No. 14-1152

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, INC., ANNIE LAURIE GAYLOR and DAN BARKER, *Plaintiffs-Appellees*,

v.

JACOB J. LEW, in his official capacity as Secretary of the Treasury, and JOHN A. KOSKINEN, in his official capacity as Commissioner of Internal Revenue, *Defendants-Appellants*.

Appeal from the United States District Court
for the Western District of Wisconsin,
Case No. 11-cv-0626
The Honorable Judge Barbara B. Crabb

BRIEF *AMICUS CURIAE* OF THE EVANGELICAL COUNCIL FOR FINANCIAL ACCOUNTABILITY, NATIONAL ASSOCIATION OF EVANGELICALS, NATIONAL HISPANIC CHRISTIAN LEADERSHIP CONFERENCE, QUEENS FEDERATION OF CHURCHES, AND CHRISTIAN LEGAL SOCIETY IN SUPPORT OF APPELLANTS AND REVERSAL

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Appellate Court No: 14-1152

Short Caption: Freedom From Religion Foundation, et al. v. Jacob Lew, et al.

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Evangelical Council for Financial Accountability, National Association of Evangelicals, Christian Legal Society, National Hispanic Christian Leadership Conference, Queens Federation of Churches,

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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Attorney's Signature: s/ Kimberlee Wood Colby Date: 4/9/14

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

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Attorney's Signature: /s/ Thomas C. Berg Date: 4/9/14

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Statement of Identity of *Amici Curiae,* Interest in the Case, and Source of Authority to File[1]

The **Evangelical Council for Financial Accountability** ("ECFA") provides accreditation to leading Christ-centered churches and parachurch organizations that faithfully demonstrate compliance with established standards for financial accountability, stewardship, and governance. For thirty-five years, one of ECFA's core principles has been the preservation of religious freedom through its standards of excellence and integrity, which help alleviate the need for burdensome government oversight of religious organizations. More than 1,850 churches, Christian ministries, denominations, educational institutions, and other tax-exempt 501(c)(3) organizations are currently accredited by ECFA.

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[1] Pursuant to FRAP 29(c)(5), neither a party nor party's counsel authored this brief, in whole or in part, or contributed money that was intended to fund preparation or submission. No person (other than the *amici curiae,* its members, or its counsel) contributed money that was intended to fund its preparation or submission. Pursuant to FRAP 29(a), all parties have consented to the filing of this brief.

Amici gratefully acknowledge the contribution of Julie Cayemberg, a student at the University of St. Thomas School of Law (Minnesota), to the preparation and drafting of this brief.

Recognizing ECFA's history and expertise in matters involving religious liberty and government regulation, Senator Charles Grassley recently called upon ECFA to provide input on significant accountability and tax policy issues, including the ministerial housing allowance exclusion. ECFA, in turn, formed a national Commission of eighty religious and nonprofit leaders from virtually every major faith group in America, along with legal experts experienced in constitutional law and church and nonprofit tax issues.

The Commission's careful consideration and recommendations on the ministerial housing allowance exclusion allow ECFA to offer unique expertise on this issue in hopes that it will be of some assistance to the Court in its deliberations. ECFA values the religious liberty principles embodied by the ministerial housing allowance exclusion, which accommodates the special relationship between churches and their ministers, allows for diversity among religions and across denominational lines, and maintains the respectful "hands-off" approach that characterizes a healthy church-state relationship. ECFA is also concerned with the longstanding reliance that religious

congregations and their ministers have placed on the ministerial housing allowance exclusion, the loss of which would have troubling consequences for active and retired ministers and their congregations.

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 41 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries and independent churches. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries.

NAE believes that religious freedom fully makes sense only on the premise that God exists, and that God's character and personal nature are such as to give rise to human duties that are prior and superior in obligation to the commands of civil society. NAE also holds that religious freedom is God-given, and therefore the civil government does not create such freedom but is charged to protect it. It is grateful for the American legal tradition of church-state relations and religious

liberty, and believes that this constitutional and jurisprudential history should be honored, nurtured, taught, and maintained.

The **National Hispanic Christian Leadership Conference** ("NHCLC"), The Hispanic National Association of Evangelicals, is America's largest Hispanic Christian organization serving millions of constituents via our 40,118 member churches and member organizations. The NHCLC exists to unify, serve and represent the Hispanic Born Again Faith community by reconciling the vertical and horizontal elements of the Christian message via the 7 directives of Life, Family, Great Commission, Stewardship, Education, Justice and Youth.

The **Queens Federation of Churches** was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of an equal number of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over 390 local churches representing every major Christian denomination and many independent congregations

participate in the Federation's ministry. The Federation and its member congregations are vitally concerned for the protection of the principle and practice of religious liberty, including the detrimental impact that would be felt by its member congregations and their ministers if the ministerial housing allowance were held unconstitutional.

The **Christian Legal Society** ("CLS") is an association of Christian attorneys, law students, and law professors, with student chapters at approximately 90 public and private law schools. CLS believes that pluralism, essential to a free society, prospers only when the First Amendment rights of all Americans are protected.

Religious institutions' right of internal governance lies at the heart of religious liberty. In enacting the ministerial housing allowance, Congress accommodated religious institutions' ability to structure their relationships with their ministers in ways that respect the institutions' internal governance and ministry needs. CLS is concerned that religious congregations and their ministers, particularly

those who have retired in reliance on the ministerial housing allowance, will suffer grave harm if the decision below is affirmed.

Summary of Argument

Section 107(2) of the Internal Revenue Code, which excludes ministers' housing allowances from income tax, is constitutional. Its validity is supported by the principle, among others, that the government may, and sometimes must, treat ministers differently from other occupations and activities—including by accommodations from tax burdens—in order to serve important values of our church-state tradition. The power to accommodate religion is not limited to the context of ministers, but it is here that the constitutional distinctiveness of religion is at its height.

The distinctiveness of ministers is recognized in three lines of legal authority, encompassing multiple Supreme Court decisions. First, and most recently, the Court has unanimously affirmed the ministerial exception to antidiscrimination laws, which seeks to protect churches from government interference in their "internal governance" decisions that affect their "faith and mission." *Hosanna-Tabor Evangelical*

Lutheran Church and School v. E.E.O.C., 132 S. Ct. 694, 705-06 (2012). *Hosanna-Tabor* made clear that the First Amendment gives special solicitude to the rights of religious organizations, and it is simply the latest in a series of cases, over decades, in which the Court has blocked government regulation affecting the church-minister relationship.

Second, in *Locke v. Davey*, 540 U.S. 712 (2004), the Court permitted a state to single out a theology student, training for the ministry, for exclusion from an otherwise available state scholarship program. Again the Court emphasized the distinctive status of ministers—this time justifying negative treatment based on a "historical and substantial state interest" in denying funds for ministerial training. If singling out ministers' training for distinctive negative treatment in *Davey* falls within the permissible zone of discretion between the Establishment Clause and the Free Exercise Clause, then so does singling out ministers' activity for accommodation in 26 U.S.C. §107(2). Tax exemptions are accommodations; they are unlike the affirmative subsidies for ministerial training involved in *Davey*.

Finally, the distinctiveness of ministers has also been recognized in statutory law, including through different treatment of ministers under the federal tax code.

Viewed within this constitutional and statutory rubric, §107(2)'s exclusion of ministerial housing allowances from taxable income is a permissible accommodation.

Section 107(2), when considered together with the exclusion of church-provided parsonages in §107(1), serves two historic and substantial state interests central to the American church-state tradition. It ensures that various denominations are treated equally, and it avoids impermissible entanglement in church governance and religious questions. Section 107 as a whole reflects Congress's judgment that ministers fall among the classes of employees (including military personnel and certain overseas workers) whose jobs tend to have particular housing requirements that call for an income-tax exclusion for housing arising out of the job duties. Proceeding from that judgment, Congress determined that the context of ministers also had distinctive features warranting separate treatment in the Code.

First, Congress enacted §107(2) to equalize the treatment of all ministers with those covered by the §107(1) parsonage exclusion, and to avoid discriminating against ministers whose churches did not or could not provide them residences. Congress thus took a positive step to ensure equality among denominations, "the clearest command of the Establishment Clause." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Section 107(2) particularly tends to preserve equality between well-established churches and new or small ones.

Second, the Supreme Court has upheld tax exemptions for religious institutions on the basis that, in part, they decreased the entanglement between church and state. Recognizing that either course, taxation of churches or exemption, requires some involvement with religion, it was enough for the Court in *Walz* that exemptions decreased entanglement on balance. Congress makes a permissible choice when it chooses entanglement between church and state at the borders of exemption rather than the entanglement of enforcing tax law against religious entities. Section 107, as a whole, is an exercise of Congressional prerogative which allows for a church to make its own

governance and control choices while preserving tax treatment of its ministers similar to the treatment of comparable workers.

Finally, reliance interests of retired ministers and those nearing retirement argue strongly for retention of the ministerial housing allowance. Thousands of churches and their ministers have structured their affairs in good-faith reliance on the provision of a housing allowance that does not trigger income tax. If this section is invalidated, retired ministers will feel significant impact, and ministers approaching retirement may not be able to contribute enough to cover the shortfall in their remaining years of active ministry.

ARGUMENT

I. The Government May, and Sometimes Must, Treat Ministers Differently From Other Occupations and Activities in Order To Serve Values Of Our Church-State Tradition.

The housing allowance in §107(2) protects ministers and their religious organizations from government-imposed burdens of taxation and tax enforcement. The constitutionality of this provision is supported by the principle, among others, that the government may (indeed, sometimes must) accommodate religion by treating ministers differently than other occupations and activities.

The power to accommodate religion is by no means limited to the context of ministers. The Supreme Court has stated more generally that "[i]t is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987). *Amos*, among many other decisions, makes clear that "there is ample room for accommodation" to promote religious freedom even when the measure is not required by the Free Exercise Clause. *Id.* at 338. As the Court put it in upholding tax exemptions for religious organizations' property, there is room for

"play in the joints" between the two Religion Clauses. *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970). But *amici* focus on the principles concerning ministers because it is here that the constitutional distinctiveness of religion is at its height. Accordingly, government has "ample room" to treat ministers distinctively to accommodate religious freedom and serve important values in our church-state tradition. As we will show, §107(2) does just that. The constitutional distinctiveness of ministers is recognized in at least three lines of legal authority, encompassing multiple Supreme Court decisions.

A. Distinctive Protection of the Church-Minister Relationship Under the *Hosanna-Tabor* Line of Cases.

The first line of authority involves judicial decisions protecting the "internal governance of the church" and its "right to shape its own faith and mission" in its relationship with its clergy. *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S. Ct. 694, 706 (2012). *Hosanna-Tabor* unanimously affirmed the existence of the so-called ministerial exception, "uniformly recognized" by the courts of appeals over previous decades, which "precludes the application of

[employment discrimination] legislation to claims concerning the employment relationship between a church and its ministers." *Id.* at 705. The Court held that the exception was a constitutional requirement grounded in both Religion Clauses of the First Amendment. It rested, the Court said, on the fact that a religious organization's relationship with its ministers involves "more than a mere employment decision," since "[t]he members of a religious group put their faith in the hands of their ministers." *Id.* at 706. Accordingly, government interference with a church's selection of clergy violates the Free Exercise Clause, which protects the church's internal governance and its right to shape its faith and mission; and it violates the Establishment Clause, "which prohibits government involvement in such ecclesiastical decisions." *Id.*

The distinctiveness of a church's relation with its ministers—"more than a mere employment decision"—was central in *Hosanna-Tabor*. The federal government attempted to subsume the church's interest into the general right of freedom of association "enjoyed by religious and secular groups alike," essentially arguing (as the Court

described it) that there was "no need—and no basis—for a special rule for ministers grounded in the Religion Clauses themselves." *Id.* (noting that associational rights apply "whether the association in question is the Lutheran church, a labor union, or a social club"). The Court firmly rejected this attempt to deny the distinctiveness of ministers, calling it "remarkable" and "untenable," since the First Amendment "gives special solicitude to the rights of religious organizations." *Id.*

Hosanna-Tabor is just the latest in a series of cases in which the Court has emphasized that the Religion Clauses call for protection of a church's governance decisions and that the distinctive relation between a church and its ministers lies at the heart of that autonomy. For example, in *Serbian E. Orthodox Diocese v. Milivojevich,* 426 U.S. 696 (1976), the Court held that a state court could not use general legal principles against "arbitrariness" to question a hierarchical church's defrocking of a bishop and its accompanying disposition of church property. The Court emphasized, among other things, "that questions of . . . the composition of the church hierarchy are at the core of ecclesiastical concern." *Id.* at 717. Earlier, in *Kedroff v. St. Nicholas*

Cathedral, 344 U.S. 94 (1952), the Court firmly established that protection of the church-minister relationship from regulation rests on the broader doctrine of church autonomy, which guarantees religious organizations "an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 116. See *Hosanna-Tabor*, 132 S. Ct. at 704-05 (reaffirming *Milivojevich* and *Kedroff*). These decisions found various protections of the church-minister relationship to be constitutionally required; but even when protection is not required, the legislature has "ample room" (*Amos*, 483 U.S. at 334) to enact statutory accommodations to protect against harms to the relationship from regulation.

B. Distinctive Treatment of Ministers in Certain Government Funding Programs under *Locke v. Davey*.

Second, the constitutional distinctiveness of ministers was also crucial in *Locke v. Davey*, 540 U.S. 712 (2004), where the Court held that a state could permissibly deny a tax-funded tuition scholarship to a student preparing for the ministry and studying theology even though

the state provided scholarships for any other accredited degree.[2] Importantly, *Davey* shows that differential treatment of ministers sometimes works to their disadvantage and the disadvantage of their churches. Singling out this student for denial of funding, the Court said, was justified by the "historic and substantial state interest" in keeping the state from providing funds for the education of clergy. *Id.* at 725, 722. As the Court explained,

> The subject of religion is one in which both the United States and state constitutions embody distinct views—in favor of free exercise, but opposed to establishment—that find no counterpart with respect to other callings or professions. That a State would deal differently with religious education for the ministry than with education for other callings is a product of these views, not evidence of hostility toward religion.

Id. at 721. By the same token, Congress's decision to exclude ministers' housing allowances from taxation, does not "evidence [favoritism]

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[2] *Amici* believe that *Davey* should be limited to the context of funding of ministerial training and does not authorize "wholesale exclusions of religious institutions and their students from otherwise neutral and generally available government support." *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1255-56 (10th Cir. 2008) (McConnell, J., for the court). Even this limited reading of *Davey*, however, reinforces the principle that the government has room to treat ministers differently from other occupations and activities.

toward religion"; instead, as we will show in Part II, it is a product of "distinct" considerations concerning ministers versus other professions. *Id.*

Moreover, the issue in *Davey* was not whether the state was required to treat ministers distinctively, but whether it was permitted to do so. Although the Court had previously held unanimously that a state could include ministerial students in general funding, *Witters v. Dept. of Services for the Blind*, 474 U.S. 481 (1986), *Davey* held that a state also had discretion to decide to exclude them in the light of the distinctive considerations concerning ministers. 540 U.S. at 719 (holding that the denial fell within the "play in the joints" between the two Religion Clauses). This case likewise involves the "play in the joints": the question, of course, is not whether the government must exempt ministers' housing from taxation, but whether it is permitted to do so. If the government may single out ministers' training for negative treatment—the denial of affirmative subsidies—it may single out ministers' activities for accommodation through §107(2).

Amici emphasize that *Davey* allowed the state to single out ministers for the denial of affirmative subsidies. But tax exemptions, the issue in this case, are different from affirmative subsidies as a matter of Supreme Court precedent and sound logic. The Court distinguished tax exemptions and subsidies in *Walz*:

> 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. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees "on the public payroll." There is no genuine nexus between tax exemption and establishment of religion.

Walz, 397 U.S. at 675. Justice Brennan, in his *Walz* concurrence, added, "Tax exemptions and subsidies . . . are qualitatively different. . . A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from the taxpayers as a whole. An exemption . . . involves no such transfer." *Id*. at 690 (Brennan, J., concurring). As noted tax scholar Edward Zelinsky has concluded:

> The characterization of any tax provision as a subsidy is only compelling if there is first established a normative baseline of taxation from which that provision is deemed to subsidize. . . . *Walz* suggests that a normative income tax may properly contain an exclusion like Section 107 to avoid enmeshing

> church and state in the inherently intrusive enforcement of the tax law. From this baseline, Section 107 is not a tax subsidy but, rather, is a part of the normative tax.

Edward A. Zelinsky*, Do Religious Tax Exemptions Entangle in Violation of the Establishment Clause? The Constitutionality of the Parsonage Allowance Exclusion and the Religious Exemptions of the Individual Health Care Mandate and the FICA and Self-Employment Taxes*, at 122-23 (March 19, 2012), *available at* http://ssrn.com/abstract=2012132.

In striking down §107(2), the district court relied heavily on *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), particularly a statement in Justice Brennan's plurality opinion equating tax exemptions with subsidies. But this statement and *Texas Monthly* itself do not control here. As the government's brief explains more fully, Justice Brennan's plurality opinion had the votes of only three justices and was rejected by six justices as too broad. See, e.g., Govt. Br. at 45-46. The crucial opinions were the concurrences of Justice Blackmun (joined by Justice O'Connor) and Justice White. Under those opinions, the result in *Texas Monthly* turned on the fact that the statute there exempted publications with religious content but not those with nonreligious content. See, e.g.,

Texas Monthly, 489 U.S. at 28 (Blackmun, J.. concurring in the judgment) (invalidating the exemption as "[a] statutory preference for the dissemination of religious ideas"); *id.* at 26 (White, J., concurring in the judgment) (because "the content of a publication determines whether its publisher is exempt or nonexempt," the Free Press Clause "[wa]s the proper basis" for invalidating the exemption). *Texas Monthly* therefore reflects the fundamental principle that with respect to expression in the public square, government must observe content neutrality under both the Free Press and Free Speech Clauses. See, e.g., *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 230 (1987) ("[O]fficial scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press."); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."). In sharp contrast, the activity of ministers, as we have already shown, may (and sometimes must) be treated differently by the

government because it lies at the core of the distinctive constitutional subject of the exercise of religion.

C. Distinctive Treatment of Ministers by Statute.

Third, statutory law, including the Internal Revenue Code, treats ministers distinctively outside of §107(2). For example, the Code classifies most ministers as self-employed for the purposes of the FICA (Social Security and Medicare) tax (while classifying them as employees with respect to income taxes and retirement plans). *Social Security and Other Information for Members of the Clergy and Religious Workers*, IRS Publication 517, at 3 (2013). Thus clergy must "pay the 'self-employment tax' which is 15.3 percent of net earnings, while employees and employers split the Social Security and Medicare (FICA) tax rate of 15.3 percent, with each paying 7.65 percent." Richard Hammar, *Five Takeaways from Friday's Housing Allowance Ruling*, Managing Your Church (Nov. 25, 2013), *available at* http://blog.managingyourchurch.com/2013/11/five_takeways_from_fridays_hou_1.html. (This is another situation in which the law treats ministers less favorably, not more favorably, than other employees. See

id. (noting the "significant" financial impact of this treatment).) Congress then in turn accommodated religion by creating an exemption from this requirement for, among others, a duly ordained, commissioned or licensed minister of a church or a member of a religious order or a Christian Science practitioner if that person is conscientiously opposed to the acceptance of any public insurance, 26 U.S.C. §1402(e), and for members of religious orders who have taken a vow of poverty. IRS Publication 517*, supra*, at 3.

Viewed within this rubric of permissible accommodation, §107(2) is a constitutional exercise of congressional power. As we show in Part II, §107(2), when considered together with §107(1), serves two "historic and substantial state interest[s]" (*Davey*, 540 U.S. at 725) central to the American church-state tradition. It ensures that various denominations are treated equally, and it reduces government entanglement in church governance and religious questions.

II. The Section 107(2) Exclusion Rests on Two Substantial, Secular Legislative Purposes Justifying Differential Treatment Of Ministers: Preserving Equality Among Denominations and Reducing Entanglement in Church Affairs.

The tax treatment of ministers' housing presents a complicated problem, and Congress responded reasonably by enacting §107 of the Internal Revenue Code. Section 107 as a whole first reflects Congress's judgment that ministers fall among the classes of employees (including many secular employees) whose jobs tend to have particular housing requirements that call for an income-tax exclusion for housing arising out of the job duties. See Govt. Br. at 51-52. The first such determination came in 1921 with the passage of the "parsonage" allowance, now §107(1), which excludes "the rental value of a home furnished to [the minister] as part of his compensation." Then in 1954 Congress added §107(2), extending the exclusion to cash allowances that certain ministers receive, as part of their compensation, "to rent or provide a home." In addition to §107, Congress set forth certain general criteria warranting exclusion for secular employees in §119(a), which provides an exclusion for in-kind housing provided to an employee on

the employer's property "for the convenience of the employer." Congress also provided categorical exclusions for certain other workers in 26 U.S.C. §134 (military personnel) and 26 U.S.C. §911 (U.S. citizens working abroad). Thus §107(2) is part of an overall effort in the Internal Revenue Code to recognize situations—all worthy, in Congress's view—in which the particular housing requirements of a group of employees call for a tax exclusion arising out of the nature of their job duties. See Govt. Br. at 4-5.

Section §107(2), understood in the context of §§107(1) and 119, is a permissible recognition of the constitutionally distinctive situation of ministers. It serves two goals central to America's tradition concerning church-state relations. First, it ensures equal treatment among different religious bodies—most particularly, between those that do and do not own housing to provide to their ministers. Second, it reduces the church-state entanglement that results from discrimination and from inquiries into matters reserved for church governance.

These two goals are closely linked, reinforcing each other. In the absence of §107(2), and §107 generally, the criteria governing tax

treatment of ministers' housing would both produce unequal treatment across denominations and entangle government in churches' decisions such as whether to own a parsonage, how to use it, and how to treat their ministers for tax purposes.

A. Section 107(2) Avoids Differential Treatment Across Religions that Would Result from Applying §§107(1) or 119 Alone.

Congress's clearest purpose in enacting §107(2) was to equalize the effect of this section across churches, avoiding discrimination against ministers whose churches did not or could not provide them residences. The Senate Report accompanying §107(2) states:

> Under present law, the rental value of a home furnished a minister of the gospel as 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. 83-1622, at 16 (1954). See also Govt. Br. at 53-57.

In acting to prevent tax law from discriminating among different faiths, Congress took a positive step to fulfill one of the highest

purposes of the First Amendment. As the Supreme Court has emphasized, "the clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Equality among religions, the Court said, is also "inextricably connected with the continuing vitality of" free exercise of religion, which "can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations." *Id.* at 245. See also *Bd. of Educ., Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 706-07 (1994). The longstanding status of the principle of equality among denominations is shown by, among other things, the emphasis given to it by James Madison, perhaps the leading architect of the Religion Clauses among the founders. See, e.g., 1 *Annals of Congress* 730-31 (Aug. 15, 1789) (statement of Mr. Madison) (describing proposal leading to First Amendment as addressing fear that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform"); James Madison, *Memorial and*

Remonstrance Against Religious Assessments, ¶3 (1785), *reprinted in Everson v. Board of Education*, 330 U.S. 1, 65 (1947) (appendix to dissent of Rutledge, J.) ("Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?").

A tax code that exempted only ministers of churches with parsonages would discriminate against certain denominations—especially "small, new" denominations (*Larson*, 456 U.S. at 245)—in several ways that Congress rightly wished to avoid. It would disfavor churches that did not own a parsonage or could not afford to buy land and construct one—primarily churches that tend to be less established or wealthy. It would discriminate against pastors serving several churches and not living on the premises of any one—a discrimination that would likewise disfavor smaller and less established religious bodies. And it would discriminate against churches whose ministers live away from the house of worship for mission-related reasons—perhaps, for example, because larger parts of the congregation live in

those other neighborhoods. In *Larson*, the Court held that a law regulating solicitations by religious organizations that raised more than 50 percent of funds from their members favored "well-established churches" over those that "are new and lacking in a constituency." 456 U.S. at 246-47 n.23. Congress could quite reasonably think that limiting a housing exclusion to church-owned parsonages would produce similar discrimination. Accordingly, Congress justifiably treated ministers differently from other occupations in order to avoid inequality among ministers of different denominations.

We reemphasize that the Court's recognition of government discretion to treat ministers distinctively has not always benefited ministers and their churches. In *Locke v. Davey*, 540 U.S. 712, it permitted the state to exclude an otherwise-eligible student from state funding because he was majoring in devotional theology, a subject preparing him for the ministry. See *supra* p. 15-18. In *Davey* too, the Court had before it the argument that the scholarship denial would avoid differential treatment among different ministers. While most faith traditions require graduate training beyond a four-year degree for

their ministers, some denominations consider an undergraduate degree from an accredited institution sufficient. Based on this fact, a group of prominent *amici*, including the American Civil Liberties Union and Americans United for Separation of Church and State, argued in *Davey* that the State could permissibly deny funding for devotional theology majors so as to avoid funding complete clergy training for some denominations but not for others. See Brief Amicus Curiae of ACLU *et al.*, *Locke v. Davey*, 2003 WL 21715031, at 20 (arguing that Washington could seek "to ensure that its scholarship program does not have the result in practice of subsidizing some religions but not others").

Although this appeal involves only a challenge to §107(2), it should be noted that §107 as a whole serves to avoid additional inequalities among churches that would result if §119 were the sole vehicle to recognize the situation of ministers concerning housing. Because §119 is limited to housing provided by employers to employees, it would discriminate against churches who treat their ministers as independent contractors for theological or mission-related reasons. In a series of cases raising the question whether ministers can deduct

business expenses as independent contractors, federal courts have reached different results for various denominations according to "[d]ifferences in church structure," primarily the degree of control and supervision exercised over the minister by a congregation or higher church body. *Alford v. U.S.*, 116 F.3d 334, 337 (8th Cir. 1997) (Assemblies of God pastor was independent contractor); *Weber v. Commissioner*, 103 T.C. 378, 1994 WL 461872 (1994), *aff'd,* 60 F.3d 1104 (4th Cir.1995) (United Methodist pastor was employee); *Shelley v. Commissioner*, 68 T.C.M. (CCH) 584 (1994) (International Pentecostal Holiness minister was independent contractor). Applying the same test for employees versus independent contractors would deny the housing allowance to ministers whose relationship to the church or denomination involved less control or supervision for reasons of church governance.

As a result, if §107 had not been enacted and churches were left to §119, the Code might induce some churches to exercise greater control over clergy than their theology would suggest, in order that the clergy might qualify as employees. This would discriminate among churches

on a matter that some view as important to their internal governance and theologically sensitive. See, e.g., LaVista Church of Christ, *Is a Preacher an Employee of the Church?*, *available at* http://lavistachurchofchrist.org/LVanswers/2007/02-12.htm ("When a preacher is doing his duty to Christ, he does not take his direction from what the local congregation wants to hear. His duty is to teach people what they need to hear. . . . Therefore, in our current terminology a preacher is an independent contractor."); *Freedom Friends Church Statement of Faith and Practice*, *available at* http://freedomfriends.org/FF-What.htm ("Early Friends had a great conscience against what they called the "hireling ministers" of the day. They understood that no intermediary is needed between the human soul and its God. Friends did without priest or pastor for the best part of 200 years. . . . For tax purposes our pastor is an independent contractor."); and *Doing the Most Good, About the Salvation Army, available at* http://blog.salvationarmyusa.org/about/ (treating "officers," i.e. clergy, as a separate category from "employees").

Likewise, if the exclusion were available only to employees, pastors serving several small churches might not qualify as employees of any one of them and could therefore be ineligible. Cf. *Alford*, 116 F.3d at 337 (doubting, although not deciding, whether "control exercised over [minister] by three separate entities" could be aggregated to render him an employee). It is legitimate to seek to avoid such discrimination against smaller churches.

In short, both §107(2) in particular and §107 in general recognize the fact that religious bodies have widely varying relationships with their clergy, for theological, mission-related, and practical reasons. Accordingly, these provisions serve historic and substantial interests in achieving equal treatment among different religious bodies, especially among their ministers.

B. Section 107(2) Is a Permissible Exercise of the Legislature's Power to Create Religious Exemptions that It Reasonably Believes Will Reduce Church-State Entanglement.

As we have just indicated, §107(2) is part of an overall judgment by Congress in §107 that ministers warrant distinctive treatment. If §107(2) were invalidated, the tax code would make an improper distinction between churches with parsonages and those without. But consigning ministers to §119 would create further problems, because the application of its criteria to ministers would entangle courts in religious questions and matters of church governance. Because of these risks of entanglement, Congress had good reasons for giving ministers distinctive treatment in §107 and then, in turn, for enacting §107(2) to accord that treatment to all ministers.

In *Walz v. Tax Commission*, the Supreme Court upheld property-tax exemptions for religious institutions on the ground, in part, that they decreased the entanglement between church and state. *Walz*, 397 U.S. at 676 ("[E]xemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state,

and tends to complement and reinforce the desired separation insulating each from the other"). The Court recognized that "either course, taxation of churches or exemption, occasions some degree of involvement with religion." *Id.* at 674. It was enough for the Court, on this point, that the exemptions decreased entanglement on balance.[3]

Enforcing the tax code and regulations can lead to two different kinds of entanglement. First, as we have already noted, the *Hosanna-Tabor* Court was particularly concerned about government interference with "internal governance" decisions that affects the church's "faith and mission." 132 S. Ct. at 706, 707; see *supra* pp. 12-15. Second, courts might well be asked to make improper religious inquiries, the "intrusive judgments regarding contested questions of belief or practice" spoken of in *Colorado Christian University v. Weaver,* 534 F.3d 1245, 1261 (10th Cir. 2008). See also *Schleicher v. Salvation Army,* 518 F.3d 472, 475

[3] As Professor Zelinsky has put it: "Extensive contact between modern tax systems and religious institutions is unavoidable. There are no disentangling alternatives, just imperfect tradeoffs between different forms of entanglement." Zelinsky, *supra*, at 103. The government may "plausibly choose entanglement between church and state at the borders of exemption rather than the entanglement of enforcing tax law against religious entities." *Id.* at 104.

(7th Cir. 2008) ("[t]he assumption behind the [ministerial exception]" is that courts should not "interfere in the internal management of churches").

For example, in the cases involving the question whether ministers can deduct business expenses as independent contractors (see *supra* pp. 29-31), the courts have recognized that they risk intruding on the church's governance of clergy as well as venturing into religious questions they should not decide. *Alford*, 116 F.3d at 339. As we have already noted, a church may have many reasons, including reasons deeply rooted in its "faith and mission," to view its ministers as independent contractors. See *supra* p. 31 (examples of church statements); *Hosanna-Tabor*, 132 S. Ct. at 707. Application of §119 would deny any housing allowance to independent-contractor ministers, and Congress can legitimately determine that the tax code should not discourage churches from making that internal-governance choice.

Moreover, the cases distinguishing employee-ministers from independent contractors have involved extensive inquiries into the degree of church supervision; inquiries that are themselves entangling.

As the Eighth Circuit put it in *Alford*: "[W]e 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*, 116 F.3d at 339 (internal quotes omitted).[4] Section 107 avoids these problems by removing §119's limitation of the exclusion to employees.

Section 107 also avoids §119's inquiry concerning the extent to which the particular minister's house is actually used for the church's "convenience": for example, how many church meetings or counseling sessions occur at the house. The Supreme Court has recognized the dangers of this type of inquiry. See, e.g., *Amos*, 483 U.S. at 336 ("It is a significant burden on a religious organization to require it, on pain of

[4] The court suggested it perhaps should avoid entanglement by ignoring church law that defines the church's control over the minister. See *Alford*, 116 F.3d at 339 ("The doctrinal and disciplinary control exercised by the [church] or available for their exercise, is guided by religious conviction and religious law, not by employment relationships, and . . . should be considered impermissible or immaterial in determining the employment status of a religious minister.") But ignoring such sources increases the risk that the court will misunderstand and override the church's internal governance.

substantial liability, to predict which of its activities a secular court will consider religious.").

Section 107, as a whole, is an exercise of Congressional prerogative that allows a church to make its own governance and control choices while preserving tax treatment of its ministers similar to the treatment of comparable workers.

III. Reliance Interests of Retired and Nearly-Retired Ministers Argue Strongly for Upholding §107(2).

Finally, upholding the tax exclusion of housing allowances is strongly supported by the long-standing reliance that retired and nearly-retired ministers have placed on the exclusion.

Section 107(2) has been in the Code for 60 years. To overturn it would upset the expectations of thousands of churches and their ministers who have relied on it in good faith. Moreover, §107(2) should be considered in light of the even longer history of the §107(1) exclusion for church-owned parsonages—which dates back to 1921—since §107(2) aims to equalize other ministers with those living in parsonages. And it should be considered in the light of the general practice of exempting

religious organizations, which "covers our entire national existence and indeed predates it." *Walz*, 397 U.S. at 678. This is reliance on a longstanding, rather than a new, law. The case is similar to *Walz*, in which the Court upheld property-tax exemptions partly on the ground that "'a page of history is worth a volume of logic.'" *Walz*, 397 U.S. at 676 (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.)). As the Court noted, decades of exempting religious organizations from taxation had not led to religious establishments; and "an unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside." *Id.* at 678.

In *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992), the Court considered "whether [a] rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling [it]." If the ministerial housing allowance were invalidated, both churches and their clergy would be directly harmed. Certainly a church will have structured property choices around the availability of the housing allowance. But far more tragic is the disparate impact doing away with

this allowance will have on older ministers. They gave their working life to fulfill a higher calling and, in good faith, structured their finances and their retirement planning around a section of the tax code extant in its current form for 60 years. If this section were invalidated, the consequences for retired ministers could run the gamut from a reduced standard of living to true want. Ministers approaching retirement may not be able to contribute enough to cover the shortfall in their remaining years of active ministry.

This is not alarmist, it is realistic. The ministry is not a highly compensated profession; the hours are often long and the work can be emotionally taxing. The unique tax status of ministers often means that during their working years they are paying double their secular counterparts' contribution for Social Security and Medicare benefits. See *supra* p. 21-22. The profession often requires sacrifice of personal and financial security. In this context, we should not in good conscience dismiss the reliance interests of ministers as unimportant. It is, in the end, an issue that will speak volumes about our system's commitment to justice.

Conclusion

The judgment of the district court should be reversed and summary judgment entered for the government.

Respectfully submitted,

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April 9, 2014

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