Nos. 18-1277 & 18-1280

IN THE

United States Court of Appeals

for the Seventh Circuit

ANNIE L. GAYLOR, ET AL.,
Plaintiffs-Appellees,

v.

STEVEN T. MNUCHIN, ET AL.,
Defendants-Appellants,

and

EDWARD PEECHER, ET AL.,
Intervenor-Defendants-Appellants.

On Appeal from the United States District Court for the Western District of Wisconsin, No. 3:16-cv-215, Judge Barbara B. Crabb

BRIEF FOR MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS AND INTERVENOR-DEFENDANT-APPELLANTS AND REVERSAL

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-1277 & 18-1280

Short Caption: ANNIE L. GAYLOR, ET AL. v. STEVEN T. MNUCHIN, ET AL. and EDWARD PEECHER, ET AL.

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The amici are 18 Members of Congress, each of whom is individually named in the Appendix on the final page of this brief.

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

Kelly J. Shackelford, Hiram S. Sasser III, Benjamin Bull, Kenneth A. Klukowski, Lea E. Patterson, First Liberty Institute, a 501(c)(3) nonprofit organization.

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Attorney's Signature: s/ Kelly J. Shackelford Date: 04/26/2018

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STATEMENT OF THE ISSUE

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

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are Members of Congress from the House of Representatives and Senate. The Constitution's Sixteenth Amendment grants Congress authority to tax incomes. That same Constitution's First Amendment codifies rights to the free exercise of religion and to be free from an established religion. Each Member represents churches, clergy, and people of faith who are impacted by how Congress taxes clergy, including the parsonage allowance. Members of Congress' oath of office obligates them to ensure that tax laws are fully consistent with the Supreme Law of the Land. *Amici* are listed in this brief's appendix.

SUMMARY OF ARGUMENT

The parsonage allowance Congress codified at 26 U.S.C. § 107(2) is fully consistent with the Constitution's Establishment Clause. While the housing provision should be sustained under any test, this court should uphold it under *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), which holds that government action intersecting religion violates the Establishment Clause if it was historically regarded as part

[1] All parties consented to the filing of this brief. No party or party counsel authored this brief in whole or part, and no person other than *amici* or their counsel contributed money for its preparation or submission.

of adopting an official religion, or otherwise coerces a person into a religious exercise.

Section 107(2) easily passes that test. Churches were historically regarded as exempt from taxation. Clergy residences are effectively an extension of the church building, as the necessary or optimal location from which ministers perform their duties. Exempting pastoral housing from taxation goes back to the adoption of the Tax Code in the early twentieth century. When Congress revisited the issue in 1954, 1984, and 2002, it continued the same policy. Members of Congress continue to hold that view today.

Moreover, courts afford wide latitude to Congress when it comes to the difficult task of crafting tax policy. Congress carefully balances competing priorities, which cannot be readily reduced to a judicial formula. Courts do not invasively second-guess Congress' exercising one of its core powers in that regard.

This case also implicates the Free Exercise Clause. The Supreme Court held in 2012 that both the Establishment Clause and the Free Exercise Clause require a ministerial exception to antidiscrimination laws. Pastors' homes are used for essential ministry activities, and thus

activities that are essential to exercising their faith. A pastor's home is functionally a part of the church building itself. The court should recognize the constitutional implications of exerting taxing power under such circumstances.

For these reasons, this court should reverse.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE PERMITS THE PARSONAGE ALLOWANCE UNDER *TOWN OF GREECE*.

For all the reasons set forth by the United States and Intervenors, the parsonage allowance of 26 U.S.C. § 107(2) passes muster under the three-pronged test from *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). But rather than apply the beleaguered *Lemon* test—or its "endorsement test" variation rooted in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989)—this court should uphold § 107(2) under the test from *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). At minimum, *Town of Greece* must inform this court's analysis, and sustains § 107(2)'s validity.

A. This court is not constrained from following *Town of Greece*.

1. Circuit precedent does not prevent this court from applying *Town of Greece* here. Denying review of a Seventh Circuit case after *Town of Greece* was decided, Justice Scalia and Justice Thomas explained, "*Town of Greece* abandoned the antiquated 'endorsement test,' which formed the basis of the decision below." *Elmbrook Sch.*

Dist. v. Doe, 134 S. Ct. 2283, 2284 (2014) (Scalia, J., dissenting from the denial of certiorari).

Subsequent to the Supreme Court's deciding *Town of Greece* and denying review in *Elmbrook*, a panel of this court observed in a footnote that there is a debate "about the continuing validity of the [*Lemon*/]endorsement test." *Freedom From Religion Found., Inc. v. Concord Cmty. Schs.*, __ F.3d ___, Nos. 17-1591 & 17-1683, 2018 U.S. App. LEXIS 7094, at *8 n.1 (7th Cir. Mar. 21, 2018). This court held that while some Justices contend *Town of Greece* repudiated *Lemon*, "*Town of Greece*, however, did not make this explicit." *Id.* Consequently, this court did "not feel free to jettison that test altogether." *Id.*

That footnote does not bind this court to follow *Lemon* in every Establishment Clause case. The law-of-the-circuit doctrine requires a panel of this court to follow circuit precedent unless supervening authority from the Supreme Court or this court sitting en banc dictates otherwise. *See Williams v. Chrans*, 50 F.3d 1356, 1358 (7th Cir. 1995). *Concord Community Schools* held only that this court was not ready to

"jettison [the *Lemon*] test altogether." It did not hold that *Lemon*'s previous reach continued unchanged.

2. The Supreme Court requires this court to follow *Lemon* only where a *Lemon* precedent is directly on point. "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *accord Agostini v. Felton*, 521 U.S. 203, 237 (1997) (specifically applying this rule in an Establishment Clause context).

The cases cited by the parties that apply a version of *Lemon*, such as *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), while relevant to this case, do not require this court to adhere to *Lemon* here. *Amos* dealt with antidiscrimination laws, and held that a religious exemption was required to avoid violating some denominations' religious tenets. *Id.* at 335. That is inapposite here.

Another is *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), dealing with a tax exemption for publishing. *Id.* at 5. While closer to the mark, there is still a vital difference. Publishing is an inherently commercial activity for for-profit organizations and informational activity for non-profit organizations. In contrast to a generally taxable activity, § 107(2) is income-disparity-reducing provision corresponding to 26 U.S.C. § 107(1), which protects housing that is church property outright. Protecting housing is analogous to protecting the church building, as many of a pastor's ministry duties are performed in the house. No Supreme Court case is directly on point.

3. But even if this court were to conclude that *Agostini* requires applying *Lemon* here, at minimum *Town of Greece* must inform the court's analysis. *Lemon*'s three problematic prongs, whether in their original form or through the subjective lens of *Allegheny*'s endorsement test, must still be shaped by examining history and inquiring into coercion, as explained in Part I.B.

B. The Establishment Clause prohibits only statutes that were historical religious establishments or that coerce nonbelievers into a religious exercise.

The Supreme Court in *Town of Greece* held that government action involving religion is unconstitutional (1) if it was historically regarded as an establishment of religion, *Town of Greece*, 134 S. Ct. at 1819–24, or (2), even if historically accepted, the practice coerces any person to participate in a religion or religious exercise, *id.* at 1824–28 (opinion of Kennedy, J.).[2] This test now governs the Establishment Clause for any case where there is not a Supreme Court case directly on point that dictates a different outcome in the lower courts.

1. *Town of Greece* holds that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Id.* at 1819 (majority opinion) (quoting *Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in part and dissenting in part)). The Establishment Clause is not violated "where history shows the specific practice is permitted." *Id.* Consequently, "the line [courts] must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding

[2] The controlling opinions in *Town of Greece* are the majority opinion and Justice Kennedy's plurality opinion. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

Fathers." *Id.* (alterations and internal quotation marks omitted). The Court upheld legislative prayer because it is "a benign acknowledgement of religion's role in society," *id.* at 1819, showcasing one example of this principle. Courts must rule permissible under the Establishment Clause "a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Id.*

"The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty." *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting). "In a typical case, attendance at the established church was mandatory, and taxes were levied to generate church revenue." *Town of Greece*, 134 S. Ct. at 1837 (Thomas, J., concurring in part and concurring in the judgment) (citing Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2144–46, 2152–59, 2161–68, 2176–80 (2003)).

The Framers wanted to prohibit compulsory religious exercises or extracting a compulsory tithe for a government-favored church. *See,*

e.g., 2 WRITINGS OF JAMES MADISON 183, 186 (G. Hunt ed. 1901);[3] *see also* Noah Feldman, *Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 351 (2002); Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 936–39 (1986). There is a constitutional difference between government expenditures versus tax exemptions when adjudicating Establishment Clause challenges. *E.g.*, *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 129–30, 140–42 (2011); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 11–13 (1989); *Walz v. Tax Comm'n*, 397 U.S. 664, 674–80 (1970).

2. Even if a government enactment concerning faith was not considered a religious establishment in 1791, *Town of Greece* also cautioned that the government action must not be coercive. "It is an elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.'" *Id.* at 1825 (opinion of Kennedy, J.) (quoting *Allegheny*, 492 U.S. at 659 (Kennedy, J.)). For example, when reviewing legislative prayer, courts conduct a "fact-sensitive" inquiry to determine whether the government "compelled its citizens to engage in a religious observance," an inquiry

[3] Madison was "the leading architect of the religion clauses of the First Amendment." *Flast v. Cohen*, 392 U.S. 83, 103 (1968).

that defines coercion "against the backdrop of historical practice," *id.*, and thus retains a historical examination as the centerpiece of the analysis. Justice Kennedy rejected the argument that feeling offended or excluded violates the Constitution. "Offense, however, does not equate to coercion." *Id.* at 1826. Indeed, "[a]dults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views." *Id.*

1. Exempting church-related housing from taxation is not a historical mark of establishing an official religion.

a. Examining the parsonage exemption through that historical inquiry, it is clear that exempting church housing from taxation was not a historical hallmark of a religious establishment. One scholar noted that "the granting of tax immunity to ecclesiastical. . . property is probably as old as the institution of taxation." Claude W. Stimson, *The Exemption of Property from Taxation in the United States*, 18 MINN. L. REV. 411, 418 (1934). Not taxing property owned by houses of worship began in ancient times in places such as the Roman Empire and Medieval Europe. CHESTER JAMES ANTIEAU ET AL., RELIGION UNDER THE

STATE CONSTITUTIONS 121–22 (1965). "Given the exemption's deep roots in the Western world and beyond, it is unsurprising that the practice was adopted without controversy by the American colonies." Justin Butterfield et al., *The Parsonage Exemption Deserves Broad Protection*, 16 TEX. REV. L. & POL. 251, 254 (2012) (footnote omitted).

Various other provisions of the Internal Revenue Code show Congress' longstanding and uniform belief that the federal government cannot tax churches in the same manner as other organizations. This is seen in numerous accommodations Congress afford churches, such as Congress' exempting churches from petitioning the IRS for 501(c)(3) tax-exempt status, 26 U.S.C. §§ 508(a), (c)(1)(A), and Congress' providing special protections to churches when being audited by the IRS, *id.* § 7611.

b. The federal government began exempting some types of housing from taxable income immediately after the passage of the Sixteenth Amendment. *See* T.D. 2079, 16 Treas. Dec. Int. Rev. 249 (1914). By 1919, the Treasury Department began exempting clergy specifically. *See* O.D. 119, 1 C.B. 82 (1919). When the Department made the mistake in 1921 of failing to exempt all housing for all clergy,

see O.D. 862, 4 C.B. 85 (1921), Congress immediately clarified the Tax Code to explicitly exempt church-provided housing from taxable income. Revenue Act of 1921 § 213(b)(11), Pub. L. No. 98, 42 Stat. 227. Four years thereafter, the judiciary correctly held that Congress intended to treat housing the same as housing allowances for purposes of taxes. *See Jones v. United States*, 60 Ct. Cl. 552, 571 (1925). *See, e.g.*, Revenue Act of 1939, 53 Stat. 1 § 22(b)(6).

c. When Congress realized that this important housing allowance did not benefit those who needed it most—churches with modest resources—lawmakers adjusted this exemption to help those who were less fortunate. In passing § 107(2), Congress made clear it designed the section to alleviate the inequity arising between ministers working for churches that could afford to provide a parsonage, and who were thus eligible for a tax exemption, and ministers working for poorer churches that could afford only to provide an allowance for housing, who were not eligible for a tax exemption. As the bill's sponsor explained:

> On March 26 of this year, I introduced H. R. 4275 to permit clergymen to exclude from gross income that amount paid to them by a church specifically in lieu of furnishing them a dwelling house.

> Under our present tax laws, section 22 (B), persons who are furnished a dwelling house in connection with their occupation must include within gross income for tax purposes the rental value of such dwelling. Subsection (6) exempts clergymen therefrom. In most cases such dwelling house is the parsonage, manse or parish house. Yet where the church does not furnish its clergy a dwelling house because it does not own one or because of other circumstances, the sum of money paid by the church to the clergyman specifically in lieu of furnishing him a dwelling must be included in gross income and taxed in the usual graduated manner.
>
> If enacted, my proposal would remove this inequity and permit all clergymen to exclude from gross income that part of a specific rental allowance up to the rental value of the dwelling house actually occupied.
>
> This situation was called to my attention by an official of a State Baptist organization. Upon looking into the matter, I realized that the present tax laws are discriminatory among our clergy. I was rather surprised that my bill has attracted so much attention, but I am pleased to say that among all the correspondence and communications that I have received, there has not been one in opposition.

Forty Topics Pertaining to the General Revision of the Internal Revenue Code: Hearing Before House Ways and Means Committee, 83d Cong. 1574–75 (1953) (statement of Representative Peter F. Mack, Jr.). Congressman Mack further emphasized "the necessity of amending this section to allow the same benefits for all of the clergymen, whether furnished a dwelling or required to rent one." *Id.* at 1575.

Multiple Senate and House committee reports reflect a unified, singular purpose to eliminate discrimination in the Tax Code:

> 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. 83-1337, at 4040 (1954).

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>
> Both the House and 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.

S. Rep. No. 83-1622, at 4646 (1954); *see also H.R. 8300: An Act to Revise the Internal Revenue Laws of the United States: Hearing Before S. Comm. on Finance*, 83d Cong. 14 (1954).

Indeed, the entire tax reflected an overarching design to remove inconsistencies and inequities throughout the Tax Code, including in the parsonage exemption. As Congressman Carl Curtis described:

> In past years the mad scramble for revenue has been so great that there seemed to be a policy in both the Congress and the Treasury Department to get all the taxes you could regardless of the consequences. If a clergyman is furnished a parsonage he does not have to pay additional taxes by reason of being allowed the use of that parsonage. But if the church had no parsonage and made an allowance to him so that he could rent or provide a place for himself, that allowance was considered income and thus increased his taxes. That, too, has been taken care of. . . . In other words this is another situation where tax relief has come about by reason of revising the law so that it accurately measures an individual's taxable income. . . . This revision is made to the end that he will pay on his actual net income. Other benefits obtained by reason of this legislation are in the same category.

100 CONG. REC. H3291–3292 (daily ed. Mar. 15, 1954) (statement of Rep. Carl T. Curtis). Likewise, Representative Wesley D'Ewart described eliminating inequalities as the committee's prime objective: "Formerly ministers who were provided a parsonage paid no tax, but those who received a cash allowance were taxed. You will note that all of these provisions are directed toward removing inequalities and hardships in existing law. This has been one of the committee's prime objectives." *Id.* at H3578 (daily ed. Mar. 18, 1954) (statement of Rep. Wesley A. D'Ewart).

The Chairman of the House Tax Committee similarly summarized the tax revision bill's objective: "Some of the other provisions of the bill would: . . . [r]emove inequities in the tax treatment of employee stock options, theft losses, separate maintenance payments, the sale of commodity futures, rental allowances for parsonages, and income from the discharge of indebtedness." *Id.* at H3423–24 (daily ed. Mar. 17, 1954) (statement of Rep. Reed, March 17, 1954); *see also*:

> The revision of our entire Internal Revenue Code for the first time in 75 years was a mammoth undertaking, and the members of the committees who worked on that bill are deserving of the highest praise. Even if no other bill had been acted on by the 83d Congress, I believe it could truthfully be said that this was a successful Congress. Under the provisions of the House bill 8300, individuals will save a total of $827 million; and every citizen will benefit in some way from the revision of the tax law. . . . Ministers of the Gospel: The cash paid to a minister by a church for the rental of a parsonage will be tax free.

100 CONG. REC. S13,975 (daily ed. Aug. 10, 1954) (statement of Sen. J. Glenn Beall).

Congress deliberately classified all clergy as self-employed for purposes of Social Security in order not to differentiate between various types of denominations or pick and choose among ministerial duties. CONF. REP. NO. 83-2679 (1954). Congress also acknowledged that under the status quo ante, without a monetary housing allowance to dovetail

with living in a residence tax-free, there would be "discrimination in existing law," which § 107(2) was written to "remove." H.R. REP. NO. 83-1337, at 4040 (1954); S. REP. NO. 83-1622, at 4646 (1954).

Without § 107(2), the original parsonage exemption's favorable treatment for churches and denominations that provide parsonages over those that provide equivalent support could itself raise Establishment Clause concerns. The disparate impact between religious denominations might look like taking sides. *See Larson v. Valente*, 456 U.S. 228, 244–46 (1982). The very cases raised by the Plaintiffs here regarding unequal treatment could instead have potentially been raised by low-income churches if § 107(2) did not exist.

d. When Congress has occasionally reexamined § 107(2), lawmakers have maintained the provision's purpose of remedying unequal tax treatment between different churches, defending it against efforts of both courts and the Internal Revenue Service to erode it. In 1984, the IRS reinterpreted the mortgage-interest deduction to exclude mortgages paid with parsonage allowances exempt under § 107(2). Congress revised the mortgage interest deduction in response:

> Mr. Chairman, in early 1983 the Internal Revenue Service issued a ruling that prevents ministers from deducting mortgage interest

> and taxes paid on their residence, to the extent that they receive a traditional, non-taxable parsonage allowance. Later, the IRS indicated that it would apply the same ruling to military personnel with respect to their quarters allowance. Because of these IRS actions, I introduced S. 2017 on October 27,1983, to maintain the status quo for both ministers and military personnel.

Charitable Contributions and Ministers' and Military Housing: Hearing Before the Subcomm. on Taxation and Debt Management of the S. Comm. on Finance, 98th Cong. 69 (testimony of Sen. Jesse Helms).

In making this revision, Congress considered the parsonage exemption part of a broader scheme that also benefited secular professions, not an isolated benefit. One of Congress' main concerns was ensuring that the IRS's interpretation of the parsonage exemption did not erode the tax treatment of military families, which received a similar exemption:

> Although revenue ruling 83-3 did not specifically apply to the basic quarters allowance and other subsistence payments of members of the uniform services, the principles similar to those contained in revenue ruling 83-3 may indeed result in a loss of the mortgage interest deduction and the property tax deduction for members of the uniform services.

Id. at 1–2 (statement of Sen. Robert J. Dole).

> [F]rom a tax equity and fairness standpoint we must also be concerned about treating similarly situated taxpayers the same. The issues raised here with respect to ministers and

> members of the Armed Forces also affect other similarly situated taxpayers.

Id. at 2.

The Committee record contained a wide variety of statements supporting the change. Among them, the statement of Rabbi Simon described the origin of the parsonage exemption:

> The tax benefit relating to parsonages and parsonage allowance is derived from English common law to equalize salaries and status between clergy in denominational groups in which movement was common and involuntary and clergy in groups that provided manses and rectories and movement was more voluntary. . . The IRS now by ruling treats clergy and military differently. If exemption is given to a large class of Americans sharing the same common tax history, the clergy are entitled to remain linked in treatment.

Id. at 207 (statement of Rabbi Matthew H. Simon, B'nai Israel Congregation, Rockville, Md.).

e. In 2002, Congress amended § 107(2) to clarify that the exemption encompasses the fair rental value of the parsonage. *See* Clergy Housing Allowance Clarification Act of 2002, Pub. L. No. 107-181, 116 Stat. 583. The effort directly responded to a pending Ninth Circuit case considering overturning the exemption as unconstitutional along similar lines as the district court in the present case. *See Warren v. Comm'r*, 282 F.3d 1119, 1119–20 (9th Cir. 2002) (appointing

Professor Erwin Chemerinsky to submit an amicus brief on § 107(2)'s constitutionality under *Texas Monthly*); *see also* Erwin Chemerinsky, *The Parsonage Exemption Violates the Establishment Clause and Should Be Declared Unconstitutional*, 24 WHITTIER L. REV. 707, 723 (2003).

Congress responded in a bipartisan manner, asserting that the parsonage exemption is one in a category of tax exemptions benefiting both religious and secular employees:

> Dating back to 1921 and recodified in 1954 in section 107 of the Tax Code, this allowance prevents clergy from being taxed on the portion of their church income that is used to provide their housing. This allowance 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. H1299–1300 (daily ed. Apr. 16, 2002) (statement of Rep. Jim Ramstad) (describing the "strong bipartisan support this legislation has received from our colleagues, with 37 cosponsors. My fellow Committee on Ways and Means member and friend, the distinguished gentleman from North Dakota (Mr. Pomeroy), the chief sponsor on the other side of the aisle, has been tremendous on working on this legislation.").

Congressman Pomeroy expressed similar sentiments:

> From the earliest days of the Federal income tax, in the 1920s, the Tax Code has allowed the clergy of all religious faiths to exclude their housing allowance from taxable income. This provision has always been recognized not as an endorsement of any one religion, but as a reasonable accommodation of all religions.
>
> The housing exclusion benefits clergy of all faiths, recognizing that a clergy person's home is not just shelter, but an essential meeting place for members of the congregation, and also, in light of the unique relationship between a pastor or a clergy member and the congregation, the distinct housing component of it is a unique feature of that relationship. . . .
>
> In conclusion, I would just observe that while this body considers many very complex issues, the issue before us is an easy one. It is an extraordinarily important issue but an easy one. Bipartisan, no-brainer. We want to continue existing tax treatment of the housing allowance allowed the clergy of this country, and in that regard, I urge all of my colleagues to vote for the legislation that the gentleman from Minnesota (Mr. Ramstad) has so capably brought before us.

Id. at 1300–01 (statement of Rep. Earl Pomeroy).

Congressman Sam Johnson of Texas echoed those sentiments:

> For thousands of years, churches, temples, mosques, and synagogues have provided housing to members of their clergy. It makes complete sense that these benefits are not taxed.
>
> Since 1921, the parsonage allowance has been considered exempt from the United States income tax system. The problem is that the Ninth Circuit Court of Appeals has taken it upon itself to challenge the very constitutionality of the clergy housing being tax-exempt.

Id. at 1301 (statement of Rep. Sam Johnson). The measure received bipartisan support and passed unanimously in the Senate. *See* 148 CONG. REC. S3887 (daily ed. May 2, 2002).

f. The current state of the law shows Congress' concern for religious liberty and centuries-old traditions of not taxing church housing as an extension of the church facility. But this housing allowance is also consistent with numerous other allowances that Congress makes for professions or duties that Congress determines provides significant public service, or allowances for businesses to foster growth and productivity.

Congress provides numerous housing allowances for different types of employees. *See, e.g.*, 26 U.S.C. § 119(a) (employees provided lodging for the convenience of the employer; *id.* § 119(c) (employees in a foreign camp); *id.* § 119(d) (employees of an educational institution); *id.* § 134 (military personnel stationed overseas); *id.* § 162(a) (employee away on business);[4] *id.* § 911(a) (U.S. citizen living abroad); *id.* § 912 (government employees living outside the United States). All are

[4] This provision applies to employees who must live somewhere other than their home for a period of less than one year.

designed to lessen the burden on employees as they carry out their employer's business.

There is good reason to treat a pastor's house as part of the church facilities. A pastor's home is a location from which the pastor conducts many essential ministry activities. Many ministers are expected to be near to the church to better serve the community. Dist. Ct. Doc. No. 52, Intervenor-Defendants' Statement of Proposed Finding of Facts ¶ 110, 119. Their duties include praying with church members during emergencies, counseling members who are in marriages that are in crisis, hearing confessions, and offering spiritual counsel. *Id.* ¶¶ 80, 108–10, 139–40. Many ministers also must care for the church facility, including quickly responding to routine incidents or needs. *Id.* ¶ 142. These duties—spiritual and temporal—can arise at any time of day or night. *Id.* ¶¶ 110, 139, 141, 149. In addition to the church building, a pastor's home frequently provides a better location for performing these ministerial duties. *See id.* ¶¶ 80, 115–17, 149. Other times, the pastor's home is the only location where certain acts of ministry can be performed, such as providing hospitality to church members, lodging for

missionaries and guest preachers, and emergency relief for members who are in need of housing. *See id.* ¶¶ 118, 148, 150.

2. Congress coerces no one by allowing pastors to maintain housing free of taxation.

Section 107(2) coerces no one. The fact that a pastor living down the street pays less in income tax because of the parsonage allowance does not coerce anyone in any fashion, much less the Plaintiffs here. It compels no action, and it constrains no action. Section 107(2) does not even result in any unwelcome contact with a religious expression, display, or message, which in times past were sometimes regarded as problematic under *Lemon* or the endorsement test, but which would be upheld under *Town of Greece*'s coercion inquiry. Whether *Lemon* or *Town of Greece*, § 107(2) is constitutional.

C. Congress continues to support the parsonage allowance as an important part of protecting religious liberty and respecting church autonomy.

Congress continues to support the policy it codified in 26 U.S.C. § 107(2). Tax policy has been a central focus of the 115th Congress, as demonstrated in passing the Tax Cuts and Jobs Act, Pub. L. No. 115-93, 131 Stat. 2054 (2017). Many of those same lawmakers are now weighing in on the parsonage exemption.

On April 18, 2018, Representative Robert Pittenger of North Carolina transmitted a letter to Chairman Kevin Brady of the House Committee on Ways and Means and Chairman Robert Goodlatte of the House Committee on the Judiciary, signed by eighteen Members of the House of Representatives.[5]

"The Parsonage allowance allows religious leaders to live near their congregation and serve the community around them," these lawmakers begin.[6] "This allowance follows the same principle that permits our military, overseas workers, and other employees across various industries to receive compensation for their housing costs."[7]

The Representatives continue:

> The Parsonage allowance is essential to treating our nation's pastors, ministers, and religious leaders fairly—avoiding government entanglement in religious matters, and leaving religious leaders free to serve sacrificially in the communities that are most in need. Our nation's religious leaders have important responsibilities that are vital to our country's overall well-being and it is our responsibility to ensure that the government does not needlessly interfere with their ability to do their job.[8]

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[5] *See* https://pittenger.house.gov/uploadedfiles/parsonage_allowance_letter-signed.pdf.
[6] Letter, *supra* note 5, at 1.
[7] *Id.*
[8] *Id.*

"Removing the Parsonage allowance would have a lasting impact not only on churches, but also on surrounding at-risk communities,"[9] these House Members add. They close by exhorting the Committee Chairmen "to continue treating our nation's selfless leaders fairly, and continue to support the Parsonage allowance, to protect the religious freedoms upon which our nation was founded."[10]

II. COURTS GIVE WIDE LATITUDE TO CONGRESS IN CRAFTING TAX LEGISLATION.

"[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden v. Kentucky*, 309 U.S. 83, 87 (1940). Among Congress' powers, its authority to tax is especially broad. This court should be accordingly deferential to how Congress weighs competing equities in crafting such legislation. "Generally, statutory classifications are valid if they bear a rational relation to a legitimate governmental purpose. . . Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes." *Regan v. Taxation with Representation*, 461 U.S. 540, 547 (1983). The Supreme Court has explicitly recognized Congress' broad

[9] *Id.*
[10] *Id.* at 2.

discretion in writing tax law. "The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. . . and the passage of time has only served to underscore the wisdom of that recognition of that large area of discretion which is needed by a legislature in formulating sound tax policies." *Madden*, 309 U.S. at 87 (footnotes omitted).

This brief in Part I.B set forth numerous examples—mostly nonreligious—of Congress making specific housing allowances in the Internal Revenue Code. "Congressional selection of particular entities or persons for entitlement to this sort of largesse is obviously a matter of policy and discretion not open to judicial review unless in circumstances which here we are not able to find. . . . For the purposes of these cases appropriations are comparable to tax exemptions and deductions, which are also a matter of grace [that] Congress can, of course, disallow . . . as it chooses. . . ." *Regan*, 461 U.S. at 549 (internal quotation marks omitted) (alteration in original). This court has accordingly recognized that the Constitution does not require "perfect equality or absolute logical consistency between persons subject to the

Internal Revenue Code." *Barter v. United States*, 550 F.2d 1239, 1240 (7th Cir. 1977) (per curiam).

Congress acted well within its broad discretion in creating the parsonage allowance, including remedying an inequity whereby higher-income churches were enjoying a housing allowance, but lower-income churches often were not. This court should rule in favor of Congress' well-considered policy.

III. TAXING MINISTERS' HOUSING COULD IMPLICATE THE FREE EXERCISE CLAUSE.

Finally, it is worth noting that the housing allowance raises some of the same considerations the Supreme Court dealt with in *Hosanna-Tabor Evangelical Church & School v. EEOC*, 565 U.S. 171 (2012). The Court held that both the Establishment and the Free Exercise Clauses require a ministerial exception to federal antidiscrimination laws. *Id.* at 188–90. "The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." *Id.* at 184. The Sixth Circuit had subsequently held that the ministerial exception "is a structural limitation imposed on the government by the Religion Clauses, a limitation that can never be waived." *Conlon v.*

InterVarsity Christian Fellowship/USA, 777 F.3d 829, 836 (6th Cir. 2015). That is to say, the Establishment and Free Exercise Clauses do "not allow for a situation in which a church could explicitly waive this protection." *Id.* The Sixth Circuit cited to a previous decision from this court, *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006), in reaching this conclusion.

Similarly, the courts were the first to recognize a parsonage allowance. A district court did so in *MacColl v. United States*, 91 F. Supp. 721, 722 (N.D. Ill. 1950), without elaborating on its reasoning. Another district court followed *MacColl*, though again without showing its work. *Conning v. Busey*, 127 F. Supp. 958, 959 (S.D. Ohio 1954). The Eighth Circuit followed suit by noting these cases, further noting that actual housing provided for a minister was already not taxed, and held that it was "not the intent nor purpose of Congress" to treat housing allowances differently than church-owned houses. *Williamson v. Comm'r*, 224 F.2d 377, 381 (8th Cir. 1955).

The courts thus first recognized parsonage allowances, just like the ministerial exception. Congress later codified this principle in the Tax Code. But the fact that Congress has codified this policy in statute

does not lessen the constitutional implications of eliminating § 107(2). The power to tax is the power to destroy. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425–26 (1819). As noted above and by the parties, pastors perform many essential ministry duties from their home. The Establishment Clause is not offended by a tax provision permitting them to do so. These homes—either literally owned by the church in § 107(1) or, in the case of § 107(2), financed by the church—are functionally extensions of the church property itself. The Tax Code should regard them as such. That being so, the Free Exercise Clause may actually require an income tax exemption like § 107(2). While a free-exercise claim was not raised in this case, these principles should inform the court's analysis.

Another "structural limitation" may exist here. The controlling opinion from *Texas Monthly* acknowledged that "the Free Exercise Cause [might] require[] a tax exemption for the sale of religious literature by a religious organization." *Texas Monthly*, 489 U.S. at 28 (Blackmun, J., concurring). For the reasons set forth above, there is a much stronger argument that the Free Exercise Clause requires not

taxing church expenditures that are the functional equivalent of a church building.

This court can base its decision solely on the Establishment Clause while noting the shoals posed by the Free Exercise Clause. The question presented in *Amos* concerned only the Establishment Clause. *See Amos*, 483 U.S. at 329–30. Yet the Court contemplated the mandates of the Free Exercise Clause to help delimit the contours of the Establishment Clause. *Id.* at 334–35. Likewise, *Walz* held that "the limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz*, 397 U.S. at 673. This approach of reading the Religion Clauses in tandem showcases the benevolent accommodation of people and institutions of faith central to a correct understanding of the Establishment Clause. *See Zorach v. Clauson*, 343 U.S. 306, 313–14 (1952).

Essentially, the Plaintiffs' arguments here set the Establishment Clause on a collision course with the Free Exercise Clause. The Framers did not design the First Amendment to the Constitution to embody such conflict. To the contrary, those Clauses should be read

harmoniously. The Establishment Clause does not forbid a housing allowance, and in fact the Free Exercise Clause supports it.

CONCLUSION

For these reasons, this court should reverse the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Cir. R. 29 because this brief contains 6,469 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Circuit Rule 32(b) because it has been prepared in proportionally spaced typeface in 14-point Century Schoolbook font using Microsoft Word.

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I hereby certify that on April 26, 2018, I electronically filed this brief with the Clerk of the Court for the U.S. Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

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APPENDIX

The Members of the 115th Congress currently serving in the Senate and the House of Representatives who have joined this brief as *amici curiae* are:

1. Sen. Ted Cruz (TX)
2. Sen. James Inhofe (OK)
3. Sen. James Lankford (OK)
4. Sen. Tim Scott (SC)
5. Rep. Robert Aderholt (AL-4)
6. Rep. Jim Banks (IN-3)
7. Rep. Michael Conaway (TX-11)
8. Rep. Louie Gohmert (TX-1)
9. Rep. Gregg Harper (MS-3)
10. Rep. Vicky Hartzler (MO-4)
11. Rep. Jody Hice (GA-10)
12. Rep. Steve King (IA-4)
13. Rep. Doug Lamborn (CO-5)
14. Rep. Mark Meadows (NC-11)
15. Rep. Luke Messer (IN-6)
16. Rep. Randy Weber (TX-14)