No. 14-1152

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 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)

PRINCIPAL BRIEF OF PLAINTIFFS-APPELLEES, FREEDOM FROM RELIGION FOUNDATION, INC., ANNIE LAURIE GAYLOR, AND DAN BARKER

BOARDMAN AND CLARK, LLP
Richard L. Bolton
Attorney for Plaintiff-Appellees
1 South Pinckney Street, Suite 410
Madison, Wisconsin 53703-4256
608-257-9521 || 608-283-1709 (fax)

June 3, 2014

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-1152

Short Caption: Freedom from Religion Foundation v. 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.

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Freedom From Religion Foundation, Inc.

(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:

Boardman & Clark, LLP, 1 South Pinckney Street, Suite 410, Madison, WI 53701 ,

(3) If the party or amicus is a corporation:
i) Identify all its parent corporations, if any; and

None.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:
None.

Attorney's Signature: /s/ Richard L. Bolton Date: June 3, 2014
Attorney's Printed Name: Richard L. Bolton
Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No
Address: 1 South Pinckney Street, Suite 410, Madison, WI 53703
Phone Number: 608-257-9521 Fax Number: 608-283-1709
E-Mail Address: rlbolton@boardmanclark.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Regulations

Treatises

I. INTRODUCTION.

The Government and interested amici ("Government") have little to say about neutrality, a critical requirement of the Establishment Clause, perhaps because §107(2) of the Internal Revenue Code undeniably confers a significant tax benefit upon religious clergy that is not available to non-clergy taxpayers. Only ministers can exclude cash housing allowances, a result that is patently unfair. Thus, whereas even the Bible commands citizens to "render on to Caesar the things which are Caesar's," the Government simply dismisses or ignores basic principles of neutrality and fairness when it comes to clergy taxation.

The Government claims that Congress intended the "parsonage" allowance in 1921 to provide a clergy benefit analogous to the exclusion for in-kind housing provided for the convenience of the employer. Whether historically true or not as to in-kind housing, however, Congress has never excluded cash housing allowances provided to non-clergy. Section 107(2), therefore, provides a tax benefit to religious clergy that is not "analogous" to any exclusion provided to non-clergy taxpayers.

The Government also argues incorrectly that the exclusion for cash housing allowances is merely an accommodation of religion. This siren cry leads only to obfuscation because paying income taxes is a burden common to all taxpayers, rather than a burden on the free exercise of religious beliefs.

The Government further claims unpersuasively that a blanket exclusion for cash housing allowances paid to ministers avoids government entanglement in determining whether such compensation was provided for the convenience of the employer. The Government's argument incorrectly assumes that cash allowances are generally excludable under the convenience of the employer doctrine, which is not true. However, if cash allowances were not excludable for

ministers, just as for non-clergy taxpayers, then no possible entanglement could occur in making "convenience of the employer" determinations. It would simply not be an issue for cash allowances. By contrast, however, the necessary determinations under §107(2) are frought entanglement.

Finally, the Government argues that exclusion of cash allowances from income is necessary to avoid discriminating in favor of churches that allegedly provide in-kind housing. If the value of in-kind housing is deemed excludable from income in order to create equivalence with non-clergy taxpayers, however, as the Government claims, that would not justify providing an exclusion for cash allowances only to religious clergy. The Government's argument, if adopted, would mean that any neutral and generally applicable qualification for a tax benefit would justify providing all religious taxpayers the same benefit, but without qualification, in order to avoid sectarian discrimination.

The Government ultimately abandons any pretense of neutrality and fairness by arguing simply that clergy who receive cash housing allowances have just as much "need" for tax benefits as those clergy who receive in-kind housing. Need, however, is not the recognized standard for conferring a religious preference under the Constitution. On the contrary, as the district court explained, non-clergy employees "need" tax exclusions just as much as ministers of the gospel - - and that is the constitutional problem with §107(2) which the Government fails to grasp.

The individual Taxpayer-plaintiffs-appellees ("Taxpayers") are just such non-clergy taxpayers who do not qualify for the §107(2) preference. The district court correctly concluded that they would not qualify for the tax benefit provided to clergy for cash housing allowances, although they are otherwise similarly situated and would take the exclusion if available. Because Taxpayers are discriminated against, therefore, the district court also correctly concluded that they have standing to challenge the constitutionality of §107(2) as an underinclusive law. The policy rationale

for administrative exhaustion before the I.R.S., moreover, is not applicable to actions that do not interfere with the orderly collection of tax receipts, as in the present case. In the end, the Government would simply shield underinclusive tax benefits from any effective review, an objective that is not legally justified.

II. JURISDICTIONAL STATEMENT.

The jurisdictional statement in the Government's brief is correct. The Government argues on appeal, however, that the district court lacked subject matter jurisdiction because Taxpayers allegedly lack standing. Taxpayers disagree.

III. STATEMENT OF ADDITIONAL FACTS.

The individual Plaintiffs-Appellees, Dan Barker and Annie Laurie Gaylor, are the Co-Presidents of The Freedom from Religion Foundation ("FFRF"). (R. 47, Gaylor Dec., ¶3.) Barker and Gaylor each receive designated housing allowances from their employer, FFRF. (*Id.* at ¶4.) The modest housing allowances designated by FFRF are intended to approximate Taxpayers' actual housing expenses. (*Id.* at ¶8.)

Gaylor and Barker have not excluded their housing allowances from taxable income because §107(2) of the Internal Revenue Code only applies to ministers of the gospel. They would exclude their housing allowances from reported income if §107(2) and implementing regulations so allowed. (*Id.* at ¶11.)

FFRF is not a church and Gaylor is not a minister. FFRF also is not a religious organization operating under the authority of a church or religious denomination. (*Id.* at ¶16.) FFRF's promotion of the separation of state and church does not constitute a religious practice and it is not based on a belief system "parallel to that of traditionally religious persons." (*Id.* at ¶18.) In fact, atheism does

not have a body of dogma, tenets, or sacred writings. (*Id.* at ¶19.) Atheism also has no hierarchical, or even congregational organization or structure. (*Id.* at ¶20.)

Gaylor does not perform services in the exercise of a ministry. She is not a "duly ordained, commissioned, or licensed minister of a church." No higher atheistic body oversees FFRF, or ordains, commissions, or licenses ministers to perform ministry. Likewise, FFRF does not ordain, commission, or license ministers. Gaylor, in short, is not ordained, commissioned, or licensed by any church or religious denomination. (*Id.* at ¶22.)

Barker and Gaylor also do not conduct religious worship or perform sacerdotal functions based on the tenets and practices of a particular religious body. Atheism does not recognize any sacerdotal functions, or forms of religious worship - - and FFRF does not have any such tenets or orthodoxy. Gaylor has never performed a wedding, baptism, funeral or other such ceremony. (*Id.* at ¶24.)

FFRF also does not have the attributes of a church. (*Id.* at ¶25.) FFRF does not have a recognized creed or form of worship. (*Id.* at ¶26.) FFRF does not have any ecclesiastical government. (*Id.* at ¶27.) FFRF does not have a formal code of doctrine and discipline applicable to members. (*Id.* at ¶28.) FFRF does not have a distinct religious history; on the contrary, FFRF has consistently presented itself to the public as a pesky secular organization that is opposed to governmental establishment of religion. (*Id.* at ¶29.) FFRF does not have an organization of ordained ministers and it does not have any prescribed course of study leading to ordination as a minister. (*Id.* at ¶30.) FFRF does not engage in worship and has no established place of worship. (*Id.* at ¶31.) FFRF does not have a congregation and does not conduct regular religious services. (*Id.* at ¶32.) FFRF does not provide religious instruction for children and has no school for the preparation of ministers. (*Id.* at ¶33.)

FFRF also does not have a body of "believers or communicants" that assemble regularly in order to worship, nor are Barker and Gaylor recognized as spiritual leaders. (*Id.* at ¶¶ 34-35.)

IV. SUMMARY OF ARGUMENT.

A. Standing.

Section 107(2) violates the Establishment Clause by providing preferential tax benefits exclusively to ministers of the gospel. This conclusion does not depend on differing constructions of §107(2). The parties agree on what §107(2) means: Religious clergy can pay virtually all of their housing costs with tax-free dollars, but similarly situated taxpayers cannot get this benefit without religious affiliation.

Taxpayers do not allege a generalized grievance. Taxpayers are similarly situated to clergy who receive a designated housing allowance. FFRF, the employer of the individual Taxpayers in this case, has designated a portion of the individual Taxpayers' income as a housing allowance, just as churches may do. Taxpayers' housing allowance is not excludable from federal income taxation, however, because Taxpayers do not perform religious services, as required for the tax benefit.

The Government suggests that Taxpayers might "conceivably" be ministers of the gospel who qualify for the §107(2) exclusion for cash housing allowances. The undisputed facts show otherwise, but the Government ignores the evidence. Taxpayers are not ordained; FFRF is not a church; and Taxpayers do not perform religious functions. Taxpayers, therefore, would face an immediate and credible threat of penalty if they excluded their housing allowances from reported taxable income.

Nullification is a proper remedy in the case of a constitutionally underinclusive tax provision. Taxpayers' discriminatory treatment can be judicially addressed by nullifying §107(2), which is the remedy that is least disruptive to the Government's tax collection responsibilities. It is also a remedy

that Taxpayers have standing to pursue. They are not obligated by law or logic to futilely pursue such claim before the I.R.S. as an administrative appeal.

The constitutional violation occurs in this case because §107(2) provides a benefit to religious clergy that is not available to these similarly situated taxpayers. This discriminatory treatment provides a basis for standing that the Supreme Court has specifically recognized. In *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436, 1440 (2011), the Court held that taxpayers have standing when they incur a cost or are not eligible for a benefit on account of religious criteria. "Those costs and benefits can result from alleged discrimination in the Tax Code, such as when the availability of a tax exemption is conditioned on religious affiliation." *Id.*

B. Merits.

Preferential tax benefits provided only to religious clergy violate the Establishment Clause. Neutrality is a necessary requirement of the Establishment Clause, which means that tax benefits cannot be preferentially provided to support religion. The Supreme Court has refused to allow government to preferentially favor religion with tax breaks that are not generally available to other taxpayers, as recognized in *Texas Monthly v. Bullock*, 489 U.S. 1 (1989).

Tax-free housing for ministers is not justifiable as an accommodation of religion, nor is there any historical evidence that Congress enacted such tax break to abate government imposed burdens on the free exercise of religion. The contemporaneous evidence indicates that Cold War advocacy of religion prompted the exclusion of cash housing allowances for clergy.

Section 107(2) also creates government entanglement with religion. In order to ensure that this preferential tax benefit is limited to religious officials, §107(2) requires complex determinations relating to the tenets, principles and practices of those churches that provide their clergy with cash housing allowances. Because the tax benefits are only available to ministers of the gospel employed

by churches, the IRS must ensure that these ministers are really dispensing religion for an employing church. The IRS, therefore, must engage in fact-intensive and intrusive inquiries to ensure that an individual is in fact a "duly ordained, licensed, or commissioned" minister of the gospel; and that the minister is really providing religious services "in the exercise of his ministry;" and that the employer qualifies as a church. These are not trivial or incidental determinations. Section 107(2), as a result, requires government entanglement with religion in order to restrict its preferential tax benefits to the "truly religious" - - which Taxpayers and FFRF are not.

Questioning tax-free housing for ministers is controversial because it is valuable to clergy and churches. From the perspective of financial self-interest, ministers and churches are understandably concerned, as the multiple amicus briefs attest, but not because of interference with religious beliefs. Financial self-interest is at the root of the controversy. Judging solely from the perspective of the Establishment Clause, however, preferential tax breaks for ministers clearly violate the fundamental principle of neutrality.

V. ARGUMENT.

A. Taxpayer-Plaintiffs Undisputedly Are Not Ordained, Commissioned, Or Licensed Ministers Of A Church And They Do Not Perform Religious Functions.

The Government admits that the income tax exclusion for housing allowances under §107(2) is only provided to taxpayers engaged in religious ministry. The Government argues, however, that Taxpayers lack standing to challenge §107(2) because they supposedly may be ministers themselves, although the Government does not actually claim that they qualify for the exclusion under §107(2). The Government instead merely insinuates that it is conceivable an atheist could meet the requirements for the exclusion under §107(2). The fact of the matter is, however, that FFRF does not ordain, license, or commission ministers, nor is FFRF a church or religious

denomination that could make such a designation. The evidence of record establishes undisputedly that Taxpayers would not qualify for a tax-free housing allowance, as the district court correctly recognized, and they were not required to seek a refund.

The Government argues simply that atheism, in some circumstances, has been deemed the equivalent of a religion under the Establishment Clause. *See Kaufman v. McCaughtry*, 419 F. 3d 678, 681-682 (7th Cir. 2005). From that limited premise, the Government concludes that Taxpayers might qualify as ministers of the gospel under §107(2). The Government's reasoning, however, is simplistic and grossly incomplete. Section 107(2) actually requires exacting evidence of religious undertaking on behalf of a church in order to exclude cash housing allowances from income. Simply being a Catholic, Lutheran, Muslim, or atheist is not enough.

1. Taxpayers Are Not Employed By A Church Or Religious Organization.

Whether a person qualifies as a minister under §107(2) depends in part on the characteristics of the employer. Section 107(2) only applies to cash compensation received by a taxpayer for providing religious services to a church or religious organization. Here, the facts undisputedly establish that FFRF is not a church or religious organization, a conclusion that is not affected by whether atheism is considered in some circumstances to be the equivalent of a religion. The *Kaufman* decision does not hold, imply, or otherwise answer the question whether an organization constitutes a church for purposes of §107(2). Whether FFRF constitutes a church, moreover, directly affects whether Taxpayers could even conceivably be ordained, commissioned, or licensed as ministers.

At a minimum, a church must include a body of believers or communicants that assembles regularly in order to worship. *Good v. Commissioner*, T.C. Memo 2012 – 323, p. 21 (T.C. 2012), quoting *Foundation of Human Understanding v. Commissioner*, 88 T.C. 1341, 1357 (1987). In

addition, fourteen detailed criteria are considered to determine whether an organization qualifies as a church. *Id.*, T.C. Memo 2012 – 323 at p.21-22.

In *Foundation of Human Understanding v. United States*, 614 F. 3d 1383, 1388-1389 (Fed. Cir. 2010), the Court of Appeals acknowledged that courts generally rely on the IRS's criteria, and on a related associational test, in determining what constitutes a church. According to the Court, the tests substantially overlap but "the most important of the fourteen criteria are the requirements of regular congregants and regular religious services." Thus, whether applying the associational test or the fourteen criteria test, in order to be considered a church, "a religious organization must create, as part of its religious activities, the opportunity for members to develop a fellowship by worshipping together." *See Church of Eternal Life and Liberty, Inc. v. Commissioner*, 86 T.C. 916, 924 (1986).

FFRF is not a church. FFRF does not have congregants, nor does it hold worship or church services. FFRF also fails to satisfy almost all of the other fourteen criteria considered by the IRS: FFRF does not have a recognized creed and form of worship; FFRF has no definite and distinct ecclesiastical government; FFRF has no formal code of doctrine and discipline; FFRF has no distinct religious history; FFRF has no organization of ordained ministers; FFRF has no ordained ministers selected after completing prescribed studies; FFRF has no established place of worship; FFRF has no regular congregations; FFRF conducts no regular religious services; FFRF provides no Sunday school for the religious instruction of the young; and FFRF has no schools for the preparation of its ministers.

The fact that FFRF is not a church is significant. Taxpayers obviously cannot be ordained, commissioned, or licensed as ministers of the gospel by FFRF, which is not a church or religious denomination. Taxpayers also are not performing the services of a minister, according to the

prescribed tenets and practices of a church or denomination, because FFRF does not have any such creed or tenets.

FFRF also is not a religious organization. Treas. Reg. § 1.1402(c)–5 provides that qualifying services as a minister must be performed for religious organizations under the authority of a religious body constituting a church or denomination. Here, FFRF undeniably was not created and authorized to act "under the authority of a religious body constituting a church or denomination."

Under Treas. Reg. § 1.1402(c) –5(b)(2)(ii), a religious organization is "deemed to be under the authority of a religious body constituting a church or church denomination if it is organized and dedicated to carrying out the tenets and principles of a faith in accordance with either the requirements or sanctions governing the creation of institutions of the faith." *Mosley v. Commissioner*, T.C. Memo 1994 – 457, p. 20 (1994). Under this test, an organization must be literally organized under the umbrella of a church or religious denomination, which FFRF is not.

The fact that FFRF is not a church or religious organization lays to rest the Government's insinuation that Taxpayers may qualify for the housing allowance exclusion under §107(2). Because FFRF is not a church or religious organization, it could not ordain, commission, or license Taxpayers as ministers of the gospel, which is an essential requirement in order to qualify for the §107(2) exclusion. Taxpayers also are not employed by a church or religious organization.

2. Taxpayers Do Not Perform The Functions Of Ministers.

The evidence also is undisputed that Taxpayers do not perform the duties of a minister. Treas. Reg § 1.1402(c)-5(b)(2) provides that service performed by a minister in the exercise of his ministry includes the ministration of sacerdotal functions and the conduct of religious worship. Treas. Reg. § 1.1402(c)-5(b)(2)(i) further provides that whether service performed by a minister constitutes the conduct of religious worship or the ministration of sacerdotal functions depends on

the tenets and practices of the particular religious body. *See* also *Wingo v. Commissioner*, 89 T.C. 922, 931 (1987). In assessing the types of services that constitute a minister's work, moreover, courts also consider whether a particular church or denomination recognizes the person as a minister or religious leader. *Id.* at 936. In the present case, Taxpayers undisputedly are not recognized by FFRF as ministers or religious leaders, and they do not conduct religious worship or perform sacerdotal functions based on or derived from the tenets and practices of FFRF.

Taxpayers also do not perform sacerdotal functions derived from the tenets and practices of a church or religious denomination. Again, FFRF does not define, prescribe, or conduct sacerdotal functions -- and neither do Taxpayers. Annie Laurie Gaylor, for instance, does not minister any sacraments; she has never performed a wedding or funeral; she has never performed a baptism; and she has never served Communion or heard Confession. She simply does not perform sacerdotal functions.

In the final analysis, whether Taxpayers qualify for the income tax exclusion provided to ministers under §107(2) is not hypothetical or speculative. They do not. Taxpayers cannot honestly and in good conscience claim the exclusion preferentially allowed only to ministers under §107(2). (*See* R. 47 and 48.)

B. Discriminatory Treatment Of Similarly Situated Taxpayers Under Section 107(2) Constitutes Particularized Injury.

Government programs that allocate benefits based on distinctions among religious, and non-religious or non-believer status, are generally doomed from the start. *American Atheists, Inc., et al. v. City of Detroit Downtown Development Authority*, 567 F.3d 278, 289 (6th Cir. 2009). Section 107(2) fails the neutrality test required by the Establishment Clause. Section 107(2) provides only ministers of the gospel with an exclusion from taxable income for cash housing allowances that are paid as part of a minister's compensation. The exemption for cash housing allowances is provided

only to ministers, and it has value. The Government's attempt to distinguish tax subsidies from tax exemptions misses the essential point that §107(2) is not financially neutral.

Tax benefits that are not neutral and available to a broad range of groups or persons without regard to religion violate the Establishment Clause. The Supreme Court recognized this principle in *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), and the Court has never waivered since in its holdings that neutrality is a necessary requirement of such government programs. The Court also has never held that discriminatory tax exemptions are beyond judicial review. "When the government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens non-beneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion...it provides unjustifiable awards of assistance to religious organizations and cannot but convey a message of endorsement to slighted members of the community." *Id.* at 15.

Courts have consistently invalidated tax exclusions that preferentially benefit churches and religious organizations. For example, in *Budlong v. Graham*, 488 F. Supp. 2d (N.D. Ga. 2007), the court declared that a sales tax exemption applicable only to religious organizations was unconstitutional and the court enjoined continued enforcement of those provisions -- without thereby providing any such exemption to the plaintiffs. In *New Orleans Secular Humanists Association, Inc. v. Bridges*, 2006 U.S. Dist. LEXIS 20020 (E.D. La. 2006), the court also enjoined the defendant from enforcing tax exemptions provided only to religious organizations. In *Haller v. Commonwealth of Pennsylvania*, 728 A.2d 351 (Pa. 1999), the Supreme Court of Pennsylvania also held that preferential enforcement of tax exemptions violated the Establishment Clause, concluding that tax exemptions for religious organizations must have an overarching secular purpose that equally benefits similarly situated non-religious organizations. *See* also *Catholic Health Initiatives of*

Colorado v. City of Pueblo, 207 P.3d 812, 818 (Colo. 2009).

Section 107(2) provides a benefit that is not neutrally available to non-clergy taxpayers. By contrast, §119 of the Revenue Code, which is generally applicable to all taxpayers, does not allow for the exclusion of any cash housing allowance paid as compensation, even if used to pay housing costs required by the employer. Section 119 is applicable only to in-kind housing, which must be provided for the "necessity of the employer."

The Supreme Court has expressly recognized that standing "can result from alleged discrimination in the Tax Code, such as when the availability of a tax exemption is conditioned on religious affiliation." *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436, 1440 (2011). Standing is premised in such cases on the discrimination that occurs when similarly situated individuals are denied a Government benefit on the basis of religious identification. "If a law or practice, including a tax credit, disadvantages a particular religious group or a particular nonreligious group, the disadvantaged party does not have to rely on *Flast* to obtain redress for a resulting injury." *Id.* at 1449.

C. Taxpayers Have Sustained Cognizable Injuries.

The Supreme Court, in *Heckler v. Mathews*, 465 U.S. 728 (1984), carefully considered the issue of standing where the extension of benefits to a disfavored group was not sought. The only remedy at issue in *Heckler* was nullification of a statute that provided benefits exclusively to a favored group.

The Supreme Court concluded in *Heckler* that "we have never suggested that the injuries caused by a constitutionally underinclusive scheme can be remedied only by extending the program's benefits to the excluded class." *Id.* at 738. The Court further stated that "we have frequently entertained attacks on discriminatory statutes or practices, even when the Government could deprive

a successful Plaintiff of any monetary relief by withdrawing the statute's benefits from both the favored and the excluded class." *Id.* at 739. The Court concluded, therefore, that nullification as a remedy does not deprive a Plaintiff of standing to seek judicial redress for alleged discrimination. *Id.*

The Supreme Court explained in *Heckler* that the right to equal treatment guaranteed by the Constitution is not coextensive with any substantive right to the benefits denied to the party being discriminated against. *Id.* The Court emphasized, instead, that the discrimination itself gives rise to standing. "Accordingly, as Justice Brandeis explained, when the right invoked is that to equal treatment, the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class, as well as by extension of benefits to the excluded class." *Id.* at 740.

D. Constitutionally Underinclusive Statutes Are Redressable By Nullification.

Courts can remedy a constitutionally underinclusive statute by ordering that benefits not be extended to the favored members of the class. The Supreme Court made this result clear in *Heckler*, 465 U.S. at 739, holding that nullification does not deprive a Plaintiff of standing to seek judicial redress for allegedly discriminatory benefits. When the right invoked is that to equal treatment, the appropriate remedy is a mandate of equal treatment, "a result that can be accomplished by withdrawal of benefits from the favored class." *Id.* at 740.

Courts have subsequently recognized *Heckler* for the proposition that similarly situated taxpayers do have standing to challenge underinclusive exemptions without being limited only to the potential remedy of an administrative petition for refund. In *Finlator v. Powers*, 902 F.2d 1158 (4th Cir. 1990), for example, the Court expressly rejected the argument that an underinclusive statute is only redressable by a claim for refund.

The *Finlator* decision preliminarily noted that Supreme Court precedent unequivocally holds that non-exempt taxpayers have standing to challenge the constitutionality of tax code exemptions. *Id.* at 1160-61, citing *Texas Monthly* and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987). In *Arkansas Writers' Project*, the Supreme Court warned that to deny standing to such parties might otherwise "effectively insulate underinclusive statutes from constitutional challenge." 481 U.S. at 227. The Supreme Court further noted that its decision in *Arkansas Writers' Project* was consistent "with the numerous decisions of this Court in which we have considered claims that others similarly situated were exempt from the operation of a state law adversely affecting the claimant." *Id.*

The defendant in *Finlator*, nonetheless, claimed that an implicit requirement of *Arkansas Writers' Project* and *Texas Monthly* is that non-exempt parties take affirmative steps to ensure their standing, such as contesting the tax prior to its payment. *Finlator*, 902 F.2d at 1161. The Court of Appeals refused to read such a requirement into the Supreme Court's decisions. *Id.* at 1162.

In *Planned Parenthood of South Carolina Incorporated, et al. v. Rose*, 361 F.3d 786, 791 (4th Cir. 2004), the Court of Appeals reiterated that standing to challenge an underinclusive statute does not require exhaustion of administrative efforts to obtain the discriminatory benefit. *Rose* dealt with a discriminatory personalized license plate program. The Court concluded that the Plaintiffs' failure to apply for an organizational plate was not fatal to their standing. Significantly, moreover, in both *Finlator* and *Rose*, the Court ordered nullification of the discriminatory statutory schemes at issue as a final and complete remedy. *See* also *Martinez, et al. v. Clark County, Nevada*, 2012 U.S. Dist. LEXIS 5313 (D. Nev., January 18, 2012), where the court considered an Establishment Clause challenge to a statute that required marriages to be performed only by religious clergy. The court

concluded that "Plaintiffs who allege that a statute is underinclusive nonetheless shall be considered to have an injury for which they can obtain redress." *Id.* at 17.

The District Court for the Northern District of Illinois also recently considered the issue of nullification in *Anheuser-Busch, Inc. v. Schnorf*, 738 F. Supp. 2d 793 (N. D. Ill. 2010). The court discussed the "extension" versus "nullification" dichotomy, and concluded that nullification was the most appropriate remedy because that course would least impact the regulatory scheme of which the underinclusive statute was a part. 738 F. Supp. 2d at 815. Similarly, in the present case, nullification of §107(2) obviously would be less disruptive to the Government's tax collection scheme than extending the housing allowance to all similarly situated taxpayers.

The Government, significantly, does not dispute that Taxpayers would have standing to seek an administrative tax refund. The Government argues, however, that this remedy is exclusive of all other remedies, including nullification. The question of standing raised by the Government, therefore, ultimately does not turn on whether Taxpayers have sufficiently alleged injuries for purposes of standing. The Government, instead, is really questioning whether Taxpayers' injuries can be addressed in an independent action for nullification.

In effect, the Government raises an exhaustion defense, *i.e.*, that Taxpayers may proceed only in a refund proceeding due to the comprehensive I.R.S. regulatory scheme. As the above discussion makes clear, however, there is no such requirement of exhaustion, with respect to underinclusive statutes, nor is there any prohibition of an action that may affect the preferential treatment of religious clergy. The Government's claim that courts may not impact a third party's tax liability would preclude challenges to underinclusive tax preferences, contrary to Supreme Court precedent. Even an administrative refund proceeding, moreover, would not include religious clergy as parties, and the beneficiaries of the preference created by §107(2) certainly are not going to challenge it

themselves. Recognized challenges to underinclusive statutes, therefore, necessarily have a quality of complaint about someone else's tax treatment, contrary to the Government's argument.

E. The Anti-Injunction Act Does Not Preclude Jurisdiction.

The Government implies that this action may be barred by the Anti-Injunction Act, due to the "highly articulated structure" of I.R.S. procedures for refund. The Government's suggestion is flawed from the outset because this is not a refund suit, nor is such a suit Taxpayers' exclusive remedy. Taxpayers are seeking equitable relief, rather than a restraint on the collection of taxes by the Government, which is the concern of the Anti-Injunction Act.

The manifest purpose of the Anti-Injunction Act is to permit the Government to collect taxes without peremptory intervention by the courts. The Act, therefore, requires that the right to disputed sums be determined initially in an administrative refund proceeding. *Enochs v. Williams Packing & Navigation Company*, 370 U.S., 7 (1962). The Act, however, bars only suits concerning the "assessment or collection of any tax;" it does not preclude claims seeking to enjoin the IRS where the suit does not impede tax collection by the Government.

The present case is like *Hibbs v. Winn*, 542 U.S. 88, 92 (2004), where the Supreme Court allowed a state taxpayer's suit for declaratory and injunctive relief to proceed because the suit did not seek to alter tax liability or deplete the state's tax revenue. The Court emphasized in *Hibbs* that a relevant distinction exists between taxpayer claims that would reduce state revenues and claims that would enlarge state receipts. *Id.* at 108. The Court also quoted favorably from Judge Easterbrook's opinion in *Dunn v. Carey*, 808 F.2d 555, 558 (1986), where the Seventh Circuit held that the analogous Tax Injunction Act is not applicable to actions that might allow the Government to raise additional taxes.

Taxpayers' claims in the present case obviously do not fall within the literal or implied scope of the Anti-Injunction Act. The Act's jurisdictional bar only applies where the court's relief would operate to reduce the flow of tax revenue to the Government. *See Levy v. Pappas*, 510 F.3d 755, 761 (7th Cir. 2007). What matters is the relief that the plaintiffs seek. *Id.* Only if the relief sought would reduce the flow of tax revenue to the Government does the Act bar federal jurisdiction. *Id.* at 762. "When a plaintiff alleges that the state tax collection or refund process is giving unfair benefits to someone else, [however] then according to *Hibbs*, the Act and comity are not in play. *Id. See also Empress Casino Joliet Corporation v. Blagojevich*, 638 F.3d 519, 532-33 (7th Cir. 2011).

The Government cites no authority for the applicability of the Anti-Injunction Act to this case. On the contrary, the relevant and controlling decisions make clear that an action for nullification does provide a remedy that is logically and legally within the jurisdiction and competency of the federal courts. In fact, the expressly limited scope of the Anti-Injuction Act positively implies no hostility to actions that do not limit tax collection.

F. The Declaratory Judgment Act Also Does Not Bar Claims To Nullify Preferential Exclusions.

The Declaratory Judgment Act also does not preclude Taxpayers' claims for relief. Federal courts have consistently construed the restriction in the Declaratory Judgment Act "with respect to Federal taxes" as being coterminous with the Anti-Injunction Act, which only bars relief that would impede the collection of taxes or reduce the flow of tax revenue. This construction again emphasizes the limited policy justification to prevent interference with tax collection.

The decision in *Cohen v. Unites States*, 650 F.3d 717 (D.C. Cir. 2011), provides a compelling and detailed analysis of the scope of the tax exclusion under the Declaratory Judgment Act. The Court recognized in *Cohen* that consistent "precedent interprets the DJA and AIA as coterminous."

Id. Included among such precedents, the Court relied upon the Seventh Circuit's decision in *Tomlinson v. Smith*, 128 F.2d 808, 810-11 (7th Cir. 1942).

The *Cohen* decision carefully explains that Congress only intended to preclude declaratory relief under the DJA when the AIA barred injunctive relief. By design, therefore, "the DJA tax exception serves a critical but limited purpose. It strips courts of jurisdiction to circumvent the AIA by providing declaratory relief in cases restraining the assessment or collection or any tax." *Cohen*, 350 F.3d at 729. That is not this case.

G. Taxpayers' Differential Treatment Is Not Merely A Generalized Grievance.

The Government misapprehends the particularity of Taxpayers' injuries in this case. Taxpayers allege discriminatory treatment specific to their own status as taxpayers who receive a designated cash housing allowance from their employer - - and they undeniably would avail themselves of the housing allowance exclusion, if available.

Taxpayers' differential rights and obligations constitute concrete and particularized injuries regardless of the number of others that are also disadvantaged. The Government's argument to the contrary is based on a flawed understanding of the particularity requirement. The Seventh Circuit recognized this misunderstanding in *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 496 (7th Cir. 2005). *See also Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687-88, 37 L. Ed. 2d 254, 93 S. Ct. 2405 (1973) ("Standing is not to be denied simply because many people suffer the same injury ... To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody.").

The Government also misperceives the nature of the injury necessary for standing. The "injury in fact" in a case of this variety is the denial of equal treatment resulting from the imposition

of barriers to government benefits that are not available to similarly situated persons; the injury is not the ultimate inability to obtain the benefit, but rather the discriminatory treatment itself. *Lac Du Flambeau*, 422 F.3d at 497, quoting *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993).

Preferential treatment of religious clergy provides a distinct and palpable basis for standing because Taxpayers are personally denied equal treatment by virtue of the Government's policy. The Government's reliance upon *Allen v. Wright*, 468 U.S. 737, 755 (1984), therefore, is misplaced because Taxpayers are, in fact, personally denied equal treatment under the law. That was not the case in *Allen*. The differential treatment of cash housing allowances is not a generalized grievance. It is personal to these Taxpayers, whose standing is not based on their general status as taxpayers, but on the differential treatment of cash housing allowances provided to clergy and non-clergy.

H. Prudential Considerations Weigh In Favor Of Exercising Jurisdiction.

The Government's ultimate appeal for unfettered discretion is more self-serving than founded in law. In particular, IRS tax exemptions simply cannot include preferences on the basis of prohibited factors such as religion, a fact not at issue in cases such as *Apache Bend Apartments, Ltd. v. United States*, 987 F.2d 1174 (5th Cir. 1993), on which the Government relies.

The principle that a law may be impermissibly underinclusive is firmly grounded in the Constitution. *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994); *Saeg v. City of Dearborn*, 641 F.3d 727, 738 (6th Cir. 2011). The right to constitutional accountability, including as to underinclusive exemptions, also is well established. Even when a complaining party may only eliminate a discriminatory preference, without eliminating the regulation itself, the courthouse door is not closed. Here, Taxpayers contend that the exemption of cash housing allowances paid to ministers is unconstitutional, as to which they do have standing because others similarly situated, *i.e.*, clergy and

ministers, are exempt from compliance with the taxation of cash housing allowances. As the Supreme Court stated in *Arkansas Writers' Project*, 41 U.S. at 218, "we do not accept the Commissioner's notion of standing, for it would effectively insulate underinclusive statutes from constitutional challenge, a proposition we soundly rejected in *Orr v. Orr*, 440 U.S. 268, 272 (1979)."

Judicial review of the Government's policy and practice of religious preference is not unprecedented or impractical. Taxpayers are not asking the Court to make individual enforcement or regulatory decisions. They, instead, simply request the Court to enjoin the Government's systemic preference for religion. This is no different than enjoining the Government from executing racially discriminatory policies in hiring, firing, prosecuting, or enforcing the laws and regulations that the Government administers.

Prudential considerations support the exercise of jurisdiction in this case, contrary to the Government's lamentation. This is not a case where Taxpayers are asserting the rights of others; they only object to discriminatory treatment to which they are subjected. Taxpayers are also within the protected zone of interests implicated by the Establishment Clause and Equal Protection requirements of the Constitution. The Government would effectively limit standing only to the beneficiaries of the Government's unconstitutional preferences -- and that is precisely why judicial review is appropriate and necessary: Underinclusive practices and policies by the Government otherwise would be effectively beyond redress, as the Supreme Court recognized in *Arkansas Writers' Project*, 481 U.S. at 227.

Nor is the discrimination at issue in this case likely to be rectified by legislative or executive action. Here, Congress has already spoken by enacting the discriminatory policy at issue. More legislation, therefore, is not likely to change anything.

The neutrality required by the Establishment Clause is not a just nose-counting or majoritarian concept, in any event. On the contrary, the Government's claim to have unfettered discretion to act as it chooses, answerable to no one, including the courts, is wrong. The Government's argument certainly does not constitute a prudential reason for the Court to abdicate its Article III responsibilities to Taxpayers. The protections of the Constitution are inviolable, regardless even of majoritarian preferences for religion.

I. Section 107(2) Violates The Establishment Clause Because It Is Not Neutral And Provides Significant Tax Benefits Exclusively To Ministers Of The Gospel.

The absence of neutrality is evident in §107(2). It only allows ministers to exclude from their income the full amount of any designated cash housing allowance provided by their church. This exemption for cash payments is available only to ministers; other taxpayers cannot deduct similar cash allowances, even if provided for the "convenience of the employer." The §107(2) exemption, therefore, confers a substantial financial benefit to ministers, by lessening the burden of housing costs, which is not neutrally available to other taxpayers.

"When the government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens non-beneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion . . . it provides unjustifiable awards of assistance to religious organizations and cannot but convey a message of endorsement to slighted members of the community." *Id.* at 15, quoting *Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., Concurring in Judgment). Here, §107(2) is not required by the Free Exercise Clause and cannot be seen as removing a significant government imposed deterrent to the free exercise of religion.

Tax exemptions provided exclusively to churches and clergy have never been upheld by the Supreme Court, including in *Walz v. Tax Commission of New York City*, 397 U.S. 664 (1970). In

Walz, the Court sustained a property tax exemption that "applied to religious properties no less than to real estate owned by a wide array of non-profit organizations." *Texas Monthly*, 489 U.S. at 11. The broad class of non-religious as well as religious beneficiaries was a critical factor in *Walz*, as well as in other cases decided by the Supreme Court. This factor is consistently emphasized by requiring that benefits to religious organizations also flow to a large number of non-religious groups. *Id.* "Indeed, were those benefits confined to religious organizations [in *Walz*], they could not have appeared other than as state sponsorship of religion; if that were so, we [Supreme Court] would not have hesitated to strike them down for lacking a secular purpose and effect." *Id.*

Justice Brennan emphasized in *Texas Monthly* the importance in *Walz* that the property tax exemption at issue flowed to a large number of non-religious groups. "The breadth of New York's property tax exemption was essential to our [Supreme Court's] holding that it was not aimed at establishing, sponsoring, or supporting religion." *Texas Monthly*, 489 U.S. at 12. The *Walz* decision "in no way intimated that the exemption would have been valid had it applied *only* to the property of religious groups or had it lacked a permissible secular objective." *Id.* at 13, n. 2. (Emphasis in original.) Justice Brennan's explanation in *Texas Monthly*, moreover, reflected the Court's own long-accepted understanding of its holding in *Walz*. *Id.* at 13, n. 3.

The exemption in *Walz* also reduced potential "entanglement" issues between state and church, including the need to make determinations of property value. Section 107(2), by contrast, does not avoid entanglement. On the contrary, §107(2) requires fact-sensitive and complex inquiries into patently religious matters, such as defining "ministers of the gospel;" "sacerdotal function;" "integral agency" of a church or church denomination; and "church." Entanglement, therefore, is inherent in §107(2).

Walz also was based in part on a unique historical rationale relating to property tax exemptions for property used by churches themselves. Unlike in *Walz*, however, the exemption created by §107(2) lacks this historical rationale, and involves personal income tax liability, which does not implicate the free exercise issues at play in *Walz*. The exemption in §107(2) for cash housing allowances paid to ministers was only first enacted in 1954, and has been questioned ever since. *Cf. Kirk v. Commissioner*, 51 T.C. 66, 72 (1968), affd. 425 F.2d 492 (D.C. Cir. 1970).

What remains crucial in evaluating a tax exemption afforded to ministers is whether some "overarching secular purpose justifies like benefits for non-religious groups." *Texas Monthly* at 15, n. 4. "In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter." *Id.* at 17, quoting *Walz*, 397 U.S. at 696.

The Supreme Court rejected in *Texas Monthly* the counter-argument that a sales tax exemption removed a government-imposed burden on the free exercise of religion. According to the Court, "it is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens claimant's freedom to exercise religious rights." *Id.* at 18. The Court concluded that payment of a sales tax did not in any way offend religious beliefs or inhibit religious activity. A significant deterrence of free exercise rights, however, is necessary in order to sustain a legislative exemption as an appropriate accommodation. *Id.* at 18, n. 8.

The Supreme Court concluded in *Texas Monthly* that the tax exemption at issue there was not mandated, or even favored, by the Establishment Clause in order to avoid excessive entanglement. "Not only does the exemption seem a blatant endorsement of religion, but it appears on its face, to produce a greater state entanglement with religion than the denial of an exemption." *Id.* at 19. The

risk of entanglement existed under the exemption statute, according to the Court, because of the need to determine that a publication qualified as being religious. *Id.*

The Government's attempt to limit *Texas Monthly* to publications involving religious speech, moreover, is not a distinction that favors the Government. Here, §107(2)'s exclusion for ministers is available only when a minister receives a cash housing allowance as compensation for services performed "in the exercise of" his or her ministry. Services performed by a minister in the exercise of his or her ministry include: (1) the administration of sacerdotal functions; (2) the conduct of religious worship; and (3) the control, conduct and maintenance of religious organizations under the authority of a religious body constituting a church or church denomination. In effect, the §107 tax break for ministers constitutes "preferential support for the communication of religious messages," every bit as much as in *Texas Monthly*. *Id.* at 28 (Blackmun, J. Concurring).

J. A Majority Of The Supreme Court Agreed On The Establishment Clause Principles In Texas Monthly.

The controlling principles recognized in *Texas Monthly* were joined in by a majority of the Supreme Court. Justice Brennan, joined by Justices Marshall and Stephens, thoroughly distinguished *Walz*, while concluding that preferential tax exemptions for religion violate the Establishment Clause. Justice Blackmun concurred, joined by Justice O'Connor, and they concluded that the case could be decided on the basis that "a tax exemption *limited to* the sale of religious literature by religious organizations violates the Establishment Clause," without deciding the Free Exercise issues in the case. *Id.* at 28. (Blackmun, Concurring.) In answering the decisive question, Justice Blackmun agreed with the opinion of Justice Brennan:

> In this case, by confining the tax exemption exclusively to the sale of religious publications, Texas engaged in preferential support for the communication of religious messages. Although some forms of accommodating religion are constitutionally permissible, *see Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*,

> 483 U.S. 327 (1987), this one surely is not. A statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable. *Texas Monthly*, 489 U.S. at 28.

Although *Texas Monthly* is dismissively described by the Government as merely a plurality decision, it is really a binding opinion of the Supreme Court on the Establishment Clause issue. The Government dismisses *Texas Monthly* because the five justices who deemed Texas' sales and use tax exemption for religious publications unconstitutional did not sign a single opinion. *Marks v. United States*, 430 U.S. 188, 193 (1997), however, recognizes the authoritative character of Supreme Court holdings supported by separate opinions that comprise a Court majority. Using this standard, *Texas Monthly* is an easy case to read because the Court does not even count as being "fragmented" on the Establishment Clause issue.

Justice Scalia, in dissent certainly understood the majority holding in *Texas Monthly* to prohibit preferential tax benefits provided exclusively to religion. Religious tax exemptions "of the type the Court invalidates today," including the §107 housing exemption, "are likewise affected" by the Court's holding, according to Justice Scalia. *Texas Monthly*, 489 U.S. at 24-25. Significantly, Justice Scalia specifically identified the §107 housing allowance as being within the scope of the Court's holding. Justice Scalia's understanding, moreover, is widely shared by scholarly commentary. *See* Rakowski, *The Parsonage Exclusion: New Developments*, Tax Notes, July 15, 2002, 429; Foster, Matthew, *Note: The Parsonage Allowance Exclusion: Past, Present and Future*, 44 Vand. L. Rev. 149, 175-176 (1991); and Chemerinsky, *The Parsonage Exemption Violates the Establishment Clause and Should be Declared Unconstitutional*, 24 Whittier Law Review 707, 715-716 (2003).

The requirement of neutrality and general applicability, particularly after *Texas Monthly*, also has consistently prevailed in judicial analysis of tax preferences. This conclusion is well-described

by Donna Adler in *The Internal Revenue Code, the Constitution and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 Wake Forest L.Rev. 855 902 (1993), concluding that "the one factual distinction that seems to be the determinative issue is the breadth of the class benefited by the tax exemption."

The controlling authority of *Texas Monthly*, in fact, suggests that even *Walz* would have been decided differently if the property tax exemption at issue had been limited only to church properties. *Cf. In re Springmoor*, 498 S.E.2d 177 (N.C. 1998) (invalidating preferential property tax exemption for religious retirement homes). Robert Sedler makes this point convincingly in *Understanding the Establishment Clause: The Perspective of Constitutional Litigation*, 43 Wayne L. Rev. 1317, 1391-1392 (1997).

K. Section 107(2) Provides Greater Benefits To Ministers Than Section 119 Provides To Non-Clergy Taxpayers.

Section 107(2) does not provide tax benefits to ministers that are otherwise available to all taxpayers under §119, contrary to the Government's claim. The benefits provided by §107(2), in fact, are provided to ministers without regard to the requirements of §119, which is limited to in-kind housing provided for the convenience of the employer. Section 107(2) has no such limitation. That is precisely why Congress adopted §107(2) -- and it is why the religious community so vigorously defends it. The requirements of §119 are different and more limiting than the requirements of §107(2), and for that reason, §107(2) undisputedly provides preferential benefits to ministers that are not neutrally and generally available to a broad range of taxpayers.

Section 107(2) permits only ministers of the gospel performing religious services to exclude from their taxable income that portion of their "compensation" that is designated as a housing allowance or housing provided in-kind. In order to claim the housing allowance, two principal conditions must be met:

> 1. The allowance must be provided as compensation for services that ordinarily are the duties of a minister of the gospel. This condition is unrelated to any requirement that the minister's residence be used to perform the services of a minister. The Internal Revenue Service, in fact, has determined that even a retired minister of the gospel is eligible to claim the housing allowance exemption because the allowance is deemed to have been paid as part of the retired minister's compensation for past services as a minister of the gospel. Rev. Rul. 63-156, 1963-2 C.V. 79.
>
> 2. The amount of the housing allowance must be designated in advance by an employing church. The designated housing allowance must then actually be used by the minister for housing purposes. *(Id.)*

Section 107(2) provides a tax benefit that is unavailable to other taxpayers -- beyond argument. Section 107(2) allows an employing church to designate part of a minister's cash compensation as a tax-free housing allowance. By contrast, §119 allows no exemption for cash allowances, even if the allowances are used to provide housing for the convenience of the employer. Section 107(2), moreover, has no requirement that compensation designated as a housing allowance be used for any particular housing selected by the church for its own convenience. The designated compensation paid to the minister is tax-free, unlike for other taxpayers, and the housing allowance does not have to be used for the convenience of the employer, also unlike the requirement for other taxpayers.

Ministers derive an enormous financial benefit from §107(2) by being paid in tax-exempt dollars. Professor Chemerinsky unflinchingly describes this significant tax break:

> Section 107's blatant favoritism for religion can be seen by comparing it with other provisions of the Internal Revenue Code that provide a benefit to ministers on the same terms as others in similar situations in secular institutions. For example, Section 119 of the Internal Revenue Code allows an income exclusion for the value of meals and lodging that are provided on the business premises of an employer as a convenience to the employer and as a condition of employment. Thus, a minister who is required to live on the church's premises is allowed an exclusion under this provision, but so is the head of a school who lives on the premises, or any other employee who is required to live in housing provided at the workplace. Section 107 is

> unique in that it provides a benefit to religion -- to "ministers of the gospel" -- that no one else receives.

Chemerinsky, 24 Whittier Law Review, at 712-713 (2003).

The benefit under §107(2) accrues only to ministers, who may use their designated housing allowance even to purchase an asset that has the potential to appreciate and increase in value. This benefit is categorically not available to other taxpayers, as described by Professor O'Neill in *A Constitutional Challenge to §107 of the Internal Revenue Code*, 57 Notre Dame Law. 853, 864 (1982).

The preferential tax benefits of §107(2) further differ from §119 because the exemption is available without regard to the "convenience of the employer." Section 119 provides an exclusion for in-kind housing if: (1) The lodging is furnished on the business premises of the employer; (2) the lodging is furnished for the convenience of the employer; and (3) the employee is required to accept such lodging as a condition of his employment. Under this test, an employee must pay income tax on the value of free housing, except where the lodging meets the "convenience of the employer" requirements.

Section 119 applies only where the employer desires to have a continuous presence of the employee at the job site and to have him within reach at all times. As the Supreme Court held in *Commissioner v. Kowalski*, 434 U.S. 77, 93 (1977), the convenience of the employer requires that the employee must accept housing in order to properly perform his duties. This requirement, however, is not imposed as a condition of the §107(2) exemption, including as to tax-free payments made directly to ministers. Section 107(2) provides for tax-free compensation to ministers in circumstances that are not available to other taxpayers, including under §119, despite the Government's unsupportable claim that all clergy housing is inhabited "for the convenience of the employer."

Section 107(2) creates a false incentive for churches to designate a minister's compensation as a housing allowance in order to increase the minister's net income, while reducing the church's wage payments correspondingly. "The effect is a significant financial benefit to religion because churches and synagogues and mosques can pay their clergy much less because of the tax-free dollars. Without the parsonage exemption, religious institutions would have to pay clergy significantly more to make up this difference." Chemerinsky, 24 Whittier Law Review at 713. The amicus briefs herein acknowledge this very point. Non-church employers, by contrast, cannot increase the net-compensation of their employees by designating an amount to cover their housing costs -- and therefore, they cannot correspondingly reduce their wage payments.

Income tax exclusions for housing allowances provided to overseas government employees and military personnel do not render §107(2) neutral and broad-based. These exemptions are not part of a comprehensive statutory scheme for excluding housing allowances from taxable income, and as Professor Chemerinsky notes, the government can give its employees a tax break as an employer. Section 107(2), in contrast, is a benefit provided only to privately-employed clergy. It is not at all about the government structuring the compensation for its own employees. *See* Chemerinsky, 24 Whittier Law Review at 728.

The Supreme Court rejected an argument similar to the Government's in *Texas Monthly*, where the State sought to justify its sales tax exemption for religious publications by citing other sales tax exemptions in its Tax Code. The Court was unimpressed by this argument, noting that other exemptions did not rescue the exemption for religious periodicals from invalidation. "What is crucial is that any subsidy afforded religious organizations be warranted by some overarching secular purpose that justifies like benefits for non-religious groups." 489 U.S. at 15 n. 4.

The Supreme Court further recognized in *Texas Monthly* that in evaluating preferences, "the Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter." 489 U.S. at 17, quoting *Walz*, 397 U.S. at 696.

Section 107(2) expressly provides an exclusion intended to benefit religion alone. The exclusion for ministers is not grounded in a secular legislative policy that motivates similar tax breaks for non-religious employees. Section 107(2) does not provide an exclusion for cash housing allowances paid to ministers for the same reason that the government exempts housing allowances paid to the military and other overseas employees of the government. "The circumference of legislation" providing allowances to overseas government employees does not "encircle a class so broad that it can be fairly concluded" that ministers of the gospel could be thought to fall within the natural perimeter.

Section 107(2) does not exempt cash housing allowances for private employees other than ministers of the gospel. This is a substantial tax benefit that is not available to other private employees, including under §119. The reason that §107(2) is defended so vigorously by churches and ministers, therefore, is not because it merely duplicates the exemption otherwise available to them under §119; their concern is driven by the fact that this substantial tax benefit would not otherwise be available to them if they are held to the standards applicable to all other taxpayers.

L. Section 107(2) Does Not Simply Eliminate Disparity of Treatment Between Religious And Secular Employees.

The Government argues unpersuasively that the original in-kind parsonage exclusion, enacted in 1921, and currently codified in §107(1), was merely intended to give ministers an

exclusion equivalent to the recognized "convenience of the employer" exemption. The Government's historical analysis is suspect, but more importantly, it does not explain the exclusion of cash housing allowances, as provided by §107(2). Such cash exclusions are not available to secular employees at all. The Government counters, however, by arguing that reducing the burden of housing costs only for ministers who receive in-kind housing is "unfair" to those ministers who have to pay cash for housing -- and so Congress supposedly enacted §107(2) in order to give an equivalent benefit to all religious ministers. The Government's claimed rationale, however, does not change the fact that the burden of housing costs for non-religious employees is equally great, but only ministers who receive cash allowances benefit from the §107(2) relief program.

The Government's historical analysis is as suspect as its logic. Section 107(1), in fact, provides tax benefits to ministers that are not generally available. Section 107(1) provides that gross income does not include the rental value of a home furnished to a minister of the gospel "as part of his compensation." Although the Government contends that this is just a restatement of §119, which allows an exemption for lodging provided for "the convenience of the employer," §107(1) is not equivalent to §119.

The Government claims that Congress' intent with respect to the parsonage exemption is evident because the original parsonage exemption enacted by Congress in 1921 was supposedly adopted in response to the Treasury Department's refusal to allow ministers to claim the same "convenience of the employer" exclusion allowed to other employees. Even the limited evidence from 1921, however, indicates that Congress intended to create an exemption that was not the same as the exemption for lodging provided for the "convenience of the employer."

The Treasury Department in 1921 did not refuse to recognize "the convenience of the employer" doctrine as it applied to ministers. The "convenience of the employer" exemption was

not claimed or explained in O.D. 862, which merely refused to recognize an exemption for housing provided as part of the salary paid to a minister. The Treasury Department, in reaching its conclusion in O.D. 862, did not address the "convenience of the employer" doctrine as applied to ministers. There was no analysis of the convenience of the employer, but rather the Department focused on the value of the parsonage as part of clergy compensation, in circumstances where a minister is "permitted" to use the parsonage -- but not required to use it. In similar circumstances, secular employees also could not claim a "convenience of the employer" exclusion.

By contrast, the Treasury Department in other cases expressly addressed the convenience doctrine when raised by employees. For example, with respect to fish cannery employees, the Treasury Department concluded:

> Where, from the location or nature of the work, it is necessary that employees engaged in fishing and canning be furnished with lodging and sustenance by the employer, the value of such lodging and sustenance may be considered as being furnished for the convenience of the employer and deemed not, therefore, to be included in computing net income of the employees. [O.D. 814.]

The Department similarly applied the "convenience of the employer" standard to hospital employees in O.D. 915.

The "convenience of the employer" rule was intended to be narrow, as evidenced by rulings such as O.D. 915 and O.D. 814. It applied, for example, to employees living on a ship, who obviously performed work that could not be performed if they were living elsewhere. Similarly, the convenience of the employer doctrine applies to some hospital employees, but only if they are on call 24 hours a day. The narrow scope of the "convenience of the employer rule," as illustrated by O.D. 915, applies where housing benefits are not supplied by the employer as "compensation for services."

The Revenue Act of 1921, by contrast, did not merely codify and make applicable the "convenience of the employer" doctrine to ministers. The Revenue Act of 1921, instead, provided that any free housing provided to ministers "as part of their compensation" would be exempt from income taxation. The 1921 Act also did not condition the exemption on housing provided for the "convenience of the employer," and it thereby provided greater tax benefits to ministers. If the Revenue Act of 1921, had merely been intended to apply the "convenience of the employer" doctrine to ministers, that is what the legislation would have said -- instead, it provided an exemption for "compensation" that was independent of the "convenience of the employer," and hence it provided broader privileges.

When §107(1) was enacted in 1954, Congress again allowed a tax benefit to ministers for in-kind housing that was not tied to the "convenience of the employer." Section 107(1) carried forward the unrestricted housing allowance from the Revenue Act of 1921, which provided a tax exemption for ministers that is broader than the exemption in §119." The fact that §107 and §119 were both enacted in 1954 makes clear that the parsonage allowance was not simply another way for Congress to articulate the "convenience of the employer" test.

The Government's claim that §107(1) is essentially identical to §119 is simply not correct. Section 119 applies only to in-kind lodging that is not intended as compensation. The Supreme Court noted this fact in its discussion of the "convenience of the employer" doctrine in *Commissioner of Internal Revenue v. Kowalski*, 434 U.S. 77, 87 (1977). The exclusion from income under "the convenience of the employer" doctrine rests upon the characterization of the benefit as non-compensatory, and it requires that the furnishing of such benefits be necessary to allow an employee to perform his duties properly. By contrast, the parsonage exemption is explicitly dependent upon the parsonage being provided as part of the minister's employment compensation.

Nothing in the history or language of §107(1) indicates that the in-kind parsonage exemption was based on "unique housing needs" of ministers.

The Government's historical analysis of §107(2) also does not support the Government's conclusion that the exclusion of "cash" housing allowances for ministers was based on the unique housing requirements of ministers. The Government cites a House Report indicating that the cash exclusion for housing allowances was intended simply because it seemed "unfair" to distinguish between in-kind housing provided as part of compensation and cash payments provided for housing. According to the Government's own explanation, therefore, enactment of §107(2) had nothing to do with the "unique housing needs" of ministers. The "unfairness" of distinguishing between in-kind and cash benefits, however, is not unique to ministers.

The historical record indicates that §107(2) was deliberately intended to broadcast a message of support for religion during the Cold War. Representative Peter Mack, who introduced §107(2), urged support for an exclusion of cash housing allowances paid to ministers in House Hearings in the following manner:

> Certainly, in these times when we are being threatened by a godless and anti-religious world movement we should correct this discrimination against certain ministers of the gospel who are carrying on such a courageous fight against this. Certainly this is not too much to do for these people who are caring for our spiritual welfare. (Hearings on General Revenue Revisions before the House Committee on Ways and Means, 83d Cong., 1st Sess., pt. 3, at 1576 (1953)).

Representative Mack further urged support for §107(2) as a means to subsidize low incomes of some religious officials:

> Of our clergymen 55% are receiving less than $2,500 per year. This is some $258 less than the $2,668 annual median income for our labor force. It is well to keep in mind that many of these clergymen support families like the rest of us, and that many of these clergymen still receive low income based on the 1940 cost of living but must pay 1953 rents for a dwelling house. (*Id.*)

The history of §107(2), therefore, does not suggest any non-religious basis for distinguishing between cash housing allowances paid to ministers and those paid to secular employees. The purpose may have been to lessen the burden of housing costs, but it was not based on delineation of occupations that require particular housing. The purpose was to lessen the burden of housing costs for ministers in order to support them in the fight against a "godless and anti-religious world movement." Such preferential support for religion constitutes endorsement rather than accommodation.

The Government, nonetheless, argues that unless all ministers and churches qualify for a particular tax benefit, then the law unconstitutionally discriminates among religious groups. In other words, according to the Government, if the IRS provides benefits to any ministers, then it must also provide preferential benefits to all ministers. The Government's argument is perverse in that religious preferences become constitutionally mandatory even if the resulting benefit is unavailable to similarly situated secular taxpayers.

The Government's argument is even more perverse in the present case. The Government first argues that the in-kind parsonage allowance for ministers was enacted in order to give ministers an exclusion similar to the "convenience of the employer" exclusion provided generally to taxpayers. The Government proceeds, however, to conclude that if ministers are provided with an exclusion for in-kind housing that creates parity with non-clergy employees, then the exclusion should be extended preferentially to all religious clergy without regard to the in-kind limitation and the requirements of the "convenience of the employer."

The fallacy in the Government's bootstrap reasoning lies in treating the exclusion for in-kind housing as discriminating among religions. Even if the in-kind exclusion is deemed equivalent to the "convenience of the employer" exclusion, it is not a promotion of some religions over others

because it does not make distinctions between different religious organizations based on any creed or orthodoxy. The in-kind limitation, in other words, does not discriminate among religions, even though it may impact religious taxpayers differently, just as secular taxpayers are impacted differently. *Cf. Droz v. Commissioner*, 48 F. 3d 120, 124 (9th Cir. 1995). *See* also *Eagle Cove Conference Center v. Town of Woodboro*, 734 F.3d 673, 680-81 (7th Cir. 2013)(substantial burden must effectively render religious exercise impracticable; burden must be truly substantial, lest it supplant facially neutral laws under auspices of religious freedom).

The "discrimination" that §107(2) is supposed to address is based on faulty reasoning. The Government presumes that no logic justifies distinguishing between ministers who receive in-kind lodging and those who receive cash allowances. Whether such a distinction makes sense, it is not a distinction that is unique to the housing needs of ministers. What the Government deems to be unfair to ministers is just as "unfair" for non-clergy --the only difference being that ministers were thought to be "caring for our spiritual welfare in the courageous fight against a godless and anti-religious world movement." That is not a distinction that justifies preferential benefits for ministers, nor is it a constitutional distinction.

M. Section 107(2) Is Not An Accommodation In Response To A Substantial Government-Imposed Burden On Free Exercise Rights.

The Government concludes that §107(2) is merely an accommodation of religion that is permissible in the case of government-imposed substantial burdens on free exercise rights. The Government's argument lacks merit, in the first place, because the factual predicate is missing: There is no evidence that §107(2), as enacted by Congress in 1954, was intended to relieve any government burden on the free exercise of religion. Low pay and high housing costs apparently prompted enactment of §107(2), but these considerations are not unique to ministers and it is not a responsibility of government to abate such concerns just for ministers.

Providing ministers who are paid in cash with a tax benefit in order to "equalize" their circumstances with ministers provided in-kind housing, moreover, is constitutionally unacceptable. Professor Chemerinsky explains the problem for the Government:

> The equality argument made by the Government and several of the Amici in the *Warren* case has no stopping point. Under this reasoning, the Government could directly subsidize housing for clergy if that would equalize the benefits with those who live in housing provided by their churches. The obvious impermissibility of such a subsidy shows why the equality argument is insufficient to justify the parsonage exemption. One Amici says that the purpose of the parsonage exemption is to "equalize the impact of the federal income tax on ministers of poor and wealthy congregations." Helping poorer religions is hardly a secular purpose; surely, the Government cannot subsidize poorer religions out of a desire to help make them more equal with wealthier religions.

Chemerinsky, 24 Whittier Law Review at 724-25.

The Government's church-equity argument also has nothing to do with government imposed burdens on free exercise rights. The Supreme Court's decision in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 43 U.S. 327 (1987), in particular, does not support the Government's argument. In *Amos*, the Supreme Court upheld the constitutionality of an exemption from anti-discrimination hiring laws as applied to religious organizations. In reaching its decision with regard to employment discrimination laws the Supreme Court said that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* at 335. "Where, as here, the government acts for the proper purpose of lifting a [government] regulation that burdens the exercise of religion, then an accommodation may be justified." *Id.* at 338. The Court recognized in *Amos*, however, that "at some point, accommodation may evolve into an unlawful fostering of religion." *Id.* at 334-335.

The rationale of *Amos* is inapplicable to §107(2). Civil rights laws, as involved in *Amos*, are regulatory in nature. They regulate what conduct is prohibited, permitted or required. The application of anti-discrimination hiring rules to a church, therefore, arguably "would interfere with the conduct of religious activities." On this basis, *Amos* upheld an exemption from the anti-discrimination laws.

By contrast, income tax laws are not regulatory in nature and do not govern behavior. Rather, they only impose a monetary obligation, which is not a constitutionally significant burden. "To the extent that imposition of a generally applicable tax merely decreases the amount of money [the taxpayer] has to spend on its religious activities, any such burden is not constitutionally significant." *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 391 (1990), citing *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). "A preacher is not free from all financial burdens of government, including taxes on income or property." *Id.* at 386-387. In *Hernandez*, the Supreme Court concluded that the federal income tax was not a "constitutionally significant" burden on religion where the taxpayer could not claim a deduction for money paid to the Church of Scientology for religious services. *See* also *Bowen v. Roy*, 476 U.S. 693, 705-06 (1986)(denial of tax benefits does not burden religious practices).

The IRS fully understands that paying taxes is a burden to all taxpayers that does not constitute a recognizable burden on free exercise rights. In *Thompson v. Commissioner*, 2013 U.S. T.C. LEXIS 3 at 24-25 (2013), the court recently emphasized just this point:

> Paying taxes is a burden, to all taxpayers, on their pocketbooks, rather than a recognizable burden on the free exercise of their religious beliefs. *Pixley v. Commissioner*, 123 T.C. at 274. 'Constitutional protection of fundamental freedoms does not confer an entitlement to such funds as may be necessary to realize all of the advantages of that freedom. *Id.*, quoting *Harris v. McRae*, 448 U.S. 297, 318 (1980).

Section 107(2) similarly is not justified in order to alleviate a substantial burden on the exercise of religion. As in *Texas Monthly*, therefore, §107 cannot be justified as a means of removing an "imposition on religious activity." *See Texas Monthly*, 489 U.S. at 15, n. 8. Liability for income tax is not a substantial government burden on free exercise of rights.

In the absence of a government-imposed burden on the free exercise of religion, the Government cannot preferentially bestow benefits exclusively on religion as an accommodation. In such cases, even a purported accommodation impermissibly advances religion if it provides a benefit to religion without providing a corresponding benefit to a large number of non-religious groups or individuals, as described in *Texas Monthly*.

N. Section 107(2) Creates Government Entanglement With Religion.

The Government's claim that inquiries under §107(2) are not entangling is implausible. Section 107(2) excludes from the gross income of a minister the cash rental or housing allowance paid as compensation. This exemption requires the IRS to first determine whether an individual qualifies as a "minister of the gospel." Administrative regulations implementing §107 further require that ministers of the gospel perform specific duties, such as sacerdotal functions, conduct of religious worship, administration and maintenance of religious organizations and their integral agencies, and performance of teaching and administrative duties at theological seminaries. T. Reg. 1.1402(c)-5. What constitutes "religious worship" and "the administration of sacerdotal functions," in turn, depends on the tenets and practices of the particular religious body at issue. T. Reg. 1.1402(c)-5(b)(2)(i). Finally, in addition, a minister must be ordained, commissioned, or licensed by a "church," a requirement involving at least fourteen factors to consider.

The necessary determinations under §107(2) require that significant evidence be marshaled to prove that an individual is in fact a minister for purposes of §107. *See* Lloyd H. Meyer, *IRS Letter*

Rulings: Rendering Unto Caesar, The Exempt Organization Tax Review (May, 1999 at 331-333). Although the Government claims that these requirements involve no doctrinal or intrusive inquiry, both common sense and reality contradict the Government's argument. The Supreme Court recognized this in *Hernandez v. Commissioner,* 490 U.S. 680, 694 (1989).

The inquiries under §107(2) historically have always required complex inquiries into the tenets of religious orthodoxy. In *Silverman v. Commissioner*, 1973 U.S. App. LEXIS 8851 (8th Cir. 1973), aff'd 57 T.C. 727 (1972), for example, the Court of Appeals considered whether a full-time cantor of a Jewish congregation qualified as a minister of the gospel under §107. In reaching a decision, "the significance of ordination in the Jewish religion as practiced in the United States was a central issue as to which the views of three major branches of Judaism were solicited." After examining the facts of that case against an analysis of the historical background of the cantorate in the Jewish faith, the Court concluded that the taxpayer qualified for the §107 exemption.

Similarly, in *Salkov v. Commissioner*, 46 T. C. 190, 198-199 (1966), the court considered whether a full-time cantor in the Jewish faith was a minister of the gospel entitled to exclude a rental allowance from his gross income under §107. The court concluded that "from the thicket of our factual and legal exploration of this issue, we emerge with the conclusion that in these particular circumstances the petitioner, a full-time cantor of the Jewish faith, qualifies as a 'minister of the gospel' within the spirit, meaning and intendment of Section 107."

The Tax Court also had to consider the tenets of the Baptist religion in *Colbert v. Commissioner*, 61 T. C. 449 (1974). The court recognized in that case that there is no formal statement of precepts that are binding on Baptist churches, but nevertheless, the term "tenets and practices" as used in the IRS Regulations include "those principles which are generally accepted as beliefs and practices within the Baptist denomination." *Id.* at 455. Determining what constitutes the

official "precepts and principles" of a religion, however, necessarily involves drawing fine lines, as in *Tenenbaum v. Commissioner*, 58 T. C. 1, 8 (1972), where the court distinguished sacerdotal functions and religious worship from a minister's job "to encourage and promote understanding of the history, ideals, and problems of Jews by other religious groups."

Questions regarding church hierarchy also must be addressed frequently when applying §107(2), as in *Mosley v. Commissioner*, 68 T. C. Memo 1994-457, where the court considered whether a particular religious organization operated under the authority or control of a church or church denomination. According to the court, this "can only be determined after reviewing all the facts and circumstances surrounding the relationship between the church denomination and the organization." The court concluded that "a religious organization is deemed under the authority of a church or church denomination if it is organized and dedicated to carrying out the tenets and principles of a faith in accordance with either the requirements or sanctions governing the creation of institutions of the faith."

The necessary and intrusive inquiries under §107(2) remain ubiquitous. In *Good v. Commissioner*, T.C. Memo 2012 -- 323 (2012), for example, the IRS recently denied a housing exclusion under §107(2) after concluding that the taxpayer "failed to introduce any credible evidence to support a finding that his purported ministry actually satisfied any of the criteria of a church." *Id.* at 23. In *Foundation of Human Understanding v. United States*, 614 Fed. 3d 1383, 1390 (Fed. Cir. 2010), the Court of Appeals affirmed denial of a tax exemption applying the fourteen factor and associational tests used by the IRS. Similarly, in *Chambers v. Commissioner*, T.C. Memo 2011--114 (2011), the Tax Court considered the fourteen criteria used by the IRS to determine whether an entity was a church. In short, while the Government may not question the validity of the indicia of religiousness, it does claim a right to know what the indicia are in deciding whether to recognize a

claimed status. *See Church of Visible Intelligence That Governs The Universe v. United States*, 4 Cl. Ct. 55, 65 (1983).

The IRS must regularly make purely religious determinations in administering §107(2). The difficulty of resolving these religious questions, and the potential for inconsistent conclusions, give rise to far more entanglement than the purely secular inquiries that underlie "convenience of the employer" determinations or business expense verification. For example, another difficult religious determination that the IRS has had to make is whether a Christian college is an "integral agency of a church." This is the subject of many private letter rulings by the IRS, prompting one commentator to conclude that "the Service has consistently ruled that ordained ministers who teach at schools that are integrally related to churches are performing services within the exercise of their ministry, no matter what they teach." Newman, *On Section 107's Worst Feature: The Teacher-Preacher*, 93 TNT 260-20 (emphasis added). College administrators, and even basketball coaches, as well as teachers, can thus qualify for the benefits of §107 if they happen to be ordained ministers. It is often difficult, however, to determine whether the criteria for "integral part of a church" are satisfied. The IRS uses the criteria listed in Rev. Rul. 72-606 and Rev. Rul. 70-549, in making these determinations. Typical rulings in this area highlight the intrusiveness of the determination. *See* LTR 9608027, 96 TNT 39-49; LTR 200002040, 2000 TNT 11-24; and LTR 200925001, 2009 TNT 117-28.

The determinations required by §107 involve regular and complex entanglement between government and taxpayer. The inquiries under §107 involve questions that are inherently religious, subjective, intrusive and beyond the general competence of government officials. These determinations necessarily create excessive entanglement, unlike "convenience of the employer" determinations under §119. By contrast, eliminating the exclusion for cash housing allowances

under §107(2) would also eliminate altogether the entanglement concerns expressed by Professor Zelinsky, cited by the Government.

O. Section 107 Violates The Establishment Clause Under The *Lemon* Test.

Section 107(2) clearly violates the Establishment Clause under the controlling test announced in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). In the first place, tax breaks for ministers that are not neutral and available generally to other taxpayers do not have a secular purpose. The exclusion for cash housing allowances paid to ministers is provided only to the clergy and it was never intended to abate any substantial government-imposed burden on religion. On the contrary, the government acknowledges that §107(2) was enacted to provide additional tax benefits exclusively to ministers, who did not receive in-kind housing from their churches. Section 107(2), therefore, by all accounts was intended to benefit religion.

The second prong of the *Lemon* test is violated by Government action that has a principal or primary effect that advances religion. Government action has the primary effect of advancing religion if it likely to be perceived as an endorsement of religion. Tax breaks provided preferentially to ministers cannot help but be perceived as an endorsement of religion. This, in fact, was the exact conclusion of the Supreme Court in *Texas Monthly*. The Government claims that giving lucrative financial benefits to ministries and churches to reduce the burden of housing costs does not give the appearance of religious endorsement, but the Government's reasoning is not convincing; it also does not reflect the views of the Supreme Court, requiring that tax benefits for religion be neutrally and generally available on the basis of secular criteria, as articulated in *Texas Monthly*. Section 107(2) was enacted as a benefit to religion, in the heat of the Cold War, and it obviously gives real and apparent endorsement, as intended.

Finally, §107(2) also has the effect of fostering governmental entanglement with religion. In order to limit the tax break provided by §107(2) to religious clergy, the IRS must make complex, intrusive and subjective inquiries into religious matters. Unlike the situation in *Walz*, therefore, the exemption provided by §107 actually increases the Government's entanglement with religion.

The Supreme Court's holding in *Texas Monthly* ultimately represents the controlling application of the *Lemon* test to the present case: Preferential tax benefits to religion, that are not neutral and generally available to other taxpayers on the basis of secular criteria, violate the Establishment Clause. While all taxpayers would like to have exclusions and deductions to cover their housing costs, the reality is that only ministers of the clergy now get this break. Section 107(2), therefore, violates the Establishment Clause in a most obvious way by conditioning tax benefits on religious affiliation.

VI. CONCLUSION.

The Court should affirm the District Court's judgment in favor of the Plaintiffs-Appellees.

Dated this 3rd day of June, 2014.

BOARDMAN & CLARK LLP

By: */s/ Richard L. Bolton*

Richard L. Bolton, SBN 1012552
rbolton@boardmanclark.com
One South Pinckney Street, Suite 410
Madison, Wisconsin 53703-4256
608-257-9521 || 608-283-1709 fax
Attorneys for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)

The undersigned, counsel of record for the Plaintiff-Appellees, furnishes the following in compliance with F.R.A.P Rule 32(a)(7):

I hereby certify that this brief conforms to the rules contained in F.R.A.P Rule 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 13,969 words.

Dated this 3rd day of June, 2014.

BOARDMAN & CLARK LLP

By: */s/ Richard L. Bolton*
Richard L. Bolton, SBN 1012552

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 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. Counsel for the Appellants was served electronically by the Notice of Docket Activity transmitted by the CM/ECF system.

It is further certified that: (1) all required privacy redactions have been made; and (2) the ECF submission was scanned for viruses with the Trend Micro OfficeScan 10.0 antivirus program (updated daily), and, according to the program, is free of viruses.

Dated this 3rd day of June, 2014.

BOARDMAN & CLARK LLP

By: */s/ Richard L. Bolton*
Richard L. Bolton, SBN 1012552

F:\DOCS\WD\26318\25\A1906331.DOC