Amici emphasize that *Davey* allowed the state to single out ministers for the denial of affirmative subsidies. But tax exemptions, the issue in this case, are different from affirmative subsidies as a matter of Supreme Court precedent and sound logic. The Court distinguished tax exemptions and subsidies in *Walz*:

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees "on the public payroll." There is no genuine nexus between tax exemption and establishment of religion.

Walz, 397 U.S. at 675. Justice Brennan, in his *Walz* concurrence, added, "Tax exemptions and subsidies . . . are qualitatively different. . . A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from the taxpayers as a whole. An exemption . . . involves no such transfer." *Id.* at 690 (Brennan, J., concurring). As noted tax scholar Edward Zelinsky has concluded:

> The characterization of any tax provision as a subsidy is only compelling if there is first established a normative baseline of taxation from which that provision is deemed to subsidize. . . . *Walz* suggests that a normative income tax may properly contain an exclusion like Section 107 to avoid enmeshing

> church and state in the inherently intrusive enforcement of the tax law. From this baseline, Section 107 is not a tax subsidy but, rather, is a part of the normative tax.

Edward A. Zelinsky, *Do Religious Tax Exemptions Entangle in Violation of the Establishment Clause? The Constitutionality of the Parsonage Allowance Exclusion and the Religious Exemptions of the Individual Health Care Mandate and the FICA and Self-Employment Taxes*, at 122-23 (March 19, 2012), *available at* http://ssrn.com/abstract=2012132.

In striking down §107(2), the district court relied heavily on *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), particularly a statement in Justice Brennan's plurality opinion equating tax exemptions with subsidies. But this statement and *Texas Monthly* itself do not control here. As the government's brief explains more fully, Justice Brennan's plurality opinion had the votes of only three justices and was rejected by six justices as too broad. See, e.g., Govt. Br. at 45-46. The crucial opinions were the concurrences of Justice Blackmun (joined by Justice O'Connor) and Justice White. Under those opinions, the result in *Texas Monthly* turned on the fact that the statute there exempted publications with religious content but not those with nonreligious content. See, e.g.,

Texas Monthly, 489 U.S. at 28 (Blackmun, J.. concurring in the judgment) (invalidating the exemption as "[a] statutory preference for the dissemination of religious ideas"); *id.* at 26 (White, J., concurring in the judgment) (because "the content of a publication determines whether its publisher is exempt or nonexempt," the Free Press Clause "[wa]s the proper basis" for invalidating the exemption). *Texas Monthly* therefore reflects the fundamental principle that with respect to expression in the public square, government must observe content neutrality under both the Free Press and Free Speech Clauses. See, e.g., *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 230 (1987) ("[O]fficial scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press."); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."). In sharp contrast, the activity of ministers, as we have already shown, may (and sometimes must) be treated differently by the

government because it lies at the core of the distinctive constitutional subject of the exercise of religion.

C. Distinctive Treatment of Ministers by Statute.

Third, statutory law, including the Internal Revenue Code, treats ministers distinctively outside of §107(2). For example, the Code classifies most ministers as self-employed for the purposes of the FICA (Social Security and Medicare) tax (while classifying them as employees with respect to income taxes and retirement plans). *Social Security and Other Information for Members of the Clergy and Religious Workers*, IRS Publication 517, at 3 (2013). Thus clergy must "pay the 'self-employment tax' which is 15.3 percent of net earnings, while employees and employers split the Social Security and Medicare (FICA) tax rate of 15.3 percent, with each paying 7.65 percent." Richard Hammar, *Five Takeaways from Friday's Housing Allowance Ruling*, Managing Your Church (Nov. 25, 2013), *available at* http://blog.managingyourchurch.com/2013/11/five_takeways_from_fridays_hou_1.html. (This is another situation in which the law treats ministers less favorably, not more favorably, than other employees. See

id. (noting the "significant" financial impact of this treatment).) Congress then in turn accommodated religion by creating an exemption from this requirement for, among others, a duly ordained, commissioned or licensed minister of a church or a member of a religious order or a Christian Science practitioner if that person is conscientiously opposed to the acceptance of any public insurance, 26 U.S.C. §1402(e), and for members of religious orders who have taken a vow of poverty. IRS Publication 517, *supra*, at 3.

Viewed within this rubric of permissible accommodation, §107(2) is a constitutional exercise of congressional power. As we show in Part II, §107(2), when considered together with §107(1), serves two "historic and substantial state interest[s]" (*Davey*, 540 U.S. at 725) central to the American church-state tradition. It ensures that various denominations are treated equally, and it reduces government entanglement in church governance and religious questions.

II. The Section 107(2) Exclusion Rests on Two Substantial, Secular Legislative Purposes Justifying Differential Treatment Of Ministers: Preserving Equality Among Denominations and Reducing Entanglement in Church Affairs.

The tax treatment of ministers' housing presents a complicated problem, and Congress responded reasonably by enacting §107 of the Internal Revenue Code. Section 107 as a whole first reflects Congress's judgment that ministers fall among the classes of employees (including many secular employees) whose jobs tend to have particular housing requirements that call for an income-tax exclusion for housing arising out of the job duties. See Govt. Br. at 51-52. The first such determination came in 1921 with the passage of the "parsonage" allowance, now §107(1), which excludes "the rental value of a home furnished to [the minister] as part of his compensation." Then in 1954 Congress added §107(2), extending the exclusion to cash allowances that certain ministers receive, as part of their compensation, "to rent or provide a home." In addition to §107, Congress set forth certain general criteria warranting exclusion for secular employees in §119(a), which provides an exclusion for in-kind housing provided to an employee on

the employer's property "for the convenience of the employer." Congress also provided categorical exclusions for certain other workers in 26 U.S.C. §134 (military personnel) and 26 U.S.C. §911 (U.S. citizens working abroad). Thus §107(2) is part of an overall effort in the Internal Revenue Code to recognize situations—all worthy, in Congress's view—in which the particular housing requirements of a group of employees call for a tax exclusion arising out of the nature of their job duties. See Govt. Br. at 4-5.

Section §107(2), understood in the context of §§107(1) and 119, is a permissible recognition of the constitutionally distinctive situation of ministers. It serves two goals central to America's tradition concerning church-state relations. First, it ensures equal treatment among different religious bodies—most particularly, between those that do and do not own housing to provide to their ministers. Second, it reduces the church-state entanglement that results from discrimination and from inquiries into matters reserved for church governance.

These two goals are closely linked, reinforcing each other. In the absence of §107(2), and §107 generally, the criteria governing tax

treatment of ministers' housing would both produce unequal treatment across denominations and entangle government in churches' decisions such as whether to own a parsonage, how to use it, and how to treat their ministers for tax purposes.

A. Section 107(2) Avoids Differential Treatment Across Religions that Would Result from Applying §§107(1) or 119 Alone.

Congress's clearest purpose in enacting §107(2) was to equalize the effect of this section across churches, avoiding discrimination against ministers whose churches did not or could not provide them residences. The Senate Report accompanying §107(2) states:

> Under present law, the rental value of a home furnished a minister of the gospel as part of his salary is not included in his gross income. This is unfair to those ministers who are not furnished a parsonage, but who receive larger salaries (which are taxable) to compensate them for expenses they incur in supplying their own home. Both the House and your committee has [sic] removed the discrimination in existing law by providing that the present exclusion is to apply to rental allowances paid to ministers to the extent used by them to rent or provide a home.

S. Rep. 83-1622, at 16 (1954). See also Govt. Br. at 53-57.

In acting to prevent tax law from discriminating among different faiths, Congress took a positive step to fulfill one of the highest

purposes of the First Amendment. As the Supreme Court has emphasized, "the clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Equality among religions, the Court said, is also "inextricably connected with the continuing vitality of" free exercise of religion, which "can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations." *Id.* at 245. See also *Bd. of Educ., Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 706-07 (1994). The longstanding status of the principle of equality among denominations is shown by, among other things, the emphasis given to it by James Madison, perhaps the leading architect of the Religion Clauses among the founders. See, e.g., 1 *Annals of Congress* 730-31 (Aug. 15, 1789) (statement of Mr. Madison) (describing proposal leading to First Amendment as addressing fear that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform"); James Madison, *Memorial and*

Remonstrance Against Religious Assessments, ¶3 (1785), *reprinted in Everson v. Board of Education*, 330 U.S. 1, 65 (1947) (appendix to dissent of Rutledge, J.) ("Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?").

A tax code that exempted only ministers of churches with parsonages would discriminate against certain denominations—especially "small, new" denominations (*Larson*, 456 U.S. at 245)—in several ways that Congress rightly wished to avoid. It would disfavor churches that did not own a parsonage or could not afford to buy land and construct one—primarily churches that tend to be less established or wealthy. It would discriminate against pastors serving several churches and not living on the premises of any one—a discrimination that would likewise disfavor smaller and less established religious bodies. And it would discriminate against churches whose ministers live away from the house of worship for mission-related reasons—perhaps, for example, because larger parts of the congregation live in

those other neighborhoods. In *Larson*, the Court held that a law regulating solicitations by religious organizations that raised more than 50 percent of funds from their members favored "well-established churches" over those that "are new and lacking in a constituency." 456 U.S. at 246-47 n.23. Congress could quite reasonably think that limiting a housing exclusion to church-owned parsonages would produce similar discrimination. Accordingly, Congress justifiably treated ministers differently from other occupations in order to avoid inequality among ministers of different denominations.

We reemphasize that the Court's recognition of government discretion to treat ministers distinctively has not always benefited ministers and their churches. In *Locke v. Davey*, 540 U.S. 712, it permitted the state to exclude an otherwise-eligible student from state funding because he was majoring in devotional theology, a subject preparing him for the ministry. See *supra* p. 15-18. In *Davey* too, the Court had before it the argument that the scholarship denial would avoid differential treatment among different ministers. While most faith traditions require graduate training beyond a four-year degree for

their ministers, some denominations consider an undergraduate degree from an accredited institution sufficient. Based on this fact, a group of prominent *amici*, including the American Civil Liberties Union and Americans United for Separation of Church and State, argued in *Davey* that the State could permissibly deny funding for devotional theology majors so as to avoid funding complete clergy training for some denominations but not for others. See Brief Amicus Curiae of ACLU *et al.*, *Locke v. Davey*, 2003 WL 21715031, at 20 (arguing that Washington could seek "to ensure that its scholarship program does not have the result in practice of subsidizing some religions but not others").

Although this appeal involves only a challenge to §107(2), it should be noted that §107 as a whole serves to avoid additional inequalities among churches that would result if §119 were the sole vehicle to recognize the situation of ministers concerning housing. Because §119 is limited to housing provided by employers to employees, it would discriminate against churches who treat their ministers as independent contractors for theological or mission-related reasons. In a series of cases raising the question whether ministers can deduct

business expenses as independent contractors, federal courts have reached different results for various denominations according to "[d]ifferences in church structure," primarily the degree of control and supervision exercised over the minister by a congregation or higher church body. *Alford v. U.S.*, 116 F.3d 334, 337 (8th Cir. 1997) (Assemblies of God pastor was independent contractor); *Weber v. Commissioner*, 103 T.C. 378, 1994 WL 461872 (1994), *aff'd,* 60 F.3d 1104 (4th Cir.1995) (United Methodist pastor was employee); *Shelley v. Commissioner*, 68 T.C.M. (CCH) 584 (1994) (International Pentecostal Holiness minister was independent contractor). Applying the same test for employees versus independent contractors would deny the housing allowance to ministers whose relationship to the church or denomination involved less control or supervision for reasons of church governance.

As a result, if §107 had not been enacted and churches were left to §119, the Code might induce some churches to exercise greater control over clergy than their theology would suggest, in order that the clergy might qualify as employees. This would discriminate among churches

on a matter that some view as important to their internal governance and theologically sensitive. See, e.g., LaVista Church of Christ, *Is a Preacher an Employee of the Church?*, *available at* http://lavistachurchofchrist.org/LVanswers/2007/02-12.htm ("When a preacher is doing his duty to Christ, he does not take his direction from what the local congregation wants to hear. His duty is to teach people what they need to hear. . . . Therefore, in our current terminology a preacher is an independent contractor."); *Freedom Friends Church Statement of Faith and Practice*, *available at* http://freedomfriends.org/FF-What.htm ("Early Friends had a great conscience against what they called the "hireling ministers" of the day. They understood that no intermediary is needed between the human soul and its God. Friends did without priest or pastor for the best part of 200 years. . . . For tax purposes our pastor is an independent contractor."); and *Doing the Most Good, About the Salvation Army, available at* http://blog.salvationarmyusa.org/about/ (treating "officers," i.e. clergy, as a separate category from "employees").

Likewise, if the exclusion were available only to employees, pastors serving several small churches might not qualify as employees of any one of them and could therefore be ineligible. Cf. *Alford*, 116 F.3d at 337 (doubting, although not deciding, whether "control exercised over [minister] by three separate entities" could be aggregated to render him an employee). It is legitimate to seek to avoid such discrimination against smaller churches.

In short, both §107(2) in particular and §107 in general recognize the fact that religious bodies have widely varying relationships with their clergy, for theological, mission-related, and practical reasons. Accordingly, these provisions serve historic and substantial interests in achieving equal treatment among different religious bodies, especially among their ministers.

B. Section 107(2) Is a Permissible Exercise of the Legislature's Power to Create Religious Exemptions that It Reasonably Believes Will Reduce Church-State Entanglement.

As we have just indicated, §107(2) is part of an overall judgment by Congress in §107 that ministers warrant distinctive treatment. If §107(2) were invalidated, the tax code would make an improper distinction between churches with parsonages and those without. But consigning ministers to §119 would create further problems, because the application of its criteria to ministers would entangle courts in religious questions and matters of church governance. Because of these risks of entanglement, Congress had good reasons for giving ministers distinctive treatment in §107 and then, in turn, for enacting §107(2) to accord that treatment to all ministers.

In *Walz v. Tax Commission*, the Supreme Court upheld property-tax exemptions for religious institutions on the ground, in part, that they decreased the entanglement between church and state. *Walz*, 397 U.S. at 676 ("[E]xemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state,

and tends to complement and reinforce the desired separation insulating each from the other"). The Court recognized that "either course, taxation of churches or exemption, occasions some degree of involvement with religion." *Id.* at 674. It was enough for the Court, on this point, that the exemptions decreased entanglement on balance.[3]

Enforcing the tax code and regulations can lead to two different kinds of entanglement. First, as we have already noted, the *Hosanna-Tabor* Court was particularly concerned about government interference with "internal governance" decisions that affects the church's "faith and mission." 132 S. Ct. at 706, 707; see *supra* pp. 12-15. Second, courts might well be asked to make improper religious inquiries, the "intrusive judgments regarding contested questions of belief or practice" spoken of in *Colorado Christian University v. Weaver,* 534 F.3d 1245, 1261 (10th Cir. 2008). See also *Schleicher v. Salvation Army,* 518 F.3d 472, 475

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[3] As Professor Zelinsky has put it: "Extensive contact between modern tax systems and religious institutions is unavoidable. There are no disentangling alternatives, just imperfect tradeoffs between different forms of entanglement." Zelinsky, *supra,* at 103. The government may "plausibly choose entanglement between church and state at the borders of exemption rather than the entanglement of enforcing tax law against religious entities." *Id.* at 104.

(7th Cir. 2008) ("[t]he assumption behind the [ministerial exception]" is that courts should not "interfere in the internal management of churches").

For example, in the cases involving the question whether ministers can deduct business expenses as independent contractors (see *supra* pp. 29-31), the courts have recognized that they risk intruding on the church's governance of clergy as well as venturing into religious questions they should not decide. *Alford*, 116 F.3d at 339. As we have already noted, a church may have many reasons, including reasons deeply rooted in its "faith and mission," to view its ministers as independent contractors. See *supra* p. 31 (examples of church statements); *Hosanna-Tabor*, 132 S. Ct. at 707. Application of §119 would deny any housing allowance to independent-contractor ministers, and Congress can legitimately determine that the tax code should not discourage churches from making that internal-governance choice.

Moreover, the cases distinguishing employee-ministers from independent contractors have involved extensive inquiries into the degree of church supervision; inquiries that are themselves entangling.

As the Eighth Circuit put it in *Alford*: "[W]e are somewhat concerned about venturing into the religious arena in adjudicating cases such as this one, and interpreting what really are church matters as secular matters for purposes of determining a minister's tax status." *Alford*, 116 F.3d at 339 (internal quotes omitted).[4] Section 107 avoids these problems by removing §119's limitation of the exclusion to employees.

Section 107 also avoids §119's inquiry concerning the extent to which the particular minister's house is actually used for the church's "convenience": for example, how many church meetings or counseling sessions occur at the house. The Supreme Court has recognized the dangers of this type of inquiry. See, e.g., *Amos*, 483 U.S. at 336 ("It is a significant burden on a religious organization to require it, on pain of

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[4] The court suggested it perhaps should avoid entanglement by ignoring church law that defines the church's control over the minister. See *Alford*, 116 F.3d at 339 ("The doctrinal and disciplinary control exercised by the [church] or available for their exercise, is guided by religious conviction and religious law, not by employment relationships, and . . . should be considered impermissible or immaterial in determining the employment status of a religious minister.") But ignoring such sources increases the risk that the court will misunderstand and override the church's internal governance.

substantial liability, to predict which of its activities a secular court will consider religious.").

Section 107, as a whole, is an exercise of Congressional prerogative that allows a church to make its own governance and control choices while preserving tax treatment of its ministers similar to the treatment of comparable workers.

III. Reliance Interests of Retired and Nearly-Retired Ministers Argue Strongly for Upholding §107(2).

Finally, upholding the tax exclusion of housing allowances is strongly supported by the long-standing reliance that retired and nearly-retired ministers have placed on the exclusion.

Section 107(2) has been in the Code for 60 years. To overturn it would upset the expectations of thousands of churches and their ministers who have relied on it in good faith. Moreover, §107(2) should be considered in light of the even longer history of the §107(1) exclusion for church-owned parsonages—which dates back to 1921—since §107(2) aims to equalize other ministers with those living in parsonages. And it should be considered in the light of the general practice of exempting

religious organizations, which "covers our entire national existence and indeed predates it." *Walz*, 397 U.S. at 678. This is reliance on a longstanding, rather than a new, law. The case is similar to *Walz*, in which the Court upheld property-tax exemptions partly on the ground that "'a page of history is worth a volume of logic.'" *Walz*, 397 U.S. at 676 (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.)). As the Court noted, decades of exempting religious organizations from taxation had not led to religious establishments; and "an unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside." *Id.* at 678.

In *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992), the Court considered "whether [a] rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling [it]." If the ministerial housing allowance were invalidated, both churches and their clergy would be directly harmed. Certainly a church will have structured property choices around the availability of the housing allowance. But far more tragic is the disparate impact doing away with

this allowance will have on older ministers. They gave their working life to fulfill a higher calling and, in good faith, structured their finances and their retirement planning around a section of the tax code extant in its current form for 60 years. If this section were invalidated, the consequences for retired ministers could run the gamut from a reduced standard of living to true want. Ministers approaching retirement may not be able to contribute enough to cover the shortfall in their remaining years of active ministry.

This is not alarmist, it is realistic. The ministry is not a highly compensated profession; the hours are often long and the work can be emotionally taxing. The unique tax status of ministers often means that during their working years they are paying double their secular counterparts' contribution for Social Security and Medicare benefits. See *supra* p. 21-22. The profession often requires sacrifice of personal and financial security. In this context, we should not in good conscience dismiss the reliance interests of ministers as unimportant. It is, in the end, an issue that will speak volumes about our system's commitment to justice.

Conclusion

The judgment of the district court should be reversed and summary judgment entered for the government.

Respectfully submitted,

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The undersigned counsel certifies that this brief complies with the type-volume limitation of FRAP 32(a)(7)(B) and 29(d) because this brief contains 6966 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii). Furthermore, this brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) and Circuit Rule 32 (b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Century Schoolhouse font.

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