Nos. 18-1277 and 18-1280

In the United States Court of Appeals for the Seventh Circuit

ANNIE L. GAYLOR, et al.,

Plaintiffs-Appellees,

v.

STEVEN T. MNUCHIN, Secretary of the United States Department of Treasury, et al.,

Defendants-Appellants,

and

EDWARD PEECHER, et al.,

Intervening Defendants-Appellants,

On Appeal from the United States District Court
for the Western District of Wisconsin,
No. 3:16-cv-00215, Judge Barbara B. Crabb Presiding

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(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:

The Becket Fund for Religious Liberty

(3) If the party or amicus is a corporation:

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

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STATEMENT CONCERNING ORAL ARGUMENT

Intervenors respectfully request oral argument. The district court enjoined a 64-year-old act of Congress that has tremendous practical importance to churches and ministers across the country. The court's decision also raises important questions about the interpretation of the First Amendment's Establishment Clause. Oral argument will aid the Court in considering these issues.

JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction under 28 U.S.C. § 1331 because Plaintiffs challenged the constitutionality of a federal statute, 26 U.S.C. § 107(2), under the Establishment and Equal Protection Clauses of the federal Constitution. This Court has jurisdiction under 28 U.S.C. § 1291 because this is a timely appeal from a final judgment disposing of all parties' claims. The district court entered final judgment on December 15, 2017. App.53.[1] Intervenors filed their notice of appeal on February 8, 2018, within the 60 days allowed by Fed. R. App. P. 4(a)(1)(B). Dkt. 97.

[1] "App." refers to the in-brief appendix. "A." refers to appellants' joint separate appendix. "Dkt." refers to district court docket entries. Unless otherwise indicated, all "§" references are to the Internal Revenue Code (26 U.S.C.) currently in effect. Pertinent statutes are set forth in the Statutory Addendum.

STATEMENT OF THE ISSUE

For over 100 years, Congress and the IRS have recognized the convenience-of-the-employer doctrine, which allows employees to exclude housing benefits from their income if the benefits are provided for "the convenience of the employer" rather than the personal benefit of the employee. Congress has applied this doctrine to hundreds of thousands of nonreligious employees at a value of over $10 billion every year. It has also applied the doctrine to ministers. Specifically, over sixty years ago, Congress adopted 26 U.S.C. § 107, which applies the convenience-of-the-employer doctrine to ministers in a way that reduces government entanglement in religious questions and discrimination among religious groups. The issue in this case is:

Whether Congress violated the Establishment Clause by adopting § 107 to apply the convenience-of-the-employer doctrine to ministers in a way that reduces government entanglement in religious questions and discrimination among religious groups.

INTRODUCTION

Home is where the heart is. But home can also be an essential part of a job. That is why, for over 100 years, the IRS and Congress have recognized the convenience-of-the-employer doctrine.

The convenience-of-the-employer doctrine says that if an employer provides an employee with housing for the *personal benefit of an employee*, it should be treated as income; but if the housing is provided for the "convenience of the employer"—that is, as "part of the maintenance of the [employer's] general enterprise"—it is not income. *Jones v. United States*, 60 Ct. Cl. 552, 575 (1925). This doctrine has existed since the dawn of the federal income tax and has been applied to a dizzying array of workers—hotel managers, nurses, fishermen, construction workers, apartment caretakers, museum directors, oil executives, non-profit presidents, teachers, school superintendents, diplomats, peace corps volunteers, state governors, prison wardens, soldiers, and many more.

It has also been applied to ministers.[2] Many ministers, including Intervenors, use their home as an essential part of their ministry. Their home is where they counsel grieving parishioners, prepare sermons, and host Bible studies. It is where they hear confessions, host missionaries, and welcome new members. It is where they make themselves available at all hours of the day or night. And for congregations that lack their own church building—like several Intervenors—the minister's home is often the

[2] In accordance with IRS usage, this brief uses the terms "minister" and "church" to refer broadly to leaders and houses of worship of all faiths.

only place where the congregation can meet.

But deciding whether a home is used "for the convenience of the employer" is no easy task. It requires a fact-intensive inquiry into the nature of the employer's business, the relationship between the employer and employee, and the way the employee uses the home for the job. For that reason, Congress has developed a series of rules to help the IRS implement the convenience-of-the-employer doctrine. There is a default rule—§ 119(a)(2)—which allows any employee to receive tax-exempt housing if certain fact-intensive conditions are met. Then there are several bright-line rules that relax these conditions for various types of employees—like employees of educational institutions (§ 119(d)), employees in foreign camps (§ 119(c)), members of the uniformed services (§ 134), employees living abroad (§§ 911-12), and employees away from home on business (§§ 162 & 132). For these categories of employees, Congress determined that a bright-line rule was preferable to a fact-intensive, multi-factor test.

Congress adopted the same approach for ministers. In 1921, it adopted what is now 26 U.S.C. § 107(1), which exempts church-provided homes—sometimes called "parsonages"—from income tax. This bright-line rule ensures that the IRS does not become entangled in second-guessing the nature of a church's ministry and the way the minister uses the home. Then, in 1954, Congress adopted 26 U.S.C. § 107(2), which exempts church-provided housing allowances. Section 107(2) arose because, by the 1950s, more ministers were receiving housing allowances instead of church-provided homes—raising the question whether these ministers should be taxed more heavily than others. Several federal courts ruled that they shouldn't be. *E.g.*, *MacColl*

v. United States, 91 F. Supp. 721 (N.D. Ill. 1950); *Conning v. Busey*, 127 F. Supp. 958 (S.D. Ohio 1954). So Congress enacted § 107(2) to codify these decisions and eliminate discrimination among ministers.

Over the last 64 years, § 107 has served the country well. It has allowed the IRS to apply the convenience-of-the-employer doctrine fairly to religious and nonreligious employees alike, and it has kept the IRS from becoming entangled in religious questions or discriminating among religious groups.

Until now. The decision below strikes down § 107(2), upsetting over a century of history and long-settled tax law. It also misapplies basic Establishment Clause precedent. According to the district court, § 107(2) "violates the establishment clause because it provides a benefit to religious persons and no one else." App.2. But the district court was mistaken. Section 107(2) takes the longstanding convenience-of-the-employer doctrine, which benefits hundreds of thousands of nonreligious employees every year, and applies it to ministers in a way that reduces entanglement and discrimination. Under controlling Supreme Court precedent, this is not only constitutionally permissible but desirable.

The district court's decision would also have devastating practical effects on ministers and communities across the country. For over a century, churches and ministers have relied on these rules to start ministries, purchase property, and help the communities they serve. The decision below threatens to impose a massive new tax burden on churches and ministers, forcing them to curtail their ministries, relocate, and in some cases shut down. The hardest hit would be the communities most in need,

especially inner-city communities like the ones Intervenors serve. Fortunately, the Establishment Clause does not require this result.

STATEMENT OF THE CASE

Intervenors adopt the Government's Statement of the Case with respect to its description of Plaintiffs (at 9-11) and the procedural history (at 3-4, 12-17). To assist the Court, however, Intervenors offer a more comprehensive background of § 107 and its relation to the convenience-of-the-employer doctrine.

I. The Convenience-of-the-Employer Doctrine

Congress enacted the federal income tax in 1913, shortly after ratification of the Sixteenth Amendment. The Bureau of Internal Revenue then began grappling with the definition of "income," particularly as applied to employer-provided benefits like meals and lodging. In a series of administrative rulings beginning in 1914, the Bureau developed what is now called the "convenience-of-the-employer doctrine." *See generally* J. Patrick McDavitt, *Dissection of a Malignancy: The Convenience of the Employer Doctrine*, 44 Notre Dame Lawyer 1104 (1969) ("McDavitt").

The convenience-of-the-employer doctrine flows from a basic principle about the nature of income—that for something to qualify as income, there "must be an economic gain, and this gain must primarily benefit the taxpayer personally." *United States v. Gotcher*, 401 F.2d 118, 121 (5th Cir. 1968). For example, a worker might receive any number of things that simultaneously benefit her *and* her employer's business—such as meals, travel, or office furnishings. But if these things are primarily intended to further the business of the employer, rather than compensate the employee, they are not treated as income. *See* Treas. Reg. § 1.132-5(a)(1)(v); Treas. Reg.

§ 1.162-2(a)-(b).

The same principle applies to lodging. Ordinarily, when an employee receives lodging, it doesn't benefit the employer other than by compensating the employee, so the value of the lodging is treated as income. But sometimes, the lodging is provided primarily for the convenience of the employer. Common examples include hotel managers who must live at the hotel, military officers who must live in the barracks, or commercial fishermen who must live on a ship. *See* M. L. Cross, Annotation, *Exclusion of Meals and Lodging from Gross Income Under "Convenience of the Employer" Rule*, 84 A.L.R.2d 1215 (1962). For these workers, the lodging is a component of their job. As the first court decision on the doctrine said, it is "part of the maintenance of the [employer's] general enterprise," not "part of the individual income of the laborer." *Jones*, 60 Ct. Cl. at 575. Excluding such lodging from income does not confer a special benefit; rather, it avoids taxing workers unjustly. McDavitt at 1105.

The convenience-of-the-employer doctrine was first recognized by administrative ruling in 1914, in a case involving in-kind lodging provided to government employees. *Id.* (citing T.D. 2079, 16 Treas. Dec. Int. Rev. 249 (1914)). But the doctrine quickly expanded to cash housing allowances and private employees. In 1919, it was extended to cash living allowances provided to an American Red Cross volunteer[3] and a clergyman under a vow of poverty.[4] Shortly thereafter, it was extended to lodging for

[3] O.D. 11, 1 C.B. 66 (1919).

[4] O.D. 119, 1 C.B. 82 (1919).

seamen,[5] workers living in camps,[6] employees in fishing and canning,[7] and hospital employees.[8] Then, in 1920, the Bureau issued a regulation applying the doctrine to *all* employees who received "living quarters . . . for the convenience of the employer."[9]

In 1921, however, the Bureau refused to extend the convenience-of-the-employer doctrine to a minister who lived in a parsonage. In a one-sentence ruling, the Bureau said that "the fair rental value of the parsonage is considered a part of his compensation for services rendered and as such should be reported as income." O.D. 862, 4 C.B. 85 (1921).

Congress immediately responded. Within months, it passed a statute excluding from gross income the rental value of a minister's church-provided "dwelling house." Martha M. Legg, *Excluding Parsonages from Taxation: Declaring a Victor in the Duel Between Caesar and the First Amendment*, 10 Geo. J.L. & Pub. Pol'y 269, 275 (2012) (quoting then-§ 213(b)(11)). There was no recorded discussion or debate over this provision. It has generally been viewed as an application of "the convenience of the employer rule," *Williamson v. Comm'r*, 224 F.2d 377, 379-80 (8th Cir. 1955), and a means of "reduc[ing] the administrative burden of applying [the rule] to clergymen." Boris I. Bittker, *Churches, Taxes and the Constitution*, 78 Yale L.J. 1285, 1292 n.18 (1969).

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[5] O.D. 265, 1 C.B. 71 (1919).

[6] T.D. 2992, 2 C.B. 76 (1920).

[7] O.D. 814, 4 C.B. 84-85 (1921).

[8] O.D. 915, 4 C.B. 85-86 (1921).

[9] McDavitt at 1106 (citing Treas. Reg. 45, art. 33 (1920 ed.)).

II. Codification in the Tax Code

Throughout the 1930s and 1940s, the IRS and courts developed the convenience-of-the-employer doctrine on an ad hoc—and sometimes conflicting—basis. *Comm'r v. Kowalski*, 434 U.S. 77, 90 (1977). So when Congress overhauled the tax code in 1954, it sought to "end the confusion" over the convenience-of-the-employer doctrine by codifying it in the tax code. *Id.* (quoting legislative history).

The main provision codifying the doctrine is § 119(a)(2). This provision excludes the value of lodging from gross income for *any* employee—secular or religious—if five conditions are met. The lodging must be furnished (1) by an employer to an employee; (2) in kind; (3) on the business premises of the employer; (4) for the convenience of the employer; and (5) as a condition of employment. Treas. Reg. § 1.119-1(b). A wide variety of employees have qualified for this exemption, including construction workers,[10] museum directors,[11] an oil executive living in Tokyo,[12] the president of the Junior Chamber of Commerce,[13] a state governor,[14] a rural school system superintendent,[15] a prison warden,[16] and many others.

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[10] Treas. Reg. § 1.119-1(f) Ex. (7); *Stone v. Comm'r*, 32 T.C. 1021 (1959).

[11] Jane Zhao, *Nights on the Museum: Should Free Housing Provided to Museum Directors Also be Tax-Free?*, 62 Syracuse L. Rev. 427, 447-49 (2012).

[12] *Adams v. United States*, 585 F.2d 1060 (Ct. Cl. 1978).

[13] *U.S. Jr. Chamber of Commerce v. United States*, 334 F.2d 660 (Ct. Cl. 1964).

[14] Rev. Rul. 75-540, 1975-2 C.B. 53; *see also* Rev. Rul. 90-64, 1990-2 C.B. 35 (principal representative of the U.S. to a foreign country).

[15] *Haack v. United States*, 75-2 U.S.T.C. ¶ 9847 (S.D. Iowa 1975).

[16] I.R.S. Priv. Ltr. Rul. 9126063 (June 28, 1991).

Other Code provisions relax § 119(a)(2)'s requirements for certain types of employees. For example, § 119(c) eliminates the "business premises" and "condition of employment" factor for workers who receive "lodging in a camp located in a foreign country." *Compare* § 119(c) *with* § 119(a)(2). The rationale is that, when a camp is in a "remote area where satisfactory housing is not available on the open market," § 119(c)(2)(A), the lodging is per se for the convenience of the employer.

Another per se rule applies to employees of educational institutions—such as college presidents, university faculty, or even elementary-school teachers. Under § 119(d), such employees can exclude a portion of the fair rental value of "qualified campus lodging," even if they cannot satisfy any of the elements of the convenience-of-the-employer doctrine. All they need to show is that the lodging is "(A) located on, or in the proximity of, a campus of the educational institution, and (B) furnished to the employee . . . by or on behalf of such institution for use as a residence." *Id.* § 119(d)(2)-(3).

An even broader per se rule is § 134, which applies to members of the military. Under this provision, "any member or former member of the uniformed services" can receive tax-exempt housing benefits—including both in-kind lodging and cash allowances—regardless of whether the requirements of § 119(a)(2) are satisfied. 26 U.S.C. § 134. This section codifies the reasoning of the first court decision applying the convenience-of-the-employer doctrine, which emphasized that a service member's duties "require his physical presence at his post or station; his service is continuous day and night; [and] his movements are governed by orders and commands." *Jones*, 60 Ct. Cl.

at 569. Under § 134, however, *every* service member is presumed to face these burdens on housing, whether living at home or abroad, on base or off, active duty or retired.

Nor is this per se rule limited to the military. Section 912 extends the same treatment to enumerated housing allowances of *all* government employees living abroad—including Peace Corps volunteers, CIA operatives, diplomats and consular officials, school teachers, and others. 26 U.S.C. § 912. Early IRS decisions allowed some of these employees to exclude housing allowances when they were "subject to transfer whenever the interests of the service require," were "available for duty at all hours," and needed "suitable and appropriate" quarters for conducting their work. G.C.M. 14836, 14-1 C.B. 45-46 (1935) (customs agents); McDavitt at 1108 & n.40 (collecting decisions). But § 912 adopts a per se rule that all such benefits "are inherently for the convenience of the government." McDavitt at 1108.

Section 911 extends another per se rule to any "citizen or resident of the United States" residing in a foreign country. Such persons need not satisfy any of the requirements of § 119(a)(2); living abroad is enough. They can exclude housing costs above a certain level—whether housing is provided in-kind or through a cash allowance. 26 C.F.R. 1.911-4(b)(1). The rationale is that, if an individual is working abroad, she likely has significant extra housing costs that reduce her real income compared with a domestic worker. But a foreign worker need not prove that these considerations apply in her individual case.

Finally, under §§ 162 and 132, anyone posted away from her normal workplace

for one year or less is not taxed on cash housing allowances or in-kind lodging provided by the employer. 26 U.S.C. §§ 162(a)(2), 132(a)(3), (d). Again, there is no need to show that the lodging is used for work; the mere fact that she has moved away temporarily, while still maintaining her permanent home and primary business location, is enough to show that the temporary lodging is for the employer's benefit. IRS, *Tax Topic 511 - Business Travel Expenses*, https://www.irs.gov/taxtopics/tc511.

The following chart summarizes these exemptions:

Tax Treatment of Housing Benefits

Sec.	Who is eligible?	Form?	What must be shown?
119(a)	All employees, secular or religious	In-kind	Lodging is furnished (1) by employer for employee; (2) in kind; (3) on business premises of employer; (4) for convenience of employer; and (5) as a condition of employment.
119(c)	Any employee living in a foreign camp	In-kind	Lodging is furnished (1) by employer for employee; (2) in kind; (3) as near as practicable to place of service; (4) in a remote area with no satisfactory housing; and (5) not available to the public and normally accommodates 10 or more employees.
119(d)	Any employee of an educational institution	In-kind	Lodging is furnished (1) by an educational institution (2) on or near campus.
134	Any member or former member of the uniformed services	In-kind & cash	Lodging or allowance is received "by reason of such member's status or service as a member of such uniformed services."
912	Any government employee living overseas	In-kind & cash	Lodging or allowance is on a list of allowances authorized by Congress or regulation.
911	Any citizen or resident living abroad	In-kind & cash	Taxpayer has a "tax home" abroad and approximately one year of overseas residence.
162 & 132	Anyone away from home for business	In-kind & cash	Temporary post is less than one year; taxpayer incurs expenses in pursuit of business away from tax home.

Congress thus has enacted an array of tax exemptions designed to relieve workers who face unique, job-related housing requirements. The default rule is § 119(a)(2), which establishes a fact-intensive standard requiring all employees to demonstrate that their lodging is provided for the convenience of their employer. But Congress has relaxed this default rule in a variety of situations where the type of work, the burdens on housing, or a non-commercial working relationship make it likely that the lodging was intended to benefit the employer.

III. Section 107

Congress followed the same pattern in applying the convenience-of-the-employer doctrine to ministers. As noted above, in 1921, Congress adopted a per se rule exempting church-owned parsonages. By the 1950s, however, fewer ministers lived in church-owned parsonages, and more were receiving cash housing allowances. A.22-23; A.25. This raised the question of whether cash housing allowances should be treated differently from church-owned parsonages.

The first court decision involving the convenience-of-the-employer doctrine rejected any distinction between cash allowances and in-kind housing. *Jones*, 60 Ct. Cl. at 571. So did early IRS rulings on charitable volunteers. O.D. 11, 1 C.B. 66 (1919); O.D. 119, 1 C.B. 82 (1919). And so did early commentators. *See* McDavitt at 1132-33, 1138. They reasoned that distinguishing between cash and in-kind housing benefits was "artificial and formalistic"; what mattered is whether the benefits were provided for the convenience of the employer. *Id.*

Thus, in the 1950s, several ministers challenged the IRS's attempt to limit the parsonage allowance to in-kind housing. Several federal courts ruled in their favor,

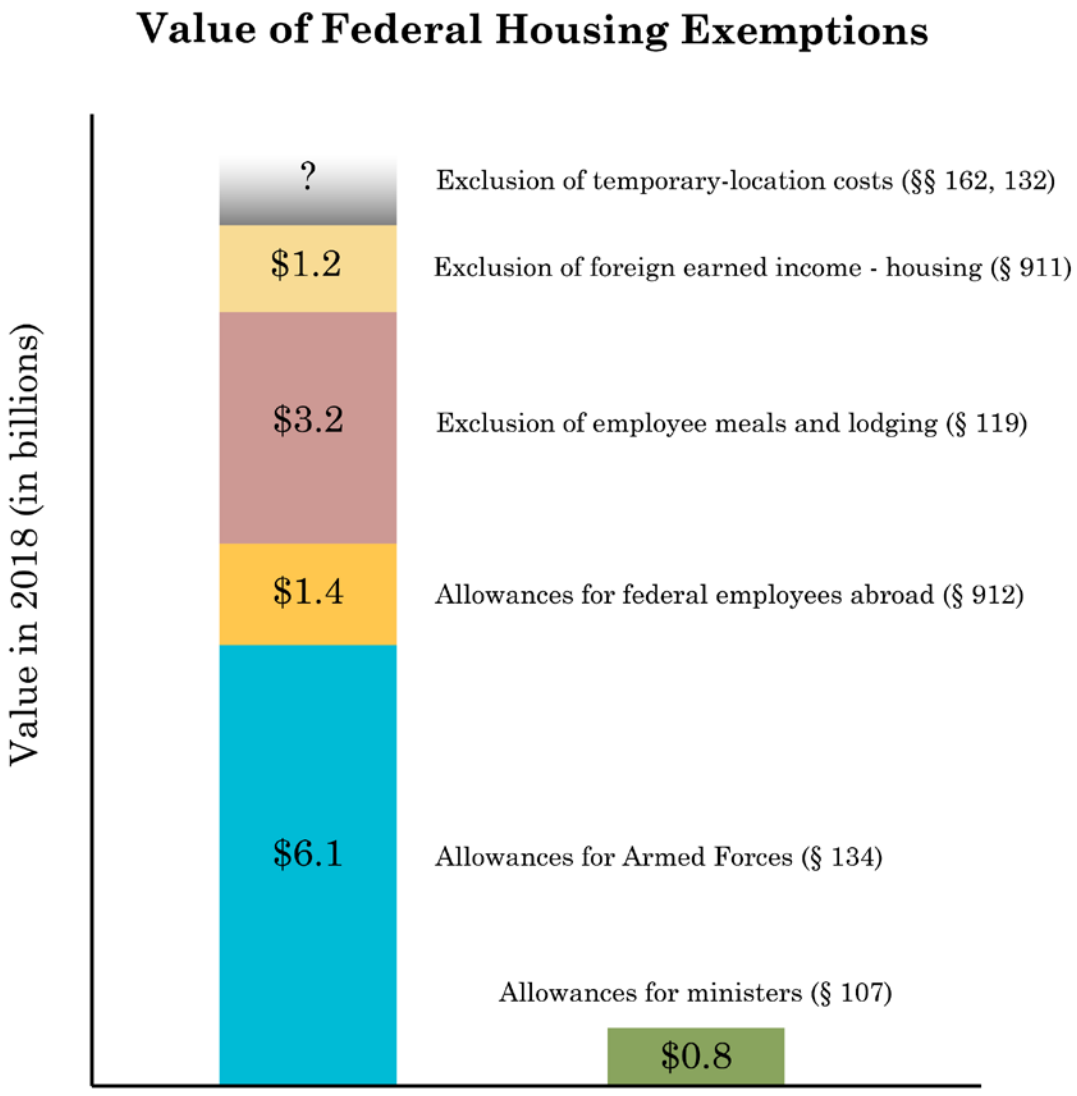
concluding that cash housing allowances should be treated no differently than in-kind parsonages. *MacColl v. United States*, 91 F. Supp. 721 (N.D. Ill. 1950); *Conning v. Busey*, 127 F. Supp. 958 (S.D. Ohio 1954); *Williamson v. Comm'r*, 224 F.2d 377 (8th Cir. 1955). As the Eighth Circuit explained, "the rationale of the [convenience-of-the-employer] rule" applies regardless whether the items "are furnished in kind or cash i[s] paid in lieu thereof." *Williamson*, 224 F.2d at 379 (citing *Jones*, 50 Ct. Cl. 552). Accordingly, these courts found "no reason to assume any legislative intent to split hairs," given the lack of any "distinction of substance between the two common methods of providing a minister with a home." *Williamson v. Comm'r.*, 22 T.C. 566, 570 (1954) (Opper, J., dissenting); *accord Williamson*, 224 F.2d at 381.

In response to these court decisions, Congress in 1954 enacted 26 U.S.C. § 107. Section 107(1) carries forward the in-kind parsonage allowance originally enacted in 1921. Section 107(2) codifies the federal court decisions requiring the IRS to treat in-kind parsonages and housing allowances alike. In the legislative history, Congress recognized that, in addition to codifying the federal court decisions, this equal treatment of in-kind parsonages and cash housing allowances was necessary to prevent discrimination against smaller, newer, and poorer churches. H.R. Rep. No. 83-1337, at 4040 (1954); S. Rep. No. 83-1622, at 4646 (1954). As one proponent explained, an exemption covering only in-kind parsonages was "discriminatory among our clergy." 99 Cong. Rec. A5372-73 (1953). Expanding the exemption to include cash allowances would "remove . . . inequity and permit all clergymen to" be treated alike. *Id.*

In 2002, Congress further amended § 107(2) to clarify that the exclusion was limited to the fair rental value of the parsonage. Pub. L. No. 107-181, 116 Stat. 583. In so doing, Congress emphasized that § 107 is "similar to other housing provisions in the Tax Code offered to workers who locate in a particular area for the convenience of their employers." 148 Cong. Rec. 4670 (Apr. 16, 2002). But it avoids entangling "inquiries by the government into the relationship between clergy and their respective churches." Clergy Housing Allowance Clarification Act, H.R. 4156, 107th Cong. § 2(a)(5) (as introduced Apr. 10, 2002). It also seeks to "accommodate the differing governance structures, practices, traditions, and other characteristics of churches through tax policies that strive to be neutral with respect to such differences." *Id.* § 2(a)(4).

In keeping with these goals, § 107 is interpreted neutrally to apply to "ministers" from all religious traditions. *Salkov v. Comm'r*, 46 T.C. 190, 194 (1966) (Jewish cantor). "Religion" is also defined to include faiths that "do not posit the existence of a Supreme Being," such as "Taoism, Buddhism, and Secular Humanism." Internal Revenue Manual § 7.25.3.6.5(2) (Feb. 23, 1999) (citing *United States v. Seeger*, 380 U.S. 163 (1965)). Nevertheless, as shown in the following chart, § 107 accounts for only a small fraction of exemptions claimed under the convenience-of-the-employer doctrine:[17]

[17] *See* Staff of the Joint Committee on Taxation, Estimates of Federal Tax Expenditures for Fiscal Years 2016-2020 (Comm. Print 2017) at Table 1. The value of temporary-location costs under §§ 162 and 132 is unknown; it appears to be reported within the larger category of "fringe benefits," totaling $8 billion. Allowances for Armed Forces and federal employees include more than just housing.



IV. Intervenors

Intervenors are ministers, churches, and a diocese that would be harmed by the invalidation of § 107(2). Bishop Ed Peecher is the founding pastor of Chicago Embassy Church on the South Side of Chicago; Pastor Chris Butler is its current pastor. A.73; A.109. Father Patrick Malone is the rector of Holy Cross Anglican Church in Waukesha, Wisconsin. A.81. The Diocese of Chicago and Mid-America of the Russian

Orthodox Church Outside of Russia ("Diocese") is a Russian Orthodox diocese headquartered in Chicago that includes twelve parishes within this Circuit. A.89.

Bishop Ed, Pastor Chris, Father Malone, and most of the Diocese's priests receive housing allowances excludible under § 107(2) to enable them to carry out their ministries. A.106, A.111, A.85, A.93. For each of them, their home is an essential component of their job.

For Pastor Chris, because Chicago Embassy lacks its own church building, many "church meetings—leadership gatherings, Bible study, social events, and spiritual counseling—often take place in [his] own home." A.111. Further, Pastor Chris must meet the "spiritual and temporal needs" of church members when they "are ill or need immediate pastoral care," including "at irregular hours or on very short notice." *Id.* Thus, it is "critical that [he] live near the church and the community that [he] serve[s]." *Id.*

Father Malone's church likewise lacks its own church building, so Father Malone's "home is an important center of spiritual life in the parish." A.100. Aside from Sunday worship, most church meetings take place in his home, including weekly morning and evening prayer services and weekday communion services. *Id.* Father Malone also routinely hosts parishioners in his home for Bible studies or because a parishioner is "in a spiritual crisis and in need of counsel." *Id.* Because of his home's extensive role in church services, and because he must be available "at any time, day or night," it is "extremely important for" Father Malone to live near the congregation. A.84-85.

The Diocese's priests also "use their homes extensively in their pastoral ministry," hosting parishioners for individual counseling and parish events and often "provid[ing] temporary lodging to church members in transition, guest speakers, missionaries, and other travelers with a connection to the church." A.103-104. The Diocese's priests must perform numerous divine services per week, act as caretakers for the parish's church buildings, and "counsel their flocks and visit the sick, regardless of the day of the week or time of day or night." A.91-92; A.103. These duties make "being a priest" in the Diocese "essentially a 24/7 job" and require the priest to live near the church building and parishioners. A.91-93; A.103-104. Church regulations also require priests "to live within the geographic boundaries of their parishes." A.92.

If § 107(2) is struck down, each Intervenor will be harmed. Chicago Embassy, Holy Cross Anglican, and many parishes within the Diocese cannot "afford to increase the[ir ministers'] compensation to offset the additional tax," A.94-95, so they would have to cut back on ministries, A.112, or, in the case of Holy Cross Anglican, consider "fold[ing]" altogether. A.86. Pastor Chris, Father Malone, and many Diocesan priests could not bear the increased taxes themselves without taking on additional secular work at the expense of their ministries. A.112; A.86; A.94-95.

On January 19, 2017, the district court granted Intervenors' request to participate in this case, recognizing that "no group of people face more to lose if plaintiffs succeed than ministers such as" Intervenors. Dkt. 35 at 2.

SUMMARY OF THE ARGUMENT

Section 107 is a logical adaptation of the convenience-of-the-employer doctrine to ministers, not an establishment of religion. As such, it is constitutional under controlling Supreme Court precedent.

I. First, § 107 is constitutional under the leading decision on tax exemptions: *Walz*. There, the Supreme Court recognized a distinction between tax exemptions and direct transfers of government revenue, concluding that tax exemptions for religious groups are generally constitutional—particularly when they comport with historical practice. Here, § 107 fits easily within the general rule of *Walz*, because it reduces entanglement between church and state and is supported by longstanding historical practice.

II. Second, § 107 is constitutional under *Texas Monthly*. There, the Supreme Court recognized an exception to *Walz* for tax exemptions that are exclusive to religious groups, further no secular purpose, and provide preferential support for the communication of religious messages. Here, however, § 107 does not stand alone. Rather, Congress has granted exemptions to hundreds of thousands of secular employees under the convenience-of-the-employer doctrine. Section 107 simply applies that broad, preexisting exemption to ministers in a way that reduces entanglement and discrimination. As such, it is constitutional under any interpretation of *Texas Monthly*.

III. Third, § 107 is constitutional under *Lemon*. It has the secular purpose and effect of ensuring fair treatment of ministers' housing costs under the convenience-of-the-employer doctrine, reducing entanglement between church and state, and

eliminating discrimination among religions. This sends a message of neutrality and non-entanglement toward religion, not endorsement.

IV. Finally, the district court's mistaken interpretation of the Establishment Clause threatens numerous state and federal tax provisions designed to reduce entanglement and discrimination. These laws show that, under the Establishment Clause, it is not only permissible for the government to consider the unique constitutional difficulties presented by the taxation of churches and ministers, but also desirable.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*. *Freedom From Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 490 (7th Cir. 2000).

ARGUMENT

The Supreme Court has employed various Establishment Clause "tests." Sometimes the Court has applied the *Lemon* test, which asks whether a law "(1) lacks a legitimate secular purpose; (2) has the primary effect of advancing or inhibiting religion; or (3) fosters an excessive entanglement with religion." *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 849 (7th Cir. 2012). More recently, the Court has abandoned the *Lemon* test in favor of a historical approach. *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2284 (2014) (Scalia, J., dissenting from denial of certiorari) ("*Town of Greece* abandoned the antiquated 'endorsement test'"). In the tax context, the Court has not applied *Lemon*, but has instead focused on the history of the Establishment Clause, the nuances of the

tax code, and principles specific to the tax context. *Walz v. Tax Comm'n*, 397 U.S. 664, 675-680 (1970); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 11-13 (1989). Accordingly, in this brief, we first show why § 107 is constitutional under the Supreme Court's leading tax cases—*Walz* and *Texas Monthly*. We then show why it also constitutional under *Lemon*.

I. Section 107 is constitutional under *Walz*.

A. *Walz* recognizes a distinction between transfers of government revenue and tax exemptions.

The Supreme Court has long distinguished between laws that affirmatively assist religious organizations and laws that merely exempt them from government-imposed burdens. Affirmatively assisting religious organizations—such as by directly funding them—may be unconstitutional if the assistance is not neutral or violates other limitations. *See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 808-836 (2000). But lifting government-imposed burdens from religious organizations—such as by exempting them from certain taxes or regulation—is often permissible and sometimes constitutionally required. *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987); *Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987).

The Supreme Court first recognized this distinction in the tax context in *Walz*. There, a taxpayer challenged New York's property tax exemptions for churches, arguing that the exemptions "indirectly require[d] [him] to make a contribution to religious bodies." 397 U.S. at 666-67. But in a 7–1 ruling, the Supreme Court disagreed.

Although the Court noted that the government granted property tax exemptions to a "broad class" of nonprofits, that was not the basis for the decision. *Id.* at 673. Instead, the Court grounded its decision on the distinction between situations where the government "transfer[s] part of its revenue to churches," and where the government merely offers "a tax exemption." 397 U.S. at 675 (emphasis added). Although transfers and exemptions both provide "economic assistance" to churches, they do so "in fundamentally different ways." *Id.* at 690 (Brennan, J., concurring). A revenue transfer "forcibly diverts the income of both believers and nonbelievers to churches." *Id.* at 691. But a tax exemption simply "refrains from diverting [the church's income] to [the state's] own uses." *Id.* In fact, a tax exemption actually reduces entanglement between church and state by eliminating the problem of "tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts [between church and state] that follow in the train of those legal processes." *Id.* at 674. Thus, the Court held that "[t]here is no genuine nexus between tax exemption and establishment of religion." *Id.* at 675.

The Court also grounded its decision on "more than a century of our history and uninterrupted practice," which showed "that federal or state grants of tax exemption to churches were not a violation of the Religion Clauses of the First Amendment." *Id.* at 680. This "unbroken practice," the Court said, could not "be lightly cast aside." *Id.* at 678; *see also id.* at 681 ("History is particularly compelling in the present case.") (Brennan, J., concurring). Thus, *Walz* teaches that tax exemptions, when they are consistent with historical practice, are typically constitutional.

The Supreme Court's more recent Establishment Clause cases confirm this principle. In *Arizona Christian School Tuition Organization v. Winn*, the Court considered a tax credit allowing taxpayers to receive dollar-for-dollar tax credits for donations made to school tuition organizations. 563 U.S. 125, 130 (2011). The school tuition organizations then provided scholarships to students attending private schools, many of which were religious. *Id.* at 129. Plaintiffs argued that a law diverting nearly $350 million in tax revenue primarily to religious schools violated the Establishment Clause. *Id.* at 147 (Kagan, J., dissenting).

But the Supreme Court held that plaintiffs had suffered no cognizable injury under the Establishment Clause. Drawing on "the history of the Establishment Clause," the Court emphasized that the "specific evil" targeted by the Founders was the "extrac[ting] and spen[ding] [of] a conscientious dissenter's funds in service of an establishment"—or, as Madison put it, the forced contribution of even "three pence only of his property." *Id.* at 140-42. When the government imposes a tax and transfers the revenue to a church, a dissenter "has in some small measure been made to contribute to an establishment in violation of conscience." *Id.* at 142. But "[w]hen the government declines to impose a tax"—by granting an exemption or tax credit—"there is no such connection between dissenting taxpayer and alleged establishment," and therefore no Establishment Clause injury. *Id.* In other words, a tax exemption is not the same as a revenue transfer.

Similarly, in *Town of Greece*, the Supreme Court held that "the Establishment Clause *must* be interpreted by reference to historical practices and understandings."

134 S. Ct. at 1819 (emphasis added). Although *Town of Greece* involved legislative prayer, not a tax exemption, the Court emphasized that basing its analysis on history was not an "exception" for legislative prayer. *Id.* at 1818. Rather, "[a]ny test the Court adopts"—in any Establishment Clause context—"must acknowledge a practice that was accepted by the Framers." *Id.* at 1819. Thus, both *Town of Greece* and *Winn* affirm the lesson of *Walz*—that revenue transfers and tax exemptions are different, and that the Establishment Clause must be interpreted in light of history.

B. Section 107 is consistent with *Walz*.

Section 107 is constitutional under *Walz*. First, like *Walz*, this case involves a tax exemption, not a revenue transfer. The government never "extract[s] and spend[s]" any funds in support of any church, so the "specific evil" prohibited by the Establishment Clause is not implicated. *Winn*, 563 U.S. at 141-42. Instead, the exemption "restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other." *Walz*, 397 U.S. at 676.

Second, § 107 is supported by "more than a century of our history and uninterrupted practice." *Walz*, 397 U.S. at 680. At the founding, established churches received two kinds of financial support: "land grants and tithes." Michael McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2147 (2003). Both involved a transfer of money or property from the government or taxpayers to the church, thus "implicat[ing] individual taxpayers in sectarian activities." *Winn*, 563 U.S. at 141-42.

Tax exemptions, by contrast, were not considered to be an element of an establishment. They were ubiquitous at the Founding, including in the District of Columbia (which was subject to the Establishment Clause) and in states that never had established churches.[18] And as states with established churches dismantled their establishments, they still retained tax exemptions for houses of worship and other church property. Chester James Antieau et al., *Religion Under the State Constitutions* 122-24 (1965); *see also Walz*, 397 U.S. at 682-83 (Brennan, J., concurring) (recounting Virginia and New York examples). In the 19th century, such exemptions remained "so entirely in accord with the public sentiment that they universally prevail[ed]." Evelyn Brody, *Property-Tax Exemption for Charities: Mapping the Battlefield* 121 (2002) (quoting *State v. Collector of Jersey City*, 24 N.J.L. 108, 120 (Sup. Ct. 1853)); *see also* Philip Schaff, *Church and State in the United States* 66 (1844). Indeed, "all of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantees." *Walz*, 397 U.S. at 676.

Parsonages have likewise been exempt in an unbroken tradition from the Founding era through the adoption of § 107(2).[19] These exemptions were never viewed as

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[18] *See* Appendix A of Supplement Containing Appendices to Brief of United States Catholic Conference as Amicus Curiae, *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (No. 135) (available at the Library of Congress) (collecting earliest religious property-tax exemptions of Delaware (1796), Maryland (1798), New York (1799), Pennsylvania (1799), Virginia (1800), District of Columbia (1802), North Carolina (1806), South Carolina (1813), Rhode Island (1822), Connecticut (1822), Georgia (1833), Massachusetts (1835), New Hampshire (1853), and New Jersey (1866)).

[19] *See, e.g.*, Laws of the State of Delaware, Section 1, Chapter XCVIII, Vol. 2, page 1247 ("real or personal property . . . belonging to . . . any church") (1796); Pub. Stat.

establishments. For example, one of the earliest cases addressing a parsonage exemption rejected the notion "that exemption from taxation of church property is the same thing as compelling contribution to churches." *Trustees of Griswold Coll. v. State*, 46 Iowa 275, 282 (1877). Instead, "the constitutional prohibition extends only to the levying of tithes, taxes, or other rates for church purposes." *Id.* The court further explained that the exemption was justified because the parsonage was "fit and proper to the objects of the church," which "require[d] frequent removals of pastors from one congregation to another" and "an itinerant ministry" (*id.* at 280-81)—demonstrating that the convenience-of-the-employer rationale for exempting parsonages was understood long before the enactment of § 107.

The district court concluded that this strong historical support for parsonage exemptions was "not instructive" because it "relates to church property tax exemptions, not to income tax exemptions." App.40. But that is because there was no income tax

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Laws of Conn. tit. 102, § 6 (1821) ("houses . . . belonging to churches"); 1801 N.Y. Laws 500, codified at 1 Rev. Stat. 388 (1829) ("personal property" or "real estate" of "any minister of the gospel or . . . priest of any denomination whatsoever"); Me. Rev. Stat. tit. II, ch. 6, § 6 (1857), as amended by 1860 Me. Laws, ch. 132 ("property held by any religious society as . . . a parsonage"); Iowa Code § 797.1 (1873) ("grounds, and buildings of . . . religious institutions"); Ky. Const. of 1891, § 176 ("all parsonages or residences owned by any religious society and occupied as a home . . . by the minister of any religion"); Wis. Rev. St. § 1038 (1898) ("parsonages"); La. Const. of 1898 (as amended 1902), art. 230 ("rectories and parsonages"); 1913 Idaho Sess. Laws 175 ("parsonage[s]"); *State v. Kittle*, 105 S.E. 775, 777 (W. Va. 1921) (statute enacted "under the [state] Constitution of 1863" exempted "parsonages"); *State v. Church of Incarnation*, 196 N.W. 802, 802 (1924) (Minnesota Constitution of 1906 exempted parsonages); Arvo Van Alstyne, *Tax Exemption of Church Property*, 20 Ohio St. L.J. 461, 479-84 (1959) (parsonages expressly exempted "[i]n 29 states and the District of Columbia" and "clearly included" in general church-property exemptions of other states).

at the Founding. When Congress enacted the first income tax in 1894, it exempted religious organizations. Revenue Act, § 32, 28 Stat. 556 (1894). It did the same in 1921, just months after the IRS first tried to tax ministers on the value of their parsonages. Thus, "[f]or so long as federal income taxes have had any potential impact on churches—over [120] years—religious organizations have been expressly exempt." *Walz*, 397 U.S. at 676.

More importantly, the district court offered no reason why property- and income-tax exemptions should be treated differently under the Establishment Clause—particularly when they have the same effect on churches and the public fisc. Under Justice Kennedy's historical analysis, which the Court adopted in *Town of Greece*, the question is not whether there is a perfect match between historical and modern practices; it is whether modern practices pose "no greater potential for an establishment of religion" than historical practices. *County of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in part and dissenting in part); *see also Town of Greece*, 134 S. Ct. at 1819. Thus, in *Town of Greece*, the Court upheld a *city council*'s prayer practice based primarily on the practices of *Congress* and the *states*. 134 S. Ct. at 1819. And in *Walz*, the Court upheld a state *property-tax* exemption with reference to a federal *income-tax* exemption. 397 U.S. at 677. Here, we have the mirror image: an *income-tax* exemption that poses "no greater potential for an establishment of religion" than a *property-tax* exemption. *Allegheny*, 492 U.S. at 670 (opinion of Kennedy, J.). Accordingly, § 107 is constitutional under *Walz*.

II. Section 107 is constitutional under *Texas Monthly*.

Section 107 is also constitutional under *Texas Monthly*. *Texas Monthly* recognizes an exception to *Walz* for tax exemptions that benefit only religious groups, serve no secular purpose, and provide preferential support for the communication of religious messages. But § 107 does none of those things. Rather, § 107 serves the constitutionally laudable goal of applying the convenience-of-the-employer doctrine to ministers in a way that reduces church–state entanglement and discrimination among religions. Thus, it is not only constitutionally permissible but desirable.

A. *Texas Monthly* forbids exemptions that further no secular purpose and provide preferential support for religious messages.

Texas Monthly involved a state sales tax exemption that applied exclusively to "periodicals" that "consist wholly of writings promulgating the teaching of [a] faith" and "books that consist wholly of writings sacred to a religious faith." 489 U.S. at 5. The Supreme Court struck down the exemption, but no opinion received more than three votes.

Justice White concluded that the exemption violated the Press Clause because it taxed publications differently based on "the message they carry." *Id.* at 25-26. Messages "promulgating the teaching of [a religious faith]" were exempt, while all other messages were taxed. *Id.* at 25-26. This "content" discrimination "is plainly forbidden by the Press Clause." *Id.* (citing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987)). Because this is the narrowest ground for the decision, *Texas Monthly* arguably does not apply beyond the context of differential taxation of the press.

Justices Blackmun and O'Connor agreed that the exemption might not "survive Press Clause scrutiny." *Id.* at 27-28. But they also concluded that the exemption violated the Establishment Clause. In their view, because the exemption was confined "exclusively to the sale of religious publications," it amounted to "preferential support for the communication of religious messages." *Id.* at 28.

A three-Justice plurality, authored by Justice Brennan, also found an Establishment Clause violation. Although the plurality acknowledged that tax exemptions granted "exclusively to religious organizations" are permissible if they don't "burden[] nonbeneficiaries markedly" and can "reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion," *id.* at 15, the plurality believed that "[n]o concrete need to accommodate religious activity ha[d] been shown." *Id.* at 18. The plurality also acknowledged that religious tax exemptions are permissible if "grounded in some secular legislative policy that motivate[s] similar tax breaks for nonreligious activities." *Id.* at 15 n.4. But the government "d[id] not argue" that a secular legislative policy motivated the exemption in *Texas Monthly*. *Id.* Thus, by "target[ing] [the exemption] at writings that *promulgate* the teachings of religious faiths," without furthering any "secular legislative policy," the government had "effectively endorse[d] religious belief." *Id.* at 15 & n.4, 17.

In sum, *Texas Monthly* recognizes an exception to *Walz* for certain types of tax exemptions. Under Justice White's concurrence—which is the narrowest opinion—an exemption violates the Press Clause if it taxes publications differently based on their content. *Id.* at 25-26. Under Justice Blackmun's concurrence, an exemption is invalid

if it is confined "exclusively" to "religious publications" and results in "preferential support for the communication of religious messages." *Texas Monthly*, 489 U.S. at 28. And under Justice Brennan's plurality, an exemption is invalid if it is "targeted at writings that *promulgate* the teachings of religious faiths," cannot "reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion," and is not "grounded in some secular legislative policy that motivate[s] similar tax breaks for nonreligious activities." *Id.* at 15 & n.4. As explained below, § 107 is permissible under all of these tests.

B. Section 107 applies the convenience-of-the-employer doctrine to ministers in a way that reduces entanglement and discrimination.

The district court held that § 107 is "invalid under either [Justice Brennan's] plurality or [Justice Blackmun's] concurring opinion" because it "provide[s] a benefit that only a group of religious persons may receive." App.15. But the district court failed to grasp the key distinction between this case and *Texas Monthly*. In *Texas Monthly*, an exemption was available *only* to publications promoting a religious message. Here, an exemption for employer-provided housing is available to hundreds of thousands of employees, religious and secular alike, under the convenience-of-the-employer doctrine. Section 107 simply applies this broad doctrine to ministers in a way that minimizes entanglement and discrimination among religious groups. That makes § 107 permissible under any reading of *Texas Monthly*.

1. Ministers fit naturally within the convenience-of-the-employer doctrine.

It is undisputed that hundreds of thousands of nonreligious employees receive tax exempt housing every year—at a cost of over $10 billion annually. *See* p.18, *supra*.

The default rule is the fact-intensive test of § 119(a)(2). But Congress has also relaxed this default rule where the type of work, the burdens on the employee's housing, or the non-commercial working relationship make it likely that the lodging or housing allowance was intended to benefit the employer. These include employees living in a foreign camp, § 119(c), employees of educational institutions, § 119(d), members of the uniformed services, § 134, government employees living overseas, § 912, citizens living abroad, § 911, and employees temporarily away from home on business, §§ 162, 132. In all of these cases, Congress determined that a bright-line rule was preferable to § 119's fact-intensive test.

The same is true of ministers. Ministers routinely face unique, work-related demands on their housing, making them a natural fit for a bright-line rule. A comparison to the strongest case—military service—is instructive. Members of the military are governed by a bright-line rule because their duties "require [their] physical presence at their post or station; [their] service is continuous day and night; [and] [their] movements are governed by orders and commands." *Jones*, 60 Ct. Cl. at 569. Of course, this is not necessarily true of every member of the military always; but it is common enough that Congress decided to adopt a bright-line rule. Ministers face similar job-related demands on their housing.

First, many ministers are required to live at or near the church to be available to those they serve. Priests must often live in a parsonage attached to the church. Nuns and monks must often live in the convent or monastery. A.93. Many churches, including the Appellant Diocese, require priests to live within the boundaries of the parish.

A.91-92. In the Diocese's case, a priest must lead multiple divine services every week and counsel members and visit the sick whenever the need may arise. A.90-92. Imams likewise must live near the mosque to lead prayer five times daily. Orthodox rabbis must live near the synagogue to comply with Sabbath restrictions on walking.

More practically, many ministers are the primary caretaker of the church building. Like the caretakers of apartment buildings—who often receive tax-exempt housing under § 119(a)(2)—ministers must respond when the fire alarm goes off, a pipe bursts, the furnace fails, the snow needs shovelling, or the building has other needs. A.103. The need is magnified for Russian Orthodox priests, who must be present when outside maintenance or emergency personnel enter the church to ensure that holy items are not desecrated. *Id.*

Second, ministers are often expected to be available "at all hours of the day and night" (A.9) to pray with congregants about emergencies, comfort grieving families, hear confessions, and offer advice. A.74-75; A.84-85; A.91-92; A.111. Roman Catholic priests must be available at any hour to administer the sacrament of anointing of the sick, which must be given "at the appropriate time" to those in danger of death. 1983 Code of Canon Law, cc.1001, 1004. Likewise, Russian Orthodox priests must be available to "drop whatever [they are] doing," "wherever" they are, and hear the final confession of dying parishioners. A.92.

Third, ministers are expected to use their homes to serve the church. The Christian New Testament requires church leaders to be "hospitable." *Titus* 1:8; *1 Timothy*

3:2. In practice, this means ministers host numerous church events, like Bible studies, women's meetings, meals for new members, and the like. A.75; A.94; A.100; A.104; A.111. It also means providing temporary lodging for church members in transition, guest speakers, missionaries, and other travelers with a connection to the church, A.100-01; A.103-04.

Ministers also use their homes for church-related duties. When congregants seek comfort, prayer, and counsel, they often meet in the minister's home. A.74-75; A.94; A.100; A.111. These duties, especially when involving sensitive matters, are often best discharged in the comfort of a home rather than a formal office. A.11. Meetings with lay leaders routinely occur in the home. *Id.*; A.75. Sermons are often prepared in the home. A.75. And in small churches that lack their own building—such as Chicago Embassy, Holy Cross Anglican, and some of the Diocese's parishes—the only place to gather is often the minister's home. A.111; A.100; A.104.

Fourth, many ministers face frequent movement and limited choice in their housing. In the Russian Orthodox Church, priests must live within the geographic boundaries of their parish, and the diocesan bishop has absolute authority to move them from parish to parish. A.92-93. Bishops can also agree to move priests across diocesan lines, including to foreign countries. *Id.* The requirement that Russian Orthodox priests live within their parish is based partly on "theological" reasons: by doing so, they "follow the example of Christ," who "became incarnate and lived among mankind." A.103. Anglicans, too, have "theological reasons why a[] priest must live in the parish": "the priest is effectively Christ's presence in the community." A.100. And

even in less hierarchical denominations, the "paramount consideration" in the choice of the minister's housing remains the "the congregations' need," not the personal consumption choices of the minister. A.29.

The point is not that ministers are like military service members or other beneficiaries of bright-line convenience-of-the-employer rules in every respect. It is that they are in a unique employment relationship that places extensive demands on their housing. Given this reality, Congress could "fairly conclude[] that [ministers] could be thought to fall within the natural perimeter" of the convenience-of-the-employer doctrine—and adopt a bright-line rule just as it has done for a host of other employees. *Texas Monthly*, 489 U.S. at 17 (plurality).

The district court disagreed with this logic on three main grounds, none persuasive. *First*, it argued that some of the bright-line rules for non-religious workers are "not instructive," because they apply to in-kind housing or travel expenses, rather than "housing allowances." App.22. But that misses the point. Regardless of the form of the housing benefit, Congress has recognized that, when applying the convenience-of-the-employer doctrine, many benefits should be treated as per se for the convenience of the employer—even when the employee can't satisfy all of the requirements of § 119(a)(2). Congress made the same decision for ministers.

Second, the district court said other bright-line rules should be ignored because some are underinclusive. App.23. In other words, because the district court could think of *other* employees who might be deserving of a bright-line rule but aren't governed by one—such as "healthcare providers, hotel managers, maintenance staff,

[and] funeral service directors"—then there must be no "general congressional policy" implementing the convenience-of-the-employer doctrine. App.23-24. But when Congress legislates in an area as complex as the IRS Code, there will inevitably be both overinclusison and underinclusion. *Kowalski*, 434 U.S. at 95-96. The question is not whether Congress got it perfect, but whether it was pursuing a reasonable secular purpose. *See Rojas v. Fitch*, 127 F.3d 184, 189 (1st Cir. 1997) (*"Texas Monthly* nowhere requires [an] underinclusiveness analysis"). Here, there was ample reason for Congress to conclude that a bright-line rule for ministers was appropriate—not only because of their unique housing demands, but because of constitutional concerns of entanglement and discrimination.

Third, the district court argued that § 107 is overinclusive, because "[s]ome ministers" don't receive housing for the convenience of their employer, while all overseas workers and members of the military "*necessarily*" do. App.24-25. But that is simply wrong. Under §§ 911-912, overseas workers receive an exemption for their housing allowances regardless of whether their housing is used for their job, and regardless of whether they can satisfy the requirements of § 119(a)(2). In many cases, they could not. And under § 134, all members and former members of the uniformed services receive an exemption for their housing allowances—even if they buy off-base housing that is never used for their job, and even if they are retired. Section 107 is no more overinclusive than these other bright-line rules.

2. Section 107 reduces entanglement in religious matters.

Section 107 is also justified by independent constitutional concerns about entanglement in religious questions. The Supreme Court has long held that government

must "avoid excessive entanglement" with religion. *Walz*, 397 U.S. at 670. This means that the government must avoid conducting "intrusive inquir[ies] into religious belief," *Amos*, 483 U.S. at 339, or answering "religious questions," *McCarthy v. Fuller*, 714 F.3d 971, 976 (7th Cir. 2013); *see also Texas Monthly*, 489 U.S. at 20 (government must avoid "inconsistent treatment [of religious groups] and government embroilment in controversies over religious doctrine") (plurality).

Amos is instructive. There, the Court unanimously upheld Title VII's religious exemption, which allows religious employers to hire "individuals of a particular religion" to carry out both religious and nonreligious "activities." *Amos,* 483 U.S. at 329-30 n.1. The Court assumed that the Free Exercise Clause would require an exemption only for "religious activities." *Id.* at 335-36. But because this narrower exemption would entangle courts in "intrusive inquir[ies]" about which activities flowed from a religious employer's "religious tenets and sense of mission," Congress was entitled to enact a "categorical" exemption for all of a religious employer's activities. *Id.* at 336, 339; *id.* at 343-46 (Brennan, J., concurring). Following *Amos*, this Court and others have upheld bright-line religious exemptions to avoid entanglement "that would likely occur in [the exemption's] absence." *Medina v. Catholic Health Initiatives*, 877 F.3d 1213, 1233-34 (10th Cir. 2017); *Cohen v. City of Des Plaines*, 8 F.3d 484, 490-91 (7th Cir. 1993) (bright-line zoning exemption for daycares located in churches avoided "governmental meddling" in whether a daycare's activities were religious or not).

Here, § 107 reduces entanglement in the same way. If Congress had not adopted the bright-line rule of § 107, ministers would have to seek an exemption under the

default rule of § 119(a)(2). This section permits an exemption for in-kind housing only if the taxpayer can show that his lodging was furnished:

(1) to an employee;

(2) on the employer's business premises; and

(3) for the convenience of the employer as a condition of employment.[20]

Treas. Reg. § 1.119-1(b). But this test is notoriously complex and fact-intensive, and applying it to ministers would create severe problems of entanglement and discrimination. *See* Edward A. Zelinsky, *Taxing the Church: Religion, Exemptions, Entanglement, and the Constitution* 169 (2017). Consider each criterion in turn.

To an Employee. Section 119(a)(2) applies only if the recipient of housing qualifies as an "employee" under IRS rules. Applying these rules to ministers would require the government to examine the church's "behavioral control" over the minister (including how it instructs and trains the minister); its "financial control" (including how it pays the minister and how much the minister invests in his own work); and how the church and minister view their own relationship. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992) ("all . . . incidents of the relationship must be assessed and weighed"). This is an "extraordinarily fact intensive" inquiry, and both the courts and the IRS have acknowledged that the results will turn on "[d]ifferences in church structure." *Alford v. United States*, 116 F.3d 334, 337 (8th Cir. 1997); *see also* I.R.S. Tech. Adv. Mem. 98-25-002 (June 19, 1998).

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[20] We address the convenience-of-the-employer and condition-of-employment factors together because there is no "substantial difference between the[m]." *Adams v. United States*, 585 F.2d 1060, 1064 (Ct. Cl. 1978).

If the minister belongs to a denomination that gives him broad autonomy with little training or instruction, he will be deemed self-employed. But if his denomination exercises more control, he will be deemed an employee. Accordingly, some courts have held that United Methodist ministers are employees,[21] while Assemblies of God and some Pentecostal ministers are not[22]—depending on the internal governance of the church. And even if a minister qualifies as an employee, an exemption under § 119 would be unavailable if one entity provided the housing (such as the congregation), but a different entity qualified as the "employer" (such as the diocese)—thus pressuring churches to make ministers answerable to those paying them, and discriminating against more hierarchical churches. *See Furhmann v. Comm'r*, T.C.M. 1977-416 (1977). For these reasons, Congress has amended *other* parts of the Code to avoid the "employee" inquiry altogether and treat all ministers the same. *See, e.g.*, 26 U.S.C. § 414(e)(3)(B)(i) (defining "employee" to include self-employed ministers—thus treating all ministers as employees); *id.* §§ 1401-03 (treating all ministers as self-employed). Section 107 has the same disentangling effect.

On the Employer's Business Premises. Section 119(a)(2) also applies only if the housing is on the "business premises of the employer." Treas. Reg. § 1.119-1(c)(1). This requirement, too, is fact-intensive. "[S]patial unity" is not dispositive, so the employer's "business premises" are not "limited to the business compound or headquarters of the employer." *Adams*, 585 F.2d at 1065-66. Instead, courts and the IRS take

[21] *Weber v. Comm'r*, 103 T.C. 378 (1994), *aff'd*, 60 F.3d 1104 (4th Cir. 1995) (2–1 decision).

[22] *Shelley v. Comm'r*, T.C.M. (RIA) 1994-432 (1994); *Alford*, 116 F.3d 334.

"a commonsense approach," *id.*, looking to whether the "business functions" performed on the premises are sufficiently "important" with respect to the "interests of the business." *Hargrove v. Comm'r*, T.C. Memo. 2006-159, at *4 (2006). Under this test, the taxpayer's home may constitute the employer's "business premises" if the "quantum [and] quality of" business activities performed there are "significant" enough. *McDonald v. Comm'r*, 66 T.C. 223, 231, 1976 WL 3665 (May 5, 1976); *see also, e.g., Adams*, 585 F.2d at 1065-67; *U.S. Jr. Chamber of Commerce v. United States*, 334 F.2d 660, 663-65 (Ct. Cl. 1964).

This inquiry is "elusive" even in the secular context. *Lindeman v. Comm'r*, 60 T.C. 609, 617 (1973) (Tannenwald, J., concurring). But applying it to ministers raises serious religious questions. For instance, to determine whether a minister qualified for a § 119(a)(2) exemption, the IRS would have to determine whether the ministerial activities he performed at home—such as spiritual counselling, prayer groups, Bible studies, and church social events, A.111; A.100-101—were sufficiently "important" with respect to the church's mission, *Hargrove*, 2006 WL 2280631, at *4, or were instead only incidental to the primary "business" of Sunday worship. Yet the Supreme Court has repeatedly "warned that courts must not presume to determine" whether "a particular act is 'central'" to a religious faith. *Emp't Div. v. Smith*, 494 U.S. 872, 887 (1990), and that courts should not second-guess a sincere belief that a particular course of action is religiously required. *Thomas v. Review Bd.*, 450 U.S. 707, 716-17 (1981). Section 107 eliminates these entangling inquiries.

For the Convenience of the Employer. Finally, § 119(a)(2) requires the government to decide whether a taxpayer's housing was "furnished for the convenience of the employer" as "a condition of his employment." Treas. Reg. § 1.119-1(b). This, in turn, requires the government to decide whether the lodging is truly necessary "to enable [the taxpayer] properly to perform the duties of his employment." *Id.*; *see also Heyward v. Comm'r*, 36 T.C. 739, 744 (1961), *aff'd*, 301 F.2d 307 (4th Cir. 1962) (lodging must be "required," not just "desirable"). The taxpayer's "state of mind" regarding what is necessary for doing his job is "not controlling," so the government must make its own determination of whether the housing is "necessary." *Dole v. Comm'r*, 43 T.C. 697,705-06, *aff'd*, 351 F.2d 308 (1st Cir. 1965); *accord, e.g., Winchell v. United States*, 564 F. Supp. 131, 134-36 (D. Neb. 1983).

Again, when the taxpayer is secular, this inquiry is difficult, McDavitt at 1139-40; when he is a minister, it is theologically charged. Does the minister's work really require that he host Bible studies, prayer meetings, and visiting missionaries in his home? Is it really necessary for a Christian minister to be available at all times to counsel grieving families and administer last rites to the dying? Is it truly important that the minister live close to the church so he can respond to emergencies, care for the building, and open it for services multiple times per week? It is well established "that courts should refrain from trolling through a person's or institution's religious beliefs." *Mitchell*, 530 U.S. at 828. Yet applying § 119(a)(2) to ministers would require the IRS to do just that.

The district court didn't dispute that applying § 119 to ministers would cause entanglement and discrimination. Instead, it said that "§ 119 is not relevant" because it applies to "employer-provided housing" (like § 107(1)) instead of housing allowances (like § 107(2)). App.33-34. But the Supreme Court has repeatedly emphasized that courts applying the Establishment Clause must consider the entire "history of the government's actions," including the complete "context in which the policy arose." *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005). Section 107 was motivated by closely related historical, practical, and constitutional concerns, and § 107(2) cannot be understood in isolation from § 107(1).

Regardless, even considering § 107(2) in isolation doesn't eliminate the entanglement problem. If § 107(2) were struck down, ministers could seek to deduct some of their housing expenses under the "home office" deduction, 26 U.S.C. § 280A. That section exempts expenses attributable to a portion of a dwelling that is "exclusively used on a regular basis" for certain "business" purposes, provided the taxpayer, if he is an "employee," maintains the home office "for the convenience of the employer." *Id.* But this standard presents the same entanglement problems as § 119—requiring the government to (1) define the scope of the minister's "business"; (2) decide whether the minister is an "employee"; and (3) determine whether she maintains her home office "for the convenience of" the church. *See Comm'r v. Soliman*, 506 U.S. 168, 175 (1993) (§ 280A inquiry is "subtle" and "depend[s] upon the particular facts of each case"); *Hamacher v. Comm'r*, 94 T.C. 348, 358 (1990) (articulating convenience-of-the-employer test under § 280A identical to that under § 119).

Alternatively, the district court suggested that § 107 *increases* entanglement by requiring the IRS to decide who is a "minister." App.32-33. But courts routinely decide whether employees are ministers. *See Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171 (2012). Congress could easily decide that applying the well-worn term "minister" is less entangling than the "extremely fact-intensive" test of Section 119. *Cf. Medina*, 877 F.3d at 1233 (rejecting argument that determining whether entity was a "church" for purposes of exemption was just as entangling as eliminating the exemption).

3. Section 107 reduces discrimination among religious groups.

Section 107 also eliminates discrimination among religious groups. The Supreme Court has repeatedly held that this is "[t]he clearest command of the Establishment Clause." *Larson v. Valente,* 456 U.S. 228, 244, 246 (1982) (collecting cases). This applies not just to intentional discrimination among religions, but also to "indirect way[s] of preferring one religion over another." *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953). Particularly "when the state passes laws that facially regulate religious issues"—as § 107 does—"it must treat individual religions and religious institutions 'without discrimination or preference.'" *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008) (McConnell, J.) (citation omitted).

Applying § 107(1) without § 107(2) would violate this principle. It takes "accumulated capital" to buy a parsonage. A.22. So "well-established churches" with "financial support" can take advantage of § 107(1), while "churches which are new and lacking in a constituency" cannot. *Larson*, 456 U.S. at 246 n.23. Indeed, before enactment of § 107(2), the parsonage allowance "worked well for clergy of established, mainstream,

and populous churches" like the "traditional, colonial-era" denominations, but it "discriminat[ed]" against "less affluent . . . groups such as Pentecostals, evangelical churches, and independent African-American congregations"—despite both having "religiously motivated reasons to provide housing to ministers." A.22-24.

Nor was the disparity merely financial. The decision to have a church-owned parsonage is influenced by theological considerations. In some denominations, like the Roman Catholic Church, the use of church-owned parsonages is "hardwired into their deployment models for clergy." A.12. The three Plenary Councils of Baltimore (1852, 1866, and 1884) urged the Catholic Church in America to "build[] up parishes with schools, rectories, and convents, not just houses of worship." *Id.* In part, this was because the bishops "could, and did, send ministers to different parishes according to the religious needs of the Church as a whole." *Id.*

In other denominations—typically newer and less hierarchical ones—there is no theological emphasis on church-owned parsonages. A.22-25. Sometimes, this is because churches expect ministers to be bi-vocational, A.16-17; other times, it is because churches may take years before acquiring a permanent place of worship, A.25; still other times, it is because the churches have a theological reluctance to amass large holdings of worldly property. And in some cases, ministers are expected to be itinerant, making a housing allowance the only feasible way of meeting their housing needs. Because of these differences, applying § 107(1) without § 107(2) "would require

religious organizations, in order to receive the exemption's benefits, to adopt a particular structure, thus interfering in the internal organization of a religious institution." *Medina*, 877 F.3d at 1234.

Thus, it is no surprise that equal treatment of housing allowances was first *imposed by courts*, even before Congress enacted § 107(2). This occurred in the early 1950s, when three federal courts held that cash housing allowances must be excluded from the income of ministers—specifically to avoid discriminatory treatment between the "quite similar arrangements" of ministers that receive in-kind parsonages and those that receive housing allowances. *Williamson*, 22 T.C. at 570 (Opper, J., dissenting), *rev'd*, 224 F.2d 377; *see also MacColl*, 91 F. Supp. 721; *Conning*, 127 F. Supp. 958. Congress then codified these decisions in § 107(2). When it did so, it expressly stated that it was seeking to "remove[] the discrimination in existing law" among various denominations. H.R. Rep. No. 83-1337, at 4040 (1954); S. Rep. No. 83-1622, at 4646 (1954). It would be ironic if the federal courts now struck down § 107(2)—over six decades after first imposing it.

Nor is this desire to remove discrimination unique to ministers. Congress did the same thing for government workers living overseas. In the 1950s, many overseas employees received tax-exempt, *in-kind* housing. But some did not. So Congress enacted the Overseas Differential and Allowances Act, which authorized *cash housing allowances*, and § 912, which excluded those cash housing allowances from income. *Anderson v. United States*, 16 Cl. Ct. 530, 534 (1989). The intent was "that all federal over-

seas employees be treated uniformly." *Id.* at 535. Congress adopted a similar approach for military service members, enacting § 134 in part to "eliminate ambiguity" over whether both in-kind housing and cash housing allowances were exempted. *See* Department of Defense, Military Compensation Background Papers 875-76 (7th Ed. Nov. 2011). Thus, §§ 912 and 134 do the same thing for overseas employees and military service members that § 107(2) does for ministers.

But treating cash allowances and in-kind housing equally does not just reduce discrimination; it is also logical. The financial impact on the minister is obviously the same. And while cash payments may be compensatory, they need not be. *See Williamson*, 224 F.2d at 379 (quoting *Saunders v. Comm'r*, 215 F.2d 768, 771 (3d Cir. 1954)). Thus, it is no surprise that, when considering the convenience-of-the-employer doctrine, early courts and commentators both rejected a distinction between cash and in-kind housing. *Id.*; *see also* p.15, *supra* (collecting authorities). Indeed, § 119 is the *only* housing exclusion to distinguish between cash and in-kind housing benefits. There is no reason to import this distinction into § 107—especially when it creates discrimination among religions.

The district court rejected this rationale for three main reasons, none of which have merit. *First*, it argued that § 107(1) "does not discriminate," because it applies a facially neutral rule that requires all religious groups "to meet the same requirements." App.28-31. But the same argument was made and rejected in *Larson*. There, too, the state's solicitation rule was "facially neutral" and required all religious groups to meet the same "secular criteria." 456 U.S. at 246 n.23. But the Supreme Court still

struck it down because those criteria favored "well-established churches" over those that "are new and lacking in a constituency." *Id.*

Second, the district court said that even if § 107(2) reduces discrimination, it is "not an appropriate response" because Congress "could have created" a more narrowly tailored exemption focusing on "rental housing" that is "subject to restrictions imposed by the church." App.31-32. But this ignores the reasons for adopting a bright-line rule. Of course, a case-by-case evaluation of the "restrictions imposed by [each] church" would be more narrowly tailored. But it would produce the same problems of entanglement and discrimination that § 107 was designed to avoid. Congress adopted a bright-line rule to address these problems—just as it did for many nonreligious employees—and that is a permissible secular purpose. *See Freedom From Religion Found., Inc. v. Concord Cmty. Schs.*, 885 F.3d 1038, 1050 (7th Cir. 2018) (Establishment Clause requires only a nonreligious purpose, not that the government "tailor [its] conduct narrowly to the stated aim.").

Finally, all the district court's objections proceed from a faulty premise—that Congress cannot seek to reduce discrimination among religions unless that discrimination is independently unconstitutional. *See* App.29-31. But even if it was not constitutionally *required* to do so, Congress was well within its discretion to eliminate discrimination between cash and in-kind housing. As the Supreme Court has repeatedly emphasized: "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz*, 397 U.S. at 1413. Indeed, because "[l]egislatures have especially broad latitude

in creating classifications and distinctions in tax statutes," Congress' legislative judgments receive "substantial deference" in Establishment Clause cases involving tax exemptions. *Mueller v. Allen*, 463 U.S. 388, 396 (1983).

C. Section 107 satisfies both opinions in *Texas Monthly*.

Viewed in this context—as a means of applying the convenience-of-the-employer doctrine to ministers—§ 107 easily satisfies both the concurring and plurality opinions in *Texas Monthly*.

1. Justice Blackmun's concurrence.

Under Justice Blackmun's concurrence, a tax exemption is invalid if it is confined "exclusively to the sale of religious publications" and results in "preferential support for the communication of religious messages." 489 U.S. at 28. Section 107 is distinguishable under this opinion in three ways.

First, unlike *Texas Monthly*, where the exemption for religious publications stood alone, § 107 is one of many exemptions offered to hundreds of thousands of non-religious employees. It is as if, in *Texas Monthly*, the state had coupled the exemption for religious literature with exemptions for hundreds of thousands of nonreligious publications. That would not be a form of "preferential support" for religious messages; it would be a form of putting religious messages on the same footing as many nonreligious messages. Indeed, in that case, Justice Blackmun would likely have said that "the Free Exercise Clause *requires* a tax exemption for the sale of religious literature." *Texas Monthly*, 489 U.S. at 28 (emphasis added) (citing *Follett v. McCormick*, 321 U.S. 573 (1944), and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)).

Second, Justice Blackmun's concurrence did not address preferential support for "religion" generally; it emphasized that the Court was dealing with "the taxation of books and journals," which implicates "three different Clauses of the First Amendment," including "the Press Clause." *Id.* at 26, 28. Accordingly, his analysis placed great weight on the fact that the tax exemption applied specifically to religious "literature"—mentioning this point, or some variation of it, no less than eighteen times. *See id.* at 26-27. Here, of course, the parsonage allowance applies to housing, not religious literature. And it applies regardless of whether the minister is involved in spreading a religious message. Because it is tied to property, the parsonage allowance is more like the property-tax exemption upheld in *Walz* than the religious-literature exemption struck down in *Texas Monthly*. *See id.* at 15 n.5 (plurality) (distinguishing *Walz* because the *Walz* exemption "failed to single out religious proselytizing as an activity deserving of public assistance").

Finally, the exemption in *Texas Monthly* was a short-lived innovation, not a policy with deep historical roots like property-tax exemptions (*Walz*) or parsonage exemptions (this case). It existed only for a three-year window from 1984-87; both before and after that, Texas exempted all magazines from taxation, 489 U.S. at 6, in keeping with the pattern in other states. *See, e.g., Md. Pennysaver Grp., Inc. v. Comptroller of Treasury,* 323 Md. 697, 702, 594 A.2d 1142, 1145 (1991) (newspapers exempt by regulation the same year that the state sales tax was enacted); Alex S. Jones, *The Media Business: Newspapers See a Threat of Spreading Sales Taxes,* N.Y. Times, Aug. 19, 1991, at D6 (newspapers and periodicals had been "largely exempt from sales taxes

on circulation"). This stands in stark contrast to the extensive historical record supporting § 107.

2. Justice Brennan's plurality

Under Justice Brennan's plurality, an exemption for religious groups is permissible if it is "grounded in some secular legislative policy that motivate[s] similar tax breaks for nonreligious activities." *Texas Monthly,* 489 U.S. at 15 n.4. The fit between the secular legislative policy and the exemption for religious groups need not be perfect. Rather, it is enough if "it can be *fairly concluded* that religious institutions *could be thought* to fall within the natural perimeter [of the legislation]." *Id.* at 17 (emphasis added).

As shown above, § 107 is grounded in the longstanding convenience-of-the-employer doctrine, which provides tens of billions of dollars in similar tax breaks to all sorts of employees—dwarfing the value of § 107 to ministers. Ministers fit easily within this doctrine. They are often required to live where they serve, to be available at all hours, to use their homes to serve the church, and to move at the discretion of the church. Like many nonreligious employees who are governed by bright-line rules, ministers are in a unique employment relationship with unique, job-related demands on their housing. Given this reality, Congress could "fairly conclude[] that [ministers] could be thought to fall within the natural perimeter" of the convenience-of-the-employer doctrine. *Texas Monthly*, 489 U.S. at 17. And given potential problems of entanglement and discrimination, § 107 is a particularly logical response.

Alternatively, even ignoring that § 107 is one of many provisions applying the convenience-of-the-employer doctrine, the *Texas Monthly* plurality *still* recognizes that

a benefit "conferred exclusively upon religious groups" is permissible if it either does not "impose substantial burdens on nonbeneficiaries" or is "designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause." 489 U.S. at 18 n.8.

Here, § 107 imposes no substantial burdens on nonbeneficiaries. Many thousands of nonreligious employees can invoke bright-line convenience-of-the-employer rules of their own, and *all* employees can invoke the general convenience-of-the-employer rule under § 119. And because § 107 is an exemption—not a transfer of funds—not a dime of taxpayer money is extracted and spent on a religious institution. *Winn*, 563 U.S. at 142. By contrast, "it is a significant burden on a religious organization to require it . . . to predict which of its activities a secular court will consider religious," *Amos*, 483 U.S. at 336—a burden § 107 alleviates by preempting the fact-intensive inquiries under § 119. Further, religious organizations have a First Amendment right to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine," *Hosanna-Tabor*, 565 U.S. at 186—and § 107(2) removes financial pressure on religious organizations to alter their relationships with their ministers. Thus, even viewing § 107 in isolation from the convenience-of-the-employer doctrine, it is still permissible under *Texas Monthly*.

Finally, this case is distinguishable from *Texas Monthly* on entanglement grounds. In *Texas Monthly*, the exemption "produce[d] greater state entanglement with religion" because it "require[d] that public officials determine whether some

message or activity is consistent with 'the teaching of the faith.'" 489 U.S. at 20 (plurality). Striking down the exemption meant that everyone would pay the same tax—thus eliminating entanglement. Here, by contrast, striking down § 107 doesn't mean that everyone will pay the same tax. It means the government must apply the fact-intensive requirements of § 280A or § 119(a)(2) to ministers—resulting in more entanglement in religious questions.

III. Section 107 is constitutional under *Lemon*.

For many of the same reasons, § 107(2) also satisfies the *Lemon* test. Under *Lemon*, a law is unconstitutional if it "(1) lacks a legitimate secular purpose; (2) has the primary effect of advancing or inhibiting religion; or (3) fosters an excessive entanglement with religion." *Doe*, 687 F.3d at 849. Alternatively, the test is described as prohibiting "government endorsement or disapproval of religion." *Id.* at 849-50.

As explained, § 107(2) has the valid secular purpose of ensuring fair taxation of ministers' housing under the convenience-of-the-employer doctrine, reducing government burdens on the exercise of religion, reducing entanglement between church and state, and eliminating discrimination among religions. Its primary effect is to accomplish precisely these goals. Further, § 107 sends a message of neutrality with respect to religion, not endorsement. Just as Congress took the unique circumstances of many nonreligious employees into account when it codified other applications of the convenience-of-the-employer doctrine, so it did with ministers and § 107.

In ruling against § 107(2) under *Lemon*'s purpose prong, the district court relied on "[t]wo pieces of legislative history." App.16. First, it cited the House Committee

Report, which explained that the purpose of § 107(2) was to "remove[] the discrimination in existing law." App.16. According to the district court, this "is not a secular purpose." App.16-17. But of course it is. The First Amendment *requires* neutral treatment of religions. *Larson*, 456 U.S. at 244. If reducing denominational discrimination were not a secular purpose, the government would be "in a double-bind": it "could not constitutionally pass a law to avoid [denominational discrimination], but then the [discrimination] would run afoul of the Constitution." *Medina*, 877 F.3d at 1231. That is not the law.

Second, the district court emphasized a fragment of Congressman Peter Mack's floor statement, arguing that his statement revealed a purpose "to 'fight against' a 'godless and anti-religious world movement.'" App.16, 23, 32. But the district court simply ignored the rest of Congressman Mack's statement, which called on Congress to "correct th[e] discrimination against certain ministers of the gospel" caused by § 107(1). 99 Cong. Rec. A5372-73 (1953). This latter statement of purpose accords with both the House and Senate Reports and the federal court decisions that § 107(2) codified. *See* pp.15-16, *supra*.

Thus, if one had to identify *the* purpose motivating the passage of § 107(2), it would be the secular purpose of reducing entanglement and denominational discrimination, not advancing religion. But in fact, government action survives the *Lemon* test so long as it merely "had *a* secular purpose." *Sherman ex rel. Sherman v. Koch*, 623 F.3d 501, 507 (7th Cir. 2010) (emphasis original). Further, this Court "generally defer[s] to the government's articulation of a secular purpose unless it is a sham." *Id.*

at 508. Because § 107(2) has multiple secular purposes, and Plaintiffs haven't shown that they are "shams," § 107(2) isn't invalidated by a single out-of-context remark from one of "the least illuminating forms of legislative history"—a "floor statement[]" by one "individual legislator[.]" *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017).

IV. Striking down § 107 would endanger scores of tax provisions throughout federal and state law.

The district court's interpretation of the Establishment Clause is not only wrong, it also threatens numerous church-specific provisions throughout federal and state tax codes. There are over 2,600 federal and state tax laws providing religious exemptions. Nina J. Crimm & Laurence H. Winer, *Politics, Taxes, and the Pulpit: Provocative First Amendment Conflicts* 43, 74-76 (2011). Many of these, like § 107, specifically address churches or ministers to reduce entanglement and discrimination.

Some of these provisions protect the relationship between churches and ministers by exempting churches from paying or withholding certain types of taxes. For example, § 3401(a)(9) exempts churches from withholding federal income taxes from ministers. Sections 1402(c)(4), 1402(e), and 3121(b)(8) exempt churches from Social Security and Medicare taxes for wages paid to ministers. And § 3309(b)(1) exempts churches from state unemployment insurance funds.

Other provisions reduce entanglement and protect church autonomy by offering procedural protections or exempting churches from disclosing information. For example, § 7611 grants special protection for churches in tax audits. Sections 508(a) and 508(c)(1)(a) exempt churches from petitioning the IRS for tax-exempt status under

§ 501(c)(3). And § 6033(a)(3) exempts churches from filing Form 990, which discloses sensitive financial information.

Still others modify tax provisions so they apply neutrally among various church polities. For example, § 414(e) allows churches to maintain a single church benefits plan exempt from ERISA for employees of multiple church affiliates, regardless of common control, and for ministers, regardless of their employment status. Section 403(b)(1)(A)(iii) allows churches to include ministers in a type of tax-deferred benefit contract even if the ministers do not qualify as employees. And § 501(m)(3)(C)-(D) allows churches to provide certain insurance to entities with common religious bonds, regardless of common control. G.C.M. 39874 (May 4, 1992); Treas. Reg § 1.502-1(b).

All of these provisions share the same salient feature as § 107: They single out churches and ministers to reduce entanglement and discrimination. But under the district court's theory—that "government may not provide a benefit that only a group of religious persons may receive"—all of these provisions would be constitutionally suspect. App.15. Indeed, many of these provisions would be *more* at risk than § 107, because they are not part of a broad secular policy like the convenience-of-the-employer doctrine.

Fortunately, the district court's decision is wrong. The Establishment Clause does not forbid laws that "give special consideration to religious groups." *Amos*, 483 U.S. at 338. When laws address religious groups to reduce entanglement or discrimination, they are constitutionally desirable and may even be constitutionally required. *Id.*; *Larson*, 456 U.S. at 244; *Hosanna-Tabor*, 565 U.S. at 171. More importantly, the

law in this case does not "single out" religious groups. It offers ministers the same treatment as hundreds of thousands of secular employees under the longstanding convenience-of-the-employer doctrine.

CONCLUSION

The decision of the district court should be reversed.

Respectfully submitted,

April 19, 2018

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the length limitation of Circuit Rule 32(c) because it contains 13,988 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the requirements of Fed. R. App. P. 32(a) and Circuit Rule 32(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 12-point Century Schoolbook font.

s/ Luke W. Goodrich
Luke W. Goodrich

Dated: April 19, 2018

CERTIFICATE OF SERVICE

I certify that on April 19, 2018, the foregoing brief and required short appendix were served on counsel for all parties by means of the Court's ECF system.

s/ Luke W. Goodrich
Luke W. Goodrich

Dated: April 19, 2018

CIRCUIT RULE 30(d) CERTIFICATION

All materials required by Seventh Circuit Rule 30(a) are included in the following appendix. All materials required by Seventh Circuit Rule 30(b) are included in Appellants' joint separate appendix, ECF No. 18.

s/ Luke W. Goodrich
Luke W. Goodrich

Dated: April 19, 2018

STATUTORY ADDENDUM

Internal Revenue Code of 1986 (26 U.S.C.):

SEC. 107. RENTAL VALUE OF PARSONAGES

In the case of a minister of the gospel, gross income does not include—

(1) the rental value of a home furnished to him as part of his compensation; or

(2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home and to the extent such allowance does not exceed the fair rental value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities.

SEC. 119. MEALS OR LODGING FURNISHED FOR THE CONVENIENCE OF THE EMPLOYER

(a) Meals and lodging furnished to employee, his spouse, and his dependents, pursuant to employment.—There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him, his spouse, or any of his dependents by or on behalf of his employer for the convenience of the employer, but only if—

. . . .

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

. . . .

(c) Employees living in certain camps.—

(1) In general.—In the case of an individual who is furnished lodging in a camp located in a foreign country by or on behalf of his employer, such camp shall be considered to be part of the business premises of the employer.

(2) Camp.—For purposes of this section, a camp constitutes lodging which is—

(A) provided by or on behalf of the employer for the convenience of the employer because the place at which such individual renders services is in a remote area where satisfactory housing is not available on the open market,

(B) located, as near as practicable, in the vicinity of the place at which such individual renders services, and

(C) furnished in a common area (or enclave) which is not available to the public and which normally accommodates 10 or more employees.

(d) Lodging furnished by certain educational institutions to employees.—

(1) In general.—In the case of an employee of an educational institution, gross income shall not include the value of qualified campus lodging furnished to such employee during the taxable year.

. . . .

(3) Qualified campus lodging.—For purposes of this subsection, the term "qualified campus lodging" means lodging to which subsection (a) does not apply and which is—

(A) located on, or in the proximity of, a campus of the educational institution, and

(B) furnished to the employee, his spouse, and any of his dependents by or on behalf of such institution for use as a residence.

SEC. 134. CERTAIN MILITARY BENEFITS

(a) General rule.—Gross income shall not include any qualified military benefit.

(b) Qualified military benefit.—For purposes of this section—

(1) In general.—The term "qualified military benefit" means any allowance or in-kind benefit (other than personal use of a vehicle) which—

(A) is received by any member or former member of the uniformed services of the United States or any dependent of such member by reason of such member's status or service as a member of such uniformed services, and

(B) was excludable from gross income on September 9, 1986, under any provision of law, regulation, or administrative practice which was in effect on such date (other than a provision of this title).

SEC. 912. EXEMPTION FOR CERTAIN ALLOWANCES

The following items shall not be included in gross income, and shall be exempt from taxation under this subtitle:

(1) Foreign areas allowances.—In the case of civilian officers and employees of the Government of the United States, amounts received as allowances or otherwise (but not amounts received as post differentials) under—

(A) chapter 9 of title I of the Foreign Service Act of 1980,

(B) section 4 of the Central Intelligence Agency Act of 1949, as amended (50 U.S.C., sec. 403e),

(C) title II of the Overseas Differentials and Allowances Act, or

(D) subsection (e) or (f) of the first section of the Administrative Expenses Act of 1946, as amended, or section 22 of such Act.

. . . .

(3) Peace Corps allowances.—In the case of an individual who is a volunteer or volunteer leader within the meaning of the Peace Corps Act and members of his family, amounts received as allowances under section 5 or 6 of the Peace Corps Act other than amounts received as—

(A) termination payments under section 5(c) or section 6(1) of such Act,

(B) leave allowances,

(C) if such individual is a volunteer leader training in the United States, allowances to members of his family, and

(D) such portion of living allowances as the President may determine under the Peace Corps Act as constituting basic compensation.

SEC. 911. CITIZENS OR RESIDENTS OF THE UNITED STATES LIVING ABROAD

(a) Exclusion from gross income.—At the election of a qualified individual (made separately with respect to paragraphs (1) and (2)), there shall be excluded from the gross income of such individual, and exempt from taxation under this subtitle, for any taxable year—

…

(2) the housing cost amount of such individual.

…

(1) Qualified individual.—The term "qualified individual" means an individual whose tax home is in a foreign country and who is—

(A) a citizen of the United States and establishes to the satisfaction of the Secretary that he has been a bona fide resident of a foreign country or countries for an uninterrupted period which includes an entire taxable year, or

(B) a citizen or resident of the United States and who, during any period of 12 consecutive months, is present in a foreign country or countries during at least 330 full days in such period.

SEC. 162. TRADE OR BUSINESS EXPENSES

(a) In general.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

…

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; . . . .

SEC. 132. CERTAIN FRINGE BENEFITS

(a) Exclusion from gross income.—Gross income shall not include any fringe benefit which qualifies as a—

…

(3) working condition fringe,

…

(d) Working condition fringe defined.—For purposes of this section, the term "working condition fringe" means any property or services provided to an employee of the employer to the extent that, if the employee paid for such property or services, such payment would be allowable as a deduction under section 162 or 167.

SEC. 280A. DISALLOWANCE OF CERTAIN EXPENSES IN CONNECTION WITH BUSINESS USE OF HOME, RENTAL OF VACATION HOMES, ETC.

(a) General rule.—Except as otherwise provided in this section, in the case of a taxpayer who is an individual or an S corporation, no deduction otherwise allowable under this chapter shall be allowed with respect to the use of a dwelling unit which is used by the taxpayer during the taxable year as a residence.

. . . .

(c) Exceptions for certain business or rental use; limitation on deductions for such use. —

(1) Certain business use.—Subsection (a) shall not apply to any item to the extent such item is allocable to a portion of the dwelling unit which is exclusively used on a regular basis—

(A) as the principal place of business for any trade or business of the taxpayer,

(B) as a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business, or

(C) in the case of a separate structure which is not attached to the dwelling unit, in connection with the taxpayer's trade or business.

In the case of an employee, the preceding sentence shall apply only if the exclusive use referred to in the preceding sentence is for the convenience of his employer. For purposes of subparagraph (A), the term "principal place of business" includes a place of business which is used by the taxpayer for the administrative or management activities of any trade or business of the taxpayer if there is no other fixed location of such trade or business where the taxpayer conducts substantial administrative or management activities of such trade or business.

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

ANNIE LAURIE GAYLOR; DAN BARKER;
IAN GAYLOR, personal representative of
the estate of Anne Nicol Gaylor; and
FREEDOM FROM RELIGION FOUNDATION, INC.,

OPINION AND ORDER

Plaintiffs,

16-cv-215-bbc

v.

STEVE MNUCHIN, Secretary of the United States
Department of Treasury; JOHN KOSKINEN,
Commissioner of the Internal Revenue Service;
and the UNITED STATES OF AMERICA,

Defendants,[1]

and

EDWARD PEECHER; CHICAGO EMBASSY CHURCH;
PATRICK MALONE; HOLY CROSS ANGLICAN CHURCH;
and the DIOCESE OF CHICAGO AND MID-AMERICA OF THE
RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA,

Intervenor-Defendants.

- -

The question in this case is whether Congress may give a subset of religious employees an income tax exemption for which no one else qualifies. At issue is the constitutionality of 26 U.S.C. § 107(2), which excludes from the gross income of a "minister of the gospel" a

[1] In accordance with Fed. R. Civ. P. 25(d), I have substituted the current Secretary of the Department of Treasury for Jacob Lew.

"rental allowance paid to him as part of his compensation." (Although the phrase "minister of the gospel" appears on its face to be limited to Christian ministers, the Internal Revenue Service has interpreted the phrase liberally to encompass certain religious leaders of other faiths as well. E.g., Silverman v. Commissioner, 57 T.C. 727, 731 (1972) (applying "minister of the gospel" to persons holding equivalent status in other religions); Rev. Rul. 78-301, 178-2 C.B. 103 (applying "minister of the gospel" to those who perform "substantially all of the religious functions" of ordained minister). The correctness of the IRS's interpretation of § 107 is not at issue.)

Plaintiff Freedom from Religion Foundation, Inc. and some of its officers brought this lawsuit to challenge § 107(2) on the ground that it discriminates against secular employees and violates both the establishment clause of the First Amendment and the equal protection component of the Fifth Amendment. Plaintiffs initially challenged § 107(1), which excludes from a minister's gross income "the rental value of a home furnished to [the minister] as part of his compensation," but I dismissed that part of the lawsuit for lack of standing. Dkt. #15.

This is the second time that the foundation and its officers have challenged § 107(2). In Freedom from Religion Foundation, Inc. v. Lew, 983 F. Supp. 2d 1051 (W.D. Wis. 2013), I concluded that the provision violates the establishment clause because it provides a benefit to religious persons and no one else, even though doing so is not necessary to alleviate a special burden on religious exercise. On appeal, the Court of Appeals for the Seventh Circuit did not reach the merits of plaintiffs' claims but instead vacated the judgment on the ground that plaintiffs did not have standing to sue. Freedom from Religion Foundation, Inc. v. Lew, 773 F.3d 815 (7th Cir. 2014).

Now plaintiffs say that they followed the directions of the court of appeals to obtain standing and are challenging § 107(2) again. In a previous opinion in this case, the court allowed three ministers who receive housing allowances, along with the churches the ministers serve, to intervene under Fed. R. Civ. P. 24 to present their own view regarding why they believe § 107(2) is valid. Dkt. #35.

The case is now before the court on three motions: (1) Christopher Butler's unopposed motion to intervene as a defendant, dkt. #81; (2) a motion for summary judgment filed by the United States of America, the Commissioner of the Internal Revenue Service and the Secretary of the United States Department of Treasury, dkt. #43; and (3) a motion for summary judgment filed by the intervenor defendants, dkt. #48. Plaintiffs have not filed their own summary judgment motion, but instead ask the court in their opposition brief to enter judgment in their favor on the court's own motion. Dkt. #65 at 41. See also Ellis v. DHL Exp. Inc. (USA), 633 F.3d 522, 529 (7th Cir. 2011) ("District courts have the authority to enter summary judgment sua sponte as long as the losing party was on notice that it had to come forward with all its evidence."). None of the defendants object to this request on procedural grounds.

The motion to intervene will be granted. Butler is the new pastor of intervenor defendant Chicago Embassy Church, replacing intervenor defendant Edward Peecher, who no longer works for that church. Like Peecher, Butler receives a housing allowance. Butler's interests are identical to Peecher's, Butler is adopting the summary judgment materials filed by intervenor defendants and he is not asking to make any changes to the case. In these circumstances, it is appropriate to allow him to intervene. Intervenor defendants have not

moved to dismiss Peecher, presumably because he now works for a different church and will continue to receive a housing allowance and claim an exemption under § 107(2). Dkt. #83, ¶ 5.

As to the merits, I will deny defendants' motions for summary judgment and grant summary judgment in plaintiffs' favor. I adhere to my earlier conclusion in Lew that § 107(2) violates the establishment clause because it does not have a secular purpose or effect and because a reasonable observer would view the statute as an endorsement of religion.

Although defendants try to characterize § 107(2) as an effort by Congress to treat ministers fairly and avoid religious entanglement, the plain language of the statute, its legislative history and its operation in practice all demonstrate a preference for ministers over secular employees. Ministers receive a unique benefit under § 107(2); it is not, as defendants suggest, part of a larger effort by Congress to provide assistance to employees with special housing needs. A desire to alleviate financial hardship on taxpayers is a legitimate purpose, but it is not a secular purpose when Congress eliminates the burden for a group made up of solely religious employees but maintains it for nearly everyone else.

Under my view of the current law, that type of discriminatory treatment violates the establishment clause. This conclusion makes it unnecessary to consider plaintiffs' alternative argument that § 107(2) violates the equal protection component of the Fifth Amendment.

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

A. Plaintiffs

Plaintiffs Annie Laurie Gaylor and Dan Barker are co-presidents of the Freedom from Religion Foundation, a nonprofit membership organization that advocates for the separation of church and state. Before her death in 2015, Anne Nicol Gayor was a lifetime member and president emerita of the foundation. (I will refer to Annie Laurie Gaylor simply as "Gaylor" and to Anne Nicol Gaylor by her full name.)

Gaylor and Barker each receive a salary from the foundation. Since 2011, the foundation has designated part of those salaries as a housing allowance. Anne Nicol Gaylor also received housing allowances before she died. The allowance for Gaylor and Barker was $4500 in 2011; $13,200 in 2012; and $15,000 in 2013. (Plaintiffs do not say what the allowance was in subsequent years, except that it is "intended to approximate their actual housing expenses for each year." Plts.' PFOF ¶ 8, dkt. #63.)

Gaylor and Barker pay federal income taxes, as did Anne Nicol Gaylor until her death. In January 2015, Gaylor and Barker filed an amended income tax return for the year 2013. (Plaintiffs do not say so expressly, but presumably Gaylor and Barker filed a joint return because they are married.) In their amended return, Gaylor and Barker claimed the designated housing allowance as an exclusion of income and they sought a partial refund of the taxes they paid. Anne Nicol Gaylor also filed an amended return for the tax year 2013 in which she sought the same refund.

On March 2, 2015, the Internal Revenue Service allowed Gaylor's and Barker's requested refund, but did not explain why. Dkt. #60-2. On April 13, 2015, the IRS

informed Anne Nicol Gaylor that it was processing her amended return, but it never issued a decision on her request for a refund.

In March 2015, Gaylor and Barker filed an amended return for the year 2012. They stated that they are "not clergy" and that their "employer is not a church," but they believed "it is unfair that ministers can exclude housing while we cannot." In July 2015, the IRS disallowed the claim. The letter stated that "individual taxpayer[s] are allowed to claim deductions for Housing on Sch A if they have mortgage interest and property taxes, otherwise there is no deduction." Dkt. #60-4. In a response to the IRS, Gaylor and Barker cited 26 U.S.C. § 107(2). In letters dated August 20, 2015, November 25, 2015 and January 12, 2016, the IRS informed Gaylor and Barker that the agency was "working on" their amended return. Dkt. #60-5; Plts.' PFOF ¶ 19, dkt. #63.

In April 2016, plaintiffs filed this lawsuit. On June 27, 2016, plaintiff received the following response from the IRS:

> My review of the information previously submitted by you indicates your claim should be denied. Your claim appears to be based on a portion of your wages being deemed to be a housing allowance. Your letter dated 07/14/2015 states that you are aware that a housing allowance is excludable from income if you are a minister of the gospel and also avows that neither of you are ministers of the gospel. It goes on to state that this is unfair and discriminatory. It appears that your concerns are misdirected. Congress writes tax laws and it is the job of the Internal Revenue Service to implement them. In other words, Congress set the rules and the IRS has to explain how those rules are applied in different situations. IRC Section 107 specifically requires that to exclude a housing allowance from income you must be a minister of the gospel. The IRS does not have the authority to interpret this to include anyone other than those who meet this definition.

Since receiving that response, plaintiffs Gaylor and Barker have filed amended returns for tax years 2014 and 2015 in which they seek a refund of taxes paid on their designated

housing allowances. They intend to continue seeking the exemption for as long as they receive a housing allowance.

B. Intervenor Defendants

Intervenor defendant Patrick W. Malone is the rector of intervenor defendant Holy Cross Anglican Church in Waukesha, Wisconsin. He lives nine blocks from the church. The church pays Malone a housing allowance, which he excludes from his gross income when he files his taxes.

Malone may be required to perform services related to his ministry at any time of the day or night. Many church meetings and social events take place in his home. He provides temporary lodging to church members and others connected to the church.

Intervenor defendant Gregory Joyce is the rector of St. Vladimir Orthodox Church, which gives Joyce a housing allowance. The church is in Chicago, Illinois and is part of intervenor defendant Diocese of Chicago and Mid-America of the Russian Orthodox Church Outside of Russia. The diocese requires its priests to live within their parish. Clergy may use their homes to provide temporary lodging for church members and others connected to the church. Some priests may conduct services in their own homes when a parish is new and does not yet have a church building. Joyce has an office in his home that he uses for church business; he counsels church members in his home and hosts parish events there, sometimes with little notice and at any hour of the day or night.

Intervenor defendant Christopher Butler is the pastor of intervenor defendant Chicago Embassy Church, which pays Butler a housing allowance. The church is a member

of the Illinois District Council of the Assemblies of God USA.

OPINION

A. Standing

One of the jurisdictional prerequisites to filing a lawsuit in federal court is "standing," which means that the plaintiffs must suffer an "injury in fact" that is "fairly traceable" to defendants' conduct and capable of being redressed by a favorable decision from the court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). In Freedom from Religion Foundation, Inc. v. Lew, 773 F.3d 815 (7th Cir. 2014), the court concluded that plaintiffs had not suffered an injury from § 107(2) because they had not "personally claimed and been denied the exemption." Id. at 821. Now it is undisputed that plaintiffs Gaylor and Barker asked for the exemption and that the IRS denied the request.

In light of the IRS's denial, the government is satisfied that plaintiffs now have standing to sue. Govt.'s Supp. Br., dkt. #75 at 7. In particular, the government does not deny that the IRS's rejection qualifies as an injury in fact; the injury is fairly traceable to § 107(2); and the injury could be redressed if plaintiffs prevail on their claim, either by granting them a refund or invalidating § 107(2). Heckler v. Mathews, 465 U.S. 728, 740 (1984) ("We have often recognized that the victims of a discriminatory government program may be remedied by an end to preferential treatment for others.").

Despite the government's position, two questions related to standing remain, one raised by the court and one raised by intervening defendants. First, as noted in an order dated June 19, 2017, dkt. #72, the IRS did not send Gaylor and Barker a rejection letter

until *after* they filed this lawsuit. Because standing is part of subject matter jurisdiction and subject matter jurisdiction must be present when a plaintiff files the lawsuit in federal court, State Farm Life Insurance Co. v. Jonas, 775 F.3d 867, 870 (7th Cir. 2014); Autotech Technologies LP v. Integral Research & Development Corp., 499 F.3d 737, 742–43 (7th Cir. 2007), this raised the question whether plaintiffs brought the case too soon. I asked the parties to file supplemental materials on this issue. Second, intervenor defendants contend that plaintiffs lack standing to seek an injunction or declaration because they "have produced no evidence suggesting that they will again be denied a refund in the future." Dkt. #53 at 5.

A review of the summary judgment materials and supplemental briefs shows that both questions should be resolved in plaintiffs' favor. First, in response to the court's June 19 order, plaintiffs cite 26 U.S.C. § 6532(a)(1), which permits the filing of a federal lawsuit to challenge a decision denying a refund after "the Secretary renders a decision" *or* "the expiration of 6 months from the date of filing the claim." In this case, plaintiffs waited more than a year before filing a federal lawsuit.

A party does not necessarily have standing to sue simply because a statute says she does. Sterk v. Redbox Automated Retail, LLC, 770 F.3d 618, 623 (7th Cir. 2014). This is because Congress "may not lower the threshold for standing below the minimum requirements imposed by the Constitution." Id. (internal quotations omitted). However, Congress does have the power to "enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." Id.

Although § 6532(a)(1) does not say so expressly, it is reasonable to construe the

provision to mean that a claim is effectively denied if the IRS does not render a decision within six months. All parties agree on this point. Because denial of the claim is the injury that confers standing, I conclude that a claimant has standing to sue once the six months have passed without a decision from the IRS. Lew, 773 F.3d at 821 n.3 (to obtain standing, plaintiffs could have "paid income tax on their housing allowance, claimed refunds from the IRS, and then sued if the IRS rejected *or failed to act upon their claims*") (emphasis added). Any other conclusion would allow the IRS to deprive a party of standing indefinitely by withholding a decision. Of course, if the agency later issued a decision in the claimant's favor, that decision could moot any pending lawsuit. However, because the IRS ultimately denied Barker's and Gaylor's claim, I need not consider that issue in this case.

Second, as to the intervenor defendants' argument that plaintiffs have not shown that future harm is likely, it is true that a party seeking prospective relief generally must show a "significant" or "substantial" risk that she will be harmed again in the future. Hummel v. St. Joseph County Board of Commissioners, 817 F.3d 1010, 1019-20 (7th Cir. 2016); Sierakowski v. Ryan, 223 F.3d 440, 443 (7th Cir. 2000). But it is simply not true that plaintiffs have adduced "no evidence" of future harm.

Intervenor defendants point out that the IRS actually granted Gaylor's and Barker's first request for a refund for the taxes they paid on their housing allowance. The agency did not explain its decision, but if that had been the only agency action on the question, I would agree with intervenor defendants that Gaylor and Barker do not have standing to obtain prospective relief.

The obvious flaw in intevenor defendants' argument is that the IRS denied Gaylor's

and Barker's later refund request. Although the opposing rulings may raise some doubt about future decisions, absolute certainty is not required. In re C.P. Hall Co., 750 F.3d 659, 660-61 (7th Cir. 2014) ("[O]ften a probabilistic harm suffices for Article III standing even when the probability that the harm will actually occur is small."); MainStreet Organization of Realtors v. Calumet City, Illinois, 505 F.3d 742, 744 (7th Cir. 2007) ("[S]tanding in the Article III sense does not require a certainty or even a very high probability that the plaintiff is complaining about a real injury, suffered or threatened.").

For two reasons, the decision denying Gaylor's and Barker's request for a refund is the more reliable indicator of the way that the IRS will handle future requests. First, it is the more recent decision. Second, it is the only decision in which the IRS explained its reasoning. In particular, the agency stated that the law "specifically requires that to exclude a housing allowance from income you must be a minister of the gospel. The IRS does not have the authority to interpret this to include anyone other than those who meet this definition." Dkt. #60-6. Thus, the agency has stated its position that Gaylor and Barker are not entitled to the exemption because they are not "ministers of the gospel." Because none of the parties have pointed to any changes in Gaylor's and Barker's behavior or status that would allow them to qualify for the exemption in the future, I see no reason why they would obtain a different result for future requests.

The intervenor defendants resist this conclusion on two grounds. First, they say that the court should not consider the IRS's rejection letter because Gaylor and Barker did not receive it until after they filed this lawsuit. Second, they say that, even if the letter may be considered, it is not informative because it relies on Gaylor's and Barker's own "avow[al]

that neither of [them] are ministers of the gospel" rather than an independent determination by the agency.

Neither argument is persuasive. As to the timing of the letter, intervenor defendants rely on the principle noted above that jurisdiction is decided at the time the complaint is filed, but they are conflating issues. Although a plaintiff must have standing to sue at the time she files her lawsuit, intervenor defendants cite no authority for the view that all the *evidence* showing that standing existed for a particular form of relief must also exist at that time. As noted above, it was the IRS's denial of the refund request that gave Gaylor and Barker standing to sue. It was not the rejection letter, which was simply evidence that the IRS would reject a similar request in the future.

With respect to the argument that the IRS's letter is not a good indicator of the agency's future rulings, it is true that the letter notes Gaylor's and Barker's "avowal" that they are not ministers of the gospel in the context of explaining the decision to deny a refund. However, regardless whether the IRS conducted its own inquiry into Gaylor's and Barker's qualifications for the exemption, the letter simply reflects what is obvious. As I noted in the earlier lawsuit, "there is no reasonable interpretation of the statute under which the phrase 'minister of the gospel' could be construed to include employees of an organization whose purpose is to keep religion out of the public square." Freedom from Religion Foundation v. Lew, 11-cv-626-bbc (W.D. Wis. Aug. 29, 2012), dkt. #30 at 9. Even the government acknowledges in its reply brief that the refunds that Barker and Gaylor received for 2013 "were issued erroneously." Dkt. #67 at 2. Accordingly, I conclude that plaintiffs Gaylor and Barker have standing to seek declaratory and injunctive relief.

Because Gaylor and Barker have standing, so does the foundation, under the doctrine of organizational standing. Sierra Club v. Franklin Cty. Power of Illinois, LLC, 546 F.3d 918, 924 (7th Cir. 2008) ("An organization has standing to sue if (1) at least one of its members would otherwise have standing; (2) the interests at stake in the litigation are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires an individual member's participation in the lawsuit."). None of the defendants argue that the foundation does not have standing if any of the individual plaintiffs do.

The death of Anne Nicol Gaylor complicates the claim of her estate, but only slightly. The IRS never issued a decision on her request for a refund, which, as noted above, qualifies as a denial of her claim, so the estate has standing to seek a refund. Although Anne Nicol Gaylor's death might moot a claim for prospective relief, that has little bearing on the case in light of my conclusion that the other plaintiffs may seek such relief. Ezell v. City of Chicago, 651 F.3d 684, 696 (7th Cir. 2011) ("Where at least one plaintiff has standing, jurisdiction is secure and the court will adjudicate the case whether the additional plaintiffs have standing or not.").

B. 2013 Decision

Because plaintiffs are raising the same challenge to § 107(2) that they raised in Freedom from Religion Foundation, Inc. v. Lew, 983 F. Supp. 2d 1051 (W.D. Wis. 2013), it makes sense to review that decision, in which I concluded that § 107(2) violates the establishment clause. (For the remainder of the opinion I will refer to that decision simply

as Lew because it will not be necessary to make any further references to the court of appeals' decision, which was limited to the issue of standing.) First, I reviewed the different tests that courts have applied in cases brought under the establishment clause, including the test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971), which requires a court to invalidate a law if (1) it has no secular purpose; (2) its primary effect advances or inhibits religion; *or* (3) it fosters an excessive entanglement with religion. As the parties had done, I applied a modified version of the Lemon test that both the Supreme Court and the Court of Appeals for the Seventh Circuit have applied in more recent cases: "whether the government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement, viewed from the perspective of a reasonable observer." Lew, 983 F. Supp. 2d at 1060 (internal quotations and citations omitted).

In concluding that § 107(2) failed that test, I relied on Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 5 (1989), which involved a state sales tax exemption for "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith." A majority of the court concluded that the exemption violated the establishment clause, but no single opinion in the case garnered at least five votes.

The plurality concluded that the exemption did not have a secular purpose or effect and conveyed a message of religious endorsement because it provided a benefit to religious publications only, without a corresponding showing that the exemption was necessary to alleviate a significant burden on free exercise. Texas Monthly, 489 U.S. at 14-15 (plurality opinion) ("[W]hen government directs a subsidy exclusively to religious organizations that

is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, as Texas has done, it provides unjustifiable awards of assistance to religious organizations and cannot but convey a message of endorsement to slighted members of the community."). The plurality also concluded that the exemption fostered entanglement because it required the government to "evaluat[e] the relative merits of differing religious claims." Id. at 20. In a concurring opinion, two justices concluded that "a tax exemption limited to the sale of religious literature by religious organizations violates the Establishment Clause" because it results in "preferential support for the communication of religious messages." Id. at 28 (Blackmun, J., concurring in the judgment).

I concluded that § 107(2) was invalid under either the plurality or concurring opinion. The provision was invalid under the plurality opinion because it gave an exemption to religious persons without a corresponding benefit to similarly situated secular persons. As to the concurring opinion, "[b]ecause a primary function of a 'minister of the gospel' is to disseminate a religious message, a tax exemption provided only to ministers results in preferential treatment for religious messages over secular ones." Lew, 983 F. Supp. 2d at 1062. In addition to Texas Monthly, other Supreme Court opinions supported the more general view that the government may not provide a benefit that only a group of religious persons may receive. Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687, 708 (1994) ("[A] statute [may] not tailor its benefits to apply only to one religious group."); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708 (1985) (giving employees "unqualified" right not to work on the Sabbath violates establishment clause

because it "takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath"); Committee for Public Education v. Nyquist, 413 U.S. 756, 793 (1973) (tax exemptions for parents of children in sectarian schools violated establishment clause because "[s]pecial tax benefits . . . cannot be squared with the principle of neutrality established by the decisions of this Court").

Even if Texas Monthly and these other cases were not dispositive, I concluded that both the purpose and effect of § 107(2) were to endorse religion, in violation of the establishment clause. Two pieces of legislative history supported that conclusion. A House of Representatives committee report issued before the law was passed in 1954 noted that "a minister of the gospel" who is "furnished a parsonage" as part of his compensation receives a tax exemption for the rental value of his home under what is now § 107(1). Lew, 983 F. Supp. 2d at 1067 (quoting H.R. Rep. No. 1337, at 15, available in U.S. Code Congressional and Administrative News, 83rd Congress, Second Session, at 4040 (1954)). The committee viewed this as "unfair" to ministers who receive a housing allowance rather than a home, so the purpose of § 107(2) was to "remove[] the discrimination in existing law by providing that the present exclusion is to apply to rental allowances paid to ministers to the extent used by them to rent or provide a home." Id. At a hearing on the bill, its sponsor in the House, Peter Mack, made the following statement:

> 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.

Id. (quoting Hearings Before the H. Comm. on Ways & Means, 83rd Cong. 1, at 1574–75

(June 9, 1953) (statement of Peter F. Mack, Jr.)). I concluded that both the statement and the report showed that the purpose of § 107(2) was to assist a group of religious persons, which is not a secular purpose.

The various arguments raised by the government failed to show that § 107(2) had a secular purpose and effect: (1) § 107(2) was not needed to eliminate discrimination, either among religions or between religious and secular employers; (2) other statutes that granted a tax exemption for a housing allowance to a small subset of secular employees were not instructive because each of those other statutes involved employees who bore special burdens not shared by the general population; (3) § 107(2) could not be justified as a mere "accommodation of religion" because the Supreme Court has held that the payment of a generally applicable tax does not qualify as a substantial burden on free exercise, Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378, 391 (1990); and (4) Walz v. Tax Commission, 397 U.S. 664 (1971), a case in which the Supreme Court rejected an establishment clause challenge to a tax exemption, was not instructive because the exemption at issue applied to both religious and secular groups. Lew, 983 F. Supp. 2d at 1063-71.

Finally, I considered the question of entanglement and concluded that Texas Monthly was instructive because both the statute in that case and § 107(2) required the government to "evaluat[e] the relative merits of differing religious claims" and created "[t]he prospect of inconsistent treatment and government embroilment in controversies over religious doctrine." Texas Monthly, 489 U.S. at 20 (plurality opinion). However, I did not decide whether § 107(2) fosters excessive entanglement because it was unnecessary to do so in light

of the conclusion that the provision does not have a secular purpose or effect. Doe ex rel. Doe v. Elmbrook School District, 687 F.3d 840, 851 (7th Cir. 2012) ("Since we conclude that the District acted unconstitutionally on other grounds, we need not address these arguments, nor must we consider the District's actions under Lemon's entanglement prong.").

In closing, I noted that Congress was "free to rewrite the provision in accordance with the principles laid down in Texas Monthly and Walz so that it includes ministers as part of a larger group of beneficiaries." Lew, 983 F. Supp. 2d at 1073.

C. Defendants' Arguments

Having reviewed the arguments raised by the government and the intervenor defendants in their summary judgment motions, I adhere to the conclusion in Lew that § 107(2) violates the establishment clause. I considered and rejected most of defendants' arguments in the previous case, so it is unnecessary to address those again. Instead, I will address defendants' new and more developed arguments.

1. Secular purpose and effect

As discussed in Lew and acknowledged by all parties, a key question under the establishment clause is whether the statute at issue has a secular purpose or can be justified on secular grounds. Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 696 (1989); Wallace v. Jaffree, 472 U.S. 38, 56 (1985); Doe, 687 F.3d at 849; Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 788 (7th Cir. 2010). The parties devote much of their briefs

to this issue, so it makes sense to focus on that as well.

a. Convenience of the employer doctrine

Some of defendants' arguments regarding possible secular justifications for § 107(2) relate to the "convenience of the employer" doctrine, so I will provide an overview of that doctrine before addressing more specific issues. The basic premise is that certain benefits may be tax exempt if the benefit or the way in which it is conferred serves the convenience of the employer. Kowalski v. Commissioner of Internal Revenue, 434 U.S. 77, 84–90 (1977). In the housing context, the Department of Treasury first applied the doctrine in 1919 to seamen living aboard a ship, using the rationale that housing should not be viewed as compensation if it is provided by the employer to enable an employee to do his job properly. Id. at 84–85. The doctrine was then applied to cannery and hospital workers who received lodging from their employer so that they could be available for work as needed. Id. at 86. See also Adam Chodorow, The Parsonage Exemption 105-06 & n.16 (Jan. 28, 2017) (forthcoming publication), dkt. #61-2 (when employees "must be on-site overnight to perform their jobs . . . providing housing is not compensatory and therefore should be excluded from income"; alternatively, doctrine may reflect "an administrative decision to exclude housing where it is difficult to distinguish between personal consumption and business necessities").

In 1954, Congress codified the exemption in 26 U.S.C. § 119, which allows an employee to exclude from his gross income "the value of any . . . lodging furnished to him,

. . . but only if . . . the employee is required to accept such lodging on the business premises of his employer as a condition of his employment." Congress has never extended § 119 to include housing allowances. In 1976, Congress made housing expenses tax deductable if the home or a portion of it is "exclusively used on a regular basis" for business purposes. 26 U.S.C. § 280A(c)(1).

Defendants devote a significant portion of their briefs to establishing the reasons why it is appropriate to grant ministers tax exemptions under the convenience of the employer doctrine. These arguments are puzzling because neither this court nor plaintiffs have suggested that the doctrine is unavailable to ministers. It is undisputed that § 119 and § 280A(c)(1) are available to anyone who can meet the relevant requirements, including ministers and any other religious employee.

The relevant question for this case is whether it was permissible for Congress to expand the convenience of the employer doctrine for ministers in a manner that eliminated *any* requirement to show that their choice of housing actually is for the convenience of the employer. This is because § 107(2) applies to *all* ministers who receive a housing allowance, regardless whether the minister's home is ever used for church purposes or whether the minister's choice of home is restricted by the church in any way.

By defendants' own assertion, historically churches provided housing to ministers near or on church property because the minister was to be available at all times; the church wanted to control the minister's living conditions so that they were consistent with church teachings; the church's ownership of the home freed the minister to focus on the religious mission rather than home maintenance and made it easier for the church to settle new

ministers. Govt.'s PFOF ¶ 20, dkt. #44; Int. Dfts.' PFOF ¶ 7, dkt. #52. However, the government fails to explain how these considerations carry over to a situation involving a housing allowance, particularly when § 107(2) includes no restrictions on the location, cost or use of a minister's home.

Thus, the question is not whether ministers may deduct housing expenses from their gross income under the convenience of the employer doctrine; they undoubtedly can under either § 119 or § 280A. The question is whether the doctrine should apply to ministers even when the reasons for applying it are absent and even though the vast majority of other taxpayers are required to justify their request for an exemption.

Defendants offer four reasons as potential secular purposes for that special treatment: (1) providing for the "unique housing needs" of ministers; (2) eliminating discrimination among religions; (3) reducing entanglement between church and state; and (4) alleviating financial hardship on ministers. I will consider each in turn.

b. Unique housing needs

Both the government and the intervenor defendants argue that § 107(2) should not be viewed in "isolation," but instead should be considered as simply one small part of a "broad" exemption that employees with "unique housing needs" receive. Dkt. #47 at 17; Dkt. #53 at 20; Dkt. #68 at 1. For the reasons explained below, I conclude that the other exemptions defendants cite do not show that § 107(2) has a secular purpose or effect.

It is clear that some of the exemptions do not provide any support for defendants' argument. The government cites § 280A, but, as discussed above, that provision is already

available to ministers, so it provides no justification for a law that benefits only ministers and under much broader circumstances.

Both the government and the intervenor defendants cite various provisions in § 119, some of which, like § 280A, could be invoked by any secular or religious employee. In any event, all of the provisions in § 119 relate to employer-provided housing rather than to housing allowances. Because § 107(1) (which relates to church-provided housing) is not at issue in this case, § 119 is not instructive.

The intervenor defendants cite 26 U.S.C. § 162(a)(2), which allows a taxpayer to deduct "traveling expenses (including amounts expended for . . . lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business" for up to one year. The language of the provision makes it clear that it applies to *business travel* expenses while a taxpayer is *away* from home. It has nothing to do with a housing allowance for a primary residence. In any event, § 162 is not limited to particular professions, so ministers are free to claim the exemption if they qualify for it.

The remaining provisions are more similar to § 107(2), but still not helpful for defendants. Defendants rely on the same exemptions the government cited in Lew, 26 U.S.C. §§ 134, 911 and 912, which give a tax exemption for housing expenses to federal employees working overseas (§ 912), other Americans working overseas (§ 911) and members of the military (§ 134). For several reasons, I disagree with defendants that § 107(2) and these provisions are part of an "overall effort" or a "broad package of tax exemptions" for "persons whose occupations often require particular housing for job-related

reasons." Dkt. #47 at 19; Dkt. #53 at 21.

First, defendants suggest that Congress considered § 107(2) and these other laws together, but they cite no evidence for that. The only other law that appears in the legislative history cited by the parties is § 107(1). In fact, it appears that Congress enacted § 134 well after it enacted § 107(2), Pub. L. 99-514, Title XI, § 1168(a), Oct. 22, 1986, 100 Stat. 2512, so § 134 could not have influenced § 107(2).

Second, defendants cite no evidence that concerns related to the convenience of the employer doctrine had anything to do with the enactment of § 107(2). Rather, as discussed in Lew and will be discussed further below, the only purposes disclosed in the legislative history are a desire to extend the benefits in § 107(1) to all ministers and provide financial assistance to those "caring for our spiritual welfare" and "carrying on . . . a courageous fight" against "a godless and anti-religious world movement."

Third, the cited laws fail to provide any potential secular justification for § 107(2) because § 107(2) cannot be fairly grouped with those other exemptions. Defendants try to characterize § 107(2) and §§ 134, 911 and 912 as setting forth a general congressional policy for providing a categorical tax exemption to a particular group of employees who "often" have work-related restrictions on their housing, dkt. #47 at 15, but that policy is not reflected in the law. There are many groups of professionals who "often" need to live near their work and be on call even when they are not working, such as certain types of healthcare providers, hotel managers, maintenance staff, funeral service directors and many others. However, none of those groups receive a categorical tax exemption for housing expenses as ministers do. Rather, if those employees wish to exclude housing expenses from their gross

income, they must satisfy the requirements for the convenience of the employer doctrine set out in § 119 or § 280A. Defendants do not even attempt to explain why ministers may be singled out for favorable treatment while similarly situated groups are excluded.

In any event, §§ 134, 911 and 912 bear no relationship to § 107(2). Those statutes do not reflect a general policy regarding employees who "often" have job-related housing requirements. Rather, they are ad hoc determinations by Congress regarding a limited number of employees in specific circumstances. Sections 912 and 134 both relate to federal employees, so the housing tax exemption they receive may be viewed simply as a benefit provided by the employer. The federal government has wide discretion in structuring the way in which it compensates its own employees, so no general policy regarding either religious or secular private employees may be inferred from those statutes. Although private citizens may invoke § 911, this includes ministers, if they are working overseas.

As I noted in Lew, it is particularly inappropriate to draw an inference of a general policy from benefits received by members of the military under § 134, who are *sui generis* as to "the level of service they give to the government and the sacrifices they make." Lew, 983 F. Supp. 2d at 1070. If anything, the fact that members of the military are the only other employees living in the United States who receive an exemption like the one in § 107(2) is strong evidence that § 107(2) demonstrates religious favoritism.

Further, all three of the statutes relate to employees whose housing is *necessarily* affected by their jobs. People who work overseas obviously are required to move for their employer and incur expenses associated with that move. As for service members, intervenor defendants acknowledge that their duties "require [their] physical presence at [their] post

or station; [their] service is continuous day and night; [and their] movements are governed by orders and commands." Dkt. #53, at 25 (quoting Jones v. United States, 60 Ct. Cl. 552, 569 (1925)).

Some ministers may be in a similar situation, including some of the intervenor defendants, but by no means are all ministers so restricted, as is demonstrated by defendants' own expert, religious historian James Hudnut-Beumler. He notes that parsonages were once ubiquitous for churches but became less common as "religious diversity . . . and residential mobility increased." Hudnut-Beumler Dec. ¶ 87, dkt. #57. (In fact, one commentator observes that 87 percent of ministers now receive cash allowances for housing. Chodorow, dkt. #61-2, at 149.) In describing modern trends, the historian stated that a minister's decision to live in a parsonage may be driven by factors such as the state of the housing market in a particular community and the convenience of the *minister*, rather than the needs of the church. Id. at ¶ 104 (at time § 107(2) was enacted, more ministers lived in housing of their own choice because "it was easier [than in previous decades] for them to get a mortgage for a home of their own and easier to sell quickly if called to a new congregation"); id. at ¶ 126 (trend is for churches to have parsonages "in those areas that are expensive"); id. at ¶ 133 (housing allowance gives minister flexibility for "accommodating family size, school district, special needs, disability access"). In fact, despite a lengthy discussion in their proposed findings of fact about past and present housing trends for ministers, defendants include no facts showing that ministers who receive a housing allowance generally are (1) restricted by their churches regarding where they can live or what kind of home they can buy; or (2) required to use their home for church purposes. Thus,

over time it appears that the factors influencing housing choices of ministers have begun to more closely resemble the factors considered by the general public. Even as to the intervenor defendants themselves, only Gregory Joyce stated that his church restricted the location of his housing.

Further, § 107(2) has been applied to employees who bear little resemblance to the intervenor defendants with respect to their duties. One commentator has noted that the IRS has granted the exemption to a rabbi working as a teacher, ministers working as guidance counselors or basketball coaches and every member of the Churches of Christ teaching at a Christian college. Chodorow, dkt. #61-2, at 114 and n. 48 (citing I.R.S. P.L.R. 1991-26-048 (Apr. 2, 1991); I.R.S. P.L.R. 2000-02-040 (Jan. 14, 2000); I.R.S. Rev. Rul. 70-549; and Jobe v. Commissioner, No. 33686-83). This shows that "ministers receive tax benefits unavailable to non-ministers performing the exact same jobs." Id.

In sum, the case is weak for the argument that ministers should receive a blanket exemption on the ground that they have unique housing needs. Even if it is true that ministers often meet the requirements for the convenience of the employer doctrine, the same could be said of other employees not covered by § 107(2) or a comparable exemption. In those other situations, the employee must actually show that she is living in housing for the convenience of the employer. I see no secular justification for eliminating as to one group of religious employees the requirement in the convenience of the employer doctrine that the employee's housing actually serves the convenience of the employer.

c. Eliminating denominational discrimination

Defendants' argument on this issue is a more developed version of the government's argument in Lew. The argument has two components. First, defendants say that Congress enacted § 213(b)(11) of the Revenue Act of 1921 (which later became § 107(1) in 1954), giving a tax exemption to ministers who live in church-provided parsonages, because the Department of Treasury was refusing to grant exemptions to ministers under the convenience of the employer doctrine. (Plaintiffs deny that the department was discriminating against ministers, but I need not resolve that dispute to decide this case.) Second, in 1954, Congress enacted § 107(2) to eliminate discrimination between ministers who lived in parsonages and ministers who received a housing allowance. H.R. Rep. No. 1337, at 15, available in U.S. Code Congressional and Administrative News, 83rd Congress, Second Session, at 4040 (1954) (purpose of § 107(2) is to "remove[]" or "correct" the "discrimination" in existing law between ministers who live in parsonages and those who receive housing allowance).

Viewed from a distance, defendants' argument has surface appeal, as both steps in the process appear to be straightforward attempts to make the law more equitable. However, a closer look reveals that the enactment of § 107(1) provides no justification for § 107(2).

As to the first step, it is apparent from the language of § 107(1) that it goes beyond simply codifying the convenience of the employer doctrine for ministers. Section 107(1) is missing the requirements in § 119 that the lodging is located "on the business premises of his employer" and offered "as a condition of his employment." Thus, the exemption in § 107(1) for ministers is broader than what most other employees receive. It seems counterintuitive to argue that, because Congress enacted one broad exemption that favored

ministers in § 107(1), it was justified in enacting § 107(2), which is an even *more* expansive exemption that provided an even greater benefit to ministers and made the disparity between ministers and secular employees that much wider.

As in Lew, § 107(1) is not at issue in this case. Accordingly, I do not consider whether § 107(1) violates the establishment clause and I will assume that defendants are correct in asserting that the purpose of § 107(1) was simply to insure that ministers received an exemption that secular employees already had. Making that assumption, however, does not help defendants justify § 107(2).

Defendants say that § 107(2) was about insuring equal treatment among all religions rather than eliminating discrimination between ministers and secular employees, but that rationale has multiple problems. First, defendants cite no authority for the view that the government may eliminate a perceived disparity among religions by *creating* (or exacerbating) a disparity between religious persons and secular persons. If Congress believed that it was unfair to treat employees with housing allowances differently from employees who live on employer-owned property, it could have enacted a statute that allowed *all* similarly situated employees, both secular and religious alike, to exclude a housing allowance from their gross income rather than targeting "ministers of the gospel" alone for more favorable treatment.

Second, as I noted in Lew, 983 F. Supp. 2d at 1068, § 107(1) did not need to be "corrected" because it does not discriminate on the basis of religious denomination. *All* statutes are "discriminatory" in the sense that each provides a benefit or imposes a restriction on some persons but not on others. However, by defendants' own assertion, the point of § 107(1) (and its precursor § 213(b)(11)) was not to give certain denominations

more favorable treatment. Rather, it simply was an attempt to extend to ministers the convenience of the employer doctrine, which recognizes that employer-provided housing may benefit the employer just as much as the employee, so the value of that housing should not be considered compensation. With respect to the vast majority of employees, Congress has not extended the doctrine to housing allowances, presumably because those employees have much greater freedom in choosing their own housing. Limiting the application of the doctrine to employees who meet its requirements is not invidious discrimination against secular *or* religious employees; it is simply a recognition that a taxpayer may not obtain a benefit in the absence of a justification for receiving the benefit.

"Under defendants' view, if one religious person received a tax exemption, then Congress would be compelled to give every religious person the same exemption, even if the exemption had nothing to do with religion." Lew, 983 F. Supp. 2d at1068. For example, churches must comply with any number of requirements and restrictions to be tax exempt under 26 U.S.C. § 501(c)(3): net earnings may not "inure[] to the benefit of any private shareholder or individual"; lobbying activities are limited; and participation in political campaigns is prohibited. Because some churches may not be able to comply with these requirements, defendants' logic suggests that Congress should eliminate them.

Intervenor defendants argue that Congress was *required* to enact § 107(2), citing Larson v. Valente, 456 U.S. 228, 230 (1982), for the proposition that the First Amendment prohibits more than just intentional religious discrimination. In Larson, 456 U.S. at 230, the Court invalidated a law "imposing certain registration and reporting requirements upon only those religious organizations that solicit more than fifty per cent of their funds from

nonmembers." Intervenor defendants say that, like the statute in Larson, § 107(1) favors "well established" and "wealthy" churches because those churches have the means to buy a parsonage. However, the Court did not adopt a "disparate impact" standard in Larson as intervenor defendants suggest. Rather, the Court found that "the history of [the challenged law] demonstrate[d] that the provision was drafted with the explicit intention of including particular religious denominations and excluding others." Id. at 253–54. In this case, defendants do not contend that Congress enacted § 107(1) or § 213(b)(11) to help some denominations or hurt others.

Intevenor defendants also cite no cases in which a court relied on Larson to either justify a statute that showed favoritism toward religious persons or invalidate a statute that required religious persons to meet the same requirements as everyone else to obtain a government benefit. Rather, the Court has cited Larson almost exclusively for the proposition that "one religious denomination cannot be officially preferred over another." E.g., Grumet, 512 U.S. at 714; County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 605 (1989). See also Lynch v. Donnelly, 465 U.S. 668, 687 n.13 (1984) (O'Connor, J., concurring) (Larson applies to "explicitly discriminatory" statutes). Section 107(1) does not discriminate on the basis of denomination, either on its face or by design.

More instructive is Hernandez, 490 U.S. at 686, in which the Court rejected an argument under Larson that 26 U.S.C. § 170 discriminates against minority religions such as the Church of Scientology by making payments to a church ineligible for a tax deduction if they were made for a particular service (in that case a service called "auditing") rather

than for membership in the church. Like the statute at issue in Hernandez, § 107(1) does not discriminate against certain religions; it is simply limiting a well-established principle of tax law to employees who meet the criteria for obtaining an exemption.

Even if I were to assume that § 107(1) discriminates against less established or wealthy churches in the sense discussed in Larson, § 107(2) was not an appropriate response to that discrimination, for two reasons. First, § 107(2) goes much further than any concern about churches who could not afford to purchase a parsonage. If that were the only concern, Congress could have created an exemption for rental housing that is provided by the church or is subject to restrictions imposed by the church. By divorcing the exemption from any connection to the convenience of the employer doctrine, Congress revealed that its true purpose was to demonstrate a religious preference. In fact, the benefit ministers receive under § 107(2) is potentially greater than that received under § 107(1) because a minister can use his housing allowance to purchase a home that will appreciate in value and he can deduct any interest he pays on his mortgage and property taxes. 26 U.S.C. § 265(a)(6); Erwin Chemerinsky, The Parsonage Exemption Violates the Establishment Clause and Should Be Declared Unconstitutional, 24 Whittier L. Rev. 707, 723 (2003).

Second, as I noted in Lew, 983 F. Supp. 2d at 1068, if § 107(1) is discriminatory, then so is § 107(2), because both provisions "discriminate" against religions that do not have ministers that meet the IRS's definition of that term. The government resists this conclusion on the ground that, "if a religion has no ministers then there is no taxation of a minister's housing that needs to be accommodated," dkt. #47 at 16 n.3, but that argument is self-defeating. Regardless whether a church has a "minister" who receives a housing allowance,

it may have other employees who do and who need and deserve a housing tax exemption just as much as a minister does. The government may mean to argue that discrimination between ministers and other religious employees is not a problem because those other employees are less likely to live in housing for the convenience of the employer and therefore should not qualify for the exemption. If that is the argument, then it supports this court's conclusion that declining to extend an exemption to all ministers does not raise a constitutional red flag if the reason is simply that the minister fails to qualify for the exemption.

In short, it is simply inaccurate to say either that § 107(1) discriminates against particular religious denominations or that § 107(2) corrects any discrimination in § 107(1). Rather, Congress' statement that it was "unfair" to make ministers pay taxes on a housing allowance is simply an admission that it wanted to provide aid to a group of religious persons. That purpose is confirmed by the sponsor's statement that § 107(2) was needed to "fight against" a "godless and anti-religious world movement." Because that is not a secular purpose, it cannot justify § 107(2) under the establishment clause.

d. Entanglement

In addition to secular purpose and effect, courts deciding a claim under the establishment clause sometimes consider whether a statute fosters "excessive entanglement" between government and religion. E.g., Agostini v. Felton, 521 U.S. 203, 233 (1997); Sherman ex rel. Sherman v. Koch, 623 F.3d 501, 519 (7th Cir. 2010). In Lew, I observed that § 107(2) appeared to be similar to the exemption struck down in Texas Monthly,

because a ruling under § 107(2) involves a complex and inherently ambiguous multifactor test. Compare Silverman v. Commissioner of Internal Revenue, 57 T.C. 727, 731-32 (1972) (Jewish cantor was "minister" for tax purposes because he performed religious worship, sacerdotal training and educational functions as specified by Jewish religious tenets), with Lawrence v. Commissioner of Internal Revenue, 50 T.C. 494, 499-500 (1968) (commissioned but not ordained Baptist minister of education was not "minister" because he was unable to officiate at baptisms, preside over or preach at worship services or take part in other aspects of Baptist services). See also Lew, 983 F. Supp. 2d at 1057 (citing cases in which tax court has applied four different tests for determining whether taxpayer is a "minister"). However, I did not decide whether § 107(2) fosters excessive entanglement because it was unnecessary in light of my conclusion that the provision does not have a secular purpose or effect.

Defendants now make the opposite argument: § 107(2) does not foster excessive entanglement; it *avoids* the entanglement that would be fostered if ministers would be required to comply with the requirements for the convenience of the employer doctrine that apply to most secular employees. Defendants say that the alleged administrative advantages of § 107(2) are themselves a secular justification for the law.

Defendants have not made a persuasive argument on this point. To begin with, defendants cite no evidence that concerns about entanglement had anything to do with § 107(2) and they cite no authority for the view that concerns about entanglement can justify preferential treatment for religious persons. Also, much of intervenor defendants' argument relates to alleged difficulties with applying *§ 119* to ministers. As noted above, §

119 applies to employees who are required to live in employer-provided housing. Because the provision that applies to ministers who live in employer-provided housing, § 107(1), is not at issue in this case, § 119 is not relevant.

Other than §§ 134, 911 and 912 (all of which are discussed above), the parties identify no federal statutes that allow secular employees to exclude a housing allowance from their gross income. The government suggests that the closest analogue to § 107(2) for most employees is 26 U.S.C. § 280A(c)(1), which allows any employee (secular or religious) to deduct her housing expenses from her gross income if the home or a portion of it is "exclusively used on a regular basis" for business purposes.

Although the government argues generally that § 280A involves "intrusive inquiries," dkt. #47 at 2, it fails to explain how those inquiries are any more intrusive for ministers than they are for any secular employee who wants the exemption. Equally important, defendants make conclusory allegations that applying § 280A to ministers would require the government to answer difficult religious questions and interfere with a minister's exercise of religion, but fail to develop the argument or provide likely scenarios in which that would occur. Cf. Illinois Bible Colleges Association v. Anderson, 870 F.3d 631(neutral educational licensing requirements did not foster excessive entanglement; "allowing a religious institution to participate in secular regulatory schemes simply does not violate the Establishment Clause.") (internal quotations omitted). After all, unlike § 107(2), § 280A on its face does not require the government to make any religious determinations. Further, it seems likely that church employees who are not ministers seek exemptions under § 280A when it is applicable. Defendants do not identify any entanglement problems that have arisen in that context.

Certainly, defendants have not shown that applying § 280A is any more intrusive or difficult than applying § 107(2).

Even if it is assumed that it would be difficult to apply § 280A to ministers, it does not follow that the solution is to give them preferential treatment. Section 280A did not even exist when Congress enacted § 107(2), so it should not be viewed as the only alternative. If Congress is concerned about entanglement issues surrounding § 280A, it could enact a law that liberalized the exemption for everyone or for a class (such as nonprofit organizations) that is "broad [enough] that it can be fairly concluded that religious [persons] could be thought to fall within the natural perimeter." Texas Monthly, 489 U.S. at 17 (plurality opinion) (internal quotations omitted). Thus, regardless whether § 107(2) fosters excessive entanglement between the government and religion, any concern about avoiding entanglement does not provide a secular justification for the law.

e. Hardship on ministers

Intervernor defendants say that "[i]mposing additional taxes on ministers' housing allowances would interfere with the ability of churches to carry out their religious missions by diverting scarce resources away from their core First Amendment activities." Dkt. #53 at 15. They cite evidence regarding the potential financial effects that invalidating § 107(2) would have on them and they argue that the statute is a permissible accommodation of the free exercise of religion.

It is likely that when § 107(2) was enacted, some members of Congress shared intervenor defendants' concerns about financial hardship on ministers. Plaintiffs cite a

statement from the law's sponsor, who observed that "many . . . clergymen support families like the rest of us"and "must pay 1953 rents for a dwelling house," but "receive low income based on the 1940 cost of living." Hearings Before the H. Comm. on Ways & Means, 83rd Cong. 1, at 1576 (June 9, 1953) (statement of Peter F. Mack, Jr.).

I do not doubt that many ministers are paid significantly less than what their commitment and skill level would suggest. This is an unfortunate truth that applies to many devoted and talented employees in service professions, both religious and secular. However, the manner in which Congress alleviated a financial burden on a group of religious persons was neither required by the free exercise clause nor permitted by the establishment clause under the facts of this case.

As an initial matter, § 107(2) is not limited to ministers with a relatively low income. In 2002, in the midst of a controversial case of a minister who sought a $100,000 exemption under § 107(2), Congress limited the amount of the exemption to the fair rental value of a home. Warren v. Commissioner of Internal Revenue, 114 T.C. 343, 345 (2000); Clergy Housing Allowance Clarification Act of 2002, Pub. L. No. 107–181, 116 Stat. 583. However, the 2002 amendment placed no limit on how expensive that home may be.

As long ago as 1984, the Department of the Treasury acknowledged that one result of § 107(2) is to give "a disproportionately greater benefit to relatively affluent ministers, due to the higher marginal tax rates applicable to their incomes." U.S. Dept. of Treasury, Tax Reform for Fairness, Simplicity, and Economic Growth: The Department Report to the President, vol. II 49 (1984). Thus, an evangelist with a multimillion dollar home is entitled under § 107(2) to deduct the entire rental value of that home, even if it is not used for

church purposes. E.g., Chodorow, dkt. #61-2, at 116 n.4 ("Joel Osteen lives in a $10.5 million home and is entitled to exclude the fair rental value of that home so long as he spends that money on the home and his church allocates that amount to housing."). If Congress were concerned about lessening the tax burden on poor Americans, it could have tied the exemption to income and made it generally available to any employee who qualified rather than to all ministers who receive a housing allowance. Nyquist, 413 U.S. at 788–89 (law motivated by desire to help "low-income parents" send children to sectarian schools "can only be regarded as one 'advancing' religion").

In any event, as I noted in Lew, the mere payment of a generally applicable tax does not qualify as a substantial burden on free exercise. Jimmy Swaggart Ministries, 493 U.S. at 391 ("[T]o the extent that imposition of a generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant."). Because "the burden of taxes is borne equally by everyone who pays them, regardless of religious affiliation, . . . concerns about free exercise do not justify a special exemption." Lew, 983 F. Supp. 2d at 1063. See also Tax Reform for Fairness, supra at 49 ("There is no evidence that the financial circumstances of ministers justify special tax treatment. The average minister's compensation is low compared to other professionals, but not compared to taxpayers in general."). Accordingly, the potential financial impact that the loss of a tax exemption might have on some ministers is not a factor that I may consider in assessing the validity of § 107(2).

2. Exemption versus subsidy

Defendants repeat an argument the government made in Lew, which is that tax exemptions do not raise the same concerns under the establishment clause that tax subsidies do. The parties cite dueling Supreme Court decisions on the question whether subsidies and exemptions are simply two sides of the same coin. Compare, e.g., Regan v. Taxation with Representation of Washington, 461 U.S. 540, 544 (1983) ("Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system."), with Walz, 397 U.S. at 675 ("The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state.").

Although these cases may suggest that the Supreme Court does not always see exemptions and subsidies as identical, exemptions do not simply get a "pass" under the establishment clause, as Texas Monthly made clear. As I noted in Lew, 983 F. Supp. 2d at 1065, if one were to take defendants' argument to its logical conclusion, it would permit the government to eliminate *all* taxes for religious organizations and individuals without any secular purpose for doing so, an extreme position that defendants do not advance.

Intervenor defendants identify the appropriate standard for evaluating a religious exemption: whether the exemption "alleviate[s] significant governmental interference with the ability of religious organizations to define and carry out their religious missions." Dkt. #53 at 14 (quoting Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335 (1987)). See also Grumet, 512 U.S. at 705 ("The Constitution allows the State to accommodate religious needs by alleviating special burdens.") (emphasis added). For example, in Amos, 483 U.S. at 335, the Court upheld a religious exemption in

an antidiscrimination law that otherwise would have required religious groups to violate their own religious beliefs, such as by requiring Catholic churches to ordain women as priests. And in Cutter v. Wilkinson, 544 U.S. 709 (2005), the Court concluded that a law requiring administrators to provide religious accommodations to persons housed in state institutions was justified by the reality of institutionalization, which is "severely disabling to private religious exercise." Id. at 720–21. "[I]n both situations, the accommodations are best described not as singling out religious persons for more favorable treatment, but as an attempt to prevent inequality caused by government-imposed burdens." Lew, 983 F. Supp. 2d at 1063.

Although intervenor defendants invoke the standard cited above for permissible religious accommodations, they fail to apply that standard to their own situation. Of course, invalidating § 107(2) could divert some of a minister's resources from endeavors that could further a church's mission, but the same would be true of *any* tax, just as taxes on secular employees divert their resources from other endeavors that are important to them. As noted above, the Supreme Court has held that generally applicable taxes do not impose a constitutionally significant burden on a taxpayer's rights under the free exercise clause. Jimmy Swaggart Ministries, 493 U.S. at 391. Thus, the payment of such taxes does not qualify as "significant governmental interference" with religious exercise and exemptions from such taxes cannot be viewed merely as a religious accommodation. Rather, because the government has eliminated a burden for certain ministers that is shared by millions of taxpayers, the exemption is more accurately viewed as religious favoritism.

3. History of religious tax exemptions

Intervenor defendants cite cases such as Town of Greece, New York v. Galloway, 134 S. Ct. 1811, 1819 (2014), for the proposition that "the Establishment Clause must be interpreted by reference to historical practices and understandings." In light of that principle, intervenor defendants say that "[o]ver 200 years of unbroken history confirm that religious tax exemptions are fully consistent with the historical meaning of the Establishment Clause." Dkt. #53 at 12.

Intervenor defendants' reliance on cases such as Town of Greece is unavailing because the history cited by intervenor defendants (which comes mostly from discussions in Walz, 397 U.S. 664) relates to church property tax exemptions, not to income tax exemptions of church employees. Bryce Langford, The Minister's Housing Allowance: Should It Stand, and If Not, Can Its Challengers Show Standing?, 63 U. Kan. L. Rev. 1129, 1163 (2015) ("[Section 107(2)] is a federal income tax exemption, and tax exemptions from federal income taxes do not have an historical and rooted tradition."). The principle in Town of Greece is limited to situations in which "history shows that the *specific practice* is permitted," 134 S. Ct. at 1819 (emphasis added), so intervenor defendants cannot generalize that all religious tax exemptions are permissible simply because one type of exemption has historical support. Particularly because defendants attempt to justify § 107(2) as part of the convenience of the employer doctrine, a doctrine that bears no relationship to church property tax exemptions, historical treatment of those exemptions is not instructive. If all religious tax exemptions were permissible as a matter of historical practice, Texas Monthly and Nyquist would have turned out differently.

Congress enacted § 107(2) in 1954, so it is not brand new. However, the question the Court asked in Town of Greece (as well as in Marsh v. Chambers, 463 U.S. 783 (1983), on which Town of Greece relies) was whether the "practice . . . was accepted by *the Framers* and has withstood the critical scrutiny of time and political change." 134 S. Ct. at 1819 (emphasis added). Section 107(2) is not entitled to any special presumptions on account of history, particularly because the statute has evaded judicial scrutiny for a variety of procedural reasons for decades. E.g., American Atheists, Inc. v. Shulman, 21 F. Supp. 3d 856 (E.D. Ky. 2014) (dismissing challenge to § 107 for lack of standing); Freedom From Religion Foundation, Inc. v. Geithner, Case No. 2:09-2894-WBS-DAD (C.D. Cal.), dkt. ##87-88 (dismissing challenge to § 107 after theory of taxpayer standing rejected by Supreme Court); Warren v. Commissioner of Internal Revenue, 302 F.3d 1012, 1014 (9th Cir. 2002) (denying taxpayer's motion to intervene to challenge § 107 after parties settled dispute); Kirk v. Commissioner of Internal Revenue, 425 F.2d 492, 495 (D.C. Cir. 1970) (declining to consider constitutional challenge to § 107 in deficiency proceeding on ground that court could not "properly consider these issues in this proceeding, particularly in view of the fact that appellants would not in any event be entitled to the exclusion" if they were successful on their claim).

4. Effect on other statutes

Finally, intervenor defendants say that invalidating § 107(2) will "endanger scores of tax provisions throughout federal and state law." Dkt. #53 at 48. Despite that broad statement, intervenor defendants discuss only one provision, 26 U.S.C. § 1402(e), which

grants an exemption for the self-employment tax to certain ministers who are "conscientiously opposed to, or because of religious principles . . . opposed to, the acceptance . . . of any public insurance."

Neither § 1402 nor any religious exemption other than § 107(2) is before the court, so I do not decide whether any of those other provisions violate the establishment clause. However, § 1402(e) is readily distinguishable from § 107(2) on two grounds, as I noted in Lew, 983 F. Supp. 2d at 1062-63. First, as is clear from the language of the provision, it applies only when paying the tax would force the minister to violate his religious beliefs, so it may be properly viewed as an accommodation of religion rather than preferential treatment. Chodorow, dkt. #61-2, at 155-56. In contrast, § 107(2) is not tied to a minister's particular religious beliefs about paying taxes and intervenor defendants do not argue that they have religious objections to paying taxes on their housing expenses.

Second, as is also clear from the face of § 1402(e), the exemption applies not simply to ministers who object to *paying* the self-employment tax but to *receiving* public insurance. Because it is unlikely that a minister claiming an exemption under § 1402(e) will receive the benefits the tax is designed to fund, the exemption may ultimately provide no net benefit to the minister. It is for these reasons that courts have upheld § 1402 against establishment clause challenges. Droz v. Commissioner of Internal Revenue, 48 F.3d 1120, 1121 (9th Cir.1995) (§ 1402 is permissible accommodation because it is "an exemption narrowly drawn to maintain a fiscally sound Social Security system and to ensure that all persons are provided for, either by the Social Security system or by their church"); Hatcher v. Commissioner of Internal Revenue, 688 F.2d 82, 84 (10th Cir.1979) ("That the principal

purpose of the legislation is not to advance or inhibit religion is evident in the mandate that those who receive the exemption forego the benefit of the program.").

D. Conclusion

Having considered all of the arguments advanced by defendants, I am not persuaded either that it was an error to conclude in Lew that § 107(2) is unconstitutional or that any new facts or law support a different conclusion. Defendants' stated concerns about treating religions equally and avoiding entanglement do not find any support in the facts or the law. Thus, any reasonable observer would conclude that the purpose and effect of § 107(2) is to provide financial assistance to one group of religious employees without any consideration to the secular employees who are similarly situated to ministers. Under current law, that type of provision violates the establishment clause.

In reaching this conclusion, I do not mean to imply that any particular minister is undeserving of the exemption or does not have a financial need for one. The important point is that many equally deserving secular employees (as well as other kinds of religious employees) could benefit from the exemption as well, but they must satisfy much more demanding requirements despite the lack of justification for the difference in treatment.

As I have discussed throughout this opinion, Congress could have enacted a number of alternative exemptions without running afoul of the First Amendment. For example, Congress could have accomplished a similar goal by allowing any of the following groups to exclude housing expenses from their gross income: (1) all taxpayers; (2) taxpayers with incomes less than a specified amount; (3) taxpayers who live in rental housing provided by

the employer; (4) taxpayers whose employers impose housing-related requirements on them, such as living near the workplace, being on call or using the home for work-related purposes; or (5) taxpayers who work for nonprofit organizations, including churches. Or some of these categories could be combined. One commentator has suggested that § 107 be amended to apply to taxpayers who work for tax exempt organizations under § 501(c)(3) and are on call at all times. Ellen P. Aprill, Parsonage and Tax Policy: Rethinking the Exclusion, 96 Tax Notes 1243 (Aug. 26, 2002).

Of course, these suggestions are not exhaustive. Congress retains wide discretion in adopting tax laws that further its legitimate policies. What Congress may not do is single out religious persons for preferential treatment without a secular basis for doing so, as it has done in § 107(2).

E. Remedy

In Lew, both the parties and the court assumed that the only available relief was declaring § 107(2) unconstitutional and enjoining its enforcement. That remains part of plaintiffs' request for relief, but now plaintiffs have raised the possibility of other types of relief as well.

First, now that the IRS has denied Gaylor's and Barker's request for a refund, plaintiffs suggest that they may be entitled to a refund and an injunction requiring the IRS to "extend benefits under the statute to those excluded." Dkt. #65 at 10. (Intervenor defendants question plaintiffs' right to obtain a refund because that request was not included in their complaint, but that argument is inconsistent with circuit law. Heitmann v. City of

Chicago, Illinois, 560 F.3d 642, 645 (7th Cir. 2009) ("Prevailing parties get the relief to which they are entitled, no matter what they ask for.").) Second, earlier in the case plaintiffs argued that "the invalidity of § 107(2) may later involve the Court in determining whether § 107(1) is, or is not, severable when evaluating any potential remedies that may be warranted," dkt. #13 at 2, suggesting that invalidating § 107(2) may require invalidating § 107(1) as well.

It seems unlikely that it would be appropriate for the court to issue an injunction directing the IRS to extend the scope of the exemption because, as noted above, there are multiple ways that the statute could be rewritten, a task generally left for Congress. Virginia v. American Booksellers Association, Inc., 484 U.S. 383, 397 (1988) ("[W]e will not rewrite a state law to conform it to constitutional requirements."). Invalidating § 107(1) along with § 107(2) also seems to stretch the limits of judicial power, particularly because a statute similar to § 107(1) existed without § 107(2) for more than 30 years. Executive Benefits Insurance Agency v. Arkison, 134 S. Ct. 2165, 2173 (2014) ("We ordinarily give effect to the valid portion of a partially unconstitutional statute so long as it remains fully operative as a law, and so long as it is not evident from the statutory text and context that Congress would have preferred no statute at all.") (internal quotations and citations omitted).

Despite my skepticism on these issues, I am reluctant to make a definitive determination regarding the appropriate remedy because none of the parties developed an argument in favor of a refund, a particular injunction or both or otherwise developed an argument regarding what the court should do in the event that it concludes that § 107(2) is unconstitutional. Accordingly, I will issue declaratory relief and give the parties an

opportunity to file supplemental materials regarding what additional remedies are appropriate, if any. In addition, the parties should address the question whether relief should be stayed pending a potential appeal.

ORDER

IT IS ORDERED that

1. Christopher Butler's motion to intervene, dkt. #81, is GRANTED.

2. The motions for summary judgment filed by defendants Jacob Lew (now Steve Mnuchin), John Koskinen and the United States of America, dkt. #43, and intervenor defendants Bishop Edward Peecher, Chicago Embassy Church, Father Patrick Malone, Holy Cross Anglican Church, the Diocese of Chicago and Mid-America of the Russian Orthodox Church Outside of Russia and Christopher Butler, dkt. #48, are DENIED.

3. On the court's own motion, summary judgment is GRANTED to plaintiffs Freedom from Religion Foundation, Annie Laurie Gaylor, Dan Barker and Ian Gaylor as the personal representative of the estate of Anne Nicol Gaylor.

4. It is DECLARED that 26 U.S.C. § 107(2) violates the establishment clause of the First Amendment to the United States Constitution.

5. The parties may have until October 30, 2017, to file supplemental briefs on the questions whether any additional remedies are appropriate and whether relief should be stayed pending a potential appeal. Response briefs are due November 8, 2017. There will be no reply. If the parties do not respond by the deadline, I will direct the clerk of court to enter judgment without awarding any additional relief.

6. All relief is STAYED pending entry of judgment.

Entered this 6th day of October, 2017.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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ANNIE LAURIE GAYLOR; DAN BARKER;
IAN GAYLOR, personal representative of
the estate of Anne Nicol Gaylor; and
FREEDOM FROM RELIGION FOUNDATION, INC.,

OPINION AND ORDER

Plaintiffs,

16-cv-215-bbc

v.

STEVE MNUCHIN, Secretary of the United States
Department of Treasury; JOHN KOSKINEN,
Commissioner of the Internal Revenue Service;
and the UNITED STATES OF AMERICA,

Defendants,

and

EDWARD PEECHER; CHICAGO EMBASSY CHURCH;
PATRICK MALONE; HOLY CROSS ANGLICAN CHURCH;
and the DIOCESE OF CHICAGO AND MID-AMERICA OF THE
RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA,

Intervenor-Defendants.

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In an order dated October 6, 2017, I granted summary judgment to plaintiffs Freedom from Religion Foundation, Annie Laurie Gaylor, Dan Barker and Ian Gaylor as the personal representative of the estate of Anne Nicol Gaylor, and concluded that 26 U.S.C. § 107(2), which excludes from the gross income of a “minister of the gospel” a “rental allowance paid to him as part of his compensation,” is unconstitutional. Specifically, I

concluded that § 107(2) violates the establishment clause of the First Amendment because it does not have a secular purpose or effect and because a reasonable observer would view the statute as an endorsement of religion. Dkt. #87. I issued a declaration, stating that 26 U.S.C. § 107(2) violates the First Amendment, but I also directed the parties to file supplemental materials regarding what additional remedies are appropriate, if any. In addition, I asked the parties to address the question whether relief should be stayed pending a potential appeal. The parties' supplemental briefing is now before the court.

All parties agree that the court should not seek to expand § 107(2) in an attempt to make it constitutional. As I stated in the summary judgment decision, I also do not think it would appropriate for the court to issue either an injunction expanding the scope of § 107(2) or an order directing the Internal Revenue Service to do so, because there are multiple ways that the statute could be rewritten and that task should generally be left for Congress. Virginia v. American Booksellers Association, Inc., 484 U.S. 383, 397 (1988) ("[W]e will not rewrite a state law to conform it to constitutional requirements.").

Additionally, all parties agree that invalidating § 107(2) does not require the court to invalidate § 107(1). I agree, particularly because a statute similar to § 107(1) existed without § 107(2) for more than 30 years. Executive Benefits Insurance Agency v. Arkison, 134 S. Ct. 2165, 2173 (2014) ("We ordinarily give effect to the valid portion of a partially unconstitutional statute so long as it remains fully operative as a law, and so long as it is not evident from the statutory text and context that Congress would have preferred no statute at all.") (internal quotations and citations omitted).

With respect to injunctive relief, both plaintiffs and defendants state that the court

should enter an injunction nullifying § 107(2) prospectively. In contrast, the intervenors argue that the court should not enter an injunction because declaratory relief would be least disruptive and would permit the government to continue applying the statute. Dkt. #89 at 6. The intervenors' position is not persuasive, as they are essentially arguing that the government should be permitted to continue allowing ministers to take advantage of § 107(2), despite the court's holding that the statute is discriminatory and unconstitutional. The intervenors cite no authority to support such an argument. Instead, they make the same arguments I considered and rejected in deciding the merits of plaintiffs' claim. Therefore, I agree with plaintiffs and defendants that an injunction nullifying § 107(2) is an appropriate remedy in this case.

Next, plaintiffs ask that the IRS be ordered to partially refund taxes they paid but which would have been reduced if they had been permitted to claim a housing allowance as an exclusion of income under § 107(2). I am denying this request. I have determined that § 107(2) is unconstitutional and should be nullified. Therefore, plaintiffs were not entitled to claim a housing allowance under § 107(2) and they are not entitled to receive a refund of taxes they paid because they were denied the allowance. Because plaintiffs cite no other basis for receiving a refund beyond § 107(2), they have not shown they are entitled to a refund.

Finally, all parties agree that any injunction should be stayed pending resolution of any appeals. Defendants and intervenors ask that injunctive relief be stayed for 180 days after the resolution of any appeals, while plaintiffs argue that the injunction should be enforced immediately upon resolution of any appeals. I agree with defendants and the

intervenors that in light of the substantial changes to tax policy and administration that will occur upon enforcement of the injunction, it is appropriate to stay injunctive relief until 180 days after the final resolution of all appeals. The additional time will allow Congress, the IRS and affected individuals and organizations to adjust to the substantial change.

ORDER

IT IS ORDERED that

1. It is DECLARED that 26 U.S.C. § 107(2) violates the establishment clause of the First Amendment to the United States Constitution.

2. Defendants Steve Mnuchin, John Koskinen and the United States of America are ENJOINED from enforcing 26 U.S.C. § 107(2). The injunction shall take effect 180 days after the conclusion of any appeals filed by defendants or intervenor-defendants or the expiration of defendants' or intervenor-defendants' deadline for filing an appeal, whichever is later.

3. The request for a tax refund made by plaintiff Freedom from Religion Foundation, Annie Laurie Gaylor, Dan Barker and Ian Gaylor as the personal representative of the estate of Anne Nicol Gaylor, is DENIED.

4. The clerk of court is directed to enter judgment accordingly and close this case.

Entered this 13th day of December 2017.

BY THE COURT:
/s/

_____
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ANNIE LAURIE GAYLOR, DAN BARKER, IAN GAYLOR, Personal Representative of the Estate of Anne Nicol Gaylor, FREEDOM FROM RELIGION FOUNDATION, INC.,

Plaintiffs,

v.

JACOB LEW, Secretary of the United States Department of Treasury, JOHN KOSKINEN, Commissioner of the Internal Revenue Service, UNITED STATES OF AMERICA,

Defendants,

and

BISHOP EDWARD PEECHER, CHICAGO EMBASSY CHURCH, FATHER PATRICK MALONE, HOLY CROSS ANGLICAN CHURCH, DIOCESE OF CHICAGO AND MID-AMERICA OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA, PASTOR CHRISTOPHER BUTLER,

Intervenor Defendants.

JUDGMENT IN A CIVIL CASE

Case No. 16-cv-215-bbc

This action came before the court for consideration with District Judge Barbara B. Crabb presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of plaintiffs Annie Laurie Gaylor, Dan Barker, Ian Gaylor, Personal Representative of the Estate of Anne Nicol Gaylor, and Freedom from Religion Foundation.

It is DECLARED that 26 U.S.C. § 107(2) violates the establishment clause of the First Amendment to the United States Constitution.

Defendants Steve Mnuchin, Secretary of the United States Department of Treasury, John Koskinen, Commissioner of the Internal Revenue Service, and the United States of America are ENJOINED from enforcing 26 U.S.C. § 107(2). The injunction shall take effect 180 days after the conclusion of any appeals filed by defendants or intervenor-defendants or the expiration of defendants' or intervenor-defendants' deadline for filing an appeal, whichever is later.

The request for a tax refund made by plaintiffs Freedom from Religion Foundation, Annie Laurie Gaylor, Dan Barker, and Ian Gaylor, as the Personal Representative of the Estate of Anne Nicol Gaylor, is DENIED.

s/ J. Titak, Deputy Clerk	12/15/2017
Peter Oppeneer, Clerk of Court	Date