UNITED STATES DISTRICT COURT
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.,

Plaintiffs,

v.

JACOB LEW, 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.

Case No. 16-CV-215

INTERVENOR-DEFENDANTS' BRIEF IN SUPPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

For almost a century, Congress has excluded the value of a minister's home or housing allowance from federal income tax. 26 U.S.C. § 107. Plaintiffs now attack this longstanding tax provision as a violation of the Establishment Clause. But their argument fails on multiple levels.

First, their argument is ahistorical. At the time of the founding, established churches in the colonies received very specific forms of financial support—namely, land grants, direct grants from the public treasury, and compulsory "tithes" from the general public. But tax exemptions—including tax exemptions for parsonages—were never viewed as a form of establishment. Such exemptions were widespread, and they remained widespread even after colonial churches were disestablished. Instead, they were viewed as *furthering* the separation of church and state. Given the Supreme Court's recent admonishment that "the Establishment Clause *must* be interpreted by reference to historical practices and understandings," this history carries great weight. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (emphasis added).

Second, Plaintiffs' argument ignores the logic of the tax code. Section 107 is not an odd, isolated provision that treats ministers' housing unlike any other type of housing. Rather, it is one small part of a broad scheme of housing-related exemptions, all rooted in the "convenience of the employer doctrine"—which is as old as the federal income tax itself. All of these exemptions, including § 107, serve the same secular purpose: ensuring fair tax treatment of employee housing costs. Thus, § 107 is consistent with even the most stringent interpretation of *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989).

Third, Plaintiffs' argument contradicts core Establishment Clause values. If § 107 were eliminated, the taxation of ministers would no longer be governed by a bright-line rule; instead, it would be governed by the notoriously fact-intensive standard of 26 U.S.C. § 119. The result would be deep, church–state entanglement—with IRS officials forced to answer religious questions about the relationship between churches and ministers and the way ministers use their homes. And if only § 107(2) were eliminated, the result would be pervasive discrimination among churches—with newer and poorer churches bearing the brunt of the discrimination. This is the opposite of what is required under the *Lemon* test. *See Lemon v. Kurtzman,* 403 U.S. 602 (1971).

Finally, Plaintiffs' argument would produce widespread harm. Hardest hit would be small churches like Intervenors', which would be forced to curtail vital ministries and, in some cases, shut down. But the harm would not be limited to small churches. The (il)logic of Plaintiffs' argument threatens scores of longstanding federal and state tax provisions, all of which have been designed to protect the separation of church and state.

Fortunately, none of this needs to happen. Plaintiffs lack standing to seek an injunction, because, despite any dispute over their 2012 taxes, the IRS has eliminated any continuing harm by granting their request for a refund of 2013 taxes. But even if the Court reaches the merits, it should hold that § 107 is not only permissible under the Establishment Clause, but desirable. Accordingly, the Court should grant summary judgment to Defendants on all of Plaintiffs' claims.

PROCEDURAL HISTORY

This is the second time that Plaintiffs' have challenged the constitutionality of 26

U.S.C. § 107 in this Court. *Freedom From Religion Found., Inc. v. Lew*, 983 F. Supp. 2d 1051 (W.D. Wis. 2013) (hereinafter "*FFRF I*"); Facts ¶ 176-77. The first case was dismissed after the Seventh Circuit held that Plaintiffs lacked standing. *Freedom from Religion Found., Inc. v. Lew*, 773 F.3d 815, 825 (7th Cir. 2014) (hereinafter "*FFRF II*"); Facts ¶ 178. This Court has already dismissed Plaintiffs' second challenge to § 107(1) for lack of standing. Order Granting Mot. to Dismiss for Lack of Standing, ECF No. 15.

On January 19, 2017, this Court allowed Intervenors to intervene as of right to defend the constitutionality of § 107(2), explaining that "[n]o other group of people has the potential to be more significantly affected by this case than ministers such as the proposed intervenors and those they represent." Opinion & Order, ECF No. 35. Intervenors now move the Court for summary judgment on each of Plaintiffs' claims.

SUMMARY JUDGMENT STANDARD

Summary judgment must be entered when the pleadings, affidavits, and other summary judgment evidence show that "there is no genuine dispute as to any material fact" and that the moving party "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The burden rests on the moving party to identify record evidence that shows the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 322-25. After the moving party has met its burden, the burden shifts to the nonmoving party to demonstrate that summary judgment should not be granted by showing that there exists a genuine fact issue for trial. *Id.* at 321-25. The court must view the evidence submitted and "all *reasonable* inferences," *Van den Bosch v. Raemisch*, 658 F.3d 778, 785 (7th Cir. 2011) (emphasis

added), in the light most favorable to the nonmoving party, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), but "conclusory allegations . . . should be disregarded," *Drake v. 3M*, 134 F.3d 878, 887 (7th Cir. 1998). Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

ARGUMENT

I. Plaintiffs lack standing.

The Constitution limits the jurisdiction of the federal courts to "Cases" and "Controversies." U.S. Const. art III, § 2, cl. 1. "No 'Case' or 'Controversy' exists if the plaintiff lacks standing to challenge the defendant's alleged misconduct." *FFRF II*, 773 F.3d at 819 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). To establish standing, Plaintiffs bear the burden of demonstrating three elements: "(1) a concrete and particularized 'injury in fact' (2) that is fairly traceable to the challenged action of the defendant, and that is (3) likely to be redressed by a favorable judicial decision." *FFRF II*, 773 F.3d at 819 (quoting *Lujan*, 504 U.S. at 560). Importantly, the plaintiff "must demonstrate standing separately for each form of relief sought." *Schirmer v. Nagode*, 621 F.3d 581, 585 (7th Cir. 2010) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.,* 528 U.S. 167 (2000)).

Here, Plaintiffs seek only prospective relief. *See* Compl. at 13, ¶ A-D. They do not seek a refund of any taxes that they paid in the past; instead, they seek a nationwide injunction striking down § 107(2) prospectively. *Id.* ¶ B. To obtain this relief, it is not enough to show "[p]ast exposure to illegal conduct." *O'Shea v. Littleton*, 414 U.S. 488,

495–96 (1974). Instead, they must show "continuing, present adverse effects" that would be remedied by an injunction. *Id.*; *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 108 (1998) (no standing to request injunctive relief when only past harm is alleged); *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (no standing unless plaintiffs are "likely to suffer future injury"); *Gates v. Towery*, 430 F.3d 429, 432 (7th Cir. 2005) (plaintiffs "lack standing to seek [prospective relief], because they do not contend that they are likely to be arrested again"); *Schirmer*, 621 F.3d at 585 (no standing when an injunction "is unlikely to prevent any injury to these plaintiffs").

Here, plaintiffs have failed to demonstrate any continuing harm that would be remedied by an injunction. In fact, the available evidence suggests that they will *not* suffer continuing harm. According to an FFRF press release, although Gaylor and Barker were denied a refund in 2012, their request for a refund in 2013 was granted. Facts ¶¶ 190-91. They have produced no evidence suggesting that they will again be denied a refund in the future. Thus, "[a]bsent a sufficient likelihood that [Gaylor and Barker] will again be wronged in a similar way, [they are] no more entitled to an injunction than any other citizen of [the United States]; and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of [the IRS] are unconstitutional." *Lyons*, 461 U.S. at 111.

The remaining Plaintiffs fare no better on the issue of standing. Ian Gaylor lacks standing to pursue injunctive relief on behalf of Anne Nicol Gaylor's estate because Ms. Gaylor is deceased. Facts ¶ 173. Because Ms. Gaylor cannot benefit from changes

in the tax law that her estate seeks, an injunction cannot redress her alleged injuries. *Platcher v. Health Prof'ls, Ltd.*, No. 04-1442, 2006 WL 1980193, at *4 (C.D. Ill. July 12, 2006) ("Decedent, unfortunately, cannot benefit from the systemic prison changes his estate seeks."); *Moulton v. Indiana*, No. 209-CV-118-PPS, 2010 WL 2008986, at *3 (N.D. Ind. May 19, 2010) (holding that representative of decedent's estate lacked standing to sue for injunctive relief "because the injunctive and declaratory relief she requests will not affect [the decedent] in any way, and will certainly not redress the alleged injuries"); *see also Bowman v. Corrections Corp. of America*, 350 F.3d 537, 550 (6th Cir. 2003) (same). "Federal courts have limited power to award equitable relief." *Platcher*, 2006 WL 1980193, at *4. And because Ms. Gaylor cannot seek to utilize § 107(2) again in the future, there is no "likelihood that [she] will again be wronged in a similar way." *Lyons*, 461 U.S. at 111. Absent ongoing harm, the estate's representative lacks standing.

FFRF likewise lacks standing because the individual Plaintiffs lack standing. FFRF has not alleged any injury to itself, only to its members. Compl. ¶¶ 5-11, 14-18, 54-59 (alleging injuries to the "individual plaintiffs" only). Because no identified member has standing, FFRF lacks standing to sue on its members' behalf. *See Hunt v. Washington St. Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977) (associational standing requires that an association's "members would otherwise have standing to sue in their own right"). Accordingly, all of Plaintiffs' claims must be dismissed for lack of subject-matter jurisdiction.

II. The parsonage allowance is not only permissible under the Establishment Clause, but desirable.

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I, cl. 1. To interpret this clause, the Supreme Court has employed various "tests," depending on the context of the dispute and the inclinations of the Justices.

In some cases, the Court has applied the *Lemon* test, which asks whether the government's action (1) has a religious "purpose," (2) has the "primary effect" of "advancing" or "endorsing" religion; and (3) fosters "excessive government entanglement with religion." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993) (describing *Lemon* test); *Lynch v. Donnelly*, 465 U.S. 668, 688-89 (1984) (O'Connor, J. concurring) (first articulating "no endorsement" test). This test has been heavily criticized by courts and commentators as malleable, self-contradictory, and ahistorical.[1] At least 7 current or recent Justices have called for its rejection.[2] And in

[1] *See, e.g.*, *Doe v. Elmbrook School District*, 687 F.3d 840, 869-77 (Easterbook, J. & Posner, J., dissenting from en banc decision) (calling *Lemon* and "no endorsement" test "hopelessly open-ended"); Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 Calif. L. Rev. 5 (1987); Michael McConnell, *Accommodation of Religion*, Sup. Ct. Rev., 1985, at 1.

[2] *See, e.g., Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2284 (2014) (Scalia, J., dissenting from denial of certiorari) (calling the endorsement test "antiquated"); *Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J., dissenting from denial of certiorari) ("Establishment Clause jurisprudence is undoubtedly in need of clarity"); *Utah Highway Patrol Ass'n v. American Atheists, Inc.*, 132 S. Ct. 12 (2011) (Thomas, J., dissenting from denial of certiorari) ("Establishment Clause jurisprudence [is] in shambles," "nebulous," "erratic," "no principled basis," "Establishment Clause purgatory," "impenetrable," "ad hoc patchwork," "limbo," "incapable of consistent application," "our mess," "little more than intuition and a tape measure,"); *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J.,

recent cases, the Court has treated the *Lemon* factors as "no more than helpful sign-posts," if it has applied them at all. *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality); *see also Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (not applying *Lemon*); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (same); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (same).

Instead, the Court has increasingly focused on the historical meaning of the Establishment Clause and the practices that have long been permitted under it. *Town of Greece*, 134 S. Ct. at 1819; *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.,* 565 U.S. 171, 183 (2012); *Van Orden*, 545 U.S. at 686; *Marsh v. Chambers*, 463 U.S. 783, 786 (1983). It has also decided two prominent cases in the tax context—*Walz v. Tax Commission*, 397 U.S. 664 (1970) and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). In these cases, although the Court mentioned some of the *Lemon* factors, its analysis was not driven by a three-factor test. Rather, the Court focused on the history of the Establishment Clause, the nuances of the tax code, and principles unique to the tax context. *Walz*, 397 U.S. at 675-680; *Texas Monthly*, 489 U.S. at 11-13.

Here, while it may be useful to consider the *Lemon* factors, it is also crucial to

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concurring) (comparing the *Lemon* test to a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried"); *Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., joined by Thomas, J., dissenting); *Allegheny Cty. v. American Civil Liberties Union*, 492 U.S. 573, 655-57 (1989) (Kennedy, J. concurring in judgment in part and dissenting in part); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) (O'Connor, J., concurring in judgment); *Wallace v. Jaffree*, 472 U.S. 38, 107-13 (Rehnquist, J., dissenting); *id.* at 90-91 (White, J., dissenting).

consider the historical meaning of the Establishment Clause, the practices that were permitted under it, and the Court's analysis in *Walz* and *Texas Monthly*. As explained below, the parsonage allowance is not only permissible under the Establishment Clause, but desirable, because it furthers the core Establishment Clause values of neutrality, non-discrimination, and non-entanglement. It is fully consistent with the historical meaning of the Establishment Clause. Part II.A, *infra*. It is fully consistent with the plurality and the controlling concurrence in *Texas Monthly*. Parts II.B and C, *infra*. And it is fully consistent with the *Lemon* test. Part II.D, *infra*. Finally, striking down the parsonage allowance would threaten scores of other provisions in the federal and state tax codes. Part II.E., *infra*.

A. The parsonage allowance is consistent with a historical understanding of the Establishment Clause.

In its most recent Establishment Clause decision, the Supreme Court reaffirmed that "the Establishment Clause *must* be interpreted by reference to historical practices and understandings." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (emphasis added). It engaged in a thorough review of legislative prayer practices "[f]rom the earliest days of the Nation" that have "long endured," and "become part of our heritage and tradition," concluding that the "prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures." *Id.* at 1823, 1825, 1819.

But this is nothing new; history has always been highly relevant in the Supreme Court's Establishment Clause jurisprudence. In *Marsh v. Chambers*, the Court upheld the practice of a state-paid chaplain's legislative prayer because it was "deeply

embedded in the history and tradition of this country." 463 U.S. 783, 786 (1983). The history "sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress." *Id.* at 790. Similarly, in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*—the Court's first decision expounding the ministerial exception, which is rooted in the Establishment Clause—the Court examined the history of colonial "[c]ontroversies over the selection of ministers," as well as "two events involving James Madison," to determine that "[t]he Establishment Clause prevents the Government from appointing ministers." 565 U.S. 171, 183-84 (2012). And in *Van Orden v. Perry*, 545 U.S. 677, 686 (2004) (plurality opinion), a plurality of the Court upheld Texas's Ten Commandments display, applying an analysis "driven both by the nature of the monument and by our Nation's history." *See also id.* at 699-700 (Breyer, J., concurring) (looking to "national traditions" and the monument's historical context).

It should come as no surprise, then, that the Court has similarly applied a historical analytical framework in tax cases. In *Walz*, the Court rejected an Establishment Clause challenge to New York's property tax exemption for church property. 397 U.S. at 680. The Court held that "[t]here is no genuine nexus between tax exemption and establishment of religion." *Id.* at 675. It reached this conclusion based on more than two centuries of "our history and uninterrupted practice" showing 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. In his concurrence, Justice Brennan similarly

looked to "history" and "practices of the Nation," finding that "[t]he existence from the beginning of the Nation's life of a practice . . . is a fact of considerable import" in interpreting constitutionality under the Establishment Clause. *Id.* at 681. Given this "uninterrupted" and "historic practice," *id.* at 685, 687, Justice Brennan observed that religious tax "exemptions were not among the evils that the Framers and Ratifiers of the Establishment Clause sought to avoid." *Id.* at 682.

So what does history have to say about the tax treatment of churches and ministers? At the Founding, an establishment of religion consisted of several key elements, all involving state coercion to participate in religious activity: (1) government control of the doctrine and personnel of the church, (2) government coercion of religious beliefs and practices, (3) government assignment of important civil functions to the church, and (4) government financial support of the church. *See* Michael McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003); *see also Felix v. City of Bloomfield*, 847 F.3d 1214 (2017) (Kelly, J., and Tymkovich, C.J., dissenting from denial of rehearing en banc) (relying on Professor McConnell's historical analysis). The "financial support" took very specific forms, consisting of government land grants to the established church, direct grants from the public treasury, and compulsory taxes or "tithes" for the support of churches and ministers. McConnell, 44 Wm. & Mary L. Rev. at 2146-59.

By contrast, tax exemptions—like the parsonage allowance—were never considered to be a hallmark of a Founding-era establishment. As the Court said in *Walz*, 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." 397 U.S. at 675. Far from creating an impermissible unity of church and state, a tax exemption "restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other." *Id.* at 676.

Over 200 years of unbroken history confirm that religious tax exemptions are fully consistent with the historical meaning of the Establishment Clause. Religious tax exemptions permeate state and federal tax codes, and have done so since the Founding. For example, in 1799, Virginia took steps to disestablish the Anglican Church, repealing measures that had given property to the church, and condemning them as being "inconsistent with the principles of the constitution, and of religious freedom, and manifestly tend[ing] to the re-establishment of a national church." 2 Va. Stat. at Large of 1792-1806 (Shepherd) 149. Yet even after it formally disestablished the Anglican Church, Virginia consistently exempted the property of "any college, houses for divine worship, or seminary of learning" from taxation. 9 Va. Stat. at Large (1775-78, Hening) 351; 13 Va. Stat. at Large (1789-92, Hening) 112, 241, 336-37; 2 Va. Stat. at Large of 1792-1806 (Shepherd) 149. "It may reasonably be inferred that the Virginians did not view the exemption for 'houses of divine worship' as an establishment of religion." *Walz*, 397 U.S. at 683 (Brennan, J., concurring). The municipal government of the District of Columbia exempted "houses for public worship" from property taxes in 1802. Acts of the Corporation of the City of Washington, First Council, c. V,

approved Oct. 6, 1802, at 13. Significantly, "[a]ll 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. And "[f]or so long as federal income taxes have had any potential impact on churches—over [120] years—religious organizations have been expressly exempt from the tax." *Id.*

While property tax exemptions for churches have often included other non-profit charitable organizations as well, many other religious tax exemptions have not. Early Congresses viewed religious tax exemptions as consistent with the Establishment Clause even when the exemptions did not apply to secular groups. For example, Congress refunded import duties paid by religious organizations on religious articles like plates for printing Bibles,[3] church vestments, furniture, and paintings,[4] and church bells;[5] and exempted all churches and appurtenant property in D.C. "from any and all taxes or assessments, national, municipal, or county."[6] Similarly, "[a]t least 45 States provide exemptions for religious groups without analogous exemptions for other types of nonprofit institutions." *Texas Monthly*, 489 U.S. at 31 (Scalia, J., dis-

[3] 6 Stat. 116 (1813); 6 Stat. 600 (1834).

[4] 6 Stat. 162 (1816).

[5] 6 Stat. 675 (1836).

[6] Act of June 17, 1870, 16 Stat. 153.

senting). These exemptions range from sales and beverage tax exemptions for sacramental wine[7] and meals served by churches[8] to sales tax exemptions for church vehicles used to transport people for religious purposes.[9] And, analogously to § 107, numerous states exempt clergy housing from taxation—and have done so for many decades.[10]

The distinction between these permissible religious tax exemptions and prohibited government sponsorship of religion is not mere formalism or historical accident. Exempting religious actors from taxation is qualitatively different than providing direct financial support, because tax exemptions respect First Amendment values by protecting church autonomy and reducing government entanglement with religion. The Supreme Court "has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987). Thus, it is a "permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Corp. of the Presiding Bishop*, 483 U.S. at 335.

Imposing additional taxes on ministers' housing allowances would interfere with

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[7] Haw. Rev. Stat. § 244D-4(b)(4); S.D. Codified Laws § 35-5-6(2); Wash. Rev. Code § 66.20.020(3).

[8] Cal. Rev. & Tax. Code Ann. § 6363.5; Idaho Code § 63-3622J; Md. Ann. Code, Tax-Gen. § 11-206(d)(1)(ii).

[9] Mich. Comp. Laws § 205.54a(b)(ii); Mo. Rev. Stat. § 144.450(4); Va. Code § 58.1-3617.

[10] *See Texas Monthly*, 489 U.S. at 31 n.3 (Scalia, J., dissenting) (collecting statutes).

the ability of churches to carry out their religious missions by diverting scarce resources away from their core First Amendment activities. As Justice Brennan recognized in *Walz*: "[T]axation would surely influence the allocation of church resources," with "public service activities . . . bear[ing] the brunt of the reallocation." 397 U.S. at 692 (Brennan, J., concurring). Taxing Bishop Ed's housing allowance, for example, would threaten Chicago Embassy Church's mission to minister to Chicago's South Side. Facts ¶¶ 93-98. Either Bishop Ed would have to take a part-time job and reduce the time he spends ministering to the church and local community, *id.* ¶¶ 93-94, or the church would have to make up the difference by diverting funds from its critical community ministries, *id.* ¶¶ 95-98. Even more dramatically, taxing Father Malone's housing allowance could force him to leave Holy Cross altogether. *Id.* ¶ 120-23. Because Holy Cross is on "a shoestring budget," forcing it to shoulder the added tax burden would likely force it to close down. *Id.* ¶ 123. Again, as Justice Brennan recognized, taxation "would bear unequally on different churches, having its most disruptive effect on those with the least ability to meet the annual levies assessed against them." *Walz*, 397 U.S. at 692 (Brennan, J., concurring). Finally, taxing the housing allowances of priests in the Diocese would cut their "already meager salaries," forcing the priests "to further cut back their priestly work in order to take additional secular work." Facts ¶ 161. Taking priests away from their pastoral duties endangers their ability to properly care for the spiritual well-being of their parishes. *Id.* ¶ 131-34, 141, 156-59.

The parsonage allowance not only alleviates a government-imposed burden on

churches, but also reduces government entanglement in religion by avoiding the "direct confrontations and conflicts" between ministers and the government that would occur without it. *Walz*, 397 U.S. at 674. With increased taxation come more IRS deficiency actions, more "tax liens, [and] tax foreclosures." *Id.* Religious tax exemptions thus "constitute[] a reasonable and balanced attempt to guard against" the "latent dangers inherent in the imposition of . . . taxes." *Walz*, 397 U.S. at 673.

In short, while the Establishment Clause prohibits the types of direct financial support that prevailed in colonial establishments—land grants, direct grants from the treasury, and compulsory "tithes" to support churches and ministers, McConnell, 44 Wm. & Mary L. Rev. at 2146-59—it does not bar the tax exemption at issue here. Such exemptions were common at the time of the Founding and actually further the core Establishment Clause goals of alleviating government burdens on religion, avoiding discrimination among churches, and avoiding entanglement between church and state.

B. The parsonage allowance is consistent with the controlling opinion in *Texas Monthly*.

The parsonage allowance is also consistent with *Texas Monthly*. Nearly 20 years after a 7–1 majority in *Walz* upheld tax exemptions for churches as a practice "deeply embedded in the fabric of our national life," 397 U.S. at 676, a fractured Court in *Texas Monthly* invalidated a 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. No opinion received more than three votes.

Justice Brennan, in a plurality opinion joined by Justices Marshall and Stevens, concluded that the sales tax exemption violated the Establishment Clause because it constituted a "subsidy exclusively to religious organizations," "burden[ed] nonbeneficiaries markedly," and "c[ould] not reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion." *Id.* at 15 (plurality). He argued that a religious tax exemption would be constitutional only if it were part of a broader scheme that provided benefits to "a large number of nonreligious groups as well." *Id.* at 11.

Justice White concurred in the result, but avoided the Establishment Clause altogether. He concluded that the sales tax exemption "discriminates on the basis of the content of publications," and therefore "is plainly forbidden by the Press Clause of the First Amendment." *Id.* at 25-26 (White, J., concurring).

Justice Blackmun, joined by Justice O'Connor, concluded that the sales tax exemption violated the Establishment Clause, but offered a "narrower resolution of the case." *Id.* at 28. Specifically, they acknowledged that "the Free Exercise Clause [may] require[] a tax exemption for the sale of religious literature by a religious organization." *Id.* And they acknowledged that an exemption might be upheld if it was coupled with an exemption for "philosophical literature" covering similar topics. *Id.* at 27. But they reasoned that "by confining the tax exemption exclusively to the sale of religious publications, Texas engaged in preferential support for the communication of religious messages." *Id.* at 28 (Blackmun, J., concurring). This sort of "statutory preference for the dissemination of religious ideas offends our most basic understanding of

what the Establishment Clause is all about." *Id.* Thus, for the Blackmun/O'Connor concurrence, the critical issue was that the tax exemption applied "exclusively" to religious literature, and that this had the effect of giving preferential support to religious messages. This focus on a preference for religious messages is the "narrowest grounds" for decision, and is therefore the controlling opinion under *Marks v. United States*, 430 U.S. 188, 193 (1977). *Accord FFRF I*, 983 F. Supp. 2d at 1061-62 (Blackmun/O'Connor concurrence is controlling); *Catholic Health Initiatives Colorado v. City of Pueblo, Dep't of Fin.*, 207 P.3d 812, 828 (Colo. 2009) (Eid, J., dissenting) (same).

Here, the parsonage allowance is distinguishable from the tax exemption struck down in *Texas Monthly* in important ways. First, unlike *Texas Monthly*, where the tax exemption for religious literature stood alone, the parsonage allowance is coupled with *numerous* tax exemptions for nonreligious housing allowances. *See infra* Part II C. These include exemptions for any nonreligious employee who receives lodging for the convenience of his employer, § 119(a), any nonreligious employee living in a foreign camp, § 119(c), any nonreligious employee of an educational institution, § 119(d), any nonreligious member of the uniformed services, § 134, any nonreligious government employee living overseas, § 912, any nonreligious citizen living abroad, § 911, and any nonreligious employee temporarily away from home on business, §§ 162, 132. It is as if, in *Texas Monthly*, the state had coupled the tax exemption for religious literature with a tax exemption for business literature, scientific literature, educational literature, travel literature, and government literature. 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 other secular messages. Indeed, in such circumstances, Justices Blackman and O'Connor would likely have argued that "the Free Exercise Clause *requires* a tax exemption for the sale of religious literature." *Texas Monthly*, 489 U.S. at 28, 26 (emphasis added) (citing *Follett v. McCormick*, 321 U.S. 573 (1944), and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)).

Second, the Blackman/O'Connor concurrence did not address preferential support for "religion" generally; instead, it emphasized that the Court was dealing with "the taxation of books and journals," which implicates "three different Clauses of the First Amendment: the Free Exercise Clause, the Establishment Clause, and the Press Clause." *Id.* at 26, 28. Accordingly, its Establishment Clause 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 ("spreading the gospel"); *id.* ("spread the gospel"); *id.* ("publications"); *id.* ("religious literature"); *id.* at 27 ("religious books"); *id.* ("religious books"); *id.* ("religious literature"); *id.* ("philosophical literature"); *id.* at 28 ("taxation of books and journals"); *id.* ("religious literature"); *id.* ("religious literature"); *id.* ("religious publications"); *id.* ("religious messages"); *id.* ("dissemination of religious ideas"); *id.* at 29 ("religious literature"); *id.* ("religious literature"); *id.* ("atheistic literature"); *id.* ("religious literature"). Here, of course, the parsonage allowance applies to housing, not religious literature. And it applies regardless of whether the minister who lives there

is involved in spreading a religious message. In that sense, because it is tied to property, the parsonage allowance is much more like the property-tax exemption upheld in *Walz*. Indeed, while some ministers certainly use their homes to teach and counsel their congregations, the connection between homes and religious messages here is even weaker than the connection between actual church buildings and religious messages in *Walz*. And the Blackmun/O'Connor concurrence certainly did not disturb *Walz*'s ruling on exemptions for churches more generally.

C. The parsonage allowance satisfies even the more restrictive test of the *Texas Monthly* plurality.

Even assuming the *Texas Monthly* plurality is controlling, the parsonage allowance still satisfies that more stringent test. Under the *Texas Monthly* plurality, "[w]hat is crucial is that any subsidy afforded religious organizations be warranted by some *overarching secular purpose* that justifies like benefits for nonreligious groups." 489 U.S. at 14 n.4 (emphasis added). The fit between the overarching secular purpose and the benefit for religious organizations 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) (quoting *Walz,* 397 U. S. at 696).

Here, § 107(2) is part of a broad scheme of tax exemptions serving the same secular purpose: ensuring fair tax treatment of employee housing costs. Since its inception, the federal income tax system has recognized that some housing costs are incurred primarily for "the convenience of the employer"—not for the employee's personal consumption—and are therefore not income. Many tax provisions embody this

doctrine. Some provisions demand case-by-case analysis of each situation, but others establish bright lines for certain classes of workers, reducing the disputes and non-uniformity that would result from an individualized, case-by-case approach. This reduction of disputes and non-uniformity is especially vital in the context of ministers, because it fulfills the Establishment Clause's core directives of limiting entanglement between church and state and avoiding discrimination among religious groups.

1. Non-ministers receive a variety of tax-exempt housing benefits under the "convenience of the employer" doctrine.

Section 107(2) is part of a broad package of tax exemptions that all trace their origin to the "convenience of the employer" doctrine, which is as old as the federal income tax itself. One cannot understand § 107(2) without understanding the convenience of the employer doctrine—including its rationale, its history, and its codification throughout the tax code.

Rationale of the Doctrine. The convenience of the employer doctrine flows from a very basic principle about the nature of income—namely, 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) (emphasis added). For example, a worker might receive any number of things that simultaneously benefit her *and* her employer's business—such as meals, travel, entertainment, and 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. In general, when an employee receives ordinary lodging or a housing allowance, it does not benefit the employer other than by compensating the employee, and so the value of the lodging is treated as income. But in some cases, 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. For these workers, the lodging is an important component of their job. As one early court put it, it is "part of the maintenance of the [employer's] general enterprise," not "part of the individual income of the laborer." *Jones v. United States*, 60 Ct. Cl. 552, 575 (1925); *see generally* J. Patrick McDavitt, *Dissection of a Malignancy: The Convenience of the Employer Doctrine*, 44 Notre Dame Law. 1104 (1969). In such cases, excluding the lodging from income does not confer a special benefit; rather, it avoids unjustly taxing workers on amounts they receive primarily on another's behalf.

History of the Doctrine. The convenience of the employer doctrine was first recognized by administrative rulings in 1914—immediately after imposition of the federal income tax in 1913—in cases involving *government employees* who received *in-kind* lodging. *Id.* at 1105 (citing T.D. 2079, 16 Treas. Dec. Int. Rev. 249 (1914)). But the doctrine quickly expanded to include *private employees* and *cash housing allowances*. In 1919, it was extended to in-kind lodging provided to private seamen. *Id.* at 1106 (citing O.D. 265, 1 C.B. 71 (1919)). In 1920, it was extended in principle to all private employees. *Id.* (citing Treas. Reg. 45, art. 33 (1920 ed.); T.D. 2992, 2 C.B. 76 (1920)). In 1921, it was extended by statute expressly to ministers. Revenue Act of

1921, Pub. L. No. 98, § 213(b)(11), 42 Stat. 227, 239 (overturning O.D. 862, 4 C.B. 85 (1921)). And in 1925—in the first federal court case addressing the doctrine—it was extended to cash housing allowances. *Jones*, 60 Ct. Cl. 552.

Early IRS rulings also extended the doctrine to cash allowances for *volunteer charitable activities*. In 1919, it was extended to a volunteer in the American Red Cross. O.D. 11, 1919-1 C.B. 66. And in the same year, it was extended to a clergyman under a vow of poverty. O.D. 119, 1919-1 C.B. 82. The non-economic motivation of these activities made it relatively easy to conclude that the allowances were primarily for the benefit of the general enterprise, not a private benefit to induce performance.

Codification in the Tax Code. In 1954, Congress codified some aspects the "convenience of the employer" doctrine in § 119(a)(2). Section 119(a)(2) now 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,[11] museum directors,[12] an oil executive living in Tokyo,[13] the president of the Junior Chamber of Commerce,[14] a state governor,[15] a rural school system superintendent,[16] a prison warden,[17] and many others.

But § 119(a)(2) is not the only provision codifying the convenience of the employer doctrine. Other provisions relax the requirements of § 119(a)(2) for certain types of employees. For example, § 119(c) governs "lodging in a camp located in a foreign country." It defines "camp" in a way that eliminates the "business premises" and "condition of employment" factors. *Compare* § 119(c) *with* § 119(a)(2). The rationale is that, when the 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

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

[12] 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).

[13] *Adams v. United States*, 218 Ct. Cl. 322 (1978).

[14] *U.S. Jr. Chamber of Commerce v. United States*, 167 Ct. Cl. 392 (1964).

[15] 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).

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

[17] I.R.S. Priv. Ltr. Rul. 9126063 (March 29, 1991).

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 in *Jones*—namely, 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." 60 Ct. Cl. at 569. *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. This reversed previous law, which required case-by-case application of the convenience of the employer doctrine to such employees. McDavitt, 44 Notre Dame Law. at 1108 & n.40 (collecting decisions).

Section 911 extends yet 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, through a cash allowance, or even purchased with their own funds. The basic 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. 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.

The following chart summarizes these exemptions:

Tax Treatment of Housing Benefits

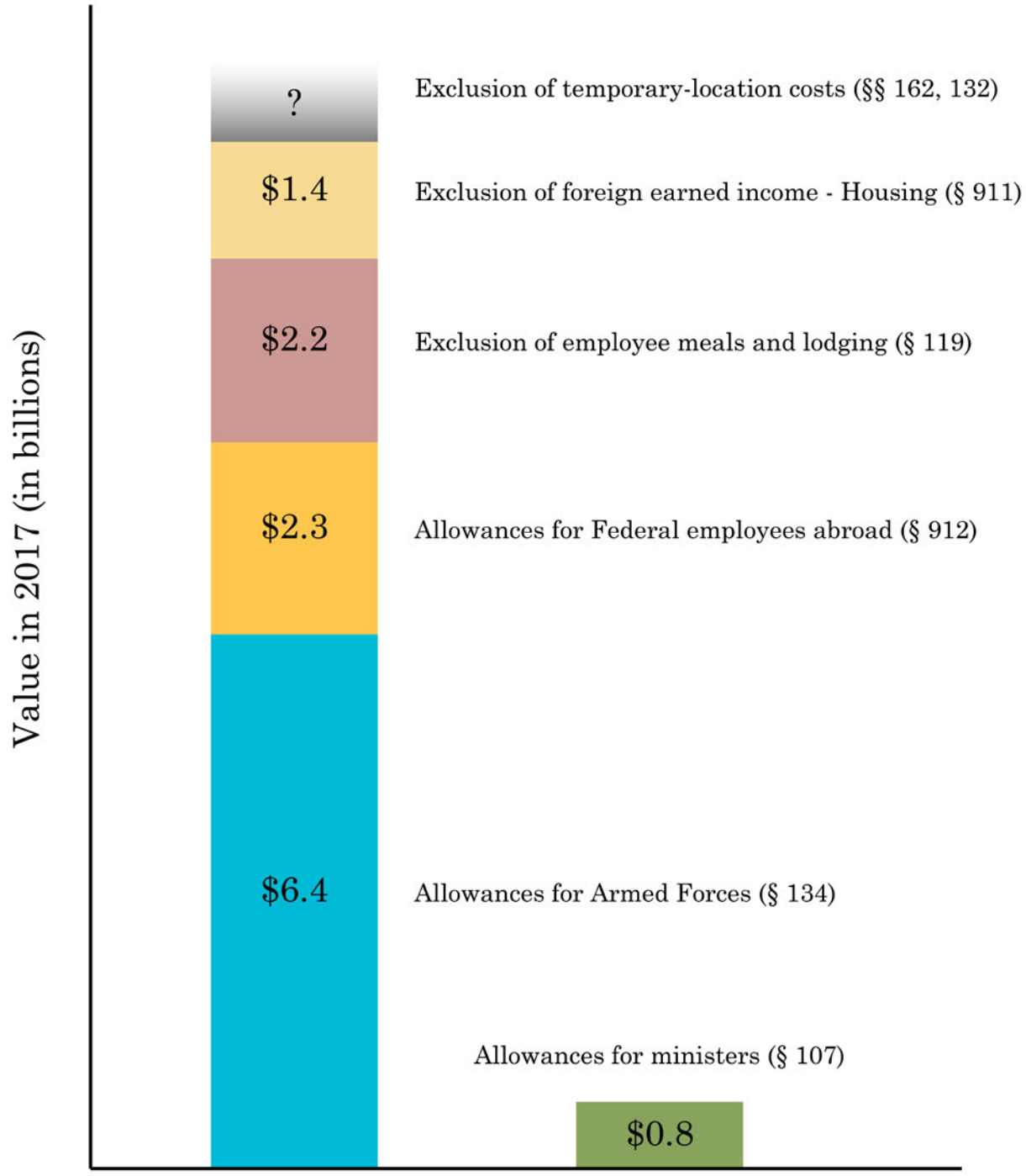
Sec.	Who is eligible?	Form?	What must be shown?
119(a)	All employees, secular or religious	In-kind	Lodging is (1) furnished by employer for employee; (2) furnished in kind; (3) on business premises of employer; (4) for convenience of employer; and (5) condition of employment.
119(c)	Any employee living in a foreign camp	In-kind	Lodging is (1) furnished by employer for employee; (2) furnished 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 inst.	In-kind	Lodging is (1) on or near campus, and (2) furnished by the educational institution.
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.

In short, Congress has enacted a broad package of tax benefits designed to relieve workers who face unique, job-related housing requirements. The default rule is § 119(a)(2), which establishes a demanding, case-by-case test requiring all employees to demonstrate that their lodging is provided for the convenience of their employer. But Congress also 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.

Value of the Exclusions. FFRF has previously suggested that these exemptions apply only to a small number of secular groups. But according to Congressional estimates, the annual value of these exemptions vastly exceeds § 107. The following graph shows the projected value of these exemptions in 2017.[18]

[18] *See* Facts ¶ 58 (citing Staff of the Joint Committee on Taxation, Estimates of Federal Tax Expenditures for Fiscal Years 2015-2019 (Comm. Print 2015) 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 $7.5 billion. *Id.* Allowances for Armed Forces and federal employees include more than just housing.

Value of Federal Housing Exemptions



As this graph shows, § 107 represents only a small fraction of exemptions for housing. All of these exemptions are reasonable reflections of the same overarching secular purpose of the convenience of the employer doctrine.

2. Ministers fit comfortably within the "convenience of the employer" doctrine.

In light of this treatment of secular workers, the question under the plurality in *Texas Monthly* is simply stated: Can it be "fairly concluded that [ministers] could be thought to fall within the natural perimeter [of this legislation]?" 489 U.S. at 17. The answer is a resounding "yes."

A comparison to the strongest case—members of the military—is instructive. As *Jones* explained, a member of the military—whether living at home or abroad, on base or off, active duty or retired—is deemed to fall within the convenience of the employer doctrine on a *per se* basis because his 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." 60 Ct. Cl. at 569. Ministers face similar job-related demands on their housing:

Required Physical Presence. First, ministers are typically required to live at or near the church to be close to those they serve. This is most obvious in the case of members of monastic communities like those in the Diocese, who share all things in common and must live in a parsonage or similar setting in close proximity to their church and labors. Facts ¶ 146.

But it is also true in other settings. Many churches, including ROCOR, require their priests to live within the boundaries of the parish and near the church. *Id.*

¶¶ 129, 143. Some churches are dedicated to serving a particular neighborhood, like Chicago Embassy Church serves Englewood, and the minister is expected to live in or near that neighborhood even when it is dangerous. *Id.* ¶ 66, 81-87, 97. The only way for Bishop Ed to provide spiritual leadership to his flock is to live among them. *Id.* ¶¶ 74-79. Likewise, Father Malone must live near his congregation to properly minister to their spiritual needs. *Id.* ¶ 104-110. That is why he lives just nine blocks from where the Church meets on Sundays. *Id.* ¶ 110.

Still other churches assign ministers to serve in homeless shelters, hospitals, or nursing homes where they are expected to live in close proximity to those they serve. Facts ¶ 119. This sort of "voluntary displacement" has deep theological roots and, in the case of Christianity, is believed to mirror the incarnation of Christ. Henri J.M. Nouwen et al., Compassion: A Reflection on the Christian Life 60-73 (2005); Facts ¶ 131.

On a more practical level, ministers in many small churches are the primary caretaker of the church building. Facts ¶ 142. Like the caretakers of apartment buildings—who often receive tax-free 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. *Id.* The need is magnified in the case of ROCOR priests, who must be present when outside maintenance or emergency personnel enter the church to ensure that holy items within the church are not desecrated. *Id.*

Service Day and Night. Ministers are also expected to be available to serve their flocks at any hour of the day or night. Facts ¶ 75; ¶ 76 ("Bishop Ed is always on call.");

¶ 110 ("Because [temporal and spiritual] needs can arise at any time, day or night, Father Malone is often involved in this ministry late in the evening and early in the morning."); ¶ 139 ("[B]eing a priest" is "essentially a 24/7 job."). ROCOR priests are responsible to "see to it that none of [their] parishioners dies without a final confession and the Holy Mysteries of Christ." Facts ¶ 141. "This means that, wherever [they are, they] must drop whatever [they are] doing to respond to a parishioner who is ill and at risk of dying." *Id.* If the priest is not available at all hours, these sacraments cannot be administered, and parishioners are at risk of the "great spiritual tragedy" of dying without them. *Id.* Because most ROCOR priests are bi-vocational, they must often hold services as early as 6 am or as late as midnight in order to perform the required services on holy days while still maintaining secular employment. *Id.* ¶ 157-58.

Ministers also respond at all hours to comfort grieving families, pray with congregants about emergencies, counsel spouses facing marital strife, hear confessions, and offer advice. *Id.* ¶¶ 108-110, 139-40. And as part of the "Chicago Peace Campaign," Bishop Ed stands on street corners of the most violent parts of Englewood and engages directly with those who are or might be gang members. *Id.* ¶ 84. The demands of ministry and the major life events of a congregation are not confined to regular business hours. *Id.* ¶ 149.

Use of Lodging for Their Duties. Ministers are also expected to use their homes to serve the church. In the Christian New Testament, there are two main lists of

qualifications for ministers; both require them to be "hospitable." *Titus* 1:8; *1 Timothy* 3:2 (Revised Standard Version); Facts ¶ 148.

In practice, this means that ministers like Bishop Ed, Father Malone, and Father Gregory regularly host gatherings like prayer meetings and church social events in their homes. Facts ¶ 80, 115-17, 149. It also means providing temporary lodging for church members in transition, guest speakers, missionaries, and other travelers with a connection to the church—a practice frequently commended in the Christian New Testament. *See, e.g.*, *Matthew* 10:11 (lodging for apostles); *Acts* 16:15 (lodging for missionaries); *Romans* 16:2 (lodging for Phoebe); *3 John* 1:5-8 (lodging for traveling Christians); Facts ¶ 118, 148, 150. Many congregants also expect the minister's home to be accessible for unplanned social visits. *Id.* ¶¶ 117, 149.

Ministers also use their homes for church-related duties. When congregants seek comfort, prayer, counsel, confession, and advice—often at irregular hours—they often meet in the minister's home. *Id.* ¶¶ 80, 117, 149. Bishop Ed uses his home to meet with the Church's pastoral team and prepares his sermons in his home office. *Id.* ¶ 80. Besides conducting the divine services and making personal visits, Father Gregory performs most of his pastoral duties from his home. *Id.* ¶ 149. And in small churches that lack their own building, like Holy Cross and new parishes in the Diocese, the only place to gather for worship is often the priest's home. *Id.* ¶¶ 115-16, 152.

Frequent Movement and Limited Choice. Ministers also face frequent movement and limited choice in their housing. This is most obvious in hierarchical denominations, such as ROCOR, where the placement of ministers is dictated by higher church authorities. *Id.* ¶ 145. In ROCOR, the diocesan Bishop has absolute authority to move priests from parish to parish. *Id.* Bishops can also agree to move priests across diocesan lines, including to foreign countries. *Id.* Nor is frequent movement limited to hierarchical denominations. The average tenure of Southern Baptist ministers is less than 3 years, and for Mainline Protestant ministers it is only four years. Facts ¶ 51.

In many religious communities, the minister's home is also expected to set an example of a frugality. This is obviously true for members of religious orders who take a vow of poverty. Facts ¶ 151. But it also includes other religious groups, where a luxurious house may be viewed as a sin or a distraction from the minister's pastoral service. *Id.* ¶ 102, 151; *see also* Alison Smale, *Vatican Suspends German Bishop Accused of Lavish Spending on Himself*, N.Y. Times, Oct. 23, 2013. In other cases, ministers may be obliged to live in an area with housing costs far higher than the minister would otherwise choose. Facts ¶ 42. Either way, the housing costs are driven by the needs of the church, not the personal consumption choices of the minister.

* * *

The point of all of this is not that ministers are exactly like military service members in every respect. It is that they are in a unique, non-commercial 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 (plurality). Accordingly, § 107(2) is constitutional even under the more stringent test of the *Texas Monthly* plurality.

In that sense, this case is analogous to *Rojas v. Fitch*, 127 F.3d 184 (1st Cir. 1997), *abrogated on other grounds by Hardemon v. City of Boston*, No. 97-2010, 1998 WL 148382 (1st Cir. Apr. 6, 1998). There, the First Circuit considered an Establishment Clause challenge to religious exemptions from federal and state unemployment taxes. The plaintiff argued that these exemptions provided unique, unjustified benefits to religious employers in violation of *Texas Monthly*. The First Circuit, however, disagreed.

Applying the *Texas Monthly* plurality, it held that a religious tax exemption is permissible as long as similar exemptions are "conferred upon a wide array of nonsectarian groups . . . in pursuit of some legitimate secular end." *Id.* at 188 (quoting *Texas Monthly*, 489 U.S. at 14-15). Turning to the unemployment taxes at issue, the court noted that the federal and state insurance programs "exclud[e] from coverage a variety of workers whose employment patterns are irregular or whose wages are not easily accountable." *Id.* at 188. Although the plaintiff argued that these exemptions were underinclusive and, thus, effectively favored religion, the court rejected the argument that "a provision incidentally benefitting religion *must* grant a like benefit to every group that could also conceivably fall within the secular rationale for the exemption provision." *Id.* at 189. Rather, it was enough that the exemptions "serve the

legitimate secular purpose of facilitating the administration of the unemployment insurance system" and reduce "entanglement concerns." *Id.*

Here, the fit between § 107 and the "legitimate secular purpose" of the convenience of the employer doctrine is even stronger. The exemption has a far longer historical pedigree. And the value of the exemption is dwarfed by the value of a wide array of nonreligious exemptions. Accordingly, this is an *a fortiori* case.

3. To the extent that the parsonage allowance provides special treatment to ministers, it is justified by important First Amendment principles.

Not only do ministers fit comfortably within the convenience of the employer doctrine, but there are powerful reasons for addressing the taxation of ministers separately in § 107, and not simply lumping them in with all other employees under § 119. Indeed, just as Congress adapted the convenience of the employer doctrine to employees in foreign camps (§ 119(c)), educational institutions (§ 119(d)), military service (§ 134), overseas government jobs (§ 912), overseas private jobs (§ 911), and jobs requiring temporary displacement (§§ 162 and 132), it has adapted the doctrine to ministers—and it has very good secular reasons for doing so. Specifically, § 107 serves two critical secular purposes: reducing entanglement between church and state, and avoiding discrimination among religious groups. Both purposes are not just constitutionally permissible but laudable.

a. The tax code routinely provides special treatment to churches and ministers to reduce entanglement and discrimination among religions.

FFRF's lawsuit implicitly assumes that churches and ministers are in an ordinary

employment relationship, and so any tax provision addressing them separately is automatically suspect. But that assumption is flawed. In many cases, the First Amendment not only permits "special solicitude" for churches, but requires it. *Hosanna-Tabor*, 565 U.S. at 189. In particular, the First Amendment (1) restricts government interference in the relationship between churches and ministers, *id.*; (2) forbids government entanglement in religious questions, *Walz*, 397 U.S. at 674; and (3) prohibits government discrimination among denominations, *Larson v. Valente*, 456 U.S. 228, 244 (1982). These three values—church autonomy, non-entanglement, and non-discrimination—are reflected throughout the tax code in specific protections for churches, none of which are available to secular non-profits.

For example, several provisions protect the relationship between churches and ministers by exempting churches from paying or withholding certain types of taxes:

- Churches are not required to withhold federal income taxes from ministers in the exercise of ministry. 26 U.S.C. § 3401(a)(9).
- Churches are exempt from Social Security and Medicare taxes for wages paid to ministers in the exercise of ministry; instead, ministers are uniformly treated as self-employed. 26 U.S.C. §§ 1402(c)(4), 1402(e), 3121(b)(8).
- Churches are exempt from state unemployment insurance funds authorized by the Federal Unemployment Tax Act. 26 U.S.C. § 3309(b)(1).

Other provisions protect church autonomy by exempting churches from disclosing information:

- Churches and certain related entities are not required to file Form 990, which discloses sensitive financial information. 26 U.S.C. § 6033(a)(3).

Still others reduce entanglement by offering unique procedural protections:

- Churches receive special procedural protections when subjected to a tax audit. 26 U.S.C. § 7611.

- Churches need not petition the IRS for recognition of their tax-exempt status under § 501(c)(3). 26 U.S.C. § 508(a), (c)(1)(A).

Still others modify tax provisions so that they apply neutrally among various church polities:

- Churches can 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. 26 U.S.C. § 414(e). This is designed "[t]o accommodate the differences in beliefs, structures, and practices among our religious denominations."[19]

- Churches can include ministers in 403(b) contracts (a type of tax-deferred benefit), even if ministers do not qualify as employees. 26 U.S.C. § 403(b)(1)(A)(iii).

- Churches can provide certain insurance to entities with common religious bonds, even if those entities are not structured to meet normal common control tests. 26 U.S.C. § 501(m)(3)(C)-(D); G.C.M. 39874 (May 4, 1992); Treas. Reg. § 1.502-1(b).

Congress has been particularly careful to make sure that general tax rules do not discriminate among ministers based on the nature of their relationship with the church. For example, when Congress extended eligibility for social security to ministers in 1954, it stipulated that all ministers would be treated as self-employed, regardless of whether they were common-law employees—precisely to avoid discriminating between groups based on the status of their ministers as employees. Conf. Rep.

[19] *See* 26 U.S.C. § 414(e)(3)(B), (5)(A); Miscellaneous pension bills: Hearings before the Subcommittee on Private Pension Plans and Employee Fringe Benefits of the Committee on Finance, United States Senate, Ninety-Sixth Congress, First Session (Dec. 4, 1979), at 367 (Statement of Sen. Talmadge).

No. 83-2679 (1954).

In short, the tax code does not treat churches and ministers as ordinary employers and employees. Rather, Congress has crafted numerous tax provisions that apply *only to churches and ministers*. These provisions, like § 107(2), reduce entanglement and prevent discrimination among religions.

b. The parsonage allowance reduces entanglement.

FFRF claims that § 107 might *increase* entanglement because it requires the government to apply "detailed rules" that "require complex inquiries into the tenets of religious orthodoxy" to determine who is a minister. Compl. ¶¶ 35, 40. But this is mistaken. Viewed in context of the entire tax code, § 107 is far less entangling than the next best alternative—which is applying the notoriously difficult standard of § 119 to ministers.

Whenever the government taxes churches and ministers, there is no completely disentangling alternative: "Either course, taxation of churches or exemption, occasions some degree of involvement with religion." *Walz*, 397 U.S. at 674. To figure out which alternative is best, it is essential to distinguish between two types of entanglement. One is called "enforcement entanglement." Edward A. Zelinsky, *Do Religious Tax Exemptions Entangle in Violation of the Establishment Clause?*, 33 Cardozo L. Rev. 1633 (2012). It occurs when the government *taxes* churches, and is therefore required to value church property, place liens on church property, and (in some cases) foreclose on church property. *Id.* This creates direct confrontations between church and state and threatens church autonomy. *Id.* at 1640.

The other type of entanglement is called "borderline" entanglement. *Id.* at 1635. It occurs when the government *exempts* churches, and is therefore required to decide who qualifies for the exemption and who doesn't. For example, it may have to decide whether an entity is "religious" and whether a publication is "consistent with 'the teaching of the faith.'" *Texas Monthly*, 489 U.S at 20. Policing the borders of a complicated exemption threatens to entangle courts in religious questions. *Walz*, 397 U.S. at 698-99 (Harlan, J., concurring).

These two types of entanglement are illustrated by *Walz* and *Texas Monthly*. *Walz* focused on "enforcement entanglement." There, the Court explained that taxing churches "would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." *Id.* at 674. Exempting churches, by contrast, would "restrict[] the fiscal relationship between church and state," thus "tend[ing] to complement and reinforce the desired separation insulating each from the other." *Id.* at 676.

Texas Monthly focused on "borderline entanglement." There, all periodicals were subject to tax, except those that consisted "wholly of writings promulgating the teaching of [a] faith." 489 U.S. at 5. Because the government had to decide which messages were "consistent with 'the teaching of the faith,'" the exemption produced "greater state entanglement" than providing no exemption at all. 489 U.S. at 20 (plurality).

Here, § 107 reduces *both* enforcement entanglement and borderline entanglement. It reduces enforcement entanglement because it avoids government taxation,

with its attendant monitoring and collection, of a core part of the relationship between churches and their ministers. More importantly, it reduces borderline entanglement because it replaces the notoriously fact-intensive standard of § 119 with the bright-line rule of § 107.

Section 119 is extremely difficult, if not impossible, to apply to ministers. First, it requires the minister to qualify as an "employee" under IRS rules. This, in turn, requires the government to tax differentially depending on internal matters of church polity. If the minister belongs to a denomination that gives him broad autonomy or exposes him to significant economic risk, he may fail this test and be considered self-employed. Some decisions suggest that United Methodist Council ministers would qualify as employees, but Assembly of God and various Pentecostal ministers would not. *See Weber v. Comm'r*, 103 T.C. 378 (1994), *aff'd*, 60 F.3d 1104 (4th Cir. 1995); *Shelley v. Comm'r*, T.C.M. (RIA) 1994-432 (1994); *Alford v. United States*, 116 F.3d 334 (8th Cir. 1997). Even if a minister qualified as an employee, a § 119 exemption 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. *See Fuhrmann v. Comm'r*, T.C.M. 1977-416 (1977).

Once these threshold concerns are overcome, § 119 still requires the government to decide whether a minister'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

him properly to perform the duties of his employment." *Id.* In other words, is it really necessary for Father Gregory and other ROCOR priests "to be available for duty at all times"? *Id.* Is it really necessary for Bishop Ed to live in close proximity to the church, to counsel church members at home, to host meetings at home, and to prepare sermons at home? These sorts of inquiries are extremely difficult and fact-intensive for secular employees. McDavitt, 44 Notre Dame Law. at 1139-40. They raise grave constitutional concerns when applied by the government to evaluate the relationship between a church and its ministers. *Hosanna-Tabor*, 565 U.S. at 190 (prohibiting "government interference with internal church decisions that affect[] the faith and mission of the church itself"); *id.* at 206 (Alito, J., concurring) (courts cannot asses "the importance and priority of the religious doctrine in question," what a "church really believes," or "how important that belief is to the church's overall mission"); *Corp. of Presiding Bishop*, 483 U.S. at 342 (Brennan, J., concurring) (courts cannot "determin[e] that certain activities are in furtherance of an organization's religious mission").

Section 107, by contrast, recognizes that the government cannot decide which uses of a minister's home are "necessary" to the mission of the church and which are not. It asks only whether the employee is functioning as a minister. This is an inquiry courts have been conducting for decades—not only in the tax context, but also under the First Amendment "ministerial exception." *See McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972). Indeed, it is an inquiry that the Supreme Court itself said was constitutionally *required* just five years ago. *Hosanna-Tabor*, 565 U.S. 171.

This is why § 107 is easily distinguishable from the exemption in *Texas Monthly*. There, the alternative to the religious exemption for periodicals was no exemption at all—all periodicals would be taxed equally. Thus, striking down the religious exemption eliminated any possibility of borderline entanglement. Here, by contrast, if § 107 were struck down, the alternative would be to apply § 119 to ministers. Far from eliminating borderline entanglement, that would exacerbate it.[20]

c. The parsonage allowance reduces discrimination.

Section § 107(2) also reduces discrimination among religions. The Supreme Court has repeatedly held that this is "[t]he clearest command of the Establishment Clause." *Larson*, 456 U.S. at 244, 246 (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). Of course, a facially neutral law is not invalid merely because it has a greater "incidental effect" on one denomination than another. *See Employment Div. v. Smith*, 494 U.S. 872, 878 (1990). But "when the state passes laws that facially regulate religious issues"—as § 107 clearly 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.) (internal quotations marks omitted).

The leading case is *Larson*. There, a Minnesota law imposed reporting requirements on all charitable organizations. But it exempted "religious organizations that

[20] It is no answer to say that § 119 applies only to in-kind lodging. Cash allowances present the same entanglement problem under §§ 162 and 280A(c)(1).

received more than half of their total contributions from members." 456 U.S. at 231. This had the effect of distinguishing between "well-established churches," which received ample "financial support from their members," and "churches which are new and lacking in a constituency" and had to rely on "public solicitation." *Id.* at 246 n.23. The state defended its rule on the ground that it was "based upon secular criteria" and merely "happen[ed] to have a disparate impact upon different religious organizations." *Id.* (internal quotations marks omitted). But the Supreme Court rejected this argument, concluding that the statute "focuses precisely and solely upon religious organizations" and makes "explicit and deliberate distinctions between [them]." *Id.*

Section 107(1), without § 107(2), would have the same effect. "[W]ell-established churches" with "financial support" can afford to purchase a parsonage and provide tax-free housing to ministers. *Id.* But "churches which are new and lacking in a constituency"—like Holy Cross and many parishes in the Diocese—cannot. *Id.*; Facts ¶¶ 114, 153. This creates a serious disparity between wealthy and poor denominations.

Nor is the disparity merely financial. The decision to have a parsonage is also 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." Facts ¶ 10. 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.* ¶ 11. 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.* ¶ 10.

In other denominations—typically newer and less hierarchical ones (Facts ¶¶ 15, 46-50)—there is no historical or theological emphasis on church-owned parsonages. Sometimes, this is because churches expect ministers to be bi-vocational (Facts ¶ 46); other times, it is because churches may take years before they establish a permanent place of worship (Facts ¶ 48, 112, 149); 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. Given these differences among denominations, § 107(1) discriminates along theological, not just financial, lines.

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. *MacColl v. United States*, 91 F. Supp. 721, 722 (N.D. Ill. 1950); *Conning v. Busey*, 127 F. Supp. 958 (S.D. Ohio 1954) (following *MacColl*); *Williamson v. Comm'r*, 224 F.2d 377 (8th Cir. 1955). 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 sadly ironic if the federal courts now struck down § 107(2)—67 years 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 authorizing *cash housing allowances*, and § 912 excluding those cash housing allowances from income. *Anderson v. United States*, 16 Cl. Ct. 530, 534 (1989), *aff'd,* 929 F.2d 648 (Fed. Cir. 1991). Thus, § 912 does the same thing for overseas employees that § 107(2) does for ministers. *See id.* at 535 ("Congress intended that all federal overseas employees be treated uniformly.").

Treating cash allowances and in-kind housing equally is also logical. Although cash payments *may* be compensatory, they need not be. "[J]ust as an employee is often furnished tangible property which cannot be regarded as compensation, an employee may be furnished cash which is not compensation." *Williamson*, 224 F.2d at 379 (quoting *Saunders v. Comm'r*, 215 F.2d 768, 771 (3d Cir. 1954)). The question is whether the lodging is furnished for the convenience of the employer—not whether it is cash or in-kind. Thus, it is no surprise that the first court decision involving the convenience of the employer doctrine rejected a distinction between cash allowances and in-kind housing. *Jones*, 60 Ct. Cl. 552. So did the first court of appeals decision involving ministers. *Williamson*, 224 F.2d at 379. So did early IRS rulings on charitable volunteers. O.D. 11, 1919-1 C.B. 66; O.D. 119, 1919-1 C.B. 82. And so did early commentators. *See* McDavitt, 44 Notre Dame Law. at 1132-33, 1138 (distinction is

"artificial and formalistic" and has "no practical place in the convenience of the employer doctrine"). 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.

D. The parsonage allowance also satisfies the *Lemon* test and the Due Process Clause.

For the same reasons described in sections II.A–C. above, the parsonage allowance also satisfies the *Lemon* test. Under *Lemon*, a statute (1) "must have a secular legislative purpose," (2) "its principal or primary effect must be one that neither advances nor inhibits religion," and (3) it "must not foster an excessive government entanglement with religion." *Lemon v. Kurtzman,* 403 U.S. 602, 612 (1971) (internal quotation marks omitted). Alternatively, the test is described as prohibiting a "government endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 692 (O'Connor, J., concurring).

As already explained, Section 107(2) has the valid secular purpose of ensuring fair treatment of ministers' housing costs 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. And applying § 107 reduces both enforcement and borderline entanglement. Furthermore, § 107 sends a message of neutrality with respect to religion, not endorsement. Just as Congress took the unique circumstances of many secular groups into account when it codified other applications of the convenience of the employer doctrine, so it did with ministers and § 107.

The parsonage allowance likewise satisfies the "equal protection component" of the Fifth Amendment's Due Process Clause. An equal protection claim "add[s] nothing" to a claim of discrimination that is already brought "under the religion clauses of the First Amendment." *World Outreach Conf. Ctr. v. City of Chicago*, 591 F.3d 531, 534 (7th Cir. 2009). Because § 107(2) does not violate the Establishment Clause, it is subject only to rational-basis review. *Locke v. Davey*, 540 U.S. 712, 720 & n.3 (2004). As described above, § 107(2) is rationally related to the legitimate government interests in providing neutral treatment to housing costs, reducing entanglement between church and state, and avoiding discrimination among religions.

E. Striking down the parsonage allowance would endanger scores of tax provisions throughout federal and state law.

An interpretation of the Establishment Clause that invalidates the parsonage allowance also threatens numerous other provisions throughout federal and state tax codes. As discussed above, nearly every state in the nation provides some tax exemptions for religious groups without analogous exemptions for other nonprofit institutions. Part II.A–C, *supra*. Likewise, Congress has created a host of tax provisions that treat churches and ministers differently than other employers and employees in order to protect the First Amendment values of church autonomy, non-entanglement, and non-discrimination. *Id.*

To take just one example, the federal tax code includes a religious exemption from self-employment taxes for "a duly ordained, commissioned, or licensed minister of a church" who "is conscientiously opposed to, or because of religious principles . . . is opposed to, the acceptance . . . of any public insurance." 26 U.S.C. § 1402(e). This

statutory test—"duly ordained, commissioned, or licensed"—is identical to the Treasury Regulation definition of a "minister of the gospel" for purposes of § 107. *See* Treas. Reg. § 1.107-1(a) (citing Treas. Reg. § 1.1402(c) 5. Thus, if § 107 impermissibly advances religion or entangles the government in religious questions, then so does the self-employment tax exemption for religious objectors to Social Security. But "[w]ithout this exemption in the Code, the IRS would be required to enforce the self-employment tax against individuals despite their religious opposition to 'public insurance' such as the Social Security system financed by the self-employment tax." Zelinsky, 33 Cardozo L. Rev. at 1669. Surely the First Amendment requires no such thing. Indeed, multiple courts have rejected this argument. *See, e.g.*, *Droz v. Comm'r*, 48 F.3d 1120, 1124-25 (9th Cir. 1995) (upholding § 1402(g) against an Establishment Clause challenge); *Ballinger v. Comm'r*, 728 F.2d 1287, 1292-93 (10th Cir. 1984) (rejecting Establishment Clause challenge to § 1402(e)). Yet this is the clear implication of FFRF's position.

Thankfully, FFRF is wrong. The Establishment Clause does not require such hostility to religion. These numerous state and federal tax provisions are constitutional, as is § 107(2).

CONCLUSION

The Court should grant Intervenors' motion for summary judgment.

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Respectfully submitted,

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