No.14-1152

IN THE
United States Court of Appeals
FOR THE SEVENTH CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, INC.,
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 United States District Court
for the Western District of Wisconsin,
Case No 11-CV-0626
The Honorable Judge Barbara B. Crabb

BRIEF OF THE CENTER FOR INQUIRY AND THE AMERICAN HUMANIST ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Both the Center for Inquiry and the American Humanist Associations are non-profit corporations, and have been granted 510(c)(3) status by the IRS. Neither has a parent company nor have they issued stock.

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STATEMENT OF INTEREST[1]

This *amici curiae* brief in support of the Freedom From Religion Foundation, Inc. is being filed on behalf of the Center for Inquiry ("CFI") and the American Humanist Association ("AHA").

CFI is a nonprofit educational organization dedicated to promoting and defending reason, science, and freedom of inquiry. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of church and state is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy.

AHA is a national nonprofit organization that advocates for the rights and viewpoints of humanists. Founded in 1941, its work is extended through more than 175 local chapters and affiliates across America. Humanism is a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our

[1] Appellants have granted consent to the filing of this *amicus* brief; this written consent is attached as Exhibit A. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity. The mission of AHA's legal center is to defend the constitutional mandate of separation of church and state.

The granting of tax exemptions to the employees of religious groups from the tax code as applied to all other employees at issue in this case implicates *amici*'s core humanist and secular interests in the separation of church and state.

SUMMARY OF ARGUMENT

Section 107(2) of the Internal Revenue Code ("the parsonage exemption") excludes from a minister of the gospel's gross income "the rental allowance paid to him as part of his compensation" up to the level of the "fair rental value of the home, including furnishings and appurtenances… plus the cost of utilities." 26 U.S.C. § 107(2). If the I.R.S. determines a person is a minister, his religious employer may pay him a housing allowance which is tax free. If this allowance is used to purchase a home, the minister of the gospel may claim a mortgage interest deduction, providing a further boost to his income, despite not paying the mortgage with taxable income.

§ 107(2) is facially unconstitutional as a violation of the First Amendment to the Constitution of the United States. It provides a significant financial benefit available only to certain employees based purely on their religious status. Religious organizations which do not employ "ministers of the gospel," *id.*, may not offer this benefit. Non-religious employers, even if identical in every other way to a church, may not offer this benefit. The law therefore discriminates "between religion and religion, and between religion and non-religion," *Epperson v. Arkansas*, 392 U.S. 97, 104 (1968), the very heart of the Establishment Clause.

Using the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as the District Court did, § 107(2) has no secular purpose, has the primary effect of advancing religion, and fosters an excessive entanglement with religion. *Id.* at 612-13. The tax exemption at question is not required under the Free Exercise Clause, as the Supreme Court has long made clear that taxing religious employees is constitutionally permissible. *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943). While a tax benefit to religion may be permissible when it is part of a scheme benefitting a wide group of non-profit entities, *Walz v. Tax Com. Of New York*, 397 U.S. 664, 673 (1970), a

tax break granted only to religion "falls afoul of the Establishment Clause." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 5 (1989).

The defenses of § 107(2) advanced by appellants and multiple religious *amici* are fundamentally flawed. The elimination of § 107(2) would not alter the situation of a church unless it decides it will, as a result, increase the pay it offers to its ministers. When viewed in this light, § 107(2) is an unconstitutional subsidy – its central effect is to enable a church to pay ministers of the gospel a lower salary than comparable secular employees (or comparable employees of non-ministerial religions) and have the government, through higher taxes on other citizens, make up the difference.

Appellants, and the religious groups that filed *amicus* briefs, argue that § 107(2) serves to remove discrimination against religion. This is false. Without § 107(2), ministers of the gospel would be able to file for housing-based tax exemptions under 26 U.S.C. § 119, like all other employees. It defies reason to claim that requiring ministers to obey the same rules as other employees could be seen as discriminatory. Appellants continue to argue that § 107(2) removes discrimination between different religious groups. Even if this were the case, it would not save the

provision. It is not a constitutionally valid role of the government to seek to level out financial or other differences between churches. Where a church's internal doctrine creates a financial burden under a neutral tax provision, it is not the government's role to provide compensation. *Cf. Hernandez v. Comm'r*, 490 U.S. 680 (1988).

Appellants' case then rests upon a single remaining claim – that § 107(2) has the secular purpose of avoiding entanglement in religious affairs. As the facts demonstrate, this is far from the case. At best, the parsonage exemption substitutes one form of entanglement for another. Instead of requiring the IRS to determine whether a minister qualifies, like all other employees, under § 119, it requires the IRS to determine if a given employee is a minister of the gospel under § 107(2), a task which has burdened courts ever since the exemption was enacted. *E.g. Colbert v. Comm'r*, 61 T.C. 449 (1974). At worst, the parsonage exemption increases the level of entanglement between church and state. When the IRS studies an exemption under § 119, it looks at the actions of an individual. When it determines if a deduction is permissible under § 107(2), it is required to look at the internal workings of the church itself, examining its creed, to determine if the employee is a qualifying minister of the gospel.

Finally, even if benefiting certain religious groups over other religions and the non-religious is seen as a valid, secular purpose, the history of the parsonage

exemption shows that it has not had this effect. Society has dramatically shifted with the rapid growth of the non-religious and of the non-traditionally religious, making financial benefits to only "mainstream" religion harder to justify. Moreover, the provision has failed to benefit smaller less endowed churches, but instead has become a tool to benefit wealthy "mega-churches," who can pay their ministers six figure salaries often completely free of federal tax. These ministers may then use the allowance to pay mortgages, permitting them to "double-dip" and claim the mortgage interest deduction, providing a further salary boost directly out of the general taxpayer's pocket. As Thomas Jefferson wrote in the preamble to Virginia's Act for Establishing Religious Freedom (1785), "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical." *Quoted in American Jewish Congress v. Chicago*, 827 F. 2d 120, 135 (7th Cir. 1987).

ARGUMENT

I. THE PARSONAGE EXEMPTION IS FACIALLY UNCONSTITUTIONAL

A. § 107(2) Applies Only To Religious Employees

The language of the parsonage exemption makes clear that it was written to benefit only a particular segment of employees of religious organizations. When the Internal Revenue Code was amended in 1954, Congress enacted §107(2), stating "a minister of the gospel" may deduct from his gross income any "rental allowance paid to him as part of his compensation." 26 U.S.C. §107.

The term "minister of the gospel" has been the subject of much litigation over the past sixty years.[2] Central to its definition is that it is a fundamentally religious position. To qualify, an individual must perform such duties as "the performance of sacerdotal functions, the conduct of religious worship … and the performance of teaching … duties at theological seminaries." 26 C.F.R. 1.107-1(a) (2002). Being an employee of a religious organization is not sufficient. An employee must perform specific functions central to the religious mission of the organization. *Tannenbaum*

[2] See *infra* II D.

v. Commissioner, 58 T.C. 1, 8 (1972) (denying exemption to ordained rabbi whose role was the promotion of history of the Jewish people).[3]

Such a benefit is unavailable to all non-religious employees. Employees not fortunate enough to be considered ministers of the gospel can deduct certain housing provided by their employers, but under much more limited circumstances. 26 U.S.C. § 119. Secular employees (and non-qualifying religious employees) may deduct the value of housing provided by their employer only if the accommodation is provided in kind, for the convenience of the employer, and if "the employee is required to accept such lodging on the business premises of his employer as a condition of his employment. *Id.*

Through § 107 the government provides exclusively to ministers of the gospel a tax benefit of significant value. The Congressional Joint Committee on Taxation estimated that "the exclusions allowed to ministers for housing costs will amount to $3.8 billion between 2013 and 2017."[4] When the government distributes almost $4 billion over a five year period based on exclusively religious qualifications, it is

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[3] Such a benefit, however, has been held to apply to retired ministers. Rev. Rul. 63-156, 1963-2 C.V. 79.

[4] *Church considering IRS parsonage-exemption case*, Episcopal News Service, Jan. 14, 2014 *available at* http://tinyurl.com/EDN-IRS (last visited May 26, 2014).

paramount that courts closely examine it to ensure that the prohibition of tax payer support is not violated. *Cf. Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947) ("No tax in any amount, large or small, can be levied to support any religious activities or institutions.")

B. § 107(2) Is Not A Constitutionally Mandated Accommodation Under The Free Exercise Clause And So Must Satisfy The Establishment Clause

The Supreme Court has been clear when it comes to the taxation of churches and church-related activity. It has found that while a person may not be taxed for exercising his or her religious rights, there is no constitutional prohibition on taxing the income of church employees or church property. While declaring a requirement to purchase a license to proselytize unconstitutional, Justice Douglas wrote that this was "something quite different … from a tax on the income of one who engages in religious activity or a tax on property used or employed in connection with those activities." *Murdock*, 319 U.S. at 112[5]; *see also Follett v. McCormick*, 321 U.S. 573, 577-78 (1944). Fifty years later, the Supreme Court reaffirmed that "the Free

[5] Justice Frankfurter went even further. He would have allowed the licensing requirement, stating "[i]t will hardly be contended … that a tax upon the income of a clergyman would violate the Bill of Rights.' *Murdock*, 319 U.S. at 135 (Frankfurter, J., *dissenting*).

Exercise Clause … does not require the State to grant … an exemption from its generally applicable sales and use tax." *Jimmy Swaggert Ministries v. Board of Equalization*, 493 U.S. 378, 392 (1993).

When, as here, the Free Exercise Clause does not mandate an accommodation, any benefit provided to religion must pass Establishment Clause review. According to the Supreme Court, an area exists between exemptions required by the Free Exercise Clause and favoritism prohibited by the Establishment Clause, wherein the government possesses discretion to offer accommodations to religion. *Locke v. Davey*, 540 U.S. 712, 718 (2004). ("We have long said 'there is room for play in the joints' between [the Clauses]." (internal citations omitted)). As the District Court rightly held, however, § 107(2) does not fall within this permissive area, but instead violates the neutrality mandated by the Establishment Clause. *Freedom from Religion Found., Inc. v. Lew*, 2013 U.S. Dist. LEXIS 166076 at *61-*62 (W.D. Wisc., Nov. 22, 2013).

C. The Parsonage Exemption Is Correctly Reviewed Under The *Texas Monthly* Standard, Not The *Walz* Standard

Appellants argue that the District Court erred by comparing § 107(2) to the exemption granted solely to religious publications struck in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), rather than the property tax exemption granted to

religious groups among multiple other non-profit groups upheld in *Walz v. Tax Commissioner of New York*, 397 U.S. 664, 673 (1970).

An examination of these cases shows the District Court was correct. The majority in *Walz* stressed that the property tax exemption covered more than simply religious groups. *Id.* (New York "has not singled out … 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, [and] playgrounds...") Contrasting with this, the plurality opinion in *Texas Monthly* found that "when confined exclusively to publications advancing the tenets of a religious faith, [a sales tax] exemption runs afoul of the Establishment Clause." 489 U.S. at 5. It explicitly distinguished *Walz*, 397 U.S. 664, as well as a string of other permissible exemptions where "the benefits derived by religious organizations flowed to a large number of nonreligious groups as well." *Texas Monthly*, 489 U.S. at 11.

As noted *supra*, the parsonage exemption applies ***solely*** to employees categorized as ministers of the gospel. Its plain meaning deliberately excludes secular employees and employees of religions without ministers. However much appellants and *amici* seek to obfuscate the situation, the fundamental point remains - § 107(2) applies only to religious groups, like the unconstitutional exemption in

Texas Monthly, 489 U.S. at 28. "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." (Blackmun, J., *concurring*).[6]

D. Under The *Lemon* Test, § 107(2) Is Unconstitutional

In *Lemon v. Kurtzman* the Supreme Court established an Establishment Clause test, requiring a statute to have a secular purpose, not to have the effect of advancing or inhibiting religion, and not to result in "excessive governmental entanglement with religion" for it to be found constitutional. 403 U.S. 602, 612-13 (1971). Failure to meet any of the three prongs invalidates a statute. *Stone v. Graham*, 449 U.S. 39, 40-41 (1980). The parsonage exemption fails all three.

§ 107(2) has no secular purpose. It specifically provides a tax exemption only to ministers of the gospel. The legislative history of the clause makes clear that the express purpose of its author, Rep. Peter Mack, was to promote religion as part of a Cold War crusade. He announced that he wished to help "ministers of the gospel …

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[6] A more detailed treatment of the applicability of *Texas Monthly*, 489 U.S. 1, as opposed to *Walz*, 397 U.S. 664 can be found in Edwin Chemerinsky, *The Parsonage Exemption Violates the Establishment Clause and Should be Declared Unconstitutional*, 24 Whittier L. Rev. 707, 714-21 (2003).

who are caring for our spiritual welfare … when we are being threatened by a godless and antireligious world movement."[7] All further allegedly secular justifications advanced by the United States and its *amici* are misplaced. *See infra* II A-C.

While the stated purpose of the parsonage exemption was to benefit religion, its effect has also been to advance religion. As noted *supra*, the cash value of § 107 to religious groups nears $4 billion over a five year period. In concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984), Justice O'Connor clarified the first two parts of the *Lemon* test. A court should determine whether, from the perspective of a reasonable observer, "the government's purpose is to advance religion and whether the statute actually conveys a message of endorsement." *Wallace v Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring).

It is hard to see how the government could send a clearer message of endorsement than the grant of billions of dollars of tax benefits to ministers of the gospel alone. The parsonage exemption tells society that ministers need not worry about the requirements faced by secular employees under § 119. This provides a significant benefit to the minister, and to his employing church, which can pay him

[7] H.R. Comm. On Ways and Means, Hearings on Forty Topics Pertaining to the General Revision of the Internal Revenue Code, 83d Cong. 1576 (Aug. 11, 1953).

less while leaving him with the same disposable income. Chemerinsky, 24 Whittier L. Rev. at 726-27.

Both appellants and *amici* make much of the claim that the parsonage exemption avoids government entanglement in religious affairs. *See e.g.* Brief for the Appellants, at 69-70; Brief of Liberty Institute as Amicus Curiae in Support of Appellants, at 3-4. Not only do they maintain that this satisfies the *Lemon* test's third prong, but also that avoiding such entanglement provides the required secular purpose and effect to make § 107(2) constitutional. As Professor Zelinsky notes, "entanglement of church and state is inevitable when the modern government decides whether to tax the modern church." Edward Zelinsky, *The First Amendment and The Parsonage Allowance*, Tax Notes, Vol. 142, No. 4, Jan. 27, 2014, available at http://tinyurl.com/ezelinksy (last visited May 28, 2014). However, there is no truth to the claim that § 107(2) reduces this level of entanglement, and, in fact, it can be seen as unconstitutionally increasing it. *See supra* II A-D.

II. THE JUSTIFICATIONS ADVANCED BY THE UNITED STATES AND CHURCH GROUPS FOR THE PARSONAGE EXEMPTION ARE FLAWED

A. Unlike Other Benefits, § 107(2) Belongs To The Individual Employee, Not The Religious Organization

While § 107(2) is often described as a deduction for a Church, it is a deduction for the individual minister of the gospel. As with all individual income tax deductions, under § 107(2) a minister receiving a housing allowance choses whether or not to claim the deduction. The church is not involved in this determination. However, § 107(2) permits it to pay a lower amount to some of its employees, knowing that if it designates part of that payment as a housing allowance, the employee will not have to pay federal income tax on it.

That this is an individual tax exemption, available only to certain religious employees, rather than a tax exemption for religious organizations does not alter the benefit to religion received, but it does alter the entanglement analysis. *See infra* II. D.

B. § 107(2) Does Not Remove Discrimination Against Churches, But Rather Creates A Favored Class Of Religious Employees

Those defending the constitutionality of the parsonage exemption claim that its purpose is simply to provide the same benefits for ministers of the gospel that are

available for other, secular, employees. *E.g.* Appellants' Brief, at 48-49; Brief of the Diocese of Chicago and Mid-America of the Russian Orthodox Church *et al.* as Amici Curiae in Support of Appellants, at 3-15. However, there is nothing in § 119 to prevent ministers of the gospel from claiming the regular housing allowance. That a particular minister, in a particular situation, may not qualify cannot be seen as evidence of discrimination any more than any secular employee failing to meet the requirements of the deduction indicates he has been unfairly treated.

In order to qualify under § 119, an employee must receive in-kind lodging from his employer, on the business premises, for the convenience of the employer, and "be required to accept such lodging … as a condition of his employment." 26 U.S.C. § 119(a)(2). To qualify under § 107, a minister of the gospel may receive either in-kind housing under § 107(1), or a designated cash allowance paid to him to rent or purchase a home, under § 107(2). The property in which the minister resides does not have to be on the premises of the employer. Residence does not have to be for the convenience of his employer. Finally, it does not have to be a job requirement that the minister reside there. To claim that such a broader, looser tax exemption

exists as a remedy to discrimination when ministers could already qualify on equal footing in other areas of the tax code[8] has no legal validity.

In an attempt to justify this special treatment granted to ministers of the gospel, for whom § 107 carves out unique benefits, supporters of the parsonage exemption point to others who receive individualized benefits under the tax code. The only benefits unavailable to ministers which are discussed are the housing tax exemptions granted to the military and to employees of the Federal Government who are stationed overseas. 26 U.S.C. § 134, § 912. These are distinguishable from the benefit offered to religious employees in § 107. The exemptions to federal employees apply to those who are required to live outside of the United States because of their job. The parsonage exemption, unlike § 119, includes no such requirement that the place of abode be determined by the employer. Moreover, the nature of the employer is controlling. Military and federal personnel are employed by the U.S. Government. Not only is there no First Amendment issue with preferential treatment being given to government employees, but also the Federal

[8] Indeed, it appears that were ministers or other religious employees to be specifically excluded from tax benefits such as those in § 119, or, for example, from those provisions of the tax code that permit tax deductions for portions of a home used as office space, this would create at least the opportunity for a challenge under the Free Exercise Clause. *See* Zelinksy, *The First Amendment and The Parsonage Allowance*, Tax Notes, Vol. 142 No. 4.

Government can determine how it pays its own employees, as it is both the source of their pay and the recipient of their taxes. "[T]hese are all federal employees, and if the government wants to pays its employees via a tax break it can certainly do so." Chemerinsky, 24 Whittier L. Rev. at 728.

C. Leveling The Playing Field Between Churches Is Not A Legitimate Secular Purpose For Tax Law

Potentially realizing the weakness of their claim that prior to § 107 ministers were discriminated against by being required to follow the same tax laws as secular employees, the defenders of the parsonage exemption seek to claim that the deduction is permissible because it reduces discrimination between churches. *E.g.* Liberty Institute Brief, at 5-7. The argument presented is that the decision whether to provide a housing allowance in cash, or to provide an actual place of residence for the minister is one fraught with theological implications based on the hierarchical power structure of the church in question. It is further claimed that providing only a deduction for housing owned by the church (in other words, only providing deductions on similar grounds to those available to employees who are not ministers of the gospel) discriminates against churches based on their location, their wealth or endowment, or their religious strictures. For example, *amici* note that Orthodox Judaism requires a rabbi to live within walking distance of his synagogue and

congregation because of the religious rules against mechanical travel on the Sabbath. Brief for National Jewish Commission on Law and Public Affairs *et al* as Amici Curiae Supporting Appellants at 6-7.

It is, however, not the role of the government to create a level playing field between religious groups. Government may exempt a religious group from the obligations of participation in a general scheme that impacts the group's religious beliefs, yet will also exempt that group from the benefits of the scheme. In *United States v. Lee*, 455 U.S. 252, 261 (1982), the Supreme Court required Amish employers to pay social security contributions for their employees, but noted that Congress had already constitutionally exempted Amish self-employed workers from such payments as their welfare was taken care of by the religious community.

However, the Supreme Court has been clear that it will not invalidate generally applicable laws simply because the internal theological requirements of a particular church means it is more financially impacted than other churches. In *Braunfeld v. Brown*, 366 U.S. 599, 606 (1960), Chief Justice Warren noted that a law "may well result in some financial sacrifice in order [for an adherent] to observe their religious beliefs" but that this differed from "attempts to make a religious practice itself unlawful." Similarly, that a Scientologist could not deduct the money spent on purchasing auditing services from his church did not violate the Free

Exercise Clause. "Any burden imposed on auditing or training therefore derives solely from the fact that, as a result of the deduction denial, adherents have less money available to gain access to such sessions. This burden is no different from that imposed by any public tax or fee." *Hernandez*, 490 U.S. at 699.

The government then has an obligation under the First Amendment not to discriminate against religions. Tax exemptions may not single out members of a particular faith for special treatment, be it positive or negative, for "when the citizens of this country approach their government, they do so only as Americans, not as members of one faith or another." *Town of Greece v. Galloway*, 572 U.S. __, 184 L. Ed. 2d 835, 884 (2014) (Kagan, J., *dissenting*). The level playing field requirement of the law requires that like people are treated alike. That a Scientologist is mandated by his religion to spend money on auditing, which is not tax deductible, while a Catholic is required instead to donate it to his church, for which a tax deduction is available, does not justify the government granting special tax exemptions to the Scientologist that are unavailable to others. That one denomination purchases property in which to house its ministers while another grants a rental allowance also does not provide a secular justification for creating a special exemption for religious employees solely to balance out disparities caused by internal doctrinal differences.

The requirement under the First Amendment is neutrality towards and between religions. *Epperson*, 393 U.S. at 104. "[O]ur cases require the state to maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion." *Comm. For Public, Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973). For that purpose, the government must create an equally applicable framework of laws. It may not compensate individuals if their particular religious faith leaves them worse off than another faith. Government may not pay the salaries of minsters of the gospel. *Everson*, 330 U.S. at 15-16. This becomes no less a violation of the constitution if the government claims its purpose is to "level the playing field" for smaller churches that cannot pay salaries at the level of those offered by mega-churches.

D. The Parsonage Exemption Does Not Prevent Entanglement Between Church And State

The final claim left for the defenders of the parsonage exemption is that absent § 107(2), the state would be required to unconstitutionally involve itself in the business of churches, examining the internal workings of the church and weighing theological imperatives. *E.g.* Appellants' Brief, at 69-70; Russian Orthodox Brief, at 25-30. This is not the role of the judicial system. "Courts are not arbiters of scriptural interpretation." *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450

U.S. 707, 716 (1981). However, § 107(2) itself directly involves the judicial system in making the sort of scriptural and theological determinations for which it is so ill-suited. At worst, the level of entanglement were ministers of the gospel required to qualify under the secular housing rules of § 119 would be the same as that with § 107. At best, requiring all employees, secular or not, to qualify for housing exemptions in the same way would significantly reduce such entanglement.

Appellants and *amici* base their claim on a series of cases where religious employers are treated differently from secular ones. *E.g.* Appellants' Brief, at 47-48; Liberty Institute Brief, at 3-4. The ministerial exception, wherein the courts refuse to second guess church determinations regarding the qualification of ministers, can be seen in *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929). The Supreme Court has at times granted religious organizations exemptions from employment law provisions in order to avoid "government interference with an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. __, 132 S. Ct. 694, 707 (2012). Similarly a Mormon organization was permitted to terminate a non-Mormon employee from a position managing a gymnasium despite § 702 of the Civil Rights Act in order to "avoid[] the kind of intrusive inquiry into religious belief" that would be necessary to determine whether the position was a religious

one. *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987).

The current case is fundamentally different. In all three cases cited *supra*, the Court feared involvement in the internal workings of the church – in telling it who it could or could not hire or fire. Religions must, under the Free Exercise Clause, be able to "define and carry out their religious missions." *Id.* at 335. No such dilemma exists with § 107(2). As noted *supra*, this is an individual allowance, granted to the minister not the church. Treating ministers of the gospel equally with all other employees would not impact the internal workings of churches at all. A church's sole decision if § 107(2) is invalidated is whether to increase the remuneration it offers its ministers to compensate for the absence of the tax deduction. This decision has no legally cognizable impact on the religious mission of the church, any more than were income tax rates to rise, leaving a church facing the same decision.

Were ministers required to use § 119, the IRS would examine whether a particular minister qualified for the exemption. This examination, as is made repeatedly for secular employees, does not significantly entangle the government in church affairs. The IRS would determine whether the individual claiming the exemption met the requirements, "namely (1) that such lodging be furnished for the convenience of the [church]; (2) that it be located on the business premises of the

[church]; and (3) that the [minister] be required to accept such lodging as a condition of his employment." *Comm'r. v. Anderson*, 371 F. 2d 59, 63 (6th Cir. 1996). There is nothing theological about these inquiries, as they simply relate to the minister's relationship with the church as an employer, and whether his presence is required on site. They certainly do not rise to the level of involvement seen in the Ministerial Exemption cases, where the Court ruled it could not interfere in who a church hired or fired.

§ 107(2), on the other hand, invites IRS and government intrusion as a matter of course. In order to qualify, an employee must be seen as a minister of the gospel. What constitutes such status has been litigated repeatedly in the sixty years since § 107 was enacted. *See, e.g., Kirk v. Comm'r*, 425 F. 2d 492 (D.C. App. 1970) (unordained church social concerns board member not minister of gospel); *Lawrence v. Comm'r*, 50 T.C. 494 (1968) (minister of education not minister of gospel); *Silverman v. Comm'r*, 57 T.C. 727 (1972) (full-time cantor without formal ordination is minister of gospel); *Tannenbaum v. Comm'r*, 58 T.C. 1 (1972) (rabbi employed by educational organization not minister of gospel); *Colbert v. Comm'r*, 61 T.C. 449 (1974) (ordained minister not minister of gospel as preaching of anti-communism not tenet of Baptist faith). It is hard to imagine any question that goes more to the heart of a religion than what makes a person a minister of that religion.

As such, § 107(2) involves significant entanglement between church and state by requiring the state to determine whether an action by a minister is the administration of sacraments, the conduct of religious worship, or the direction of the spiritual life of a religious organization. To claim that this is not entanglement, but that determining if a minister lives on the church premises as a condition of his employment at the convenience of the church, as the hundreds of religious *amici* in this case do, appears to be more than a little self-serving.

E. There Is No Logical End Point For State Support Of Churches Under The Rational Of Appellants And *Amici*

Under the rationale adopted by appellants and religious *amici*, there is no degree of government support for a religious group which could be classified as unconstitutional, provided it was claimed to equalize the situation of different churches. If it is constitutional to provide a benefit of billions of dollars in reduced taxes to a subset of religious groups, explicitly excluding secular groups and those religions which lack ministers of the gospel, with the justification of removing disparities between favored religions, then how could it not be permissible for the government to directly subsidize the housing of clergy for religious groups which cannot afford housing allowances for their ministers? Or to pay the salaries of

ministers for churches that are less well funded? Or to provide, free of charge, publically owned land for landless religious groups to construct churches?

That a religious group's belief system causes it financial disadvantage does not justify government favoritism towards religion to remove that disadvantage. The common sense nature of this can be seen most clearly by analogy. A Mosque may hire an imam, and as a condition of employment require him to participate in the Hajj, or pilgrimage to Mecca. Such a trip would likely qualify as a business expense, and thus be tax deductible. If the government were to decide not to require the imam to claim a business expense, but instead permit only mosques, or only certain religious groups to grant their employees tax deductible travel allowances, regardless of whether those allowances were used for business travel, then there would surely be a violation of the Establishment Clause. *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (Government may not "constitutionally pass laws or impose requirements which aid all religions as against non-believers.") However, under the logic of the argument of appellants, such a deduction, or, indeed, the direct payment of those travel expenses from the public purse, would be permissible.

III. MODERN SOCIETY HAS NO PLACE FOR THE PARSONAGE EXEMPTION

The world of 2014 is a very different one from that of 1954 when Rep. Peter Mack proposed the parsonage exemption to acknowledge the threat from "a godless and antireligious world movement … [and] to correct this discrimination against [those] who are carrying on such a courageous fight against this foe." Hearings on Forty Topics Pertaining to the General Revision of the Internal Revenue Code, 83d Cong. at 1576. Mack spoke in the time of the Cold War - government was at this time adding the phrase "under God" to the Pledge of Allegiance (1954), and the motto "In God We Trust" to our paper currency (1957). Christianity was often held out as a central element of American identity as opposed to godless communism.

In 1954, according to polling by Gallup, 93% of the population identified as Christian (either Protestant or Roman Catholic) with 3% Jewish and an insignificant number saying they had no religion. Gallup Religion Poll (yearly aggregates), http://www.gallup.com/poll/1690/religion.aspx (last viewed May 27, 2014). By 2013, the number of those answering none had risen to 15%, with a further 5% answering that they had "other" beliefs. *Id.* These results are reflected in the American Religious Identification Survey which showed a drop in Americans self-identifying as Christians from 86% in 1990 to 76% in 2008. Barry A. Kosmin &

Ariela Keysar, *American Religious Identity Survey* 3 (2009), *available at* http://tinyurl.com/ARISReport (last visited May 27, 2014). Further research shows that one in five Americans, and one in three Americans under thirty, does not affiliate with a religion. Pew Research Ctr., *"Nones" on the Rise: One-in-Five Adults Have No Religious Affiliation* 13 (2012), *available at* http://tinyurl.com/Pew-nones (last visited May 27, 2014).

While the parsonage exemption was an unconstitutional privilege for religion when it was enacted, the changes in society undercut any possible rationale for treating 'ministers of the gospel' in such an expensive and privileged fashion, while denying such benefits to secular non-profit employees. § 107(2) tells one third of Americans under thirty that they must pay higher taxes to support those who spread the message of a religion in which they have no belief. This cannot pass muster under the Establishment Clause.

IV. THE PARSONAGE EXEMPTION HAS NOT PROVIDED A LEVEL PLAYING FIELD BUT HAS ENSHRINED RELIGIOUS PRIVILEGE

A. § 107(2) Has Benefitted Churches Which Were Already Advantaged

In 2002, the IRS appealed a Tax Court decision which held that a minister of the gospel could deduct all of a parsonage allowance, even if it exceeded the fair rental value of the property inhabited. When the Ninth Circuit questioned the constitutionality of § 107(2), *Warren v. Comm'r.*, 282 F.3d 1119 (9th Cir. 2002), Congress rapidly amended the law, limiting it to reasonable rental value but awarding the minister in question the full value of the allowance as a deduction in prior years. *See* Chemerinksy, 24 Whittier L. Rev. at 708-09.

The minister in question here was Rick Warren, founder and Chief Pastor of Saddleback Church. Saddleback Valley Community Church attracts in excess of 20,000 to its services, ranking in the top ten attended mega-churches in the United States. Hartford Institute for Religion Research, http://tinyurl.com/hartford-inst (last visited May 27, 2014).

When defending this law, the United States and its *amici* have stressed the constitutionality of § 107(2) is based on its intent to benefit smaller, less prosperous churches. Leaving aside that this is not a secular purpose sufficient to satisfy the *Lemon* test, *see supra*, the parsonage exemption is written so broadly, encompassing *all* ministers of the gospel, that it also benefits the largest churches. And, because larger churches can offer larger housing allowances, the value of the exemption is higher to richer churches, and the disparity in church finances is magnified. § 107(2) therefore has the opposite effect of the alleged secular purpose.

Because Saddleback Church is a religious organization, it is not required to file Form 990s or regular audited financial statements for the public to examine, unlike secular non-profit organizations. What is clear, however, is that Saddleback is far from the poverty stricken parish that the proponents of the parsonage exemption would have us believe it is designed to help. At the end of 2009, facing a drop off in income as a result of the recession, Rick Warren launched an appeal to raise $900,000. Three days later the press reported that the Church had raised $2.4 million dollars. Los Angeles Times, *O.C. Pastor asks for $900,000, receives $2.4 million* (Jan. 2, 2010), http://tinyurl.com/LA-Warren (last visited May 27, 2014).

B. § 107(2) Forces All Taxpayers To Subsidize The Salaries Of Wealthy Ministers In Violation Of The Constitution

Because § 107(2) is written so expansively, including all ministers of the gospel, as well as excluding all secular employees, it cannot be seen as a targeted effort to reduce disparity between churches. As noted *supra*, the wealthier a church, the more it can pay as a housing allowance, and the greater the benefit received, thus increasing, not reducing, the gap between 'rich' and 'poor' churches. The benefit to ministers is hard to overstate. According to Christianity Today, in 2012-13 a senior pastor's average base salary ranged from $33,000 to $70,000. A full 84% of those surveyed also received a housing allowance, accounting for $20,000 to $38,000 in additional, ***tax-free*** income. *Judge Strikes Down Housing Tax Break For Pastors* (Nov. 24, 2013) available at http://tinyurl.com/CTparsonage (last visited June 2, 2014).

Moreover, unlike secular employees who must receive tax deductible housing in-kind under § 119, ministers of the gospel may take this cash allowance and use it to pay their mortgages. The mortgage interest deduction on this payment can then be used to further reduce the minister's tax burden. As Chemerinsky notes,

assuming an allowance of $1,000 monthly, a mortgage interest payment of $333 per month, and a 33% tax bracket, the value of the mortgage deduction, paid with untaxable income, is a further $111 per month. "The church spends $1,000, but the clergyman receives total benefits in the amount of $1,111." 24 Whittier L. Rev. at 712-13.[9]

Like all money, this has to come from somewhere. For every extra $111 a month that a minister can reduce his tax bill, secular employees must pay an extra $111 a month in taxes for the government to break even. This tax break to religion is therefore, in a very real sense, a tax increase on secular individuals. The parsonage exemption thus goes against the bedrock of the First Amendment, and violates Thomas Jefferson's stricture that "no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever." Virginia Statue of Religious Freedom, *cited in Everson*, 330 U.S. at 13.

[9] Of course, the value is often significantly higher. In 1994, Pastor Warren received a housing allowance of $79,999 for the year, and deducted mortgage interest of around $36,000. Chemerinsky, 24 Whittier L. Rev. at 714. While the deductible amount is now limited to the reasonable rental value (plus expenses including utilities) the large mansions inhabited by the preachers of America's mega-churches do not seem likely to have low reasonable rental values.

CONCLUSION

For the above reasons, this Court must uphold the decision of the United States District Court for the Western District of Wisconsin that 26 U.S.C. § 107(2) is unconstitutional as a violation of the Establishment Clause of the First Amendment to the Constitution of the United States of America.

Respectfully submitted.

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(s) ___/s Nicholas J. Little, Esq._____Attorney for _Center for Inquiry_____Dated: _____June 9, 2014_____

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Nicholas Little <nlittle@centerforinquiry.net>

Amicus Brief for FFRF v. Lew

4 messages

Nicholas Little <nlittle@centerforinquiry.net> Mon, Jun 2, 2014 at 3:17 PM
To: Judith.A.Hagley@usdoj.gov

Ms. Hagley

My name is Nick Little and I am the Legal Director for the Center for Inquiry, a secular humanist non-profit organization that seeks to promote science, reason and secular values. I would like to request your permission to file an amicus brief with the Seventh Circuit Court of Appeals supporting the position of the Freedom From Religion Foundation in the above mentioned litigation. It is likely other humanist and secular groups will sign on to this brief.

Please feel free to contact me with any questions.

Yours,

Nick Little

--
Nicholas J. Little
Legal Director
Center for Inquiry
1020 19th St. NW, Suite 425
Washington, DC 20036
Tel - (202) 629-2403 ext. 202
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Hagley, Judith A. (TAX) <Judith.A.Hagley@usdoj.gov> Mon, Jun 2, 2014 at 3:20 PM
To: Nicholas Little <nlittle@centerforinquiry.net>
Cc: "Hagley, Judith A. (TAX)" <Judith.A.Hagley@usdoj.gov>

Nick, I have no objection. Best, Judith

Judith A. Hagley

Attorney

Appellate Section

Tax Division

Department of Justice

From: Nicholas Little [mailto:nlittle@centerforinquiry.net]
Sent: Monday, June 02, 2014 3:18 PM
To: Hagley, Judith A. (TAX)
Subject: Amicus Brief for FFRF v. Lew

[Quoted text hidden]

Nicholas Little <nlittle@centerforinquiry.net> Mon, Jun 2, 2014 at 3:20 PM
To: "Hagley, Judith A. (TAX)" <Judith.A.Hagley@usdoj.gov>

Thank you.
[Quoted text hidden]

Nicholas Little <nlittle@centerforinquiry.net> Thu, Jun 5, 2014 at 4:13 PM
To: Customer Service <briefs@wilsonepes.com>

Permission from the government for amicus brief in FFRF case.
[Quoted text hidden]

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

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