax benefit to

religious organizations and "no one else" (App2), as occurred in *Texas Monthly*.

Second, unlike § 107(2), which has a long history and effect of eliminating discrimination and minimizing entanglement between church and state, the religion-specific exemption in *Texas Monthly* lacked *any* secular purpose or effect. An objective observer could only conclude that the government was endorsing the subject of the tax exemption — the promotion of a religious message. Here, in sharp contrast, by eliminating discrimination and entanglement problems, § 107(2) would be understood by an objective observer to "alleviate a special burden on religious exercise." (App2.)

Finally, § 107(2) does not require the Government to determine whether "some message or activity is consistent with 'the teaching of the faith,'" as was true in *Texas Monthly*, 489 U.S. at 20. To the contrary, it precludes such questions from arising by eliminating inquiries into the extent to which the minister's home is used for religious rather than secular purposes.

CONCLUSION

The judgment of the District Court, as it relates to § 107(2), should be vacated, and the case remanded with instructions to dismiss for lack of jurisdiction. Alternatively, that aspect of the judgment should be reversed.

Respectfully submitted,

KATHRYN KENEALLY
Assistant Attorney General

TAMARA W. ASHFORD
Principal Deputy Assistant Attorney General

/s/ Judith A. Hagley

GILBERT S. ROTHENBERG (202) 514-3361
TERESA E. MCLAUGHLIN (202) 514-4342
JUDITH A. HAGLEY (202) 514-8126
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044
Judith.a.hagley@usdoj.gov
Appellate.taxcivil@usdoj.gov

Of Counsel:

JOHN W. VAUDREUIL
United States Attorney

APRIL 2014

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS OF FED. R. APP. P. 32(a)

Case No. 14-1152

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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/s/ Judith A. Hagley

Attorney for Appellants

Dated: April 2, 2014

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2014, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system and that fifteen papers copies were sent to the Clerk by First Class Mail. Counsel for the appellees was served electronically by the Notice of Docket Activity transmitted by the CM/ECF system.

It is further certified that: (1) all required privacy redactions have been made; and (2) the ECF submission was scanned for viruses with the Trend Micro OfficeScan 10.0 antivirus program (updated daily), and, according to the program, is free of viruses.

/s/ Judith A. Hagley
JUDITH A. HAGLEY
Attorney for Appellants

STATUTORY ADDENDUM

Internal Revenue Code of 1986 (26 U.S.C.):

SEC. 107. RENTAL VALUE OF PARSONAGES.

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.

SEC. 119. MEALS OR LODGING FURNISHED FOR THE CONVENIENCE OF THE EMPLOYER

(a) *Meals and lodging furnished to employee, his spouse, and his dependents, pursuant to employment.* – There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him, his spouse, or any of his dependents by or on behalf of his employer for the convenience of the employer, but only if —

. . . .

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

. . . .

SEC. 280A. DISALLOWANCE OF CERTAIN EXPENSES IN CONNECTION WITH BUSINESS USE OF HOME, RENTAL OF VACATION HOMES, ETC.

(a) *General rule.* – Except as otherwise provided in this section, in the case of a taxpayer who is an individual or an S corporation, no deduction otherwise allowable under this chapter shall be allowed with respect to the use of a dwelling unit which is used by the taxpayer during the taxable year as a residence.

. . . .

(c) *Exceptions for certain business or rental use; limitation on deductions for such use.* —

(1) *Certain business use.* — Subsection (a) shall not apply to any item to the extent such item is allocable to a portion of the dwelling unit which is exclusively used on a regular basis —

(A) as the principal place of business for any trade or business of the taxpayer,

(B) as a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business, or

(C) in the case of a separate structure which is not attached to the dwelling unit, in connection with the taxpayer's trade or business.

In the case of an employee, the preceding sentence shall apply only if the exclusive use referred to in the preceding sentence is for the convenience of his employer. For purposes of subparagraph (A), the term "principal place of business" includes a place of business which is used by the taxpayer for the administrative or management activities of any trade or business of the taxpayer if there is no other

fixed location of such trade or business where the taxpayer conducts substantial administrative or management activities of such trade or business.

. . . .

CIRCUIT RULE 30(d) CERTIFICATION

All of the materials required by Seventh Circuit Rule 30(a) are included in this appendix. All of the materials required by Seventh Circuit Rule 30(b) are included in the separately bound Appendix filed herewith.

/s/ Judith A. Hagley
Judith A. Hagley
Attorney for Appellants

April 2, 2014

Appendix Table of Contents

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

FREEDOM FROM RELIGION FOUNDATION, INC.,
ANNIE LAURIE GAYLOR and DAN BARKER,

OPINION AND ORDER

Plaintiffs,

11-cv-626-bbc

v.

JACOB LEW and DANIEL WERFEL,

Defendants.[1]

- -

Plaintiff Freedom from Religion Foundation, Inc. and its two co-presidents, plaintiffs Annie Laurie Gaylor and Dan Barker, brought this lawsuit under the Administrative Procedure Act, 5 U.S.C. § 702, contending that certain federal income tax exemptions received by "ministers of the gospel" under 26 U.S.C. § 107 violate the establishment clause of the First Amendment and the equal protection component of the Fifth Amendment. Defendants Timothy Geithner and Douglas Schulman (now succeeded by Jacob Lew and Daniel Werfel) have filed a motion for summary judgment, dkt. #40, which is ready for review.

In their complaint, plaintiffs challenged both § 107(1) and § 107(2), but in response

[1] Initially, plaintiffs sued Timothy Geithner and Douglas Schulman in their official capacities as Secretary of the Treasury Department and Commissioner of the Internal Revenue Service. Pursuant to Fed. R. Civ. P. 25(d), I have substituted the new Secretary, Jacob Lew, and the Acting Commissioner, Daniel Werfel.

to defendants' motion for summary judgment, plaintiffs narrowed their claim to § 107(2), which excludes from gross income a minister's "rental allowance paid to him as part of his compensation." (Section 107(1) excludes "the rental value of a home furnished to [the minister] as part of his compensation.") Because plaintiffs have not opposed defendants' argument that plaintiffs lack standing to challenge § 107(1), I will grant defendants' motion as to that aspect of plaintiffs' claim.

With respect to plaintiffs' challenge to § 107(2), I adhere to my conclusion in the order denying defendants' motion to dismiss, dkt. #30, that plaintiffs have standing to sue because it is clear from the face of the statute that plaintiffs are excluded from an exemption granted to others. With respect to the merits, I conclude that § 107(2) violates the establishment clause under the holding in Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989), because the exemption provides a benefit to religious persons and no one else, even though doing so is not necessary to alleviate a special burden on religious exercise. This conclusion makes it unnecessary to consider plaintiffs' equal protection argument.

Although plaintiffs did not file their own motion for summary judgment, "[d]istrict courts have the authority to enter summary judgment sua sponte as long as the losing party was on notice that it had to come forward with all its evidence." Ellis v. DHL Exp. Inc. (USA), 633 F.3d 522, 529 (7th Cir. 2011). In this case, the parties have fully briefed the relevant issues, which are primarily legal rather than factual. Further, plaintiffs asked the court to enter judgment in their favor in their brief in opposition to defendants' motion for summary judgment. Dkt. #52 at 66. Although defendants objected to this request in their

reply brief, dkt. #53 at 3, it was on the same grounds that defendants believe that *they* are entitled to summary judgment. Defendants do not suggest that they would have raised any other arguments or presented any additional facts if plaintiffs had filed their own motion. Under these circumstances, I conclude that it is appropriate to deny defendants' motion for summary judgment and grant summary judgment in plaintiffs' favor with respect to § 107(2).

In concluding that § 107(2) violates the Constitution, I acknowledge the benefit that the exemption provides to many ministers (and the churches that employ them) and the loss that may be felt if the exemption is withdrawn. Clergy Housing Allowance Clarification Act of 2002, 148 Cong. Rec. H1299-01 (Apr. 16, 2002) (statement of Congressman Jim Ramstad) (in 2002, estimating that § 107 would relieve ministers of $2.3 billion in taxes over next five years). However, the significance of the benefit simply underscores the problem with the law, which is that it violates the well-established principle under the First Amendment that "[a]bsent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." Board of Education of Kiryas Joel Village School Disrict v. Grumet, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment). Some might view a rule against preferential treatment as exhibiting hostility toward religion, but equality should never be mistaken for hostility.

It is important to remember that the establishment clause protects the religious and nonreligious alike. Linnemeir v. Board of Trustees of Purdue University, 260 F.3d 757, 765 (7th Cir. 2001) ("The Supreme Court has consistently described the Establishment Clause

as forbidding not only state action motivated by a desire to advance religion, but also action intended to 'disapprove,' 'inhibit,' or evince 'hostility' toward religion."). If a statute imposed a tax solely *against* ministers (or granted an exemption to everyone except ministers) without a secular reason for doing so, that law would violate the Constitution just as § 107(2) does. Stated another way, if the government were free to grant discriminatory tax exemptions in favor of religion, then it would be free to impose discriminatory taxes against religion as well. Under the First Amendment, everyone is free to worship or not worship, believe or not believe, without government interference or discrimination, regardless what the prevailing view on religion is at any particular time, thus "preserving religious liberty to the fullest extent possible in a pluralistic society." McCreary County, Kentucky v. American Civil Liberties Union of Kentucky, 545 U.S. 844, 882 (2005) (O'Connor, J., concurring).

OPINION

A. Standing

As they did in their motion to dismiss, defendants argue that plaintiffs do not have standing to challenge § 107(2). To obtain standing, plaintiffs must show that they suffered an injury in fact that is fairly traceable to defendants' conduct and capable of being redressed by a favorable decision from the court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

Plaintiffs Gaylor's and Barker's alleged injury is the unequal treatment they receive under § 107(2):

> In the case of a minister of the gospel, gross income does not include—
>
> * * *
>
> (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.

In particular, plaintiffs argue that "ministers of the gospel" receive a tax exemption under § 107(2) that Gaylor and Barker do not, even though a portion of the salary Gaylor and Barker receive from Freedom from Religion Foundation is designated as a housing allowance. Plts.' PFOF ¶ 2, dkt. #50; Dfts.' Resp. to Plts.' PFOF ¶ 2, dkt. #55. In addition, plaintiffs argue that an order enjoining § 107(2) would redress their injury because it would eliminate the unequal treatment. The parties agree that Gaylor and Barker are both members of the foundation and that the purpose of the foundation is related to the claims in this case, so if the individual plaintiffs have standing, then the foundation does as well. Sierra Club v. Franklin County Power of Illinois, LLC, 546 F.3d 918, 924 (7th Cir. 2008).

Defendants do not deny that a person who is denied a tax exemption that others receive has suffered an injury in fact. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 7-8 (1989) (general interest magazine had standing to challenge state tax exemption received by religious publications); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 224-25 (1987) (same). See also Arizona Christian School Tuition Organization v. Winn, — U.S. —, 131 S. Ct. 1436, 1439 (2011) ("[P]laintiffs may demonstrate standing on the ground that they have incurred a cost or been denied a benefit on account of their religion. Those costs and benefits can result from alleged discrimination in the tax code, such as when the

availability of a tax exemption is conditioned on religious affiliation."). In addition, defendants do not deny that a discriminatory tax exemption may be redressed by eliminating the exemption for everyone. Heckler v. Mathews, 465 U.S. 728, 740, (1984) ("We have often recognized that the victims of a discriminatory government program may be remedied by an end to preferential treatment for others."). However, defendants argue that the lawsuit is premature because plaintiffs have never tried to claim the exemption. Until the Internal Revenue Service denies a claim, defendants say, plaintiffs have not suffered an injury.

As an initial matter, it is not clear whether plaintiffs would have standing to challenge § 107(2) in the context of a proceeding to claim the exemption. In several cases, courts have rejected establishment clause challenges to tax exemptions brought by parties who filed claims for the exemption that were denied. In each of those cases, the court held that the party could not receive the exemption if the court declared it to be unconstitutional, so a favorable decision could not redress their injury. Templeton v. Commissioner of Internal Revenue, 719 F.2d 1408, 1412 (7th Cir. 1983); Ward v. Commissioner of Internal Revnue, 608 F.2d 599, 601 (5th Cir. 1979); Kirk v. Commissioner of Internal Revenue, 425 F.2d 492, 495 (D.C. Cir. 1970). Thus, if accepted, defendants' view could insulate § 107 from challenge by anyone.

In any event, I considered and rejected defendants' argument in the context of denying their motion to dismiss. Dkt. #30. In particular, I concluded that plaintiffs' alleged injury is clear from the face of the statute and that there is no plausible argument that the individual plaintiffs could qualify for an exemption as "ministers of the gospel," so it would

serve no legitimate purpose to require plaintiffs to claim the exemption and wait for the inevitable denial of the claim. Finlator v. Powers, 902 F.2d 1158, 1162 (4th Cir. 1990) (concluding that nonexempt taxpayers had standing to challenge exemption without first claiming exemption because plaintiffs' "injury is created by the very fact that the [law] imposes additional [tax] burdens on the appellants not placed on" those entitled to exemption). See also California Medical Association v. Federal Electric Commission, 453 U.S. 182, 192 (1981) (concluding that plaintiffs had standing, noting that they "expressly challenge the statute on its face, and there is no suggestion that the statute is susceptible to an interpretation that would remove the need for resolving the constitutional questions raised"); Harp Advertising Illinois, Inc. v. Village of Chicago Ridge, Illinois, 9 F.3d 1290, 1291–92 (7th Cir. 1993) ("Challenges to statutes as written, without inquiring into their application, are appropriate when details of implementation are inconsequential.").

The Supreme Court has not addressed this question explicitly, but in Walz v. Tax Commission of City of New York, 397 U.S. 664, 666-67 (1970), the plaintiff was an owner of real estate in New York City who objected to the issuance of "property tax exemptions to religious organizations." Although there was no indication in the opinion that the owner requested an exemption for himself before bringing his lawsuit, the Court reached the merits of his claim under the establishment clause. In Winn, 131 S. Ct. at 1449, the Court acknowledged that it had omitted a discussion of standing from the decision in Walz but suggested that the plaintiff could have relied on the alleged discriminatory treatment among different property owners to demonstrate standing to sue.

In their motion for summary judgment, defendants do not ask the court to reconsider the conclusion that plaintiffs have standing to challenge § 107(2) if it is clear from the face of the statute that they are not entitled to the exemption. Instead, defendants expand an argument that was relegated to a footnote in their motion to dismiss, dkt. #23 at 10 n.3, which is that it is *not* clear from the face of the statute and the implementing regulations that plaintiffs are ineligible for the exemption under § 107(2). Rather, defendants say that it is "conceivable" that atheists such as Gaylor and Barker could qualify as "ministers of the gospel" under § 107, so they should be required to claim the exemption before challenging the statute.

Although defendants devote a substantial amount of their briefs to this argument, it is difficult to take it seriously. Under no remotely plausible interpretation of § 107 could plaintiffs Gaylor and Barker qualify as "ministers of the gospel." However, for the sake of completeness, I will address the primary arguments that defendants raise in their briefs on this issue.

Much of defendants' argument rests on Kaufman v. McCaughtry, 419 F.3d 678, 682 (7th Cir. 2005), in which the court concluded that atheism could qualify as a religion under the free exercise clause in the context of a claim brought by an atheist prisoner who wanted to start an atheist study group. (The court went on to reject the prisoner's claim because he could not show that the absence of an atheist study group imposed a substantial burden on his religious exercise, id. at 683, without explaining how an atheist could make that showing in a different case.) However, the issue in this case is not the scope of the free exercise clause

of the First Amendment as interpreted in the context of one case decided in 2005, but the proper interpretation of the phrase "ministers of the gospel" in a statute enacted in 1954, so cases such as Kaufman provide little guidance.

Alternatively, defendants says that the IRS regulations promulgated under § 107 do not discriminate against "nontheistic beliefs" and that the IRS does not evaluate the "content" of a claimant's professed religion, but these arguments are red herrings as well. As I noted in the order denying defendants' motion to dismiss, the IRS has interpreted § 107 liberally to include members of non-Christian faiths. E.g., Salkov v. Commissioner of Internal Revenue, 46 T.C. 190, 194 (1966) (approving tax exemption for Jewish cantor after rejecting interpretation of term "gospel" as being limited to books of New Testament and instead construing term to mean "glad tidings or a message, teaching, doctrine, or course of action having certain efficacy or validity"). However, even if I assume that IRS would continue to stretch the plain meaning of § 107, there is a difference between non-theistic faiths such as Buddhism and having no faith at all. Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (distinguishing "those religions based on a belief in the existence of God," "those religions founded on different beliefs" and "non-believers"). Defendants point to no regulations or decisions suggesting that a person who did not subscribe to any faith could qualify for an exemption under § 107(2).

Regardless whether the IRS might recognize atheism as a religion, this does not answer the question whether it would recognize an atheist "minister," which is the only question that matters. Defendants cite no evidence that atheists *have* "ministers" as that

term is used in § 107, which is sufficient reason to reject an argument that an atheist could qualify for an exemption under that statute.

Even if I assume that there are atheists ministers, neither plaintiff Gaylor nor plaintiff Barker could qualify as one. Under the federal regulations, the key question is whether the claimant is seeking an exemption for "services performed by a minister [that] are performed in the exercise of his ministry." 26 C.F.R. § 1.1402(c)-5(b)(2). The tax court has struggled to come up with a consistent framework to answer that question, applying different tests in cases such as Good v. Commissioner of Internal Revenue, 104 T.C.M. (CCH) 595 (T.C. 2012), Mosley v. Commissioner of Internal Revenue, 68 T.C.M. (CCH) 708 (T.C. 1994), and Lawrence v. Commissioner of Internal Revenue, 50 T.C. 494 (1968), but both sides in this case cite Knight v. Commissioner of Internal Revenue, 92 T.C. 199, 205 (1989), as identifying all the relevant factors. In Knight, the court considered whether the claimant: (1) performs sacerdotal functions under the tenets and practices of the particular religious body constituting his church or church denomination; (2) conducts worship services; (3) performs services in the control, conduct, and maintenance of a religious organization that operates under the authority of a church or church denomination; (4) is ordained, commissioned, or licensed; and (5) is considered to be a spiritual leader by his religious body.

Plaintiffs do not come close to meeting any of these factors. Defendants cite no persuasive evidence that either Gaylor or Barker is ordained, that they perform "sacerdotal" functions or conduct "worship" services, that anyone in the foundation considers Gaylor and Barker to be "spiritual" leaders or that the foundation is under the authority of a "church."

Again, even assuming that atheism is a religion, the Freedom from Religion Foundation is not an "atheist" organization in the sense that the purpose of the group is to "practice" atheism like the prisoner in Kaufman. Rather, the foundation is open to non-atheists, Barker Decl. ¶ 19, dkt. #48, and the purpose of the foundation, according to its bylaws, is to advocate and educate. Gaylor Decl., dkt. #47 exh. 1 at 1 (purpose of foundation is to promote "the constitutional principle of separation of church and state and to educate the public on matters related to non-theistic beliefs"). Defendants do not identify a single "religious" belief espoused by the foundation. In fact, defendants admit that the foundation is not a church or a religious organization operating under the authority of a church, that plaintiffs Gaylor's and Barker's roles as co-presidents of the foundation do not constitute an ordination, commissioning or licensing as ministers and that the foundation does not engage in worship. Dfts.' Resp. to Plts.' PFOF ¶¶14, 22, 29, dkt. #55.

Although some of Gaylor's and Barker's work may *relate to* religious issues, this is in the context of political and legal advocacy, similar to organizations such as the American Center for Law and Justice or the Anti-Defamation League. Tanenbaum v. Commissioner of Internal Revenue, 58 T.C. 1, 8 (1972) (denying exemption for employee of American Jewish Committee because he "was not hired to perform 'sacerdotal functions' or to conduct 'religious worship'; rather, his job is to encourage and promote understanding of the history, ideals, and problems of Jews by other religious groups"). See also Flowers v. United States, No. CA 4-79-376-E, 1981 WL 1928, *6 (N.D. Tex. Nov. 25, 1981) (upholding denial of exemption because housing allowance was for educational rather than sacerdotal functions);

Colbert v. Commissioner, 61 T.C. 449 (1974) (taxpayer did not qualify for exemption because his "primary emphasis . . . was in warning and awakening people to the dangers of communism and in educating them as to the principles of communism" rather than "religious instruction in the principles laid down by Christ"). In other words, even if I were to assume that the foundation is an "atheist organization," that is not enough to qualify plaintiffs as ministers because they do not engage in the activities that a minister performs. Kirk, 425 F.2d at 495 (affirming denial of claim under § 107 by church employee in part because "all the services performed by petitioner in this case were of secular nature").

Defendants argue that plaintiff Barker engages in a number of activities that could be classified as "sacerdotal," such as performing "de-baptisms," lecturing, performing marriages, counseling, promoting free thought and writing "free thought" songs. (The regulations do not define the term "sacerdotal" except to say that it "depends on the tenets and practices of the particular religious body constituting [a claimant's] church or church denomination." 26 C.F.R. § 1.1402(c)—5(b)(2)(i).) Defendants' argument is a nonstarter because it does not apply to Gaylor, only to Barker; defendants admit that Gaylor is not a minister. Dfts.' Resp. to Plts.' PFOF ¶ 14, dkt. #55. "Where at least one plaintiff has standing, jurisdiction is secure and the court will adjudicate the case whether the additional plaintiffs have standing or not." Ezell vs. City of Chicago, 651 F.3d 684, 696 (7th Cir. 2011).

In any event, none of this evidence provides any support for a view that Barker could qualify as a minister of the gospel. As an initial matter, defendants do not deny that Barker

engaged in some of the activities (such as writing songs and books) before working for the foundation, Dfts.' Rep. to Plts.' Resp. to Dfts.' PFOF ¶ 6, dkt. #54, and that any marriages he officiates are done on his own time, not as an employee of the foundation. Barker Decl. ¶ 24, dkt. #48. See also Tanenbaum, 58 T.C. at 8 (refusing to consider "[a]ny other functions [the claimant] may perform . . . by virtue of his own personal desires but are not cause for remuneration by the" employer). The counseling Barker performs relates to issues such as "how to deal with religious relatives," "how to start an FFRF chapter" and "how to teach children about morality *without* religion." Dfts.' PFOF ¶ 6(a), dkt. #41 (emphasis added). The "debaptismal certificate" can be downloaded by anyone off the internet and will be signed by Barker for five dollars. Dkt. #42-15. Each certificate includes the saying "With soap, baptism is a good thing." Id. Barker describes the certificates as "a tongue-in-cheek way to bring attention to opting out of religion." Barker Decl. ¶ 25, dkt. #48. I do not see how any of this conduct could relate "to the tenets and practices" of a particular religious body and defendants do not even attempt to develop an argument on this point.

In their reply brief, defendants argue that it "does not matter whether Ms. Gaylor or Mr. Barker would or would not be eligible for the exclusion provided in § 107 if they claimed it. What matters is that *an* atheist may lawfully make a claim for the exclusion." Dkt. #53 at 6. This argument is puzzling because it rests on a premise that a plaintiff's own experience is irrelevant to the question of standing. That is obviously incorrect. A plaintiff's standing to sue is determined not by asking whether some hypothetical third party is being injured, but by whether the *plaintiff* is being injured. Kowalski v. Tesmer, 543 U.S. 125,

129 (2004) ("We have adhered to the rule that a party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.") (internal quotations omitted). Defendants seem to concede now that plaintiffs have been injured because they cannot qualify for the exemption. Defendants do not explain why that injury "does not matter" so long as it would be possible for some atheist to qualify under some set of circumstances, but they seem to be confusing standing with the merits. To the extent defendants are arguing that § 107(2) is constitutional if it would allow an exemption for an "atheist minister" in the abstract, that argument has nothing to do with standing.

Defendants make a related argument in their reply brief that plaintiffs' alleged injury would not be fairly traceable to any "religious discrimination" by defendants if § 107 were interpreted as encompassing an "atheist minister." Dfts.' Br., dkt. #53, at 12. Again, this argument rests on a misunderstanding of standing requirements. The question is whether the plaintiff's injury is fairly traceable to the defendant's *conduct*, Massachusetts v. EPA, 549 U.S. 497, 536 (2007), not whether the plaintiff will be able to prove that the injury was caused by a violation of a particular right, which is another question on the merits. Arreola v. Godinez, 546 F.3d 788, 794-95 (7th Cir. 2008) ("Although the two concepts unfortunately are blurred at times, standing and entitlement to relief are not the same thing.").

Accordingly, I conclude that plaintiffs have standing to bring a facial challenge to § 107(2) because the statute denies them an exemption that others receive, the injury is fairly

traceable to the conduct of defendants as those responsible for implementing the tax code and plaintiff's injury is redressable by a declaration that § 107(2) is unconstitutional and an order enjoining its enforcement.

Finally, defendants raise other arguments about whether the case is ripe for adjudication and whether the Administrative Procedure Act waives the government's sovereign immunity under the facts of this case, but both of these arguments are contingent on a finding that § 107(2) does not harm plaintiffs. Because I have rejected that argument, I need not address defendants' other arguments separately.

B. Merits

1. Standard of review

The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const., Amend. I. The first question in every case brought under the establishment clause is the proper standard of review.

The test applied most commonly by courts was articulated first in Lemon v. Kurtzman, 403 U.S. 602 (1971). Under Lemon, government action violates the establishment clause if (1) it has no secular purpose; (2) its primary effect advances or inhibits religion; or (3) it fosters an excessive entanglement with religion. Although individual justices have criticized the test, e.g., Santa Fe Independent School District v. Doe, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting); Tangipahoa Parish Board of

Education v. Freiler, 530 U.S. 1251 (2000) (Scalia, J., dissenting from denial of certiorari), the Supreme Court as a whole continues to apply it. E.g., McCreary County, Kentucky v. American Civil Liberties Union of Kentucky, 545 U.S. 844, 859-67 (2005). Further, it is the test the Court of Appeals for the Seventh Circuit has employed in recent cases brought under the establishment clause. E.g., Doe ex rel. Doe v. Elmbrook School District, 687 F.3d 840, 849 (7th Cir. 2012); Sherman ex rel. Sherman v. Koch, 623 F.3d 501, 507 (7th Cir. 2010); Milwaukee Deputy Sheriffs' Association v. Clarke, 588 F.3d 523, 527 (7th Cir. 2009); Vision Church v. Village of Long Grove, 468 F.3d 975, 991-92 (7th Cir. 2006).

In Lynch v. Donnelly, 465 U.S. 668, 691 (1984), Justice O'Connor offered what she later described as a "refinement" of the first two parts of the Lemon test, under which the court asks "whether the government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement," Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring), viewed from the perspective of a "reasonable observer." Elk Grove Unified School District v. Newdow, 542 U.S. 1, 34 (2004) (O'Connor, J., concurring in the judgment). The Supreme Court has applied Justice O'Connor's test in several subsequent cases, e.g., McCreary County, 545 U.S. at 866; Zelman v. Simmons-Harris, 536 U.S. 639, 654-55 (2002); County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 620 (1989), as has the Court of Appeals for the Seventh Circuit. Clarke, 588 F.3d at 529; Linnemeir v. Board of Trustees of Purdue University, 260 F.3d 757, 764 (7th Cir. 2001); Freedom from Religion Foundation, Inc. v. City of Marshfield, Wisconsin, 203 F.3d 487, 493 (7th Cir. 2000). See also Salazar v. Buono, 559

U.S. 700, 721 (2010) (assuming that "reasonable observer" test applied).

Although the Supreme Court has articulated other tests as well over the years, e.g., Lee v. Weisman, 505 U.S. 577 (1992); Marsh v. Chambers, 463 U.S. 783, 787 (1983), the parties rely on the modified version of the Lemon test, so I will do the same.

2. Texas Monthly, Inc. v. Bullock

Consideration of the question whether § 107(2) violates the establishment clause must begin with Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989), the only case in which the Supreme Court has addressed the constitutionality of a tax exemption granted solely to religious persons. In Texas Monthly, the statute at issue exempted from the state sales tax "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith."

The justices in the plurality opinion (Justices Brennan, Marshall and Stevens) and those concurring in the judgment (Justices Blackmun and O'Connor) agreed that the statute violated the establishment clause. The plurality applied the familiar test under Lemon, 403 U.S. at 612, as well as the endorsement test. In concluding that the statute did not have a secular purpose or effect and conveyed a message of religious endorsement, the plurality emphasized that the exemption provided a benefit to religious publications only, without a corresponding showing that the exemption was necessary to alleviate a significant burden on free exercise:

> Every tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become indirect and vicarious "donors." Insofar as that subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause. However, when government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, as Texas has done, it provides unjustifiable awards of assistance to religious organizations and cannot but convey a message of endorsement to slighted members of the community.

Id. 14-15 (internal quotations, citations and alterations omitted). In addition, the plurality stated that the statute seemed "to produce greater state entanglement with religion than the denial of an exemption" because the statute required the government to "evaluat[e] the relative merits of differing religious claims" in order to determine whether a publication qualified for the exemption. Id. at 20.

In the concurring opinion, Justices Blackmun and O'Connor concluded that "a tax exemption limited to the sale of religious literature by religious organizations violates the Establishment Clause" because it results in "preferential support for the communication of religious messages." Id. at 28. They added that "[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." Id.

Because no single opinion garnered at least five votes in Texas Monthly, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193 (1977)

(internal quotation marks omitted). Although the rule in Marks likely would make Justice Blackmun's opinion controlling, the differences between the plurality and concurring opinions in Texas Monthly are minimal for the purpose of this case. Under either opinion, a tax exemption provided only to religious persons violates the establishment clause, at least when the exemption results in preferential treatment for religious messages. Haller v. Commissioner of the Dept. of Revenue, 728 A.2d 351, 354-55 (Pa. 1999) ("[A] majority of the Court in Texas Monthly clearly recognized that tax exemptions that include religious organizations must have an overarching secular purpose that equally benefits similarly situated nonreligious organizations.").

Because a primary function of a "minister of the gospel" is to disseminate a religious message, a tax exemption provided only to ministers results in preferential treatment for religious messages over secular ones. Accordingly, I conclude that Texas Monthly controls the outcome of this case. Although this case involves an income tax exemption instead of a sales tax exemption, neither the plurality nor the concurrence placed any importance on the type of tax involved and defendants do not provide any grounds for distinguishing the two types. Even Justice Scalia in his dissent in Texas Monthly stated that § 107 is a "tax exemptio[n] of the type the Court invalidates today." Texas Monthly, 489 U.S. at 33 (Scalia, J., dissenting).

3. Accommodation of religion

Tellingly, defendants make little effort to distinguish Texas Monthly. They make a

fleeting reference to the plurality's statement that preferential treatment for religious groups may be permissible if it "remov[es] a significant state-imposed deterrent to the free exercise of religion," Texas Monthly, 489 U.S. at 14, but they do not explain how that statement might apply to this case. Of course, "[a]ny [government action] pertaining to religion can be viewed as an 'accommodation' of free exercise rights," Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 347 (1987) (O'Connor, J., concurring in the judgment), but the "principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." Lee, 505 U.S. at 587.

Although it is undoubtedly true that taxes impose a burden on ministers, the same is true for all taxpayers. Defendants do not identify any reason why a requirement on ministers to pay taxes on a housing allowance is more burdensome for them than for the many millions of others who must pay taxes on income used for housing expenses. In any event, the Supreme Court has rejected the view that the mere payment of a generally applicable tax may qualify as a substantial burden on free exercise. Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378, 391 (1990) ("[T]o the extent that imposition of a generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant.").

Defendants cite several cases in which courts have found that 26 U.S.C. § 1402(e) and (g), which give exemptions to certain religious persons from paying taxes related to

Social Security, are permissible accommodations of religion. E.g., Droz v. Commissioner of Internal Revenue, 48 F.3d 1120, 1121 (9th Cir. 1995); Hatcher v. Commissioner of Internal Revenue, 688 F.2d 82, 84 (10th Cir. 1979). See also Templeton, 719 F.2d at 1413-14 (rejecting equal protection challenge to same provisions). However, the exemptions in § 1402 are limited to those who have a religious objection to receiving public insurance *and* belong to a religion that will provide the assistance that others ordinarily would receive under Social Security. Thus, § 1402 is distinguishable from § 107 because § 1402 limits the exemption to those whose religious exercise would be substantially burdened. In addition, there is no preferential treatment to religious persons because the exemption is limited to those who will receive from their religious sect (rather than the government) the benefits the tax is designed to provide. Droz, 48 F.3d at 1121 (§ 1402(g) is a permissible accommodation because it is "an 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"); Hatcher, 688 F.2d at 84 ("That the principal purpose of the legislation is not to advance or inhibit religion is evident in the mandate that those who receive the exemption forego the benefit of the program. To further assure that one claiming the exemption does not become a public charge Congress required that the exemption only be given to persons belonging to organizations that make provision for dependent members.").

Along the same lines, the cases in which the Supreme Court has upheld religious accommodations are in contexts that otherwise would result in severe restrictions on free

exercise. Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687, 705 (1994) ("The Constitution allows the State to accommodate religious needs by alleviating *special* burdens.") (emphasis added). For example, in Amos, 483 U.S. at 335, the Court upheld a religious exemption in an antidiscrimination law that otherwise would have required religious groups to violate their own religious beliefs, such as by requiring Catholic churches to ordain women as priests. And in Cutter v. Wilkinson, 544 U.S. 709 (2005), the Court concluded that a law requiring administrators to provide religious accommodations to persons housed in state institutions was justified by the reality of institutionalization, which is "severely disabling to private religious exercise." Id. at 720-21. Thus, in both situations, the accommodations are best described not as singling out religious persons for more favorable treatment, but as an attempt to prevent inequality caused by government-imposed burdens. School District of Abington Township v. Schempp, 374 U.S. 203, 299 (1963) (Brennan, J., concurring) ("[H]ostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion.").

As noted above, in this case, the burden of taxes is borne equally by everyone who pays them, regardless of religious affiliation, so concerns about free exercise do not justify a special exemption. In 1984, the Treasury Secretary himself recognized this point in a memorandum in which he recommended the repeal of § 107 because "[t]here is no evidence that the financial circumstances of ministers justify special tax treatment. The average minister's compensation is low compared to other professionals, but not compared to

taxpayers in general." U.S. Dept. of Treasury, Tax Reform for Fairness, Simplicity, and Economic Growth: The Department Report to the President, vol. II 49 (1984). In fact, the Secretary argued that § 107 "provides a disproportionately greater benefit to relatively affluent ministers, due to the higher marginal tax rates applicable to their incomes." Id. (The Treasury Department withdrew the recommendation after many members of the clergy objected to it. Gabriel O. Aitsebaomo, Challenges to Federal Income Tax Exemption of the Clergy and Government Support of Sectarian Schools through Tax Credits Device and the Unresolved Questions after Arizona v. Winn, 28 Akron Tax J. 1, 15 (2013).) Under these circumstances, I see no basis for concluding that § 107(2) may be justified as an accommodation of religion.

4. Walz v. Tax Commission of City of New York

Instead of Texas Monthly, defendants rely on Walz, 397 U.S. 664, in which the Supreme Court rejected a challenge under the establishment clause to a statute that gave a tax exemption to property used for "religious, educational or charitable purposes." Id. at 666-67. The obvious distinction between Walz and this case is that the statute in Walz was not a tax exemption benefiting religious persons only, but a wide variety of nonprofit endeavors. See also Schempp, 374 U.S. at 301-02 (1963) (Brennan, J., concurring) (no establishment clause violation when "certain tax deductions or exemptions . . . incidentally benefit churches and religious institutions, along with many secular charities and nonprofit organizations" because, in that situation "religious institutions simply share benefits which

government makes generally available to educational, charitable, and eleemosynary groups").

Defendants argue that the broader scope of the statute in Walz "was not dispositive for the majority," Dfts.' Br., dkt. #44, at 42, but that view is contradicted by the opinion itself as well as later decisions applying it. In concluding that the purpose of the exemption was not to advance religion, the Court observed that the state "has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." Walz, 397 U.S. at 673. It went on to say that the statute applies to groups that have "beneficial and stabilizing influences in community life" as opposed to "private profit institutions." Id. See also id. at 687, 689 (Brennan, J., concurring) ("These organizations are exempted because they, among a range of other private, nonprofit organizations contribute to the well-being of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone, to the detriment of the community. . . . Government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society."); id. at 697 n.1 (Harlan, J., concurring) (tax exemption does not violate establishment clause "because New York has created a general class so broad that it would be difficult to conclude that religious organizations cannot properly be included in it").

In Texas Monthly, 489 U.S. at 11, the plurality stated that "[t]he breadth of New York's property tax exemption was essential to our holding [in Walz] that it was not aimed at establishing, sponsoring, or supporting religion, but rather possessed the legitimate secular purpose and effect of contributing to the community's moral and intellectual diversity and encouraging private groups to undertake projects that advanced the community's well-being and that would otherwise have to be funded by tax revenues or left undone." Further, the plurality reviewed other cases in which the Court had upheld benefits to religious organizations and concluded that they too involved a broader array of groups. "[W]ere those benefits confined to religious organizations, they could not have appeared other than as state sponsorship of religion; if that were so, we would not have hesitated to strike them down for lacking a secular purpose and effect." Texas Monthly, 489 U.S. at 10-11 (plurality opinion) (citing Widmar v. Vincent, 454 U.S. 263 (1981); Mueller v. Allen, 463 U.S. 388 (1983); and Walz, 397 U.S.664). See also Grumet, 512 U.S. at 704 ("We have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges," including in Walz.).

To support their argument that the holding in Walz was not limited to exemptions that include nonreligious groups, defendants cite the statement by the Court that it was "unnecessary to justify the tax exemption on the social welfare services or 'good works' that some churches perform for parishioners and others-family counselling, aid to the elderly and the infirm, and to children." Walz, 397 U.S. at 674. However, defendants are taking the statement out of context. The Court went on to explain that it did not want the government

to have to evaluate whether a religious body's good works were "good enough" to qualify because that could "produc[e] a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." Id. Thus, the Court's observation is best read as an attempt to avoid a justification for an exemption that would lead to greater entanglement between church and state. The Court did not suggest that the government was free to provide tax exemptions to religious entities without including other groups.

Defendants also rely on Walz for the proposition that a "tax exemption does not implicate the same constitutional concerns as a direct subsidy," Dfts.' Br., dkt. #44, at 43, quoting the Court's statement that "[t]he grant of a tax 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." Walz, 397 U.S. at 675. Taken to its logical conclusion, an argument relying on a distinction between exemptions and subsidies would permit the government to eliminate *all* taxes for religious organizations, an extreme position that defendants do not advance. However, in the absence of a categorical approach, it is not clear how exemptions could be treated differently from subsidies and defendants do not provide any suggestions.

In any event, to the extent that Walz suggested a different analysis for exemptions, that view is inconsistent with both the plurality and concurring opinions in Texas Monthly, neither of which made a distinction between the two types of support. It was rejected explicitly by the plurality, which stated that "[e]very tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become 'indirect and vicarious 'donors.'"

Texas Monthly, 489 U.S. at 14 (quoting Bob Jones University v. United States, 461 U.S. 574, 591 (1983)). The Court has resisted the distinction in other opinions as well. Ragland, 481 U.S. at 236 ("Our opinions have long recognized—in First Amendment contexts as elsewhere—the reality that tax exemptions, credits, and deductions are a form of subsidy that is administered through the tax system.") (internal citations omitted); Regan v. Taxation With Representation of Washington, 461 U.S. 540, 544 (1983) ("Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system."). See also Walz, 397 U.S. at 701 (Douglas, J., dissenting) ("[O]ne of the best ways to 'establish' one or more religions is to subsidize them, which a tax exemption does."); Adler, 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, 862 n.30 (1993) ("[T]he large body of literature about tax expenditures accepts the basic concept that special exemptions from tax function as subsidies."), quoted with approval in Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819, 861 (1995) (Thomas, J., concurring).

Defendants cite Winn, 131 S. Ct. at 1439, as an example of a recent case in which the Court distinguished between exemptions and subsidies. However, Winn was a case about determining a plaintiff's injury for the purpose of taxpayer standing, a doctrine the Court has taken great effort to cabin. Id. at 1445 (emphasizing "the general rule against taxpayer standing"). The Court did not rely on Walz for the distinction it made between exemptions and subsidies in the standing context and defendants do not explain how the distinction in Winn applies to a case about the substantive scope of the establishment clause.

In sum, I conclude that defendants cannot rely on Walz or Winn to preserve § 107(2).

5. Other cases

In addition to Texas Monthly, there are other cases in which the Supreme Court has held that it violates the establishment clause to single out religious beliefs for preferential treatment without providing a similar benefit to secular individuals or groups. For example, in Community for Public Education v. Nyquist, 413 U.S. 756, 793 (1973), the Court concluded that tax exemptions for parents of children in sectarian schools violated the establishment clause, reasoning that "[s]pecial tax benefits . . . cannot be squared with the principle of neutrality established by the decisions of this Court." And in Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985), in an opinion by Chief Justice Burger (the author of Walz), the Court held that it violated the establishment clause to give employees an "unqualified" right not to work on the Sabbath because it meant "that Sabbath religious concerns automatically control over all secular interests at the workplace" and "the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." Id. at 709. See also Grumet, 512 U.S. at 708-09 ("[A] statute [may] not tailor its benefits to apply only to one religious group.").

In addition to these Supreme Court cases, there are several cases in which other courts have concluded that tax exemptions violated the establishment clause when they benefited religious groups only. E.g., Finlator, 902 F.2d at 1162 (striking down sales tax exemption for Bibles); Haller, 728 A.2d at 355 (striking down sales tax exemption for

"religious publications"); Appeal of Springmoor, Inc., 498 S.E.2d 177 (N.C. 1998) (striking down property tax exemption for nursing homes "owned, operated and managed by a religious or Masonic organization"); Thayer v. South Carolina Tax Commission, 413 S.E.2d 810, 813 (S.C. 1992) (striking down sales tax exemption for "religious publications"). See also American Civil Liberties Union Foundation of Louisiana v. Crawford, CIV.A. 00-1614, 2002 WL 461649 (E.D. La. Mar. 21, 2002) (granting preliminary injunction against tax exemption provided to places of accommodation "operated by religious organizations for religious purposes"). Defendants cite no cases to the contrary, with the exception of cases involving § 1402, which are distinguishable for the reasons explained above.

6. Purpose and effect of § 107(2)

In an attempt to show that neither the purpose nor the effect of § 107(2) is to advance or endorse religion, defendants argue that the provision actually *eliminates* discrimination among different religions and between religious and nonreligious persons. In support of this view, defendants say that the impetus for both § 107(1) and § 107(2) can be traced to the "convenience of the employer" doctrine, under which employees would not be taxed under certain circumstances on the value of housing provided by their employer. Commissioner of Internal Revenue v. Kowalski, 434 U.S. 77, 85-86 (1977). The Treasury Department began applying the doctrine in 1919, shortly after the federal government began collecting income tax, using the rationale that housing should not be viewed as compensation if it is provided by the employer to enable an employee to do his job properly. Id. at 84-90.

Examples of employees who received the exemption included seamen and hospital workers who were required to be on call 24 hours a day. Id. at 84, 86. In 1954, Congress codified the exemption in 26 U.S.C. § 119, which allows an employee to exclude from his gross income "the value of any . . . lodging furnished to him, . . . but only if . . . the employee is required to accept such lodging on the business premises of his employer as a condition of his employment."

According to defendants, in 1921 the Treasury Department refused to apply the convenience of the employer doctrine to ministers who lived in church-provided housing. (Plaintiffs dispute that view, but I need not resolve that dispute for the purpose of this opinion.) Defendants say that, in response, Congress passed § 213(b)(11) of the Revenue Act of 1921, which allowed ministers of the gospel to exclude from their gross income the rental value of housing they received as part of their compensation. (That exemption later became § 107(1).) Finally, defendants say that the purpose of § 107(2) when it was enacted in 1954 was to eliminate discrimination against ministers who could not claim the already existing exemption for ministers who lived in parsonages. In particular, defendants say that § 107(2) was needed to help "less-established and less wealthy religions [that] were not able to provide housing for their spiritual leaders." Dfts.' Br., dkt. #44, at 33. Defendants cite a committee report from the House of Representatives in support of their view:

> Under present law, the rental value of a home furnished a minister of the gospel as a 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.

> Your committee has 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.

H.R. Rep. No. 1337, at 15, available in U.S. Code Congressional and Administrative News, 83rd Congress, Second Session, at 4040 (1954).

Plaintiffs challenge defendants' view that the purpose of § 107(2) was to eliminate religious discrimination by quoting a statement from Representative Peter Mack, the sponsor of the 1954 law, :

> 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 Before the H. Comm. on Ways & Means, 83rd Cong. 1, at 1574-75(June 9, 1953) (statement of Peter F. Mack, Jr), dkt. #51-9. Plaintiffs argue that Mack's statement shows that § 107(2) "was deliberately intended to send a message of support for religion during the Cold War." Plts.' Br., dkt. #52, at 52.

The difference between plaintiffs' and defendants' view of the purpose of § 107(2) is more semantic than substantive. Under either view, the point of the law was to assist a subset of religious groups, which, as I will explain below, is not a secular purpose under the establishment clause.

Because the validity of § 107(1) is not before the court, I must assume for the purpose of this case that Congress did not violate the establishment clause by granting a tax exemption on the rental value of a home provided to a minister as part of his compensation.

However, by defendants' own assertion, the purpose of § 107(1) was to eliminate discrimination between secular and religious employees by giving ministers a similar exemption to the one now codified in 26 U.S.C. § 119 for housing provided to an employee for the convenience of the employer. Assuming this is correct, it does little to help justify the later enactment of § 107(2), which expanded the exemption to include not just the value of any housing provided but also the portion of the minister's salary designated for housing expenses. Defendants say that § 107(2) was needed to eliminate discrimination against certain religious sects, particularly those that were "less wealthy and less established," but there are multiple problems with that argument.

To begin with, defendants are wrong to suggest that § 107(2) was needed to eliminate religious discrimination. Section 107(1) is not discriminatory in the sense that it singles out certain religions for more favorable treatment; rather, it gives a benefit to ministers who meet certain housing criteria, just as § 119 gives a benefit to employees who meet certain housing criteria. Although not all ministers can qualify for the exemption, the same is true for secular employees under § 119. In other words, § 107(1) no more "discriminates" against ministers who purchase their own housing than § 119 "discriminates" against secular employees who purchase their own housing. Because the distinction made in both statutes relates to the type of housing the employee has rather than religious affiliation, there is no religious discrimination. Under defendants' view, if one religious person received a tax exemption, then Congress would be compelled to give every religious person the same exemption, even if the exemption had nothing to do with religion.

Further, to the extent that § 107(1) discriminates among religions, § 107(2) does not eliminate that discrimination but merely shifts it. In particular, § 107(2) discriminates against those religions that do not *have* ministers. Erwin Chemerinsky, The Parsonage Exemption Violates the Establishment Clause and Should Be Declared Unconstitutional, 24 Whittier L. Rev. 707, 723 (2003) ("[S]ection 107(2) itself discriminates among religions: It offers a huge financial benefit to those religions and churches that have clergy as compared to those which do not. Moreover, it discriminates among clergy based on the specific tasks they are performing."); Thomas E. O'Neill, A Constitutional Challenge to Section 107 of the Internal Revenue Code, 57 Notre Dame L. Rev. 853, 865-66 (1982) ("Section 107(2) may unconstitutionally prefer certain religions over others. For example, a congregational religion with no permanent or specifically designated ministers would not receive section 107(2)'s financial benefits as would a centralized religion with a designated ministry."). In addition, § 107(2) creates an imbalance even with respect to those ministers who benefit from § 107(1) because ministers who get an exemption under § 107(2) can use their housing allowance to purchase a home that will appreciate in value and still can deduct interest they pay on their mortgage and property taxes, resulting in a greater benefit than that received under § 107(1). Chemerinsky, 24 Whittier L. Rev. at 712; 26 U.S.C. § 265(a)(6) ("No deduction shall be denied under this section for interest on a mortgage on, or real property taxes on, the home of the taxpayer by reason of the receipt of an amount as. . . (B) a parsonage allowance excludable from gross income under section 107").

In any event, even if I assume that the exemption in § 107(2) applies equally to all

religions, that would not solve the problem because the provision applies to religious persons *only*. Congress did not incorporate an exemption for secular employees into § 107(2) or expand § 119 to accomplish a similar result. Kowalski, 434 U.S. at 84-96 (rejecting interpretation of § 119 that would extend it to cash allowances). A desire to assist disadvantaged churches and ministers is not a secular purpose and it does not produce a secular effect when similarly disadvantaged secular organizations and employees are excluded from the benefit. Nyquist, 413 U.S. at 788-89 (law motivated by desire to help "low-income parents" send children to sectarian schools "can only be regarded as one 'advancing' religion"). The establishment clause requires neutrality not just among the various religious sects but between religious and secular groups as well. McCreary County, 545 U.S. at 875-76 ("[T]he government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause."); Nyquist, 413 U.S. at 771 ("[I]t is now firmly established that a law may be one 'respecting an establishment of religion' even though its consequence is not to promote a 'state religion,' and even though it does not aid one religion more than another but merely benefits all religions alike.") (internal citation omitted); Gillette v. United States, 401 U.S. 437, 450 (1971) ("[T]he Establishment Clause prohibits government from abandoning secular purposes . . . to favor the adherents of any sect or religious organization."). Under defendants' view, there would be no limit to the amount of support the government could provide to religious groups over secular ones.

Alternatively, defendants cite provisions in the tax code granting housing allowance

exemptions for nonreligious reasons as evidence that § 107(2) does not advance religion. First, under 26 U.S.C. § 134, members of the military may exclude from their gross income any "qualified military benefit," which includes a housing allowance. 37 U.S.C. § 403. Second, under 26 U.S.C. § 911, United States citizens who live abroad may deduct a portion of their housing expenses from their gross income. Finally, under 26 U.S.C. § 912, certain federal employees who live abroad may exclude from their gross income "foreign area allowances," which may include housing expenses.

In Texas Monthly, 489 U.S. at 14, the plurality acknowledged that a tax exemption benefiting sectarian groups could survive a challenge under the establishment clause if the exemption was "conferred upon a wide array of nonsectarian groups as well." However, the Court rejected the argument that it was enough to point to a small number of secular groups that could receive a similar exemption for a different reason:

> The fact that Texas grants other sales tax exemptions (e.g., for sales of food, agricultural items, and property used in the manufacture of articles for ultimate sale) for different purposes does 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 nonreligious groups.

Texas Monthly, 489 U.S. at 15 n.4.

In this case, defendants have not identified an "overarching secular purpose" that justifies both § 107(2) and the other exemptions they cite. Defendants suggest vaguely that all of the recipients have "unique housing needs," Dfts.' Br., dkt. #44, at 39, but they never identify how the needs of ministers who do not live in employer housing are different from those of any other taxpayer. In their reply brief, defendants say that § 107 is like the other

statutes in that all of them involve "[p]eople whose housing is dictated by their work," Dfts.' Br., dkt. #53, at 20, but that argument is disingenuous because it applies only to § 107(1), which is not at issue in this case. Section 107(2) does not include any limitations on the type or location of housing that a minister purchases or rents, so it cannot be described as being related to the convenience of the employer doctrine.

Each of the other statutes defendants cite involving exemptions for secular employees was motivated by a purpose specific to the particular group involved. For example, the purpose of § 911 is to protect American business people living overseas from *double* taxation, Brewster v. Commissioner of Internal Revenue, 473 F.2d 160, 163 (D.C. Cir. 1972), and the purpose of § 912 is to insure that "federal civilian employees should be adequately reimbursed for additional expenses necessarily incurred because of their overseas services." Anderson v. United States, 16 Cl. Ct. 530, 534 (1989). Thus, both of these statutes are less about giving a particular group preferential treatment and more about attempting to avoid penalizing particular taxpayers for engaging in work that provides a benefit to the United States.

Although I did not uncover a discussion of the purpose of § 134 in the case law, it seems obvious that it would be a mistake to rely on any benefit members of the military receive as providing an "overarching secular purpose" for giving a similar benefit to ministers or anyone else. Because members of the military are unique in the level of service they give to the government and the sacrifices they make, it is not surprising that they receive certain benefits not available to the general public. A housing allowance is only one of many

"qualified military benefits" that may be excluded from gross income.

Defendants say that § 912 (relating to federal civilian employees living overseas) is similar to § 107 in that its original scope was limited to employees who lived in housing provided by the government, but Congress expanded the exemption to cover housing allowances as well. Anderson, 16 Cl. Ct. at 534-35. This argument is a nonstarter because it does not change the fact that, unlike § 107(2), the purpose of both exemptions in § 912 is to alleviate special burdens experienced by certain taxpayers as a result of their living situation. In any event, any superficial similarity between § 107 and § 912 is irrelevant because a decision by the federal government to expand the scope of an exemption to more of its own employees as it did in § 912 does not implicate the establishment clause as does an exemption that singles out religious persons for more favorable treatment.

In sum, defendants cite no evidence that the concerns that motivated § 134, § 911 and § 912 have anything to do with § 107(2). Accordingly, I agree with plaintiffs that § 107(2) does not have a secular purpose or effect and that a reasonable observer would view § 107(2) as an endorsement of religion.

7. Applicability of § 107(2) to atheists

As discussed above, defendants argued in the context of addressing plaintiffs' standing to sue that it is "conceivable" that an atheist could qualify as a "minister of the gospel" under § 107. Dfts.' Br., dkt. #44, at 10. In the context of discussing the merits in their reply brief, defendants make a similar statement that an atheist could "make a claim" that he or she is

a minister of the gospel under § 107. Dfts.' Br., dkt. #53, at 27. In support of an argument that construing § 107(2) to include atheists would defeat plaintiffs' claim, defendants cite a passage in Justice Blackmun's concurring opinion in Texas Monthly that the tax exemption at issue in that case "might survive Establishment Clause scrutiny" if it included "atheistic literature distributed by an atheistic organization." Texas Monthly, 489 U.S. at 49 (Blackmun, J., concurring in the judgment). However, defendants never go so far as to argue that the phrase "minister of the gospel" § 107 could be interpreted reasonably as applying to an atheist. In fact, they decline expressly to take a position on that issue. Dfts.' Br., dkt. #44, at 10 ("The United States is not taking the position that any particular person would, in fact, qualify to claim the exclusion under § 107(2).").

I am not aware of any decision in which a majority of the Supreme Court considered whether a claim under the establishment clause would be defeated if the particular benefit at issue were granted to atheists, but still excluded secular groups. At least in the context of this case, there is a plausible argument that the claim would survive. Under Lemon, the question is whether the government has "advanced religion." Thus, if atheism were included under the umbrella of "religion," § 107(2) still would advance religion over secular interests, even if the provision applied to atheists, because secular taxpayers still would be excluded from the benefit. Further, regardless whether § 107(2) could be read to include an "atheist minister," the statute still discriminates against religions that do not employ ministers, as noted above.

Regardless, to the extent defendants mean to argue that § 107(2) is constitutional

because of an abstract possibility that an atheist could qualify as a minister of the gospel, I disagree. Defendants are correct that courts must construe statutes to "avoid constitutional difficulties," Clark v. Martinez, 543 U.S. 371, 381-382 (2005), but that canon applies only if the statute is "readily susceptible to such a construction." Reno v. American Civil Liberties Union, 521 U.S. 844, 884 (1997). A court may not "rewrite a . . . law to conform it to constitutional requirements." Id. at 884-885.

In this case, no reasonable construction of § 107 would include atheists. In the concurring opinion in Texas Monthly that defendants cite, Justice Blackmun rejected as "facially implausible" an argument that atheistic literature could be included as part of "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith." Texas Monthly, 489 U.S. at 29 (Blackmun, J., concurring in the judgment). Defendants do not explain why they believe interpreting § 107 to include atheists is any more plausible. Hearings Before the H. Comm. on Ways & Means, 83rd Cong. at 1574-75 (sponsor of § 107(2) stating that purpose of law was to help ministers who are "fight[ing] against" a "godless and anti-religious world movement").

The only authority defendants cite is Kaufman, 419 F.3d at 682, in which the court concluded that atheism could qualify as a religion under the free exercise clause for the purpose of that case. However, the question under § 107 is not whether atheism is a religion but whether an atheist can be a "minister of the gospel," a very different question. In Kaufman, the court cited Reed v. Great Lakes Cos., 330 F.3d 931, 934 (7th Cir. 2003), for

the proposition that religion under the free exercise could be defined simply as "taking a position on divinity," Kaufman, 419 F.3d at 682, but, as discussed above, qualifying as a "minister of the gospel" is much more complicated. Defendants cite no evidence that an "atheist minister" exists (a term that many might view as an oxymoron), let alone an atheist that satisfies the IRS's criteria for a "minister of the gospel," by performing "sacerdotal" functions, conducting "worship" services or acting as a "spiritual" leader under the authority of a "church."

8. Entanglement

With respect to the question whether § 107(2) fosters excessive entanglement between church and state, I see little distinction between this case and Texas Monthly, in which the plurality concluded that the Texas statute "appear[ed], on its face, to produce greater state entanglement with religion than the denial of an exemption" because granting the exemption required the government to "evaluat[e] the relative merits of differing religious claims" and created "[t]he prospect of inconsistent treatment and government embroilment in controversies over religious doctrine." Texas Monthly, 489 U.S. at 20 (plurality opinion). Defendants argue that "it is constitutionally permissible for a government to determine whether a person's belief is 'religious' and sincerely held," Dfts.' Br., dkt. #53, at 25, but, as discussed above, § 107 and its implementing regulations go well beyond a determination whether a belief is "religious," involving a complex and inherently ambiguous multifactor test. Compare Kaufman, 419 F.3d at 682 (concluding in four

paragraphs that atheism could qualify as a religion under free exercise clause) with Foundation of Human Understanding v. United States, 88 Fed. Cl. 203 (Fed. Cl. 2009) (32-page decision devoted entirely to question whether organization qualified as "church" under tax code). See also Justin Butterfield, Hiram Sasser and Reed Smith, The Parsonage Exemption Deserves Broad Protection, 16 Tex. Rev. L. & Pol. 251, 264 (2012) (arguing in favor of the constitutionality of § 107, but acknowledging that "there is an entanglement problem" with the implementing regulations).

More persuasive is defendants' reliance on Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, — U.S. —, 132 S. Ct. 694, 699 (2012), in which the Supreme Court concluded that a "minister" could not sue a church for employment discrimination under Title VII. Although the Court did not consider expressly whether a "ministerial" exception to Title VII created excessive entanglement, the Court applied the exception to the facts of the case without expressing any reservations.

Hosanna-Tabor is not on all fours with this case because, like Amos, it involved countervailing concerns that a contrary rule would lead to interference with "a religious group's right to shape its own faith and mission through its appointments." Hosanna-Tabor, 132 S. Ct. at 706. In any event, because I have concluded that § 107(2) does not have a secular purpose or effect, I need not decide whether the provision fosters excessive entanglement between church and state. Doe, 687 F.3d at 851 n. 15 ("Since we conclude that the District acted unconstitutionally on other grounds, we need not . . . consider the District's actions under Lemon's entanglement prong.").

C. Conclusion

Although I conclude that § 107(2) violates the establishment clause and must be enjoined, this does not mean that the government is powerless to enact tax exemptions that benefit religion. "[P]olicies providing incidental benefits to religion do not contravene the Establishment Clause." Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753, 768 (1995) (plurality opinion). In particular, because "[t]he nonsectarian aims of government and the interests of religious groups often overlap," the government is not "required [to] refrain from implementing reasonable measures to advance legitimate secular goals merely because they would thereby relieve religious groups of costs they would otherwise incur." Texas Monthly, 489 U.S. at 10 (plurality opinion). Thus, if Congress believes that there are important secular reasons for granting the exemption in § 107(2), it is free to rewrite the provision in accordance with the principles laid down in Texas Monthly and Walz so that it includes ministers as part of a larger group of beneficiaries. Haller, 728 A.2d at 356 (noting that Texas amended statute at issue in Texas Monthly to grant sales tax exemption to broader range of groups). As it stands now, however, § 107(2) is unconstitutional.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendants Timothy Geithner and Douglas Schulman (now succeeded by Jacob Lew and Daniel Werfel), dkt. #40, is

GRANTED with respect to plaintiffs' Freedom from Religion Foundation, Inc.'s, Annie Laurie Gaylor's and Dan Barker's challenge to 26 U.S.C. § 107(1). Plaintiff's complaint is DISMISSED as to that claim for lack of standing.

2. Defendants' motion for summary judgment is DENIED as to plaintiffs' challenge to 26 U.S.C. § 107(2). On the court's own motion, summary judgment is GRANTED to plaintiffs as to that claim.

3. It is DECLARED that 26 U.S.C. § 107(2) violates the establishment clause of the First Amendment to the United States Constitution.

4. Defendants are ENJOINED from enforcing § 107(2). The injunction shall take effect at the conclusion of any appeals filed by defendants or the expiration of defendants' deadline for filing an appeal, whichever is later.

5. The clerk of court is directed to enter judgment in favor of plaintiffs and close this case.

Entered this 21st day of November, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

FREEDOM FROM RELIGION FOUNDATION, INC., ANNIE LAURIE GAYLOR and DAN BARKER,

Plaintiffs,

v.

JACOB LEW and DANIEL WERFEL,

Defendants.

JUDGMENT IN A CIVIL CASE

Case No. 11-cv-626-bbc

This action came before the court for consideration before the court with District Judge Barbara B. Crabb presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of defendants Jacob Lew and Daniel Werfel dismissing plaintiffs' claim challenging the constitutionality of 26 U.S.C. § 107(1) for lack of standing.

IT FURTHER ORDERED AND ADJUDGED that judgment is entered in favor of plaintiffs Freedom from Religion Foundation, Inc., Annie Laurie Gaylor and Dan Barker on their claim challenging the constitutionality of 26 U.S.C. §107(2). It is declared that 26 U.S.C. § 107(2) violates the establishment clause of the First Amendment to the United States Constitution. Defendants Jacob Lew and Daniel Werfel are enjoined from enforcing 26 U.S.C. § 107(2). The injunction shall take effect at the conclusion of any

appeals filed by defendants or the expiration of defendants' deadline for filing an appeal, whichever is later.

Approved as to form this 25th day of November, 2013.

Barbara B. Crabb
District Judge

By: Lynn Fawcett, Deputy Clerk
Peter Oppeneer, Clerk of Court

11-25-13
Date