No. 14-1152

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

Plaintiffs-Appellees

v.

JACOB J. LEW and JOHN A. KOSKINEN,

Defendants-Appellants

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

REPLY BRIEF FOR THE APPELLANTS

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GLOSSARY

A	Appellants' separately bound record appendix
Am. Br.	*Amicus* brief
APA	Administrative Procedure Act
App	Appendix bound with appellants' opening brief
Br.	Plaintiffs' answering brief
The Code	Internal Revenue Code
Commissioner	Commissioner of Internal Revenue
Doc.	Documents in the original record, as numbered by the Clerk of the District Court
FFRF	Freedom from Religion Foundation, Inc.
Gov't Br.	Appellants' opening brief
IRS	Internal Revenue Service
Plaintiffs	FFRF, Annie Gaylor, and Dan Barker
Secretary	Secretary of the Treasury

This reply brief is directed only towards those contentions in plaintiffs' answering brief and the brief *amicus curiae* of the Center for Inquiry that warrant a further response. In all other respects, we rely upon our opening brief.

INTRODUCTION

In our opening brief, we argued that plaintiffs lack standing to sue for unequal treatment under § 107(2)[1] because they have not personally sought and been denied the parsonage exclusion. We further argued that prudential concerns and statutory limitations under the APA also counsel dismissal because Congress generally has confined tax litigation to deficiency proceedings and refund suits brought by taxpayers contesting their own tax liabilities, and plaintiffs were not contesting their own tax liabilities through one of those designated procedures.

In response, plaintiffs repeatedly misconstrue our argument. In the process, they obscure — but do not dispute — the simple dispositive fact that they have not sought or been denied the tax benefit about

[1] Unless otherwise indicated, all "§" references are to the Internal Revenue Code (the Code), as currently in effect.

which they complain. Without that predicate injury — unequal treatment by the Government regarding a tax benefit — they are merely complaining about the enjoyment of the exclusion by third parties not before the Court. And "[o]rdinarily a person does not have standing to complain about someone else's receipt of a tax benefit." *Flight Attendants Against UAL Offset v. Commissioner*, 165 F.3d 572, 574 (7th Cir. 1999).

Regarding the merits, we argued in our opening brief that § 107(2) does not violate the Establishment Clause. The statute has the secular purpose and effect of eliminating discrimination among ministers and of minimizing the Government's entanglement with the church-minister relationship, thereby satisfying each prong of the *Lemon* test. We emphasized three critical aspects of § 107(2). First, the statute involves an exemption from tax, rather than a direct subsidy. Second, the statute relates to the employment relationship between a church and its minister and has an effect similar to that of the ministerial exception adopted by the courts. Third, the statute is neutral because it merely adapts the Code's general tax benefits for employment-related housing to the unique context of a church and its minister.

In response, plaintiffs ignore the first two critical aspects of § 107(2). They fail to come to grips with our argument that the District Court's subsidy analysis conflicts with binding authority. And examining the statute in isolation, they contend that § 107(2) is not neutral because it applies only to ministers. As we demonstrate below, plaintiffs' neutrality analysis is flawed, as is their analysis of § 107(2) under the *Lemon* test.

ARGUMENT

A. Plaintiffs lack standing to sue

1. Plaintiffs misconstrue our standing argument

Our standing argument is simple and straightforward. Plaintiffs do not have standing because they have not asked for the § 107(2) exclusion about which they complain. Until they do so, they lack a particularized, concrete injury that satisfies the requirements of Article III. Our position is grounded in controlling Supreme Court precedent holding that an alleged unequal-treatment injury "accords a basis for standing only to 'those persons who are *personally* denied equal treatment' by the challenged discriminatory conduct." *Allen v. Wright*, 468 U.S. 737, 755 (1984) (emphasis added) (quoting *Heckler v. Mathews*, 465 U.S. 728, 739-740 (1984)). Without the personal denial of equal

treatment, the plaintiff raises only a "generally available grievance about government," which "does not state an Article III case or controversy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-574 (1992).

Citing *Allen*, this Court has recognized that "[o]rdinarily a person does not have standing to complain about someone else's receipt of a tax benefit." *Flight Attendants*, 165 F.3d at 574. Plaintiffs have standing to complain only about *their own* tax liabilities. In and of itself, the fact that ministers are not taxed on their housing allowances causes no injury to plaintiffs. To successfully invoke the court's jurisdiction, plaintiffs must allege a claim of injury that implicates their own tax treatment, rather than simply challenging the tax treatment of the ministers whom § 107(2) benefits. And to challenge their own tax treatment, plaintiffs must follow the deficiency or refund procedures that ordinarily apply when a taxpayer claims that he has been required to overpay his tax. *See* Gov't Br. 29-32. Plaintiffs have not done so here. (A24,27,31.)

Rather than engage that argument, plaintiffs instead — without any citation to our brief — accuse the Government of making numerous

arguments that we have not, in fact, made. We have not argued (i) that the Government has "unfettered discretion to act as it chooses" (Br. 22), (ii) that "discriminatory tax exemptions are beyond judicial review" (Br. 12), or (iii) that the Court should "shield underinclusive tax benefits from any effective review" (Br. 3). To the contrary, we have acknowledged that plaintiffs *could* have standing to challenge § 107(2) as a discriminatory, underinclusive tax exclusion. As the District Court recognized (App6), we have argued only that their suit is "premature because plaintiffs have never tried to claim the exemption." If plaintiffs were to claim the exclusion — either in a deficiency proceeding or in a refund suit — they would have standing to sue, as we explained in our opening brief (pp. 24-26). In the cases we cited, the plaintiffs had standing to challenge underinclusive tax benefits because they had first sought the benefit for themselves.

Nor have we argued, as plaintiffs contend (Br. 16), that "an administrative tax refund" is "exclusive of all other remedies, including nullification." To the contrary, as the District Court observed (App6), we acknowledged in the court below that "nullification," rather than a refund, "is an available remedy" if the statute were determined to be

unconstitutional (Doc. 53 at 4 n.3). But plaintiffs may seek nullification of § 107(2) *only* in proceedings addressing their own tax liabilities, such as a refund suit. And bringing a refund suit would not preclude nullification as a remedy. For example, in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8 (1989), the Court held that "invalidat[ing] the tax altogether" was a possible remedy, even though the plaintiff had brought a refund suit. Similarly, in *Heckler*, the Court held that "nullification" would be an appropriate remedy in a suit where the plaintiff had applied for the benefit at issue. 465 U.S. at 738-739 & n.5.

Along the same lines, we have not argued that "courts may not impact a third party's tax liability" (Br. 17) or that plaintiffs' suit is precluded by the Anti-Injunction Act or the Declaratory Judgment Act (Br. 17-19), as plaintiffs further contend. As noted above, if a statute is determined to be unconstitutional in a suit brought by a taxpayer challenging his own tax liability, nullification would be an appropriate remedy, and that remedy — by definition — could "impact a third party's tax liability." What we have argued, and what plaintiffs ignore, is that it is "'not enough to point to an assertedly illegal benefit flowing to a third party that happened to be a religious entity,'" and that

taxpayers lack standing where they "'do not complain about their own tax status.'" Gov't Br. 23 (quoting *In re U.S. Catholic Conference*, 885 F.2d 1020, 1022, 1024-1026 (2d Cir. 1989)).

Finally, we have not argued, as plaintiffs contend (Br. 19), that they lack a particularized injury because their alleged injury "is shared by many people." *Lac du Flambeau Bank of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 496 (7th Cir. 2005). Rather, we have argued that, when a plaintiff alleges an injury based on a disparity in treatment accorded similarly situated persons, he has not suffered a particularized injury until he has sought, and been denied, the treatment in question. Once he does so, his particularized injury will support Article III standing, even if millions have also suffered the same injury. In short, we have by no means argued that the "courthouse door" is permanently "closed" to plaintiffs (Br. 21). But they will not be able to allege any direct and personal injury flowing from assertedly unconstitutional limitations on the § 107(2) exclusion unless they first seek and are denied the exclusion.

2. Plaintiffs' analysis of Supreme Court standing precedent is flawed

Turning to the argument that we actually made, which is that plaintiffs lack standing under controlling decisions of the Supreme Court, plaintiffs contend (Br. 6, 13) that they have standing under *Ariz. Christian School Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011). Plaintiffs are incorrect. Although the Court in *Winn* observed that "plaintiffs may demonstrate standing [in Establishment Clause cases] on the ground that they have incurred a cost or been denied a benefit on account of their religion," and that such "costs and benefits can result from alleged discrimination in the tax code," *id.* at 1440, the Court did not — as plaintiffs suggest (Br. 6, 13) — permit suits where the plaintiff was challenging only a third party's tax liability and not his own. To the contrary, the Court cited *Texas Monthly* as support for its observation regarding standing in Establishment Clause cases. *Id.* And, as we noted in our opening brief (p. 36), standing was recognized in *Texas Monthly* because the plaintiff there "petitioned for a refund of its own taxes," and therefore "sought to litigate . . . its own liability." *Fulani v. Brady*, 935 F.2d 1324, 1328 (D.C. Cir. 1991). As the Court in *Winn* emphasized, to satisfy Article III, the "'injury must affect the

plaintiff in a personal and individual way.'" 131 S. Ct. at 1442 (citation omitted). In *Texas Monthly*, unlike the situation here, the discriminatory tax exemption affected the plaintiff in a personal and individual way because the plaintiff was seeking a refund of its own taxes.

A statute that limits benefits on an allegedly discriminatory basis does not affect a plaintiff in a personal and individual way until the plaintiff actually takes steps to obtain the benefit at issue, as illustrated in *Heckler*. The Supreme Court in *Heckler* did not hold, as plaintiffs suggest (Br. 14), that "discrimination [in a statute] itself gives rise to standing." Rather, and as explained in our opening brief (pp. 19-22), the male plaintiff in *Heckler* had standing precisely because, after applying for Social Security benefits, he "personally has been denied benefits that similarly situated women receive." 465 U.S. at 735, 740 & n.9. It was not enough that the statute at issue was discriminatory on its face. To sustain a particularized and individualized injury that could satisfy Article III, the plaintiff had to actually seek, and be denied, the benefits before bringing suit. Without the personal denial, the plaintiff would be asserting only a "generalized" grievance. *Id.* The

Supreme Court reiterated that point later in *Allen*, where it held that a plaintiff lacked standing to challenge another's tax liability and distinguished *Heckler* on the basis that the plaintiff there was "'personally denied equal treatment.'" 468 U.S. at 755 (citation omitted).

Plaintiffs attempt to distinguish their case from *Allen* by asserting (Br. 20) that the individual plaintiffs here "are, in fact, personally denied equal treatment under the law." But they fail to explain how that could possibly be the case. As we noted in our opening brief (pp. 10, 26), and plaintiffs do not dispute, the individual plaintiffs have not contacted the IRS or Treasury about their housing allowances. Consequently, they have neither personally sought nor been denied equal treatment by the Government. (A24,27,31.) *See Am. Atheists, Inc. v. Shulman*, No. 2012-264, 2014 WL 2047911, at *8 (E.D. Ky. 2014) (holding that an atheist organization lacked standing to challenge statutory provisions exempting churches from certain filing requirements for tax-exempt status where the organization "never sought classification as a church or a religious organization under I.R.C. § 501(c)(3)"). Granting plaintiffs standing at this point in time, before

the IRS has been given a chance to rule on the novel question of statutory interpretation raised by plaintiffs' complaint, would violate the very separation of powers principles that the standing rules are designed to protect. *See* Gov't Br. 37-38.

3. Plaintiffs fail to justify their bid to have this Court go into conflict with the Fifth Circuit's *en banc* decision in *Apache Bend*

In our opening brief (pp. 21-22, 31-32), we demonstrated that plaintiffs' lawsuit was nearly identical to one dismissed for lack of standing in *Apache Bend Apartments, Ltd. v. United States*, 987 F.2d 1174 (5th Cir. 1993) (*en banc*). The plaintiffs in *Apache Bend*, like plaintiffs here, sought to challenge an allegedly discriminatory federal tax benefit without first seeking the benefit and without litigating their own tax liabilities. Applying *Allen* and *Heckler*, the Fifth Circuit, sitting *en banc*, held that plaintiffs lacked standing to pursue an "injury of unequal treatment," based on their ineligibility for special transition rules extended to other taxpayers, because they did not "seek transition relief for themselves" or "to litigate their own tax liability." 987 F.2d at 1177. Instead, they "ask[ed] only that transition relief be denied to the favored taxpayers." *Id.* As a result, their asserted harm was no more

than a "generalized grievance" that could not support standing. *Id.* at 1178. As the Fifth Circuit explained, "Congress has erected a complex structure to govern the administration and enforcement of tax laws, and has established precise standards and procedures for judicial review of tax matters." *Id.* at 1177. That structure does not include stand-alone suits outside the deficiency and refund procedures that challenge a third party's tax liability.

Plaintiffs do not contend that *Apache Bend* was incorrectly decided or that it conflicts with this Court's precedent. Instead, they brush the *en banc* decision aside by noting (Br. 20) that the case did not involve an Establishment Clause challenge. That distinction, however, is irrelevant and in no way undermines the Fifth Circuit's standing analysis. As we explained in our opening brief (pp. 9 n.3, 22-23), standing principles apply with equal force in the Establishment Clause context.

B. Section 107(2) does not violate the Establishment Clause

In our opening brief (pp. 3-4, 48-49, 56-59, 65-66), we demonstrated that § 107 does not violate the Establishment Clause. It is just one component in a larger Congressional scheme that exempts

qualifying employment-related housing from taxation. Section 107 provides minister-specific tax benefits that are similar to those provided to other taxpayers. It merely tailors the benefit to avoid entanglement with the church-minister relationship. The fact that § 107(2) contains the term "minister" by no means makes it constitutionally invalid. *See Texas Monthly*, 489 U.S. at 10 ("Nor have we required that legislative categories make no explicit reference to religion."). As was acknowledged even in the plurality opinion in *Texas Monthly*, upon which plaintiffs predicate their arguments, a religion-specific tax benefit is fully consistent with the Establishment Clause where the benefit is "grounded in some secular legislative policy that motivated similar tax breaks for nonreligious activities." *Id.* at 14 n.4. Section 107 is grounded in the same secular legislative policy that exempts from income taxation housing utilized for the employer's convenience. Plaintiffs' argument to the contrary lacks merit, as does their contention that § 107 violates the *Lemon* test.

1. Section 107 is neutral towards religion because it provides tax benefits similar to those provided elsewhere in the Code for housing utilized for the employer's convenience, but tailors the benefit to avoid entanglement

Congress has not provided housing tax benefits "exclusively" to ministers, as plaintiffs and their *amicus* contend (Br. 22-25; Center for Inquiry Am. Br. 7-12). Rather, the exclusions from tax provided in § 107 are merely a minister-specific application of the larger, overarching Congressional policy of not taxing qualifying employment-related housing. In arguing to the contrary, plaintiffs and their *amicus* ignore or misstate how Congress treats employment-related housing.

The Code contains a number of other exclusions and deductions for housing used for the employer's convenience that are not religion-specific, but are available to all taxpayers who meet the specified criteria. In some instances, eligibility for the housing tax benefit is determined on a case-by-case basis. For example, § 119(a) permits taxpayers to exclude employer-provided housing if the taxpayer proves (among other things) that the housing is provided for the employer's convenience. In addition, §§ 162 and 280A(c)(1) permit taxpayers to deduct their housing costs to the extent the taxpayer proves that the

home is being used for his employer's convenience (and meets other statutory requirements).

In other instances, the housing tax benefit is provided categorically, without requiring the taxpayer to demonstrate that he is using his home for his employer's convenience. In this category fall the exclusions provided in § 107 (ministers), § 119(d) (certain educational employees), § 134 (military personnel), and § 912 (government employees living abroad). But in all such cases, the tax benefit is provided for the same overarching secular purpose: housing utilized for the employer's convenience (and meeting other requirements) is not treated as taxable income to the employee.

A comparison of § 107 to the other employment-related housing provisions in the Code highlights that the tax benefits provided by § 107 are similar to other existing benefits. Section 107(1) excludes the value of housing furnished to ministers in kind, just as § 119 excludes the value of housing furnished to non-minister employees in kind. Similarly, § 107(2) excludes an allowance for housing furnished to ministers in cash, just as §§ 162 and 280A(c)(1) provide a deduction for housing used for the employer's business and convenience. Section 107

merely permits ministers to claim the tax benefit without requiring an inquiry into whether the housing is being used for the church's convenience, an inquiry required under §§ 119 and 280A(c)(1). In this sense, § 107 is similar to the other blanket exclusions for housing allowances, such as that provided in §§ 134 and 912, which permit military personnel and government employees living abroad, respectively, to exclude from income cash housing allowances without first demonstrating that the housing is being used for the employer's convenience.

In response, plaintiffs insist (Br. 22) that § 107(2) is unconstitutional. First, according to plaintiffs (Br. 22), "other taxpayers cannot deduct similar cash allowances, even if provided for the 'convenience of the employer.'" They further contend (Br. 28) that § 107(2) "has no requirement" that the housing be used for the church's "convenience." As we demonstrate below, both arguments lack merit.

Before turning to those arguments, however, we wish to clarify a point obscured by plaintiffs. The Government does not contend that "[l]iability for income tax" is a "substantial government burden on free exercise" rights (Br. 40). It is not. Rather, we contend that, having

chosen to exclude from income, or make deductible, housing used for the employer's convenience, it was permissible for Congress to extend those tax benefits to ministers in a way that promotes two secular goals — equality of treatment by the Government of all religious denominations and avoidance of potential church-state entanglement. *See* Gov't Br. 59-68.

a. Plaintiffs' contention that § 107(2) provides ministers an exclusive tax benefit conflicts with the Code and Congressional intent

Plaintiffs contend (Br. 22, 45) that § 107(2) provides a tax benefit exclusively for ministers because "other taxpayers cannot deduct similar cash allowances, even if provided for the 'convenience of the employer.'" That statement is not only incorrect, but it is also directly contradicted by § 280A(c)(1), a provision ignored by plaintiffs in their answering brief. As we explained in our opening brief — and plaintiffs ignore, but do not dispute — taxpayers can deduct cash allowances provided by their employers to the extent that the cash is used for housing expenses incurred for the "convenience of [the] employer." § 280A(c)(1). Accordingly, although (as plaintiffs observe (Br. 13)) "§ 119" does not allow taxpayers to exclude or deduct "any cash housing

allowance paid as compensation, even if used to pay housing costs required by the employer," § 280A(c)(1) does.

Plaintiffs' contention (Br. 22, 45) also conflicts with §§ 134 and 912, both of which allow "other taxpayers" to exclude "similar cash allowances." The existence of blanket exclusions for the military and other government employees in §§ 134 and 912, respectively, flatly refutes plaintiffs' contention (Br. 1) that "Congress has never excluded cash housing allowances provided to non-clergy."

Plaintiffs' contention (Br. 31) that § 107(2)'s "exclusion for ministers is not grounded in a secular legislative policy that motivates similar tax breaks for non-religious employees" disregards contrary Congressional judgment. As Congress understood, § 107 is "similar to other housing provisions in the Tax Code offered to workers who locate in a particular area for the convenience of their employers, and military personnel who receive a tax exclusion for their housing." 148 Cong. Rec. 4670 (Apr. 16, 2002). As Congress further understood, § 107 also accommodates the fact that "clergy frequently are required to use their homes for purposes that would otherwise qualify for favorable tax treatment, but which may require more intrusive inquiries by the

government into the relationship between clergy and their respective churches with respect to activities that are inherently religious." Clergy Housing Allowance Clarification Act, H.R. 4156, 107th Cong. § 2(a)(5) (as introduced April 10, 2002). Since non-minister taxpayers are able to enjoy similar "favorable tax treatment" for their housing, *id.*, § 107(2) — read in its broader context — by no means results in an overall scheme that provides benefits exclusively to ministers.

Plaintiffs also assume, incorrectly (Br. 29-30), that ministers generally do not utilize church-provided housing for their church's convenience. As we demonstrated in our opening brief (pp. 6-7, 51), but plaintiffs simply disregard, the parsonage traditionally is an extension of the church itself and is typically used for religious purposes. Accordingly, whether provided in cash or in kind, the minister's housing benefit historically was considered to be provided for the church's "convenience." *Williamson v. Commissioner*, 224 F.2d 377, 380 (8th Cir. 1955); *see Eveland v. Erickson*, 182 N.W. 315, 319 (S.D. 1921) (observing that a church "furnish[es] the pastor a house" to "make efficient the religious work and purpose of the church"); Barham, *The Parsonage Exclusion under the Endorsement Test: Last Gasp or Second*

Wind?, 13 Va. Tax Rev. 397, 418 (1993) (observing that the "clergymember's situation is unique because by and large his home becomes the business place of his employer"). The *amici* briefs submitted in support of the Government's appeal provide concrete examples of this historical fact. *E.g.*, Diocese of Chicago Am. Br. 16-21; Nat'l Jewish Comm'n Am. Br. 5-8. In other words, Congress, the courts, and commentators all acknowledge the traditional use of parsonages for the convenience of the church.

Plaintiffs' contention is also at odds with the summary-judgment record. In the court below, the Government submitted a declaration from a professor of American Religious History detailing how ministers traditionally resided in parsonages for the church's convenience. (A37-51.) Plaintiffs, for their part, submitted no countervailing evidence. On the contrary, plaintiffs admitted that there was "[n]o dispute" that the "parsonage system provided a critical means for churches to ensure that the spiritual needs of their congregations were met." (A73.) Indeed, one of the plaintiffs, Dan Barker, conceded that, for a minister, "everywhere was the house of God," not just the property formally owned by the Church. (Doc. 38 at 9.) These undisputed facts provide

the background context for § 107. Whether or not "all" clergy inhabit their parsonages for their churches' convenience (Br. 30), it was certainly reasonable for Congress to assume that many of them generally do.

Because ministers traditionally use their homes for the convenience of the church, § 107 serves the same secular purpose that animates §§ 119 and 280A(c)(1). *See* H.R. 4156, 107th Cong. § 2(a)(5) (observing that § 107 accommodates the fact that "clergy frequently are required to use their homes for purposes that would otherwise qualify for favorable tax treatment"); *Williamson*, 224 F.2d at 380 (holding that cash housing allowances were provided to ministers for the church's "convenience"); Barham, above, at 418. That historical fact is no less true because § 107 refers to housing provided to ministers as part of their "compensation" while § 119 does not, as plaintiffs point out (Br. 34-35). Section 119 excludes from income housing furnished to an employee for the employer's convenience (provided certain other conditions are met), even if it is intended in part as compensation. *Commissioner v. Kowalski*, 434 U.S. 77, 91 (1977).

b. The categorical nature of § 107's exclusions does not violate the Establishment Clause because other provisions of the Code provide categorical exclusions for similar employer-provided housing benefits, and obviating a showing of employer convenience in the church-minister context serves the secular purpose of avoiding entanglement

Plaintiffs contend (Br. 27-32) that § 107 is not neutral because the benefit it confers is not contingent upon the convenience of the employer. This contention misses the mark. Other provisions in the Code also categorically exclude housing benefits from taxation without requiring such a demonstration. *E.g.*, §§ 134, 912. Like §§ 134 and 912, § 107 provides a blanket exclusion that is merited because of the nature of the specific occupation at issue. To be sure, § 107 confers tax benefits on ministers, a religious occupation. But rather than extending the exclusion to other employees of religious organizations, it limits the exclusion to ministers. Ministers are provided with the exclusion because their occupation — like that of the military and foreign government employees living abroad — frequently requires them to use their homes for the employer's convenience. (A76.)

Moreover, given that the minister "personif[ies]" the church, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706-707 (2012), asking whether the minister is residing in the parsonage for the church's convenience is a somewhat circular question. The church's convenience and the minister's convenience are, for all practical purposes, one and the same. The unique nature of the church-minister relationship obviates the need for a case-by-case determination whether the employer's convenience is served.

In addition, the absence of an express convenience-of-the-employer requirement in § 107 furthers — rather than thwarts — the objectives underlying the Establishment Clause. *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336-339 (1987) (holding that lifting a burden that potentially creates church-state entanglement problems furthers Establishment Clause objectives). To be sure, Congress eschewed the case-specific, convenience-of-the-employer qualification in § 107, but it did not do so in order to provide ministers with a special benefit. As Congress observed when it amended § 107(2) in 2002, it did so for two salutary reasons. First, it wished to avoid "intrusive inquiries by the

government into the relationship between clergy and their respective churches with respect to activities that are inherently religious." H.R. 4156, 107th Cong. § 2(a)(5). Second, it hoped "to minimize the involvement of the Government in the affairs of churches, that is, to keep the separation between Church and State." 148 Cong. Rec. 5106 (April 18, 2002). Plaintiffs have not — and cannot — demonstrate that this Congressional explanation is a sham.

By arguing (Br. 27-32) that a minister's housing tax benefits should be subject to a convenience-of-the-employer requirement, plaintiffs fail to appreciate that inquiring into why the church provides its minister housing, and into what church business is performed in the minister's home, would raise some of the same concerns that prompted the judicially created ministerial exception adopted by the Supreme Court in *Hosanna-Tabor*. *See* Gov't Br. 47-48, 64-65. Like the ministerial exception, which minimizes governmental interference "in the internal management of churches," *Schleicher v. Salvation Army*, 518 F.3d 472, 474-475 (7th Cir. 2008), § 107 minimizes governmental evaluation of church activities that take place in the parsonage, as well as inquiries regarding the church's convenience *vis-a-vis* its minister.

Just as the ministerial exception does in the employment context, § 107 accommodates the church-minister employment relationship in the tax context.

Commentators who have analyzed § 107 in the broader context of the Code's other housing-related benefits have concluded that the provision is constitutional as a neutral provision that tailors a generally available tax benefit to avoid Establishment Clause concerns raised by the church-minister context. As Professor Bittker has explained, the "blanket exclusion" under § 107 "does not 'prefer' religion but merely reduces the administrative burden of applying [the Code's convenience-of-the-employer doctrine] to clergymen." Bittker, *Churches, Taxes & the Constitution*, 78 Yale L. J. 1285, 1292 n.18 (1969); *see* Barham, above, at 420 (observing that § 107 is constitutional because it provides tax benefits that are "very similar" to housing-related benefits provided elsewhere in "the Code," unlike the provision invalidated in *Texas Monthly*); Legg, *Excluding Parsonages from Taxation: Declaring a Victor in the Duel between Caesar & the First Amendment*, 10 Georgetown J. of Law & Public Policy 269, 271 (2012) (concluding that "the parsonage exclusions are constitutional when (necessarily) viewed

as one element of a larger congressional plan to extend tax relief to recipients of employer-provided housing as a principal feature of their employment"); Zelinsky, *Do Religious Tax Exemptions Entangle in Violation of the Establishment Clause? The Constitutionality of the Parsonage Allowance Exclusion*, 33 Cardozo L. Rev. 1633, 1663 (2012) (concluding that "Section 107 is a constitutionally permissible means of managing the entanglement problems inherent in the income tax treatment of housing provided to" ministers).

In contrast, the commentators cited by plaintiffs (Br. 27, 29), who conclude that § 107 violates the Establishment Clause, failed to analyze the provision in the broader context of the Code's other housing-related benefits or to consider how § 107 adapts those benefits to accommodate the unique church-minister context. For the same reason, despite plaintiffs' suggestion to the contrary (Br. 26), the passing observation in the dissenting opinion in *Texas Monthly* that § 107 was an exemption "of the type the Court invalidates today" sheds essentially no light on the question. *Texas Monthly*, 489 U.S. at 33 (Scalia, J., joined by Rehnquist, C.J., and Kennedy, J., dissenting). Section 107 was not at

issue in *Texas Monthly*, and, consequently, the Court had no occasion to analyze § 107 in light of its history and broader context in the Code.

2. Plaintiffs' analysis of § 107(2) under the *Lemon* test cannot withstand scrutiny

In our opening brief (pp. 49-70), we demonstrated that § 107(2) satisfies each part of the *Lemon* test. Plaintiffs' arguments to the contrary lack merit.

a. Section 107 has a secular purpose

Section 107 was enacted for the secular purpose of eliminating discrimination against, and among, ministers and of minimizing entanglement with a church's internal affairs. *See* Gov't Br. 49-59. Plaintiffs' argument to the contrary (Br. 32-34) lacks merit. To be sure, there is no direct evidence elucidating why Congress enacted the original parsonage allowance in 1921. But the timing of its enactment suggests that Congress did so in order to override a recent Treasury ruling. The Treasury had refused to exclude church-provided parsonages from income, despite the fact that it had allowed similarly situated non-ministers exclusions for employer-provided housing under the convenience-of-the-employer doctrine. *See* Gov't Br. 5-6, 52. Granted, the Treasury "did not address the 'convenience of the

employer' doctrine" when it ruled that ministers must include in income the value of their parsonages, as plaintiffs observe (Br. 33). The critical fact remains, however, that Congress disagreed with the Treasury's ruling and equalized the treatment of ministers and non-ministers by enacting the first predecessor to § 107. Despite the Treasury's initial ruling that a minister was merely "permitted" (Br. 33) to use a parsonage for his own convenience, it was understood at the time (1921), as it was when Congress later reenacted the parsonage allowance in § 107 (1954), that ministers actually were required to live in parsonages for their churches' convenience. *E.g.*, *Williamson,* 224 F.2d at 380; *Eveland*, 182 N.W. at 319; A76.

Congress later preserved that equal treatment between ministers and non-ministers who reside in employer-provided housing when it enacted §§ 107(1) and 119 in 1954. Although worded differently, those provisions provide comparable tax benefits. Both exclude from taxation the value of housing provided in kind to the employee. As Congress has explained, § 107(1) simply does so without "intrusive inquiries by the government into the relationship between clergy and their respective

churches with respect to activities that are inherently religious." H.R. 4156, 107th Cong. § 2(a)(5).

Section 107(2), in turn, was enacted to eliminate discrimination *among* ministers, and not to endorse religion, as plaintiffs contend (Br. 35-36). As the 1954 House and Senate Reports describe, § 107(2) was enacted to "remove[ ] the discrimination in existing law" that treated ministers who received parsonage allowances differently than those who received in-kind parsonages. *See* Gov't Br. 54. And, in doing so, Congress was merely codifying the equal treatment among ministers that had been imposed by the judiciary in the years preceding the enactment of § 107(2). *See* Gov't Br. 7, 53-54; A76. Although plaintiffs ignore that case law in their answering brief, the legislative history of § 107(2) expressly focused on that then-pending litigation, noting that the "proposed change would create an equitable condition for ministers similarly situated and would probably eliminate court action by those who would seek relief." Hearings on Forty Topics Pertaining to the General Revision of the Internal Revenue Code at 1574 (June 1953).

The fact that one congressman, Representative Peter Mack, used religious Cold War rhetoric regarding "godless" Communism to

advocate passage of § 107 does not mean (as plaintiffs suggest (Br. 35-36)) that § 107(2) was enacted for religious reasons. As noted in our opening brief (p. 61 n.10), the possible religious motives of an individual legislator are irrelevant. What matters is the legislative purpose of the statute, which was to eliminate discrimination. That purpose was described in the 1954 House and Senate Reports, when Congress enacted § 107(2), and was confirmed in the 2002 legislative history, upon the amendment of § 107(2). *See* Gov't Br. 8, 54-55. In any event, Representative Mack also observed that the parsonage tax benefit should either be eliminated or expanded to include all ministers. He quoted from a letter that he had received in support of the law that "every minister occupying a parsonage rent free should be taxed on the rental value of that parsonage, or that [§ 107(2)] should be enacted." Hearings on Forty Topics, above, at 1575 (Statement of Representative Mack). Accordingly, read in context, Representative Mack's statement indicates that he was primarily motivated to treat all ministers equally, rather than to endorse religion.

Finally, there is no merit to plaintiffs' contention (Br. 37) that no secular purpose is served by seeking to treat all ministers equally

because, they assert, Congress did not actually seek to treat all "non-clergy" equally. We disagree with both their premise and their conclusion. To begin with, as we have already shown, by providing broadly available exclusions and deductions (in §§ 119 and § 280A(c)(1)) for housing used for the employer's convenience, whether provided in cash or in kind, Congress *has* attempted to equalize the situation for secular employees. At all events, plaintiffs' conclusion lacks merit. As we explained in our opening brief (pp. 61-62), but as plaintiffs ignore, providing differences in treatment among secular employees poses no First Amendment concerns. Moreover, as the *amici* have explained, unlike a secular employer, a church's decision to provide its minister a church-owned or minister-paid parsonage may involve theological — not just financial — considerations. *E.g.*, Diocese of Chicago Am. Br. 31-32; Liberty Inst. Am. Br. 5-7; Nat'l Jewish Comm'n Am. Br. 5-8.

b. The primary effect of § 107 is secular

Section 107(2)'s primary effect is secular because it provides ministers a generally available tax benefit, eliminates discrimination among religions, and further separates church and state. *See* Gov't Br. 63-69. In arguing that the primary effect of the statute is to advance

religion (Br. 44-45), plaintiffs offer no response to (i) our comparison of § 107 and the judicially created "ministerial exception" to certain employment laws, (ii) our argument that § 107 avoids the potentially intrusive inquiries required by §§ 119, 162, and 280A(c)(1), or (iii) our critique of the District Court's flawed subsidy analysis. Instead, plaintiffs assert (Br. 44) that "[t]ax breaks provided preferentially to ministers cannot help but be perceived as an endorsement of religion." That assertion, however, is belied by our demonstration above (in Section B.1) that § 107 does *not* provide tax breaks preferentially to ministers. In addition, the ministerial exception is not perceived as an endorsement of religion, and plaintiffs implicitly acknowledge — by failing to dispute — that § 107 should be perceived the same way.

Section 107(2) has a secular effect because it equalizes the Government's treatment of all ministers. It is important to note, however, that we do not go so far as to suggest, as plaintiffs contend (Br. 36), that "if the IRS provides benefits to any ministers, then it must also provide preferential benefits to all ministers." Rather, our point is that Congress *may* permissibly seek to equalize its treatment of ministers with regard to parsonages furnished in cash as well as in kind

— not that it *must* do so. Between the "two Religion Clauses," there is a middle ground — "room for play in the joints" — within which Congress may accommodate religion "without sponsorship and without interference." *Walz v. Tax Commission*, 397 U.S. 664, 668-669 (1970). Section 107 fits squarely within that middle ground, as a codification of the denominational neutrality principle in the unique context of parsonages.

Plaintiffs' related contention that "Section 107(2) is not an accommodation in response to a substantial government-imposed burden on Free Exercise rights" (Br. 37 (capitalization altered)) misses the mark. Although the "Free Exercise Clause prohibits the state from imposing a 'substantial burden,'" *Kaufman v. Pugh*, 733 F.3d 692, 696 (7th Cir. 2013), an exemption can be a "permissible legislative accommodation of religion" under the Establishment Clause, even though it was not "compelled by the Free Exercise Clause," *Cutter v. Wilkinson*, 544 U.S. 709, 719-720 (2005). The tax benefit provided in § 107(2) is similar to that provided to non-ministers in other parts of the Code. Any difference between § 107(2) and the other Code provisions serves the secular purpose of equalizing governmental treatment of

ministers and avoiding church-state entanglement. Consequently, the Government need not identify a substantial government-imposed burden on Free Exercise rights.

c. Section 107 minimizes, rather than produces, excessive entanglement

Section 107 does not produce excessive entanglement with religion. It does not involve intrusive government participation in, supervision of, or inquiry into religious affairs. *See* Gov't Br. 69-70. Like the tax exemption upheld in *Walz* and the judicially created ministerial exception, § 107(2) minimizes church-state entanglement by eliminating any convenience-of-the-employer inquiry and thereby avoiding questions regarding whether a minister's use of his home is necessary to the church's religious mission. And, unlike the tax exemption invalidated in *Texas Monthly*, § 107(2) does not require the Government to evaluate whether a message or activity is consistent with a church's doctrinal teachings, inquiring only whether the taxpayer is functioning as a minister according to certain objective regulatory criteria.

In response, plaintiffs contend (Br. 40-45) that § 107(2) produces excessive entanglement because it is "limit[ed]" to ministers and

therefore "requires the IRS to first determine whether an individual qualifies as a 'minister of the gospel.'" As the Supreme Court made clear in *Hosanna-Tabor*, however, determining whether an individual is a minister does not produce excessive entanglement. There, the Court unanimously endorsed the ministerial exception, a doctrine that by definition is limited to ministers. Indeed, the term "minister" is used throughout federal law. It would be untenable to suggest that every law limiting its scope to ministers produces excessive entanglement in violation of the Establishment Clause. *E.g., Arver v. United States,* 245 U.S. 366, 376, 389-390 (1918) (observing that "the unsoundness" of an Establishment Clause challenge to a military-draft exemption for "ministers of religion" was "too apparent" to require further comment); *United States v. Novak*, 475 F.2d 180, 182 (7th Cir. 1973) (applying "minister" as used in the federal Military Selective Service Act); *Soltane v. Dep't of Justice*, 381 F.3d 143, 147 (3d Cir. 2004) (applying "minister" as used in 8 U.S.C. §§ 1101(a)(27), 1153(b)(4)). As these decisions recognize, a court or administrative agency can determine whether an individual is a minister by occupation without becoming excessively entangled in church affairs. *See Flowers v. United States*, No. 4-79-376,

1981 WL 1928, at *7 (N.D. Tex. 1981) (determining that the requirements of § 107 "do not create the substantial entanglement of the kind which the Supreme Court was referring to in *Walz*").

Limitations and line-drawing are inherent in the nature of tax benefits. "'Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes,'" even in Establishment Clause cases, and courts must give "substantial deference" to a legislative "judgment" regarding a "tax" provision that is challenged under the Establishment Clause. *Mueller v. Allen*, 463 U.S. 388, 396 (1983) (citation omitted). From the standpoint of limiting entanglement, Congress reasonably has concluded that allowing ministers to proceed under § 107 (which requires the IRS to determine whether a taxpayer qualifies as a minister) is preferable to requiring them to proceed under §§ 119 and 280A(c)(1) (which would require the IRS to determine whether the minister's home is being used for religious purposes for the church's convenience). Plaintiffs' request that this Court second-guess that legislative judgment is unfounded.

CONCLUSION

For the reasons set forth above and in our opening brief, the District Court's judgment, as it relates to § 107(2), should be vacated, and the case remanded with instructions to dismiss for lack of jurisdiction. Alternatively, that aspect of the judgment should be reversed.

Respectfully submitted,

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Case No. 14-1152

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

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/s/ Judith A. Hagley

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Dated: June 26, 2014

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2014, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system and that fifteen papers copies were sent to the Clerk by First Class Mail. Counsel for the appellees was served electronically by the Notice of Docket Activity transmitted by the CM/ECF system.

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