2014 WL 1569041 (C.A.7) (Appellate Brief)
United States Court of Appeals, Seventh Circuit.

FREEDOM FROM RELIGION FOUNDATION, INC., et al., Plaintiffs-Appellee,
v.
Jacob J. LEW, in his official capacity as Secretary of the Treasury, et al., Defendants-Appellants.

No. 14-1152.
April 9, 2014.

Appeal from the United States District Court for the Western District of Wisconsin,
No. 3:11-cv-626-BBC. The Honorable Barbara B. Crabb, Judge Presiding

Amicus Curiae Brief of the Church Alliance, Et AL. in Support of Defendants-Appellants

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***I CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

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

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Attorney's Signature: *s/ Laurence A. Hansen*

Date: *April 8, 2014*

Attorney's Printed Name: *Laurence A. Hansen*

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

***1 PARTIES REPRESENTED BY LOCKE LORD LLP**

The Church Alliance, a coalition of the chief executive officers of more than 30 denominational benefit programs, covering ministers affiliated with the American Baptist Churches in the U.S.A., Assemblies of God, Associate Reformed Presbyterian Church, Association of Unity Churches, Christian Church (Disciples of Christ), Church of God (Anderson, IN), Church of God (Cleveland, TN), Christian Reformed Church in North America, Church of the Brethren, Church of the Nazarene, Community of Christ, Converge Worldwide (Baptist General Conference), Episcopal Church, Evangelical Free Church of America, Evangelical Lutheran Church in America, Evangelical Presbyterian Church, Fellowship of Christian Churches and Churches of Christ, Free Methodist Church - USA, International Church of the Foursquare Gospel, Jewish Conservative Movement, Lutheran Church-Missouri Synod, Mennonite Church USA, National Association of Free Will Baptists, Presbyterian Church (U.S.A.), Reformed Church in America, Seventh-day Adventist Church, Southern Baptist Convention, Unitarian Universalist Association, United Church of Christ, United Methodist Church, Wesleyan Church, Wisconsin Evangelical Lutheran Synod, and other denominations.

The following churches, associations or conventions of churches, or other religious organizations are additional *amici* represented by Locke Lord LLP in this matter:

The American Baptist Churches in the U.S.A.

General Synod of the Associate Reformed Presbyterian Church, Inc.

Cantors Assembly *

* = an organization affiliated with the Jewish Conservative Movement

Central Conference of American Rabbis

Christian Reformed Church in North America

Church of God (Anderson, IN)

Church of God (Cleveland, TN)

Churches of God, General Conference

Church of the Brethren

Church of the Nazarene

Community of Christ

Converge Worldwide (Baptist General Conference)

The Presiding Bishop of The Episcopal Church

***2** Evangelical Covenant Church

Evangelical Lutheran Church in America

Evangelical Presbyterian Church

Free Methodist Church - USA

International Church of the Foursquare Gospel

Jewish Educators Assembly *

* = an organization affiliated with the Jewish Conservative Movement

Jewish Theological Seminary of America *

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Lutheran Church--Missouri Synod

Moravian Church in America

Board of Retirement and Insurance of the National Association of Free Will Baptists

North American Association of Synagogue Executives *

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The Rabbinical Assembly *

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Reformed Church in America

The Salvation Army National Corporation

General Conference of Seventh-day Adventists

Union for Reform Judaism

Unitarian Universalist Association

Unitarian Universalist Ministers Association

Unitarian Universalist Retired Ministers and Partners Association

United Church of Christ

General Council on Finance and Administration of The United Methodist Church

United States Conference of Catholic Bishops

United Synagogue of Conservative Judaism *

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Wesleyan Church

Wisconsin Council of Churches

***3** Wisconsin Evangelical Lutheran Synod

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

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: *s/ Michael W. McConnell*

Date: *April 8, 2014*

Attorney's Printed Name: *Michael W. McConnell*

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

***1 PARTIES REPRESENTED BY KIRKLAND & ELLIS LLP**

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*1 INTERESTS OF THE *AMICI*

The Church Alliance and other religious organizations listed below respectfully submit this *amicus curiae* brief in support of appellants.

The Church Alliance is a coalition of the chief executive officers of more than 30 denominational benefit programs, covering ministers affiliated with the American Baptist Churches in the U.S.A., Assemblies of God, Associate Reformed Presbyterian Church, Association of Unity Churches, Christian Church (Disciples of Christ), Church of God (Anderson, IN), Church of God (Cleveland, TN), Christian Reformed Church in North America, Church of the Brethren, Church of the Nazarene, Community of Christ, Converge Worldwide (Baptist General Conference), Episcopal Church, Evangelical Free Church of America, Evangelical Lutheran Church in America, Evangelical Presbyterian Church, Fellowship of Christian Churches and Churches of Christ, Free Methodist Church - USA, International Church of the Foursquare Gospel, Jewish Conservative Movement, Lutheran Church--Missouri Synod, Mennonite Church USA, National Association of Free Will Baptists, Presbyterian Church (U.S.A.), Reformed Church in America, Seventh-day Adventist Church, Southern Baptist Convention, Unitarian Universalist Association, United Church of Christ, United Methodist Church, Wesleyan Church, Wisconsin Evangelical Lutheran Synod, and other denominations.

The Church Alliance has a substantial interest in the validity of section 107(2) of the Internal Revenue Code of 1986 both because of the immediate impact on ***2** compensation and housing, and also because of the indirect impact on retirement benefits. The Church Alliance believes that this brief, which focuses on the jurisprudential history of legislative accommodations, adds a perspective not duplicated by the parties.

The following churches, associations or conventions of churches, or other religious organizations, some of which are represented within the Church Alliance, are additional *amici* that have religious leaders eligible for the housing allowance under section 107(2) and support this brief:
American Baptist Churches in the U.S.A.

General Synod of the Associate Reformed Presbyterian Church, Inc.

Cantors Assembly *

* = an organization affiliated with the Jewish Conservative Movement

Central Conference of American Rabbis
Christian Reformed Church in North America

Church of God (Anderson, IN)

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***3** The Presiding Bishop of The Episcopal Church

Evangelical Covenant Church

Evangelical Lutheran Church in America

Evangelical Presbyterian Church

Free Methodist Church - USA

International Church of the Foursquare Gospel

Jewish Educators Assembly *

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Jewish Theological Seminary of America *

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Lutheran Church--Missouri Synod
Moravian Church in America

Board of Retirement and Insurance of the National Association of Free Will

Baptists

North American Association of Synagogue Executives *

* = an organization affiliated with the Jewish Conservative Movement

The Rabbinical Assembly *

* = an organization affiliated with the Jewish Conservative Movement

Reformed Church in America
The Salvation Army National Corporation

General Conference of Seventh-day Adventists

Union for Reform Judaism

Unitarian Universalist Association

Unitarian Universalist Ministers Association

***4** Unitarian Universalist Retired Ministers and Partners Association

United Church of Christ

General Council on Finance and Administration of The United Methodist

Church

United States Conference of Catholic Bishops

United Synagogue of Conservative Judaism *

* = an organization affiliated with the Jewish Conservative Movement

Wesleyan Church
Wisconsin Council of Churches

Wisconsin Evangelical Lutheran Synod

The parties have consented to the filing of this brief. No party's counsel authored this brief, in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person--other than *amici curiae*, their members, or their counsel-- contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION

The United States Supreme Court has long distinguished between affirmative assistance to religious organizations and merely lifting government-imposed burdens so as to allow those organizations to exercise their religious mission more freely. When Congress chooses not to impose a burden on religious organizations--whether by ***5** means of tax exemption or regulatory exception--it honors, rather than transgresses, this Nation's long tradition of separation between church and state. It does not establish religion to leave it alone.

Moreover, Internal Revenue Code section 107(2)--all "section" and "Code" references in this brief refer to the Internal Revenue Code--must be viewed in the context of the housing income exclusion of section 119, which is undoubtedly constitutional. Section 119 excludes employer-provided housing allowances from employees' income under certain circumstances. Congress has enacted multiple special provisions that relax the general conditions of section 119 for certain taxpayers, including members of the armed forces, I.R.C. § 134, teachers and other employees of educational institutions, I.R.C. § 119(d), and employees in remote locations abroad, I.R.C. § 119(c). The question raised in this appeal is whether the special provision pertaining to housing allowances for ministers, added to the other exceptions, is an impermissible establishment of religion.

It is not. As we explain, in enacting section 107, Congress recognized legitimate differences between ministers' housing and housing provided to secular employees. Forcing churches to conform to the section 119 criteria, Congress recognized, would create serious practical inequalities among religious groups, and would entangle the government in drawing lines regarding different forms of religious activity, even ***6** though those lines have little or no relation to legitimate tax policy in the context of churches.

Although section 107 refers to a "minister of the gospel," the Internal Revenue Service has always interpreted it as applying to persons holding an equivalent status in other religions. *See, e.g. Salkov v. Comm'r*, 46 T.C. 190 (1966) and Rev. Rul. 78-301, 1978-2 C.B. 103 (Jewish cantors); *see also* Rev. Rul. 58-221, 1958-1 C.B. 53 (rabbi's assistant). It presumably includes nontheists when they perform the functions of a minister. *See Washington Ethical Soc. v. District of Columbia*, 249 F.2d 127, 129 (D.C. Cir. 1957) (applying a religious tax exemption to the Ethical Culture movement); 29 C.F.R. § 1605.1 ("the [E.E.O.C.] will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."). Accordingly, the word "ministers," as used in this brief, refers to the ministers, priests, rabbis, imams, and other spiritual leaders covered by section 107. Similarly, "church" means the church, denomination, synagogue, temple, other house of worship, association or convention of such, seminary, or any other similar organization with which a "minister" is affiliated.

ARGUMENT

I. Section 107(2) is a permissible accommodation of religion that satisfies the three-prong *Lemon* test.

The Supreme Court has never interpreted the Establishment Clause as preventing legislatures from enacting laws with special reference to religion. Indeed, ***7** such an interpretation is belied by the very language of the First Amendment, which singles out "religion" for special treatment under both the Free Exercise and Establishment Clauses. *See Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 713 (1981). It often is legitimate (and sometimes is constitutionally required) for legislatures to take the special needs and circumstances of religion into account in drafting laws. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987); *Gillette v. United States*, 401 U.S. 437, 453 (1971).

The district court's opinion is premised in large part on the assumption that the government cannot extend a benefit to a religious entity without extending a similar benefit to secular entities. Op. at 25, 34. But that is contrary to Supreme Court precedent. In *Amos*, the Court expressly repudiated the argument that laws that "single[] out religious entities for a benefit" or "give special consideration to religious groups are *per se* invalid." 483 U.S. at 338. Rather, "[w]here...government acts with the proper purpose of lifting a regulation that burdens the exercise of religion," there is "no reason to require that the exemption comes packaged with benefits to secular entities." *Id.; see also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687,

705 (1994) (noting that "the Constitution allows the State to accommodate religious needs by alleviating special burdens"). Thousands of state and federal laws "single out" religion for special treatment. James E. Ryan, Smith *and the Religious Freedom Restoration Act: An* ***8** *Iconoclastic Assessment*, 78 Va. L. Rev. 1407, 1445-49 (1992) (citing more than 2,000 legislative accommodations of religion in federal and state law).

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court articulated a three-prong test for determining whether a legislative act can withstand an Establishment Clause challenge: (1) the act must have a secular legislative purpose; (2) its principal or primary effect must neither advance nor inhibit religion; and (3) it must not foster excessive governmental entanglement with religion. *Id.* at 612-13. This Court applies the *Lemon* test to Establishment Clause claims. *See, e.g.*, *Sherman ex rel. Sherman v. Koch*, 623 F.3d 501, 507 (7th Cir. 2010).

A. Section 107 has a secular purpose.

The "secular purpose" test "aims at preventing the relevant governmental decisionmaker...from abandoning neutrality and acting with the intent of promoting *a particular point of view in religious matters."* *Amos*, 483 U.S. at 335 (emphasis added). *See* Andrew Koppelman, *Secular Purpose*, 88 Va. L. Rev. 87, 89 (2002) (interpreting the secular-purpose requirement as meaning "that government may not declare religious truth"). A statute is not unconstitutional under this test merely because it provides a "benefit" to religion (even intentionally), but "only when...there was no question that the statute or activity was motivated wholly by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984).

***9** For a variety of historical reasons, some churches--especially older, more hierarchical churches--tend to own parsonages and rectories, while others--often newer, perhaps less firmly established churches--do not. Before the adoption of the Internal Revenue Code of 1954, section 22(b)(6) of the 1939 Code excluded from a minister's income a "dwelling house and appurtenances thereof" furnished to a minister of the gospel as part of his compensation. That section was carried forward into section 107(1) of the 1954 Code without substantive change. S. Rep. No. 83-1622, at 186 (1954); H. Rep. 83-1337, at A35 (1954). In adding section 107(2), Congress made clear that its purpose was to equalize the effect of section 107 on different churches. As explained in the Senate Report:

Under present law, the rental value of a home furnished a minister of the gospel as a part of his salary is not included in his gross income. This is unfair to those ministers who are not furnished a parsonage, but who receive larger salaries (which are taxable) to compensate them for expenses they incur in supplying their own home.

Both the House and your committee has [sic] removed the discrimination in existing law by providing that the present exclusion is to apply to rental allowances paid to ministers to the extent used by them to rent or provide a home.

S. Rep. No. 83-1622, at 16 (1954). [1] The Tax Court has accordingly recognized that "the purpose of [section 107(2)] was to equalize the situation between those ministers who ***10** received a house rent free and those who were given an allowance that was actually used to provide a home." *Marine v. Comm'r*, 47 T.C. 609, 613 (1967).

1 In adding section 107(2) to the 1954 Code, Congress could have been merely codifying judicial holdings that cash housing allowances to ministers were excludable from the ministers' taxable income on the basis of section 22(b)(6) of the 1939 Code. *See, e.g.*, *Conning v. Busey*, 127 F. Supp. 958, 959 (S.D. Ohio 1954); *MacColl v. United States*, 91 F. Supp. 721, 722 (N.D. Ill. 1950). In 1956 the IRS acknowledged the extended reach of section 22(b)(6) of the 1939 Code when it announced that it would no longer litigate whether cash housing allowances were exempt from federal income tax under that section. Rev. 56-58, 1956-1 C.B. 604, *obsoleted* by Rev. Rul. 72-619, 1972-2 C.B. 650.

Ensuring equal treatment of different churches is a legitimate secular purpose. [2] In fact, it is of constitutional dimension, since one of the clearest commands of the First Amendment is that all religions be treated equally. *See Larson v. Valente*, 456 U.S. 228,

244 (1982); *Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d 975, 991 (7th Cir. 2006) (First Amendment requires "governmental neutrality between religion and religion").

2 In Point I.B.2 below, we discuss other ways in which the enactment of section 107(2) prevents inequality, entanglement, and perverse incentives for religious bodies. These also constitute legitimate secular purposes for the provision.

The district court's chief response is to say that section 107(1) is not discriminatory because section 119 is not, meaning there was no discrimination problem for section 107(2) to remedy. Op. at 32, 34. But that is exactly backwards: *both* section 107(1) and section 119 discriminate in that they distinguish between employees with different housing arrangements. But it is because section 107(1) discriminates between different *religious* groups that its discrimination is constitutionally problematic in a way that section 119 is not, requiring the special solution of section 107(2).

***11** The district court's other response, that section 107(2) creates discrimination problems of its own, fares no better. Op. at 33. It makes no sense to say that the accommodation of section 107(2) is problematic because it does not apply to churches that have no clergy. The exemption addresses the problem of discrimination between churches with or without parsonages, and religions without clergy do not need the accommodation in the first place. Besides, almost every conceivable arrangement would create at least *some* inequities; Congress was entitled to cure the *most salient* of these.

B. Section 107 does not have the primary effect of advancing or inhibiting religion.

1. Even viewed in isolation from section 119, section 107 does not have the primary effect of advancing religion.

This Nation has a longstanding history of exempting religious activity from tax--sometimes as part of a broad category of eleemosynary institutions and sometimes not--reflecting a longstanding view that tax exemptions, unlike direct subsidies, reduce the level of interaction between church and state. *See Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970). The American constitutional tradition holds that while religion (as such) is not entitled to public subsidy, it may be exempted from taxation, "so long as none was favored over others and none suffered interference." *Id.* at 677. Tax exemption is best understood as a way of leaving churches alone--of neither advancing nor inhibiting their activities. That is why, when religion was disestablished in early America, tax ***12** exemptions for churches were regarded as consistent with disestablishment even by the most ardent separationists. *See id.* at 677-78; *id.* at 683-85 (Brennan, J., concurring). Government may not support religion, but the church need not be required to support the state.

The Supreme Court fully embraced this tradition in *Walz*. Describing a property tax exemption as merely "sparing the exercise of religion from the burden of property taxation," *id.* at 673, the Court reasoned:

> 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.... There is no genuine nexus between tax exemption and establishment of religion.

Id. at 675. Justice Brennan shared this view in a concurring opinion:

> Tax exemptions and general subsidies, however, are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer.

Id. at 690 (Brennan, J., concurring). Whatever the distinctions are between section 107(2) and the statute in *Walz*, Op. at 23-24, that case at a minimum stands for the proposition that a tax exemption for religion does not normally count as a subsidy.

Contrary to the district court's view that exemptions and subsidies are indistinguishable, *see* Op. at 27, the Supreme Court has continued to confirm the contrary conclusion. *See* ***13** *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1447 (2011); *see also* Boris Bittker, *Churches, Taxes and the Constitution*, 78 Yale L.J. 1285 (1969); Edward A. Zelinsky, *Are Tax "Benefits" Constitutionally Equivalent to Direct Expenditures?*, 112 Harv. L. Rev. 379 (1998).

Moreover, *Walz's* distinction between affirmative assistance and mere exemption from burden has been expanded from taxation to a wide array of regulatory exemptions. The Court distinguishes between measures designed to lift government-imposed burdens on the exercise of religion and those providing affirmative assistance or subsidies to religious activity. Whereas affirmative government assistance may be extended to religious bodies only on a neutral basis and subject to other limitations, *see Mitchell v. Helms*, 530 U.S. 793, 808-36 (2000); *Agostini v. Felton*, 521 U.S. 203, 222-35 (1997), it is not illegitimate for government to provide exemptions or accommodations specifically for the exercise of religion, *Hobbie*, 480 U.S. at 144-45; *Gillette*, 401 U.S. at 453; *see Amos*, 483 U.S. at 338 (where a challenged provision merely lifts a government-imposed burden on religious exercise, the Court has not "require[d] that the exemption come[] packaged with benefits to secular entities").

The implicit baseline for constitutional analysis is government inaction: if the government merely leaves churches alone, exempt from the burden of tax or regulation, it generally does not violate the Establishment Clause. Only when the government transfers resources from public coffers to religious bodies or otherwise directly ***14** participates in, directs, encourages, or endorses religious activity, does the question of "advancement" of religion arise.

The case the district court relied on, *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (plurality opinion per Brennan, J.), is not to the contrary. There, the Supreme Court struck down a Texas statute that exempted from state sales and use taxes "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teachings of the faith and books that consist wholly of writings sacred to a religious faith." *Id.* at 5. To be sure, the plurality opinion in that case contains broad language that seemingly contradicts the *Walz* distinction between tax exemptions and direct subsidies. *See, e.g.*, *id.* at 14 ("Every tax exemption constitutes a subsidy that affects nonqualifying taxpayers...."); *see also* Edward A. Zelinsky, *Dr. Warren, The Parsonage Exclusion, and the First Amendment*, 95 Tax Notes 115 (Apr. 1, 2002) (pointing out conceptual inconsistency between *Walz* and *Texas Monthly*). But the plurality opinion commanded only three votes. The controlling opinions--separate concurrences by Justices White and Blackmun (the latter joined by Justice O'Connor)--do not rest on any such path-breaking innovation. Because they constitute narrower grounds for the judgment, these concurring opinions are controlling. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (when no single rationale commands a majority, the Court's holding "may be viewed as that position taken by ***15** those Members who concurred in the judgments on the narrowest grounds") (citation omitted).

The simplest and most persuasive basis for the *Texas Monthly* decision appears in Justice White's concurring opinion, which the district court did not cite. Justice White noted that *Texas Monthly* involved differential taxation of organs of the press based on their content (indeed, of their viewpoint), which is plainly unconstitutional under the Press Clause. 489 U.S. at 25-26 (White, J., concurring); *see Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987). Any broader application to non-press activities, such as housing allowances for ministers, is therefore beyond the rationale of the case.

Justices Blackmun and O'Connor, while agreeing with Justice White, offered a different narrow rationale for invalidating the Texas statute. They criticized the plurality opinion for "subordinating the Free Exercise value, even...at the expense of longstanding precedents." *Tex. Monthly*, 489 U. S. at 27 (Blackmun, J., concurring). They declined to label tax exemptions as "subsidies," preferring to analyze the case within the framework of permissible accommodations of religion. *Id.* at 28 (citing *Amos*, 483 U.S. 327). Ultimately, they invalidated the statute not because it was a subsidy to religion, but because it was drawn too narrowly--protecting only periodicals "that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith." *Id.* at 5 (plurality opinion); *id.* at 28-29 (Blackmun, J., concurring). As they pointed out, this would exclude "philosophical ***16** literature distributed by nonreligious organizations devoted to such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong." *Id.* at 27-28 (Blackmun, J., concurring). Justices Blackmun and O'Connor thus proposed that the tax exemption should be broadened rather than eliminated.

Id. at 27-28 (Blackmun, J., concurring). And, they suggested that the tax exemption statute would likely be constitutional if it included "the sale of atheistic literature distributed by an atheistic organization"--but found that the record did not support any such interpretation. *Id.* at 29.

The district court failed to grapple with Justice Blackmun's concurrence, although acknowledging that it was "likely...controlling." Op. at 19. Whatever effect the plurality decision might have on section 107, Justice Blackmun's concurrence does not call the statute into question, for section 107 is not so narrowly drawn as the statute in *Texas Monthly*. It does not confine itself to ministers of certain types of churches. As noted earlier, it likely includes the functional equivalents of ministers in such nontheistic traditions as Buddhism, Taoist, or Ethical Culture. Nor is it an exemption based on content or viewpoint. Rather, it employs a "functional" test, based on the nature and scope of a minister's duties. *See, e.g.*, *Toavs v. Comm'r*, 67 T.C. 897, 903-04 (1977); *Colbert v. Comm'r*, 61 T.C. 449, 455 (1974). Ministers' work does not consist "wholly" of teaching the faith, and whether an individual is deemed a "minister" does not depend on the content of his or her beliefs. Because of the breadth of its coverage, ***17** section 107 is not subject to the same constitutional defect that Justices O'Connor and Blackmun identified. Indeed, in light of their apparent approval of a hypothetical statute extending the Texas exemption to "atheistic" publications, the broad-based exclusion here must be constitutional.

Finally, although the *Texas Monthly* plurality cited the "breadth" of the tax exemption in *Walz* as significant, *see Tex. Monthly*, 489 U.S. at 11, not even Justice Brennan supported a categorical ban on tax exemptions targeted exclusively to religious persons or groups. Justice Brennan qualified his opinion with the *caveat*--which the district court failed to acknowledge--that "we in no way suggest that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause." *Id.* at 18 n.8 (plurality opinion) (emphasis in original). Rather, Justice Brennan stated that "benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs" are permissible so long as they are "designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause" or "would not[] impose substantial burdens on nonbeneficiaries" of the programs. *Tex. Monthly*, 489 U.S. at 18 n.8 (plurality opinion). The problem in *Texas Monthly*, according to the plurality, was that "[n]o concrete need to accommodate religious activity ha[d] ***18** been shown."[3] *Id.* at 18. Availability of a benefit to secular entities may be *a* basis for upholding a benefit for religion, *see* Op. at 25, but it is certainly not the *only* reason. *See Amos*, 483 U.S. at 338.

3 Neither the two concurring Justices Blackmun and O'Connor nor the three dissenting Justices agreed with that conclusion. *See Tex. Monthly*, 489 U.S. at 27 (Blackmun, J., concurring); *id.* at 40-41 (Scalia, J., dissenting).

The district court thus mistakenly concluded that *Texas Monthly* stands for the proposition that "a tax exemption provided only to religious persons violates the establishment clause, at least when the exemption results in preferential treatment for religious messages." Op. at 19. In reality, *no* opinion in that case supports such a broad proposition, least of all the controlling concurrences.

2. Viewed in the context of section 119, as it should be, section 107 is a permissible accommodation of religion.

In contrast to the exemption in *Texas Monthly*, which applied solely to a narrow category of religious publications, section 119 excludes employer-provided housing benefits from income for a broad category of taxpayers. Section 107(2) simply ensures that the exclusion is equally available to ministers of all religions. The district court acknowledged that religious accommodations that "attempt to prevent [religious] inequality caused by government-imposed burdens" are permissible. Op. at 22. That is precisely what section 107(2) does. Even if Justice Brennan's reasoning in *Texas Monthly* controls, requiring churches and ministers to conform their affairs to the criteria of ***19** section 119 in order to receive the benefit of the housing exclusion would create inequalities among different churches, increase the intrusiveness and entanglement of government enforcement, and inhibit religious activity in ways that, Congress has determined, do not promote the ends of the Internal Revenue Code.

Section 119 contains general provisions for the exclusion of meals and lodging furnished for the convenience of the employer. Moreover, related Code provisions accommodate the needs of teachers, professors, and other employees of educational institutions, military personnel, and certain taxpayers working abroad. I.R.C. §§ 119(c)-(d), 134, 911. Although the precise reasons and circumstances vary, Congress determined in each case that the unique housing needs of particular professions are not well-served by the general rule of section 119.

The ministerial housing exemption is likewise unique, but the underlying principle is similar. Applied to churches and ministers, some section 119 criteria are arbitrary and would produce perverse and unequal results between denominations. Section 107 solves those problems, and enables ministers to share in a widely available tax exemption without the burden of complying with criteria that are arbitrary and unequal as applied to them. It follows that, applying the constitutional framework of *Amos* and the *Texas Monthly* plurality, section 107 is constitutional because the differences between sections 107 and 119 are "designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct ***20** protected by the Free Exercise Clause" or otherwise respond to a "concrete need to accommodate religious activity." *Tex. Monthly*, 489 U.S. at 18 & n.8 (plurality opinion).

There are four significant differences between section 107(2) and the housing exclusion of section 119: (1) the section 119 exclusion is available only to employees, not independent contractors; (2) section 119 extends only to housing on the premises of the employer, as a condition of employment; (3) section 119 extends only to housing provided in-kind and not to cash housing allowances; and (4) the section 119 exclusion requires case-by-case proof that the lodging is provided for the benefit of the employer. As shown below, each difference constitutes a legitimate response by Congress to ministers' special circumstances.

a. for employees only

Section 107 extends the housing exclusion to all ministers, whether they are employees or self-employed. This serves the interests both of interdenominational equality and of reducing entanglement. The employment status of ministers varies from one faith tradition to another, depending in large part on ecclesiology. *Compare Weber v. Comm'r*, 103 T.C. 378, 394 (1994), *aff'd*, 60 F.3d 1104 (4th Cir. 1995) (finding a minister of The United Methodist Church to be an employee), *with Shelley v. Comm'r*, 68 T.C.M. (CCH) 584, *10 (1994) (finding a minister of the International Pentecostal Holiness Church to be self-employed); *see also* I.R.S. Tech. Adv. Mem. 98-25-002 (Jun. 19, 1998) ("[d]ifferences in church structure" account for the contrary results in *Weber* and ***21** in *Shelley*). Experience has shown that drawing the line between employees and independent contractors in the context of ministers is difficult and intrusive.

In light of longstanding constitutional principle "that one religious denomination cannot be officially preferred over another," *see Larson*, 456 U.S. at 244, it is surely permissible for Congress to decide not to base eligibility for a tax benefit on such a distinction. Examining the particular facts and circumstances in each case is an intrusive inquiry, causing one appellate court to remark that "we are somewhat concerned about venturing into the religious arena in adjudicating cases such as this one, and interpreting what really are church matters as secular matters for purposes of determining a minister's tax status." *Alford v. United States*, 116 F.3d 334, 339 (8th Cir. 1997). Congress was free to accommodate the different polities among churches by treating all ministers, whether employees or self-employed, similarly.

Congress has made similar accommodations elsewhere in the Code by treating ministers uniformly, regardless of whether they are employees or self-employed, sometimes treating all ministers as employees and sometimes treating them as self-employed. For example, section 414(e)(3)(B)(i) provides that for purposes of Code sections regarding qualified retirement plans, the term "employee" includes self-employed ministers. In contrast, for purposes of self-employment taxes (Code sections 1401-03), all ministers are treated as self-employed. *See Social Security and Other Information for Members of the Clergy and Religious Workers: For Use in Preparing 2013* ***22** *Returns*, IRS Pub. 517. By eliminating the arbitrary distinction between employees and self-employed ministers for purposes of the housing exclusion, Congress responded to a "concrete need" for accommodation. *Tex. Monthly*, 489 U.S. at 18 (plurality opinion).

b. on the employer's premises

Section 119 applies only to housing provided on the employer's premises, meaning "at a place where the employee performs a significant portion of his [or her] duties or on the premises where the employer conducts a significant portion of [its] business." *Comm'r v. Anderson*, 371 F.2d 59, 67 (6th Cir. 1966), *cert. denied*, 387 U.S. 906 (1967). Congress relaxed this requirement to accommodate employees of educational institutions, allowing housing exclusions for lodging provided "on, or in the proximity of, a campus of the educational institution...." I.R.C. § 119(d)(3)(A). Presumably, this is on the theory that colleges and similar institutions have a legitimate pedagogical interest in encouraging faculty to live "in the proximity of" the campus so as to be more easily available to students.

Similar considerations lie behind the elimination of this restriction as applied to ministers. Unlike most secular employees, ministers perform many of their duties at home, or away from the house of worship. They are often expected to be available to their parishioners at all hours in response to personal crises, and they frequently use their residences for church functions such as counseling, fellowship gatherings, prayer groups, Torah study, and the like.

***23** Functionally, the minister's residence, whether owned by the church or not, is an extension of the church and its ministries. Because of the geographically dispersed nature of church activities, it would make little functional sense to insist that ministerial housing be part of the same real estate parcel as the house of worship. A rectory (or manse or ashram) is no less a rectory because it may be miles from the church building.

To be sure, not all ministers' homes are functional extensions of a church. But this is exactly the situation that Congress was entitled to take into account in enacting section 107(2). That section avoids the need for the IRS to investigate what the "duties" of a minister are and where they are or should be performed. *Cf. United States v. Morelan*, 356 F.2d 199 (8th Cir. 1966) (determining whether restaurant allowance for on-duty state highway patrol was on the "business premise of the employer"). For Congress to insist on case-by-case evidence of such issues would entail monitoring and surveillance of church activities--precisely the type of governmental entanglement that the third prong of the *Lemon* test is designed to prevent--and would have dramatically unequal effects on different religions. As Justice Brennan explained in *Amos*, 483 U.S. at 343 (Brennan, J., concurring), Congress was constitutionally entitled to extend the benefit broadly to all ministers rather than to insist on an intrusive case-by-case test.

c. in-kind only

Section 119 applies only to in-kind benefits. Treas. Reg. § 1.119-1(e). Only if the employer owns or rents the home and provides it to the employee is its value excluded ***24** from the employee's gross income. If applied to churches, this limitation would serve no discernible functional purpose, but would produce the effect of discriminating between different churches. As noted above, elimination of these inequalities was Congress' express purpose in adding section 107(2).

From the church's point of view, there is no difference in function between a church-owned parsonage and a home owned or rented by the minister. Either way, the dwelling is usually used for church-related functions as well as for the minister's personal dwelling. The principal difference is that a church-owned parsonage is less adaptable to the diverse needs of today's ministers. In an earlier day, the typical minister was likely to be of a certain age, station, and family composition. No longer. Today, ministers have a wide variety of housing needs--from single-person homes to homes accommodating large families. For Congress to limit the housing exclusion benefit to church-owned housing would induce churches either to buy and sell property with every change of clergy or to force upon their ministers a one-size-fits-all form of housing. Congress was entitled to determine that no tax policy justifies so pointless an imposition.

So, too, transportation patterns no longer require ministers to live adjacent to the church building to have their homes used for church purposes by congregants who themselves live over a large geographical area. In some cases, the locus of the church

community may have moved away from the church, and the minister's residence might ***25** be more central to that locus than the actual church building. Section 107(2) accommodates these realities whereas section 119 does not.

More important, imposing an in-kind-only limitation on churches would have the effect of according different treatment to different churches. Some churches-- typically older, wealthier, and more established churches--have a tradition of owning and providing parsonages or rectories at or near the church building. Anglican canon law used to require it. *See Town of Pawlet v. Clark*, 13 U.S. 292, 330 (1815). Other churches have not taken that course, and would find it difficult to do so today. Some churches have the resources to purchase or maintain housing for their ministers, while other churches do not. Many churches in this country--storefront churches, for example--do not even own their own houses of worship. It is unfair--and might even be unconstitutional-- to treat these churches differently. The more equal treatment of different churches is a legitimate purpose and effect under the Establishment Clause.

d. for the benefit of the employer

Finally, under section 119, the housing exclusion is available only if it is provided for the convenience of the employer. I.R.C. § 119(a). That requirement is eliminated under section 107 for ministers and under section 119(d) for employees of educational institutions. I.R.C. §§ 107, 119(d). If we are correct that it was constitutional for Congress to eliminate the requirement that the taxpayer live in employer-owned ***26** housing on the business premises, then it is unclear what further relevance this requirement may have. Congress could have eliminated it for that reason alone.

In any event, Congress was surely entitled to remove this intrusive and entangling inquiry, with its potential for discrimination between religious traditions. The vast majority of ministers will satisfy this requirement because of the usual practice of using the minister's home for church functions. To require proof on a case-by-case basis would require the IRS to second-guess ecclesiastical judgments regarding the scope of the mission of the religious organization and the mission's relation to minister housing. [4] As Justice Brennan explained, those are not appropriate inquiries for a government agency. *Amos*, 483 U.S. at 342 (Brennan, J., concurring).

4 Indeed, it is not always clear who the "employer" is. *See, e.g.*, *Weber*, 103 T.C. at 394 (while finding that taxpayer/minister was an employee of The United Methodist Church, court avoided the more difficult question of "which part of the United Methodist Church is the employer.").

In sum, each of the differences between sections 107(2) and 119 constitutes a legitimate response to the special needs and circumstances of ministers, just as other Code provisions accommodate section 119 to the special needs and circumstances of teachers, military personnel, and Americans working in remote locations. By tailoring these requirements, Congress has removed burdens on churches' ability to organize and conduct their religious missions, eliminated a serious source of inequality among ***27** churches, and reduced the level of entanglement between religious and governmental authorities.

C. Section 107(2) does not entail an "excessive entanglement" between church and state.

Nor can section 107(2) be faulted on "excessive entanglement" grounds. Indeed, either position--to exclude housing allowances as income or to include them-- would entail a certain degree of entanglement. *See Walz*, 397 U.S. at 674-75. Congress correctly judged that there would be less entanglement with section 107(2) than without it.

"Not all entanglements...have the effect of advancing or inhibiting religion [,]" and the Supreme Court has always tolerated some level of interaction between church and state. *Agostini*, 521 U.S. at 233. The administration of section 107(2) does not involve the type of "comprehensive, discriminating, and continuing state surveillance" of religion that constitutes excessive entanglement and runs afoul of the Establishment Clause. *Lemon*, 403 U.S. at 619. The three factors to consider in evaluating administrative entanglement are (1) the character and purpose of the religious institution affected by the government action;

(2) the nature of government-mandated activity; and (3) the resulting relationship between the government and the religious institution. *See Sherman*, 623 F.3d at 507 (*citing Lemon*, 403 U.S. at 612-13).

Section 107(2) implicates none of these concerns. The parties to an administrative conflict under section 107(2) will almost invariably be only the government and an individual minister. Administration of section 107(2) is straightforward and requires no ***28** intrusive examination of religious practices or beliefs. To ascertain what part of the minister's income constitutes a housing allowance exempt under section 107(2), one must review only the minister's employment contract or church resolution approving the allowance. This is no more intrusive than determining whether exempt property is being used for religious worship--a routine task that unquestionably survives the entanglement bar. *See Walz*, 397 U.S. at 676-80.

Comparison to the sales tax exemption struck down in *Texas Monthly* is illustrative. There, the state was required to inspect publications to determine whether their messages were consistent with "the teaching of the faith"--a process that necessarily led to "government embroilment in controversies over religious doctrine." *Tex. Monthly*, 489 U.S. at 20. This constitutes entanglement of the worst sort--and bears no resemblance to section 107.

II. Reliance interests militate against a change in the law.

Particularly strong reliance interests would render a change in the law on this point inappropriate and unjust.

For more than 200 years, tax exemptions and exclusions for religious activity have been common in our law, and their constitutional status secure. *See* Jason Butterfield et al., *The Parsonage Exemption Deserves Broad Protection*, 16 Tex. Rev. L. & Pol. 251, 255 (2012). The few cases challenging them were dismissed for want of a substantial federal question. ***29** *See* Boris Bittker, *Churches, Taxes and the Constitution*, 78 Yale L.J. 1285 & n.6 (1969). "If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Walz*, 397 U.S. at 678 (citation omitted); *see also Walz*, 397 U.S. at 681 (Brennan, J., concurring) ("The existence from the beginning of the Nation's life of a practice, such as tax exemptions for religious organizations, is not conclusive of its constitutionality. But such practice is a fact of considerable import in the interpretation of abstract constitutional language.").

When asked to reconsider established precedent, a court should consider "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling." *Tate v. Showboat Marine Casino P'ship*, 431 F.3d 580, 583 (7th Cir. 2005). In this context--far more than in *Texas Monthly*--reliance interests are particularly strong. For more than 50 years, the churches of America and their ministers have been assured that they could receive the benefit of the housing-allowance exclusion without constructing and maintaining church-owned parsonages on the premises of their place of worship. If section 107(2) is held unconstitutional, churches that acted in reliance on this statute--and on the century and a half of constitutional jurisprudence that supported it--would be trapped. In many cases, because of the scarcity of land, it is no longer possible to construct an on-premises parsonage. In other cases, it would be prohibitively expensive.

***30** Moreover, ministers have arranged their affairs (buying property, establishing and funding pensions) in accordance with the tax rules established by Congress. They will find their circumstances severely straitened, and their hopes for a tolerable retirement jeopardized. Indeed, the practical consequences are particularly severe as they affect retirement. As an indirect result of section 107(2), a portion of retirement benefits paid to retired ministers may be excluded from the ministers' gross income. Rev. Rul. 75-22, 1975-1 C.B. 49. If section 107(2) were held unconstitutional, older ministers, who have contributed to their retirement plans throughout their ministerial careers in order to provide a certain level of after-tax income during retirement, may be unable to contribute enough over their remaining working years to make up for the shortfall. Retired ministers would have no ability at all.

These consequences, which would be felt by institutions and individuals of limited resources, and who have dedicated themselves to a higher calling, are gravely unjust. The benefits to other taxpayers of invalidating section 107(2), by contrast,

would be minimal. The reliance interests here and the hardships that would be caused by upsetting them would render a change in the law especially unjust.

*31 CONCLUSION

For the above reasons, the Church Alliance respectfully submits that section 107(2) is constitutional.

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