UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

ANNIE LAURIE GAYLOR; DAN BARKER; IAN GAYLOR, PERSONAL REPRESENTATIVE OF THE ESTATE OF ANNE NICOL GAYLOR; and FREEDOM FROM RELIGION FOUNDATION, INC.,	)	
Plaintiffs,	)	
v.	)	Case No. 3:16-cv-00215
JACOB LEW, Secretary of the United States Department of Treasury; JOHN KOSKINEN, Commissioner of the Internal Revenue Service; and the UNITED STATES OF AMERICA,	)	
Defendants,	)	
and	)	
EDWARD PEECHER; CHICAGO EMBASSY CHURCH; PATRICK MALONE; HOLY CROSS ANGLICAN CHURCH; and THE DIOCESE OF CHICAGO AND MID-AMERICA OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA,	)	
Intervenor-Defendants.	)	

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Congress has two options with respect the taxation of religion and religious entities: it may ignore them completely or it may address them in a manner that navigates the space between accommodating the free exercise of religion and establishing religion. But absolute separation between church and state is not required (or even possible in all circumstances).

This case presents the question whether Congress has permissibly accommodated religion by choosing to exempt from gross income a minister's "rental allowance." 26 U.S.C. § 107(2).[1] Section 107(2) merely adapts the tax code's general exemptions for certain types of employer-provided housing to the unique context of a church and its minister. Indeed, 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 a different code provision, 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, may also prevent more intrusive 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 short, the exemption in § 107(2) was created to eliminate discrimination between secular and non-secular employees, and among employees of different religious groups, all while limiting government contact with religion to objectively verifiable information that does not inquire into the content of religious tenets. Plaintiffs can show no facts to suggest otherwise. For

[1] All statutory references refer to the Internal Revenue Code (26 U.S.C.), unless otherwise noted.

these reasons, this Court should grant defendants' motion for summary judgment on all of plaintiffs' claims.

STATEMENT OF FACTS

Defendants have filed a Statement of Proposed Findings of Fact (referred to in this brief as "SPFF ¶ __") in support of their motion for summary judgment.

BACKGROUND

Plaintiffs brought this suit to challenge the constitutionality of § 107 – which provides certain federal income tax exclusions to ministers. (*See* Doc. 1, Prayer for Relief, ¶¶ A, B (asking this Court to declare that § 107, "and implementing Treasury Regulations, violate the Establishment Clause and the Due Process Clause of the United States Constitution" and to enjoin the defendants "from continuing to grant or allow preferential and discriminatory tax benefits under §107 of the Internal Revenue Code exclusively to religious clergy").)

Section 107 has two components. The first permits ministers to exclude from their income the value of any housing that is provided by their employer. § 107(1). The second permits minsters to exclude from their income the amount of any housing allowance that they receive from their employer. § 107(2).

On October 24, 2016, the Court granted the defendants' partial motion to dismiss and ordered that the "complaint is DISMISSED as to the claim that 26 U.S.C. § 107(1) is unconstitutional. The case will proceed on the claim that 26 U.S.C. § 107(2) is unconstitutional." (Doc. 15.)

On January 19, 2017, the Court granted the motion to intervene filed by Bishop Edward Peecher, Chicago Embassy Church, Father Patrick Malone, Holy Cross Anglican Church, and

the Diocese of Chicago and Mid-America of the Russian Orthodox Church Outside of Russia. (Doc. 35.)

Defendants now move for summary judgment on all remaining claims set forth in the plaintiffs' complaint.

ARGUMENT

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Factual disputes are genuine only if there is sufficient evidence for a reasonable [factfinder] to return a verdict in favor of the non-moving party on the evidence presented, and they are material only if their resolution might change the suit's outcome under the governing law." *Maniscalco v. Simon*, 712 F.3d 1139, 1143 (7th Cir. 2013) (quotation omitted). To determine whether there is a genuine dispute as to any material fact, the court must consider the materials cited in the record on the motion, Fed. R. Civ. P. 56(c)(3), and consider those facts and "all reasonable inferences in favor of the nonmoving party," *Van den Bosch v. Raemisch*, 658 F.3d 778, 785 (7th Cir. 2011). But "conclusory allegations . . . should be disregarded on summary judgment." *Drake v. Minn. Mining & Mfg. Co*, 134 F.3d 878, 887 (7th Cir. 1998); *accord Zilisch v. R.J. Reynolds Tobacco Co.*, 2011 U.S. Dist. LEXIS 154501, at *2–4 (W.D. Wis. Jun. 21, 2011) (Crabb, J.).

The court must review the submissions on summary judgment in light of a plaintiff's heightened standard of proof when deciding whether a reasonable factfinder could return a verdict for the non-moving party. *McLaughlin v. State Farm Mut. Auto. Ins. Co.*, 30 F.3d 861,866 (7th Cir. 1994). In light of plaintiffs' facial challenge, plaintiffs hold a heavy burden: "A facial challenge to a [statute] is, of course, the most difficult challenge to mount successfully,

since the challenger must establish that *no set of circumstances exists* under which the [statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added); *accord Doe v. Heck*, 327 F.3d 492, 528 (7th Cir. 2003). Further, the standard for summary judgment must incorporate certain canons of constitutional construction "out of respect for Congress, which we assume legislates in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). Thus, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2594 (2012) (quoting *Hooper v. California*, 155 U.S. 648, 657, (1895)); *accord Mueller v. Thompson*, 858 F. Supp. 885, 900 (W.D. Wis. 1994) (Crabb, C.J.) (quoting *Rust*, 500 U.S. at 190), *vacated on other grounds sub nom Mueller v. Reich*, 54 F.3d 438 (7th Cir. 1995), *vacated on other grounds sub nom Wisconsin v. Mueller*, 519 U.S. 1144 (1997) (Mem.).

"[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [the Court's] plain duty is to adopt that which will save the Act." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring) quoted *in Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2593; *accord Parsons v. Bedford*, 28 U.S. 433,448–49 (1830) ("No court ought, unless the terms of an act of congress render it unavoidable, to give a construction to the act which should, however unintentional, involve a violation of the constitution."); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979). Though the Court should not engage in "disingenuous evasion" to uphold a statute's constitutionality, *Rust*, 500 U.S. at 191 (quotation omitted), the Court should opt for an interpretation consistent with the Constitution "[e]ven to avoid a serious doubt" about the constitutionality of a statute. *Blodgett*, 275 U.S. at 148 (Holmes, J., concurring); *accord Mueller*, 858 F. Supp. at 900.

I. SECTION 107(2) AND ITS IMPLEMENTING REGULATIONS ARE CONSTITUTIONAL UNDER THE *LEMON* TEST.

The Establishment Clause of the First Amendment to the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. The Supreme Court "will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz v. Tax Comm'n of N.Y.C.*, 397 U.S. 664, 669 (1970). "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Id.* at 673.

To navigate the "play in the joints" for any statute challenged under the Establishment Clause for affording some benefit to religion, the typical analysis is what has become known as the *Lemon* test. First articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971), and further developed in myriad additional precedent, the *Lemon* test "remains the prevailing analytical tool for the analysis of Establishment Clause claims." *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 849 (7th Cir. 2012), *cert. denied*, 134 S. Ct. 2283 (2014) (quotation omitted). To be consistent with the Establishment Clause (1) a challenged statute must have "a secular legislative purpose;" (2) the principal or primary effect of the statute "must be one that neither advances nor inhibits religion;" and (3) the statute "must not foster 'an excessive government entanglement

with religion.'"[2] *Lemon*, 403 U.S. at 612–613 (quoting *Walz*, 397 U.S. at 674); *Elmbrook Sch. Dist.*, 687 F.3d at 849.

In applying the *Lemon* test, courts have concluded that other tax provisions that touch on religion are consistent with the Establishment Clause. *See, e.g.*, *Droz v. Comm'r*, 48 F.3d 1120, 1124–25 (9th Cir. 1995) (applying the *Lemon* test, and upholding the constitutionality of § 1402(g) against an Establishment Clause challenge); *Ballinger v. Comm'r*, 728 F.2d 1287, 1292–93 (10th Cir. 1984) (rejecting Establishment Clause challenge to § 1402(e)); *Templeton v. Comm'r*, 719 F.2d 1408, 1412 n.5 (7th Cir. 1983) (rejecting a constitutional challenge to § 1402(g) for lack of standing, but also noting that courts reaching the merits of that question had "uniformly held that this section is not unconstitutional"). Likewise, in the present case, application of the *Lemon* test makes clear that § 107(2) is consistent with the Establishment Clause.

A. The secular purpose of § 107(2) is to eliminate discrimination between religious and secular employees, and among religious employees.

On its face, § 107(2) is related to religion. But that does not end the inquiry, because a statute does not need to be "unrelated to religion" to have a secular purpose. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987). "[T]he Establishment Clause has never been so interpreted." *Id.*; *accord Texas Monthly*, 489 U.S. 1, 10 (1989) (Brennan, J., plurality opinion) (the Supreme Court has never required "that legislative categories make no explicit reference to religion"). "Rather, *Lemon*'s 'purpose' requirement aims

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[2] While the Supreme Court has occasionally discussed whether "excessive entanglement" is "a factor separate and apart from 'effect,'" or "an aspect of the inquiry into a statute's effect," *Agostini v. Felton*, 521 U.S. 203, 232-33 (1997), it is clear that purpose, effect, and entanglement remain integral to Establishment Clause jurisprudence, *Elmbrook Sch. Dist.*, 687 F.3d at 849.

at preventing the relevant governmental decisionmaker—in this case, Congress—from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Amos*, 483 U.S. at 335. There is no requirement for complete separation between church and state because "total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." *Lemon*, 403 U.S. at 614. "A statute may be motivated in part by a religious purpose and nonetheless satisfy the first criterion of *Lemon*" because the law also serves a secular purpose. *Sherman ex rel. Sherman v. Koch*, 623 F.3d 501, 507 (7th Cir. 2010). A reviewing court generally defers to the government's articulation of a secular purpose "unless it is a sham." *Id.* at 508; *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 865 (2005); *see also Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2594 ("every reasonable construction must be resorted to, in order to save a statute from unconstitutionality").

"The eyes that look to purpose belong to an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act." *McCreary County*, 545 U.S. at 862 (2005) (quotations omitted). A court may also look to the statute's "interpretation by a responsible administrative agency, . . . the historical context of the statute, and the specific sequence of events leading to passage of the statute." *Edwards v. Aguillard*, 482 U.S. 578, 594–95 (1987) (internal citations omitted); *see Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1019–21, 1028 (9th Cir. 2010); *Katcoff v. Marsh*, 755 F.2d 223, 232–35 (2d Cir. 1985); *Karlin v. Foust*, 975 F. Supp. 1177, 1210 (W.D. Wis. 1997) (Crabb, J.) *aff'd in part, rev'd in part on other grounds*, 188 F.3d 446 (7th Cir. 1999).

The secular purpose of § 107(2) should be interpreted not only in light of the Establishment Clause, but also in light of "other equally valid provisions of the Constitution,

including the Free Exercise Clause, when they are implicated." *Katcoff*, 755 F.2d at 233. Here, the additional and "equally valid" provision of the Constitution is Congress' authority to "lay and collect taxes." U.S. CONST. art. I, § 8, cl. 1. Because Congress is charged with the power to lay and collect taxes, it has two options with respect to religion and religious entities: it may ignore them completely or it may address them in a manner that navigates the space between accommodating the free exercise of religion and establishing religion. "Either course, taxation of churches or exemption, occasions some degree of involvement with religion." *Walz*, 397 U.S. at 674. The Supreme Court has emphasized that, even in Establishment Clause cases, "legislatures 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).

In the exercise of its power to lay and collect taxes, Congress has chosen to tax a minister's (and all other taxpayers') "gross income," which "means all income from whatever source derived." § 61(a). There is no exception for wages derived from an occupation as a religious leader. Section 107(2), though, provides an exception from gross income for the housing allowance that a minister receives from his employer. The secular purpose of § 107(2) is to eliminate discrimination between secular and non-secular employees, and among employees of different religious groups. Eliminating discrimination between secular and non-secular employees, and among religious employees, is a valid secular purpose for a statute and, here, is consistent with the Establishment Clause. *See Warnke v. United States*, 641 F. Supp. 1083, 1092 (E.D. Ky. 1986) ("Section 107(2) was added to equalize the disparate treatment between ministers who were provided a parsonage and those who were compensated more generously to

provide one for themselves."); *see also Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005) (finding the lack of discrimination between bona fide faiths relevant to finding valid accommodation); *Found. of Human Understanding v. United States*, 88 Fed. Cl. 203, 216 (2009) (not reaching the constitutionality of a challenged provision, but observing that "[w]hile the government may constitutionally tax the income of religious organizations and may decide not to exercise this power and grant reasonable exemptions to qualifying organizations while continuing to tax those who fail to meet these qualifications, unconstitutional discrimination may nevertheless arise if benefits granted to one religious group are denied to others of essentially the same class." (quotations and alteration omitted)); *Kaufman*, 419 F.3d at 684 (by accommodating only some religious meetings and not all (including the requested atheist group), according to the Seventh Circuit, the prison officials were "promoting the favored [religious views]" in a manner inconsistent with the Establishment Clause and the first prong of Lemon).

1. The historical context and legislative history of § 107(2) show its secular purpose of nondiscrimination.

The path of enactment of the current version of § 107(2), and its historical context, illustrate its secular purposes: (1) to eliminate tax discrimination between secular employees who received lodging for the convenience of their employer and ministers who did the same and (2) to eliminate discrimination among ministers of various faiths, not all of whom received lodging from their religious employers.

Long before there was an income tax in the United States, it was the standard ecclesiastic housing practice in Western Europe for religious organizations to provide housing for their spiritual leaders on church grounds or nearby to church grounds. (SPFF ¶¶ 18-20.); ALAN SAVIDGE, THE PARSONAGE IN ENGLAND 7–9 (1964). When American colonists, many of them Christians of some denomination, arrived in what would become the United States, they brought

this practice with them. (SPFF ¶¶ 18-22.) Among the motivating reasons for providing ministers such housing were: the need for immediate spiritual care for congregants at unpredictable times, day or night; to reinforce the faith's expectations for simple living among its clergy; to free the minister from temporal concerns to focus on spiritual work; and to facilitate quick and easy deployment of clergy. (SPFF ¶¶ 19-20.) Being able to fulfill these tasks were at the heart of a minister's job requirements. (SPFF ¶¶ 19-20.)

A minister's home was 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 State v. Erickson*, 182 N.W. 315, 319–20 (S.D. 1921); *see generally* Maurice T. Brunner, Annotation, *Taxation: Exemption of Parsonage or Residence of Minister, Priest, Rabbi, or Other Church Personnel*, 55 A.L.R.3d 356, at *10 (1974) ("Most 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."); (SPFF ¶¶ 23-24.). Recognizing that a minister's residence may be used to conduct church business, the constitutions or statutes of many states specifically exempt residences of clergy from property tax. John Witte, Jr., *Taxation of Church Property: Historical Anomaly or Valid Constitutional Practice*, 64 S. CAL L. REV. 363, 391–392 (1991). In the nineteenth and early twentieth centuries, the parsonage system was in "very wide use," especially among the most established religions like the Roman Catholic Church and Methodist Episcopal churches. (SPFF ¶¶ 25-32.)

The modern federal income tax was authorized by the ratification of the 16th Amendment to the Constitution and the first statutes providing for individual income tax were enacted in

1913. *See Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 20 (1916). Once income was to be taxed, questions arose about whether certain income would be excluded or exempt from that tax, and if so, which income. (SPFF ¶¶ 40-41.) During 1919, 1920, and 1921, the Treasury Department determined that some secular employees would be permitted to exclude employer-provided housing from their taxable income. *See generally Comm'r v. Kowalski*, 434 U.S. 77, 84–90 (1977) (describing history of tax exemptions for employer-provided housing); (SPFF ¶ 45). They included seamen living aboard ship (O.D. 265, 1 C.B. 71 (1919)); persons living in "camps" (T.D. 2992, 2 C.B. 76 (1920)); cannery workers (O.D. 814, 4 C.B. 84, 84–85 (1921)); and hospital employees (O.D. 915, 4 C.B. 85, 85–86 (1921)). These rulings began the "convenience-of-the-employer doctrine," which were supported by the rationale that the housing benefits supplied by the employer to the employee were not "compensation for services and hence not income" and/or that the employees were granted the benefit "solely because the employer's business could not function properly unless an employee was furnished that benefit on the employer's premises." *Kowalski*, 434 U.S. at 85–86; (*see also* SPFF ¶ 45.)

In 1921, however, the Department of Treasury announced that clergy would be taxed on the fair rental value of parsonages provided as living quarters, O.D. 862, 4 C.B. 85 (Apr. 1921), even though ministers traditionally resided in church-provided housing for the convenience of their employers (SPFF ¶¶ 19-20, 26-27, 29, 39, 41). Congress reversed Treasury's decision by enacting § 213(b)(11) of the Revenue Act of 1921, which provided 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." Ch. 136, 42 Stat. 227, 239. In this way, Congress eliminated the discrimination between secular employees who received lodging on their employer's premises for their employer's convenience and religious employees who received the same. It is likely that

Congress enacted § 213(b)(11) with the awareness that ministers were housed in parsonages for the convenience of their employers and in furtherance of their job duties. (SPFF ¶¶ 42-46; *see also id.* 31-39.)

The language of § 213(b)(11) was carried forward in successive revenue acts and was incorporated into the Internal Revenue Code of 1939 without substantive change. *See* Report of the Joint Committee on Internal Revenue Taxation, Vol. I at 7 (1927); Revenue Act of 1928, Pub. L. No. 562, ch. 852, § 22(b)(8), 45 Stat. 791, 798; Revenue Act of 1932, Pub. L. No. 154, ch. 209, § 22(b)(6), 47 Stat. 169, 179; Internal Revenue Code of 1939, Pub. L. No. 1, 53 Stat. 1, 10. But, at the time, less-established and less wealthy religions were not able to provide housing for their spiritual leaders; among them were denominations that employed part-time ministers and rabbis "characteristic of smaller, newer, and less affluent religious groups such as Pentecostals, evangelical churches, and independent African-American congregations." (SPFF ¶¶ 28-29, 47-56.) When churches that did not own parsonages provided their ministers with cash housing allowances in lieu of housing in kind (SPFF ¶¶ 52-54), Treasury took the position that such allowances must be included in income. *See* I.T. 1694, C.B. II-1, 79 (1923) ("the statute [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"); (SPFF ¶¶ 53). Several courts, however, rejected Treasury's position and held such allowances to be excludable. *See Williamson v. Comm'r*, 224 F.2d 377, 381 (8th Cir. 1955), *rev'g* 22 T.C. 566 (1954); *Conning v. Busey*, 127 F. Supp. 958, 959 (S.D. Ohio 1954); *MacColl v. United States*, 91 F. Supp. 721, 722 (N.D. Ill. 1950). As the Eighth Circuit stated in *Williamson*, "it was not the intent nor purpose of Congress that a house allowance in lieu of the rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel should be included in his gross

income." *Williamson*, 224 F.2d at 381; (*see also* SPFF ¶¶ 53). It was just as important to those denominations lacking a parsonage to provide housing for their ministers for the same reasons that housing a minister in a parsonage was important. (SPFF ¶¶ 48-49.)

When § 107 came into the Code in its present form in 1954, Congress added § 107(2), which allowed ministers to exclude certain "rental allowance[s]." Pub. L. No. 591, ch. 736, sec. 107, 68A Stat. 3, 32. The 1954 amendment that added Section 107(2) was expressly intended to eliminate discrimination between ministers who received housing in-kind and those who received a cash housing allowance. *See* H.R. Rep. No. 1337, at 15 (1954); S. Rep. No. 1622, at 16 (1954); *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 117 n.13 ("It is not only appropriate but realistic to presume that Congress was thoroughly familiar with [pertinent judicial] precedents . . . and that it expects its enactments to be interpreted in conformity with them." (quoting *N. Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995) (alterations omitted)); (*see also* SPFF ¶¶ 31-38, 42-46). Indeed, Congress was urged to include the housing allowance provision in the 1954 Code precisely because the Commissioner "had not acquiesced [in *MacColl*], and those ministers entitled to relief must litigate in order to get relief." *See* Forty Topics Pertaining to the General Revision of the Internal Revenue Code: Hearings Before the House Comm. on Ways and Means, 83rd Cong. at 1574 (1953) (statement of Ray G. McKennan). The House Report stated explicitly:

> 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 (1954); *accord* S. Rep. No. 1622, at 16 (1954) (making no changes to the House Report).

When Congress clarified the extent of the parsonage exclusion provided in § 107 by adding § 107(2), it simultaneously created § 119 in order to clarify the law of employer-provided lodging. Over time, Congress added still more provisions to the Internal Revenue Code to acknowledge other groups of taxpayers who have unique housing needs because of their employment and who, therefore, need not include housing benefits in their gross income. *See* §§ 134, 911, & 912. These exclusions all possess the valid secular purpose of lessening the burden of housing costs for persons whose occupations often require particular housing, rather than housing according to the individual's own free choice. Although the IRS and the Tax Court had always interpreted § 107(2) to require a limitation on amounts excludable up to the fair rental value of a minister's house, *see, e.g.*, Rev. Rul. 71-280, 1971-2 C.B. 92; *Marine v. Comm'r*, 47 T.C. 609 (1967); *Reed v. Comm'r*, 82 T.C. 208 (1984), the statutory language did not reflect that limitation until the passage of the Clergy Housing Allowance Clarification Act of 2002, P.L. 107-181 (2002).

The legislative history for the Clergy Housing Allowance Clarification Act of 2002 confirms the congressional purpose for § 107(2): to prevent discrimination and preserve neutrality. 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." Clergy Housing Allowance Clarification Act, H.R. 4156, 107th Cong. § 2(a)(4) (as introduced April 10, 2002).

Today, both provisions of § 107 are necessary because different religions address their clergy housing needs in different ways in light of the changing culture and demographics of the United States. (SPFF ¶¶ 48-87.) It is still the case that more established and wealthier churches,

or those with a long history of parsonage, are more likely to have on-site or nearby church-owned property for their clergy. (SPFF ¶¶ 25-27, 31, 47, 50-51, 56, 60.) In many rural or high-priced areas of the country, a church-owned home might be the only way that a minister can live near her congregation, especially in light of the generally low wages for ministers. (SPFF ¶¶ 74-80.) In other situations, a housing allowance is more suited to the needs of the church because, for example, it can only afford a part-time minister (SPFF ¶¶ 29-34, 47, 50), the congregation is newer and has not yet determined where to establish a place of worship (but still needs to support its minister) (SPFF ¶¶ 57-59, 84-85), or to eliminate some of the temporal concerns of its spiritual leader (SPFF ¶¶ 63-68, 81-83, 86).

Therefore, § 107(2) has the permissible secular purpose of eliminating government discrimination between secular and non-secular employees and among religious employees, and furthers one of the core purposes of the Establishment Clause. *Cf. Fowler v. Rhode Island*, 345 U.S. 67, 69–70 (1953) (state statute under which minister-appellant was arrested held to violate the Establishment Clause for preferring one religion over another); *Larson v. Valente*, 456 U.S. 228, 246 & n.23 (The "principle of denominational neutrality" applies to legislation that may "effectively" distinguish between "well-established churches" that own parsonages and "churches which are new" that do not.).[3] For the same reasons, § 107(2) "remov[ed] a significant state-imposed deterrent to the free exercise of religion," *see Texas Monthly*, 489 U.S. at 15, because it "lift[ed] from a nonprofit activity of a religious organization the burden of demonstrating that the particular nonprofit activity is religious as well as the burden of refraining

[3] In *Freedom From Religion Foundation v. Lew*, this Court opined that if a religion has no ministers then § 107(2) discriminates against those religions. 983 F. Supp. 2d 1051, 1068, *vacated and remanded*, 773 F.3d 815 (7th Cir. 2014). But if a religion has no ministers then there is no taxation of a minister's housing that needs to be accommodated *vis-à-vis* secular employees or ministers of another religion.

from discriminating on the basis of religion." *Amos*, 483 U.S. at 348–349 (O'Connor, J., concurring in judgment).

2. The context of the current administration of § 107(2) and other tax statutes regarding housing benefits demonstrates a secular purpose of nondiscrimination.

There are other provisions of the Internal Revenue Code that, like § 107(2), acknowledge groups of taxpayers who have unique housing needs because of their employment. These statutes provide a similar income tax exclusion as § 107 does for in-kind housing provided by an employer or for a housing allowance. *See* §§ 119, 134, 280A, 911, & 912. The provisions that exclude housing allowances from gross income reflect the congressional decision that, for certain job-related reasons, various housing allowances are necessary, even though the employee does not receive the lodging in-kind, in order to eliminate discrimination between similarly situated groups.

Section 119 excludes employer-provided lodging from gross income. Under § 119, an exclusion is available for the value of housing provided on the "business premises," when the housing is provided "at the convenience of employer," and if the housing is provided "as a condition of employment" such that the employee is "required to accept the lodging in order to enable him properly to perform the duties of his employment" *See* 26 CFR § 1.119-1(b)-(c). All taxpayers, regardless of profession, may qualify for an exclusion from gross income of the value of employer-provided lodging, so long as the taxpayer meets those criteria. Further, 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).

Section 134 excludes from gross income "any qualified military benefit," meaning "any allowance or in-kind benefit (other than personal use of a vehicle)," which is received because of

the taxpayer's status as a member of the uniformed services. One excludable allowance is the "basic allowance for housing" authorized in 37 U.S.C. § 403, which varies according to pay grade, dependency status, and geographic location. The basic housing allowance is to furnish housing for members of the military and their families when they are not housed on government property. *See Basic Allowance for Housing (BAH)*, DEF. TRAVEL MGMT. OFF., http://www.defensetravel.dod.mil/site/bah.cfm (last visited March 8, 2017).

In addition, § 912 excludes from gross income, among other things, certain "foreign area allowances" paid to civilian officers and employees of the Foreign Service, the CIA, and other agencies, as well as Peace Corps allowances. Although the statute itself does not explicitly mention housing, the Overseas Differential and Allowances Act (ODAA), codified in § 912(1)(C), is the main vehicle for tax-exempt housing allowances for government workers overseas. *See, e.g.*, *Induni v. Comm'r*, 98 T.C. 618 (1992), *aff'd*, 990 F.2d 53 (2d Cir. 1993) (INS employee); *Anderson v. United States*, 16 Cl. Ct. 530 (1989), *aff'd*, 929 F.2d 648 (Fed. Cir. 1991) (civilian teachers in overseas military schools); *Bell v. United States*, 1977 U.S. Ct. Cl. LEXIS 586 (Ct. Cl. 1977) (Foreign Service officer).

The legislative history of the ODAA reflects an intent to equalize the treatment afforded to certain federal employees in foreign countries who were provided free housing, and those who were not, just as § 107(2) was intended to remove discrimination against ministers who receive a cash allowance instead of a parsonage. *See Anderson*, 16 Cl. Ct. at 534–535. The purpose of the ODAA was "to improve and strengthen government overseas activities by establishing a uniform system for compensating all government employees in overseas posts irrespective of the agency by which they are employed" and to "provide uniformity of treatment for all overseas employees

to the extent justified by relative conditions of employment." S. Rep. No. 1647, 86th Cong., 2d Sess., 3338, n.7.

Section 911 permits a United States citizen or resident living abroad to exclude from her gross taxable income a portion of her foreign housing expenses. § 911(a)(2) & (c)(4). The total exclusion allowed is the amount of her foreign housing expenses for the year, minus a base amount. § 911(c)(1). The exclusion is limited to a maximum cap, which varies depending on the location of the taxpayer's foreign home. § 911(c)(2). In the event that the taxpayer maintains more than one home outside the United States, one for herself and one for her spouse and dependents, she may claim the foreign housing exclusion for both homes if her family does not reside with her due to "living conditions which are dangerous, unhealthful, or otherwise adverse." § 911(c)(3)(B)(ii).

Thus, § 107(2) is part of an overall effort to recognize situations – all worthy, in the view of Congress – in which the particular housing requirements of a particular group of employees call for a particular tax exclusion or deduction arising out of the nature of their job duties. These exclusions lessen the burden of housing costs for persons whose occupations often require particular housing for job-related reasons, rather than housing according to the individual's own free choice. Section 107 adapts those provisions to the unique church-minister context, to avoid the entanglement problems that could arise if ministers had to rely on provisions other than § 107 to exclude or deduct the value of church-provided housing. Therefore, § 107 does not "burden[] nonbeneficiaries markedly" because it is just one of the provisions in the Internal Revenue Code

that provides an exclusion from gross income or a tax deduction for employees who have unique housing needs because of their employment.[4] *Texas Monthly*, 489 U.S. at 15.

The contextual evidence shows that the secular purpose of § 107(2) is not to advance religion, but to fit within the mold of other provisions that address housing realities for different groups of taxpayers. For all of these reasons, § 107(2) meets the first prong of the *Lemon* test: it has a secular purpose. Plaintiffs can show no facts to demonstrate otherwise.

B. The primary effect of § 107(2) does not advance or inhibit religion.

A law does not have the primary effect of advancing religion merely because "religious groups [are] better able to advance their purposes on account of [the law]." *Amos*, 483 U.S. at 336 (citations omitted); *accord Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 719 (1994) (O'Connor, J., concurring in part and concurring in judgment); *Bowen v. Kendrick*, 487 U.S. 589, 607 (1988); *see also Zorach v. Clauson*, 343 U.S. 306, 313-15 (1952). Rather, the test is whether "the *government itself* has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337; *accord Cohen v. City of Des Plaines*, 8 F.3d 484, 491 (7th Cir. 1993). "Under this prong, the question is: irrespective of government's actual purpose, whether the practice under review in fact conveys a message of endorsement or disapproval."[5] *Sherman*, 623 F.3d at 517 (quotation omitted). As explained below, to 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), § 107(2) is a tax exemption, not a direct subsidy,

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[4] In addition, §107 does not burden nonbeneficiaries because it is an income tax exclusion and does not spend taxpayer money in support of religion. *See infra* § I.B.1.a.

[5] Although some courts identify the "endorsement test" as distinct from the *Lemon* test, the Seventh Circuit appears to include it in the "effects" prong of *Lemon*. *See Elmbrook Sch. Dist.*, 687 F.3d at 849–50; *Sherman*, 623 F.3d at 517.

and it was designed not only to eliminate discrimination among religions, but also to further separate church and state.

1. The government does not advance religion through § 107(2).

a. A tax exclusion like § 107(2) does not "advance religion" because it leaves religion alone.

Section 107(2) permits a "minister" to exclude from gross income (and therefore exclude from federal income taxation) a housing allowance provided as part of his or her compensation by an employer. It does not spend taxpayer dollars in support of religion or religious entities. The fact that § 107(2) involves a tax exclusion, rather than the granting of a direct subsidy from government to religion, is crucial to an understanding of its constitutional soundness. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 590 (1997) (for "Establishment Clause" purposes "there is a constitutionally significant difference between subsidies and tax exemptions"); *see* Douglas Laycock, *Towards a General Theory of the Religion Clauses*, 81 COLUM. L. REV. 1373, 1416 (1981) (Government "does not . . . establish religion by leaving it alone."). A line of cases going back at least 90 years instructs that government may, consistent with the Constitution, refrain from imposing a burden on religion through a regulatory or tax exemption, even though the scope of the provision is religion-specific. In *Arver v. United States*, the Supreme Court said that "the unsoundness" of an Establishment Clause challenge to draft exemptions for ministers and theological students was "too apparent" to require further comment. 245 U.S. 366, 389–390 (1918). More than 60 years ago, in *Zorach v. Clauson*, the Court held that the religion-specific exemption did not offend the First Amendment, because the Establishment Clause did not require "that the government show a callous indifference to religious groups." 343 U.S. at 314. To do so "would be preferring those who believe in no religion over those who do believe." *Id.*

The Supreme Court last examined a tax exemption granted on the basis of an entity's religious status in *Walz*, holding that "[t]he legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion," and thus "is neither sponsorship nor hostility." 397 U.S. at 672. The New York statute did not attempt to establish religion, but "simply spar[ed] the exercise of religion from the burden of property taxation levied on private profit institutions." *Id.* at 673. The fact that the exemption in *Walz* also applied to nonreligious organizations was not dispositive for the majority, which found it "unnecessary to justify" the exemption for religious organizations "on the social welfare services or 'good works'" they might provide. *Id.* at 674. Indeed, to have rested the exemption on a "good works" rationale would have invited excessive entanglement with religion. *Id.*

In a concurring opinion joined by Justices Marshall and Stevens, Justice Brennan focused on the distinction between tax exemptions and "governmental subsidy of churches," which "would, of course, constitute impermissible state involvement with religion." *Id.* at 690; *see also Lemon*, 403 U.S at 625. He explained that a "subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole," whereas an exemption "assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes." *Walz*, 397 U.S. at 690. Thus "[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." *Id.* at 675; *see also Elmbrook Sch. Dist.*, 687 F.3d at 869 (Easterbrook, J., dissenting) ("The actual Establishment Clause bans laws respecting the *establishment* of religion[,]" which, among other things, is "taxation for the support of a church [or] the employment of clergy on the public payroll."). While the Court in *Regan v. Taxation With Representation of Washington* pointed out

that tax exemption is similar to a subsidy, it quoted *Walz* to clarify that it did not mean they were identical in all respects. 461 U.S. 540, 544 n.5 (1983). Consequently, "[t]here is no genuine nexus between tax exemption and establishment of religion." *Walz*, 397 U.S. at 675; *Ariz. Christian Sch. Tuition Org. v. Winn* (*ACSTO*), 563 U.S. 125, 142 (2011) (remarking that tax credits do not implicate individual taxpayers in sectarian activities).

As the Supreme Court went on to explain in *ACSTO*, tax benefits, including the tax credits at issue in that case, are qualitatively different from government spending for Establishment Clause purposes. 563 U.S. at 142–143 ("The distinction between governmental expenditures and tax credits refutes respondents' assertion of standing. . . . The STO tax credit is not tantamount to a religious tax or to a tithe and does not visit the injury identified in *Flast*."). "When the government declines to impose a tax . . . there is no such connection between dissenting taxpayer and alleged establishment," and therefore no injury to a taxpayer. *Id.* at 142. This is so "even if one assumes that an expenditure or tax benefit depletes the government's coffers." *Id.* at 136. [6]

b. Section 107(2) does not advance religion because it is unlikely to create new incentives to religious activity.

Given the specialized professional qualifications and job duties on which eligibility for the exclusion under § 107(2) depends, *see* 26 CFR §§ 1.107-1(a)-(b), 1.1402(c), it is unlikely that § 107(2), if properly applied, creates new incentives to religious activity. (*See* SPFF ¶¶ 20.d., 26-27, 64, 78.) As discussed above, tax exclusions for employer-provided housing are available to a

[6] Language in *Texas Monthly* conflating a sales tax exemption with a "subsidy," 489 U.S. at 5, is inconsistent with this precedent, *see Camps Newfound/Owatonna*, 520 U.S. at 590 (for "Establishment Clause" purposes "there is a constitutionally significant difference between subsidies and tax exemptions"), and should not control.

variety of professions, and there is no evidence to suggest that the advancement of religion is the primary effect of excluding that form of income for "ministers."

In addition, meeting the relevant requirements to qualify for an exclusion under § 107(2) would render a minister responsible for paying self-employment taxes, including on his parsonage or housing allowance, rather than splitting the employment tax burden with his or her employer as other employees do, and thereby possibly increasing his or her overall tax burden, or at least substantially reducing the tax savings from § 107(2). § 1402(a)(8). Courts have upheld regulatory exemptions implicating far more plausible incentives for religious activities than the housing allowance exclusion involved here. *See Cutter*, 544 U.S. at 725 & n.13 (acknowledging the argument that "prison gangs use religious activity to cloak their illicit and often violent conduct," but nonetheless upholding religious accommodations against facial challenge); *Kiryas Joel*, 512 U.S. at 725 (Kennedy, J., concurring in judgment) (discussing draft exemption upheld in *Gillette v. United States*, 401 U.S. 437 (1971)); *Amos*, 483 U.S. at 337 (exemption from civil rights staffing constraints); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144–145 (1987) (unemployment benefits); *Zorach*, 343 U.S. at 312, 315 (time off from public school for religious education).

2. Section 107(2) does not inhibit religion.

As described above, § 107(2) does not inhibit religion generally or any one religion in particular. Similarly, the administration of § 107(2) does not inhibit religion. Its intent and its effect are to eliminate discrimination between secular and non-secular employees and among employees of different religions. The elimination of such discrimination is a valid secular purpose and effect. *See* Section I.A., *supra.*

3. The government is not endorsing or disapproving of religion through § 107(2).

Section 107(2) does not "convey[] a message of endorsement or disapproval" of religion. *Sherman*, 623 F.3d at 517. Courts have used the "reasonable observer" test to evaluate what message the government is conveying. *Freedom from Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1, 11 (1st Cir. 2010); *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1158–59 (10th Cir. 2010), *amended and superseded sum nom Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010); *see also Elmbrook Sch. Dist.*, 687 F.3d at 850 (To evaluate the endorsement test in a religious display case "we must assess the totality of the circumstances surrounding the display to determine whether a reasonable person would believe that the display amounts to an endorsement of religion." (quotation and alteration omitted)). It follows from the history and context of the statute described above that the government is neither endorsing nor disapproving of religion through § 107(2). Congress exercised its power to lay and collect taxes upon ministers in a manner consistent with the Establishment Clause.

Thus, § 107(2) satisfies the second prong of the *Lemon* test: its primary effect is neither to advance nor inhibit religion. Plaintiffs can show no facts to demonstrate otherwise.

C. Section 107(2) does not foster excessive government entanglement with religion.

"Either course, taxation of churches or exemption, occasions some degree of involvement with religion." *Walz*, 397 U.S. at 674. Congress, pursuant to its authority to "lay and collect tax," U.S. CONST. art. I, § 8, cl. 1, and mindful of its obligation to "make no law respecting the establishment of religion," U.S. CONST. amend. I., determined not to exempt religion and religious activity from all contact with areas of federal taxation. Instead, Congress enacted § 107, § 1402, and numerous other tax statutes that touch on religion. While these statutes require some administrative contact with religion, this contact does not constitute "excessive entanglement,"

and is consistent with the Constitution. *Walz*, 397 U.S. at 676. (Avoiding excessive entanglement "cannot mean absence of all contact" between government and religion.). "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon*, 403 U.S. at 614.

To determine whether the "line of separation" has been crossed and the government entanglement with religion is "excessive," the court must "examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Id.* at 615. The court must also determine whether the relationship between government and religion "is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement" *Walz*, 397 U.S. at 675. "The test is inescapably one of degree." *Id.* at 674.

Federal taxing authorities necessarily have some contact with religion because "gross income means all income from whatever source derived." § 61(a). There is no exception for income derived from an occupation as a religious leader. But this contact between the government and religion, or religious persons, does not create an unconstitutional "establishment" of religion through "excessive entanglement." At least one court has already held that the administration of § 107 does not give rise to excessive entanglement with religion when considering whether a taxpayer qualified for the exclusion of a housing allowance under § 107(2). *Flowers v. United States*, 1981 U.S. Dist. LEXIS 16758, at *18 (N.D. Tex. Nov. 25, 1981) ("The Court finds that the requirements of section 107 do not create the substantial entanglement of the kind which the Supreme Court was referring to in *Walz* . . . ."); *see also Johnson-Bey v. Lane*, 863 F.2d 1308, 1312 (7th Cir. 1988) ("Patients in public hospitals,

members of the armed forces in some circumstances . . . —and prisoners—have restricted or even no access to religious services unless government takes an active role in supplying those services. . . . The religious establishments that result are minor and seem consistent with, and indeed required by, the overall purpose of the First Amendment's religion clauses, which is to promote religious liberty."); *Carter v. Broadlawns Med. Ctr.*, 857 F.2d 448, 456–57 (8th Cir. 1988); *Katcoff*, 755 F.2d at 231–32.

The hallmark of impermissible government entanglement is when a challenged statute or practice requires "intrusive judgments regarding contested questions of religious belief or practice." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1261 (10th Cir. 2008). Thus, where government is required to make determinations regarding the "sacredness," validity, or "religiousness" of a religious belief, entanglement may become excessive.

> The anti-entanglement rule originated in the context of education, changing with re-interpretations of the famous doctrine of *Lemon v. Kurtzman*, 403 U.S. 602, (1971), although it has migrated to other contexts. *See, e.g.*, *Rweyemamu v. Cote*, 520 F.3d 198, 208–09 (2d Cir. 2008) (Title VII of the Civil Rights Act unconstitutional as applied to ordained priest); *Schleicher v. Salvation Army*, 518 F.3d 472, 474, 477–78 (7th Cir. 2008) (Fair Labor Standards Act presumptively excepts "clerical personnel"). At first the prohibition on entanglements was formulated as an independent requirement of the Establishment Clause, later as one element of determining the "effect" of the law in advancing or inhibiting religion. *Agostini*, 521 U.S. at 232–33; *see also Zelman v. Simmons-Harris*, 536 U.S. 639, 668–69 (2002) (O'Connor, J., concurring) (discussing history of the "entanglement inquiry."). Properly understood, the doctrine protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices, whether as a condition to receiving benefits (as in *Lemon*) or as a basis for regulation or exclusion from benefits (as here). *See* Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 397 (1984).

Id. (internal parallel citations omitted).

By contrast, when "[t]he institution, rather than the State," determines what is devotional, *Locke v. Davey*, 540 U.S. 712, 717 (2004), there is no constitutionally impermissible entanglement. "This avoided the intrusiveness problem; the State made no contentious religious judgments, but simply deferred to the self-evaluation of the affected institutions." *Colo. Christian Univ.*, 534 F.3d at 1266 (discussing *Locke*, 540 U.S. at 717). The use of "neutral, objective criteria rather than criteria that involve the evaluation of contested religious questions and practices" does not implicate the same entanglement problems. *Id.*

"Nor is it constitutionally problematic to inquire into whether a belief is 'religious' in nature and sincerely held." *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 640 (W.D. Va. 2010) (citing *Benning v. Georgia*, 391 F.3d 1299, 1313 (11th Cir. 2004), *aff'd sub nom Liberty Univ., Inc. v. Lew*, 733 F.3d 72 (4th Cir. 2013); *Sutton v. Rasheed*, 323 F.3d 236, 250–51 (3d Cir. 2003)) (holding that courts and the government may inquire into the existence of religious beliefs or practices); *accord Jones v. Bradley*, 590 F.2d 294, 295 (9th Cir. 1979) ("It is clearly impermissible to inquire into the 'truth' of religious doctrines or beliefs. There is no prohibition, however, against ruling whether or not a set of beliefs constitutes a religion when deciding if First Amendment protections apply.") (citing *United States v. Ballard*, 322 U.S. 78 (1944)). "[C]ivil authorities are not barred from settling disputes implicating the secular side of church affairs as long as they rely on neutral principles of law." *Church of Scientology of Cal. v. Comm'r*, 83 T.C. 381, 462 (1984) (citing *Jones v. Wolf*, 443 U.S. 595, 602–603 (1979); *Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970)).

Rather than promoting "official and continuing surveillance" of religious entities, *Walz*, 397 U.S. at 675, § 107(2) avoids excessive entanglement with religion. The IRS uses

permissible, neutral, and objective criteria to ensure the requirements of § 107(2) are met. (*See* SPFF ¶¶ 88-107.) The IRS does not, however, analyze the merits of a taxpayer's religious beliefs, (*see* SPFF ¶¶ 108-114), which minimizes entanglement and maintains a government policy of neutrality toward religion. *Zorach*, 343 U.S. at 314. Because the IRS does not attempt to resolve any issues of religious doctrine or responsibility, but rather seeks to verify an individual's position according to the religion's self-evaluated tenets and practices, it is like the approach taken by the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC* to determine whether a person was a "minister" who fell under the ministerial exception to employment discrimination suits. 565 U.S. 171, 190–192 (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 190. 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 188–190. Indeed, the U.S. Court of Appeals the Seventh Circuit 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).

Since a minister "will personify" his church, *Hosanna-Tabor*, 565 U.S. at 188, his residence is traditionally more than mere housing. (SPFF ¶¶ 23-39.) 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." *Glass*, 497 P.2d at 760.

For purposes of § 107, the IRS evaluates whether a taxpayer may be a "minister" by reference to the five factors articulated in § 1402(c), 26 CFR § 1.1402(c)-5, and controlling legal precedent.[7] (SPFF ¶¶ 88-107.) This test respects distinctions already made by taxpayers' respective religious denominations, and does not scrutinize the content of any religious beliefs, theistic or otherwise. For example, to show that the taxpayer has been ordained, commissioned, or licensed, the taxpayer must show "a copy of the certificate (or, if [he] did not receive one, a letter from the governing body of [his] church) that establishes [his] status as an ordained, commissioned, or licensed minister." (SPFF ¶¶ 100.) If the taxpayer does not have such a certificate, the individual may demonstrate that, under "the tenets and practices of [his] religious denomination or church" he "performs substantially all the religious functions" of an ordained minister. (SPFF ¶¶ 102.) Thus, the IRS seeks only to confirm that the individual engages in the requisite job tasks of the denomination.

The IRS does not consider "the content or sources of a doctrine which is alleged to constitute a particular religion" and "make[s] no attempt to evaluate the content of whatever doctrine a particular organization claims is religious." (SPFF ¶¶ 112.) Specifically with respect to the issue of the validity of religious belief, the IRS "may not pass judgment on the merits of the applicant's asserted religious belief" or require an organization claiming tax-exempt status as a church "to prove 'the validity of the religious doctrines or beliefs of the applicant or its members.'" (SPFF ¶¶ 113.)

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[7] Section 1.107-1 provides that the rules in § 1.1402(c)-(5) will be applicable to determinations that the home or rental allowance excluded is provided as remuneration for services which are ordinarily the duties of a minister.

The plaintiffs' experience in this case demonstrates that no government "surveillance" or "monitoring" is required to evaluate whether a taxpayer is a "minister" for purposes of § 107. Here, plaintiffs' only interaction with the IRS consists of their submission of amended tax returns along with a request for a refund of income taxes paid on their housing allowances. (SPFF ¶¶ 1-8, 10-13.) In turn, the IRS either denied the requests or took no action. (SPFF ¶¶ 9, 14.) These interactions are hardly the type of "intrusive judgments," *Colo. Christian Univ. v. Weaver*, 534 F.3d at 1261, or "continuing surveillance," *Walz*, 397 U.S. at 675, that constitute impermissible government entanglement. (*See also* SPFF ¶¶ 88-107.)

Further, the existence of § 107(2) itself avoids problems of entanglement between church and state that could result from administering the convenience-of-the-employer doctrine under statutes like §§ 119 or 280A 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"); Clergy Housing Allowance Clarification Act, H.R. 4156, 107th Cong. § 2(a)(3), (5) (as introduced April 10, 2002) (§ 107 was 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)).

Without § 107, ministers who are furnished parsonages in kind could rely on the 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 deduction for housing used for the employer's business and convenience. §§ 162, 280A(c)(1);

I.T. 1694. But, absent § 107, such claims would raise issues regarding the church's "convenience," the scope of the church's "business premises," the terms of the minister's employment, and other investigative questions to determine the merits of the claimed exclusion or deduction. 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);[8] *see* Martha M. Legg, *Excluding Parsonages from Taxation: Declaring a Victor in the Duel between Caesar & the First Amendment*, 10 GEORGETOWN J. OF LAW & PUBLIC POLICY 269, 292 (2012) (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"); Dean T. Barham, 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 "requir[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. Comm'r*, 490 U.S. 680, 697 (1989) (citation omitted). By obviating the resolution of such questions, § 107(2) has a salutary effect: the statute removes the potential for entanglement by eliminating the intrusive inquiries that could arise if ministers were forced to rely upon § 119 or § 280A(c)(1). *Cf. Hosanna-Tabor*, 565 U.S. at 190-92.

[8] 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.

As a result, there is no dispute of material fact that, as applied to plaintiffs, the administration of § 107(2) does not result in excessive entanglement between government and religion. In addition, there is no dispute of material fact that the administration of § 107(2) does not result in excessive entanglement between government and religion in every situation, *see Salerno*, 481 U.S. at 745, because plaintiffs have made no factual showing whatsoever on the issue. Accordingly, § 107(2) meets the third prong of the *Lemon* test: it does not foster excessive government entanglement with religion.

D. *Texas Monthly* is distinguishable and should not control the outcome of this case.

In *Freedom From Religion Foundation v. Lew*, this Court concluded that § 107(2) violates the Establishment Clause under *Texas Monthly 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." 983 F. Supp. 2d 1051, 1053 (W.D. Wis. 2013), *vacated and remanded*, 773 F.3d 815 (7th Cir. 2014). In *Texas Monthly*, the Supreme Court addressed a state sales-tax exemption for periodicals distributed by a "religious faith" that promoted the "teaching 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). But *Texas Monthly* is distinguishable and should not control.

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(2) 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(2)'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, *Excluding Parsonages from Taxation: Declaring a Victor in the Duel between Caesar & the First Amendment*, 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," *Freedom from Religion*, 983 F. Supp. 2d at 1053, 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." *Id.*

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.

II. SECTION 107(2) DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

Plaintiffs attempt to articulate two distinct claims in their Amended Complaint: one under the Establishment Clause and one under the Due Process Clause for violation of their equal protection rights. (Doc. 1 ¶ 1; *id.*, Prayer for Relief, ¶ A.) But their equal protection claim adds nothing to their Establishment Clause claim. *See World Outreach Conf. Ctr. v. City of Chi.*, 591 F.3d 531, 534 (7th Cir. 2009). Even when challenged under equal protection, the Establishment Clause analysis is proper where the statute at issue "afford[s] a uniform benefit to all religions" and does not discriminate among them. *Amos*, 483 U.S. at 338–39; *accord Locke*, 540 U.S. at 720 n.3; *Larson*, 456 U.S. at 252; *see World Outreach Conf. Ctr.*, 591 F.3d at 534; *Conyers v. Abitz*, 416 F.3d 580, 586 (7th Cir. 2005) (holding that a plaintiff's "free-exercise claim arises under the First Amendment and gains nothing by attracting additional constitutional labels" like equal protection); *Eulitt ex rel. Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 354 (1st Cir. 2004).

A statute that is consistent with the Establishment Clause receives rational basis scrutiny in the equal protection analysis. *Locke*, 540 U.S. at 720 n.3; *St. John's United Church of Christ v. City of Chi.*, 502 F.3d 616, 638 (7th Cir. 2007). Because § 107(2) is consistent with the Establishment Clause, the only remaining inquiry for plaintiffs' equal protection claim is "whether Congress has chosen a rational classification to further a legitimate end." *Amos*, 483 U.S. at 339; *see also Locke*, 540 U.S. at 720 n.3; *St. John's United Church of Christ*, 502 F.3d at 638.

As described thoroughly above, § 107(2) is rationally related to the legitimate purpose of eliminating discrimination between secular and non-secular employees required by their unique job-related circumstances to obtain specific housing and to eliminating discrimination between religions, all while limiting government contact with religion to objectively verifiable

information that does not inquire into the merits of the professed religious tenets. *See Templeton*, 719 F.2d at 1414 (§ 1402(e) and (g) are rationally related to Congress's intent to accommodate particular religious beliefs with an exemption from the requirement of paying Social Security tax). Therefore, § 107(2) passes the rational scrutiny test. Plaintiffs have no facts to show that its existence or the manner in which it is administered violates their equal protection rights.

III. THE COURT SHOULD ENTER SUMMARY JUDGMENT ON PLAINTIFFS' REMAINING CLAIMS FOR RELIEF.[9]

Deductions and exclusions from tax are matters of legislative grace and the burden of clearly showing the right to a claimed deduction or exclusion is on the taxpayer. *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440 (1934). To determine whether a taxpayer qualifies as a "minister of the gospel" to claim the exclusion from gross income in § 107, courts analyze five factors. *See Knight v. Comm'r*, 92 T.C. 199, 204–05 (Tax 1989); *Wingo v. Comm'r*, 89 T.C. 922, 934–37 (Tax 1987); *see also* § 1402(c), 26 C.F.R. § 1.1402(c)-5. Those factors include whether the individual administers sacerdotal functions; conducts worship services; performs services in the control, conduct and maintenance of a religious organization; is considered a spiritual leader by his or her religious body; and is ordained, licensed or commissioned. *Id.*

Here, there is no dispute that none of the factors are present. Indeed, in their complaint in this case, plaintiffs admit that they "are not religious clergy." (SPFF ¶ 15.) Likewise, in their amended tax returns, plaintiffs' explained that they are "not clergy and our employer is not a church, but we think it is unfair that ministers can exclude housing while we cannot." (SPFF ¶ 16; *see also id.* ¶ 17.) On these facts, as this Court previously concluded, "there is no plausible

[9] In their complaint, plaintiffs have not specifically requested a refund of income taxes paid on housing allowances received, but their request for "such further relief as the Court deems just and equitable," (Doc. 1, Prayer for Relief, ¶ D), could be construed as such a request.

argument that the individual plaintiffs could qualify for an exemption as 'ministers of the gospel.'" *Freedom from Religion*, 983 F. Supp. 2d at 1055–56. The same result should obtain here, and the Court should enter summary judgment in defendants' favor on plaintiffs' remaining claims. *See Kirk v. Comm'r*, 425 F.2d 492, 495 (D.C. Cir. 1970) ("It was expressly stipulated that Kirk was not a 'minister of the gospel'. Appellants accordingly are not entitled to the benefit of the exclusion.").

CONCLUSION

For all the foregoing reasons, the defendants' motion for summary judgment should be granted.

Dated: March 8, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on March 8, 2017, service of the foregoing BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT was made upon all parties by filing it with the Clerk of Court using the CM/ECF system.

/s/ *Richard G. Rose*
RICHARD G. ROSE