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*.

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 *AMICUS CURIAE* OF THE EVANGELICAL COUNCIL FOR FINANCIAL ACCOUNTABILITY, NATIONAL ASSOCIATION OF EVANGELICALS, NATIONAL HISPANIC CHRISTIAN LEADERSHIP CONFERENCE, QUEENS FEDERATION OF CHURCHES, AND CHRISTIAN LEGAL SOCIETY IN SUPPORT OF APPELLANTS AND REVERSAL

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-1152

Short Caption: Freedom From Religion Foundation, et al. v. Jacob Lew, et al.

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

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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Evangelical Council for Financial Accountability, National Association of Evangelicals, Christian Legal Society, National Hispanic Christian Leadership Conference, Queens Federation of Churches,

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Center for Law and Religious Freedom of the Christian Legal Society, 8001 Braddock Road, Ste. 302, Springfield, VA 22151; Kimberlee Wood Colby, 8001 Braddock Road, Ste. 302, Springfield, VA 22151.

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

None of the amici curiae is a subsidiary of any other corporation.

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Attorney's Signature: s/ Kimberlee Wood Colby Date: 4/9/14

Attorney's Printed Name: Kimberlee Wood Colby

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

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Attorney's Signature: /s/ Thomas C. Berg Date: 4/9/14

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Statement of Identity of *Amici Curiae,* Interest in the Case, and Source of Authority to File[1]

The **Evangelical Council for Financial Accountability** ("ECFA") provides accreditation to leading Christ-centered churches and parachurch organizations that faithfully demonstrate compliance with established standards for financial accountability, stewardship, and governance. For thirty-five years, one of ECFA's core principles has been the preservation of religious freedom through its standards of excellence and integrity, which help alleviate the need for burdensome government oversight of religious organizations. More than 1,850 churches, Christian ministries, denominations, educational institutions, and other tax-exempt 501(c)(3) organizations are currently accredited by ECFA.

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[1] Pursuant to FRAP 29(c)(5), neither a party nor party's counsel authored this brief, in whole or in part, or contributed money that was intended to fund preparation or submission. No person (other than the *amici curiae,* its members, or its counsel) contributed money that was intended to fund its preparation or submission. Pursuant to FRAP 29(a), all parties have consented to the filing of this brief.

Amici gratefully acknowledge the contribution of Julie Cayemberg, a student at the University of St. Thomas School of Law (Minnesota), to the preparation and drafting of this brief.

Recognizing ECFA's history and expertise in matters involving religious liberty and government regulation, Senator Charles Grassley recently called upon ECFA to provide input on significant accountability and tax policy issues, including the ministerial housing allowance exclusion. ECFA, in turn, formed a national Commission of eighty religious and nonprofit leaders from virtually every major faith group in America, along with legal experts experienced in constitutional law and church and nonprofit tax issues.

The Commission's careful consideration and recommendations on the ministerial housing allowance exclusion allow ECFA to offer unique expertise on this issue in hopes that it will be of some assistance to the Court in its deliberations. ECFA values the religious liberty principles embodied by the ministerial housing allowance exclusion, which accommodates the special relationship between churches and their ministers, allows for diversity among religions and across denominational lines, and maintains the respectful "hands-off" approach that characterizes a healthy church-state relationship. ECFA is also concerned with the longstanding reliance that religious

congregations and their ministers have placed on the ministerial housing allowance exclusion, the loss of which would have troubling consequences for active and retired ministers and their congregations.

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 41 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries and independent churches. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries.

NAE believes that religious freedom fully makes sense only on the premise that God exists, and that God's character and personal nature are such as to give rise to human duties that are prior and superior in obligation to the commands of civil society. NAE also holds that religious freedom is God-given, and therefore the civil government does not create such freedom but is charged to protect it. It is grateful for the American legal tradition of church-state relations and religious

liberty, and believes that this constitutional and jurisprudential history should be honored, nurtured, taught, and maintained.

The **National Hispanic Christian Leadership Conference** ("NHCLC"), The Hispanic National Association of Evangelicals, is America's largest Hispanic Christian organization serving millions of constituents via our 40,118 member churches and member organizations. The NHCLC exists to unify, serve and represent the Hispanic Born Again Faith community by reconciling the vertical and horizontal elements of the Christian message via the 7 directives of Life, Family, Great Commission, Stewardship, Education, Justice and Youth.

The **Queens Federation of Churches** was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of an equal number of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over 390 local churches representing every major Christian denomination and many independent congregations

participate in the Federation's ministry. The Federation and its member congregations are vitally concerned for the protection of the principle and practice of religious liberty, including the detrimental impact that would be felt by its member congregations and their ministers if the ministerial housing allowance were held unconstitutional.

The **Christian Legal Society** ("CLS") is an association of Christian attorneys, law students, and law professors, with student chapters at approximately 90 public and private law schools. CLS believes that pluralism, essential to a free society, prospers only when the First Amendment rights of all Americans are protected.

Religious institutions' right of internal governance lies at the heart of religious liberty. In enacting the ministerial housing allowance, Congress accommodated religious institutions' ability to structure their relationships with their ministers in ways that respect the institutions' internal governance and ministry needs. CLS is concerned that religious congregations and their ministers, particularly

those who have retired in reliance on the ministerial housing allowance, will suffer grave harm if the decision below is affirmed.

Summary of Argument

Section 107(2) of the Internal Revenue Code, which excludes ministers' housing allowances from income tax, is constitutional. Its validity is supported by the principle, among others, that the government may, and sometimes must, treat ministers differently from other occupations and activities—including by accommodations from tax burdens—in order to serve important values of our church-state tradition. The power to accommodate religion is not limited to the context of ministers, but it is here that the constitutional distinctiveness of religion is at its height.

The distinctiveness of ministers is recognized in three lines of legal authority, encompassing multiple Supreme Court decisions. First, and most recently, the Court has unanimously affirmed the ministerial exception to antidiscrimination laws, which seeks to protect churches from government interference in their "internal governance" decisions that affect their "faith and mission." *Hosanna-Tabor Evangelical*

Lutheran Church and School v. E.E.O.C., 132 S. Ct. 694, 705-06 (2012). *Hosanna-Tabor* made clear that the First Amendment gives special solicitude to the rights of religious organizations, and it is simply the latest in a series of cases, over decades, in which the Court has blocked government regulation affecting the church-minister relationship.

Second, in *Locke v. Davey*, 540 U.S. 712 (2004), the Court permitted a state to single out a theology student, training for the ministry, for exclusion from an otherwise available state scholarship program. Again the Court emphasized the distinctive status of ministers—this time justifying negative treatment based on a "historical and substantial state interest" in denying funds for ministerial training. If singling out ministers' training for distinctive negative treatment in *Davey* falls within the permissible zone of discretion between the Establishment Clause and the Free Exercise Clause, then so does singling out ministers' activity for accommodation in 26 U.S.C. §107(2). Tax exemptions are accommodations; they are unlike the affirmative subsidies for ministerial training involved in *Davey*.

Finally, the distinctiveness of ministers has also been recognized in statutory law, including through different treatment of ministers under the federal tax code.

Viewed within this constitutional and statutory rubric, §107(2)'s exclusion of ministerial housing allowances from taxable income is a permissible accommodation.

Section 107(2), when considered together with the exclusion of church-provided parsonages in §107(1), serves two historic and substantial state interests central to the American church-state tradition. It ensures that various denominations are treated equally, and it avoids impermissible entanglement in church governance and religious questions. Section 107 as a whole reflects Congress's judgment that ministers fall among the classes of employees (including military personnel and certain overseas workers) whose jobs tend to have particular housing requirements that call for an income-tax exclusion for housing arising out of the job duties. Proceeding from that judgment, Congress determined that the context of ministers also had distinctive features warranting separate treatment in the Code.

First, Congress enacted §107(2) to equalize the treatment of all ministers with those covered by the §107(1) parsonage exclusion, and to avoid discriminating against ministers whose churches did not or could not provide them residences. Congress thus took a positive step to ensure equality among denominations, "the clearest command of the Establishment Clause." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Section 107(2) particularly tends to preserve equality between well-established churches and new or small ones.

Second, the Supreme Court has upheld tax exemptions for religious institutions on the basis that, in part, they decreased the entanglement between church and state. Recognizing that either course, taxation of churches or exemption, requires some involvement with religion, it was enough for the Court in *Walz* that exemptions decreased entanglement on balance. Congress makes a permissible choice when it chooses entanglement between church and state at the borders of exemption rather than the entanglement of enforcing tax law against religious entities. Section 107, as a whole, is an exercise of Congressional prerogative which allows for a church to make its own

governance and control choices while preserving tax treatment of its ministers similar to the treatment of comparable workers.

Finally, reliance interests of retired ministers and those nearing retirement argue strongly for retention of the ministerial housing allowance. Thousands of churches and their ministers have structured their affairs in good-faith reliance on the provision of a housing allowance that does not trigger income tax. If this section is invalidated, retired ministers will feel significant impact, and ministers approaching retirement may not be able to contribute enough to cover the shortfall in their remaining years of active ministry.

ARGUMENT

I. The Government May, and Sometimes Must, Treat Ministers Differently From Other Occupations and Activities in Order To Serve Values Of Our Church-State Tradition.

The housing allowance in §107(2) protects ministers and their religious organizations from government-imposed burdens of taxation and tax enforcement. The constitutionality of this provision is supported by the principle, among others, that the government may (indeed, sometimes must) accommodate religion by treating ministers differently than other occupations and activities.

The power to accommodate religion is by no means limited to the context of ministers. The Supreme Court has stated more generally that "[i]t is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987). *Amos*, among many other decisions, makes clear that "there is ample room for accommodation" to promote religious freedom even when the measure is not required by the Free Exercise Clause. *Id.* at 338. As the Court put it in upholding tax exemptions for religious organizations' property, there is room for

"play in the joints" between the two Religion Clauses. *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970). But *amici* focus on the principles concerning ministers because it is here that the constitutional distinctiveness of religion is at its height. Accordingly, government has "ample room" to treat ministers distinctively to accommodate religious freedom and serve important values in our church-state tradition. As we will show, §107(2) does just that. The constitutional distinctiveness of ministers is recognized in at least three lines of legal authority, encompassing multiple Supreme Court decisions.

A. Distinctive Protection of the Church-Minister Relationship Under the *Hosanna-Tabor* Line of Cases.

The first line of authority involves judicial decisions protecting the "internal governance of the church" and its "right to shape its own faith and mission" in its relationship with its clergy. *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S. Ct. 694, 706 (2012). *Hosanna-Tabor* unanimously affirmed the existence of the so-called ministerial exception, "uniformly recognized" by the courts of appeals over previous decades, which "precludes the application of

[employment discrimination] legislation to claims concerning the employment relationship between a church and its ministers." *Id.* at 705. The Court held that the exception was a constitutional requirement grounded in both Religion Clauses of the First Amendment. It rested, the Court said, on the fact that a religious organization's relationship with its ministers involves "more than a mere employment decision," since "[t]he members of a religious group put their faith in the hands of their ministers." *Id.* at 706. Accordingly, government interference with a church's selection of clergy violates the Free Exercise Clause, which protects the church's internal governance and its right to shape its faith and mission; and it violates the Establishment Clause, "which prohibits government involvement in such ecclesiastical decisions." *Id.*

The distinctiveness of a church's relation with its ministers—"more than a mere employment decision"—was central in *Hosanna-Tabor*. The federal government attempted to subsume the church's interest into the general right of freedom of association "enjoyed by religious and secular groups alike," essentially arguing (as the Court

described it) that there was "no need—and no basis—for a special rule for ministers grounded in the Religion Clauses themselves." *Id.* (noting that associational rights apply "whether the association in question is the Lutheran church, a labor union, or a social club"). The Court firmly rejected this attempt to deny the distinctiveness of ministers, calling it "remarkable" and "untenable," since the First Amendment "gives special solicitude to the rights of religious organizations." *Id.*

Hosanna-Tabor is just the latest in a series of cases in which the Court has emphasized that the Religion Clauses call for protection of a church's governance decisions and that the distinctive relation between a church and its ministers lies at the heart of that autonomy. For example, in *Serbian E. Orthodox Diocese v. Milivojevich,* 426 U.S. 696 (1976), the Court held that a state court could not use general legal principles against "arbitrariness" to question a hierarchical church's defrocking of a bishop and its accompanying disposition of church property. The Court emphasized, among other things, "that questions of . . . the composition of the church hierarchy are at the core of ecclesiastical concern." *Id.* at 717. Earlier, in *Kedroff v. St. Nicholas*

Cathedral, 344 U.S. 94 (1952), the Court firmly established that protection of the church-minister relationship from regulation rests on the broader doctrine of church autonomy, which guarantees religious organizations "an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 116. See *Hosanna-Tabor*, 132 S. Ct. at 704-05 (reaffirming *Milivojevich* and *Kedroff*). These decisions found various protections of the church-minister relationship to be constitutionally required; but even when protection is not required, the legislature has "ample room" (*Amos*, 483 U.S. at 334) to enact statutory accommodations to protect against harms to the relationship from regulation.

B. Distinctive Treatment of Ministers in Certain Government Funding Programs under *Locke v. Davey*.

Second, the constitutional distinctiveness of ministers was also crucial in *Locke v. Davey*, 540 U.S. 712 (2004), where the Court held that a state could permissibly deny a tax-funded tuition scholarship to a student preparing for the ministry and studying theology even though

the state provided scholarships for any other accredited degree.[2] Importantly, *Davey* shows that differential treatment of ministers sometimes works to their disadvantage and the disadvantage of their churches. Singling out this student for denial of funding, the Court said, was justified by the "historic and substantial state interest" in keeping the state from providing funds for the education of clergy. *Id.* at 725, 722. As the Court explained,

> The subject of religion is one in which both the United States and state constitutions embody distinct views—in favor of free exercise, but opposed to establishment—that find no counterpart with respect to other callings or professions. That a State would deal differently with religious education for the ministry than with education for other callings is a product of these views, not evidence of hostility toward religion.

Id. at 721. By the same token, Congress's decision to exclude ministers' housing allowances from taxation, does not "evidence [favoritism]

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[2] *Amici* believe that *Davey* should be limited to the context of funding of ministerial training and does not authorize "wholesale exclusions of religious institutions and their students from otherwise neutral and generally available government support." *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1255-56 (10th Cir. 2008) (McConnell, J., for the court). Even this limited reading of *Davey*, however, reinforces the principle that the government has room to treat ministers differently from other occupations and activities.

toward religion"; instead, as we will show in Part II, it is a product of "distinct" considerations concerning ministers versus other professions. *Id.*

Moreover, the issue in *Davey* was not whether the state was required to treat ministers distinctively, but whether it was permitted to do so. Although the Court had previously held unanimously that a state could include ministerial students in general funding, *Witters v. Dept. of Services for the Blind*, 474 U.S. 481 (1986), *Davey* held that a state also had discretion to decide to exclude them in the light of the distinctive considerations concerning ministers. 540 U.S. at 719 (holding that the denial fell within the "play in the joints" between the two Religion Clauses). This case likewise involves the "play in the joints": the question, of course, is not whether the government must exempt ministers' housing from taxation, but whether it is permitted to do so. If the government may single out ministers' training for negative treatment—the denial of affirmative subsidies—it may single out ministers' activities for accommodation through §107(2).