No. 14-1152

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, INCORPORATED, 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

ON APPEAL FROM THE JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN (No. 11-cv-0626; Honorable Barbara B. Crabb)

BRIEF FOR THE APPELLANTS

KATHRYN KENEALLY
Assistant Attorney General

TAMARA W. ASHFORD
Principal Deputy Assistant Attorney General

GILBERT S. ROTHENBERG (202) 514-3361
TERESA E. MCLAUGHLIN (202) 514-4342
JUDITH A. HAGLEY (202) 514-8126
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

Of Counsel:

JOHN W. VAUDREUIL
United States Attorney

TABLE OF CONTENTS

Page

Page

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cases (Cont'd): **Page(s)**

Cases (Cont'd): **Page(s)**

Cases (Cont'd): **Page(s)**

Constitution, Statutes, and Regulations: **Page(s)**

Constitution, Statutes, and Regulations (Cont'd): Page(s)

Miscellaneous: **Page(s)**

GLOSSARY

APA	Administrative Procedure Act
The Code	Internal Revenue Code
Commissioner	Commissioner of Internal Revenue
FFRF	Freedom from Religion Foundation, Inc.
IRS	Internal Revenue Service
Plaintiffs	FFRF, Annie Gaylor, and Dan Barker
Secretary	Secretary of the Treasury

STATEMENT REGARDING ORAL ARGUMENT

In this case, the District Court struck down the longstanding exclusion for a parsonage allowance under § 107(2) of the Internal Revenue Code as a violation of the Establishment Clause, at the behest of plaintiffs, an atheist advocacy organization and two of its members. Issues of great administrative importance regarding the constitutionality of the exclusion and plaintiffs' standing to sue are presented. Counsel for the appellants respectfully inform the Court that they believe that oral argument is essential to the disposition of this appeal.

STATEMENT OF JURISDICTION

Freedom from Religion Foundation, Inc. (FFRF) and its co-presidents Annie Gaylor and Dan Barker (together, plaintiffs) brought this suit for declaratory and injunctive relief against the Secretary of the Treasury and the Commissioner of Internal Revenue. (Doc1,13.)[1] FFRF, a Wisconsin corporation, has its principal place of business in Madison, Wisconsin. (*Id.*) The gravamen of the complaint was that § 107 of the Internal Revenue Code, which excludes from federal income taxation certain housing benefits provided to ministers, violates the Establishment Clause of the First Amendment to the United States Constitution and the Equal Protection component of the Constitution's Due Process Clause. Plaintiffs sought (i) a declaration that § 107 is unconstitutional and (ii) an injunction against the continued allowance of the exclusion. Although plaintiffs invoked the District Court's jurisdiction under 28 U.S.C. § 1331, the Government maintains that the court lacked subject matter jurisdiction. Because they failed to seek the

[1] "Doc" references are the documents in the original record, as numbered by the Clerk of the District Court. "A" and "App" references are to appellants' separately bound record appendix and the appendix bound with this brief, respectively. Unless otherwise indicated, all "§" references are to the Internal Revenue Code, as currently in effect. Pertinent statutes are set forth in the Statutory Addendum.

exclusion provided by § 107, plaintiffs lack standing to challenge it. *See* Argument I, below.

The District Court rendered a final judgment on November 26, 2013, disposing of all claims of all parties. (App44-45.) The Government filed its notice of appeal on January 24, 2014, within the 60 days allowed by Fed. R. App. P. 4(a)(1)(B). (Doc58.) *See* 28 U.S.C. § 2107(b). This Court's jurisdiction over the appeal rests upon 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether plaintiffs have standing to challenge the constitutionality of the exclusion for a parsonage allowance under § 107(2), when they have neither sought nor been denied the exclusion.

2. If plaintiffs have standing, whether § 107(2) violates the Establishment Clause.

STATEMENT OF THE CASE

A. Procedural overview

Plaintiffs brought this suit against the Secretary and the Commissioner, seeking (i) a declaration that § 107 violates the Establishment Clause and (ii) an injunction barring the allowance of the exclusion. Because plaintiffs did not themselves seek the benefits of

§ 107, the Government moved to dismiss the case, contending that plaintiffs lacked standing. The District Court denied the motion. (A1-20.) The Government later moved for summary judgment, renewing its argument that plaintiffs lacked standing and contending that § 107 does not violate the Establishment Clause. Plaintiffs did not contest the motion insofar as it concerned their standing to challenge the exclusion under § 107(1) for housing furnished in kind. But they opposed the motion insofar as the exclusion under § 107(2) for a cash parsonage allowance was concerned. The court granted the Government summary judgment regarding § 107(1). After concluding that plaintiffs had standing to challenge the latter exclusion (App1-15), the court granted plaintiffs summary judgment *sua sponte* regarding § 107(2), striking down the statute as unconstitutional (App15-42). The Government now appeals.

B. Background: § 107

Section 107 is one of several statutory exclusions from gross income for employment-connected housing benefits. Taxpayers who are furnished housing by their employers may exclude the value of that housing from their gross income where (among other things) the

housing is furnished for the "convenience of the employer." § 119. Taxpayers who furnish their own housing, but use it for business purposes for the "convenience of [the] employer," may deduct from income expenses related to that housing. § 280A(c)(1). In addition, certain federal employees may exclude from gross income cash provided to them for housing purposes. § 134 (military housing allowance); § 912 (foreign housing allowance for Foreign Service, the CIA, etc.).

Section 107 provides an analogous exclusion for housing or its cash equivalent provided to a "minister of the gospel" by his employing church.[2] Specifically, when furnished or paid to him "as part of his compensation," a minister's gross income does not include "(1) the

[2] Although § 107 "is phrased in Christian terms" to apply to a "minister of the gospel," "Congress did not intend to exclude those persons who are the equivalent of 'ministers' in other religions." *Salkov v. Commissioner*, 46 T.C. 190, 194 (1966) (holding that a Jewish cantor was a "minister of the gospel"). The Commissioner interprets "religion" to include "beliefs (for example, Taoism, Buddhism, and Secular Humanism) that do not posit the existence of a Supreme Being." Internal Revenue Manual § 7.25.3.6.5(2) (Feb. 23, 1999). Moreover, the employer need not be a church or religious organization, as long as the minister is compensated for ministerial services. Treas. Reg. § 1.1402(c)-5(c)(2) (26 C.F.R.).

rental value of a home" or "(2) the rental allowance paid to him . . . to the extent used by him to rent or provide a home and to the extent such allowance does not exceed the fair rental value of the home," plus utilities. § 107.

Section 107 has its origins in the Revenue Act of 1921, which created an exclusion for "[t]he rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of his compensation." Pub. L. No. 98, sec. 213(b)(11), 42 Stat. 227, 239. This exclusion was carried forward in successive revenue acts and was incorporated into the Internal Revenue Code of 1939 without substantive change. *See* Section 22(b)(6) of the 1939 Code, 53 Stat. 10. When the exclusion was reenacted as § 107(1) of the Internal Revenue Code of 1954, the addition of § 107(2) allowed ministers to exclude "rental allowance[s]."

Although the legislative history of the 1921 Revenue Act does not explain why the in-kind exclusion was introduced, the treatment of clergy housing under prior law sheds light on Section 213(b)(11)'s purpose. Immediately before its enactment, the Treasury Department had allowed some employees — but not clergy — to exclude the value of

employer-provided housing from income pursuant to the "convenience of the employer" doctrine. *See Commissioner v. Kowalski*, 434 U.S. 77, 84-90 (1977) (describing history of exclusion for such employer-provided housing). Those benefiting included seamen living aboard ships, workers living in "camps," cannery workers, and hospital employees. *Id.* In 1921, the Treasury announced that ministers would be taxed on the fair rental value of parsonages provided as living quarters, O.D. 862, 4 C.B. 85 (1921), even though ministers traditionally resided in parsonages for the church's convenience (A37-51). Shortly thereafter, Congress changed that treatment by enacting Section 213(b)(11), thereby placing ministers on an equal footing with other employees who already enjoyed an exclusion for housing provided for the employer's convenience.

When the parsonage exclusion was enacted, churches had differing traditions and practices that influenced how they provided parsonages to their ministers. (A37-65,68-73.) Older or more hierarchical churches tended to furnish church-owned parsonages to ministers; newer churches favored providing ministers cash housing

allowances. (*Id.*) But either way, the minister's housing was generally used for the church's religious purposes. (A37-39,41-42,50-51,70-71,73.)

When churches that did not own parsonages provided ministers with cash housing allowances in lieu of in-kind housing, the Treasury ruled that the statutory exclusion was limited to in-kind housing and that housing allowances were includable in gross income. I.T. 1694, C.B. II-1, at 79 (1923). The Treasury noted, however, that the allowance would be deductible by the minister as a business expense, to the extent it was used for "expenses attributable to the portion of the parsonage which is devoted to professional use." *Id.* Several courts disagreed. They held that, in order to treat similarly situated ministers equally, cash allowances must also be considered excludable under the statutory parsonage exclusion. *E.g., Williamson v. Commissioner*, 224 F.2d 377, 380 (8th Cir. 1955); *Conning v. Busey*, 127 F. Supp. 958 (S.D. Ohio 1954); *MacColl v. United States*, 91 F. Supp. 721 (N.D. Ill. 1950). Whether paid in cash or in kind, the benefits were considered provided for the church's "convenience" and therefore excludable. *Williamson*, 224 F.2d at 380.

In 1954, Congress resolved the dispute by codifying the prevailing judicial view in § 107, which excludes compensatory housing furnished to ministers in cash as well as in kind. In doing so, Congress sought to remove "discrimination" against ministers who were paid cash allowances, as the House and Senate Reports explained. H.R. Rep. No. 1337, at 15 (1954); S. Rep. No. 1622, at 16 (1954).

In 2002, Congress amended § 107(2) to clarify that the exclusion was limited to the fair rental value of the parsonage. Pub. L. No. 107-181, 116 Stat. 583. The bill that introduced the proposed amendment reiterated that one of the purposes of § 107 was to "accommodate the differing governance structures, practices, traditions, and other characteristics of churches through tax policies that strive to be neutral with respect to such differences." Clergy Housing Allowance Clarification Act, H.R. 4156, 107th Cong. § 2(a)(4) (as introduced April 10, 2002). In addition to preventing discrimination, § 107 was also designed, according to this legislative history, to avoid "intrusive inquiries by the government into the relationship between clergy and their respective churches" entailed by the generally available convenience-of-the-employer doctrine codified elsewhere in the Code.

Id. at § 2(a)(5). Section 107 avoids such potential church-state entanglement by eliminating any need for the minister to demonstrate that the parsonage or allowance therefor is being used for the church's convenience under § 119 or § 280A(c)(1), respectively.

C. FFRF

FFRF is a nonprofit membership corporation that promotes the separation of church and state and educates on matters of "non-theism." (A3.) Gaylor and Barker, FFRF's co-presidents, are "nonbeliever[s]" who are "opposed to government preferences and favoritism towards religion."[3] (Doc13 at 3.) FFRF provides Gaylor and Barker (formerly an ordained minister) with housing allowances not exceeding housing-related expenses. Plaintiffs complained that the § 107 exclusion, being

[3] Although Gaylor and Barker also alleged that they were "federal taxpayers," they did not attempt to maintain suit as taxpayers under *Flast v. Cohen*, 392 U.S. 83 (1968). (A5.) In a previous attempt to invalidate § 107 brought by FFRF and others, the district court held that the plaintiffs had standing as taxpayers to sue under the Establishment Clause. *FFRF v. Geithner*, 715 F. Supp. 2d 1051, 1059-1061 (E.D. Cal. 2010). But after the Supreme Court held that taxpayers lacked standing to challenge tax benefits under the Establishment Clause unless they personally have "been denied a benefit on account of their religion," *Ariz. Christian School Tuition Org. v. Winn*, 131 S. Ct. 1436, 1440 (2011), the parties stipulated to dismissal without prejudice. (A29-30.)

limited to "ministers of the gospel," subsidizes, promotes, and endorses religion in violation of the Establishment Clause. (Doc13 at 5.) Although they complained of unequal treatment, neither Gaylor nor Barker had personally sought or been denied the exclusion before filing suit, either by claiming it on their income tax returns or by filing claims for refund with the IRS challenging the statute as unconstitutional unless it applied to them. (A22-23,30.)

D. The proceedings below

The Government moved to dismiss for lack of subject matter jurisdiction. (Doc12,16-17.) It contended that plaintiffs lacked standing to sue under Article III of the Constitution. The Government contended that there was no injury-in-fact because neither Gaylor nor Barker had personally sought or been denied the exclusion, and it was insufficient merely to allege that it is illegal for third parties to enjoy it. (Doc12 at 17-22.) The Government further contended that entertaining plaintiffs' claims, and recognizing a waiver of sovereign immunity under the Administrative Procedure Act, 5 U.S.C. § 702, would also be at odds with the highly articulated structure of tax litigation, which generally precludes the issuance of declaratory and injunctive relief and confines

disputes regarding tax treatment to deficiency actions and suits for refund brought by the affected taxpayers. (Doc27 at 4-7.)

In response, plaintiffs contended that they had standing to challenge § 107(2). They argued that, having received housing allowances, they were similarly situated to clergy enjoying the exclusion. (Doc20.)

The District Court denied the Government's motion. (A1-20.) The court considered it "clear" that plaintiffs are not entitled to the exclusion and that there was no reason to require them to undergo the "futile" exercise of seeking the exclusion. (A2.)

The Government moved for summary judgment. (Doc44,54.) Besides renewing its jurisdictional arguments (Doc44 at 5-25), the Government defended the constitutionality of § 107 (*id.* at 25-52). It contended that § 107 does not violate the Establishment Clause because it has the secular purpose and effect of eliminating discrimination against, and among, ministers, and of limiting government entanglement with religion. (Doc44 at 3.)

Plaintiffs opposed the motion, but only as it related to § 107(2). They argued that the District Court had jurisdiction and that § 107(2) violates the Establishment Clause. (Doc52.)

The District Court granted the Government summary judgment regarding § 107(1). Respecting § 107(2), however, the court granted summary judgment to plaintiffs *sua sponte*. (App1-3.) The court reaffirmed its conclusion that plaintiffs had standing to challenge § 107(2), finding it "clear from the face of the statute that plaintiffs are excluded from an exemption granted to others." (App2.) The court further held that § 107(2) violates the Establishment Clause because it "provides a benefit to religious persons and no one else, even though doing so is not necessary to alleviate a special burden on religious exercise." (App2.) The court held that the case was controlled by the plurality opinion in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), striking down a sales tax exemption for religious periodicals. (App2.) The court rejected the Government's argument that § 107(2) was enacted for the secular purpose of avoiding discrimination among ministers. Although the court observed that other Code provisions provide tax benefits for employer-provided housing, it did not consider

whether § 107(2) avoids the potential church-state entanglement posed by ministers being forced to rely upon generally available tax benefits for housing used for an employer's convenience. (App29-37.)

SUMMARY OF ARGUMENT

Plaintiffs — an advocacy organization promoting atheism and the separation of church and state, and its co-presidents — challenge the constitutionality of § 107(2), a longstanding exclusion for a cash parsonage allowance paid by a church to its minister. Plaintiffs do not themselves seek the exclusion, but only to nullify its enjoyment by ministers who are not parties to this action. The District Court held that plaintiffs had standing to challenge § 107(2) and that the statute violates the Establishment Clause. Both rulings are flawed.

1. Under Article III, a plaintiff lacks standing to sue unless he alleges a personal injury fairly traceable to the defendant's alleged unlawful conduct. A mere interest in a problem or a grievance shared in common with the public does not suffice. Where, as here, a plaintiff alleges an injury from unequal treatment, he lacks standing unless and until he personally seeks and is denied the benefit at issue. Without the personal denial of equal treatment, the plaintiff raises only a

generalized grievance, not a case or controversy. Plaintiffs here have not personally asked for the § 107(2) exclusion, nor are they litigating their own tax liabilities. Because they seek only to deprive others of the exclusion, they have suffered no actual personal injury at the hands of the Government.

Prudential concerns and statutory limitations under the APA also counsel dismissal. Congress has erected a highly articulated structure that confines tax litigation to suits by taxpayers contesting their *own* tax liabilities in Tax Court deficiency actions or suits for refund in the district courts and Court of Federal Claims. Injunctive and declaratory relief is generally precluded where federal taxes are concerned. To recognize a plaintiff's standing to challenge the tax liability of third parties not before the court would disturb this carefully crafted statutory scheme.

2. If the Court were to reach the merits, it should uphold § 107(2) as constitutional. Section 107(2) has a secular purpose and effect and avoids excessive church-state entanglement. The clergy have long been provided with homes at or near their places of worship and use them in connection with their ministries. Just as it has done for lay employees

furnished housing for the employer's convenience under § 119, Congress has merely exercised the discretion that accompanies its taxing power to exempt the value of such professionally used parsonages from taxation. Extension of this "refusal to tax" to the cash equivalent of in-kind housing under § 107(2) merely "eliminates the discrimination," in the words of the drafters, that would otherwise exist against ministers, and between churches that have historically provided parsonages in kind and those that do not. Permitting ministers to exclude parsonage allowances under § 107(2), rather than forcing them to rely on the generally available deduction for the business use of the home under § 280A(c)(1), may also prevent more intrusive Government inquiries into the church-minister relationship, and avoid the need to evaluate whether activities in a minister's home are secular or religious. These statutory purposes comport fully with the restraints of the Establishment Clause.

In striking down the law, the District Court erred. It failed to come to grips with the reasons Congress enacted § 107 in the first place. It also disregarded the fact that the housing exclusions provided to ministers are merely part of a larger Congressional design providing

exclusions or deductions for certain employer-provided housing benefits for all taxpayers. Given the unique history and context of § 107(2), the plurality opinion in *Texas Monthly* by no means "controls" this case, as the District Court erroneously assumed (App19). That case concerned a distinctly different tax exemption that lacks the redeeming features present here.

ARGUMENT

I

Plaintiffs lack standing to sue

Standard of review

A plaintiff's standing to sue presents a question of law reviewable *de novo*. *Love Church v. Evanston*, 896 F.2d 1082, 1085 (7th Cir. 1990).

A. Introduction

The standing doctrine has both constitutional and prudential aspects. The "core component" of standing, derived directly from the "cases" or "controversies" requirement of Article III of the Constitution, is grounded on the separation of powers. *Allen v. Wright*, 468 U.S. 737, 750-752 (1984). It requires the plaintiff to "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id.* at 751. The injury, moreover,

must be "concrete, particularized, and actual or imminent (instead of conjectural or hypothetical)." *Am. Fed'n of Gov't Employees v. Cohen*, 171 F.3d 460, 466 (7th Cir. 1999). "[G]eneralized grievances" "do not present constitutional 'cases' or 'controversies.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, __ S. Ct. __, 2014 WL 1168967, at *6 n.3 (Mar. 25, 2014).

In addition to these constitutional requirements, there are also certain prudential limitations on the exercise of federal jurisdiction. This inquiry includes "whether the constitutional or statutory provision" in question "properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

In this case, the District Court struck down § 107(2), which has been on the statute books for some 60 years, at the behest of plaintiffs who have not been injured by the statute, though they object to § 107(2) as a matter of principle. There is no dispute that the individual plaintiffs, Gaylor and Barker, have never sought the very tax benefit

about which they complain. Nor do they seek to litigate their own tax liabilities.[4]

The Supreme Court has "always insisted on strict compliance with [the] jurisdictional standing requirement," because the "'law of Art. III standing is built on a single basic idea — the idea of separation of powers.'" *Raines v. Byrd*, 521 U.S. 811, 819-820 (1997) (citation omitted). The Court also has repeatedly "[w]arn[ed] against premature adjudication of constitutional questions." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997). In our tripartite system of government, a court does not act as a "constitutional check" on a Congressional enactment unless a bona fide dispute involving an actually injured litigant requires the court to pass on the validity of a statute.

As demonstrated below, the District Court's ruling is at odds with settled law regarding constitutional standing. In contravention of prudential standing limitations, moreover, the ruling also bypasses the proper channels for tax litigation enacted by Congress that confine tax

[4] Because FFRF alleges no injury to itself, its standing depends on that of its members, the individual plaintiffs. The District Court recognized as much. (A4.)

litigation to suits by taxpayers contesting their own tax liabilities, after the taxpayer first seeks the tax benefit in question from the Internal Revenue Service. These restrictions are by no means "arbitrary" rules (A15) that "waste" time (A8). They are critical components of a constitutional design that ensures that courts are the "'last'" — not the first — "'resort.'" *Allen*, 468 U.S. at 752 (citation omitted).

B. Plaintiffs lack standing under Article III

Here, although they contend that they are similarly situated to the ministers who enjoy it, plaintiffs do not seek to enjoy the parsonage exclusion themselves. Instead, they seek to deprive the ministers of the benefit, even though the clergy are not before the court. Because plaintiffs do not seek to improve their own economic situation, the apparent gravamen of their claim is that they have been stigmatized by the Government's failure to provide them with equal treatment on account of their atheism. The Supreme Court has held, however, that an injury of this type "accords a basis for standing *only* to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *Allen*, 468 U.S. at 755 (emphasis added) (quoting *Heckler v. Mathews*, 465 U.S. 728, 739-740 (1984)). Without

the personal denial of equal treatment, the plaintiff raises only a "generally available grievance about government," which "does not state an Article III case or controversy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-574 (1992). Insisting on a personalized injury, the Supreme Court "has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction in federal court." *Allen*, 468 U.S. at 754.

In *Allen*, the Supreme Court held that the parents of African-American children lacked standing to sue Treasury officials to challenge the tax-exempt status of racially discriminatory schools, because they had not been "personally denied equal treatment" by the Government, but were merely seeking to litigate another person's tax liability. 468 U.S. at 754-756. Similarly, in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-167 (1972), the Court held that an African-American plaintiff lacked standing to challenge a racially discriminatory membership policy because he "never sought to become a member."

In *Heckler*, by contrast, a widower was found to have standing to challenge a law requiring his spousal Social Security benefits to be offset against his Civil Service pension unless he demonstrated that he

had been his late wife's dependent, where no such showing was required for a widow to escape the offset. The Court stressed, however, that the plaintiff "personally has been denied benefits that similarly situated women receive." 465 U.S. at 740 & n.9. Given that personal denial, the Court explained, "there can be no doubt about the direct causal relationship between the Government's alleged deprivation of appellee's right to equal protection and the personal injury appellee has suffered — denial of Social Security benefits solely on the basis of his gender." *Id.*

Applying these principles, the Fifth Circuit, sitting *en banc*, held that plaintiffs lacked standing to pursue an "injury of unequal treatment," based on their ineligibility for special transition rules extended to other taxpayers that temporarily preserved certain repealed tax benefits. *Apache Bend Apartments, Ltd. v. United States*, 987 F.2d 1174, 1177-1178 (5th Cir. 1993). The court held that "plaintiffs have not suffered any direct injury in the sense that they personally asked for and were denied a benefit granted to others."[5] *Id.*

[5] The Fifth Circuit framed its decision in terms of prudential standing. It nevertheless observed that its prudential concerns about allowing the plaintiffs to litigate "generalized grievances" outside the

In so ruling, the court distinguished the injury in *Heckler*, emphasizing that the plaintiff there had constitutional standing because he "specifically sought benefits for himself," was "*personally*" denied those benefits, and raised "his equal protection argument in the context of litigating *his* right to receive Social Security benefits." *Id.* at 1178 n.3. Unlike the plaintiff in *Heckler*, the plaintiffs in *Apache Bend* "were not *personally denied* benefits" under the tax provision at issue, and "never even sought such benefits." *Id.* Consequently, the asserted harm was no more than a "generalized grievance" that could not support standing. *Id.* at 1178.

These principles apply no less in the Establishment Clause context. The "Establishment Clause does not exempt clergy or lay persons from Article III's standing requirements." *In re U.S. Catholic Conference*, 885 F.2d 1020, 1024 (2d Cir. 1989). In *Winn*, for example, the Supreme Court held that the plaintiffs lacked standing to challenge

---

normal channels of litigating their own tax liabilities were "closely related to the constitutional requirement of personal 'injury in fact,' and the policies underlying both are similar." 987 F.2d at 1176. Decisions such as *Allen* and *Heckler* confirm that the matter likewise affects constitutional standing in the first instance. As the Supreme Court recently opined, "generalized grievances" do not pass muster under Article III. *Lexmark*, 2014 WL 1168967, at *6 n.3.

a tax benefit under the Establishment Clause because they had not personally "been denied a benefit on account of their religion," but were merely complaining in their capacity as taxpayers that the challenged provision unlawfully benefited religious groups. 131 S. Ct. at 1440, 1449. Similarly, in *Catholic Conference*, certain clergy plaintiffs alleged that the Government's failure to revoke the tax exemption of the Catholic Church for electioneering against abortion violated the Establishment Clause. The Second Circuit held that the plaintiffs lacked standing because they "do not complain about their own tax status" and had "neither been personally denied equal treatment under the law nor in any way prosecuted by the IRS." *Id*. at 1022, 1024-1026. As the court emphasized, it is "not enough to point to an assertedly illegal benefit flowing to a third party that happened to be a religious entity." *Id*. at 1025.

As these decisions make clear, a plaintiff alleging unequal treatment lacks the requisite personal injury unless and until the person seeks — and is denied — equal treatment. Until that point, he complains only of a generalized grievance. Put another way, a person does not have standing to ask that *another* person's tax benefit be *taken*

away without first seeking and being denied the benefit himself. Any injury would otherwise be too abstract and diffuse.

Although a would-be litigant lacks standing to deprive others of a tax benefit he eschews, he indubitably would have standing, by contrast, to challenge the exaction of an unconstitutional tax from himself, which results in a direct and personal "economic injury." *Hein v. FFRF*, 551 U.S. 587, 599 (2007). But in order to have standing to challenge a tax benefit as unconstitutional, the taxpayer must actually seek the tax benefit himself, placing his own liability in suit. *E.g.*, *Texas Monthly,* 489 U.S. at 8 (recognizing the standing of a general-interest magazine to raise an Establishment Clause challenge to a tax exemption limited to religious periodicals, where it "paid" the tax and sought a "refund"); *Droz v. Commissioner*, 48 F.3d 1120, 1122 & n. 1 (9th Cir. 1995) (recognizing that taxpayer had standing to raise Establishment Clause challenge to a religious exemption from the self-employment tax under § 1402(g) for sects opposed to certain insurance, where he claimed, and was denied, the exemption); *Moritz v. Commissioner*, 469 F.2d 466, 467 (10th Cir. 1972) (addressing Equal Protection challenge brought by a single male who claimed a

dependent-care expense deduction that the statute limited to married or widowed men, but allowed to women regardless of marital status); *Warnke v. United States*, 641 F. Supp. 1083 (E.D. Ky. 1986) (addressing Establishment Clause challenge to regulations under § 107 by taxpayer who claimed, and was denied, the § 107(2) exclusion). In these cases, the taxpayers actually sought the tax benefit from the taxing authority and then litigated their own tax liability, either by way of a deficiency proceeding in Tax Court (as in *Droz* and *Moritz*) or by filing a refund suit (as in *Texas Monthly* and *Warnke*).

So, too, here, Gaylor and Barker could have sought the § 107(2) exclusion by claiming it on their returns and then petitioning the Tax Court if the IRS were to disallow the exclusion. § 6213(a). Alternatively, they could have paid the resulting taxes due, claimed refunds from the IRS, and then sued for refund if their claims were rejected or not acted upon for six months. §§ 6511, 6532(a)(1), 7422; 28 U.S.C. §§ 1346(a)(1), 1491. Either way, plaintiffs would have standing to litigate their entitlement to the exclusion and to raise an Establishment Clause challenge in that regard. But perhaps preferring

to wreak a greater impact — wresting the benefit from ministers nationwide — Gaylor and Barker did neither. (A22-23,30.)

Although plaintiffs "identify their injury as the alleged unequal treatment they have received from" the IRS and Treasury (A6), they, in fact, have received *no* treatment from those agency-defendants. As plaintiffs concede, they have not contacted the IRS or Treasury about their housing allowances. They have neither personally sought nor been denied equal treatment. (A24,27,31.) Without that critical step, plaintiffs' claim is reduced to the allegation that § 107(2) violates the Establishment Clause. But as the Supreme Court has emphasized — and the District Court ignored — plaintiffs have "no standing to complain simply that their Government is violating the law." *Allen*, 468 U.S. at 755.

Plaintiffs' suit suffers from the same flaw that precluded standing in *Allen*, *Winn*, *Apache Bend*, and *Catholic Conference*. Plaintiffs contend that the Government violates the Establishment Clause by permitting ministers to claim the § 107(2) exclusion. But just as in those cases, plaintiffs here are not litigating their own tax liabilities. They are merely suing to have the Government act in accordance with

their view of the law. Because plaintiffs have not sought, and been denied, the § 107(2) exclusion, they have not suffered an actual, concrete, and particularized injury. Without such an injury, plaintiffs lack Article III standing.

This Court recently made a like point when FFRF sought to challenge the constitutionality of a federal statute creating the National Day of Prayer as violating the Establishment Clause. *FFRF v. Obama*, 641 F.3d 803 (7th Cir. 2011). The Court held that FFRF lacked standing because — even if the statute violated the Establishment Clause — FFRF was not personally "injure[d]" by the statute, explaining that FFRF's "offense at the behavior of the government, and a desire to have public officials comply with (plaintiff's view of) the Constitution, differs from a legal injury." *Id*. at 805, 807. A legal injury, the Court emphasized, requires "an invasion of one's own rights to create standing." *Id*. at 806. Similarly, in *FFRF v. Zielke*, 845 F.2d 1463 (7th Cir. 1988), the Court held that FFRF lacked standing to challenge a Ten Commandments display because FFRF failed to allege an actual, concrete injury. As the Court explained, FFRF's commitment

"to the principle of separation of church and state . . . alone does not satisfy the standing doctrine." *Id.* at 1468 n.3. The same is true here.

C. Plaintiffs' lawsuit also runs afoul of other limitations on standing

Plaintiffs' complaint also runs afoul of other limitations on standing. To surmount the prudential principles that limit standing in a suit brought (as here) under the APA, plaintiffs must show not only that they fall within the zone of protected interests, but that there is no "evidence that Congress intended to preclude the plaintiff from suing," such as "'the structure of the statutory scheme.'" *City of Milwaukee v. Block*, 823 F.2d 1158, 1166 (7th Cir. 1987) (citation omitted). These limitations counsel against the exercise of jurisdiction and disclose that the APA does not waive sovereign immunity here.

To begin with, although a person who actually claims a tax benefit might arguably fall within the zone of interests protected by the statute conferring it, plaintiffs here fall short. Eschewing any claim to the § 107(2) exclusion they seek to nullify, they likewise cede any claim to being within the statute's penumbra. To say, moreover, that they fall within the zone of interests protected by the Establishment Clause, merely because of their interest in the separation of church and state,

would not meaningfully set them apart from masses of other citizens who also wish the Government to abide by the law.

In any event, the intent of Congress *not* to allow plaintiffs to contest the tax liability of third parties is manifest. As we explain below, "Congress has created a highly articulated and exclusive structure of federal tax litigation that limits judicial review of tax matters to precisely defined channels." (Doc27 at 5.) Plaintiffs are attempting to litigate outside of those established channels.

Congress has authorized taxpayers to bring deficiency actions in the Tax Court to obtain review of asserted deficiencies in income, gift, estate and certain excise taxes without first having to pay the amount in dispute. §§ 6211, 6212, 6213(a). Alternatively, Congress has permitted taxpayers to sue for a refund in a federal district court or in the Court of Federal Claims after the taxpayer has duly filed an administrative refund claim and the claim either has been denied or not acted upon for six months. §§ 6511, 6532(a)(1), 7422(a). These remedies are adequate and specific remedies under 5 U.S.C. §§ 703 and 704 that foreclose review under the APA.

Congress has otherwise generally precluded "any person, whether or not such person is the person against whom such tax was assessed," from maintaining a suit "for the purpose of restraining the assessment or collection of any tax" (§ 7421(a)), and has likewise generally barred declaratory relief in all actions "with respect to Federal taxes" (28 U.S.C. § 2201(a)). To be sure, the Anti-Injunction Act may not apply of its own terms here, because the effect of plaintiffs' suit would be to increase tax collections. *Cf. Hibbs v. Winn*, 542 U.S. 88, 104 (2004) (construing Tax Injunction Act, 28 U.S.C. § 1341). Nevertheless, taken as a whole, this concerted structure generally confines tax disputes to challenges by taxpayers in deficiency actions and refund suits. It expressly — or at least impliedly — forecloses review. 5 U.S.C. §§ 701(a)(1), 702(1), (2).

Against this backdrop, "[i]t is well-recognized that the standing inquiry in tax cases is more restrictive than in other cases." *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995). The standing inquiry becomes particularly "restrictive" (*id.*) where a plaintiff seeks to litigate the tax liability of third parties who are not before the court. In that context, the courts have recognized

"the principle that a party may not challenge the tax liability of another." *United States v. Williams*, 514 U.S. 527, 539 (1995). As this Court has observed, "[o]rdinarily a person does not have standing to complain about someone else's receipt of a tax benefit." *Flight Attendants Against UAL Offset v. Commissioner*, 165 F.3d 572, 574 (7th Cir. 1999).

These principles apply with special force where, as here, a plaintiff seeks to increase the tax liabilities of third parties who are not before the court. It would be passing strange to allow plaintiffs, who have not sought the exclusion for themselves, to harness the injunctive power of the court to require the IRS to deny the exclusion to other persons. The better view is that Congress intended no such thing. *See Louisiana v. McAdoo*, 234 U.S. 627, 632 (1914) (declining to adjudicate third-party challenge to favorable tax treatment for another taxpayer, because the maintenance of such actions "would operate to disturb the whole revenue system of the government").

Tellingly, the Fifth Circuit, sitting *en banc*, denied standing in a similar situation in *Apache Bend*. There, as noted above, the plaintiffs challenged preferential transition relief granted to other taxpayers not

before the court. But they did not "seek transition relief for themselves" or "to litigate their own tax liability." 987 F.2d at 1177. Instead, they "asked only that transition relief be denied to the favored taxpayers." *Id.* The Fifth Circuit held that prudential concerns counseled dismissal, explaining that "Congress has erected a complex structure to govern the administration and enforcement of tax laws, and has established precise standards and procedures for judicial review of tax matters." *Id.*

Those same concerns counsel dismissal here. As the Fifth Circuit pointed out in *Apache Bend*, the highly articulated structure of federal tax litigation painstakingly designed by Congress counsels dismissal of a case of this ilk. It is unquestionably "evidence that Congress intended to preclude the plaintiff[s] from suing" outside of that structure. *Block*, 823 F.2d at 1166. By respecting Congress's structure, the Fifth Circuit declined to expand its judicial power. The District Court should have exercised the same restraint here.

D. The District Court's standing analysis cannot withstand scrutiny

The District Court relaxed the standing requirements described above because — in its view — those requirements were "arbitrary" (A15) and a "waste" of "time" (A8). The court considered it "clear" that

plaintiffs could not qualify for the exclusion and saw "no reason" to put them through the "futile" exercise of seeking the benefits themselves. (A2.) This approach is flawed for several reasons.

1. As we have already explained, a plaintiff making an unequal-treatment claim has not been injured for standing purposes unless he has sought, and been denied, the benefit at issue. The District Court's contrary ruling is at odds with this established principle. In *Heckler*, the Supreme Court held that the plaintiff had standing precisely because he "personally has been denied benefits that similarly situated women receive," and therefore was not merely asserting a generalized grievance. 465 U.S. at 740 n.9. In *Allen*, by contrast, the Court held that a plaintiff did not have standing to challenge another's tax liability. It distinguished *Heckler* on the basis that the plaintiff there was "'personally denied equal treatment.'" 468 U.S. at 755 (citation omitted). Where, as here, a plaintiff makes an unequal-treatment claim without contesting his own tax liability, the plaintiff, by definition, is attempting to contest the tax liability of another taxpayer. As the courts held in *Allen*, *Winn*, *Catholic Conference*, and *Apache Bend*, he lacks standing to do so. Far from being an "arbitrary" step, presenting

a "formal claim" to the IRS regarding one's own tax liability (A2,15), and then having that personal claim denied, provides the concrete and personal injury that Article III requires.

There is no basis for the District Court's attempt to excuse plaintiffs from seeking and being denied the exclusion by the IRS on the theory that it would be "futile." (A2.) To begin with, the court was speculating in concluding that the IRS would deny such a claim. But in any event, Article III's standing requirements must be "strict[ly] compli[ed] with," *Raines*, 521 U.S. at 819-820. Moreover, there is no "futility" exception in federal tax litigation, as it was long ago established in the analogous situation regarding the requirement of filing an administrative refund claim under § 6511 before suit. *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 273 (1931). Applying this fundamental principle, this Court has held that it lacks the "authority to excuse [the taxpayer's] failure to make a claim as required by section 7422(a), notwithstanding our certainty that the IRS ultimately will reject her claim." *Bartley v. United States*, 123 F.3d 466, 469 (7th Cir. 1997). Similarly, here, the court lacked the authority to excuse plaintiffs from personally seeking, and being denied, the § 107(2)

exclusion, and to have allowed the plaintiffs to litigate their claims outside the structure that Congress has designed for tax litigation, on grounds of futility.

Other taxpayers whose challenges to the constitutionality of the tax laws have been heard have first sought the tax benefit at issue, even where doing so was arguably futile. For example, in *Texas Monthly*, a nonreligious magazine sought the exemption provided for "religious" periodicals by paying the tax "under protest" and then suing "to recover those payments in state court." 489 U.S. at 6. Similarly, in *Moritz*, the taxpayer claimed the dependent-care expense deduction available to all women regardless of marital status, notwithstanding that he was ineligible for it as an unmarried man, and then brought suit in Tax Court to contest the resulting deficiency determined against him. 469 F.2d at 467. In both cases, seeking the tax benefit may have been futile. But once the benefit was denied, the taxpayer had sustained the requisite injury concerning his own tax liability that gave rise to his standing to sue.

The District Court's reliance (App7) on *Finlator v. Powers*, 902 F.2d 1158 (4th Cir. 1990), is misplaced. That decision is both incorrect

and distinguishable. There, the court concluded that taxpayers had standing to challenge a state tax exemption, notwithstanding that they had not taken any "minimal steps" to allow the State to "preclude or redress their injuries *ab initio*," such as contesting the liability, refusing to pay, paying under protest or suing for refund. *Id*. at 1161. The court "decline[d] to read such an implicit requirement into" *Texas Monthly*, "absent a clear statement by the Supreme Court to that effect." *Id*. at 1162. This ruling was misconceived. As the court explained in *Fulani v. Brady*, 935 F.2d 1324, 1328 (D.C. Cir. 1991), standing was recognized in *Texas Monthly* because the plaintiff there "petitioned for a refund of its own taxes," and therefore "sought to litigate . . . its own liability." As we have already explained, the Supreme Court has made it clear, in cases such as *Heckler* and *Allen*, that the plaintiff must seek from the defendant (and personally be denied) the benefit at issue in order to have standing to litigate an unequal-treatment claim. Moreover, the court in *Finlator* concluded that there were no "prudential concerns" that militated against finding standing in that state tax case. 902 F.2d at 1162. By contrast, there *are* prudential concerns that counsel

against recognizing standing in this federal tax case. *See* Section I.C, above.

2. The District Court's conclusion that following the formal rules of standing would be a "waste" of "time" (A8) fails to appreciate the importance of those rules. Article III is "not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 476 (1982). "In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be *more* careful to insist on the formal rules of standing, not *less* so." *Winn*, 131 S. Ct. at 1449 (emphasis added). In its eagerness to entertain the suit, the District Court disregarded these important constitutional principles and erroneously engaged in "premature adjudication of constitutional questions." *Arizonans for Official English*, 520 U.S. at 79.

The District Court's exercise of jurisdiction in this federal tax case, where the plaintiffs did not first present the issue to the IRS, is

particularly troubling. Whether the § 107 exclusion extends to atheists presents a question of statutory interpretation of apparent first impression. Notably, this Court has held that "atheism" is a "religion" for "Establishment Clause" purposes. *Kaufman v. McCaughtry*, 419 F.3d 678, 684 (7th Cir. 2005). Although the District Court had its own views regarding the matter (App8-14), it is the Secretary and the Commissioner, not the courts, who are charged with the responsibility for enforcing the tax laws in the first instance. The court should have allowed them the opportunity to determine whether an atheist could qualify. The court's arrogation of this Executive Branch prerogative raises serious constitutional concerns.

3. The District Court's rationales for relaxing the standing requirements are unfounded. The court's reliance (A7-9) on cases permitting preenforcement challenges is misplaced. "To satisfy the injury-in-fact requirement in a preenforcement action, the plaintiff must show 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution thereunder.'" *ACLU*

v. Alvarez, 679 F.3d 583, 590-591 (7th Cir. 2012) (citation omitted). Plaintiffs cannot satisfy that standard.

To begin with, unlike the situations presented in the cases cited by the District Court (A7-9), no conduct is proscribed by § 107(2), nor do plaintiffs face a "credible threat of prosecution" under it. And the court's concern that plaintiffs might be "vulnerable to civil sanctions" (A9) for seeking the exclusion does not excuse a taxpayer from seeking a tax benefit from the IRS first.[6] A taxpayer whose position has colorable merit need not fear that a penalty will be imposed against him. Moreover, the District Court's reservations in this regard are fundamentally at odds with its ultimate conclusion that plaintiffs are similarly situated to the ministers reaping the benefit, but for an invidious and unconstitutional restriction (according to the court) that the compensation so excluded be earned in a religious endeavor.

---

[6] To be sure, a taxpayer may be liable for a penalty for making a "frivolous" submission to the IRS. § 6702. The accuracy-related penalty under § 6662 with which the court was apparently concerned (A9), however, applies only to underpayments, § 6662(a), not to refund claims, and even then only to positions taken without reasonable cause and good faith, § 6664(c)(1).

Similarly lacking in merit is the District Court's suggestion that the plaintiffs would lack "standing to challenge § 107(2) in the context of a proceeding to claim the exemption." (App6 (citing *Templeton v. Commissioner*, 719 F.2d 1408 (7th Cir. 1983), among others).) That aspect of *Templeton* has since been overruled. In *Templeton*, this Court held that a taxpayer lacked standing to challenge the underinclusiveness of a tax exemption under the Establishment Clause because the injury was not redressable: if the taxpayer did not qualify, the most he could achieve was to deprive the favored class of the benefit, rather than improve his own situation. *Id*. at 1412. That rationale, however, was later "rejected" by the Supreme Court in *Texas Monthly*, because it would "'effectively insulate underinclusive statutes from constitutional challenge.'" 489 U.S. at 8 (citation omitted). But the plaintiff in *Texas Monthly* had standing to challenge the underinclusive tax exemption at issue there precisely because it had paid the tax and sought a "refund," thereby presenting a "live controversy" for the Court to adjudicate. *Id*. The District Court erred in allowing plaintiffs here to bypass that route.

II

Section 107(2) does not violate the Establishment Clause

Standard of review

The District Court's grant of summary judgment to plaintiffs on their Establishment Clause claim is reviewed *de novo*. *Books v. Elkhart County, Ind.*, 401 F.3d 857, 863 (7th Cir. 2005).

A. Introduction

1. The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I, cl. 1. Generally speaking, the First Amendment's Free Exercise Clause prohibits Congress from interfering with religious practices and institutions, while the Establishment Clause prohibits Congress from inappropriately advancing religion. Between the "two Religion Clauses," there is a middle ground — "room for play in the joints" — within which Congress may accommodate religion "without sponsorship and without interference." *Walz v. Tax Commission*, 397 U.S. 664, 668-669 (1970).

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.'" *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (citation omitted); *see Cutter v. Wilkinson*, 544 U.S. 709, 719-720 (2005) (upholding Religious Land Use & Institutionalized Persons Act as a "permissible legislative accommodation of religion," even though it was not "compelled by the Free Exercise Clause"); *Gillette v. United States*, 401 U.S. 437, 450 (1971) (upholding religion-specific exemption from military draft).

2. To determine whether the Government's accommodation of religion is permissible under the Establishment Clause, courts generally apply the three-pronged test set forth by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which "'remains the prevailing analytical tool for the analysis of Establishment Clause claims.'" *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 849 (7th Cir. 2012) (*en banc*) (citation omitted), *petition for cert. filed*, No. 12-755 (Sup. Ct. Dec. 20, 2012). In order to comport with the Establishment Clause, (i) "the statute must have a secular legislative purpose," (ii) "its principal or primary effect must be one that neither advances nor inhibits religion," and (iii) it "must not foster 'an excessive government

entanglement with religion.'" *Lemon*, 403 U.S. at 612-613 (citation omitted).

A comparison of *Amos* and *Walz* (upholding religious exemptions) to *Texas Monthly* (invalidating such an exemption) illustrates the contours of permissible accommodation of religion. In *Amos*, the Supreme Court addressed whether the exemption for religious organizations from the prohibition against religious discrimination under Title VII violates the Establishment Clause. The Court upheld the exemption as a permissible accommodation, even though it was not required by the Free Exercise Clause. 483 U.S. at 336. The Court concluded that the exemption satisfied the *Lemon* test. First, it served the secular purpose of minimizing governmental interference "with the decision-making process in religions." *Id*. Second, it did not advance religion but merely removed a regulatory burden imposed thereon. *Id*. at 338. Third, it avoided excessive entanglement by "effectuat[ing] a more complete separation" of church and state. *Id*. at 339. The Court expressly rejected the complaint "that [the exemption] singles out religious entities for a benefit." *Id*. at 338. As the Court explained, "[w]here, as here, government acts with the proper purpose of lifting a

regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities." *Id.*

In *Walz*, the Supreme Court held that exempting religious organizations from a generally applicable property tax did not violate the Establishment Clause. The Court emphasized that the tax exemption served the permissible purpose of "sparing the exercise of religion from the burden of property taxation." 397 U.S. at 673-674. The exemption, moreover, by no means sponsored religion, but "simply abstains from demanding that the church support the state." *Id.* at 675. And it "create[d] only a minimal and remote involvement between church and state and far less than taxation of churches." *Id.* at 676. Although the Court observed that the property tax exemption was also available to other nonprofit organizations, its conclusion that the exemption was a "permissible state accommodation to religion" did not depend on that fact. *Id.* at 673. As the Court explained, the Establishment Clause prohibits government "sponsorship" of "religious activity," and a property-tax exemption — unlike a "direct money subsidy" — does not run afoul of that prohibition because the

"government does not transfer part of its revenue to churches." *Id.* at 675.

Finally, in *Texas Monthly*, the Supreme Court addressed a state sales-tax exemption for periodicals distributed by a "religious faith" that promoted the "teachings of the faith." 489 U.S. at 5-6. A divided majority of the Court held that this differentiation of literature based upon religious content violated either the Establishment Clause (all but White, J.) or the Press Clause of the First Amendment (White, J.). *Id.* at 17-25 (Brennan, J., joined by Marshall and Stevens, JJ.); *id.* at 25-26 (White, J., concurring in the judgment); *id.* at 26-29 (Blackmun, J., joined by O'Connor, J., concurring in the judgment). Justice Blackmun's concurrence provides the rationale for the Court because it provides the narrowest grounds on which the decision is based. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (observing that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds'") (citation omitted). Justice Blackmun believed that, although "some forms of

accommodating religion are constitutionally permissible" (citing *Amos* as an example), the Texas sales-tax exemption was not, because it entailed "preferential support for the communication of religious messages" without any secular justification for doing so. 489 U.S. at 28.

3. As demonstrated below, § 107 is a permissible accommodation of religion under *Lemon*. Like the exemptions in *Amos* and *Walz*, § 107 lifts a burden on religious practice by eliminating governmental discrimination against (§ 107(1)) — and between (§ 107(2)) — religions, and by minimizing governmental interference with a church's internal affairs, without burdening third parties. Unlike the exemption in *Texas Monthly*, § 107 does not endorse a religious message. It merely adapts the Code's general exemptions for certain types of employer-provided housing to the unique context of a church and its minister. *See* Legg, *Excluding Parsonages from Taxation: Declaring a Victor in the Duel between Caesar & the First Amendment*, 10 Georgetown J. of Law & Public Policy 269, 271 (2012) (concluding that "the parsonage exclusions are constitutional when (necessarily) viewed as one element of a larger congressional plan to extend tax relief to recipients of employer-provided housing as a principal feature of their employment").

4. Before turning to those arguments, however, we first highlight three aspects of § 107(2) that are crucial to an understanding of its constitutional soundness. First, § 107(2) involves an exemption from tax, rather than the grant of a direct subsidy. As a general rule, the "grant of a tax exemption is not sponsorship" prohibited by the Establishment Clause, despite the "indirect economic benefit" that goes with it. *Walz*, 397 U.S. at 674-675. Unlike a "direct money subsidy," the "government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Id.* at 675. Moreover, the Government's refusal to "impose a tax" on religion does not impose a burden on third parties. *Winn*, 131 S. Ct. at 1447.

Second, § 107(2) provides an exclusion from gross income for employment benefits provided by a church to its minister. The courts have been particularly solicitous of governmental accommodation regarding the "employment relationship between a religious institution and its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 705 (2012). In *Hosanna-Tabor*, the Supreme Court held that "there is a ministerial exception grounded in

the Religion Clauses of the First Amendment" that precludes the government from applying generally applicable anti-discrimination laws to a church's minister, even though such laws may be applied to the church's other employees. *Id.* at 707. As the Court explained, the church-minister relationship concerns "the internal governance of the church," given that the minister "personif[ies] its beliefs," and a church's decisions regarding its ministers "affects the faith and mission of the church itself." *Id.* at 706-707. Indeed, this Court refers to the "ministerial exception" as the "internal affairs" doctrine because the exception is designed to prohibit governmental interference "in the internal management of churches." *Schleicher v. Salvation Army*, 518 F.3d 472, 474-475 (7th Cir. 2008) (applying doctrine to reject ministers' claim that church violated minimum-wage laws).

Third, § 107(2) is but a single provision in a larger Congressional scheme that exempts qualifying employer-provided housing from taxation. As noted above (at pp. 3-4), and described more fully below, the Code contains several tax benefits for housing used by a taxpayer in the business or for the convenience of his employer, including §§ 119 and 280A(c)(1). Section 107 merely adapts those provisions to the

unique church-minister context, so as to avoid the entanglement problems that could arise if ministers had to rely on those provisions to exclude or deduct the value of church-provided housing. "When viewed in the context of other employer-provided housing provisions — both historic and currently-existing — [§ 107(2)] hardly singles out religion for an exclusive benefit in violation of the Constitution." Legg, above, at 297.

B. Section 107 is a permissible accommodation of religion

As demonstrated below, § 107(2) does not violate the Establishment Clause because it satisfies each part of the *Lemon* test.

1. Section 107(2) has a secular legislative purpose

In reviewing an Establishment Clause challenge, it is critical to consider the historical context of the statute and the specific sequence of events leading to its passage. *See Salazar v. Buono*, 130 S. Ct. 1803, 1816 (2010) (reversing determination that law violated Establishment Clause where the "District Court took insufficient account of the context in which the statute was enacted and the reasons for its passage"). The legislative history and context of § 107(2) demonstrates that the manifest purpose of the statute is to achieve parity among clergy and

denominations, irrespective of a minister's housing arrangements, and to avoid interference in a church's internal affairs.

a. The history and context of § 107

Church-provided housing is a tradition that dates back at least to the 13th century. Savidge, *The Parsonage in England* 7-9 (1964). The patterns of housing members of the clergy in America have deep histories in the churches of Western Europe. The most common feature of this long-held tradition is that clergy lived in housing (called a parsonage) on the church grounds or nearby on church-owned property. (A68-69.) The parsonage system provided a critical means for churches to ensure that the spiritual needs of their congregations were met by housing the clergy in a place available to the congregation that could accommodate the church business conducted there. (A73.)

In 1921, when Congress first enacted the parsonage exclusion, most religious denominations in the United States furnished parsonages to ministers in kind. (A72.) The denominations that did not do so were generally very small or were newer sects. (A72,76.) The latter denominations found it more convenient or feasible to furnish

parsonages for their ministers by providing them with cash in lieu of the use of a church-owned building. (A72,76.)

Whether provided by means of cash or in kind, parsonages are furnished to ministers for the church's "convenience." *Williamson*, 224 F.2d at 380. Since a minister "will personify" his church, *Hosanna-Tabor*, 132 S. Ct. at 706, his residence is traditionally more than mere housing (A70). It is an extension of the church itself and is typically used for "religious purposes such as a meeting place for various church groups and as a place for providing religious services such as marriage ceremonies and individual counseling." *Immanuel Baptist Church v. Glass*, 497 P.2d 757, 760 (Okla. 1972); *see* Brunner, *Taxation: Exemption of Parsonage or Residence of Minister, Priest, Rabbi or Other Church Personnel*, 55 A.L.R.3d 356, 404 (1974) (observing that "[m]ost ministerial residences can be expected to be incidentally used to some considerable extent as an office, a study, a place of counseling, a place of small meetings, such as boards or committees, and a place in which to entertain and lodge church visitors and guests").

Against this historical backdrop, Congress enacted an exclusion from gross income for parsonages in 1921, just eight years after the

modern federal income tax was authorized by the 16th Amendment to the Constitution. *See* Revenue Act of 1921, Section 213(b)(11). Section 213(b)(11) — the precursor to § 107(1) — excluded from income "[t]he rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of his compensation." 42 Stat. 227, 239. Immediately before the enactment of Section 213(b)(11), the Treasury Department had allowed some employees — but not clergy — to exclude the value of employer-provided housing from income under the "convenience of the employer" doctrine.[7] *See*, above, pp. 5-6. In response, Congress enacted Section 213(b)(11). Ministers were thereby placed on an equal footing with other types of employees who were already enjoying the Treasury's recognition of an exclusion for housing provided for the employer's convenience. It also spared them the prospect of undergoing an intrusive inquiry regarding the church's convenience.

[7] The convenience-of-the-employer rationale for excluding housing furnished in kind was at first recognized only in Treasury rulings and regulations, but was ultimately codified by Congress in 1954 as § 119. *See Kowalski*, 434 U.S. 77.

Ministers whose churches chose to furnish them with parsonages by way of providing cash allowances for that purpose sought to exclude the parsonage allowance under Section 213(b)(11). The Treasury determined that Section 213(b)(11) "applies only to cases where a parsonage is furnished to a minister and not to cases where an allowance is made to cover the cost of a parsonage." I.T. 1694. The Treasury advised, however, that such ministers could deduct their payments for the parsonage to the extent that the parsonage was used for "professional" rather than personal reasons.[8] *Id.*

Several courts, however, rejected the Treasury's determination and permitted ministers to exclude from income the value of parsonages furnished to them in cash as well as in kind. *See*, above, p. 7. As the Eighth Circuit explained, when a church provides a minister a parsonage allowance in lieu of a parsonage, it was "manifestly for the

[8] Prior to 1976, the costs associated with the business use of the taxpayer's residence were deductible on the same terms as any other "ordinary and necessary" business expense. *E.g.*, Revenue Act of 1921, § 214(a)(1); § 162. In 1976, however, Congress enacted § 280A, which must be satisfied, in addition to § 162, in order to deduct such expenses. Section 280A(c)(1) requires the residence to be used "for the convenience of [the] employer," just as the employer-furnished housing must be so used in order to qualify for the coordinate exclusion under § 119.

convenience of the employer," and such housing should be excluded from income, whether furnished in cash or in kind. *Williamson*, 224 F.2d at 380.

In 1954, Congress codified those decisions by enacting § 107(2) as an additional exclusion to the existing one, which was redesignated as § 107(1). The statute as a whole leaves it to churches to determine how to provide parsonages — in cash or in kind — free from any influence from the tax laws. As the House and Senate Reports explained (using identical language), the rationale for the new provision was as follows:

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

H.R. Rep. No. 1337, at 15 (emphasis added); S. Rep. No. 1622, at 16 (emphasis added). Congress had been alerted to the discrimination in existing law by officials from various religious denominations who complained that the existing "discriminatory" tax provision benefited some clergy and churches but not others. Hearings on Forty Topics

Pertaining to the General Revision of the Internal Revenue Code at 1574-1575 (Aug. 1953) (Statement of Hon. Peter Mack). Section 107(2) was enacted "to equalize the disparate treatment among religious denominations." Legg, above, at 275.

Those purposes of preventing discrimination and preserving neutrality were confirmed in 2002, when Congress amended § 107(2) to clarify that the exclusion is limited to the fair rental value of the parsonage. 116 Stat. 583. The bill introducing the proposed amendment explained that § 107 was designed to "accommodate the differing governance structures, practices, traditions, and other characteristics of churches through tax policies that strive to be neutral with respect to such differences." H.R. 4156, 107th Cong. § 2(a)(4). The bill further confirmed that § 107 was also intended to minimize "intrusive inquiries by the government" into a church's internal affairs by obviating the convenience-of-the-employer inquiry required by §§ 119 and 280A(c)(1). *Id*. at § 2(a)(3), (5).

b. The statute's history and context disclose the secular purpose of eliminating discrimination against, and among, ministers and of minimizing interference with a church's internal affairs

Far from seeking to provide religion a *special* benefit, Congress enacted § 107(1) and its statutory predecessors to ensure that ministers received the *same* tax benefit that similarly situated secular employees had received pursuant to the convenience-of-the-employer doctrine (now codified in § 119). All employees — religious or lay — are entitled to exclude from gross income the value of "lodging furnished to him" by his "employer for the convenience of the employer." § 119. When the convenience-of-the-employer doctrine was initially developed, the Treasury applied it to many secular employees, but not to ministers. By allowing secular employees, but not ministers, to exclude employer-provided housing from income, the Treasury's 1921 ruling raised serious constitutional concerns. *E.g., McDaniel v. Paty*, 435 U.S. 618, 629 (1978) (determining that law permitting all persons, except for "ministers," to participate in political conventions violated the First Amendment). Congress quickly reacted to that ruling by enacting Section 213(b)(11) of the Revenue Act of 1921, the predecessor of

§ 107(1). Consequently, § 107(1) simply levels the playing field between ministers and other types of employees. It is manifestly constitutional.[9]

After eliminating discrimination *against* ministers who were furnished housing in kind by their churches, Congress next eliminated discrimination *among* ministers. It addressed the problem that some churches furnished parsonages by providing parsonages in kind, while others did so by providing cash for that purpose. Congress enacted § 107(2) to ensure that all ministers who were similarly situated were treated equally by the Government, tax-wise. Because § 107(2) has the permissible secular purpose of avoiding governmental discrimination among religions, it furthers one of the core purposes of the Establishment Clause. *See Larson v. Valente*, 456 U.S. 228, 246 (1982) (determining that law that applied to some, but not all, religions violated the Establishment Clause by running afoul of the "principle of denominational neutrality").

Moreover, by enacting § 107(2), Congress removed tax-related impediments to a church's decision whether to furnish a parsonage to

[9] Due to plaintiffs' uncontested lack of standing, § 107(1) is not even challenged here.

its minister in cash or in kind, thereby avoiding interference in the church's internal affairs. *See* H.R. 4156, 107th Cong. § 2(a)(3) (observing that one purpose of § 107 is to "minimize government intrusion into internal church operations and the relationship between a church and its clergy"). "Under the *Lemon* analysis, 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." *Amos*, 483 U.S. at 335. Section 107(2) allows each church to decide whether and how best to furnish a parsonage to its ministers.

Finally, § 107 also serves the secular purpose of avoiding problems of entanglement between church and state that could result from administering the convenience-of-the-employer doctrine where ministers are concerned. As Congress and the courts have recognized, the minister's home is used for the "convenience of the employer," whether the home is owned by the church or its minister. *Williamson*, 224 F.2d at 380; 148 Cong. Rec. 4671 (Apr. 16, 2002) (observing that § 107 recognizes "that a clergy person's home is not just shelter, but an essential meeting place for members of the congregation"). By

providing an exclusion for housing provided by churches to ministers, regardless of the form in which it is furnished, § 107 avoids the intrusive convenience-of-the-employer inquiry required by § 119 (when taxpayers seek to exclude employer-provided housing) or § 280A(c)(1) (when taxpayers seek to deduct the cost of housing used in the employer's business). *See* H.R. 4156, 107th Cong. § 2(a)(5) (observing that one purpose of § 107 is to accommodate the fact that "clergy frequently are required to use their homes for purposes that would otherwise qualify for favorable tax treatment, but which may require more intrusive inquiries by the government into the relationship between clergy and their respective churches with respect to activities that are inherently religious"). Avoiding entanglement is a secular purpose. *See Amos*, 483 U.S. at 336.

c. The District Court ignored the statute's history and context

In concluding that § 107(2) lacked a "secular purpose" (App31), the District Court ignored the statute's history and context, including Congress's articulation of its anti-discrimination purpose in the 1954 House and Senate reports quoted above. That primary purpose has been recognized by the courts and commentators. *E.g., Warnke*, 641 F.

Supp. at 1087 (observing that § 107(2) was enacted "to eliminate discrimination"); 1 Mertens Law of Fed. Income Taxation § 7:196 n.71 (2013) (same). For purposes of the first prong of the *Lemon* test, the District Court should have deferred to Congress's articulation of its secular purpose, unless it determined that purpose to be a "sham." *McCreary County v. ACLU*, 545 U.S. 844, 865 (2005). The District Court did not — and could not — find that Congress's articulated purpose here was a "sham."

The District Court's error in disregarding the secular purpose asserted by Congress is magnified by the fact that the law in question is a tax statute. The Supreme Court has emphasized that, even in Establishment Clause cases, "'[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes,'" and that courts must give "substantial deference" to a legislative "judgment" regarding a "tax" provision that is challenged under the Establishment Clause. *Mueller v. Allen*, 463 U.S. 388, 396 (1983) (citation omitted).

The District Court nevertheless opined that § 107(2) was intended "to assist disadvantaged churches and ministers" and held that doing so could not be considered a secular purpose when like benefits were

withheld from secular organizations and employees. (App34.) In so holding, the court lost sight of the fact (i) that Congress created the exclusion for cash parsonage allowances to "remove[ ] the discrimination in existing law" *among* ministers, H.R. Rep. No. 1337, at 15; S. Rep. No. 1622, at 16, and (ii) that the original parsonage exclusion was intended to alleviate discrimination *against* ministers, who had not been accorded the favorable treatment extended to other, secular employees who had also been furnished lodging for the employer's convenience.[10]

There is no merit to the District Court's further suggestion (App32) that any concern about discrimination was unfounded because § 119 treats "secular" employees who purchase their own housing differently than secular employees who receive employer-provided housing. Treating secular employees differently does not raise First Amendment concerns, while treating churches and their ministers

---

[10] Moreover, whether any particular legislator might actually have wished to grant a particular advantage to churches would not have undermined Congress's legitimate anti-discrimination purpose. *See Sherman v. Koch*, 623 F.3d 501, 510 (7th Cir. 2010) (observing that "'what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law'") (citation omitted).

differently *does*. The "principle of denominational neutrality," which applies to legislation that may "effectively" distinguish between "well-established churches" that own parsonages and "churches which are new" that do not, *Larson*, 456 U.S. at 246 & n.23, has no parallel with regard to secular organizations and their employees.

By enacting § 107(2), Congress intended to lift the burden of discriminatory tax treatment that had been imposed on churches and ministers by allowing *all* ministers to exclude the value of the parsonage from income, no matter how each church chooses to provide that housing. In providing that equal treatment, the statute by no means "discriminates against those religions that do not *have* ministers," as the District Court protested. (App33.) If a religion has no ministers, then, *a fortiori*, there is no taxation of a minister's housing that needs to be accommodated. *See* Legg, above, at 292 (observing that "religions without clergy have no leaders needing the benefit of the exclusion"). Nor does § 107(2) create an "imbalance" between ministers who receive housing in kind and those who receive a housing allowance, as the court posited. (App33.) The fact that a minister who uses his housing allowance to buy a home may also benefit from the Code's

deductions available to homeowners is not a consequence of § 107(2), but flows from the minister's independent decision to use the housing allowance to purchase, rather than rent, a home.

2. Section 107(2) does not have the primary effect of advancing or inhibiting religion

To determine whether a law has the primary effect of advancing or inhibiting religion, this Court considers whether "'irrespective of government's actual purpose,'" the "'practice under review in fact conveys a message of endorsement or disapproval.'" *Sherman*, 623 F.3d at 517 (citation omitted). A "reasonable observer" would not "view § 107(2) as an endorsement of religion," as the District Court assumed. (App37.) To the contrary, a reasonable observer, *i.e.*, one who is familiar with "'the text, legislative history, and implementation of the statute,'" *McCreary*, 545 U.S. at 862 (citation omitted), would understand that § 107(2) is a tax exemption, not a subsidy, and that it was designed not only to eliminate discrimination among religions, but also to further separate church and state.

a. Section 107 does not endorse religion, but merely minimizes governmental influence on, and entanglement with, a church's internal affairs

In ruling that § 107(2) lacked a secular effect, the District Court failed to appreciate that § 107(2) minimizes governmental interference with a church's internal affairs. The limited nature of the exclusion in § 107 — which applies only to ministers and not to all religious employees — confirms that its primary effect is not to advance religion, but to preserve the autonomy of churches. Section 107 preserves the "autonomy" of churches by permitting them to determine how best to furnish parsonages to their ministers (whether with cash or in kind) "under the ecclesiastical doctrine of each church," free of discriminatory tax laws and without any adverse tax consequences hinging on that determination. Legg, above, at 291. In this regard, the § 107 exclusion is similar to the "ministerial exception," or "internal-affairs doctrine," that the courts have applied to generally applicable employment laws. Like that doctrine, which minimizes governmental interference "in the internal management of churches," *Schleicher*, 518 F.3d at 475, § 107 minimizes both governmental influence on a church's decision regarding

how to furnish a parsonage, and governmental evaluation of church activities that take place in the parsonage.

The effect of the § 107 exclusion must also be judged in the context of other housing-related exclusions and deductions provided in the Code. *See* Zelinsky, *The First Amendment & the Parsonage Allowance*, Tax Notes 5-8 (Dec. 2013) (critiquing District Court's opinion for analyzing "section 107 in isolation from other code provisions," and explaining how applying § 119 to religious employers creates church-state entanglement problems). Section 107 is "similar to other housing provisions in the Tax Code offered to workers who locate in a particular area for the convenience of their employers, and military personnel who receive a tax exclusion for their housing." 148 Cong. Rec. 4670 (Apr. 16, 2002). All taxpayers may exclude certain employer-provided housing from income. § 119. Likewise, all taxpayers may deduct the cost of their housing to the extent that it is used for their employer's business and convenience. § 280A(c)(1); I.T.1694. In addition, certain employees of the federal government are entitled to exclude their housing allowance without first demonstrating that the housing was being used for the employer's convenience. *See* § 134 (military members); § 912

(civil servants on foreign postings). Section 107 provides similar tax benefits to ministers, but does so in a way that avoids the intrusive inquiries implicit in the employer's convenience and business exigency requirements inherent in §§ 119, 162, and 280A(c)(1).

Ministers who are furnished parsonages in kind could rely on the Code's exclusion for housing furnished "for the convenience of the employer" that "the employee is required to accept . . . on the business premises of his employer as a condition of his employment." § 119. Similarly, ministers who receive parsonage allowances could rely on the Code's deduction for housing used for the employer's business and convenience. §§ 162, 280A(c)(1); I.T. 1694. Ministers' claims of the exclusion or deduction, as the case may be, would raise questions regarding the church's "convenience," the scope of the church's "business premises," and the terms of the minister's employment. It has been argued that the "blanket exclusion" under § 107 "does not 'prefer' religion but merely reduces the administrative burden of applying § 119 to clergymen." Bittker, *Churches, Taxes & the*

Constitution, 78 Yale L. J. 1285, 1292 n.18 (1969);[11] *see* Legg, above, at 292 (explaining that § 107 prevents "entanglement" problems under § 280A(c)(1) by "avoid[ing] the need to have the IRS make case-by-case determinations of whether the parsonage was truly granted 'for the convenience of the employer' based on the church's ecclesiastical doctrine or instead granted as a form of compensation not directly for the benefit of the church"); Note, *The Parsonage Exclusion under the Endorsement Test*, 13 Va. Tax Rev. 397, 418-419 (1993) (comparing § 107(2) to § 119). If it were necessary for such questions to be answered, it might "require[e] the Government to distinguish between 'secular' and 'religious' benefits or services, which may be 'fraught with the sort of entanglement that the Constitution forbids.'" *Hernandez v. Commissioner*, 490 U.S. 680, 697 (1989) (citation omitted). By obviating the resolution of such questions, § 107 has a salutary effect. Each prong of § 107 removes the potential for entanglement by eliminating the intrusive inquiries that could arise if ministers were forced to rely upon

[11] Although Professor Bittker adverted only to § 119 at this point, the same logic would also apply to claims of deductions for the minister's use of the home for church business under § 280A(c)(1), which is likewise infused with the convenience-of-the-employer doctrine.

§ 119 or § 280A(c)(1). The statute therefore has an indisputably secular effect.

b. Section 107(2) does not subsidize religion, as the District Court erroneously concluded

Besides having a secular effect, § 107(2) does not provide government funding for any religious activity, but only a tax exemption for housing. The Supreme Court has made it clear that 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." *Walz*, 397 U.S. at 675. Indeed, observing the long history in the United States of exempting church property from taxation, the Court concluded that "[n]othing" in the "two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religious belief." *Id*. at 678.

Ignoring the analysis of tax exemptions in *Walz*, the District Court instead based its decision on the proposition that "'[e]very tax exemption constitutes a subsidy.'" (App18 (quoting *Texas Monthly*, 489 U.S. at 14-15).) The court's reliance on this statement from *Texas*

Monthly is misplaced. The quoted language, endorsed only by Justices Brennan, Marshall, and Stevens, did not overrule the majority opinion in *Walz*, where the Court held that a "tax exemption" is not a "subsidy," and does not advance religion because there "is no genuine nexus between tax exemption and establishment of religion." 397 U.S. at 675. The Supreme Court continues to recognize the ruling in *Walz* that, for "Establishment Clause" purposes, "there is a constitutionally significant difference between subsidies and tax exemptions." *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 590 (1997). In disregarding that critical difference, the District Court erred.

3. Section 107(2) does not produce excessive entanglement

Section 107 does not produce excessive entanglement with religion. Indeed, the District Court did not find otherwise. (App41.) To "constitute excessive entanglement, the government action must involve 'intrusive government participation in, supervision of, or inquiry into religious affairs.'" *Vision Church v. Village of Long Grove*, 468 F.3d 975, 995 (7th Cir. 2006) (citation omitted). As a tax exemption, § 107(2) does not raise this concern. As the Court noted in *Walz,* a tax "exemption

creates only a minimal and remote involvement between church and state and far less than taxation of churches." 397 U.S. at 676.

Moreover, by adapting the tax benefits generally available to taxpayers in §§ 119 and 280A(c)(1) to the unique circumstances of ministers, § 107 prevents the entanglement that would ensue if the tax benefit were contingent on whether the minister acts for the "convenience of the employer" in using his home. By making such scrutiny unnecessary, the exclusion provided in § 107(2) avoids entanglement and promotes the statute's secular purposes.

Because § 107(2) satisfies each part of the *Lemon* test, it does not violate the Establishment Clause. For the same reasons, § 107(2) does not violate the Equal Protection component of the Fifth Amendment's Due Process Clause, an issue raised by plaintiffs but not reached by the District Court (App2). *See Amos*, 483 U.S. at 338-339 & n.16 (rejecting equal-protection claim for the same reasons that the Court rejected Establishment Clause claim).

4. *Texas Monthly* is not controlling because it is distinguishable in crucial respects

In concluding that § 107(2) violates the Establishment Clause, the District Court relied almost solely on the *Texas Monthly* plurality

opinion. (App19.) Far from being "control[ling]" (*id.*), *Texas Monthly* is readily distinguishable.

First, in contrast to the situation in *Texas Monthly*, where only religious publications could avoid the tax on periodical sales, here, all taxpayers are permitted to exclude, or deduct, the costs of housing provided by the employer for its convenience (§ 119) or by the employee for the employer's convenience (§ 280A(c)(1)). Section 107 provides tax benefits similar to those provided in §§ 119 and 280A(c)(1), but tailors the benefit to avoid entanglement with the church-minister relationship. Section 107's "exclusions are similar to the property tax exemption at issue in *Walz* because the exclusions flow to ministers as a part of a larger congressional policy of not taxing qualifying employer-provided housing." Legg, above, at 288. And "[u]nlike *Texas Monthly*'s narrowly tailored religious publication exemption, the parsonage exclusions in § 107 are part of a larger scheme that more closely aligns with the employer discrimination exception at issue in *Amos*." *Id.* at 290. When § 107(2) is examined as merely one component of a larger, integrated tax code, Congress has by no means provided a tax benefit to

religious organizations and "no one else" (App2), as occurred in *Texas Monthly*.

Second, unlike § 107(2), which has a long history and effect of eliminating discrimination and minimizing entanglement between church and state, the religion-specific exemption in *Texas Monthly* lacked *any* secular purpose or effect. An objective observer could only conclude that the government was endorsing the subject of the tax exemption — the promotion of a religious message. Here, in sharp contrast, by eliminating discrimination and entanglement problems, § 107(2) would be understood by an objective observer to "alleviate a special burden on religious exercise." (App2.)

Finally, § 107(2) does not require the Government to determine whether "some message or activity is consistent with 'the teaching of the faith,'" as was true in *Texas Monthly*, 489 U.S. at 20. To the contrary, it precludes such questions from arising by eliminating inquiries into the extent to which the minister's home is used for religious rather than secular purposes.

CONCLUSION

The judgment of the District Court, as it relates to § 107(2), should be vacated, and the case remanded with instructions to dismiss for lack of jurisdiction. Alternatively, that aspect of the judgment should be reversed.

Respectfully submitted,

KATHRYN KENEALLY
Assistant Attorney General

TAMARA W. ASHFORD
Principal Deputy Assistant Attorney General

/s/ Judith A. Hagley

GILBERT S. ROTHENBERG (202) 514-3361
TERESA E. MCLAUGHLIN (202) 514-4342
JUDITH A. HAGLEY (202) 514-8126
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044
Judith.a.hagley@usdoj.gov
Appellate.taxcivil@usdoj.gov

Of Counsel:

JOHN W. VAUDREUIL
United States Attorney

APRIL 2014

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS OF FED. R. APP. P. 32(a)

Case No. 14-1152

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

[X] this brief contains 13,994 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

[ ] this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[X] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook, *or*

[ ] this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

/s/ Judith A. Hagley

Attorney for Appellants

Dated: April 2, 2014

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2014, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system and that fifteen papers copies were sent to the Clerk by First Class Mail. Counsel for the appellees was served electronically by the Notice of Docket Activity transmitted by the CM/ECF system.

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

/s/ Judith A. Hagley
JUDITH A. HAGLEY
Attorney for Appellants

STATUTORY ADDENDUM

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

SEC. 107. RENTAL VALUE OF PARSONAGES.

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

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

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

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

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

. . . .

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

. . . .

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

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

. . . .

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

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

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

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

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

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

fixed location of such trade or business where the taxpayer conducts substantial administrative or management activities of such trade or business.

. . . .

CIRCUIT RULE 30(d) CERTIFICATION

All of the materials required by Seventh Circuit Rule 30(a) are included in this appendix. All of the materials required by Seventh Circuit Rule 30(b) are included in the separately bound Appendix filed herewith.

/s/ Judith A. Hagley
Judith A. Hagley
Attorney for Appellants

April 2, 2014

Appendix Table of Contents

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

FREEDOM FROM RELIGION FOUNDATION, INC.,
ANNIE LAURIE GAYLOR and DAN BARKER,

OPINION AND ORDER

Plaintiffs,

11-cv-626-bbc

v.

JACOB LEW and DANIEL WERFEL,

Defendants.[1]

- -

Plaintiff Freedom from Religion Foundation, Inc. and its two co-presidents, plaintiffs Annie Laurie Gaylor and Dan Barker, brought this lawsuit under the Administrative Procedure Act, 5 U.S.C. § 702, contending that certain federal income tax exemptions received by "ministers of the gospel" under 26 U.S.C. § 107 violate the establishment clause of the First Amendment and the equal protection component of the Fifth Amendment. Defendants Timothy Geithner and Douglas Schulman (now succeeded by Jacob Lew and Daniel Werfel) have filed a motion for summary judgment, dkt. #40, which is ready for review.

In their complaint, plaintiffs challenged both § 107(1) and § 107(2), but in response

[1] Initially, plaintiffs sued Timothy Geithner and Douglas Schulman in their official capacities as Secretary of the Treasury Department and Commissioner of the Internal Revenue Service. Pursuant to Fed. R. Civ. P. 25(d), I have substituted the new Secretary, Jacob Lew, and the Acting Commissioner, Daniel Werfel.

to defendants' motion for summary judgment, plaintiffs narrowed their claim to § 107(2), which excludes from gross income a minister's "rental allowance paid to him as part of his compensation." (Section 107(1) excludes "the rental value of a home furnished to [the minister] as part of his compensation.") Because plaintiffs have not opposed defendants' argument that plaintiffs lack standing to challenge § 107(1), I will grant defendants' motion as to that aspect of plaintiffs' claim.

With respect to plaintiffs' challenge to § 107(2), I adhere to my conclusion in the order denying defendants' motion to dismiss, dkt. #30, that plaintiffs have standing to sue because it is clear from the face of the statute that plaintiffs are excluded from an exemption granted to others. With respect to the merits, I conclude that § 107(2) violates the establishment clause under the holding in Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989), because the exemption provides a benefit to religious persons and no one else, even though doing so is not necessary to alleviate a special burden on religious exercise. This conclusion makes it unnecessary to consider plaintiffs' equal protection argument.

Although plaintiffs did not file their own motion for summary judgment, "[d]istrict courts have the authority to enter summary judgment sua sponte as long as the losing party was on notice that it had to come forward with all its evidence." Ellis v. DHL Exp. Inc. (USA), 633 F.3d 522, 529 (7th Cir. 2011). In this case, the parties have fully briefed the relevant issues, which are primarily legal rather than factual. Further, plaintiffs asked the court to enter judgment in their favor in their brief in opposition to defendants' motion for summary judgment. Dkt. #52 at 66. Although defendants objected to this request in their

reply brief, dkt. #53 at 3, it was on the same grounds that defendants believe that *they* are entitled to summary judgment. Defendants do not suggest that they would have raised any other arguments or presented any additional facts if plaintiffs had filed their own motion. Under these circumstances, I conclude that it is appropriate to deny defendants' motion for summary judgment and grant summary judgment in plaintiffs' favor with respect to § 107(2).

In concluding that § 107(2) violates the Constitution, I acknowledge the benefit that the exemption provides to many ministers (and the churches that employ them) and the loss that may be felt if the exemption is withdrawn. Clergy Housing Allowance Clarification Act of 2002, 148 Cong. Rec. H1299-01 (Apr. 16, 2002) (statement of Congressman Jim Ramstad) (in 2002, estimating that § 107 would relieve ministers of $2.3 billion in taxes over next five years). However, the significance of the benefit simply underscores the problem with the law, which is that it violates the well-established principle under the First Amendment that "[a]bsent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." Board of Education of Kiryas Joel Village School Disrict v. Grumet, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment). Some might view a rule against preferential treatment as exhibiting hostility toward religion, but equality should never be mistaken for hostility.

It is important to remember that the establishment clause protects the religious and nonreligious alike. Linnemeir v. Board of Trustees of Purdue University, 260 F.3d 757, 765 (7th Cir. 2001) ("The Supreme Court has consistently described the Establishment Clause

as forbidding not only state action motivated by a desire to advance religion, but also action intended to 'disapprove,' 'inhibit,' or evince 'hostility' toward religion."). If a statute imposed a tax solely *against* ministers (or granted an exemption to everyone except ministers) without a secular reason for doing so, that law would violate the Constitution just as § 107(2) does. Stated another way, if the government were free to grant discriminatory tax exemptions in favor of religion, then it would be free to impose discriminatory taxes against religion as well. Under the First Amendment, everyone is free to worship or not worship, believe or not believe, without government interference or discrimination, regardless what the prevailing view on religion is at any particular time, thus "preserving religious liberty to the fullest extent possible in a pluralistic society." McCreary County, Kentucky v. American Civil Liberties Union of Kentucky, 545 U.S. 844, 882 (2005) (O'Connor, J., concurring).

OPINION

A. Standing

As they did in their motion to dismiss, defendants argue that plaintiffs do not have standing to challenge § 107(2). To obtain standing, plaintiffs must show that they suffered an injury in fact that is fairly traceable to defendants' conduct and capable of being redressed by a favorable decision from the court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

Plaintiffs Gaylor's and Barker's alleged injury is the unequal treatment they receive under § 107(2):

> In the case of a minister of the gospel, gross income does not include—
>
> * * *
>
> (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home and to the extent such allowance does not exceed the fair rental value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities.

In particular, plaintiffs argue that "ministers of the gospel" receive a tax exemption under § 107(2) that Gaylor and Barker do not, even though a portion of the salary Gaylor and Barker receive from Freedom from Religion Foundation is designated as a housing allowance. Plts.' PFOF ¶ 2, dkt. #50; Dfts.' Resp. to Plts.' PFOF ¶ 2, dkt. #55. In addition, plaintiffs argue that an order enjoining § 107(2) would redress their injury because it would eliminate the unequal treatment. The parties agree that Gaylor and Barker are both members of the foundation and that the purpose of the foundation is related to the claims in this case, so if the individual plaintiffs have standing, then the foundation does as well. Sierra Club v. Franklin County Power of Illinois, LLC, 546 F.3d 918, 924 (7th Cir. 2008).

Defendants do not deny that a person who is denied a tax exemption that others receive has suffered an injury in fact. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 7-8 (1989) (general interest magazine had standing to challenge state tax exemption received by religious publications); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 224-25 (1987) (same). See also Arizona Christian School Tuition Organization v. Winn, — U.S. —, 131 S. Ct. 1436, 1439 (2011) ("[P]laintiffs may demonstrate standing on the ground that they have incurred a cost or been denied a benefit on account of their religion. Those costs and benefits can result from alleged discrimination in the tax code, such as when the

availability of a tax exemption is conditioned on religious affiliation."). In addition, defendants do not deny that a discriminatory tax exemption may be redressed by eliminating the exemption for everyone. Heckler v. Mathews, 465 U.S. 728, 740, (1984) ("We have often recognized that the victims of a discriminatory government program may be remedied by an end to preferential treatment for others."). However, defendants argue that the lawsuit is premature because plaintiffs have never tried to claim the exemption. Until the Internal Revenue Service denies a claim, defendants say, plaintiffs have not suffered an injury.

As an initial matter, it is not clear whether plaintiffs would have standing to challenge § 107(2) in the context of a proceeding to claim the exemption. In several cases, courts have rejected establishment clause challenges to tax exemptions brought by parties who filed claims for the exemption that were denied. In each of those cases, the court held that the party could not receive the exemption if the court declared it to be unconstitutional, so a favorable decision could not redress their injury. Templeton v. Commissioner of Internal Revenue, 719 F.2d 1408, 1412 (7th Cir. 1983); Ward v. Commissioner of Internal Revnue, 608 F.2d 599, 601 (5th Cir. 1979); Kirk v. Commissioner of Internal Revenue, 425 F.2d 492, 495 (D.C. Cir. 1970). Thus, if accepted, defendants' view could insulate § 107 from challenge by anyone.

In any event, I considered and rejected defendants' argument in the context of denying their motion to dismiss. Dkt. #30. In particular, I concluded that plaintiffs' alleged injury is clear from the face of the statute and that there is no plausible argument that the individual plaintiffs could qualify for an exemption as "ministers of the gospel," so it would

serve no legitimate purpose to require plaintiffs to claim the exemption and wait for the inevitable denial of the claim. Finlator v. Powers, 902 F.2d 1158, 1162 (4th Cir. 1990) (concluding that nonexempt taxpayers had standing to challenge exemption without first claiming exemption because plaintiffs' "injury is created by the very fact that the [law] imposes additional [tax] burdens on the appellants not placed on" those entitled to exemption). See also California Medical Association v. Federal Electric Commission, 453 U.S. 182, 192 (1981) (concluding that plaintiffs had standing, noting that they "expressly challenge the statute on its face, and there is no suggestion that the statute is susceptible to an interpretation that would remove the need for resolving the constitutional questions raised"); Harp Advertising Illinois, Inc. v. Village of Chicago Ridge, Illinois, 9 F.3d 1290, 1291–92 (7th Cir. 1993) ("Challenges to statutes as written, without inquiring into their application, are appropriate when details of implementation are inconsequential.").

The Supreme Court has not addressed this question explicitly, but in Walz v. Tax Commission of City of New York, 397 U.S. 664, 666-67 (1970), the plaintiff was an owner of real estate in New York City who objected to the issuance of "property tax exemptions to religious organizations." Although there was no indication in the opinion that the owner requested an exemption for himself before bringing his lawsuit, the Court reached the merits of his claim under the establishment clause. In Winn, 131 S. Ct. at 1449, the Court acknowledged that it had omitted a discussion of standing from the decision in Walz but suggested that the plaintiff could have relied on the alleged discriminatory treatment among different property owners to demonstrate standing to sue.

In their motion for summary judgment, defendants do not ask the court to reconsider the conclusion that plaintiffs have standing to challenge § 107(2) if it is clear from the face of the statute that they are not entitled to the exemption. Instead, defendants expand an argument that was relegated to a footnote in their motion to dismiss, dkt. #23 at 10 n.3, which is that it is *not* clear from the face of the statute and the implementing regulations that plaintiffs are ineligible for the exemption under § 107(2). Rather, defendants say that it is "conceivable" that atheists such as Gaylor and Barker could qualify as "ministers of the gospel" under § 107, so they should be required to claim the exemption before challenging the statute.

Although defendants devote a substantial amount of their briefs to this argument, it is difficult to take it seriously. Under no remotely plausible interpretation of § 107 could plaintiffs Gaylor and Barker qualify as "ministers of the gospel." However, for the sake of completeness, I will address the primary arguments that defendants raise in their briefs on this issue.

Much of defendants' argument rests on Kaufman v. McCaughtry, 419 F.3d 678, 682 (7th Cir. 2005), in which the court concluded that atheism could qualify as a religion under the free exercise clause in the context of a claim brought by an atheist prisoner who wanted to start an atheist study group. (The court went on to reject the prisoner's claim because he could not show that the absence of an atheist study group imposed a substantial burden on his religious exercise, id. at 683, without explaining how an atheist could make that showing in a different case.) However, the issue in this case is not the scope of the free exercise clause

of the First Amendment as interpreted in the context of one case decided in 2005, but the proper interpretation of the phrase "ministers of the gospel" in a statute enacted in 1954, so cases such as Kaufman provide little guidance.

Alternatively, defendants says that the IRS regulations promulgated under § 107 do not discriminate against "nontheistic beliefs" and that the IRS does not evaluate the "content" of a claimant's professed religion, but these arguments are red herrings as well. As I noted in the order denying defendants' motion to dismiss, the IRS has interpreted § 107 liberally to include members of non-Christian faiths. E.g., Salkov v. Commissioner of Internal Revenue, 46 T.C. 190, 194 (1966) (approving tax exemption for Jewish cantor after rejecting interpretation of term "gospel" as being limited to books of New Testament and instead construing term to mean "glad tidings or a message, teaching, doctrine, or course of action having certain efficacy or validity"). However, even if I assume that IRS would continue to stretch the plain meaning of § 107, there is a difference between non-theistic faiths such as Buddhism and having no faith at all. Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (distinguishing "those religions based on a belief in the existence of God," "those religions founded on different beliefs" and "non-believers"). Defendants point to no regulations or decisions suggesting that a person who did not subscribe to any faith could qualify for an exemption under § 107(2).

Regardless whether the IRS might recognize atheism as a religion, this does not answer the question whether it would recognize an atheist "minister," which is the only question that matters. Defendants cite no evidence that atheists *have* "ministers" as that

term is used in § 107, which is sufficient reason to reject an argument that an atheist could qualify for an exemption under that statute.

Even if I assume that there are atheists ministers, neither plaintiff Gaylor nor plaintiff Barker could qualify as one. Under the federal regulations, the key question is whether the claimant is seeking an exemption for "services performed by a minister [that] are performed in the exercise of his ministry." 26 C.F.R. § 1.1402(c)-5(b)(2). The tax court has struggled to come up with a consistent framework to answer that question, applying different tests in cases such as Good v. Commissioner of Internal Revenue, 104 T.C.M. (CCH) 595 (T.C. 2012), Mosley v. Commissioner of Internal Revenue, 68 T.C.M. (CCH) 708 (T.C. 1994), and Lawrence v. Commissioner of Internal Revenue, 50 T.C. 494 (1968), but both sides in this case cite Knight v. Commissioner of Internal Revenue, 92 T.C. 199, 205 (1989), as identifying all the relevant factors. In Knight, the court considered whether the claimant: (1) performs sacerdotal functions under the tenets and practices of the particular religious body constituting his church or church denomination; (2) conducts worship services; (3) performs services in the control, conduct, and maintenance of a religious organization that operates under the authority of a church or church denomination; (4) is ordained, commissioned, or licensed; and (5) is considered to be a spiritual leader by his religious body.

Plaintiffs do not come close to meeting any of these factors. Defendants cite no persuasive evidence that either Gaylor or Barker is ordained, that they perform "sacerdotal" functions or conduct "worship" services, that anyone in the foundation considers Gaylor and Barker to be "spiritual" leaders or that the foundation is under the authority of a "church."

Again, even assuming that atheism is a religion, the Freedom from Religion Foundation is not an "atheist" organization in the sense that the purpose of the group is to "practice" atheism like the prisoner in Kaufman. Rather, the foundation is open to non-atheists, Barker Decl. ¶ 19, dkt. #48, and the purpose of the foundation, according to its bylaws, is to advocate and educate. Gaylor Decl., dkt. #47 exh. 1 at 1 (purpose of foundation is to promote "the constitutional principle of separation of church and state and to educate the public on matters related to non-theistic beliefs"). Defendants do not identify a single "religious" belief espoused by the foundation. In fact, defendants admit that the foundation is not a church or a religious organization operating under the authority of a church, that plaintiffs Gaylor's and Barker's roles as co-presidents of the foundation do not constitute an ordination, commissioning or licensing as ministers and that the foundation does not engage in worship. Dfts.' Resp. to Plts.' PFOF ¶¶14, 22, 29, dkt. #55.

Although some of Gaylor's and Barker's work may *relate to* religious issues, this is in the context of political and legal advocacy, similar to organizations such as the American Center for Law and Justice or the Anti-Defamation League. Tanenbaum v. Commissioner of Internal Revenue, 58 T.C. 1, 8 (1972) (denying exemption for employee of American Jewish Committee because he "was not hired to perform 'sacerdotal functions' or to conduct 'religious worship'; rather, his job is to encourage and promote understanding of the history, ideals, and problems of Jews by other religious groups"). See also Flowers v. United States, No. CA 4-79-376-E, 1981 WL 1928, *6 (N.D. Tex. Nov. 25, 1981) (upholding denial of exemption because housing allowance was for educational rather than sacerdotal functions);

Colbert v. Commissioner, 61 T.C. 449 (1974) (taxpayer did not qualify for exemption because his "primary emphasis . . . was in warning and awakening people to the dangers of communism and in educating them as to the principles of communism" rather than "religious instruction in the principles laid down by Christ"). In other words, even if I were to assume that the foundation is an "atheist organization," that is not enough to qualify plaintiffs as ministers because they do not engage in the activities that a minister performs. Kirk, 425 F.2d at 495 (affirming denial of claim under § 107 by church employee in part because "all the services performed by petitioner in this case were of secular nature").

Defendants argue that plaintiff Barker engages in a number of activities that could be classified as "sacerdotal," such as performing "de-baptisms," lecturing, performing marriages, counseling, promoting free thought and writing "free thought" songs. (The regulations do not define the term "sacerdotal" except to say that it "depends on the tenets and practices of the particular religious body constituting [a claimant's] church or church denomination." 26 C.F.R. § 1.1402(c)—5(b)(2)(i).) Defendants' argument is a nonstarter because it does not apply to Gaylor, only to Barker; defendants admit that Gaylor is not a minister. Dfts.' Resp. to Plts.' PFOF ¶ 14, dkt. #55. "Where at least one plaintiff has standing, jurisdiction is secure and the court will adjudicate the case whether the additional plaintiffs have standing or not." Ezell vs. City of Chicago, 651 F.3d 684, 696 (7th Cir. 2011).

In any event, none of this evidence provides any support for a view that Barker could qualify as a minister of the gospel. As an initial matter, defendants do not deny that Barker

engaged in some of the activities (such as writing songs and books) before working for the foundation, Dfts.' Rep. to Plts.' Resp. to Dfts.' PFOF ¶ 6, dkt. #54, and that any marriages he officiates are done on his own time, not as an employee of the foundation. Barker Decl. ¶ 24, dkt. #48. See also Tanenbaum, 58 T.C. at 8 (refusing to consider "[a]ny other functions [the claimant] may perform . . . by virtue of his own personal desires but are not cause for remuneration by the" employer). The counseling Barker performs relates to issues such as "how to deal with religious relatives," "how to start an FFRF chapter" and "how to teach children about morality *without* religion." Dfts.' PFOF ¶ 6(a), dkt. #41 (emphasis added). The "debaptismal certificate" can be downloaded by anyone off the internet and will be signed by Barker for five dollars. Dkt. #42-15. Each certificate includes the saying "With soap, baptism is a good thing." Id. Barker describes the certificates as "a tongue-in-cheek way to bring attention to opting out of religion." Barker Decl. ¶ 25, dkt. #48. I do not see how any of this conduct could relate "to the tenets and practices" of a particular religious body and defendants do not even attempt to develop an argument on this point.

In their reply brief, defendants argue that it "does not matter whether Ms. Gaylor or Mr. Barker would or would not be eligible for the exclusion provided in § 107 if they claimed it. What matters is that *an* atheist may lawfully make a claim for the exclusion." Dkt. #53 at 6. This argument is puzzling because it rests on a premise that a plaintiff's own experience is irrelevant to the question of standing. That is obviously incorrect. A plaintiff's standing to sue is determined not by asking whether some hypothetical third party is being injured, but by whether the *plaintiff* is being injured. Kowalski v. Tesmer, 543 U.S. 125,

129 (2004) ("We have adhered to the rule that a party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.") (internal quotations omitted). Defendants seem to concede now that plaintiffs have been injured because they cannot qualify for the exemption. Defendants do not explain why that injury "does not matter" so long as it would be possible for some atheist to qualify under some set of circumstances, but they seem to be confusing standing with the merits. To the extent defendants are arguing that § 107(2) is constitutional if it would allow an exemption for an "atheist minister" in the abstract, that argument has nothing to do with standing.

Defendants make a related argument in their reply brief that plaintiffs' alleged injury would not be fairly traceable to any "religious discrimination" by defendants if § 107 were interpreted as encompassing an "atheist minister." Dfts.' Br., dkt. #53, at 12. Again, this argument rests on a misunderstanding of standing requirements. The question is whether the plaintiff's injury is fairly traceable to the defendant's *conduct*, Massachusetts v. EPA, 549 U.S. 497, 536 (2007), not whether the plaintiff will be able to prove that the injury was caused by a violation of a particular right, which is another question on the merits. Arreola v. Godinez, 546 F.3d 788, 794-95 (7th Cir. 2008) ("Although the two concepts unfortunately are blurred at times, standing and entitlement to relief are not the same thing.").

Accordingly, I conclude that plaintiffs have standing to bring a facial challenge to § 107(2) because the statute denies them an exemption that others receive, the injury is fairly

traceable to the conduct of defendants as those responsible for implementing the tax code and plaintiff's injury is redressable by a declaration that § 107(2) is unconstitutional and an order enjoining its enforcement.

Finally, defendants raise other arguments about whether the case is ripe for adjudication and whether the Administrative Procedure Act waives the government's sovereign immunity under the facts of this case, but both of these arguments are contingent on a finding that § 107(2) does not harm plaintiffs. Because I have rejected that argument, I need not address defendants' other arguments separately.

B. Merits

1. Standard of review

The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const., Amend. I. The first question in every case brought under the establishment clause is the proper standard of review.

The test applied most commonly by courts was articulated first in Lemon v. Kurtzman, 403 U.S. 602 (1971). Under Lemon, government action violates the establishment clause if (1) it has no secular purpose; (2) its primary effect advances or inhibits religion; or (3) it fosters an excessive entanglement with religion. Although individual justices have criticized the test, e.g., Santa Fe Independent School District v. Doe, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting); Tangipahoa Parish Board of

Education v. Freiler, 530 U.S. 1251 (2000) (Scalia, J., dissenting from denial of certiorari), the Supreme Court as a whole continues to apply it. E.g., McCreary County, Kentucky v. American Civil Liberties Union of Kentucky, 545 U.S. 844, 859-67 (2005). Further, it is the test the Court of Appeals for the Seventh Circuit has employed in recent cases brought under the establishment clause. E.g., Doe ex rel. Doe v. Elmbrook School District, 687 F.3d 840, 849 (7th Cir. 2012); Sherman ex rel. Sherman v. Koch, 623 F.3d 501, 507 (7th Cir. 2010); Milwaukee Deputy Sheriffs' Association v. Clarke, 588 F.3d 523, 527 (7th Cir. 2009); Vision Church v. Village of Long Grove, 468 F.3d 975, 991-92 (7th Cir. 2006).

In Lynch v. Donnelly, 465 U.S. 668, 691 (1984), Justice O'Connor offered what she later described as a "refinement" of the first two parts of the Lemon test, under which the court asks "whether the government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement," Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring), viewed from the perspective of a "reasonable observer." Elk Grove Unified School District v. Newdow, 542 U.S. 1, 34 (2004) (O'Connor, J., concurring in the judgment). The Supreme Court has applied Justice O'Connor's test in several subsequent cases, e.g., McCreary County, 545 U.S. at 866; Zelman v. Simmons-Harris, 536 U.S. 639, 654-55 (2002); County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 620 (1989), as has the Court of Appeals for the Seventh Circuit. Clarke, 588 F.3d at 529; Linnemeir v. Board of Trustees of Purdue University, 260 F.3d 757, 764 (7th Cir. 2001); Freedom from Religion Foundation, Inc. v. City of Marshfield, Wisconsin, 203 F.3d 487, 493 (7th Cir. 2000). See also Salazar v. Buono, 559

U.S. 700, 721 (2010) (assuming that "reasonable observer" test applied).

Although the Supreme Court has articulated other tests as well over the years, e.g., Lee v. Weisman, 505 U.S. 577 (1992); Marsh v. Chambers, 463 U.S. 783, 787 (1983), the parties rely on the modified version of the Lemon test, so I will do the same.

2. Texas Monthly, Inc. v. Bullock

Consideration of the question whether § 107(2) violates the establishment clause must begin with Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989), the only case in which the Supreme Court has addressed the constitutionality of a tax exemption granted solely to religious persons. In Texas Monthly, the statute at issue exempted from the state sales tax "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith."

The justices in the plurality opinion (Justices Brennan, Marshall and Stevens) and those concurring in the judgment (Justices Blackmun and O'Connor) agreed that the statute violated the establishment clause. The plurality applied the familiar test under Lemon, 403 U.S. at 612, as well as the endorsement test. In concluding that the statute did not have a secular purpose or effect and conveyed a message of religious endorsement, the plurality emphasized that the exemption provided a benefit to religious publications only, without a corresponding showing that the exemption was necessary to alleviate a significant burden on free exercise:

> Every tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become indirect and vicarious "donors." Insofar as that subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause. However, when government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, as Texas has done, it provides unjustifiable awards of assistance to religious organizations and cannot but convey a message of endorsement to slighted members of the community.

Id. 14-15 (internal quotations, citations and alterations omitted). In addition, the plurality stated that the statute seemed "to produce greater state entanglement with religion than the denial of an exemption" because the statute required the government to "evaluat[e] the relative merits of differing religious claims" in order to determine whether a publication qualified for the exemption. Id. at 20.

In the concurring opinion, Justices Blackmun and O'Connor concluded that "a tax exemption limited to the sale of religious literature by religious organizations violates the Establishment Clause" because it results in "preferential support for the communication of religious messages." Id. at 28. They added that "[a] statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable." Id.

Because no single opinion garnered at least five votes in Texas Monthly, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193 (1977)

(internal quotation marks omitted). Although the rule in Marks likely would make Justice Blackmun's opinion controlling, the differences between the plurality and concurring opinions in Texas Monthly are minimal for the purpose of this case. Under either opinion, a tax exemption provided only to religious persons violates the establishment clause, at least when the exemption results in preferential treatment for religious messages. Haller v. Commissioner of the Dept. of Revenue, 728 A.2d 351, 354-55 (Pa. 1999) ("[A] majority of the Court in Texas Monthly clearly recognized that tax exemptions that include religious organizations must have an overarching secular purpose that equally benefits similarly situated nonreligious organizations.").

Because a primary function of a "minister of the gospel" is to disseminate a religious message, a tax exemption provided only to ministers results in preferential treatment for religious messages over secular ones. Accordingly, I conclude that Texas Monthly controls the outcome of this case. Although this case involves an income tax exemption instead of a sales tax exemption, neither the plurality nor the concurrence placed any importance on the type of tax involved and defendants do not provide any grounds for distinguishing the two types. Even Justice Scalia in his dissent in Texas Monthly stated that § 107 is a "tax exemptio[n] of the type the Court invalidates today." Texas Monthly, 489 U.S. at 33 (Scalia, J., dissenting).

3. Accommodation of religion

Tellingly, defendants make little effort to distinguish Texas Monthly. They make a

fleeting reference to the plurality's statement that preferential treatment for religious groups may be permissible if it "remov[es] a significant state-imposed deterrent to the free exercise of religion," Texas Monthly, 489 U.S. at 14, but they do not explain how that statement might apply to this case. Of course, "[a]ny [government action] pertaining to religion can be viewed as an 'accommodation' of free exercise rights," Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 347 (1987) (O'Connor, J., concurring in the judgment), but the "principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." Lee, 505 U.S. at 587.

Although it is undoubtedly true that taxes impose a burden on ministers, the same is true for all taxpayers. Defendants do not identify any reason why a requirement on ministers to pay taxes on a housing allowance is more burdensome for them than for the many millions of others who must pay taxes on income used for housing expenses. In any event, the Supreme Court has rejected the view that the mere payment of a generally applicable tax may qualify as a substantial burden on free exercise. Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378, 391 (1990) ("[T]o the extent that imposition of a generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant.").

Defendants cite several cases in which courts have found that 26 U.S.C. § 1402(e) and (g), which give exemptions to certain religious persons from paying taxes related to

Social Security, are permissible accommodations of religion. E.g., Droz v. Commissioner of Internal Revenue, 48 F.3d 1120, 1121 (9th Cir. 1995); Hatcher v. Commissioner of Internal Revenue, 688 F.2d 82, 84 (10th Cir. 1979). See also Templeton, 719 F.2d at 1413-14 (rejecting equal protection challenge to same provisions). However, the exemptions in § 1402 are limited to those who have a religious objection to receiving public insurance *and* belong to a religion that will provide the assistance that others ordinarily would receive under Social Security. Thus, § 1402 is distinguishable from § 107 because § 1402 limits the exemption to those whose religious exercise would be substantially burdened. In addition, there is no preferential treatment to religious persons because the exemption is limited to those who will receive from their religious sect (rather than the government) the benefits the tax is designed to provide. Droz, 48 F.3d at 1121 (§ 1402(g) is a permissible accommodation because it is "an exemption narrowly drawn to maintain a fiscally sound Social Security system and to ensure that all persons are provided for, either by the Social Security system or by their church"); Hatcher, 688 F.2d at 84 ("That the principal purpose of the legislation is not to advance or inhibit religion is evident in the mandate that those who receive the exemption forego the benefit of the program. To further assure that one claiming the exemption does not become a public charge Congress required that the exemption only be given to persons belonging to organizations that make provision for dependent members.").

Along the same lines, the cases in which the Supreme Court has upheld religious accommodations are in contexts that otherwise would result in severe restrictions on free

exercise. Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687, 705 (1994) ("The Constitution allows the State to accommodate religious needs by alleviating *special* burdens.") (emphasis added). For example, in Amos, 483 U.S. at 335, the Court upheld a religious exemption in an antidiscrimination law that otherwise would have required religious groups to violate their own religious beliefs, such as by requiring Catholic churches to ordain women as priests. And in Cutter v. Wilkinson, 544 U.S. 709 (2005), the Court concluded that a law requiring administrators to provide religious accommodations to persons housed in state institutions was justified by the reality of institutionalization, which is "severely disabling to private religious exercise." Id. at 720-21. Thus, in both situations, the accommodations are best described not as singling out religious persons for more favorable treatment, but as an attempt to prevent inequality caused by government-imposed burdens. School District of Abington Township v. Schempp, 374 U.S. 203, 299 (1963) (Brennan, J., concurring) ("[H]ostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion.").

As noted above, in this case, the burden of taxes is borne equally by everyone who pays them, regardless of religious affiliation, so concerns about free exercise do not justify a special exemption. In 1984, the Treasury Secretary himself recognized this point in a memorandum in which he recommended the repeal of § 107 because "[t]here is no evidence that the financial circumstances of ministers justify special tax treatment. The average minister's compensation is low compared to other professionals, but not compared to

taxpayers in general." U.S. Dept. of Treasury, Tax Reform for Fairness, Simplicity, and Economic Growth: The Department Report to the President, vol. II 49 (1984). In fact, the Secretary argued that § 107 "provides a disproportionately greater benefit to relatively affluent ministers, due to the higher marginal tax rates applicable to their incomes." Id. (The Treasury Department withdrew the recommendation after many members of the clergy objected to it. Gabriel O. Aitsebaomo, Challenges to Federal Income Tax Exemption of the Clergy and Government Support of Sectarian Schools through Tax Credits Device and the Unresolved Questions after Arizona v. Winn, 28 Akron Tax J. 1, 15 (2013).) Under these circumstances, I see no basis for concluding that § 107(2) may be justified as an accommodation of religion.

4. Walz v. Tax Commission of City of New York

Instead of Texas Monthly, defendants rely on Walz, 397 U.S. 664, in which the Supreme Court rejected a challenge under the establishment clause to a statute that gave a tax exemption to property used for "religious, educational or charitable purposes." Id. at 666-67. The obvious distinction between Walz and this case is that the statute in Walz was not a tax exemption benefiting religious persons only, but a wide variety of nonprofit endeavors. See also Schempp, 374 U.S. at 301-02 (1963) (Brennan, J., concurring) (no establishment clause violation when "certain tax deductions or exemptions . . . incidentally benefit churches and religious institutions, along with many secular charities and nonprofit organizations" because, in that situation "religious institutions simply share benefits which

government makes generally available to educational, charitable, and eleemosynary groups").

Defendants argue that the broader scope of the statute in Walz "was not dispositive for the majority," Dfts.' Br., dkt. #44, at 42, but that view is contradicted by the opinion itself as well as later decisions applying it. In concluding that the purpose of the exemption was not to advance religion, the Court observed that the state "has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." Walz, 397 U.S. at 673. It went on to say that the statute applies to groups that have "beneficial and stabilizing influences in community life" as opposed to "private profit institutions." Id. See also id. at 687, 689 (Brennan, J., concurring) ("These organizations are exempted because they, among a range of other private, nonprofit organizations contribute to the well-being of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone, to the detriment of the community. . . . Government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society."); id. at 697 n.1 (Harlan, J., concurring) (tax exemption does not violate establishment clause "because New York has created a general class so broad that it would be difficult to conclude that religious organizations cannot properly be included in it").

In Texas Monthly, 489 U.S. at 11, the plurality stated that "[t]he breadth of New York's property tax exemption was essential to our holding [in Walz] that it was not aimed at establishing, sponsoring, or supporting religion, but rather possessed the legitimate secular purpose and effect of contributing to the community's moral and intellectual diversity and encouraging private groups to undertake projects that advanced the community's well-being and that would otherwise have to be funded by tax revenues or left undone." Further, the plurality reviewed other cases in which the Court had upheld benefits to religious organizations and concluded that they too involved a broader array of groups. "[W]ere those benefits confined to religious organizations, they could not have appeared other than as state sponsorship of religion; if that were so, we would not have hesitated to strike them down for lacking a secular purpose and effect." Texas Monthly, 489 U.S. at 10-11 (plurality opinion) (citing Widmar v. Vincent, 454 U.S. 263 (1981); Mueller v. Allen, 463 U.S. 388 (1983); and Walz, 397 U.S.664). See also Grumet, 512 U.S. at 704 ("We have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges," including in Walz.).

To support their argument that the holding in Walz was not limited to exemptions that include nonreligious groups, defendants cite the statement by the Court that it was "unnecessary to justify the tax exemption on the social welfare services or 'good works' that some churches perform for parishioners and others-family counselling, aid to the elderly and the infirm, and to children." Walz, 397 U.S. at 674. However, defendants are taking the statement out of context. The Court went on to explain that it did not want the government

to have to evaluate whether a religious body's good works were "good enough" to qualify because that could "produc[e] a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." Id. Thus, the Court's observation is best read as an attempt to avoid a justification for an exemption that would lead to greater entanglement between church and state. The Court did not suggest that the government was free to provide tax exemptions to religious entities without including other groups.

Defendants also rely on Walz for the proposition that a "tax exemption does not implicate the same constitutional concerns as a direct subsidy," Dfts.' Br., dkt. #44, at 43, quoting the Court's statement that "[t]he 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." Walz, 397 U.S. at 675. Taken to its logical conclusion, an argument relying on a distinction between exemptions and subsidies would permit the government to eliminate *all* taxes for religious organizations, an extreme position that defendants do not advance. However, in the absence of a categorical approach, it is not clear how exemptions could be treated differently from subsidies and defendants do not provide any suggestions.

In any event, to the extent that Walz suggested a different analysis for exemptions, that view is inconsistent with both the plurality and concurring opinions in Texas Monthly, neither of which made a distinction between the two types of support. It was rejected explicitly by the plurality, which stated that "[e]very tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become 'indirect and vicarious 'donors.'"

Texas Monthly, 489 U.S. at 14 (quoting Bob Jones University v. United States, 461 U.S. 574, 591 (1983)). The Court has resisted the distinction in other opinions as well. Ragland, 481 U.S. at 236 ("Our opinions have long recognized—in First Amendment contexts as elsewhere—the reality that tax exemptions, credits, and deductions are a form of subsidy that is administered through the tax system.") (internal citations omitted); Regan v. Taxation With Representation of Washington, 461 U.S. 540, 544 (1983) ("Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system."). See also Walz, 397 U.S. at 701 (Douglas, J., dissenting) ("[O]ne of the best ways to 'establish' one or more religions is to subsidize them, which a tax exemption does."); Adler, The Internal Revenue Code, The Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making, 28 Wake Forest L. Rev. 855, 862 n.30 (1993) ("[T]he large body of literature about tax expenditures accepts the basic concept that special exemptions from tax function as subsidies."), quoted with approval in Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819, 861 (1995) (Thomas, J., concurring).

Defendants cite Winn, 131 S. Ct. at 1439, as an example of a recent case in which the Court distinguished between exemptions and subsidies. However, Winn was a case about determining a plaintiff's injury for the purpose of taxpayer standing, a doctrine the Court has taken great effort to cabin. Id. at 1445 (emphasizing "the general rule against taxpayer standing"). The Court did not rely on Walz for the distinction it made between exemptions and subsidies in the standing context and defendants do not explain how the distinction in Winn applies to a case about the substantive scope of the establishment clause.

In sum, I conclude that defendants cannot rely on Walz or Winn to preserve § 107(2).

5. Other cases

In addition to Texas Monthly, there are other cases in which the Supreme Court has held that it violates the establishment clause to single out religious beliefs for preferential treatment without providing a similar benefit to secular individuals or groups. For example, in Community for Public Education v. Nyquist, 413 U.S. 756, 793 (1973), the Court concluded that tax exemptions for parents of children in sectarian schools violated the establishment clause, reasoning that "[s]pecial tax benefits . . . cannot be squared with the principle of neutrality established by the decisions of this Court." And in Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985), in an opinion by Chief Justice Burger (the author of Walz), the Court held that it violated the establishment clause to give employees an "unqualified" right not to work on the Sabbath because it meant "that Sabbath religious concerns automatically control over all secular interests at the workplace" and "the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." Id. at 709. See also Grumet, 512 U.S. at 708-09 ("[A] statute [may] not tailor its benefits to apply only to one religious group.").

In addition to these Supreme Court cases, there are several cases in which other courts have concluded that tax exemptions violated the establishment clause when they benefited religious groups only. E.g., Finlator, 902 F.2d at 1162 (striking down sales tax exemption for Bibles); Haller, 728 A.2d at 355 (striking down sales tax exemption for

"religious publications"); Appeal of Springmoor, Inc., 498 S.E.2d 177 (N.C. 1998) (striking down property tax exemption for nursing homes "owned, operated and managed by a religious or Masonic organization"); Thayer v. South Carolina Tax Commission, 413 S.E.2d 810, 813 (S.C. 1992) (striking down sales tax exemption for "religious publications"). See also American Civil Liberties Union Foundation of Louisiana v. Crawford, CIV.A. 00-1614, 2002 WL 461649 (E.D. La. Mar. 21, 2002) (granting preliminary injunction against tax exemption provided to places of accommodation "operated by religious organizations for religious purposes"). Defendants cite no cases to the contrary, with the exception of cases involving § 1402, which are distinguishable for the reasons explained above.

6. Purpose and effect of § 107(2)

In an attempt to show that neither the purpose nor the effect of § 107(2) is to advance or endorse religion, defendants argue that the provision actually *eliminates* discrimination among different religions and between religious and nonreligious persons. In support of this view, defendants say that the impetus for both § 107(1) and § 107(2) can be traced to the "convenience of the employer" doctrine, under which employees would not be taxed under certain circumstances on the value of housing provided by their employer. Commissioner of Internal Revenue v. Kowalski, 434 U.S. 77, 85-86 (1977). The Treasury Department began applying the doctrine in 1919, shortly after the federal government began collecting income tax, using the rationale that housing should not be viewed as compensation if it is provided by the employer to enable an employee to do his job properly. Id. at 84-90.

Examples of employees who received the exemption included seamen and hospital workers who were required to be on call 24 hours a day. Id. at 84, 86. In 1954, Congress codified the exemption in 26 U.S.C. § 119, which allows an employee to exclude from his gross income "the value of any . . . lodging furnished to him, . . . but only if . . . the employee is required to accept such lodging on the business premises of his employer as a condition of his employment."

According to defendants, in 1921 the Treasury Department refused to apply the convenience of the employer doctrine to ministers who lived in church-provided housing. (Plaintiffs dispute that view, but I need not resolve that dispute for the purpose of this opinion.) Defendants say that, in response, Congress passed § 213(b)(11) of the Revenue Act of 1921, which allowed ministers of the gospel to exclude from their gross income the rental value of housing they received as part of their compensation. (That exemption later became § 107(1).) Finally, defendants say that the purpose of § 107(2) when it was enacted in 1954 was to eliminate discrimination against ministers who could not claim the already existing exemption for ministers who lived in parsonages. In particular, defendants say that § 107(2) was needed to help "less-established and less wealthy religions [that] were not able to provide housing for their spiritual leaders." Dfts.' Br., dkt. #44, at 33. Defendants cite a committee report from the House of Representatives in support of their view:

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

> Your committee has 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.

H.R. Rep. No. 1337, at 15, available in U.S. Code Congressional and Administrative News, 83rd Congress, Second Session, at 4040 (1954).

Plaintiffs challenge defendants' view that the purpose of § 107(2) was to eliminate religious discrimination by quoting a statement from Representative Peter Mack, the sponsor of the 1954 law, :

> Certainly, in these times when we are being threatened by a godless and anti-religious world movement we should correct this discrimination against certain ministers of the gospel who are carrying on such a courageous fight against this. Certainly this is not too much to do for these people who are caring for our spiritual welfare.

Hearings Before the H. Comm. on Ways & Means, 83rd Cong. 1, at 1574-75(June 9, 1953) (statement of Peter F. Mack, Jr), dkt. #51-9. Plaintiffs argue that Mack's statement shows that § 107(2) "was deliberately intended to send a message of support for religion during the Cold War." Plts.' Br., dkt. #52, at 52.

The difference between plaintiffs' and defendants' view of the purpose of § 107(2) is more semantic than substantive. Under either view, the point of the law was to assist a subset of religious groups, which, as I will explain below, is not a secular purpose under the establishment clause.

Because the validity of § 107(1) is not before the court, I must assume for the purpose of this case that Congress did not violate the establishment clause by granting a tax exemption on the rental value of a home provided to a minister as part of his compensation.

However, by defendants' own assertion, the purpose of § 107(1) was to eliminate discrimination between secular and religious employees by giving ministers a similar exemption to the one now codified in 26 U.S.C. § 119 for housing provided to an employee for the convenience of the employer. Assuming this is correct, it does little to help justify the later enactment of § 107(2), which expanded the exemption to include not just the value of any housing provided but also the portion of the minister's salary designated for housing expenses. Defendants say that § 107(2) was needed to eliminate discrimination against certain religious sects, particularly those that were "less wealthy and less established," but there are multiple problems with that argument.

To begin with, defendants are wrong to suggest that § 107(2) was needed to eliminate religious discrimination. Section 107(1) is not discriminatory in the sense that it singles out certain religions for more favorable treatment; rather, it gives a benefit to ministers who meet certain housing criteria, just as § 119 gives a benefit to employees who meet certain housing criteria. Although not all ministers can qualify for the exemption, the same is true for secular employees under § 119. In other words, § 107(1) no more "discriminates" against ministers who purchase their own housing than § 119 "discriminates" against secular employees who purchase their own housing. Because the distinction made in both statutes relates to the type of housing the employee has rather than religious affiliation, there is no religious discrimination. Under defendants' view, if one religious person received a tax exemption, then Congress would be compelled to give every religious person the same exemption, even if the exemption had nothing to do with religion.

Further, to the extent that § 107(1) discriminates among religions, § 107(2) does not eliminate that discrimination but merely shifts it. In particular, § 107(2) discriminates against those religions that do not *have* ministers. Erwin Chemerinsky, The Parsonage Exemption Violates the Establishment Clause and Should Be Declared Unconstitutional, 24 Whittier L. Rev. 707, 723 (2003) ("[S]ection 107(2) itself discriminates among religions: It offers a huge financial benefit to those religions and churches that have clergy as compared to those which do not. Moreover, it discriminates among clergy based on the specific tasks they are performing."); Thomas E. O'Neill, A Constitutional Challenge to Section 107 of the Internal Revenue Code, 57 Notre Dame L. Rev. 853, 865-66 (1982) ("Section 107(2) may unconstitutionally prefer certain religions over others. For example, a congregational religion with no permanent or specifically designated ministers would not receive section 107(2)'s financial benefits as would a centralized religion with a designated ministry."). In addition, § 107(2) creates an imbalance even with respect to those ministers who benefit from § 107(1) because ministers who get an exemption under § 107(2) can use their housing allowance to purchase a home that will appreciate in value and still can deduct interest they pay on their mortgage and property taxes, resulting in a greater benefit than that received under § 107(1). Chemerinsky, 24 Whittier L. Rev. at 712; 26 U.S.C. § 265(a)(6) ("No deduction shall be denied under this section for interest on a mortgage on, or real property taxes on, the home of the taxpayer by reason of the receipt of an amount as. . . (B) a parsonage allowance excludable from gross income under section 107").

In any event, even if I assume that the exemption in § 107(2) applies equally to all

religions, that would not solve the problem because the provision applies to religious persons *only*. Congress did not incorporate an exemption for secular employees into § 107(2) or expand § 119 to accomplish a similar result. Kowalski, 434 U.S. at 84-96 (rejecting interpretation of § 119 that would extend it to cash allowances). A desire to assist disadvantaged churches and ministers is not a secular purpose and it does not produce a secular effect when similarly disadvantaged secular organizations and employees are excluded from the benefit. Nyquist, 413 U.S. at 788-89 (law motivated by desire to help "low-income parents" send children to sectarian schools "can only be regarded as one 'advancing' religion"). The establishment clause requires neutrality not just among the various religious sects but between religious and secular groups as well. McCreary County, 545 U.S. at 875-76 ("[T]he government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause."); Nyquist, 413 U.S. at 771 ("[I]t is now firmly established that a law may be one 'respecting an establishment of religion' even though its consequence is not to promote a 'state religion,' and even though it does not aid one religion more than another but merely benefits all religions alike.") (internal citation omitted); Gillette v. United States, 401 U.S. 437, 450 (1971) ("[T]he Establishment Clause prohibits government from abandoning secular purposes . . . to favor the adherents of any sect or religious organization."). Under defendants' view, there would be no limit to the amount of support the government could provide to religious groups over secular ones.

Alternatively, defendants cite provisions in the tax code granting housing allowance

exemptions for nonreligious reasons as evidence that § 107(2) does not advance religion. First, under 26 U.S.C. § 134, members of the military may exclude from their gross income any "qualified military benefit," which includes a housing allowance. 37 U.S.C. § 403. Second, under 26 U.S.C. § 911, United States citizens who live abroad may deduct a portion of their housing expenses from their gross income. Finally, under 26 U.S.C. § 912, certain federal employees who live abroad may exclude from their gross income "foreign area allowances," which may include housing expenses.

In Texas Monthly, 489 U.S. at 14, the plurality acknowledged that a tax exemption benefiting sectarian groups could survive a challenge under the establishment clause if the exemption was "conferred upon a wide array of nonsectarian groups as well." However, the Court rejected the argument that it was enough to point to a small number of secular groups that could receive a similar exemption for a different reason:

> The fact that Texas grants other sales tax exemptions (e.g., for sales of food, agricultural items, and property used in the manufacture of articles for ultimate sale) for different purposes does not rescue the exemption for religious periodicals from invalidation. What is crucial is that any subsidy afforded religious organizations be warranted by some overarching secular purpose that justifies like benefits for nonreligious groups.

Texas Monthly, 489 U.S. at 15 n.4.

In this case, defendants have not identified an "overarching secular purpose" that justifies both § 107(2) and the other exemptions they cite. Defendants suggest vaguely that all of the recipients have "unique housing needs," Dfts.' Br., dkt. #44, at 39, but they never identify how the needs of ministers who do not live in employer housing are different from those of any other taxpayer. In their reply brief, defendants say that § 107 is like the other

statutes in that all of them involve "[p]eople whose housing is dictated by their work," Dfts.' Br., dkt. #53, at 20, but that argument is disingenuous because it applies only to § 107(1), which is not at issue in this case. Section 107(2) does not include any limitations on the type or location of housing that a minister purchases or rents, so it cannot be described as being related to the convenience of the employer doctrine.

Each of the other statutes defendants cite involving exemptions for secular employees was motivated by a purpose specific to the particular group involved. For example, the purpose of § 911 is to protect American business people living overseas from *double* taxation, Brewster v. Commissioner of Internal Revenue, 473 F.2d 160, 163 (D.C. Cir. 1972), and the purpose of § 912 is to insure that "federal civilian employees should be adequately reimbursed for additional expenses necessarily incurred because of their overseas services." Anderson v. United States, 16 Cl. Ct. 530, 534 (1989). Thus, both of these statutes are less about giving a particular group preferential treatment and more about attempting to avoid penalizing particular taxpayers for engaging in work that provides a benefit to the United States.

Although I did not uncover a discussion of the purpose of § 134 in the case law, it seems obvious that it would be a mistake to rely on any benefit members of the military receive as providing an "overarching secular purpose" for giving a similar benefit to ministers or anyone else. Because members of the military are unique in the level of service they give to the government and the sacrifices they make, it is not surprising that they receive certain benefits not available to the general public. A housing allowance is only one of many

"qualified military benefits" that may be excluded from gross income.

Defendants say that § 912 (relating to federal civilian employees living overseas) is similar to § 107 in that its original scope was limited to employees who lived in housing provided by the government, but Congress expanded the exemption to cover housing allowances as well. Anderson, 16 Cl. Ct. at 534-35. This argument is a nonstarter because it does not change the fact that, unlike § 107(2), the purpose of both exemptions in § 912 is to alleviate special burdens experienced by certain taxpayers as a result of their living situation. In any event, any superficial similarity between § 107 and § 912 is irrelevant because a decision by the federal government to expand the scope of an exemption to more of its own employees as it did in § 912 does not implicate the establishment clause as does an exemption that singles out religious persons for more favorable treatment.

In sum, defendants cite no evidence that the concerns that motivated § 134, § 911 and § 912 have anything to do with § 107(2). Accordingly, I agree with plaintiffs that § 107(2) does not have a secular purpose or effect and that a reasonable observer would view § 107(2) as an endorsement of religion.

7. Applicability of § 107(2) to atheists

As discussed above, defendants argued in the context of addressing plaintiffs' standing to sue that it is "conceivable" that an atheist could qualify as a "minister of the gospel" under § 107. Dfts.' Br., dkt. #44, at 10. In the context of discussing the merits in their reply brief, defendants make a similar statement that an atheist could "make a claim" that he or she is

a minister of the gospel under § 107. Dfts.' Br., dkt. #53, at 27. In support of an argument that construing § 107(2) to include atheists would defeat plaintiffs' claim, defendants cite a passage in Justice Blackmun's concurring opinion in Texas Monthly that the tax exemption at issue in that case "might survive Establishment Clause scrutiny" if it included "atheistic literature distributed by an atheistic organization." Texas Monthly, 489 U.S. at 49 (Blackmun, J., concurring in the judgment). However, defendants never go so far as to argue that the phrase "minister of the gospel" § 107 could be interpreted reasonably as applying to an atheist. In fact, they decline expressly to take a position on that issue. Dfts.' Br., dkt. #44, at 10 ("The United States is not taking the position that any particular person would, in fact, qualify to claim the exclusion under § 107(2).").

I am not aware of any decision in which a majority of the Supreme Court considered whether a claim under the establishment clause would be defeated if the particular benefit at issue were granted to atheists, but still excluded secular groups. At least in the context of this case, there is a plausible argument that the claim would survive. Under Lemon, the question is whether the government has "advanced religion." Thus, if atheism were included under the umbrella of "religion," § 107(2) still would advance religion over secular interests, even if the provision applied to atheists, because secular taxpayers still would be excluded from the benefit. Further, regardless whether § 107(2) could be read to include an "atheist minister," the statute still discriminates against religions that do not employ ministers, as noted above.

Regardless, to the extent defendants mean to argue that § 107(2) is constitutional

because of an abstract possibility that an atheist could qualify as a minister of the gospel, I disagree. Defendants are correct that courts must construe statutes to "avoid constitutional difficulties," Clark v. Martinez, 543 U.S. 371, 381-382 (2005), but that canon applies only if the statute is "readily susceptible to such a construction." Reno v. American Civil Liberties Union, 521 U.S. 844, 884 (1997). A court may not "rewrite a . . . law to conform it to constitutional requirements." Id. at 884-885.

In this case, no reasonable construction of § 107 would include atheists. In the concurring opinion in Texas Monthly that defendants cite, Justice Blackmun rejected as "facially implausible" an argument that atheistic literature could be included as part of "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith." Texas Monthly, 489 U.S. at 29 (Blackmun, J., concurring in the judgment). Defendants do not explain why they believe interpreting § 107 to include atheists is any more plausible. Hearings Before the H. Comm. on Ways & Means, 83rd Cong. at 1574-75 (sponsor of § 107(2) stating that purpose of law was to help ministers who are "fight[ing] against" a "godless and anti-religious world movement").

The only authority defendants cite is Kaufman, 419 F.3d at 682, in which the court concluded that atheism could qualify as a religion under the free exercise clause for the purpose of that case. However, the question under § 107 is not whether atheism is a religion but whether an atheist can be a "minister of the gospel," a very different question. In Kaufman, the court cited Reed v. Great Lakes Cos., 330 F.3d 931, 934 (7th Cir. 2003), for

the proposition that religion under the free exercise could be defined simply as "taking a position on divinity," Kaufman, 419 F.3d at 682, but, as discussed above, qualifying as a "minister of the gospel" is much more complicated. Defendants cite no evidence that an "atheist minister" exists (a term that many might view as an oxymoron), let alone an atheist that satisfies the IRS's criteria for a "minister of the gospel," by performing "sacerdotal" functions, conducting "worship" services or acting as a "spiritual" leader under the authority of a "church."

8. Entanglement

With respect to the question whether § 107(2) fosters excessive entanglement between church and state, I see little distinction between this case and Texas Monthly, in which the plurality concluded that the Texas statute "appear[ed], on its face, to produce greater state entanglement with religion than the denial of an exemption" because granting the exemption required the government to "evaluat[e] the relative merits of differing religious claims" and created "[t]he prospect of inconsistent treatment and government embroilment in controversies over religious doctrine." Texas Monthly, 489 U.S. at 20 (plurality opinion). Defendants argue that "it is constitutionally permissible for a government to determine whether a person's belief is 'religious' and sincerely held," Dfts.' Br., dkt. #53, at 25, but, as discussed above, § 107 and its implementing regulations go well beyond a determination whether a belief is "religious," involving a complex and inherently ambiguous multifactor test. Compare Kaufman, 419 F.3d at 682 (concluding in four

paragraphs that atheism could qualify as a religion under free exercise clause) with Foundation of Human Understanding v. United States, 88 Fed. Cl. 203 (Fed. Cl. 2009) (32-page decision devoted entirely to question whether organization qualified as "church" under tax code). See also Justin Butterfield, Hiram Sasser and Reed Smith, The Parsonage Exemption Deserves Broad Protection, 16 Tex. Rev. L. & Pol. 251, 264 (2012) (arguing in favor of the constitutionality of § 107, but acknowledging that "there is an entanglement problem" with the implementing regulations).

More persuasive is defendants' reliance on Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, — U.S. —, 132 S. Ct. 694, 699 (2012), in which the Supreme Court concluded that a "minister" could not sue a church for employment discrimination under Title VII. Although the Court did not consider expressly whether a "ministerial" exception to Title VII created excessive entanglement, the Court applied the exception to the facts of the case without expressing any reservations.

Hosanna-Tabor is not on all fours with this case because, like Amos, it involved countervailing concerns that a contrary rule would lead to interference with "a religious group's right to shape its own faith and mission through its appointments." Hosanna-Tabor, 132 S. Ct. at 706. In any event, because I have concluded that § 107(2) does not have a secular purpose or effect, I need not decide whether the provision fosters excessive entanglement between church and state. Doe, 687 F.3d at 851 n. 15 ("Since we conclude that the District acted unconstitutionally on other grounds, we need not . . . consider the District's actions under Lemon's entanglement prong.").

C. Conclusion

Although I conclude that § 107(2) violates the establishment clause and must be enjoined, this does not mean that the government is powerless to enact tax exemptions that benefit religion. "[P]olicies providing incidental benefits to religion do not contravene the Establishment Clause." Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753, 768 (1995) (plurality opinion). In particular, because "[t]he nonsectarian aims of government and the interests of religious groups often overlap," the government is not "required [to] refrain from implementing reasonable measures to advance legitimate secular goals merely because they would thereby relieve religious groups of costs they would otherwise incur." Texas Monthly, 489 U.S. at 10 (plurality opinion). Thus, if Congress believes that there are important secular reasons for granting the exemption in § 107(2), it is free to rewrite the provision in accordance with the principles laid down in Texas Monthly and Walz so that it includes ministers as part of a larger group of beneficiaries. Haller, 728 A.2d at 356 (noting that Texas amended statute at issue in Texas Monthly to grant sales tax exemption to broader range of groups). As it stands now, however, § 107(2) is unconstitutional.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendants Timothy Geithner and Douglas Schulman (now succeeded by Jacob Lew and Daniel Werfel), dkt. #40, is

GRANTED with respect to plaintiffs' Freedom from Religion Foundation, Inc.'s, Annie Laurie Gaylor's and Dan Barker's challenge to 26 U.S.C. § 107(1). Plaintiff's complaint is DISMISSED as to that claim for lack of standing.

2. Defendants' motion for summary judgment is DENIED as to plaintiffs' challenge to 26 U.S.C. § 107(2). On the court's own motion, summary judgment is GRANTED to plaintiffs as to that claim.

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

4. Defendants are ENJOINED from enforcing § 107(2). The injunction shall take effect at the conclusion of any appeals filed by defendants or the expiration of defendants' deadline for filing an appeal, whichever is later.

5. The clerk of court is directed to enter judgment in favor of plaintiffs and close this case.

Entered this 21st day of November, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge

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

FREEDOM FROM RELIGION FOUNDATION, INC., ANNIE LAURIE GAYLOR and DAN BARKER,

Plaintiffs,

v.

JACOB LEW and DANIEL WERFEL,

Defendants.

JUDGMENT IN A CIVIL CASE

Case No. 11-cv-626-bbc

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

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of defendants Jacob Lew and Daniel Werfel dismissing plaintiffs' claim challenging the constitutionality of 26 U.S.C. § 107(1) for lack of standing.

IT FURTHER ORDERED AND ADJUDGED that judgment is entered in favor of plaintiffs Freedom from Religion Foundation, Inc., Annie Laurie Gaylor and Dan Barker on their claim challenging the constitutionality of 26 U.S.C. §107(2). It is declared that 26 U.S.C. § 107(2) violates the establishment clause of the First Amendment to the United States Constitution. Defendants Jacob Lew and Daniel Werfel are enjoined from enforcing 26 U.S.C. § 107(2). The injunction shall take effect at the conclusion of any

appeals filed by defendants or the expiration of defendants' deadline for filing an appeal, whichever is later.

Approved as to form this 25th day of November, 2013.

Barbara B. Crabb
District Judge

By: Lynn Fawcett, Deputy Clerk
Peter Oppeneer, Clerk of Court

11-25-13
Date

No. 14-1152

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, INCORPORATED, 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

ON APPEAL FROM THE JUDGMENT AND ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN
(No. 11-cv-0626; Honorable Barbara B. Crabb)

APPENDIX FOR THE APPELLANTS

KATHRYN KENEALLY
Assistant Attorney General

TAMARA W. ASHFORD
Principal Deputy Assistant Attorney General

GILBERT S. ROTHENBERG (202) 514-3361
TERESA E. McLAUGHLIN (202) 514-4342
JUDITH A. HAGLEY (202) 514-8126
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

Of Counsel:

JOHN W. VAUDREUIL
United States Attorney

Circuit Rule 30(d) Certification

All of the materials required by Seventh Circuit Rule 30(a) are included in the appendix bound with the appellants' brief. All of the materials required by Seventh Circuit Rule 30(b) are included in this separately bound Appendix.

/s/ Judith A. Hagley
Judith A. Hagley
Attorney for Appellants

April 2, 2014

APPENDIX TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

FREEDOM FROM RELIGION FOUNDATION, INC.,
ANNIE LAURIE GAYLOR, ANNE NICOL GAYLOR
and DAN BARKER,

OPINION AND ORDER

Plaintiffs,

11-cv-626-bbc

v.

UNITED STATES OF AMERICA,

Defendant.

- -

Plaintiffs Freedom from Religion Foundation, Inc., Annie Laurie Gaylor, Anne Nicol Gaylor and Dan Barker brought this lawsuit under the Administrative Procedure Act, 5 U.S.C. § 702, to challenge the constitutionality of 26 U.S.C. § 107, which gives a tax exemption to any "minister of the gospel" for compensation received related to certain housing expenses. In particular, plaintiffs contend that § 107 violates their rights under the establishment clause of the First Amendment and the equal protection component of the Fifth Amendment. They seek to enjoin the government from "continuing to grant or allow preferential and discriminatory tax benefits under §107 of the Internal Revenue Code exclusively to religious clergy." Am. Cpt., dkt. #13, at 12.

In an order dated June 28, 2012, dkt. #24, I questioned whether plaintiffs could sue under § 702 because that statute is limited to challenges of "agency action" and requires the

plaintiffs to name "the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance" with plaintiffs' proposed injunction. I agree with the parties that any failure by plaintiffs to comply with § 702 may be resolved by naming as defendants Timothy Geithner (Secretary of the Department of the Treasury) and Douglas Shulman (Commissioner of the Internal Revenue Service), who are in charge of the agencies responsible for administering § 107. Because plaintiffs seek to name Geithner and Shulman in their official capacities as agents of the United States, I may amend the caption to include them without requiring plaintiffs to file a new complaint. E.g., Jaros v. Illinois Dept. of Corrections, 684 F.3d 667, 670 (7th Cir. 2012).

With that question resolved, I turn to defendant's motion to dismiss for lack of subject matter jurisdiction on the ground that plaintiffs have not been injured by § 107 and therefore lack standing to sue. In response, plaintiffs say that their injury is the unequal treatment they receive under the statute. Because a portion of their salary is designated as a housing allowance, they say that they would be entitled to an exemption under § 107 but for the limitation to "ministers of the gospel." Defendant acknowledges that the denial of a tax exemption constitutes an adequate injury for the purpose of standing, but it argues that plaintiffs cannot file a federal lawsuit until they claim an exemption on their tax returns and the IRS denies the claim.

I am denying defendant's motion to dismiss. Because it is clear from the face of the statute that plaintiffs are not entitled to the exemption, I see no reason to make their standing contingent on the futile exercise of making a formal claim with the IRS.

ALLEGATIONS OF FACT

Plaintiff Freedom from Religion Foundation is a non-profit membership organization that "advocates for the separation of church and state and educates on matters of non-theism." The foundation's principal office is in Madison, Wisconsin.

Plaintiffs Annie Laurie Gaylor and Dan Barker are the co-presidents of the foundation; Anne Nicol Gaylor is the president emerita. The foundation's executive council provides each of the individual plaintiffs a housing allowance that does not exceed plaintiffs' housing-related expenses.

Plaintiffs are challenging the constitutionality of 26 U.S.C. § 107, which is titled "Rental value of parsonages" and provides:

> In the case of a minister of the gospel, gross income does not include--
>
> (1) the rental value of a home furnished to him as part of his compensation; or
>
> (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home and to the extent such allowance does not exceed the fair rental value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities.

Plaintiff Barker is a former ordained minister who previously excluded his housing allowance from his taxable income, but no longer does so. The individual plaintiffs believe they would be entitled to claim the § 107 exemption if it were not limited to ministers of the gospel.

OPINION

The sole issue raised by defendant's motion to dismiss is whether plaintiffs have standing to challenge the constitutionality of 26 U.S.C. § 107; defendant does not challenge the merits of plaintiffs' complaint at this stage of the case. The standard for determining standing under the Constitution is well established: plaintiffs must show that they suffered an injury in fact that is fairly traceable to the defendant's action and capable of being redressed by a favorable decision from the court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Because each of the individual plaintiffs is a member of the foundation and a purpose of the foundation is related to plaintiff's claims in this lawsuit, the foundation's standing rises and falls with the members'. Sierra Club v. Franklin County Power of Illinois, LLC, 546 F.3d 918, 924 (7th Cir. 2008).

A. Injury in Fact

1. Taxpayer standing

Most of defendant's opening brief is devoted to arguing that plaintiffs do not have what courts refer to as "taxpayer standing." Under that theory, the plaintiff objects to a particular government expenditure and claims as an injury the misuse of the plaintiff's tax dollars. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 343-44 (2006) ("[T]he alleged injury is based on the asserted effect of the allegedly illegal activity on public revenues, to which the taxpayer contributes."). This theory has been rejected by the Supreme Court in most cases on the ground that "interest in the moneys of the Treasury . . . is shared with

millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." Frothingham v. Mellon, decided with Massachusetts v. Mellon, 262 U.S. 443, 486-87 (1923). See also Arizona Christian School Tuition Organization v. Winn, 131 S. Ct. 1436, 1439 (2011) ("[T]he mere fact that a plaintiff is a taxpayer is not generally deemed sufficient to establish standing in federal court.").

I need not consider whether plaintiffs have taxpayer standing because they are not asserting that argument in this case. The foundation raised it in a previous challenge to § 107 brought in the Eastern District of California and received a favorable ruling from the court after the government filed a motion to dismiss. Freedom From Religion Foundation, Inc. v. Geithner, 715 F. Supp. 2d 1051 (E.D. Cal. 2010). However, the parties later agreed to dismissal of the case without prejudice under Fed. R. Civ. P. 41(a)(1)(A)(ii) after the Supreme Court decided Winn, reversing a decision from the Court of Appeals for the Ninth Circuit on which the district court had relied for its ruling on taxpayer standing. Case No. 2:09-2894-WBS-DAD (C.D. Cal.), dkt. ##87-88. Plaintiffs have not included a theory of taxpayer standing in their complaint or their brief in this case.

2. Ideological injuries

Defendant raises a second argument for plaintiffs' lack of standing, which is that plaintiffs' alleged injury is their disagreement with the government's conduct, a claim that

is not sufficient to confer standing. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 483 (1982); United States v. Richardson, 418 U.S. 166, 176-77 (1974). This is another strawman. It is undoubtedly true that plaintiffs object to § 107 because they believe it violates the establishment clause and that this may be the primary reason they filed the lawsuit, but that is not the injury plaintiffs are alleging for the purpose of showing standing.

3. Unequal treatment

Plaintiffs identify their injury as the alleged unequal treatment they have received from defendant: "ministers of the gospel" may receive a tax exemption for certain housing expenses, but plaintiffs may not. Thus, plaintiffs' injury is not just that they object to the exemption that ministers of the gospel receive, but that plaintiffs are being denied the same benefit.

The parties agree that a person who is denied a tax exemption that others receive has suffered an injury in fact. That much is established by Supreme Court precedent. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 7-8 (1989) (general interest magazine had standing to challenge state tax exemption received by religious publications); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 224-25 (1987) (same). See also Winn, 131 S. Ct. at 1439 ("[P]laintiffs may demonstrate standing on the ground that they have incurred a cost or been denied a benefit on account of their religion. Those costs and benefits can result from alleged discrimination in the tax code, such as when the availability of a tax exemption

is conditioned on religious affiliation."). The question presented by defendant's motion is whether a plaintiff's injury arises from the allegedly discriminatory statute itself or not until the plaintiff claims the exemption and the Internal Revenue Service denies it. Texas Monthly and Arkansas Writers' Project both involved plaintiffs that had been denied a tax refund by state authorities, but the Court did not say in either case whether seeking a refund was required to establish standing, so those cases do not help to resolve the dispute.

a. Is a pre-enforcement challenge appropriate in this case?

Distilled, defendant's objection is that plaintiffs do not have standing to bring a pre-enforcement challenge to 26 U.S.C. § 107, but are limited to challenging the statute as applied to them. However, there is no categorical bar under federal standing doctrine from challenging a statute on its face before it is applied, although special concerns may apply. Brandt v. Village of Winnetka, Illinois, 612 F.3d 647, 649-50 (7th Cir. 2010) ("[P]re-enforcement challenges [to a potential First Amendment violation] are within Article III."). See also Santa Fe Independent School District v. Doe, 530 U.S. 290, 313-14 (2000) (considering facial challenge under establishment clause to policy that had not yet been enforced); Virginia v. American Booksellers Association, Inc., 484 U.S. 383, 393 (1988) (concluding that plaintiffs had standing to bring preenforcement challenge); Owner-Operator Independent Drivers Association, Inc. v. Federal Motor Carrier Safety Administration, 656 F.3d 580, 586-87 (7th Cir. 2011) (same). In general, "[c]hallenges to statutes as written, without inquiring into their application, are appropriate when details of implementation are

inconsequential." Harp Advertising Illinois, Inc. v. Village of Chicago Ridge, Illinois, 9 F.3d 1290, 1291-92 (7th Cir. 1993). In other words, plaintiffs have standing to challenge a statute before it has been applied to them when the injury to their First Amendment rights is clear from the face of the statute. That is the situation in this case.

What purpose would it serve for plaintiffs to attempt to claim the exemption before challenging it in court? If the meaning of § 107 as applied to plaintiffs were in doubt, then defendant might have a valid point that plaintiffs' claims of injury are premature. E.g., Warnke v. United States, 641 F. Supp. 1083, 1084-85 (E.D. Ky. 1986) (self employed minister sought refund under § 107, arguing that statute did not require him to be employed by third party). However, there is no plausible argument that plaintiffs could make that they qualify as "ministers of the gospel," so it would be pointless to require plaintiffs to jump through the hoop of filing a claim to prove that they are not entitled to the exemption. Cf. California Medical Association v. Federal Electric Commission, 453 U.S. 182, 192 (1981) (concluding that plaintiffs had standing, noting that they "expressly challenge the statute on its face, and there is no suggestion that the statute is susceptible to an interpretation that would remove the need for resolving the constitutional questions raised"); American Civil Liberties Union of Illinois v. Alvarez, 679 F.3d 583, 593-94 (7th Cir. 2012) ("This is not a case in which the threat of prosecution hinges on a highly attenuated claim of speculative future events or unknowable details about the manner in which the statutory violation will be committed or enforced.").

The purpose of standing rules is not to waste the plaintiffs' and the government's time

and resources in unnecessary busy work that will lead to an obvious outcome. Just as courts have held that plaintiffs need not engage in conduct clearly prohibited by a statute before challenging the statute, e.g., Ezell v. City of Chicago, 651 F.3d 684, 695-96 (7th Cir. 2011); Schirmer v. Nagode, 621 F.3d 581, 586 (7th Cir. 2010), I see little reason to require plaintiffs to claim an exemption that they would have no good faith basis to claim, an act that could make plaintiffs vulnerable to civil sanctions. Mulcahy, Pauritsch, Salvador & Co., Ltd. v. Commissioner, 680 F.3d 867, 872 (7th Cir. 2012) (understatement of tax liability without good faith basis may subject taxpayer to monetary penalties).

In a footnote in its reply brief, defendant argues that it is "conceivable" that plaintiffs could qualify for the exemption under § 107 because the IRS does not require "that an individual maintain theistic beliefs in order to perform functions that may be considered the duties of a minister of the gospel." Dft.'s Br., dkt. #23, at 10 n.3. It does not cite any regulations or decisions for this proposition, but rather a popular nonfiction book. Id. (citing Alain de Botton, Religion for Atheists (Pantheon ed., Mar. 6, 2012)). Regardless whether the statute requires "theistic beliefs" to qualify for the exemption, there is no reasonable interpretation of the statute under which the phrase "minister of the gospel" could be construed to include employees of an organization whose purpose is to keep religion out of the public square.

Nothing in the implementing regulations or decisions of the IRS or the federal courts suggests a different interpretation. Although the tax courts have construed § 107 expansively to include non-Christian religions, e.g., Silverman v. Commissioner, 57 T.C. 727, 731

(1972); Salkov v. Commissioner, 46 T.C. 190, 194 (1966), a person does not qualify for the exemption unless his or her "ministry includes the ministration of sacerdotal functions and the conduct of religious worship, and the control, conduct, and maintenance of religious organizations (including the religious boards, societies, and other integral agencies of such organizations), under the authority of a religious body constituting a church or church denomination." 26 C.F.R. § 1.1402(c)-5(b)(2). See also Carter v. United States, 973 F.2d 1479, 1481 (9th Cir. 1992) (§ 107 applies to "members of the clergy"); Flowers v. United States, 1981 WL 1928, *6 (N.D. Tex. 1981) (upholding denial of exemption because housing allowance was for educational rather than sacerdotal functions); Colbert v. Commissioner, 61 T.C. 449 (1974) (taxpayer did not qualify for exemption because his "primary emphasis . . . was in warning and awakening people to the dangers of communism and in educating them as to the principles of communism" rather than "religious instruction in the principles laid down by Christ"). A church is similarly defined as an organization with duties that "include the ministration of sacerdotal functions and the conduct of religious worship." 26 C.F.R. § 1.511-2(a)(3). See also Whittington v. Commissioner, 2000 WL 1358652, *3 (U.S. Tax Ct. 2000) ("At a minimum, a church includes a body of believers or communicants that assembles regularly in order to worship.").

Defendant does not address the language of the statute and implementing regulations, much less explain how the individual plaintiffs could meet the definition for "ministers" or the foundation could meet the definition for "church." Thus, it seems that the only way that plaintiffs could receive an exemption for housing expenses would be for the IRS to flagrantly

violate § 107 and disregard its own interpretative regulations. I decline to assume that this is a realistic possibility.

b. Other cases addressing a party's standing to challenge tax exemptions

Although neither the Supreme Court nor the Court of the Appeals for the Seventh Circuit has addressed the particular question raised by defendant's motion, the Court of Appeals for the Fourth Circuit has rejected the view that a plaintiff does not have standing to challenge a discriminatory tax exemption until she makes an unsuccessful attempt to claim the exemption. In Finlator v. Powers, 902 F.2d 1158 (4th Cir. 1990), the court stated, "[w]e do not believe that this additional requirement would improve the vigorousness or quality of the parties' advocacy, would enhance the posture of this case, would clarify the legal issues presented for review, would strengthen the justiciability of the appellants' claims, or would contribute in any way to our ability to decide a question presented and contested by parties having a demonstrated interest and stake in its resolution." Id. at 11-62. The court reaffirmed this view in Planned Parenthood of South Carolina Inc. v. Rose, 361 F.3d 786, 791-92 (4th Cir. 2004), in which it concluded that plaintiffs objecting to a "Choose Life" license plate did not have to request a pro-choice license plate to obtain standing because the statute at issue made it clear that they would not be able to obtain one. See also Budlong v. Graham, 414 F. Supp. 2d 1222, 1227 (N.D. Ga. 2006) (plaintiffs had standing to challenge tax exemption; they were "forced to endure a tax because the literature they seek to purchase and sell does not meet state-imposed religion and content requirements");

Flamer v. City of White Plains, New York, 841 F. Supp. 1365, 1372 (S.D.N.Y. 1993) (plaintiff had standing to challenge resolution banning religious displays on public property even though he had not submitted personal request to erect display).

Defendant suggests that Finlator is no longer good law in light of Winn, but its argument is not persuasive. The question in Winn was whether taxpayers had standing to challenge a state statute granting a tax credit to individuals who made a contribution to a "student tuition organization." The plaintiffs were not arguing that they were unable to qualify for the credit or that the credit itself was discriminatory. Id. at 1447 ("Respondents are likewise able to contribute to an STO of their choice, either religious or secular. And respondents also have the option of contributing to other charitable organizations, in which case respondents may become eligible for a tax deduction or a different tax credit."). Rather, their argument was that they were injured because other taxpayers had the option of making a contribution to a religious student tuition organization, which meant that the credit had the effect of "us[ing] State income-tax revenues to pay tuition for students at religious schools." Id. at 1441. In other words, the plaintiffs were objecting to the government's use of their tax dollars. Because plaintiffs are not claiming taxpayer standing in this case, Winn is not instructive.

The only contrary case defendant cites is Apache Bend Apartments, Ltd. v. United States through IRS, 987 F.2d 1174 (5th Cir. 1993), a case in which the plaintiffs were challenging the constitutionality of the transition rules of the Tax Reform Act of 1986, which gave specified exemptions to a small number of taxpayers. In a split decision the

majority held that "prudential concerns convince us that the plaintiffs have not alleged an injury that is appropriate for judicial resolution." Id. at 1177. Although defendant's reliance on this case is limited to a string citation, I will address the majority's reasoning because it is the only similar case that supports defendant's position and many of defendant's and the majority's arguments overlap.

The majority identified a number of reasons for its decision: (1) "the injury of inequality alleged by the plaintiffs essentially is nothing more than a claim to 'an asserted right to have the Government act in accordance with law,'" id. at 1179 (citing Allen v. Wright, 468 U.S. 737, 754 (1984)); (2) only a small number of taxpayers could claim the tax exemption at issue, so the plaintiffs had a "generalized grievance . . . that they share with all taxpayers," id. at 1178; (3) if the court "accept[ed] the plaintiffs' claim of standing [as sufficient] in this case, there would be no principled basis upon which to deny standing to any taxpayer wishing to challenge any of the countless provisions of the federal tax laws which treat some taxpayers more favorably than others," id. at 1180; (4) "Congress has erected a complex structure to govern the administration and enforcement of the tax laws, and has established precise standards and procedures for judicial review of tax matters," id. at 1177; and (5) "the relief the plaintiffs seek, if granted, would seriously disrupt the entire revenue collection process." Id.

I have already addressed the first reason: plaintiffs' allegation of discriminatory treatment is distinct from a simple disagreement with the government's conduct. In none of the cases cited by the court in Apache Bend or by defendants did the plaintiffs identify

as their injury the denial of a benefit provided to a similarly situated third party. E.g., Whitmore v. Arkansas, 495 U.S. 149, 160 (1990) (injury was "the public interest protections of the Eighth Amendment"); Richardson, 418 U.S. at176-77 (rejecting claim of taxpayer standing); Ex parte Levitt, 302 U.S. 633, 634 (1937) (injury was disagreement with Justice Black's appointment to Supreme Court); Hein v. Freedom from Religion Foundation, Inc., 551 U.S. 587 (2007) (rejecting claim of taxpayer standing); Freedom from Religion Foundation, Inc. v. Obama, 641 F.3d 803 (7th Cir. 2011) (injury was "offense at the behavior of the government").

The strongest objection is the second, which is that plaintiffs' injury is simply a "generalized grievance" because it is widely shared with other taxpayers. Defendant repeats this argument in its briefs. Like the dissenting judges in Apache Bend, plaintiffs argue that the denial of a tax benefit is not a generalized grievance because their injury is shared only by others who are similarly situated, which plaintiffs identify in this case as employees who are provided a home or a housing allowance as part of their compensation for their employment. Apache Bend, 987 F.2d at 1182 (Goldberg, C.J., dissenting) ("class of aggrieved taxpayers is limited to those taxpayers who are similarly situated to the taxpayers who are treated more favorably"). This would be one way to limit the class of plaintiffs with standing, though it is not clear whether it is consistent with Supreme Court precedent because it suggests that a plaintiff does not have standing unless she can show that she would be successful in obtaining the benefit in the absence of the challenged provision. E.g., Northeastern Florida Chapter of Associated General Contractors of America v. City of

Jacksonville, Florida, 508 U.S. 656, 665-66 (1993) ("The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.").

Regardless whether standing is limited as plaintiffs suggest, I disagree with defendant that plaintiffs lack standing because they have a "generalized grievance." The Supreme Court has rejected the view that a plaintiff does not suffer an injury in fact simply because it is "widely shared." Massachusetts v. EPA, 549 U.S. 497, 522 (2007) ("That these climate-change risks are 'widely shared' does not minimize Massachusetts' interest in the outcome of this litigation"); Federal Election Commission v. Akins, 524 U.S. 11, 24 (1998) ("[W]here a harm is concrete, though widely shared, the Court has found 'injury in fact' "). Rather, the question is whether plaintiffs' injury is sufficiently "concrete." As noted above, the parties agree that the denial of a tax benefit meets that standard. Further, requiring taxpayers to seek a refund would not limit the potential class of people who would have standing to sue; it would simply put an arbitrary barrier in their way. To the extent that a large number of taxpayers have standing to challenge § 107, that is due less to the nature of the injury and more to the small number of people that receive the tax benefit. Under defendant's view, if the government gave a tax exemption limited to Caucasians of Norwegian descent, taxpayers with other ancestries could not challenge the exemption simply because they greatly outnumber the favored group.

The third objection is related to the second: the majority noted that the tax code contains many exemptions for many different groups of people, so it would cause judicial

chaos to allow disfavored groups to sue to challenge those exemptions. However, simply because a person has standing to sue does not mean that his lawsuit is likely to follow. It is well established that any conceivable rational basis is enough to justify most government classifications, Nordlinger v. Hahn, 505 U.S. 1, 15 (1992), so the vast majority of lawsuits challenging allegedly discriminatory tax exemptions would be frivolous on their face. Many people may have standing to challenge a wide variety of laws affecting a large number of people, such as traffic regulations or state insurance requirements, but challenges to such laws are few and far between, presumably because the government's authority to enact them is clear.

The fourth objection, that allowing plaintiffs to sue would "disrupt" the operation of the government, seems to be misguided. First, the case cited for this proposition, Louisiana v. McAdoo, 234 U.S. 627 (1914), was about sovereign immunity; it had nothing to do with standing. Second, if plaintiffs prevailed on their claims, it would not place any additional burdens on the government; it would eliminate a tax exemption. Thus, the primary effect would be to increase the funds retained by the federal government. Budlong, 414 F. Supp. 2d at 1227 ("Were it to enjoin the enforcement of such tax exemptions, this Court would actually enrich the State of Georgia's coffers, not deplete them.").

The fifth objection is that Congress has enacted a number of procedures for challenging provisions of the tax code. Again, that is not an objection to standing. More important, defendant cites no statute that prohibits plaintiffs from bringing this action. As defendant acknowledges, the Anti-Injunction Act, 26 U.S.C. § 7421, bars suits that seek to

enjoin the government from assessing or collecting a tax, not from eliminating an exemption, so it does not apply to this case. Cf. Hibbs v. Winn, 542 U.S. 88, 107-08 (2004) (challenge to state tax exemption not barred by Tax Injunction Act, which is state corollary to Anti-Injunction Act). Defendant suggests that the Declaratory Judgment Act may be read as forbidding all lawsuits related to taxes, but it acknowledges that the Court of Appeals for the Seventh Circuit has interpreted that act as being coextensive with the Anti-Injunction Act. Tomlinson v. Smith, 128 F.2d 808, 811 (7th Cir. 1942).

It is true that the tax code provides particular mechanisms for challenging deficiencies and seeking refunds, but neither the majority in Apache Bend Beedn nor defendant cited any authority for the proposition that a court may refuse to exercise jurisdiction over a claim because Congress has limited federal jurisdiction over a *different* claim. Although there may be good reasons for requiring litigation related to any tax statute to be brought in tax court, that does not mean that courts may limit their own jurisdiction when Congress declined to do so. Rather, the general rule is that federal courts must exercise jurisdiction over cases arising under federal law unless it is unmistakably clear that Congress intended to withdraw that jurisdiction. Mims v. Arrow Financial Services, LLC, 132 S. Ct. 740, 748-49 (2012) (when "the claim arises under federal law, . . . federal-question jurisdiction under § 1331 . . . endures unless Congress divests federal courts of their § 1331 adjudicatory authority").

Finally, although neither side raises this issue, one might argue that plaintiffs do not have standing to challenge their alleged unequal treatment unless they allege that in fact they would claim the exemption in the absence of the "minister of the gospel" limitation. Cf.

Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 182-83 (2000) (plaintiffs had standing to challenge defendant's discharge of pollutants into river by alleging that they would use river but for defendant's conduct); Babbitt v. United Farm Workers National Union, 442 U.S. 289 (1979) (plaintiff challenging statute before enforcement establishes standing by "alleg[ing] an intention to engage in a course of conduct . . . proscribed by a statute"). Plaintiffs do not allege explicitly that they would apply for the exemption if they qualified for it, but I may reasonably infer at this stage that they would from their allegations that plaintiff Barker claimed the exemption in the past when he was a minister and that the remaining individual defendants believe they would qualify but for the religious limitation. E.g., Ord v. District of Columbia, 587 F.3d 1136, 1143 (D.C. Cir. 2009) (inferring intent to engage in conduct from allegation that plaintiff had engaged in conduct in past but cannot do so now because of restriction). However, at summary judgment, plaintiffs may need to come forward with more specific evidence on this point.

B. Redressability

With respect to the other requirements of standing, there does not seem to be any genuine dispute that plaintiffs' injury may be traced to § 107 and defendant's implementation of it and that plaintiffs' injury could be redressed by invalidating § 107. In its opening brief, defendant argued that plaintiffs' alleged injury was not redressable because they cannot obtain a refund in this lawsuit or an injunction stopping the government from collecting a tax. However, in its reply brief, defendant acknowledges that nullifying § 107

would be an appropriate remedy. This is consistent with several cases in which the Supreme Court has held that the government's denial of a benefit to the plaintiff does not have to be redressed by awarding the benefit to the plaintiff; rather, the injury may be redressed by eliminating preferential treatment to others. Heckler v. Mathews, 465 U.S. 728, 740, (1984) ("We have often recognized that the victims of a discriminatory government program may be remedied by an end to preferential treatment for others."). Accord Texas Monthly, 489 U.S. at 7-8; Orr v. Orr, 440 U.S. 268, 271-72 (1979).

C. Sovereign Immunity

At the end of its brief in chief, defendant argues that plaintiffs' claims are barred by sovereign immunity, but it does not deny that 5 U.S.C. § 702 waives immunity for claims seeking prospective relief. Rather, its immunity argument is that plaintiffs cannot bring a claim under § 702 because they lack standing to sue. Because I have rejected defendant's standing argument, its sovereign immunity argument necessarily fails as well.

ORDER

IT IS ORDERED that

1. Defendant United States of America's motion to dismiss, dkt. #16, is DENIED.

2. The motion to amend the caption of the complaint filed by plaintiffs Freedom from Religion Foundation, Inc., Annie Laurie Gaylor, Anne Nicol Gaylor and Dan Barker, dkt. #26, is GRANTED. The caption is AMENDED to include Timothy Geithner and

Douglas Shulman in their official capacities.

3. Because the deadlines in this case have been stayed pending this order, the clerk of court is directed to set up a new scheduling conference with the magistrate judge.

Entered this 29th day of August, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge

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

----------x
FREEDOM FROM RELIGION :
FOUNDATION, INC., ANNE NICOL :
GAYLOR, ANNIE LAURIE GAYLOR, :
and DAN BARKER, :
Plaintiffs, : Case No. 11-CV-626
-vs- :
UNITED STATES OF AMERICA, :
Defendant. : VOLUME I
----------x

DEPOSITION OF:
ANNIE LAURIE GAYLOR

Milwaukee, Wisconsin
April 23, 2013
1:20 p.m. to 3:35 p.m.

PHYLLIS KAPARIS, RPR

APPEARANCES:
BOARDMAN & CLARK LLP
One South Pinckney Street
Fourth Floor
Madison, Wisconsin, 53701-0927
BY: MR. RICHARD L. BOLTON
(rbolton@boardmanclark.com),
appeared on behalf of the Plaintiffs.

U.S. DEPARTMENT OF JUSTICE
TAX DIVISION
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044
BY: MS. ERIN HEALY GALLAGHER
(erin.healygallagher@usdoj.gov)
appeared on behalf of the Defendant.

INDEX

EXHIBITS

PROCEEDINGS

ANNIE LAURIE GAYLOR, called as a witness herein, having been first duly sworn on oath, was examined and testified as follows:

MS. HEALY GALLAGHER: We are on the record in the case of Freedom From Religion Foundation, et al., versus United States. It is April 23, 2013, at about 1:20 p.m. Central.

We met earlier this morning. My name is Erin Healy Gallagher of the United States Department of Justice in the Tax Division. I'm appearing on behalf of the United States.

Mr. Bolton, would you make your appearance?

MR. BOLTON: Attorney Rich Bolton appearing for the plaintiffs and with the witness Annie Laurie Gaylor.

MS. HEALY GALLAGHER: All right. This deposition will be governed by the Federal Rules of Civil Procedure, and any pertinent local rules of the Western District of Wisconsin.

Page 45

compensation for 2010?
A. Yes.
Q. And again there's no dollar figure reported in Box 14, right?
A. That's right.
Q. Do you incur like expenses for your personal credit card or personal bank account on behalf of FFRF?
A. I try not to.
Q. So Mr. Barker travels, so he submits expenses to the organization --
A. Well, we have an office credit card.
Q. Okay.
A. So we keep them distinct from personal --
Q. Okay.
A. -- credit card.
Q. So do you, too, submit receipts --
A. Yes.
Q. Sorry.
A. We try hard --
Q. Let me finish the question.

Page 46

A. -- to keep the -- I'm sorry.
Q. Let me finish the question.
If you incur an expense on behalf of FFRF, do you then submit receipts to the organization?
A. Yes.
Q. And that --
A. As I said, we try hard. Once in a while something goes wrong with a receipt, but we have the credit card also, receipt.
Q. Sure. And so then FFRF reimburses you if necessary or --
A. We try not to do that. We have an office credit card, so we're trying to use the FFRF credit card for anything related to FFRF. Our CPA and I frown on a lot of reimbursements going out, and I try to discourage that even with our other staff, but sometimes it happens.
Q. So then when someone travels, like is there one office credit card or is there --
A. No. Dan has one, and I have one at the moment. And my mother had one, and we've kept it

Page 47

active because all the UPS charges go on her credit card, and that way it's cleaner. So we pass our credit cards out to trusted staff for things like ordering software. We don't have another office credit card at the moment, but it seems to work out.
Q. In the event, though, that you did for some reason use your personal credit card to purchase something on behalf of FFRF --
A. Yes.
Q. -- would you then submit that receipt and be reimbursed?
A. Yes, I would try to do that. It happens once in a while.
Q. Okay. If you could turn to Exhibit 15, please. This is the copy of your Individual Income Tax Return for 2010 that was produced by your counsel. Again, if you take a look through this tax return, it appears that you did not report any self-employment income in 2010; is that right?
A. Yes, I did not. I'm not self-employed.

Page 48

Okay.
Q. On each of these tax returns there has been income reported from what appears to be a family trust?
A. Uh-huh.
Q. Yes?
A. Yes.
Q. Other than your compensation from FFRF and the income from the family trust, do you have any other sources of income for, for example, 2012?
A. No.
Q. Any other sources of income for 2011?
A. No.
Q. Any other sources of income for 2010?
A. No.
Q. Have you ever exempted your housing allowance from your income?
A. No.
Q. Have you ever filed a claim for refund --
A. No.

Page 49

Q. Sorry. I take pauses. It can be confusing.
So have you ever filed a claim for refund to claim an income tax refund on the taxes that you did pay on the amount of your housing allowance?
A. No.
Q. So, Ms. Gaylor, what is the -- you allege that the IRS is discriminating against you by its enforcement of Section 107. What is the discrimination that's happening? What facts do you have to support that?
A. I pay more taxes --
Q. And --
A. -- than if I were allowed to claim the housing exemption.
Q. And what facts do you have to support that statement?
A. Well, it's true.
Q. So you're looking at this solely from the perspective of Section 107.
A. Well, I guess you -- could you rephrase

Page 50

the question? I'm not quite sure what you're asking me.
Q. Sure. So it sounds to me -- correct me if I'm wrong -- that you believe you pay more in taxes. Is that generally, or in income tax, or your ultimate -- your bottom line tax bill is greater than someone who can claim the exemption under 107?
A. Well, I mean, it's all relative. I can't say for every single person who claims the housing exemption that I pay more taxes than they do. But I know that I pay more taxes because I'm not allowed to take the housing allowance that FFRF is offering me because I'm not a minister of the gospel.
Q. Have you done any calculations?
A. You mean on how much less we'd be paying?
Q. Right.
A. I'm not very good at math. So I haven't done it in my head, no, but I know it would be less.

Page 51

Q. How do you know it would be less?
A. Because I would be allowed to exempt from my taxable income substantial amounts of my salary.
Q. Again, is this from a perspective of your income tax only, or your entire federal tax bill, because your entire federal tax bill has other components to it. I should say, have you looked at the housing allowance in that perspective?
A. I guess I don't know how to answer that question. I read the 107 statute. I read, you know, Chimerinsky's amicus to the Ninth Circuit. I'm not a tax expert, but I know that I cannot claim the allowance that is being given to me because I'm not a minister of the gospel, and that this is favoritism to ministers of the gospel, quote, unquote, because of who they are.
Because Peter Mack, who introduced this legislation, said it was to reward ministers for fighting godlessness. And, so in other words, all these ministers around the country are given

Page 52

this huge tax benefit because they're fighting FFRF, and me, and other nonbelievers. And I feel that is terribly wrong, and it's discriminatory, and it is offensive.
It's not just -- you know, it's not just a pocketbook injury. It's also an affront that the government would be favoring ministers for fighting godlessness. And FFRF wants to reward its leaders for promoting godlessness, and we are not allowed to do that.
MR. BOLTON: As the author of the Amended Complaint, if it will help to simplify things, I believe from the perspective of the claim we are just looking at it from the income tax perspective of Section 107.
MS. HEALY GALLAGHER: So the bottom line is the pocketbook injury.
MR. BOLTON: The 107 relative to that the ministers are allowed to take it, so there's discrimination as between the two groups. But in terms of --
MS. HEALY GALLAGHER: So income tax

Page 73

salary.
Q. Okay. Similar questions for 2012. Your salary was -- or your compensation was $88,778, right?
A. Yes.
Q. And that included any amount of housing allowance that was designated by FFRF?
A. Yes. Again, the base salary is the same, and this would be including bonus and some royalties in there.
Q. Sorry. So the base salary is 85,000?
A. Yes. The salary has been the same.
Q. Taking a look at Interrogatory No. 6 at the bottom of Page 7, have you ever spoken with the IRS in any way about the housing allowance under 107?
A. No.
Q. Have you ever spoken with the secretary of the Treasury or the Treasury Department about it?
A. No.
Q. Have you spoken to anyone in the United

Page 74

States government about the housing allowance under 107, except me?
A. No. I think you're the first.
Q. Have your tax returns during or since 2009 been subject to audit at all?
A. No.
Q. Handing you what's been marked as Exhibit 1, which is the Amended Complaint in this case. Do you recognize the Amended Complaint?
A. Yes.
Q. Take a look at Paragraph 19. This paragraph alleges that an exemption under 107 is discriminatorily denied to other taxpayers who receive similar housing allowances. What are the facts that you have to show that this exemption is discriminatorily denied other taxpayers?
A. The way that it's -- that 107 is written discriminates.
Q. Do you have any other facts other than the text of the statute?
A. I don't think I need any other facts, but, no.

Page 75

Q. No, you don't have any other facts?
A. Well, there are other facts.
Q. What are they?
A. The administrative code, the way that this law is administered. But I don't -- I mean, I think on its face 107 clearly discriminates for religion and for ministers and against everyone else.
Q. Do you have any facts other than the statute or regulatory codes to support that allegation?
A. Like I said, I really don't think you need more.
Q. That's not my question, ma'am. Do you have any other facts?
A. I personally, no.
Q. Other than personally?
A. I'm not quite sure what you're -- your question seems to almost imply that it doesn't exist somehow. I mean, 107, the statutory language clearly differentiates ministers of the gospel from every other taxpayer. And that's a

Page 76

fact.
Q. All I'm asking -- the purpose for this deposition is just to find out what facts you have in support of your allegations, so that's all I'm asking.
So aside from the language of the statute aside, from the regs, do you have any other facts that support your allegation that 107 discriminatorily denies a tax benefit to other taxpayers?
A. I guess not, because I don't -- like I said, I don't think you need more facts than that.
MR. BOLTON: She's not trying to be difficult.
MS. HEALY GALLAGHER: I'm not trying to be difficult either.
MR. BOLTON: I know.
BY MS. HEALY GALLAGHER:
Q. You don't have any other facts; do you?
A. Well, I mean -- I guess not. I think that the question doesn't quite seem valid to me,

Q. And in your mind -- just asking you as a factual matter -- what's the difference between entanglement and excessive entanglement between government and religion?

A. Well, I think that Dan answered it already, and I would agree with his analysis that something that makes the government come in and make decisions pertaining to how religious or how sacred some action is by a church, versus a content neutral kind of regulation. One is just required to maintain society, the other is intrusive.

Q. Take a look at Paragraph 47. Paragraph 47 discusses obligations imposed on you as an individual plaintiff that are not imposed on ministers. What are the obligations that are imposed on you?

A. Paying -- not being allowed to use our housing allowance in reducing our tax burden. And, you know, maybe it's not quite fair to say it, but even having this deposition today is -- each minister who claims a housing allowance

isn't being asked all these questions, for example.

Q. Are there any other burdens?

A. I think that covers it.

Q. Paragraph 49, the allegation is that you as an individual plaintiff is otherwise similarly situated to ministers who receive the benefit of the exemption. Tell me how you are similarly situated to a minister who can claim the exemption under 107.

A. As the head of a national organization, it's a membership organization where we have services for our members, provide services, support, you know, we're a group for like-minded people who are free from religion to join. We're called on to be hosts, to provide sometimes more personal support for people. And, you know, we represent the organization. We're the known -- two people who are the most known. So we are kind of figureheads. And --

Q. Are there any other ways, aside from like the tasks of the job that you've just

described, that you are otherwise similarly situated to a minister who could claim 107?

A. No. But I could say one year Madison Magazine -- this is back in the 1990's -- named my mother, who was then the president of FFRF, as Madison's favorite religious leader. She won the contest. It was a joke, but, I mean, she got the most votes as an irreligious person. So there's -- you know, we're sort of in an opposite position, but known for our freethinking views.

Q. Any other ways that you're similarly situated to ministers who you believe could claim 107?

A. Well, you know, we really are kind of -- I don't think in our movement people are real hierarchical, but, you know, for example, irreverence has its own, not rituals, but Dan does de-baptisms. He's in demand to do that as an ordained minister. We have a de-baptism certificate that he signs. People can download one for free, but if they want a pretty one that's signed by Dan and has got the certificate,

they can order it from FFRF. It's like the -- you know, the opposite of what ministers do.

Q. Okay. Any other ways that you are similarly situated to a minister who could claim the exemption under 107?

A. No, I don't think -- I can't think of anything in particular.

Q. Also in Paragraph 49 it says you as an individual plaintiff would otherwise qualify for the housing exemption of Section 107 except for the application of religious criteria.

Are you familiar with all the requirements to qualify?

A. You mean from 107?

Q. Right.

A. Well, I've read it.

Q. So what facts do you have to support the idea that you would otherwise qualify for the housing exemption under 107?

A. Well, for example, if 107 said all the directors of 501(c)(3) organizations could -- if they were paid in a housing allowance could

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

----------x
FREEDOM FROM RELIGION :
FOUNDATION, INC., ANNE NICOL :
GAYLOR, ANNIE LAURIE GAYLOR, :
and DAN BARKER, :
Plaintiffs, : Case No. 11-CV-626
-vs- :
UNITED STATES OF AMERICA, :
Defendant. :
----------x

DEPOSITION OF:
DAN BARKER

Milwaukee, Wisconsin
April 23, 2013
9:00 a.m. to 12:23 p.m.

PHYLLIS KAPARIS, RPR

APPEARANCES:
BOARDMAN & CLARK LLP
One South Pinckney Street
Fourth Floor
Madison, Wisconsin, 53701-0927
BY: MR. RICHARD L. BOLTON
(rbolton@boardmanclark.com),
appeared on behalf of the Plaintiffs.

U.S. DEPARTMENT OF JUSTICE
TAX DIVISION
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044
BY: MS. ERIN HEALY GALLAGHER
(erin.healygallagher@usdoj.gov)
appeared on behalf of the Defendant.

ALSO PRESENT:
Annie Laurie Gaylor
Rebecca Markert
Patrick Elliott

INDEX

EXHIBITS

PROCEEDINGS

DAN BARKER, called as a witness herein by the Defendant, after having been first duly sworn, was examined and testified as follows:

MS. HEALY GALLAGHER: We are on the record in the case of Freedom From Religion Foundation, et al., versus United States on April 23, at about 9:00 a.m.

My name is Erin Healy Gallagher of the United States Department of Justice in the Tax Division, and I'm appearing on behalf of the United States. We have a court reporter here to record the proceedings.

Mr. Bolton, would you please make your appearances?

MR. BOLTON: Rich Bolton from the Boardman Clark law firm, here representing the witness and the plaintiffs. And the witness is here, Dan Barker.

Also present are two staff attorneys from the plaintiff FFRF, Rebecca Markert and

Page 17

you review, if any, to help respond to those interrogatories?
A. None, other than I mentioned before, I have knowledge of the minutes and resolutions of the Foundation, but did not physically touch them.
Q. Okay. The third Request for Production is, all documents concerning your housing allowance as identified in the Amended Complaint.
Again, any documents other than your tax returns that you have in your possession that are related to your housing allowance?
A. The documents that I looked at are in our files for our filing of taxes, which included the tax returns and checks and bills and receipts needed to file our taxes for those years.
Q. Did those bills and checks and receipts have to do with your housing allowance?
A. It had to do with the taxes we paid for our property.
Q. So property taxes.
A. Yes.

Page 18

Q. Okay.
A. And the documents we received on our mortgage, when it comes to the interest on our mortgage, those kinds of documents that I looked at, which are in those files for preparing our taxes for those years. And additional documents as well, canceled checks for documenting household expenses and so on.
Q. Okay. The fourth Request for Production is, all documents concerning communication between you and the IRS regarding your housing allowance.
And the response is, there are none. Is that correct to your knowledge today?
A. That's correct, yes.
Q. Request for Production No. 5, all documents concerning your status as an employee of FFRF or as a self-employed person for federal tax purposes.
A. I did not look at any physical documents regarding my employment. I don't know if Lisa provided to you any.

Page 19

Q. I'm just asking about what you did.
A. No.
Q. So if you didn't, that's fine.
And we talked about Request for Production No. 6, your federal income tax returns, including all supporting documentation, that were required to be filed during the relevant time period and for tax year 2012.
MS. HEALY GALLAGHER: And actually the relevant time period was defined as 2009, but I think we have that.
MR. BOLTON: Right. I hadn't recognized that --
MS. HEALY GALLAGHER: Right.
MR. BOLTON: -- but I think we did produce the 2009 as well.
MS. HEALY GALLAGHER: Okay.
BY MS. HEALY GALLAGHER:
Q. So it sounds like there are additional documents in your possession that go to the actual housing expenses that you've incurred for the time that you've had a housing allowance; is

Page 20

that right?
A. Related to what we actually stated to the employer, no. We could perhaps come up with more to -- but what we stated to Freedom From Religion Foundation, our justification for the amount of the housing allowance, no, is house payments, mortgage interest, taxes, those things that I mentioned to you.
Q. Right. And you have documents showing how much you paid in property taxes, right?
A. Yes.
Q. And you have documents showing how much you paid for your mortgage, right?
A. Yes.
Q. And for landscaping, right?
A. Yes.
Q. Other --
A. For some of it, yes.
Q. Other things related to the house.
A. Yes.
Q. Okay. Mr. Barker, did you withhold any documents that were responsive to those requests?

Page 45

record producer, which was barely a living wage, but it was a living wage when it all added up, I had begun working as a -- well, it didn't start off as a computer programmer -- but for a company that was doing computer programming. And I can't remember the name of that first company. It was in California, building monitoring systems for the petroleum industry where I started doing programming and computer analysis for them.

And then 80 -- I suppose it was 1984, I don't remember, I went to work for Safetran in California; Cucamonga, California. Safetran built -- I don't know if they still exist -- dispatching systems for the railroads, and I was a programmer and analyst for those systems that moved trains around the tracks, which were mainly in the Midwest, Indiana and Illinois was where the systems I was working on. And I did that for about two years. And was just employed just as a nonminister, just as a programmer until 1987.

Q. And you mentioned that you had done consulting work for FFRF before you were hired on

Page 46

as an employee.

A. Yes. It was small, it was computer-related. FFRF asked me to set up their very first computer database. It must have been in 1986. I don't remember exactly when, '85, '86. And it was small consulting work. I was a member of the Foundation and a volunteer for the Foundation, and did a lot of free volunteer work on weekends, you know, besides my regular job. And the consulting was -- well, I just remember that one database consulting job, but there must have been others.

Q. When did you join Freedom From Religion?

A. 1984, as a member.

Q. So what were you hired to do when you were first employed full-time?

A. It was mid 1987, probably June, PR director.

Q. Before we move on to your employment with Freedom From Religion Foundation, for all of the jobs that we've talked about from when you

Page 47

left Azusa to 1987, were you ever fired from any job?

A. Nope.

Q. Tell me about the history of your employment with Freedom From Religion Foundation.

A. 1987, PR director, on the staff, on the payroll. And over the years continued until 19 -- until 2004 as PR director formally. That was the title, but the duties were much more varied than that.

Q. What were your tasks as PR director?

A. Writing, promotion, public speaking, editing, helping around the office in proofing, working also with the computer system and database which I had helped to set up originally. It basically was doing anything that needed to be done. Everyone on the staff, especially at that time, was doing every possible thing. So we all pitched in.

Formally PR director, which means I did a lot of public speaking. As a former minister, preacher, it was a good fit to be out as a public

Page 48

-- I can't use the word preacher, but if I use it, I'll put it in quotes -- as a "preacher" for atheism and agnosticism.

And I often would then, of course, deal with members of the Foundation. I wouldn't call it counseling in a religious sense, but it was a parallel to that, viewing members of the foundation somewhat as members or congregants in a sense that many of them had questions or problems with how do I deal with religious relatives, how do I announce the news that I am no longer a believer, morality with God -- basically doing much of what I used to do as a minister, but now for a totally different message, for a nonminister of the gospel type of message. And it was, of course, much more than that. Every week and every day a different task or duty or problem would come up in a small, growing organization, but primarily for me it was PR.

Q. So you mentioned sort of a stopping point or perhaps transitional point in 2004.

Page 61

projects as they come up through designated -- you know, people designate billboard campaigns. Over the years we've had projects -- in fact, our newspaper started off as a project. Freethought Today was a fundraising project. We have an ongoing legal fund project to raise money for the legal activities of the Foundation, and various projects like that as the years go and the months pass.

The legal fund and general fund are ongoing. And then we have special projects twice a year that we raise money for this or for that. Way back in the early years we had a special project to buy a company vehicle, and people donated to that. So it's that kind of a thing.

Could I clarify?

Q. Please.

A. I have spoken on the telephone from our home to a number of these people, but not physically in the home.

Q. Is there any reason it was necessary for you to speak to them from your home?

Page 62

A. They called me. They found me, and they called, and especially people in Madison who would find me.

Q. So what about the rest of your tasks that you perform as co-president of Freedom From Religion Foundation, what, if any, tasks are required to take place at your home?

A. None are required.

Q. Is your current home or your housing allowance -- actually I'll withdraw that.

Is there any reason that you're required to live where you live for the convenience of Freedom From Religion Foundation?

A. There is no formal reason for that.

Q. Are there any informal reasons?

A. It's nice to be close, for example, the alarm system goes off, if we need to get to the office for some reason. We have occasionally entertained members of the foundation at our home and housed them on occasion. It's not required, but it is informally nice for us to have a home pretty close to the office so that we can be

Page 63

available for those occasions as they arise.

Q. About how far is your home from the Freedom From Religion Foundation office?

A. We walk to work from our home and back. It's about two and a half miles. So it's a walkable distance, and a very quick ride, very quick drive. You can almost see it from here.

Q. What is the actual physical address for FFRF?

A. 304 West Washington Avenue.

MR. BOLTON: It's actually just a couple blocks from here.

MS. HEALY GALLAGHER: That is close.

MR. BOLTON: Can we take a quick break?

MS. HEALY GALLAGHER: We can.

(A recess was taken.)

BY MS. HEALY GALLAGHER:

Q. Let's go back on the record, please.

Let's speak for a little bit about the housing allowance that you allege has been designated for you by Freedom From Religion Foundation. How did the idea for a housing

Page 64

allowance come up?

A. We started a lawsuit -- I forget what year it was -- in California.

Can I ask Rich for confirmation about that, or is that okay?

Q. It's just to your recollection.

A. Okay. And because of the taxpayer standing we pulled out of that, and realized that in order to challenge what we think is an unconstitutional special tax advantage to ministers of the gospel, we would need to show that the injury that results from that unconstitutional advantage is a real injury. So while what I do at FFRF is not ministry -- it's what you might call an anti-ministry I suppose -- in order to demonstrate that there was an advantage that the government is giving to clergy that nonclergy don't get, it would be clearer for the Foundation then, at least on paper, to designate for me and Annie Laurie -- and, I suppose, potentially anyone else who might fall under that -- a housing allowance, to show that

Page 65

discrimination.
So it was part of the process of establishing standing. It wasn't because I want the exclusion. I can't speak for Annie Laurie, but I don't want the exclusion. It would be nice, you know, to be able to drop your tax liability that clergy get to do. But to document the actual harm, material harm, to someone like me; whereas, before I used to take advantage of such a break, tax break, now because my views have changed, I don't get to take advantage of that, the only way to show that would be a document that we also have housing expenses. So that to my understanding at least is why we decided to move to our Executive Council that they adopt a resolution, which they eventually did, designating a housing allowance.
Q. When you say you moved the Executive Council --
A. Made a motion.
Q. Right. Is that motion reflected in minutes of any meeting?

Page 66

A. Yes, it is. I don't recall though --
MR. BOLTON: Just for my understanding, and I asked in terms of anything that's memorialized, I think everything I have defined in writing in terms of the resolution and whatnot, we produced.
MS. HEALY GALLAGHER: Right. I would be curious, though, to see the minutes of that meeting that reflects this motion --
MR. BOLTON: Okay.
MS. HEALY GALLAGHER: -- to seek the housing allowance in the first instance.
BY MS. HEALY GALLAGHER:
Q. And this may have been part of the motion, but to your recollection how did you determine the amount of the housing allowance that you requested?
A. House payments, taxes, looking at the documents that we mentioned earlier related to actual expenses of maintaining our home, interest, all of those things, and came up with what we considered to be a reasonable amount to

Page 67

reflect what it costs us to maintain our own home.
Q. And --
MR. BOLTON: Can we -- you may have asked this, and I wasn't listening -- just so the record is clear.
When you refer to us, Annie Laurie Gaylor and you have been married since --
THE WITNESS: Since '87.
MR. BOLTON: Okay. And you may have said that, and I just. So the "us" is you and Annie Laurie Gaylor.
THE WITNESS: Our household, yeah, as co-presidents and as co-homeowners, I guess, of the same home.
BY MS. HEALY GALLAGHER:
Q. Was there -- does anybody else receive a housing allowance on paper so designated from Freedom From Religion Foundation?
A. Anne Gaylor, who is the president emerita, is also designated a housing allowance.
Q. Is there anybody else?

Page 68

A. No, not to my knowledge, unless I slept through one of those meetings.
Q. Is the housing allowance in addition to any salary that you were already earning, or did it become part of the salary?
A. It's not in addition to any salary we are already earning. It's an allowance on paper only. We did not get a raise. It did not affect our income in any way.
Q. So have you ever exempted from your income tax any amount of your housing allowance designated by FFRF?
A. No. I wouldn't know how to do that. I wouldn't know what the mechanism would be to do that. But, no, I never have.
Q. And you've never filed a claim for refund with the IRS requesting a refund in the amount of the income tax that you paid on what's been designated as your housing allowance?
A. No. Again, if I had wanted to, I wouldn't know how to do that, what is the procedure or mechanism. I have never wanted to.

Page 101

A. No.
Q. If we take a look at paragraph little i at the bottom of Page 3.
MR. BOLTON: Which page?
MS. HEALY GALLAGHER: 3 of Exhibit 3.
BY MS. HEALY GALLAGHER:
Q. It asks for your yearly wages during the relevant time period.
And the response for you is that you received $87,550 in 2011. Now, just so I'm clear, that amount includes the $5,500 that you were designated as a housing allowance in 2011; is that right?
A. Yes, it does.
Q. And this $87,550 in 2011, that would have been your salary regardless?
A. That's true.
Q. The same question for 2012. It says that you received $91,690 in 2012. And that would have been your salary regardless of any housing allowance in 2012, right?
A. That is true, to my knowledge. I can't

Page 102

speak for what Counsel might decide, but to my knowledge that is true, yeah.
Q. If you take a look at Interrogatory No. 6 at the bottom of Page 7, Identify all communication between you and the IRS regarding your housing allowance identified in Amended Complaint, Paragraph 13.
The response is, no such communications have occurred because Section 107 IRC exclusion is only available to ministers of the gospel.
So, Mr. Barker, you've never had any interaction with the IRS regarding Section 107; is that right?
A. Not currently. If you consider that I excluded the income way back then, does that count as interaction with the IRS?
Q. Well, we can start with that, if you think that that's --
A. Is that called interaction, or is that just --
Q. Well, I'm just asking for your thoughts and your opinion on this. So we'll start with

Page 103

that.
MR. BOLTON: I think when you're talking about -- I think he's considering simply the return itself being a communication as opposed to --
MS. HEALY GALLAGHER: That's fine. I mean, we'll start with that.
MR. BOLTON: Okay.
BY MS. HEALY GALLAGHER:
Q. We'll start with that. So you're taking the return claiming a housing allowance as communicating with the IRS regarding Section 107.
A. I don't know. If that qualifies as communicating -- is that interacting or communicating? If it's interacting, I -- there was no interaction.
Q. I'm not trying to mince words.
A. Okay. I just don't want to say anything that's not clear.
Q. I understand.
A. To my --
MR. BOLTON: Other than the filing, did

Page 104

you have any communications?
THE WITNESS: No. There was no two-way interaction between me and the IRS regarding housing allowance.
BY MS. HEALY GALLAGHER:
Q. Sure. How about -- and so that was in the early 80's you submitted an income tax return excluding certain income --
A. That's right.
Q. -- from your gross income to the IRS.
A. And if you call that interaction, yes. But I don't know if you would define that as interaction. But other than that, there has been no interaction.
Q. Okay. So with respect to the housing allowance that Freedom From Religion Foundation has designated on your behalf, have you had any communication with the IRS whatsoever?
A. No.
Q. I'm handing you what's been marked Defendant's Exhibit 1, which is the Amended Complaint in this case. Do you recognize the

Page 121

Saddleback Church, about the reasoning for the exclusion in his salary and his ordination. So evidence would include the actual ordination documents. And I think that's significant. It's a significant amount of evidence.
Q. Anything else?
A. That's all.
Q. That's all. So just the information that you have from the Rick Warren investigation, right?
A. Yes. This is a legal Complaint, but, yes, you're right.
Q. So you don't have any personal knowledge of the evidence that's required?
A. I was not audited for those years that I claimed that exclusion, so I wouldn't have any personal -- that would be the only way to have any personal evidence, I think.
Q. Well, have you heard from anybody else that they've been required to show evidence to the IRS?
A. I have not heard that, no.

Page 122

Q. Paragraph 36, The inquiries under Section 107 require complex inquiries into the tenets of religious orthodoxy.
What facts do you have to support that contention?
A. Well, again, this is a Complaint. I don't have any facts about how the IRS does its business, so I can't say either way. But from the wording that the IRS uses in the section and sacerdotal functions and so on, this is our contention. But I don't have any direct facts about the internal workings of the IRS.
Q. Same question for Paragraph 37. The IRS is regularly required to make purely religious determinations in administering Section 107.
Do you have any facts to support that contention?
A. I don't have any personal facts, only my knowledge there have been cases where the IRS has challenged. And I can't bring you those documents now, but stories, you know, news

Page 123

stories.
Q. Do you have any information from other than news stories?
A. No, I don't.
Q. In Paragraph 47 the allegation is, The discriminatory benefits allowed by Section 107 as administered by the IRS and Treasury Department imposes obligations on the individual plaintiffs that are not imposed on ministers.
What are the obligations that are imposed upon you that are not imposed upon ministers?
MR. BOLTON: As the draftsman of the Complaint, by the way, I don't know necessarily whether he knows what the draftsman of the Complaint intended by this phrase.
THE WITNESS: But I can answer it, I think.
MR. BOLTON: Sure.
THE WITNESS: I'm obligated to pay all my taxes. I'm obligated to pay taxes on all of the wages and income that I received from the

Page 124

Freedom From Religion Foundation. Ministers of the gospel don't have that obligation.
BY MS. HEALY GALLAGHER:
Q. Any other obligations?
A. No. We're just challenging a tax code.
Q. Are you aware of any obligations that may be imposed on ministers that are not imposed on you?
A. Well, they are obligated to prove that they are in fact ministers. I suppose if the IRS audits them or questions their exclusion, then they are obligated to prove that fact. That's an obligation.
Q. Paragraph 49, if you want to take a second to read it. I'd like to paraphrase one section. There's an allegation that the individuals are otherwise similarly situated to ministers who receive the benefit of Section 107.
What facts, if any, do you have that show that you are similarly situated to ministers who receive the benefit of Section 107?
A. I'm not a minister of the gospel

Page 125

anymore, but in my own personal life the things that I am doing today are similar to what I was doing before as a minister. I don't call it preaching. It's lecturing or debating. I don't call it spiritual counseling. It is psychological counseling. I don't call it traveling evangelism anymore, but I call it traveling promotion for freethought. Writing music, I don't write religious music anymore. I write irreverent music, which is similar, like the flip side of a coin.

So I'm not doing ministry or ministry of the gospel. What I am doing is as a human being the same thing, promoting, convincing, counseling, persuading, PR, all of that. So in my current position at the Freedom From Religion Foundation I'm not a minister. I'm certainly not a minister of the gospel, but I am doing very much the same natural material things that ministers of the gospel do in their own religious duties, which -- because I haven't changed. I'm still speaking what I think is the truth. But

Page 126

the fact that my opinion has changed now makes me not a minister or religious officiant anymore, but because my opinions on religion have changed, the very same duties that I'm doing now that would have been qualified for the exclusion under this section, now no longer qualify because it's not in the promotion of the gospel, but it is questioning the gospel. It is countering the gospel. So I'm doing very much similar things to what I did before.

Q. So the similarity it sounds like is in the tasks that you do. Is that right?

A. That's right, yes.

Q. Are there any other similarities between you and ministers of the gospel that you think would qualify --

A. Besides tasks that we --

Q. Hang on one second.

A. I'm sorry.

Q. Let me get the question clear for the record.

Is there any other way that you are

Page 127

similarly situated to ministers who can claim the Section 107 exemption?

A. We are both hired by nonprofits, by 501(c)(3) nonprofit organizations, which is a similarity. Regardless of what we do, we are working for a nonprofit organization. Besides that and the actual tasks, I can't imagine any other similarity, except sometimes people tell me I look like a preacher. I don't know if that counts.

Q. So other than the tasks that you perform and that you're hired by a nonprofit, and that perhaps there's a physical resemblance at times, any other way that you're similarly situated to someone who could exempt income under Section 107?

A. I own a home. I suppose there's a similarity there. And at this time I can't think of any other similarities.

Q. So the tasks you perform, hired by a nonprofit, occasional physical resemblance, and owning a home. Anything else?

Page 128

A. At this time there's nothing else. I might think of something else later, but not now.

Q. So in Paragraph 52 if you want to take a look at it. I'll ask you a question about sort of the latter half where the allegation is, the individual plaintiffs are otherwise qualified for the housing allowance exemption except for religious criteria.

Is there any other way that you might be qualified for this exemption, other than what we've just talked about, with respect to being similarly situated to ministers?

A. Let me read the whole sentence again.

Q. Sure.

A. I'd say, no.

Q. Paragraph 54, The actions of the defendant have the effect each year of excluding hundreds of millions of dollars from taxation, and this exclusion is available only to ministers of the gospel.

How do you know that Section 107 excludes hundreds of millions of dollars a year

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

FREEDOM FROM RELIGION FOUNDATION, INC.; ANNIE LAURIE GAYLOR; ANNE NICOL GAYLOR; and DAN BARKER

Plaintiffs,

v.

Case No. 11 CV 0626

UNITED STATES OF AMERICA; TIMOTHY GEITHNER, in his official capacity; and DOUGLAS SHULMAN, in his official capacity,

Defendants.

DECLARATION OF JAMES HUDNUT-BEUMLER

Pursuant to 28 U.S.C. § 1746, I, James Hudnut-Beumler, declare that:

I. Statement of Qualifications

1. I am the Anne Potter Wilson Distinguished Professor of American Religious History at Vanderbilt University and dean of Vanderbilt's Divinity School.

2. I have served as Dean since 2000.

3. Prior to coming to Vanderbilt in 2000, I was dean of the faculty at Columbia Theological Seminary, a program associate for the Lilly Endowment, and administrative director of the undergraduate program in Public and International Affairs at Princeton University.

4. I earned my Ph.D. in Religion from Princeton University as well.

5. As a historian of American religion I have spent the years since 1990 mostly studying the economics of American religion and carefully attending to the ways in which a multi-religious culture has balanced the freedom of religious expression with official state neutrality toward any particular faith.

6. I am the author of several works on economic and social developments in American religious life, including the books *In Pursuit of the Almighty's Dollar: An Economic History of Protestantism* (2007) *Generous Saints: Congregations Rethinking Money and Ethics* (1999) and *Looking for God in the Suburbs: The Religion of the American Dream and Its Critics, 1945-1965* (1994), each of which provide background for my testimony.

7. I teach the History and Historiography of American Religion, Material History, History of Religion in the American South, and courses for ministerial candidates in the Presbyterian Church (USA).

8. Attached as Exhibit A is my curriculum vitae.

9. Attached as Exhibit B is a list of articles I have written in the past 10 years.

II. Background for My Testimony

10. The United States has retained me to examine and analyze and testify about the historical context of ministers' parsonages and parsonage allowances, and their treatment under the internal revenue laws of the United States.

11. Throughout this Declaration, I note materials that I relied upon to reach my conclusions.

12. In addition to those specific items, I also relied on the items listed in the attached Bibliography (Exhibit C).

III. The Historical Context of Ministers' Parsonages and Parsonage Allowances, and Their Treatment under the Internal Revenue Laws of the United States.

A. Introduction

13. The religious practice of housing ministers in parsonages[1] antedates the Internal Revenue Code by more than a millennium.

14. The decision to tax cash income, and its equivalents, in the early 20th century led to questions that potentially posed fundamental challenges to the way religious institutions had provided for their religious ministries for centuries.

15. Though the Income Tax as we know it had to be delayed in its implementation from 1909 until the passage of the 16th amendment in 1913, the introduction of the tax posed all kinds of new questions to long-standing social practices: did sailors have to pay income tax for their room and board while they did their jobs envoyage? Did ranch hands have to pay income tax on their bunks and beans? Did soldiers have to pay

[1] Throughout this report the term "minister" is used inclusively to represent all professional religious leaders of whatever faith groups, and the term "parsonage" is used inclusively to represent housing, of whatever form, supplied to such leaders in order to enable the ministry of the religious group, usually a congregation

income tax for the value of their base housing, and did officers' wives have to pay income tax on the value of rent while they waited stateside to see if their men returned from the Philippines and war with Filipino insurgents?[2]

16. None of these questions would have mattered so long as the United States relied principally on sales and excise taxes.

17. To these novel concerns were added the question and what of the clergy? They lived next door to their churches in houses and rectories. Did they need to pay a tax on the value of the housing or was it a part of the job—an offer said members of the cloth "could not refuse?"

18. Administrative rulings, courts, and Congress have recognized that ministerial parsonages, and later, cash allowances in lieu of parsonages, are a key dimension of the way religious groups with professional ministries have provided for their sacramental and pastoral affairs.

B. Parsonages Before the Income Tax in the United States

19. The patterns of housing members of the clergy in America have deep histories in the churches of Western Europe. The most important and common feature of religious organizations' approach to housing members of the clergy is the basic assumption that the clergy would live in housing

[2] In this, and preceding examples, I am speaking of the Federal Income Tax and not SECA, which was later applied to such forms for compensation

on the premises of the church grounds or nearby on ecclesiastically-owned property.

20. The historical record shows that underlying this assumption were four religiously motivated reasons for congregations to provide housing for their spiritual leaders.

21. Doing so enabled them to more freely exercise their religious beliefs than if they did not provide housing. Those reasons are:

a. First, the ecclesiastical employer required priests and ministers to live nearby to the location of their work at all hours of the day and night, particularly at the unpredictable moments when parishioners may be *in extremis* and in need of immediate pastoral care.[3]

b. Second, by controlling the living arrangements of clergy, the church can reinforce the faith's expectations for simple living, or holiness among the clergy; that is, members of the clergy should thereby live no better and no worse than their church authorities have arranged for them to live.[4]

---

[3] A clear example of this is the Catholic *Code of Canon Law*, which provides in Canon 883, 3, that each priest has the faculty to carry out the anointing of the sick, and in Canon 1003, § 2 provided: "All priests to whom the care of souls has been committed have the duty and the right to administer the anointing of the sick to all the faithful committed to their pastoral office."

[4] "The Priest, Pastor and Leader of the Parish Community," accessed March 30, 2013, http://www.vatican.va/roman_curia/congregations/cclergy/documents/rc_con_cclergy_doc_20020804_istruzione-presbitero_en.html.

c. Third, by having the church own the living premises instead of the minister owning his housing, the clergy were freed from temporal burdens (like home repair, yard work, and the like) to engage in spiritual work.[5]

d. Fourth, by owning housing for their clergy, congregations, dioceses and other church entities were freed from the difficulties associated with resettling clergy when the time came for personnel redeployment.[6]

22. These four religiously motivated reasons for a congregation to provide housing for its spiritual leader or leaders remain as relevant to religious practice today as they were to religious practice when the first settlers came to the colonies that would become the United States.

23. Even after King Henry VIII in England closed monasteries and seized vast church holdings for the crown in the 1530s, a standard ecclesiastic housing practice prevailed among the English-speaking peoples, for the four reasons mentioned above: a clergyman assigned to a parish had a yearly income fixed and additionally lived in a parish-owned rectory for the course of his ministry in that particular place.[7]

---

[5] Russell E. Richey, *American Methodism: a Compact History* (Nashville: Abingdon Press, 2012), p. 53.
[6] "Priestly Celibacy in Patristics and Church History," accessed March 10, 2013, http://www.vatican.va/roman_curia/congregations/cclergy/documents/rc_con_cclergy_doc_01011993_chisto_en.html.; Richey, *American Methodism*, 53; and Russell E. Richey, *The Methodist Conference in America: a History* (Nashville: Kingswood Books, 1996), 174.
[7] Alan Savidge, *The Parsonage in England ; Its History and Architecture* (London: S. P. S. K, 1964), 7-9.

24. This was the standard ecclesiastic housing practice that, in various forms, the several denominations of Christians forming the overwhelming majority of American colonists brought with them into the United States at the founding of the independent republic.[8]

25. The colonial history of the American continent contains the physical evidence of religious life, with parsonages built by towns and congregations for their ministers, and with larger chapter houses built for the early religious orders of catholic priests and sisters. For example:

a. The Keith House was built in 1662 by the proprietors of what was originally called the Duxborough Plantation, later called Old Bridgewater, Massachusetts for the first settled minister James Keith, who served the area from 1664 to 1719.[9]

b. The Manor House of St. Thomas Manor (1741) in Maryland is the oldest Jesuit residence in continuous use in the world. Clergy from this house served St. Ignatius Church in addition to other duties.[10]

c. Old Lutheran Parsonage (1743) Schoharie County, New York is one of the oldest religious buildings of any kind remaining in New York State.[11]

---

[8] Michael McConnell, "Establishment at the Founding" in *No Establishment of Religion: America's Original Contribution to Religious Liberty* (New York: Oxford University Press, 2012), 50.
[9] Eric B. Schultz and Michael J. Tougias, *King Philip's War: The History and Legacy of America's Forgotten Conflict* (The Countryman Press, 2000).
[10] Earl Arnett, Robert J. Brugger, and Edward C. Papenfuse, *Maryland: A New Guide to the Old Line State* (Johns Hopkins University Press, 1999), 116.

d. The Old Dutch Parsonage, built in 1751 by three different Dutch Reformed Congregations in New Jersey for the use of their pastor, still stands in Somerville, New Jersey.[12]

26. Such homes for clergy went by various names - rectory, parsonage, or manse - but amounted to the same thing: a home that accomplished the four religiously motivated purposes for a congregation to provide a parsonage with which I opened this report.

27. Because of heating and cooling concerns, and because most early church buildings were not open during the week, the parsonages were used for more than simply housing the minister.

28. Ordinarily the pastor's study was located in the parsonage.

29. The pastor counseled church members in the study; and meetings with the pastor for prayer and to conduct church business with lay leadership were customarily conducted in the parlor.[13]

30. The parsonage system was in very wide use in the nineteenth and early twentieth centuries.[14]

---

[11] Historic American Buildings Survey (Library of Congress) http://www.loc.gov/pictures/item/ny0752
[12] Brochure, "The Old Dutch Parsonage & Wallace House" (New Jersey Department of Environmental Protection, Division of Parks & Forestry).
[13] James David Hudnut-Beumler, *In Pursuit of the Almighty's Dollar: A History of Money and American Protestantism* (Chapel Hill: University of North Carolina Press, 2007), 132
[14] Ralph Almon Felton, *The Home of the Rural Pastor* (Madison, N.J: Dept. of the Rural Church, Drew Theological Seminary, 1948), 9 documents usage in 1171 pastorates in 12 denominations in the first half of the twentieth century, where all but .3% of pastors lived in church owned 95.9% or rented 3.8% housing

31. For the Roman Catholic Church and Methodist Episcopal churches (north and south) the practice of providing rectories and parsonages, respectively, was virtually universal and hardwired into their deployment models for clergy. Both religions established parsonages at or very near their houses of worship.

32. In both religions, the bishop of a diocese or conference could, and did, send ministers to different parishes according to the religious needs of the Church as a whole.[15] Providing housing on-site to the ministers enabled them to move freely according to their denomination's religious needs without having to extricate themselves from a private tenancy or a home that they owned only to have to find new accommodations where they were called.[16]

33. For example, the three Plenary Councils of Baltimore (1852, 1866, and 1884) of America's Roman Catholic Church hierarchy each stressed the importance of "bricks and mortar" in building up parishes with schools, rectories, and convents, not just houses of worship, as important to helping Roman Catholic Americans keep the Catholic faith in an overwhelmingly Protestant land; this guidance largely proved a roadmap

---

[15] Code of Canon Law, Can. 391 §1;*The Book of Discipline of the United Methodist Church: Specific Responsibilities of Bishops, Para.* 529–533

[16] "Time to Bring Back the Parsonage?," *SBC Voices*, accessed April 9, 2013, http://sbcvoices.com/timeto-bring-back-the-parsonage/.

for the continuing practice of the American Catholic church over the next century.[17]

34. As for the Methodists, as early as the 1830s, the influential churchman Nathan Bangs was urging his brethren to give up their horses and endless circuits for houses of worship and parsonages, saying, "it had long been evident to many of our ministers and people that for the want of having a preacher stationed in all important places, we had lost much of the fruits of our labor."[18]

35. By the late nineteenth century, the historical record suggests that the Methodists had taken this advice to heart. Methodist ministers' wives wrote of the shabbiness of church-provided homes and the heartbreak of laboring to make a home livable over a series of months only to learn that one's husband's Methodist bishop had reassigned him to another church with another parish with a parsonage full of peeling wallpaper and threadbare furniture.[19]

---

[17] Jay P. Dolan, *The American Catholic Experience: a History from Colonial Times to the Present*, 1st ed (Garden City, N.Y: Doubleday, 1985), 350-3.
[18] Nathan Bangs, as quoted in Richey, *American Methodism*, 53
[19] For an extended treatment of the difficulties associated with living as a member of a minister's family see the eighth chapter of James Hudnut-Beumler, *In Pursuit of the Almighty's Dollar: A History of Money and American Protestantism*. (Chapel Hill: University of North Carolina Press, 2007); for contemporaneous accounts of the difficulties of parsonage living in the 19th century, see: Anonymous, *The Minister's Wife; or, What Becomes of the Salary* (Boston, James M. Usher, 1861); A. H. Redford, *The Preacher's Wife* (Nashville: Publishing House of the Methodist Episcopal Church, South, 1877); Mary Orme Tucker, *Itinerate Preaching in the Early Days of Methodism* (Boston, B. B. Russell, 1872); and. Leonard I. Sweet, *The Minister's Wife: Her Role in Nineteenth-Century American Evangelicalism* (Philadelphia: Temple University Press, 1983)

36. The logic and religious importance of housing ministers at or near their congregations was even clear to churches like the African Methodist Episcopal Church (AME), which for various reasons struggled to house its pastors and maintain vital ministries.

37. An article in the African-American *Christian Recorder* in 1867 celebrated the achievement of an AME church in Zanesville, Ohio, that led the way in showing that AME congregations could provide for their ministries on the same basis as their white counterpart denomination. Without parsonages it was harder to expect itinerating ministers in the AME, the author believed, to attend to the needs of the congregations with their whole beings.[20]

38. By 1910 the parsonage was an established feature of the Methodist Episcopal Church's ministry, but its bishops were quick to point out that they did not understand the parsonage to be a form of secular compensation so much as religious support for a nonsecular calling. Their comments illustrate the third of the four religious motivations for providing ministerial housing. They wrote: "Methodist preachers are 'supported,' not hired. The difference is vital, a 'support' is the sum estimated, for a pastor already appointed, by an authorized committee after consultation with the pastor, as sufficient to furnish himself and

[20] J. A. Warren, "Church Parsonages -Progress at Zanesville" in *The Christian Recorder*, May 25, 1867.

family a comfortable livelihood. Under this plan consecration is not compromised, and the preacher's message may weigh its full gospel value."[21]

39. Therefore, the historical record demonstrates that two of the largest American churches overseen by bishops entered the 20th century determined to use clergy housing principally as a tool for pastorally effective, spiritually focused, and ecclesially accountable ministry. And, using the Zanesville AME church example, other less established and less populous churches struggled to do the same.

40. For wider societal evidence of the extent of parsonage use, however, there were three censuses of religious bodies conducted in 1906, 1916, and 1926 by the U. S. Bureau of the Census.These censuses were of the nosy sort ("How much is your house worth and how much do you make?") that historians so value years later.

41. From them we know the value, by denomination, for every county and state, of church buildings, both of the primary places of worship, church halls, and of parsonages.

42. The 1916 census (the census with information closest in time before Congress exempted the value of a parsonage from federal income tax)

[21] "The Episcopal Address," 1912, Methodist Episcopal Church General Conference, as quoted in Richey, *Methodist Conference*, 174.

provides several pieces of important historical evidence about the extent of the utilization of parsonages by American religious bodies and their ministers at the dawn of the income tax era.

43. First, the evidence obtained from the Census of Religious Bodies conducted by the U.S. Bureau of the Census of the Department of Commerce shows incremental change with respect to most categories, including parsonage utilization, compared to the Census of 1906. For instance, there was only a 3.2% growth in the percentage of congregations reporting a parsonage.[22]

44. Second, it supports the idea that, in the absence of any rulings about the tax status of parsonages with respect to income to clergy, they were in wide usage by the largest, most well-organized faith groups of the day.

45. At first the statistics do not seem to evidence a high rate of parsonage utilization because, while the nation in 1916 had 199,634 church edifices, the religious bodies only reported 65,272 parsonages in use.[23]

46. However, the authors of the report on parsonages noted that 69 out of the 202 reporting denominations listed no parsonages.[24]

47. The denominations for which there were no parsonages reported were generally very small, either having no regular ministry, or being faiths

[22] United States, *Religious Bodies: 1916* (Washington: Govt. Print. Off, 1919), Vol.1, 142-3
[23] Ibid.
[24] Ibid.

whose ministers were part-time and expected to engage in other principal full-time work.[25]

48. The statistics also failed to take account of situations in which a minister might serve more than one church, and as many as five churches, in a circuit, but live in the parsonage of only the largest church, a common practice in then-rural Protestant America.[26]

49. In my opinion, the best historical perspective on the relationship between ministers and parsonages in 1916 must consider both the religious census's data on parsonages and its data on ministers of the various faiths.

50. Out of the 95,702 ministers reporting their work to the census, 80,435 reported engaging in pastoral work, with 64,899 engaging exclusively in pastoral work.[27]

51. Then, as now, many ordained clergy worked as teachers, chaplains, as denominational or evangelical or philanthropic workers, or were retired.[28]

52. I infer that congregations were interested in housing principally the clergy who actively performed sacramental duties for them. Here then the

---

[25] Ibid. 53.
[26] Ralph Almon Felton, *The Home of the Rural Pastor* (Madison, N.J: Dept. of the Rural Church, Drew Theological Seminary, 1948)., provides the best documentation of the utilization of parsonage in rural ministry, including a single parsonage being used by a minister in the service of several congregations. As for the statistics failing to take account of these situations, the very nature of aggregate statistics tends to mask what is happening in individual cases
[27] *Religious Bodies* 142-3
[28] Ibid., 69.

relationship becomes much stronger between ministers in the various traditions in 1916 and their respective traditions' parsonages.

53. Looking at Roman Catholics, the Methodist Episcopal Church, and the Presbyterian Church in the United States of America, three of the largest denominations of that era with very high rates of response to the Census from both ministers and from churches on the parsonage question in 1916,[29] we discover the following: the Roman Catholic Church had 15,120 church edifices, 8,976 parsonages, with 11,482 priests engaged in pastoral work and 7,943 clergy engaged exclusively in pastoral work.[30]

54. The Methodist Episcopal Church reported 28,406 church edifices and 14,262 parsonages, with 10,193 ministers engaged in pastoral work, and 9,611 engaged exclusively in pastoral work.[31]

55. Finally, the Presbyterian Church in the United States of America with 4,536 congregations reporting parsonages had 5,165 ministers engaged in pastoral work with 4,886 clergy engaged exclusively in pastoral work.[32]

56. In each case, in my opinion, the close correspondence between the number of parsonages and the number of clergy engaged exclusively in parish work is revealing of the relationship between a congregation and its desire

[29] Ibid., 142-3
[30] Ibid
[31] Ibid.
[32] Ibid.

to organize itself in such a way to facilitate the full-time presence of its minister.

57. Residual over/under counts can be explained by extra parsonages for assistants, vacant parsonages, and so forth.

58. These conclusions are supported by records from the General Assembly of the Presbyterian Church in United States of America in 1921, for example: nearly every church that year lists that it has a manse or that it is sharing its minister with another church that has a manse, and the value of that manse.[33]

59. The pattern reveals the old Western European Church practice that the successful congregations led by professionally ordained and set apart full-time clergy continued to be housed at the congregation's pleasure and expense.

60. In combination with the foregoing Census information, a 1919 analysis of the information provided for the entire United States from the Income Tax Returns for 1916 sheds additional light on the religious needs to provide housing for ministers.

61. The 1919 analysis noted that less than 1% of all people who self-reported as ministers reported an income above $3,000.[34] The journal also noted

[33] Presbyterian Church in the U.S.A, *Minutes of the General Assembly of the Presbyterian Church in the United States of America* (New York: Presbyterian Board of Publication, 1921).
[34] "Ministers' Salaries," *Christian Education* 2, no. 13 (May 1, 1919), 4

that "taking the [ministers'] profession as a whole two out of three men are paid less than $1,000 a year."[35]

62. These low prevailing wages would have created another set of problems for ministers in the early twentieth century had they been required to find housing of their own - the lack of a modern real estate industry and mortgage financing suitable to most minister's needs and capabilities.

63. Throughout the early 1900s, mortgages "featured variable interest rates, high down payments, and short maturities....[B]efore the Great Depression, homeowners typically renegotiated their loans every year."[36]

64. These facts indicate, that $5,000-$6,000 and more homes were out of reach to clergy earning an average of $1,500 per year, who would have been expected to put down half of the purchase price, pay a floating interest rate, and come up with a balloon payment at the end of five years. This would be especially true if clergy had to re-sell the home after short tenures of less than five years in particular churches because of an ecclesiastical imperative to move to where they were needed.

65. In my opinion, these historical records show that the parsonage system provided a critical means for churches to ensure that the spiritual needs of their congregations were met by providing for their clerics' needs for a

[35] Ibid.
[36] Richard K. Green and Susan M. Wachter, "The American Mortgage in Historic and International Context" *The Journal of Economic Perspectives*, volume 19, number 4 (Autumn 2005) 93-114.

place to live so that they could be immediately available to the congregation and to live in a much larger home to accommodate the church business conducted there.

C. Parsonages and the United States Income Tax

66. All of the foregoing sets the stage for Congress's decision, in adopting the "Revenue Act of 1921," to exempt from taxation "the rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of his compensation" in Section 213(b)(11).

67. From the foregoing data, I, as a historian of American religion, can only conclude that most citizens in the late 1910s and early 1920s would have understood the place and function of parsonages in American religious life.

68. I note that the Revenue Act of 1921 did not exempt all clergy income from income taxation.

69. Instead, the historical record suggests that it was a recognition that people who lived in houses not of their own choosing, over which they had neither property rights nor a right to refuse were not being offered "compensation" on the same terms as the other income that was being taxed under the 1921 Act.

70. Supporting this analysis is the fact that Section 213(b), which listed the items to be excluded from gross income, include a mostly common sense

list of items, the results of which including them as income would be perverse (such as double taxation, taxation of insurance payouts, government payouts for injury, or lawsuit payouts).

71. Further, the historical context suggests that lawmakers in 1921 would have readily acceded to the premise that it would have been odd to tax a minister on the rental value of a parsonage in which he was obliged by his employer, the church, to live and work.

72. The Bureau of Internal Revenue had earlier established what is commonly called the "for the convenience of the employer doctrine" starting with an office ruling, O.D. 265, 1 C B 71 (1919).

73. It held that the shipboard food and board given to seamen in addition to their wages did not count as income for tax purposes. But a 1921 decision by the same office, O.D. 862, 4 C B 85 (1921) held that "When in addition to the salary paid a clergyman he is permitted to use the parsonage living quarters free of charge the fair rental value of the parsonage considered a part of his compensation for services rendered and as such should be reported as income."

74. The inclusion of Section 213(b)(11) in the Revenue Act of 1921, later the same year, can be seen as an explicit congressional disagreement with the Bureau's view that the "convenience of the employer doctrine" (or something like it) did not apply to the clergyman and his parsonage.

75. By adding to the qualifier "or something like it" I mean to signal while it is clear that Congress reversed the direction of O.D. 862, they did not offer any rationale that explicitly put clergy housing under the rubric of housing provided for the convenience of the employer, nor did they create such a category in the 1921 Act.

76. Not even the President of the United States living in the White House received an explicit carve-out in the 1921 Act, it can be noted.

77. But, due to the similarities of wording, in my opinion, the intent of the congressional action was to reverse the Bureau's construal of parsonage living as income.

78. One can imagine that Congress would have done the same for President Harding had he been charged the full rental value of living in his nice, big white house with its attendant duties and headaches by virtue of an Internal Revenue Office Decision.

79. Congress may also have viewed it as odd to tax clergy for living in a property that was exempt from property tax in most localities by long custom so long as it was occupied for the intended purpose of religious activity.

80. Parsonages were, after all, often the site of a minister's study, the place where prayer groups met during weekdays, and meetings were held with lay leaders of the church and parishioners counseled.[37]

81. All we know for certain from the Congressional Record from November 2, 1921 is that when the senator from South Carolina's proposed amendment "to exempt the rental value of a dwelling house and the appurtenances thereof furnished to a minister of the gospel as part of his compensation from gross income" on the floor of the Senate, the committee chair Senator Penrose accepted the amendment and the Senate agreed to it without discussion.[38]

D. The Introduction of Parsonage Housing Allowances and Their Exemption from Federal Income Tax

82. The parsonage income tax exclusion worked well for clergy of established, mainstream, and populous churches who could afford to purchase (or already owned) a manse or parsonage for their clergy.

83. But there were other churches, just as there had been throughout the history of the United States, with paid clergy who did not benefit from this exemption.[39]

---

[37] John Witte, Jr. "Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice? *Southern California Law Review*, Jan, 1991, Vol.64 (2), 378.
[38] *62 S Congressional Record November, 2, 1921 (p. 7162)*
[39] Ralph Almon Felton, *The Salary of Rural Pastors* (Madison, N.J: Dept. of the rural church, Drew theological seminary, 1946), 27. J. A. Warren, "Church Parsonages -Progress at Zanesville" in *The Christian Recorder*, May 25, 1867; United States, *Religious Bodies*.

84. Yet the four religiously motivated reasons to provide housing to ministers were just as true for these minority religions.

85. Thus, the first three decades of the parsonage exemption applied only to clergy of more established churches with fulltime clergy serving communities with enough accumulated capital to build or acquire a parsonage.

86. Because a dwelling is a complete unit (either you have one or not; you can't have half a parsonage) the provision made for a relatively high barrier of entry to newer and less affluent congregations seeking to provide for the temporal needs of their clergy so that the clergy could tend to the spiritual needs of the congregation.

87. The parsonage exemption, therefore, was available to some kinds of congregations rather than others, a situation that would only intensify in succeeding decades as religious diversity, and residential mobility increased.[40]

88. In some instances churches lacking readily available parsonages provided their ministers with cash in lieu of a parsonage.[41]

89. Such ministers eventually were successful in claiming they were entitled to a tax-free housing allowance on the analogy of the one that that had

[40] Robert Wuthnow, *The Restructuring of American Religion: Society and Faith Since World War II*, Studies in Church and State (Princeton, N.J: Princeton University Press, 1988)
[41] *MacColl v. United States*, 91 F. Supp. 721 (E.D. Ill. 1950)

been already established as available to military officers who lived off base under the convenience of the employer doctrine.

90. In a series of cases federal courts ruled that a minister's cash housing allowance was excluded from taxable income under Section 22(b)(6) of Internal Revenue Code of 1939 (see *MacColl v. United States*, 91 F. Supp. 721 (E.D. Ill. 1950) and *Conning v. Busey*, 127 F.Supp. 958 (E.D. Oh. 1954)).

91. These factors set the stage for Congress's 1954 articulation of Section 107 of the Internal Revenue Code, which explicitly recognized both a parsonage and cash provided in lieu of a parsonage as exempt from income tax.

92. What had happened historically to religious institutions that made this not only desirable for particular ministers so that they could continue to provide religious services to their congregations, but intelligible to lawmakers and the public? The four religiously motivated reasons to provide minister's housing remained relevant, but the way in which they were put into effect changed with the rapid post-war social change, especially in residential housing patterns, suburbanization, and domestic prosperity after WWII.

93. Accompanying these social changes was the so-called revival of religious interest.[42]

94. Taking each of these in turn we can see that the 1954 Internal Revenue Code Sec 107(2) provision allowing clergy to accept income tax exempt cash housing allowances accommodated more institutions and clergy combinations.

95. Importantly, instituting the parsonage allowance option eliminated discrimination[43] between traditional, colonial era denominations' style of providing for their ministries and the part-time ministers and rabbis who were characteristic of smaller, newer, and less affluent religious groups such as Pentecostals, evangelical churches, and independent African-American congregations.[44]

96. After the close of WWII in 1945, the existing pent-up demand for housing, which having gone unmet while wartime production had gone into

---

[42] James David Hudnut-Beumler, *Looking for God in the Suburbs: The Religion of the American Dream and Its Critics, 1945-1965* (New Brunswick, N.J: Rutgers University Press, 1994)

[43] The House Ways and Means Committee wrote in its Report to accompany the 1954 revision of the Internal Revenue Code: "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." It continued, "Your committee has 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." H.R. Rep. No. 83–1337 (1954), p.15 see also S. Rep. No. 83–1622, at 186 (1954) for the Senate's parallel report on its version of the bill.

[44] Two articles provide the contrast between styles of ministry: "Mainline Protestant Ministers Turning From the Inner City - New York Times," *New York Times*, accessed April 2, 2013, http://www.nytimes.com/1990/05/31/nyregion/mainline-protestant-ministers-turning-from-the-innercity. html?pagewanted=all&src=pm. and "In Poor Areas, Street Churches Give Cohesion; Street Churches Help Poor Areas Cohere," accessed April 2, 2013, http://www.nytimes.com

military manufacturing, combined with a baby boom to drive a sustained 20-year process of residential suburban housing starts.[45]

97. Accompanying all these new suburbanites were tens of thousands of new churches from mainline Protestant groups, the Roman Catholic Church, and from the Conservative and Reformed branches of Judaism, all of which were often approached by developers to locate new congregations and even given land on the condition that they build houses of worship.[46]

98. One example of this is Protestant suburban church "planting." Often, a denomination sent the minister into a community first to live and gather a church congregation which might meet in a school for a time before building a house of worship.[47] In this instance, there was no "parsonage" to live in because a congregation would have been too new to purchase a home for its minister.

99. Except for the Catholic parishes, very few of the new suburban churches included a parsonage or rectory on the premises (even once a house of worship was built).

---

[45] James Hudnut-Beumler, "Suburbanization and Religion," *The Cambridge History of Religions in America Volume III: 1945 to the Present*, 108

[46] Hudnut-Beumler, *Looking for God in the Suburbs, 2-8.*

[47] See L. F. Dingman and Presbyterian Church in the U.S.A, "Church Extension Program, the Presbytery of Washington City" (Washington: Presbytery of Washington City, 1956); Richard A. Myers, Cooperative Church Extension Planning (Chicago: Church Federation of Greater Chicago, 1959); Methodist Church (U.S.), Mid-century Report (Philadelphia, Pa, 1950) for examples of churches' thinking about how to extend their ministries into the new suburban areas

100. Instead, it made sense, in light of the four religiously motivated reasons to provide housing for a minister, for suburban congregations to house their clergy in the community along with the rest of the community's residents[48] because their clergy could still be maximally available to parishioners.

101. Sometimes the congregation would own the home. Less frequently, they would enable the minister through a cash allowance to rent or purchase the home; particularly as clergy became older and nearer retirement.[49]

102. Even after 1965 suburbanization continued, though on a less dramatic pace, so that by the year 2000, people living in metropolitan areas, but outside the municipal boundaries of principal cities, constituted a majority of the population.[50]

103. Another feature of the housing boom was easier access to mortgages with far friendlier terms for consumers.[51]

104. Thus, although ministers' salaries had declined relative to general wages since the 1890s and their relative standard of living decreased accordingly,

---

[48] A 1962 survey of pastors conducted found that 73% of respondents preferred a parsonage removed from the church building and in the neighborhood with other homes, in part to raise children with a minimum of distinctions from others in the community. Methodist Church (U.S.), *Planning* ([Philadelphia, Pa: Division of National Missions of the Board of Missions of the Methodist Church], 1963), 7

[49] Methodist Church (U.S.), *Planning*., 5

[50] Hudnut-Beumler, "Suburbanization and Religion," 119

[51] James Hudnut-Beumler, "Suburbanization and Religion," *The Cambridge History of Religions in America Volume III: 1945 to the Present*, 108

[52] it was easier for them to get a mortgage for a home of their own and easier to sell quickly if called to a new congregation.

105. In addition to suburbanization, the historical record shows that a major social change pushing an increasing number of clergy towards the acceptance of a cash allowance to purchase their own homes in place of living in a manse or parsonage was the changing view of retirement in American society.

106. Initially, ministers were excluded from Social Security.

107. Under 1954 amendments to the Social Security Act, ministers were first permitted to elect to contribute to, and be covered by, Social Security as self-employed workers.

108. Then, 1967 amendments to the Social Security Act automatically included ministers in Social Security as self-employed workers unless they

[52] Hudnut-Beumler, *In Pursuit of the Almighty's Dollar*, 91. For this reason and in keeping with the social changes of the 1970s and 1980s, many ministers' wives began working outside the home. This in itself created a shift away from a traditional parsonage in which the minister's wife has a key role in maintaining and running the home in a way that met the spiritual needs of the congregation. For examples of this literature about the difficulties of parsonage life see: John H. Morgan and Linda B. Morgan, "Wives of Priests" (Notre Dame, IN: The Parish Life Institute), 1980; Charlotte Ross, *Who is the Minister's Wife?* (Philadelphia: Westminster, 1980; Mary Owens Fitzgerald, *The North Carolina Conference Parsonage System: Insights and Alternatives* (privately published, 1979; Robert W. and Mary Frances Bailey, *Coping with Stress in the Minister's Home* (Nashville: Broadman Press, 1979); Frederick Leonard Smoot, "Self perceived Effects of the Parsonage System on United Methodist Clergy and Spouses' Sense of Becoming in Growth in the Parish Ministry." Ph.D. Dissertation, Claremont School of Theology, 1978, for a full account of the negative psychological effects of continuing the parsonage system into the late 20th Century; and Cameron Lee and Jack O. Balswick, *Life in a Glass House: The Minister's Family in Its Unique Social Context* (Grand Rapids, Mich.: Ministry Resources Library, 1989).

individually claimed an exemption based on conscience or religious principles.[53]

109. Clergy, like other Americans of the middle 20th century, were now beginning to think more and more about retirement as a phase of life for which provisions needed to be made, rather than dying on the job.[54]

110. And religious institutions, which once had homes for superannuated and dying ministers, began to fund pensions that coordinated with Social Security and assumed that ministers would eventually retire, living out some golden years happily like anyone else.[55]

111. This then raised the question of where were these ministers to live, and clergy began to be more interested in building equity towards having a home they would own in retirement; and, as eventual retirement became a temporal need of clergy, religious bodies began to adapt so as to keep their clergy focused on the spiritual aspects of their work.[56]

E. The Role of Housing in the Contemporary Practice of Ministry

112. The four religious motivations for providing housing for a minister have remained relevant, whether a congregation opts to provide a parsonage for its spiritual leader or a housing allowance.

---

[53] *Social Security Bulletin*, April 1985, volume 48, number 4, 38
[54] Norman Lobsenz, *The Minister's Complete Guide to Successful Retirement* (Great Neck, New York: Channel Press, 1955).
[55] Ibid., 46
[56] Ibid., 126-134

113. The changing demographics and social trends of the United States since World War II have impacted that choice, but the religious motivations have not changed.

114. In surveying the contemporary scene, it is my opinion that the paramount consideration in utilizing church-owned housing, or providing an allowance, is still the congregations' need to house clergy in such a way so that the minister can live with his or her people. It is of the essence of the office of minister, priest, or rabbi, that one be near one's congregation.

115. In a rural area this may favor a church owning a parsonage because the availability and marketability of homes near a congregation's place of worship is poor.

116. And in a place like Manhattan, San Francisco, Chicago, or affluent areas in southern California, a church-owned parsonage or apartment may be the only way for a church to get its clergy men and women close to their place of ministry and members of their congregation.[57]

117. Indeed, because ministerial employment pays so little (national mean = $46,880)[58] and real estate is worth so much in a place like the Upper East

[57] The cost of housing in Brownsville, Texas, is 71% of the national average. The comparable figures for other areas are as follows: Charlotte, NC (79.5%), New York (Manhattan) (386.7%), San Diego (194.4%), and San Francisco (281%). *Source:* C2ER, Arlington, VA, ACCRA Cost of Living Index, Annual Average 2010

[58] Occupational Employment and Wages, May 2012 for organizationally employed clergy, http://www.bls.gov/oes/current/oes212011.htm#nat

Side of Manhattan, it is quite possible for the fair market rental value of someone's apartment to be worth much more than one's salary.

118. In cases like this, taxing the full market rental value of the high-value parsonage would, in my opinion, have the effect of raising the price of having a minister in particular neighborhoods near their congregations to unsustainable levels.

119. For example, 40 of the 57 Presbyterian congregations on Long Island still had manses as of April 2012 according to Mark Tammen, Long Island's general presbyter. Tammen reported that sky high housing costs "price pastors out of the market except for the largest congregations. If the person from God you want to call is in Minneapolis, if you don't have a manse, you can't call them," he said.[59]

120. The information officer for the Episcopal Diocese of Long Island, Rev. Canon Shawn Duncan, made a similar point, analytically, saying, "Nationally the trend is to have rectories in those areas that are expensive to live."[60]

121. In other instances, however, a cash allowance can give a religious congregation the flexibility it needs to better perform its religious functions at its own discretion.

[59] "Parting with the Parsonage," *New York Times*, April 8, 2012 RE 6
[60] Ibid.

122. For example, the conservative Temple Beth-El of Cedarhurst, Long Island sold the five bedroom home of its senior Rabbi Sholom Stern at his request and provided him a housing allowance instead for a smaller place when his children had grown up and left the home, using the proceeds to redirect funds to synagogue programming.[61]

123. A church of elderly congregants may not be up to being a landlord for a rambling manse.

124. Another congregation may wish to free its pastor of the temporal concerns of retirement, as in the case of Rev. Mark Bigelow, of the Congregational Church of Huntington, Long Island, age 52, who asked his church after 21 years of living in its parsonage to sell the three-bedroom home and pay him a cash allowance.[62]

125. A newer congregation of immigrants who are still working on where to establish their place of worship, may still use the housing allowance to support their minister's needs without having to commit to a particular property for a parsonage.

126. In this instance the availability of the parsonage allowance provision can be used by newer religions while reducing the discrimination between them and the older, more established religions that benefitted from the parsonage-only income tax exemption for ministers.

---

[61] Ibid.
[62] Ibid.

127. A cash allowance may allow the church and its minister to be flexible about accommodating family size, school district, special needs, disability access and so forth, again allowing a minister to ensure his or her family's needs are met and freeing the minister to provide spiritual guidance and counseling to the congregation.

128. In other words, then, both the income tax-free parsonage and the income tax-free housing allowance have useful functions in allowing congregations, in their discretion, to supply their needs for ministerial services.

F. Conclusion

129. The historical record shows that both provisions of § 107 are important to allow religious groups to provide the sacramental and pastoral services necessary to their beliefs, traditions, and rituals in ways that respect the wide variety of economic and demographic realities of American society even now in the 21st century.

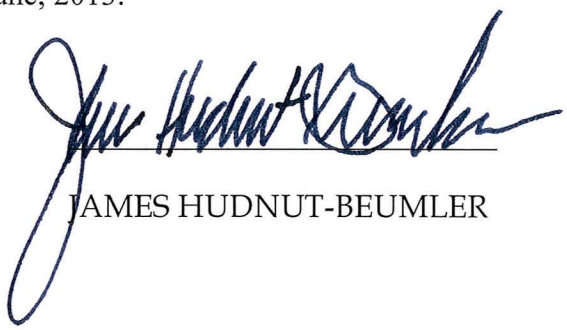
130. The parsonage exemption in § 107(1) allows a religious group to keep its spiritual leader near its place of worship and accountable to its ministry, as religious groups have done from time immemorial.

131. The extension of a cash allowance alternative, in § 107(2), for groups that could not provide such housing beginning in the 1950s eliminated discrimination between the older, more established and mainstream

religions in the United States and newer, less popular, minority faith groups and ministers in American society who could not use the parsonage exclusion but still had the same spiritual needs as the older religions.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Nashville, Tennessee on the 18th day of June, 2013.



JAMES HUDNUT-BEUMLER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

FREEDOM FROM RELIGION FOUNDATION, INC.; ANNIE LAURIE GAYLOR, and DAN BARKER

Plaintiffs,

v. Case No. 11 CV 0626

UNITED STATES OF AMERICA; TIMOTHY GEITHNER, in his official capacity; and DOUGLAS SHULMAN, in his official capacity,

Defendants.

PLAINTIFFS' RESPONSE TO UNITED STATES' STATEMENT OF PROPOSED FINDINGS OF FACT

The Plaintiffs respond to the Defendant's Proposed Finding of Fact in support of its motion for summary judgment as follows:

I. PLAINTIFFS

1. Plaintiff Freedom From Religion Foundation ("FFRF") is a non-profit, atheist membership organization that advocates for the separation of church and state and educates on matters of non-theism. (Doc. 13, Am. Compl., ¶ 7; Annie Laurie Gaylor Dep. 26:12-21, Apr. 23, 2013 (Doc. 37); FFRF 30(b)(6) Dep.143:9-17, 180:10-19, Apr. 24, 2013 (Doc. 39).)

RESPONSE: Dispute. FFRF is not an atheist membership organization, and the record cited by Defendant does not say otherwise. (See also Barker Dec., ¶19.)

33. According to Mr. Barker, the designations of the housing allowances were "on paper only." (Barker Dep. 68:3-9.) Mr. Barker and Ms. Gaylor would have received the amounts anyway as part of their base salaries. (*Id.* 101:2-102:2 (referring to Ex. 3 Interrog. No. 3(i)); Gaylor Dep. 72:5- 73:12 (same); FFRF 30(b)(6) Dep., 168:12-17.)

RESPONSE: Dispute that record cite accurately and fully states testimony because housing allowances must be designated by employer and do not have to involve raise in salary.

34. Neither Mr. Barker nor Ms. Gaylor contend that FFRF owns a dwelling that they seek to use as their lodging, the fair rental value of which they would seek to exempt from their gross income for federal income tax purposes.

RESPONSE: No dispute.

35. Neither Mr. Barker nor Ms. Gaylor has had communication with the IRS regarding their housing allowances. (Ex. 3 Interrog. No. 6; *see also Id.* Interrog. No. 5.)

RESPONSE: No dispute.

36. Mr. Barker and Ms. Gaylor's tax returns for the years 2011 through 2013 have not been audited by the IRS. (FFRF 30(b)(6) Dep. 74:4-6.)

RESPONSE: No dispute.

37. FFRF has had no communication with the IRS regarding Mr. Barker's or Ms. Gaylor's housing allowances. (*Id.* 172:8-15; Ex. 5 Interrog. No. 7.)

RESPONSE: No dispute.

III. THE HISTORICAL CONTEXT FOR § 107

A. Parsonages Before the Income Tax in the United States

38. "The patterns of housing members of the clergy in America have deep histories in

the churches of Western Europe. The most important and common feature of religious organizations' approach to housing members of the clergy is the basic assumption that the clergy would live in housing on the premises of the church grounds or nearby on ecclesiastically-owned property." (Decl. of James Hudnut-Buemlerl ¶ 19.)

RESPONSE: No dispute

39. "The historical record shows that underlying this assumption were four religiously motivated reasons for congregations to provide housing for their spiritual leaders." (*Id.* ¶ 20.)

RESPONSE: Dispute that the opinion is supported by the referenced source.

40. Doing so enabled them to more freely exercise their religious beliefs than if they did not provide housing. Those reasons are:

a. First, the ecclesiastical employer required priests and ministers to live nearby to the location of their work at all hours of the day and night, particularly at the unpredictable moments when parishioners may be in extremis and in need of immediate pastoral care.

b. Second, by controlling the living arrangements of clergy, the church can reinforce the faith's expectations for simple living, or holiness among the clergy; that is, members of the clergy should thereby live no better and no worse than their church authorities have arranged for them to live.

c. Third, by having the church own the living premises instead of the minister owning his housing, the clergy were freed from temporal burdens (like home repair, yard work, and the like) to engage in spiritual work.

d. Fourth, by owning housing for their clergy, congregations, dioceses and other church entities were freed from the difficulties associated with resettling clergy

when the time came for personnel redeployment."

(*Id.* ¶ 21.)

RESPONSE: Dispute that the opinion is supported by the referenced source.

41. The overwhelming majority of American colonists were from Christian denominations.

(*Id.* ¶ 24.)

RESPONSE: No dispute.

42. Those colonists brought with them the standard ecclesiastic housing practice at that time,for the four reasons mentioned above: "a clergyman assigned to a parish had a yearly income fixed and additionally lived in a parish-owned rectory for the course of his ministry in that particular place." (*Id.* ¶ 23; *see also Id.* ¶ 24-26.)

RESPONSE: Dispute that the opinion is supported by the source as to the "four reasons mentioned."

43. A parsonage was "used for more than simply housing the minister." (*Id.* ¶ 27.)

RESPONSE: No dispute.

44. Often, church business was conducted in the parsonage. (*Id.* ¶¶ 27-29, 80.)

RESPONSE: No dispute.

45. "The parsonage system was in very wide use in the nineteenth and early twentieth centuries." (*Id.* ¶ 30.)

RESPONSE: No dispute.

46. "For the Roman Catholic Church and Methodist Episcopal churches (north and south) the practice of providing rectories and parsonages, respectively, was virtually universal and hardwired into their deployment models for clergy. Both religions established parsonages at

or very near their houses of worship." (*Id.* ¶¶ 31, 38.)

RESPONSE: No dispute.

47. "In both religions, the bishop of a diocese or conference could, and did, send ministers to different parishes according to the religious needs of the Church as a whole. Providing housing on-site to the ministers enabled them to move freely according to their denomination's religious needs without having to extricate themselves from a private tenancy or a home that they owned only to have to find new accommodations where they were called." (*Id.* ¶ 32; *see Id.* ¶¶ 33-35, 38.)

RESPONSE: No dispute.

48. "The logic and religious importance of housing ministers at or near their congregations was even clear to churches like the African Methodist Episcopal Church (AME), which for various reasons struggled to house its pastors and maintain vital ministries." (*Id.* ¶ 36.)

RESPONSE: Dispute that "providing for their ministries on the same basis as their white counterpart" constitutes evidence of religious importance.

49. "An article in the African-American Christian Recorder in 1867 celebrated the achievement of an AME church in Zanesville, Ohio, that led the way in showing that AME congregations could provide for their ministries on the same basis as their white counterpart denomination. Without parsonages it was harder to expect itinerating ministers in the AME, the author believed, to attend to the needs of the congregations with their whole beings." (*Id.* ¶ 37.)

RESPONSE: No dispute.

50. "[T]wo of the largest American churches overseen by bishops entered the 20th century determined to use clergy housing principally as a tool for pastorally effective, spiritually focused, and ecclesially accountable ministry. And, using the Zanesville AME church example,

other less established and less populous churches struggled to do the same." (*Id.* ¶ 39.)

RESPONSE: No dispute.

51. The 1906 Census and the 1916 Census "support[] the idea that, in the absence of any rulings about the tax status of parsonages with respect to income to clergy, they were in wide usage by the largest, most well-organized faith groups of the day." (*Id.* ¶ 44; *see Id.* ¶¶ 40-43, 48-58.)

RESPONSE: No dispute.

52. The "successful congregations led by professionally ordained and set apart full-time clergy continued to be housed at the congregation's pleasure and expense." (*Id.* ¶ 59.)

RESPONSE: No dispute.

53. "However, the authors of the report on parsonages noted that 69 out of the 202 reporting denominations listed no parsonages." (*Id.* ¶ 46.)

RESPONSE: No dispute.

54. "The denominations for which there were no parsonages reported were generally very small, either having no regular ministry, or being faiths whose ministers were part-time and expected to engage in other principal full-time work." (*Id.* ¶ 47; *see also Id.* ¶ 48.)

RESPONSE: No dispute.

55. A 1919 analysis of the information provided for the entire United States from the Income Tax Returns for 1916 "noted that less than 1% of all people who self-reported as ministers reported an income above $3,000. The journal also noted that 'taking the [ministers'] profession as a whole two out of three men are paid less than $1,000 a year.'" (*Id.* Tif 60-61.)

RESPONSE: No dispute.

56. "These low prevailing wages would have created another set of problems for

ministers in the early twentieth century had they been required to find housing of their own - the lack of a modern real estate industry and mortgage financing suitable to most minister's needs and capabilities." (*Id.* ¶ 62.)

RESPONSE: No dispute.

57. "Throughout the early 1900s, 'mortgages featured variable interest rates, high down payments, and short maturities....[B]efore the Great Depression, homeowners typically renegotiated their loans every year.' (*Id.* ¶ 63.)

RESPONSE: No dispute.

58. "These facts indicate, that $5,000-$6,000 and more homes were out of reach to clergy earning an average of $1,500 per year . . . . This would be especially true if clergy had to re-sell the home after short tenures of less than five years in particular churches because of an ecclesiastical imperative to move to where they were needed. ." (*Id.* ¶ 64.)

RESPONSE: No dispute.

59. "[T]he parsonage system provided a critical means for churches to ensure that the spiritual needs of their congregations were met by providing for their clerics' needs for a place to live so that they could be immediately available to the congregation and to live in a much larger home to accommodate the church business conducted there." (*Id.* ¶ 65.)

RESPONSE: No dispute.

B. Parsonages and the United States Income Tax

60. "Though the Income Tax as we know it had to be delayed in its implementation from 1909 until the passage of the 16th amendment in 1913, the introduction of the tax posed all kinds of new questions to long-standing social practices: did sailors have to pay income tax for their room and board while they did their jobs envoyage? Did ranch hands have to pay income

tax on their bunks and beans? Did soldiers have to pay income tax for the value of their base housing, and did officers' wives have to pay income tax on the value of rent while they waited stateside to see if their men returned from the Philippines and war with Filipino insurgents?" (*Id.* ¶ 15.)

RESPONSE: Dispute that the opinion is supported by the source and otherwise constitutes speculation.

61. "To these novel concerns were added the question and what of the clergy? They lived next door to their churches in houses and rectories. Did they need to pay a tax on the value of the housing or was it a part of the job—an offer said members of the cloth 'could not refuse?' (*Id.* ¶ 17.)

RESPONSE: Dispute that the opinion is supported by the source and otherwise constitutes speculation.

62. In the "Revenue Act of 1921," Congress exempted from federal income taxation "the rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of his compensation" in § 213(b)(11) of the Revenue Act of 1921. (*Id.* ¶ 66.)

RESPONSE: No dispute.

63. There is no explicit explanation in the legislative history for the legislative intent behind § 213(b)(11) of the Revenue Act of 1921. (*Id.* TT 74-75, 81.)

RESPONSE: No dispute.

64. It is likely, however, that Congress, in enacting § 213(b)(11) of the Revenue Act of 1921, was aware of the foregoing historical context for the way in which religious employers used parsonages for their employees and would have thought it "odd to tax a minister on the rental value of a parsonage in which he was obliged by his employer, the church, to live and

work.. (*Id.* ¶ 71; *see Id.* TT 66-71, 75-81.)

RESPONSE: Dispute that the opinion is supported by the source and otherwise constitutes speculation.

65. In part, this is because the "Bureau of Internal Revenue had earlier established what is commonly called the 'for the convenience of the employer doctrine' starting with an office ruling, O.D. 265, 1 C B 71 (1919)." (*Id.* ¶ 72.) "It held that the shipboard food and board given to seamen in addition to their wages did not count as income for tax purposes. (*Id.*)

RESPONSE: Dispute that the proposed finding supports finding No. 64.

66. "But a 1921 decision by the same office, O.D. 862, 4 C B 85 (1921) held that 'When in addition to the salary paid a clergyman he is permitted to use the parsonage living quarters free of charge the fair rental value of the parsonage considered a part of his compensation for services rendered and as such should be reported as income.' (*Id.* ¶¶ 73, 80.)

RESPONSE: No dispute that the referenced decision was rendered but without consideration of or claim made under convenience of the employer doctrine.

C. The Introduction of Parsonage Housing Allowances and Their Exemption from Federal Income Tax

67. "The parsonage income tax exclusion worked well for clergy of established, mainstream, and populous churches who could afford to purchase (or already owned) a manse or parsonage for their clergy." (*Id.* ¶ 82.)

RESPONSE: Object as ambiguous as to what "worked well" means.

68. "But there were other churches, just as there had been throughout the history of the United States, with paid clergy who did not benefit from this exemption." (*Id.* ¶ 83.)

RESPONSE: No dispute.

69. "Yet the four religiously motivated reasons to provide housing to ministers were

just as true for these minority religions." (*Id.* ¶ 84.)

RESPONSE: Dispute. The opinion is not supported by the source.

70. "Thus, the first three decades of the parsonage exemption applied only to clergy of more established churches with fulltime clergy serving communities with enough accumulated capital to build or acquire a parsonage." (*Id.* ¶ 85-86.)

RESPONSE: No dispute.

71. "The parsonage exemption, therefore, was available to some kinds of congregations rather than others, a situation that would only intensify in succeeding decades as religious diversity, and residential mobility increased." (*Id.* ¶ 87.)

RESPONSE: Dispute that the parsonage exemption distinguished by congregation. The opinion is not support by the source.

72. "In some instances churches lacking readily available parsonages provided their ministers with cash in lieu of a parsonage." (*Id.* ¶ 88.)

RESPONSE: No dispute.

73. As a result of court decisions in 1950 and 1954, "[s]uch ministers eventually were successful in claiming they were entitled to a tax-free housing allowance on the analogy of the one that that had been already established as available to military officers who lived off base under the convenience of the employer doctrine." (*Id.* ¶ 89-90.)

RESPONSE: No dispute.

74. "The four religiously motivated reasons to provide minister's housing remained relevant, but the way in which they were put into effect changed with the rapid post-war social change, especially in residential housing patterns, suburbanization, and domestic prosperity after WWII" (*Id.* ¶ 92), and a revival of religious interest (*Id.* ¶ 93).

RESPONSE: Dispute that opinion is supported by source as to relevance of religiously motivated reasons.

75. Considering all of these facts, "the 1954 Internal Revenue Code Sec 107(2) provision allowing clergy to accept income tax exempt cash housing allowances accommodated more institutions and clergy combinations." (*Id.* ¶ 94; *see also Id.* ¶ 91-92.)

RESPONSE: Dispute that § 107(2) accommodated clergy by removing any substantial governmental-imposed burden. The opinion is not supported by the record source.

76. "Importantly, instituting the parsonage allowance option eliminated discrimination between traditional, colonial era denominations' style of providing for their ministries and the part-time ministers and rabbis who were characteristic of smaller, newer, and less affluent religious groups such as Pentecostals, evangelical churches, and independent African-American congregations." (*Id.* ¶ 95.)

RESPONSE: Dispute that the distinction between in-kind housing and cash allowances represented denominational preference. The opinion of discrimination is not supported.

77. "After the close of WWII in 1945, the existing pent-up demand for housing, which having gone unmet while wartime production had gone into military manufacturing, combined with a baby boom to drive a sustained 20-year process of residential suburban housing starts." (*Id.* ¶ 96.)

RESPONSE: No dispute.

78. "Accompanying all these new suburbanites were tens of thousands of new churches from mainline Protestant groups, the Roman Catholic Church, and from the

Conservative and Reformed branches of Judaism, all of which were often approached by developers to locate new congregations and even given land on the condition that they build houses of worship." (*Id.* 97.)

RESPONSE: No dispute.

79. "One example of this is Protestant suburban church 'planting.' Often, a denomination sent the minister into a community first to live and gather a church congregation which might meet in a school for a time before building a house of worship. In this instance, there was no `parsonage' to live in because a congregation would have been too new to purchase a home for its minister." (*Id.* ¶ 98.)

RESPONSE: No dispute.

80. "Except for the Catholic parishes, very few of the new suburban churches included a parsonage or rectory on the premises (even once a house of worship was built)." (*Id.* ¶ 99.)

RESPONSE: No dispute.

81. "Instead, it made sense, in light of the four religiously motivated reasons to provide housing for a minister, for suburban congregations to house their clergy in the community along with the rest of the community's residents because their clergy could still be maximally available to parishioners." (*Id.* ¶ 100.)

RESPONSE: Dispute that the opinion as to "religiously motivated reasons" is supported by the source.

82. "Sometimes the congregation would own the home. Less frequently, they would enable the minister through a cash allowance to rent or purchase the home; particularly as clergy became older and nearer retirement." (*Id.* ¶ 101.)

RESPONSE: No dispute.

83. "Another feature of the housing boom was easier access to mortgages with far friendlier terms for consumers." (*Id.* ¶ 103.)

RESPONSE: No dispute.

84. "Thus, although ministers' salaries had declined relative to general wages since the 1890s and their relative standard of living decreased accordingly, it was easier for them to get a mortgage for a home of their own and easier to sell quickly if called to a new congregation." (*Id.* 104.)

RESPONSE: No dispute.

85. "In addition to suburbanization, the historical record shows that a major social change pushing an increasing number of clergy towards the acceptance of a cash allowance to purchase their own homes in place of living in a manse or parsonage was the changing view of retirement in American society." (*Id.* ¶ 105.)

RESPONSE: No dispute.

86. "Clergy, like other Americans of the middle 20th century, were now beginning to think more and more about retirement as a phase of life for which provisions needed to be made, rather than dying on the job." (*Id.* ¶ 109; *see id.* ¶¶ 106-08.)

RESPONSE: No dispute.

87. "And religious institutions, which once had homes for superannuated and dying ministers, began to fund pensions that coordinated with Social Security and assumed that ministers would eventually retire, living out some golden years happily like anyone else." (*Id.* ¶ 110.)

RESPONSE: No dispute.

88. "This then raised the question of where were these ministers to live, and clergy began to be more interested in building equity towards having a home they would own in retirement; and, as eventual retirement became a temporal need of clergy, religious bodies began to adapt so as to keep their clergy focused on the spiritual aspects of their work." (*Id.* ¶ 111.)

RESPONSE: No dispute.

D. The Role of Housing in the Contemporary Practice of Ministry

89. "The four religious motivations for providing housing for a minister have remained relevant, whether a congregation opts to provide a parsonage for its spiritual leader or a housing allowance." (*Id.* ¶ 112.)

RESPONSE: Dispute that "religious motivations" were or remained relevant. The opinion is not supported by the source.

90. "The changing demographics and social trends of the United States since World War II have impacted that choice, but the religious motivations have not changed." (*Id.* ¶ 113.)

RESPONSE: Dispute the conclusion that "religious motivations have not changed." The opinion is not supported by the source.

91. "In surveying the contemporary scene, it is my opinion that the paramount consideration in utilizing church-owned housing, or providing an allowance, is still the congregations' need to house clergy in such a way so that the minister can live with his or her people. It is of the essence of the office of minister, priest, or rabbi, that one be near one's congregation." (*Id.* ¶ 114.)

RESPONSE: Dispute that the opinion is supported by the source.

92. "In a rural area this may favor a church owning a parsonage because the availability and marketability of homes near a congregation's place of worship is poor." (*Id.* ¶

APPEAL,CLOSED

U.S. District Court
Western District of Wisconsin (Madison)
CIVIL DOCKET FOR CASE #: 3:11−cv−00626−bbc

Freedom From Religion Foundation, Inc. et al v. Geithner, Timothy et al
Assigned to: District Judge Barbara B. Crabb
Referred to: Magistrate Judge Stephen L. Crocker
Case in other court: Seventh Circuit, 14−01152
Cause: 28:1331 Federal Question: Other Civil Rights

Date Filed: 09/12/2011
Date Terminated: 11/26/2013
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff

Freedom From Religion Foundation, Inc.

represented by **Richard L. Bolton**
Boardman &Clark LLP
1 South Pinckney Street, 4th Floor
P.O. Box 927
Madison, WI 53701−0927
608−283−1789
Fax: 608−283−1709
Email: rbolton@boardmanclark.com
ATTORNEY TO BE NOTICED

Plaintiff

Annie Laurie Gaylor

represented by **Richard L. Bolton**
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

Anne Nicol Gaylor
TERMINATED: 06/18/2013

represented by **Richard L. Bolton**
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

Dan Barker

represented by **Richard L. Bolton**
(See above for address)
ATTORNEY TO BE NOTICED

V.

Defendant

Timothy Geithner
Secretary of the United States Department of the Treasury
TERMINATED: 11/07/2011

represented by **Erin Healy Gallagher**
U.S. Department of Justice, Tax Division
P.O. Box 7238
Ben Franklin Station
Washington, DC 20044
202−353−2452
Fax: 202−514−6770
Email: erin.healygallagher@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Richard Adam Schwartz
United States Department of Justice, Tax Division
P.O. Box 7238
Washington, DC 20044
202−307−6322
Email: richard.a.schwartz@usdoj.gov
ATTORNEY TO BE NOTICED

Defendant

Douglas Shulman
Commissioner of the Internal Revenue Service
TERMINATED: 11/07/2011

represented by **Erin Healy Gallagher**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Richard Adam Schwartz
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

United States of America

represented by **Erin Healy Gallagher**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Leslie K. Herje
U.S. Attorney's Office
P.O. Box 1585
Madison, WI 53701−1585
608−264−5158
Fax: 608−264−5724
Email: leslie.herje@usdoj.gov
ATTORNEY TO BE NOTICED

Richard Adam Schwartz
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Timothy Geithner
in his official capacity as Secretary of the Department of the Treasury

represented by **Erin Healy Gallagher**
United States Department of Justice, Tax Division
P.O. Box 7238
Washington, DC 20044
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Leslie K. Herje
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Richard Adam Schwartz
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Douglas Shulman
in his official capacity as the Commissioner of the Internal Revenue Service

represented by **Erin Healy Gallagher**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Leslie K. Herje
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Richard Adam Schwartz
(See above for address)
LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
09/13/2011	1	COMPLAINT against Timothy Geithner, Douglas Shulman. (Filing fee $ 350 receipt number 0758−836319.), filed by Freedom From Religion Foundation, Inc., Annie Laurie Gaylor, Dan Barker, Anne Nicol Gaylor. (Attachments: # 1 JS−44 Civil Cover Sheet, # 2 Summons) (Bolton, Richard) (Entered: 09/13/2011)
09/14/2011		Case randomly assigned to Magistrate Judge Stephen L. Crocker. (krj) (Entered: 09/14/2011)
09/14/2011		Standard attachments for Magistrate Judge Stephen L. Crocker required to be served on all parties with summons or waiver of service: Briefing Guidelines, Corporate Disclosure Statement, Order Regarding Assignment of Civil Cases, Notice of Assignment to a Magistrate Judge and Consent/Request for Reassignment, Order on Dispositive Motions. (krj) (Entered: 09/14/2011)
09/14/2011	2	Summons Issued as to Timothy Geithner, Douglas Shulman. (krj) (Entered: 09/14/2011)
09/19/2011	3	Corporate Disclosure Statement by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor (Bolton, Richard) (Entered: 09/19/2011)
11/07/2011	4	Joint Motion to Substitute Party by Defendants Timothy Geithner, Douglas Shulman. Response due 11/14/2011. (Attachments: # 1 Text of Proposed Order) (Healy Gallagher, Erin) (Entered: 11/07/2011)
11/07/2011	5	Unopposed Motion for Extension of Time to File Answer re 1 Complaint, by Defendants Timothy Geithner, Douglas Shulman. Response due 11/14/2011. (Attachments: # 1 Text of Proposed Order) (Healy Gallagher, Erin) (Entered: 11/07/2011)
11/07/2011	6	** TEXT ONLY ORDER ** ORDER granting 4 Motion to Substitute Party. United States of America added. Timothy Geithner and Douglas Shulman terminated. Signed by Magistrate Judge Stephen L. Crocker on 11/7/11. (krj) (Entered: 11/07/2011)
11/07/2011	7	** TEXT ONLY ORDER ** ORDER granting 5 Motion for Extension of Time to Answer. United States of America answer due 12/23/2011. Signed by Magistrate Judge Stephen L. Crocker on 11/7/11. (krj) (Entered: 11/07/2011)
11/07/2011		Set Telephone Pretrial or Status Conference: Telephone Pretrial Conference set for 11/29/2011 at 02:00 PM before Magistrate Judge Stephen L. Crocker. Counsel for Plaintiff responsible for setting up the call to chambers at (608) 264−5153. [Standing Order Governing Preliminary Pretrial Conference attached] (krj) (Entered: 11/07/2011)
11/08/2011		Case randomly reassigned to District Judge Barbara B. Crabb and Magistrate Judge Stephen L. Crocker. (lak) (Entered: 11/08/2011)
11/22/2011	8	Notice of Appearance filed by Richard Adam Schwartz for Defendant United States of America (Schwartz, Richard) (Entered: 11/22/2011)
11/23/2011	9	Preliminary Pretrial Conference Report by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor, Defendant United States of America (Bolton, Richard) (Entered: 11/23/2011)
11/29/2011		Minute Entry for proceedings held before Magistrate Judge Stephen L. Crocker: Telephone Preliminary Pretrial Conference held on 11/29/2011 [:10] (cak) (Entered: 11/29/2011)
12/01/2011	10	Pretrial Conference Order − Amendments to Pleadings due 2/3/2012. Dispositive Motions due 9/7/2012. Settlement Letters due 12/21/2012. Court Trial set for 2/4/2013 at 09:00 AM. Signed by Magistrate Judge Stephen L. Crocker on

		11/30/11. (krj) (Entered: 12/01/2011)
12/23/2011	11	**MOTION TO DISMISS** by Defendant United States of America. Brief in Opposition due 1/13/2012. Brief in Reply due 1/23/2012. (Healy Gallagher, Erin) (Entered: 12/23/2011)
12/23/2011	12	Brief in Support of 11 Motion to Dismiss by Defendant United States of America (Healy Gallagher, Erin) (Entered: 12/23/2011)
01/13/2012	13	AMENDED COMPLAINT against United States of America, filed by Freedom From Religion Foundation, Inc., Annie Laurie Gaylor, Dan Barker, Anne Nicol Gaylor. (Bolton, Richard) (Entered: 01/13/2012)
01/18/2012	14	Motion for Extension of Time *to Answer or Otherwise Respond to the Amended Complaint* by Defendant United States of America. Motions referred to Magistrate Judge Stephen L. Crocker. Response due 1/25/2012. (Attachments: # 1 Text of Proposed Order) (Healy Gallagher, Erin) (Entered: 01/18/2012)
01/20/2012	15	** TEXT ONLY ORDER ** ORDER granting 14 Motion for Extension of Time. Response to amended complaint due 2/24/12. Signed by Magistrate Judge Stephen L. Crocker on 1/19/12. (krj) (Entered: 01/20/2012)
02/24/2012	16	**MOTION TO DISMISS *Amended Complaint*** by Defendant United States of America. Brief in Opposition due 3/16/2012. Brief in Reply due 3/26/2012. (Healy Gallagher, Erin) (Entered: 02/24/2012)
02/24/2012	17	Brief in Support of 16 Motion to Dismiss *Amended Complaint* by Defendant United States of America (Healy Gallagher, Erin) (Entered: 02/24/2012)
03/23/2012	18	Unopposed Motion for Extension of Time *for Leave to File Response Brief* by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor. Motions referred to Magistrate Judge Stephen L. Crocker. (Bolton, Richard) (Entered: 03/23/2012)
03/23/2012	19	** TEXT ONLY ORDER ** ORDER granting 18 Motion for Extension of Time. Brief in Opposition due 3/29/2012. Brief in Reply due 4/9/2012. Signed by Magistrate Judge Stephen L. Crocker on 3/23/12. (krj) (Entered: 03/23/2012)
03/29/2012	20	Brief in Opposition by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor re: 16 Motion to Dismiss filed by United States of America (Bolton, Richard) (Entered: 03/29/2012)
04/04/2012	21	Unopposed Motion for Extension of Time *to Reply in Further Support of its Motion to Dismiss Plaintiffs' Amended Complaint* by Defendant United States of America. Motions referred to Magistrate Judge Stephen L. Crocker. (Healy Gallagher, Erin) (Entered: 04/04/2012)
04/05/2012	22	** TEXT ONLY ORDER ** ORDER granting 21 Motion for Extension of Time. Brief in Reply due 4/20/2012. Signed by Magistrate Judge Stephen L. Crocker on 4/4/2012. (lak) (Entered: 04/05/2012)
04/20/2012	23	Brief in Reply by Defendant United States of America in Support of 16 Motion to Dismiss *Amended Complaint* (Healy Gallagher, Erin) (Entered: 04/20/2012)
06/28/2012	24	ORDER that plaintiffs have until 7/16/12 to show cause why case should not be dismissed on ground that 5 U.S.C. 702 does not waive defendant's sovereign immunity; defendant response due 7/23/12. Signed by District Judge Barbara B. Crabb on 6/28/12. (krj) (Entered: 06/28/2012)
07/16/2012	25	Declaration of Richard L. Bolton filed by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor re: 24 Order, (Attachments: # 1 Exhibit A − IRS Website Material) (Bolton, Richard) Modified exhibit on 7/17/2012 (mmo). (Entered: 07/16/2012)

07/16/2012	26	Motion to Amend and Response to 24 Order by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor. (Bolton, Richard) Modified event text on 7/17/2012 (mmo). (Entered: 07/16/2012)
07/18/2012		Set/Reset Briefing Deadlines as to 26 Motion to Amend and response to 24 order. Response due 7/23/2012. (krj) (Entered: 07/18/2012)
07/23/2012	27	Response to Order to Show Cause by Defendant United States of America (Healy Gallagher, Erin) (Entered: 07/23/2012)
08/03/2012	28	Unopposed Motion to Stay *Deadlines Pending Decision on Motion to Dismiss* by Defendant United States of America. (Schwartz, Richard) Modified on 8/6/2012 (krj). (Entered: 08/03/2012)
08/06/2012	29	** TEXT ONLY ORDER ** The parties' agreed motion to stay deadlines pending a decision on the motion to dismiss 28 is granted. If further scheduling is needed after the court decides the motion, then the court will convene a telephonic scheduling conference. Signed by Magistrate Judge Stephen L. Crocker on 8/6/12. (krj) (Entered: 08/06/2012)
08/29/2012	30	ORDER granting 26 Motion to Amend Caption of complaint; denying 16 Motion to Dismiss. Signed by District Judge Barbara B. Crabb on 8/29/12. (krj) (Entered: 08/29/2012)
08/29/2012		Set/Reset Hearings: Telephone Scheduling Conference set for 9/20/2012 at 02:30 PM before Magistrate Judge Stephen L. Crocker. Counsel for Plaintiff responsible for setting up the call to chambers at (608) 264−5153. (krj) (Entered: 08/29/2012)
09/10/2012	31	Unopposed Motion for Extension of Time to File Answer re 30 Order on Motion to Amend/Correct, Order on Motion to Dismiss, 13 Amended Complaint by Defendants Timothy Geithner, Timothy Geithner, Douglas Shulman, Douglas Shulman, United States of America. Motions referred to Magistrate Judge Stephen L. Crocker. (Attachments: # 1 Text of Proposed Order) (Schwartz, Richard) (Entered: 09/10/2012)
09/11/2012	32	** TEXT ONLY ORDER ** ORDER granting 31 Motion for Extension of Time to Answer. Answer due 9/21/2012. Signed by Magistrate Judge Stephen L. Crocker on 9/11/12. (krj) (Entered: 09/11/2012)
09/20/2012		Minute Entry for proceedings held before Magistrate Judge Stephen L. Crocker: Telephone Scheduling Conference held on 9/20/2012 [:10] (cak) (Entered: 09/20/2012)
09/21/2012	33	AMENDED Scheduling Order: Dispositive Motions due 6/28/2013. Settlement Letters due 11/22/2013. Court Trial set for 1/6/2014 at 09:00 AM. Signed by Magistrate Judge Stephen L. Crocker on 9/20/12. (krj) (Entered: 09/21/2012)
09/21/2012	34	ANSWER to Amended Complaint by Defendants Timothy Geithner, Douglas Shulman, United States of America. (Schwartz, Richard) Modified docket text on 9/21/2012 (mmo). (Entered: 09/21/2012)
06/17/2013	35	Disregard − refiled as entry 36 ; Modified on 6/17/2013; wrong caption/case number on document. (mmo). (Entered: 06/17/2013)
06/17/2013	36	STIPULATION of Dismissal *[of Plaintiff Anne Nicol Gaylor − Corrected]* by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor, Defendants Timothy Geithner, Timothy Geithner, Douglas Shulman, Douglas Shulman, United States of America. (Bolton, Richard) (Entered: 06/17/2013)
06/18/2013		Party Anne Nicol Gaylor terminated pursuant to Fed. R. Civ. P. 41(a)(1) without further order of the court. (krj) (Entered: 06/18/2013)
06/28/2013	37	Deposition of Annie Laurie Gaylor taken on Apr. 23, 2013 (Healy Gallagher, Erin) (Entered: 06/28/2013)
06/28/2013	38	Deposition of Dan Barker taken on Apr. 23, 2013 (Healy Gallagher, Erin) (Entered: 06/28/2013)

06/28/2013	39	Deposition of Freedom From Religion Foundation, Inc. (30(b)(6)) taken on Apr. 24, 2013 (Healy Gallagher, Erin) (Entered: 06/28/2013)
06/28/2013	40	**MOTION FOR SUMMARY JUDGMENT** by Defendants Timothy Geithner, Douglas Shulman, United States of America. Brief in Opposition due 7/19/2013. Brief in Reply due 7/29/2013. (Healy Gallagher, Erin) (Entered: 06/28/2013)
06/28/2013	41	Proposed Findings of Fact filed by Defendants Timothy Geithner, Douglas Shulman, United States of America re: 40 Motion for Summary Judgment (Healy Gallagher, Erin) (Entered: 06/28/2013)
06/28/2013	42	Declaration of Barbara Cantrell filed by Defendants Timothy Geithner, Douglas Shulman, United States of America re: 40 Motion for Summary Judgment (Attachments: # 1 Exhibit 3 − Plaintiffs Annie Laurie Gaylor and Dan Barker's Answers to Defendant United States of America's First Set of Written Interrogatories, # 2 Exhibit 5 − Plaintiff Freedom From Religion Foundation Inc.'s Answers to Defendant United States of America's First Set of Written Interrogatories, # 3 Exhibit 30 − Publication 1828: Tax Guide for Churches and Religious Organizations: Benefits and Responsibilities Under the Federal Tax Law, # 4 Exhibit 31 − Ministers Audit Techniques Guide, # 5 Exhibit 32 − Publication 517: Social Security and Other Information for Members of the Clergy and Religious Workers, # 6 Exhibit 33 − Form 4361: Application for Exemption From Self−Employment Tax for Use by Ministers, Members of Religious Orders and Christian Science Practitioners, # 7 Exhibit 34 − I.R.M. § 4.19.6: Examining Process/Liability Determination/SSA Correspondence, Minister Waivers, and Application for Exemption from Social Security, # 8 Exhibit 36 − I.R.M. § 1.11.6, Using and Researching the Internal Revenue Manual (IRM, # 9 Exhibit 37 − I.R.M. § 4.76.7: Examining Process/Exempt Organizations Examination Guidelines/Church Tax Inquiries and Examinations − IRC § 7611, # 10 Exhibit 38 − I.R.M. § 7.25.3: Rulings and Agreements/Exempt Organizations Determinations Manual/Religious, Charitable, Educational, Etc. Organizations, # 11 Exhibit 40 − I.R.M. § 4.76.6: Examining Process/Exempt Organizations Examination Guidelines/Religious Organizations, # 12 Exhibit 41 − Solstice Tribute, # 13 Exhibit 42 − Losing Faith In Faith: From Preacher To Atheist, # 14 Exhibit 43 − Faith−free Clergy Struggle to Escape Pulpit, # 15 Exhibit 44 − DeBaptismal Certificate, # 16 Exhibit 45 − Just Pretend: A Freethought Book for Children, # 17 Exhibit 46 − Friendly Neighborhood Atheist 2 CD Album, # 18 Exhibit 47 − Beware of Dogma CD, # 19 Exhibit 48 − Adrift on a Star: Irreverent Songs by Dan Barker, # 20 Exhibit 49 − Dan Barker's Ordination Certificate, # 21 Exhibit 50 − In Defense of "Godlessness", # 22 Exhibit 51 − Secular Memorials and Funerals Without God, # 23 Exhibit 52 − "Let's Dispense with Christian Funerals") (Healy Gallagher, Erin) (Entered: 06/28/2013)
06/28/2013	43	Declaration of Dean James Hudnut−Beumler filed by Defendants Timothy Geithner, Douglas Shulman, United States of America re: 40 Motion for Summary Judgment (Attachments: # 1 Exhibit A − CV, # 2 Exhibit B − Publications, # 3 C − Bibliography) (Healy Gallagher, Erin) (Entered: 06/28/2013)
06/28/2013	44	Brief in Support of 40 Motion for Summary Judgment by Defendants Timothy Geithner, Douglas Shulman, United States of America (Healy Gallagher, Erin) (Entered: 06/28/2013)
07/17/2013	45	Unopposed Motion for Extension of Time *for Plaintiffs To Respond To Defendants' Motion For Summary Judgment* by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor. Motions referred to Magistrate Judge Stephen L. Crocker. (Bolton, Richard)

		(Entered: 07/17/2013)
07/18/2013	46	** TEXT ONLY ORDER ** ORDER granting 45 Motion for Extension of Time. Brief in Opposition due 7/26/2013. Brief in Reply due 8/12/2013. Signed by Magistrate Judge Stephen L. Crocker on 7/17/13. (krj) (Entered: 07/18/2013)
07/26/2013	47	Declaration of Annie Laurie Gaylor filed by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor re: 40 Motion for Summary Judgment (Attachments: # 1 Exhibit 001, FFRF Bylaws, # 2 Exhibit 002, FFRF 2012 Year In Review, # 3 Exhibit 003, FFRF FAQ Page, # 4 Exhibit 004, FFRF Website Page, # 5 Exhibit 005, FFRF DeBaptismal Certificate) (Bolton, Richard) (Entered: 07/26/2013)
07/26/2013	48	Declaration of Dan Barker filed by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor re: 40 Motion for Summary Judgment (Attachments: # 1 Exhibit 001, FFRF Bylaws, # 2 Exhibit 002, FFRF Year In Review, # 3 Exhibit 003, FFRF FAQ Page, # 4 Exhibit 004, FFRF Website Page, # 5 Exhibit 005, DeBaptismal Certificate) (Bolton, Richard) (Entered: 07/26/2013)
07/26/2013	49	Response to Proposed Findings of Fact filed by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor re: 40 Motion for Summary Judgment (Bolton, Richard) (Entered: 07/26/2013)
07/26/2013	50	Proposed Findings of Fact by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Annie Laurie Gaylor (Bolton, Richard) (Entered: 07/26/2013)
07/26/2013	51	Affidavit of Richard L. Bolton filed by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor re: 40 Motion for Summary Judgment (Attachments: # 1 Exhibit 001, Erwin Chemerinsky Article, # 2 Exhibit 002, Texas Monthly Decision, # 3 Exhibit 003, Report Staff of Joint Committee, # 4 Exhibit 004, Crt. of Appeals 9th Cir. − Motion for Leave, # 5 Exhibit 005, Lloyd Mayer Article, # 6 Exhibit 006, Tax Court Decision, # 7 Exhibit 007, Eighth Circuit Decision, # 8 Exhibit 008, IRS Letter, # 9 Exhibit 009, Rep. Mark Comments) (Bolton, Richard) Modified exhibit description on 7/29/2013 (mmo). (Entered: 07/26/2013)
07/26/2013	52	Brief in Opposition by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor re: 40 Motion for Summary Judgment filed by Douglas Shulman, Timothy Geithner, United States of America (Bolton, Richard) (Entered: 07/26/2013)
08/12/2013	53	Brief in Reply by Defendants Timothy Geithner, Douglas Shulman, United States of America in Support of 40 Motion for Summary Judgment (Healy Gallagher, Erin) (Entered: 08/12/2013)
08/12/2013	54	Reply in Support of Proposed Findings of Fact filed by Defendants Timothy Geithner, Douglas Shulman, United States of America re: 40 Motion for Summary Judgment (Healy Gallagher, Erin) (Entered: 08/12/2013)
08/12/2013	55	Response to Proposed Findings of Fact filed by Defendants Timothy Geithner, Douglas Shulman, United States of America re: 40 Motion for Summary Judgment (Healy Gallagher, Erin) (Entered: 08/12/2013)
11/22/2013	56	ORDER granting in part and denying in part 40 Motion for Summary Judgment by defendants Timothy Geithner and Douglas Schulman, now succeeded by Jacob Lew and Daniel Werfel. The motion is GRANTED with respect to plaintiffs'

		challenge to 26 U.S.C. § 107(1); plaintiffs' complaint is dismissed as to that claim for lack of standing. The motion is DENIED as to plaintiffs' challenge to 26 U.S.C. § 107(2). On the court's own motion, summary judgment is GRANTED to plaintiffs as to that claim. It is DECLARED that 26 U.S.C. § 107(2) violates the establishment clause of the First Amendment and defendants are ENJOINED from enforcing § 107(2). The injunction shall take effect at the conclusion of any appeals filed by the defendants. Signed by District Judge Barbara B. Crabb on 11/21/2013. (arw) (Entered: 11/22/2013)
11/26/2013	57	JUDGMENT entered in favor of Defendants Jacob Lew and Daniel Werfel dismissing plaintiffs' claim challenging the constitutionality of 26 U.S.C. § 107(1); entered in favor of plaintiffs Annie Laurie Gaylor, Dan Barker and Freedom from Religion Foundation, Inc. on their claim challenging the constitutionality of 26 U.S.C. § 107(2). It is declared that 26 U.S.C. § 107(2) violates the establishment clause of the First Amendment. Defendants are enjoined from enforcing 26 U.S.C. § 107(2). The injunction shall take effect at the conclusion of any appeals filed by defendants or the expiration of defendants' appeal deadline. (BBC/LAK) (arw) (Entered: 11/26/2013)
01/24/2014	58	NOTICE OF APPEAL by Defendants Timothy Geithner, Timothy Geithner, Douglas Shulman, Douglas Shulman, United States of America as to 57 Judgment. Appeal filed by USA. Docketing Statement filed. (Attachments: # 1 Docketing Statement) (Healy Gallagher, Erin) (Entered: 01/24/2014)
01/24/2014	59	Appeal Information Packet. (krj) (Entered: 01/24/2014)
01/24/2014	60	Transmission of Notice of Appeal, Docketing Statement, Appeal Information Sheet, Docket Sheet and Judgment to Seventh Circuit Court of Appeals re 58 Notice of Appeal. (Attachments: # 1 appeal information sheet, # 2 docketing statement, # 3 judgment, # 4 docket sheet) (krj) (Entered: 01/24/2014)
01/24/2014		USCA Case Number 14−1152 for 58 Notice of Appeal, filed by Douglas Shulman, Timothy Geithner, United States of America. (krj) (Entered: 01/24/2014)
01/31/2014	61	Designation of Record on Appeal by Defendants Timothy Geithner, Timothy Geithner, Douglas Shulman, Douglas Shulman, United States of America re 58 Notice of Appeal, (Healy Gallagher, Erin) (Entered: 01/31/2014)
01/31/2014	62	Transcript Request Form by Defendants Timothy Geithner, Timothy Geithner, Douglas Shulman, Douglas Shulman, United States of America re 58 Notice of Appeal, (Healy Gallagher, Erin) (Entered: 01/31/2014)
02/03/2014	63	Court Reporter Certification of Seventh Circuit Transcript Information Sheet re 58 Notice of Appeal, (jat) (Entered: 02/03/2014)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing separately bound appendix for the Appellants with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system on April 2, 2014, and that 10 paper copies were sent to the Clerk by First Class Mail. Counsel for the appellees was served electronically by the Notice of Docket Activity transmitted by the CM/ECF system.

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

/s/ Judith A. Hagley
JUDITH A. HAGLEY
*Attorney for appellant*s