

No. 00 - 71217

In the
United States Court of Appeals
for the Ninth Circuit

RICHARD D. and ELIZABETH WARREN,

Petitioners-Appellees,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellant.

On Appeal from the Decision of the United States Tax Court

**AMICUS CURIAE BRIEF
OF THE CHURCH ALLIANCE**

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INTEREST OF THE *AMICUS*

The Church Alliance respectfully submits this *amicus curiae* brief in support of petitioners-appellees Richard D. and Elizabeth K. Warren.

The Church Alliance is a coalition of the chief executive officers of more than 30 denominational benefit programs, covering ministers affiliated with The American Baptist Churches, The Central Conference of American Rabbis, The Christian Church (Disciples of Christ), The Church of the Brethren, The Church of God (Anderson, IN), The Church of God (Cleveland, TN), The Church of the Nazarene, Community of Christ, The Episcopal Church, The Evangelical Lutheran Church in America, The Joint Retirement Board for Conservative Judaism, The Lutheran Church-Missouri Synod, The Mennonite Church USA, The Seventh-day Adventist Church, The Southern Baptist Convention, The Presbyterian Church (U.S.A.), The United Church of Christ, The United Methodist Church, The Wisconsin Evangelical Lutheran Synod, and other denominations.

The Church Alliance has a substantial interest in the validity of section 107(2) of the Internal Revenue Code of 1986 (“Code” or “I.R.C.”) both because of the immediate impact on compensation and housing, and also because of the indirect impact on retirement benefits, as explained in Point II below. The Church Alliance believes that this brief, which focuses on the jurisprudential history of

legislative accommodations, adds a perspective that is not duplicated by the parties.

INTRODUCTION

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

Moreover, section 107 must be viewed in the context of the housing income exclusion of Code section 119, the constitutionality of which cannot reasonably be questioned. Under section 119, the provision of housing by employers is excluded from employees’ income under certain circumstances. Congress has enacted special provisions that relax the general conditions of section 119 for certain categories of taxpayer, including members of the armed forces, teachers and other employees of educational institutions, employees in remote locations abroad, and, as shall be seen—ministers. The question raised by this Court is whether the

special provision pertaining to ministers is an impermissible establishment of religion.¹

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

Section 107 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.

I.R.C. § 107.

Although section 107 refers to a “minister of the gospel,” the Internal Revenue Service (“IRS”) has always interpreted this phrase as applying to persons

¹ The Court also requested briefing on whether the Court has, or should exercise, authority to determine the constitutionality of section 107(2) in this case. While others will brief this issue, we believe the answer is “no.”

holding an equivalent status in other religions. Thus, ministers of all faiths are eligible and covered by section 107. *See, e.g. Salkov v. Comm'r*, 46 T.C. 190 (1966) (Jewish cantors); *see also* Rev. Rul. 58-221, 1958-1 C.B. 53 (1958) (rabbi's assistant). Accordingly, the word "ministers," as used in this brief, refers to the ministers, priests, rabbis, imams, and other spiritual leaders covered by section 107. Similarly, "church" means the church, denomination, synagogue, temple, other house of worship, association or convention of such, seminary, or any other similar religious organization with which a "minister" is affiliated.

ARGUMENT

I. **Section 107(2) Is A Permissible Accommodation Of Religion That Satisfies The Three-Prong Test Of *Lemon v. Kurtzman*.**

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

335 (1987); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987); *Gillette v. United States*, 401 U.S. 437, 453 (1971).

In *Amos*, the Court expressly repudiated the argument that laws that “single[] out religious entities for a benefit” or “give special consideration to religious groups are *per se* invalid.” 483 U.S. at 338. Rather, “[w]here . . . government acts with the proper purpose of lifting a regulation that burdens the exercise of religion,” the Court held that there is “no reason to require that the exemption come packaged with benefits to secular entities.” *Id.*; see also *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 705 (1994) (noting that “the Constitution allows the State to accommodate religious needs by alleviating special burdens”). An academic study found thousands of state and federal laws “singling out” religion for special treatment. James E. Ryan, Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment, 78 VA. L. REV. 1407, 1446-1449 (1992) (citing over 2,000 legislative accommodations of religion in federal and state law).

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court articulated a three-prong test for determining whether a legislative act can withstand an Establishment Clause challenge: (1) the act must have a secular legislative purpose; (2) its principal or primary effect must neither advance nor inhibit religion; and (3) it must not foster excessive governmental entanglement with

religion. *Id.* at 612-13. This Court applies the *Lemon* test as it has been modified by the Supreme Court. *See, e.g., Am. Family Ass’n, Inc. v. City & County of San Francisco*, 277 F.3d 1114, 1121-23 (9th Cir. 2002).

A. Section 107 has a secular purpose.

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

When Congress enacted section 107(2) in 1954, it made clear that its purpose was to equalize the effect of the tax laws on different churches, some of which own parsonages and some of which do not. As explained in the Senate Report:

Under present law, the rental value of a home furnished a minister of the gospel as a part of his salary is not included in his gross income. This is unfair to those ministers who are not furnished a parsonage,

but who receive larger salaries (which are taxable) to compensate them for expenses they incur in supplying their own home.

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

S. Rep. No. 83-1622, at 4645 (1954).

The Tax Court has accordingly recognized that “the purpose of [section 107(2)] was to equalize the situation between those ministers who received a house rent free and those who were given an allowance that was actually used to provide a home.” *Marine v. Comm’r*, 47 T.C. 609, 613 (1967).

Insuring equal treatment of different churches is a legitimate secular purpose. Indeed, it is of constitutional dimension, since one of the clearest commands of the First Amendment is that all religions be accorded equal rights. *Larsen v. Valente*, 456 U.S. 228, 244 (1982); *Droz v. Comm’r*, 48 F.3d 1120, 1124-25 (9th Cir. 1995). For a variety of historical reasons, some churches—especially older, more hierarchical churches—tend to own parsonages and rectories, while others—often newer, perhaps less firmly established churches—do not. Congress properly regarded the unequal treatment of these religious groups as “unfair” and

“discriminat[ory].” S. Rep. No. 83-1622, at 4645. Eliminating these inequalities is a valid secular purpose.²

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

The key question in this case is whether the primary effect of section 107 is to “advance or inhibit religion.” *Lemon v. Kurtzman*, 403 U.S. 612 (1971). It is not.

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

This Nation has a longstanding history of exempting religious activity from tax—sometimes as part of a broad category of eleemosynary institutions and sometimes not—reflecting a longstanding view that tax exemptions, unlike direct subsidies, reduce the level of interaction between church and state. *See Walz v. Tax Comm’n*, 397 U.S. 664, 673 (1970). The American constitutional tradition holds that while religion (as such) is not entitled to public subsidy, it may be exempted from taxation, “so long as none was favored over others and none suffered interference.” *Id.* at 677. Tax exemption is best understood as a way of leaving churches alone—of neither advancing nor inhibiting their activities. That is why, when religion was disestablished in early America, tax exemptions for

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

churches were regarded as consistent with disestablishment even by the most ardent separationists. *See id.* at 677-78; *id.* at 683-85 (Brennan, J., concurring) (recounting early history in Virginia and New York, and at the federal level under Presidents Jefferson and Madison). Government may not support religion, but the church need not be required to support the state.

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

The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. . . . There is no genuine nexus between tax exemption and establishment of religion.

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

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

Id. at 690 (Brennan, J., concurring).

In recent cases, *Walz*'s distinction between affirmative assistance and mere exemption from burden has been generalized, so that it now applies not just to tax but to a wide array of regulatory exemptions. The Court distinguishes between measures designed to lift government-imposed burdens on the exercise of religion

and those providing affirmative assistance or subsidies to religious activity.

Whereas affirmative government assistance (“subsidies”) may be extended to religious bodies only on a neutral basis and subject to other limitations,³ it is not illegitimate for government to provide exemptions or accommodations specifically for the exercise of religion. *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 144-45 (1987); *Gillette v. United States*, 401 U.S. 437, 453 (1971); *see Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338 (1987) (where a challenged provision merely lifts a government-imposed burden on religious exercise, the Court has not “require[d] that the exemption come[] packaged with benefits to secular entities”). The implicit baseline for constitutional analysis is one of government inaction: if the government merely leaves churches alone, exempt from the burden of tax or regulation, it generally does not violate the Establishment Clause. Only when the government transfers resources from the public coffers to religious bodies or otherwise directly participates in, directs, encourages, or endorses religious activity, does the question of “advancement” of religion arise.

Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (plurality opinion per Brennan, J.), where the Supreme Court struck down a Texas statute that exempted

³ *See Mitchell v. Helms*, 530 U.S. 793, 808-36 (2000); *Agostini v. Felton*, 521 U.S. 203, 222-35 (1997).

from state sales and use taxes “[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teachings of the faith and books that consist wholly of writings sacred to a religious faith,” *id.* at 5, is not to the contrary. To be sure, the plurality opinion in that case contains broad language that seemingly contradicts the *Walz* distinction between tax exemptions and direct subsidies. *See, e.g., id.* at 14 (“Every tax exemption constitutes a subsidy that affects non-qualifying taxpayers. . . .”); *see also* Edward A. Zelinsky, *Dr. Warren, The Parsonage Exclusion, and the First Amendment*, 95 TAX NOTES 115 (Apr. 1, 2002) (pointing out conceptual inconsistency between *Walz* and *Texas Monthly*).⁴

But the plurality opinion commanded only three votes. The controlling opinions—separate concurrences by Justices White and Blackmun (the latter

⁴ As a matter of tax theory, it is difficult—and perhaps conceptually impossible—to distinguish between tax “subsidies” and natural tax exclusions. Is it a “subsidy” to decline to tax the imputed value of a home? Does it devalue homemaking services not to treat unremunerated household work as qualifying for Social Security? Does it subsidize business to allow deductions for business lunches—or is the refusal of a full deduction an exercise in populist resentment? As long as these questions are merely ones of tax policy, legislatures can resolve them without need for a general theory. But if the distinction between subsidy and tax neutrality is to be constitutionalized, it would be necessary to have a coherent theory of the “natural” form of the tax base—something we know we do not have. That is why some of this Nation’s most eminent tax theorists have concluded that religious tax exemptions should not generally be treated as “subsidies” for purposes of the Establishment Clause. *See* Boris Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285 (1969); Edward A. Zelinsky, *Are Tax “Benefits” Constitutionally Equivalent to Direct Expenditures?*, 112 HARV. L. REV. 379 (1998).

joined by Justice O'Connor)—do not rest on any such pathbreaking innovation. Because they constitute narrower grounds for the judgment, these concurring opinions are controlling. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (when no single rationale commands a majority, the Court's holding “may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds”) (citation omitted).

The simplest and most persuasive basis for the *Texas Monthly* decision was set forth by Justice White, who noted that *Texas Monthly* involved differential taxation of organs of the press based on their content (indeed, of their viewpoint), which is plainly unconstitutional under the Press Clause. 489 U.S. at 25-26 (White, J., concurring); *see Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987). Any broader application to non-press activities, such as housing allowances for ministers, is therefore beyond the rationale of the case.

Justices Blackmun and O'Connor, while agreeing with Justice White, offered a different narrow rationale for invalidating the Texas statute. They criticized the plurality opinion for “subordinating the Free Exercise value, even . . . at the expense of longstanding precedents.” *Tex. Monthly*, 489 U. S. at 27 (Blackmun, J., concurring). They declined to label tax exemptions as “subsidies,” preferring to analyze the case within the framework of permissible accommodations of religion. *Id.* at 28 (Blackmun, J., concurring) (citing *Amos*,

483 U.S. 327). Ultimately, they invalidated the statute not because it was a subsidy to religion, but because it was drawn too narrowly—protecting only periodicals “that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith.” *Id.* at 5 (plurality opinion per Brennan, J.); *id.* at 28-29 (Blackmun, J., concurring). As they pointed out, this would exclude “philosophical literature distributed by nonreligious organizations devoted to such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong.” *Id.* at 27-28 (Blackmun, J., concurring). Indeed, it would even exclude religious materials that did not consist “wholly” of “writings promulgating the teaching of the faith” or of books that are not “sacred writings.” *Id.* at 5 (plurality opinion per Brennan, J.). Justices Blackmun and O’Connor thus proposed that the tax exemption should be broadened rather than eliminated. *Id.* at 27-28 (Blackmun, J., concurring). Indeed, they suggested that the tax exemption statute would likely be constitutional if it included “the sale of atheistic literature distributed by an atheistic organization”—but found that the record did not support any such interpretation. *Id.* at 29 (Blackmun, J., concurring).

Section 107 is not so narrowly drawn. It does not confine itself to ministers of certain types of churches. It includes the functional equivalents of ministers in such nontheistic traditions as Buddhism, Taoist, or Ethical Culture. Nor is it an

exemption based on content or viewpoint. Rather, it employs a “functional” test, based on the nature and scope of a minister’s duties. *See, e.g., Toavs v. Comm’r*, 67 T.C. 897 (1977); *Colbert v. Comm’r*, 61 T.C. 449 (1974). Ministers’ work does not consist “wholly” of teaching the faith, and whether an individual is deemed a “minister” does not depend on the content of his beliefs. Because of the breadth of its coverage, section 107 is not subject to the same constitutional defect that Justices O’Connor and Blackmun identified. Indeed, in light of their apparent approval of a hypothetical statute extending the Texas exemption to “atheistic” publications, the broad-based exclusion here seems clearly constitutional.

Finally, not even the plurality opinion supported a categorical ban on tax exemptions targeted exclusively to religious persons or groups. Justice Brennan qualified his opinion with the *caveat* that “we in no way suggest that all benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause.” *Tex. Monthly*, 489 U.S. at 18 n.8 (plurality opinion) (citing *Zorach v. Clauson*, 343 U.S. 306 (1952), and *Amos*, 483 U.S. 327). Rather, Justice Brennan stated that “benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs” are permissible so long as they are “designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by

the Free Exercise Clause” or “would not[] impose substantial burdens on nonbeneficiaries” of the programs. *Tex. Monthly*, 489 U.S. at 18 n.8 (plurality opinion).

The problem in *Texas Monthly*, according to the plurality, was that “[n]o concrete need to accommodate religious activity” had been shown.⁵ *Id.* at 18. By contrast, as we will now show, requiring churches and ministers to conform their affairs to the criteria of section 119 in order to receive the benefit of the housing exclusion would create inequalities among different churches, increase the intrusiveness and entanglement of government enforcement, and inhibit religious activity in ways that, Congress has determined, do not promote the ends of the Internal Revenue Code. We turn to that analysis.

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

In contrast to the exemption in *Texas Monthly*, which applied solely to a narrow category of religious publications, the privilege of excluding employer-provided housing benefits from income is available to a broad category of taxpayers. Section 107(2) simply ensures that the exclusion is equally available to ministers of all religions.

⁵ Neither the two concurring Justices Blackmun and O’Connor nor the three dissenting Justices agreed with that conclusion. *See Tex. Monthly*, 489 U.S. at 27 (Blackmun, J., concurring); *id.* at 40-41 (Scalia, J., dissenting).

Section 119 contains general provisions for the exclusion of meals and lodging furnished for the convenience of the employer. Moreover, related Code provisions accommodate the needs of teachers, professors, and other employees of educational institutions, military personnel, and certain taxpayers working abroad. I.R.C. §§ 119(c)-(d), 134, 911. Applied to churches and ministers, some section 119 criteria are arbitrary and would produce perverse and unequal results between denominations. Section 107 solves those problems, and enables ministers to share in a widely available tax exemption without the burden of complying with criteria that are arbitrary and unequal as applied to them. It follows that, applying the constitutional framework of *Amos* and the *Texas Monthly* plurality, section 107 is constitutional because the differences between sections 107 and 119 are “designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause” or otherwise respond to a “concrete need to accommodate religious activity.” *Tex. Monthly*, 489 U.S. at 18 & n.8 (plurality opinion per Brennan, J.).

There are four significant differences between section 107 and the housing exclusion of section 119: (1) the section 119 exclusion is available only to employees, not independent contractors; (2) section 119 extends only to housing on the premises of the employer, as a condition of employment; (3) section 119 extends only to housing provided in-kind and not to cash housing allowances; and

(4) the section 119 exclusion requires case-by-case proof that the lodging is provided for the benefit of the employer. As shown below, each difference constitutes a legitimate response by Congress to the special circumstances of ministers.

a. for employees only

Section 107 extends the housing exclusion to all ministers, regardless of whether they are employees or self-employed. This serves the interests both of interdenominational equality and of reducing entanglement. The employment status of ministers varies from one faith tradition to another, depending in large part on ecclesiology. Experience has shown that drawing the line between employees and independent contractors in the context of ministers is difficult and intrusive.

On the same day in 1994, the Tax Court filed two opinions on whether ministers were employees and thereby subject to the limitations on miscellaneous itemized deductions imposed on employees by Code section 67. In *Weber v. Commissioner*, 103 T.C. 378 (1994), *aff'd*, 60 F.2d 1104 (4th Cir. 1995), the court found a minister of The United Methodist Church to be an employee, while in *Shelley v. Commissioner*, 68 T.C.M. (CCH) 584 (1994), it found a minister of the International Pentecostal Holiness Church to be self-employed. The court was certainly correct when it noted in *Weber* that in determining whether a minister is

an employee for tax purposes, “there may be differences with respect to ministers in other churches or denominations, and the particular facts and circumstances must be considered in each case.” *Weber*, 103 T.C. at 395 n. 1; *see also* Tech. Adv. Mem. 9825002 (June 19, 1998) (“[d]ifferences in church structure” account for the contrary results in *Weber* and in *Alford v. United States*, 116 F.3d 334 (8th Cir. 1997) (finding minister was an independent contractor)).

In light of longstanding constitutional principles barring the government from favoring one form of church polity over another,⁶ it is surely permissible for Congress to decide not to base eligibility for a tax benefit on such a distinction. Examining the particular facts and circumstances in each case is an intrusive inquiry, causing one appellate court to remark that “we are somewhat concerned about venturing into religious areas in adjudicating cases such as this one, and interpreting what really are church matters as secular matters for purposes of determining a minister’s tax status.” *Alford*, 116 F.3d at 339. Congress was certainly free to accommodate the different polities among churches by treating all ministers, whether employees or self-employed, similarly.

⁶ *See Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Watson v. Jones*, 80 U.S. 679 (1871); *Lutheran Soc. Serv. v. United States*, 758 F.2d 1283 (8th Cir. 1985).

Congress has made similar accommodations in other Code sections by treating ministers uniformly, regardless of whether they are employees or self-employed, sometimes treating all ministers as employees and sometimes treating them as self-employed. For example, section 414(e)(3)(B)(i) provides that for purposes of Code sections regarding qualified retirement plans, the term “employee” includes self-employed ministers. I.R.C. § 414(e)(3)(B)(i). In contrast, for purposes of taxes under the Self Employment Contributions Act (Code sections 1401-03), all ministers are treated as self-employed. *See Social Security and Other Information for Members of the Clergy and Religious Workers: For Use in Preparing 2001 Returns*, IRS Pub. 517. By eliminating the arbitrary distinction between employees and self-employed ministers for purposes of the housing exclusion, Congress plainly responded to a “concrete need” for accommodation. *Tex. Monthly*, 489 U.S. at 18 (plurality opinion per Brennan, J.).

b. on the employer’s premises

Section 119 applies only to housing provided on the employer’s premises, meaning “at a place where the employee performs a significant portion of his [or her] duties or on the premises where the employer conducts a significant portion of [its] business.” *Comm’r v. Anderson*, 371 F.2d 59, 67 (6th Cir. 1966), *cert. denied*, 387 U.S. 906 (1967). Congress relaxed this requirement to accommodate employees of educational institutions, allowing housing exclusions for lodging

provided “on, or in the proximity of, a campus of the educational institution. . . .” I.R.C. § 119(d)(3)(A). Presumably, this is on the theory that colleges and similar institutions have a legitimate pedagogical interest in encouraging faculty to live “in the proximity of” the campus so as to be more easily available to students.

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

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

To be sure, not all ministers’ homes are functional extensions of a church. But this is exactly the situation that Congress was entitled to take into account in enacting section 107(2). That section avoids the need for the IRS to investigate

what the “duties” of a minister are and where they are or should be performed. *Cf. United States v. Morelan*, 356 F.2d 199 (8th Cir. 1966) (determining whether restaurant allowance for on-duty state highway patrol was on the “business premise of the employer”). For Congress to insist on case-by-case evidence of such issues would entail monitoring and surveillance of church activities—precisely the type of governmental entanglement that the third prong of the *Lemon* test is designed to prevent—and would have dramatically unequal effects on different religions. As Justice Brennan explained in *Amos*, 483 U.S. at 343 (Brennan, J., concurring), Congress was constitutionally entitled to extend the benefit broadly to all ministers rather than to insist on an intrusive case-by-case test.

c. in-kind only

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

From the church’s point of view, there is no difference in function between a church-owned parsonage and a home owned or rented by the minister. Either way, the dwelling is usually used for church-related functions as well as for the

minister's personal dwelling. The principal difference is that a church-owned parsonage is less adaptable to the needs of today's diverse ministers. It may have once been the case that the typical minister was likely to be of a certain age, station, and family composition. No longer. Today, ministers have a wide variety of housing needs—from single-person homes to large families. For Congress to limit the housing exclusion benefit to church-owned housing would induce churches either to buy and sell property with every change of clergy or to force upon their ministers a one-size-fits-all form of housing. Congress was entitled to make the judgment that no tax policy justifies so pointless an imposition.

So, too, transportation patterns no longer require ministers to live adjacent to the church building to have their homes used for church purposes by congregants who themselves live over a large geographical area. In some cases, the locus of the church community may have moved away from the church, and the minister's residence might be more central to that locus than the actual church building. Section 107(2) accommodates these realities whereas section 119 does not.

More important, imposing an in-kind-only limitation on churches would have the effect of according different treatment to different churches. Some churches have a tradition of owning and providing parsonages or rectories at or near the church building. Anglican canon law used to require it. *See Town of Pawlet v. Clark*, 13 U.S. 292, 330 (1815). Typically, these are the older, wealthier,

and more established churches. Other churches have not taken that course, and it would be difficult today to do so. Moreover, while some churches have the resources to purchase or maintain housing for their ministers, other churches would find this requirement financially impossible. Many churches in this country—storefront churches, for example—do not even own their own houses of worship. It is certainly unfair—and might even be unconstitutional—to treat these churches differently. The more equal treatment of different churches is surely a legitimate purpose and effect under the Establishment Clause.

d. for the benefit of the employer

Finally, under section 119, the housing exclusion is available only if it is provided for the convenience of the employer. I.R.C. § 119(e). That requirement is eliminated under section 107 for ministers and under section 119(d) for employees of educational institutions. I.R.C. §§ 107, 119(d). If we are correct that it was constitutional for Congress to eliminate the requirement that the taxpayer live in employer-owned housing on the business premises, then it is not clear what further relevance this requirement may have. Congress could have eliminated it for that reason alone.

In any event, Congress was surely entitled to remove this intrusive and entangling inquiry, with its potential for discrimination between religious traditions. The vast majority of ministers will satisfy this requirement because of

the usual practice of using the minister's home for church functions. To require proof on a case-by-case basis would require the IRS to second-guess ecclesiastical judgments regarding the scope of the mission of the religious organization and the mission's relation to minister housing.⁷ As Justice Brennan has explained, those are not appropriate inquiries for a government agency:

Determining that certain activities are in furtherance of an organization's religious mission. . . [is] a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.

Amos, 483 U.S. at 342 (Brennan, J., concurring).

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

⁷ Indeed, it is not always clear who the "employer" is whose convenience must be served. In *Weber*, for example, while the Tax Court found that the taxpayer was a minister, it avoided the more difficult question of exactly who his employer was: "[w]e need not decide which part of the United Methodist Church is the employer." 103 T.C. at 394. Given the structure of The United Methodist Church, a minister's employer could have been viewed as the entire denomination, an Annual Conference, some intermediate level or organization of the Church, or the local church.

serious source of inequality among churches, and reduced the level of entanglement between religious and governmental authorities.

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

Nor can section 107(2) be faulted on “excessive entanglement” grounds. Indeed, either position—to exclude housing allowances as income or to include them—would entail a certain degree of entanglement. *See Walz v. Tax Comm’n*, 397 U.S. 664, 674-75 (1970). Congress correctly judged that there would be less entanglement with section 107(2) than without it.

“Not all entanglements . . . have the effect of advancing or inhibiting religion[,]” and the Supreme Court has always tolerated some level of interaction between church and state. *Agostini v. Felton*, 521 U.S. 203, 232-33 (1997) The administration of section 107(2) does not involve the type of “comprehensive, discriminating, and continuing state surveillance” of religion that constitutes excessive entanglement and runs afoul of the Establishment Clause. *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). The three factors that must be considered in evaluating administrative entanglement are (1) the character and purpose of the religious institution affected by the government action; (2) the nature of government-mandated activity; and (3) the resulting relationship between the

government and the religious institution. *See Vernon v. City of Los Angeles*, 27 F.3d 1385, 1399 (9th Cir. 1994) (citing *Lemon*, 403 U.S. at 615).

Section 107(2) does not implicate any of these concerns. The parties to an administrative conflict under section 107(2) will almost invariably be only the government and an individual minister. Administration of section 107(2) is straightforward and requires no intrusive examination of religious practices or beliefs. *See Tex. Monthly*, 489 U.S. at 21 (plurality opinion per Brennan, J.) (“[T]he ‘routine and factual inquiries’ commonly associated with the enforcement of tax laws ‘bear no resemblance to the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement with religion.’”) (citation omitted). To ascertain what part of the minister’s income constitutes a housing allowance exempt under section 107(2), one must review only the minister’s employment contract or church resolution approving the allowance. This is no more intrusive than determining whether exempt property is being used for religious worship—a routine task that unquestionably survives the entanglement bar. *See Walz*, 397 U.S. at 676-80.

In this respect, section 107 is easily distinguishable from the sales tax exemption struck down in *Texas Monthly*. There, the state was required to inspect publications to determine whether their messages were consistent with “the teaching of the faith”—a process that necessarily led to “government embroilment

in controversies over religious doctrine.” *Tex. Monthly*, 489 U.S. at 20. This constitutes entanglement of the worst sort.

Indeed, for reasons elaborated in the previous section, section 107 reduces the degree of entanglement that would be entailed if churches and their ministers were required to rely on section 119 in order to exclude housing benefits from taxable compensation.

II. Reliance Interests Militate Against A Change In The Law.

Even if the above considerations were insufficient to support the constitutionality of section 107(2), peculiarly strong reliance interests would render a change in the law on this point inappropriate and unjust.

For more than 200 years, tax exemptions and exclusions for religious activity have been common in our law, and their constitutional status secure. The few cases challenging them were dismissed for want of a substantial federal question. *See* Boris Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285 & n.6 (1969). “If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.” *Walz v. Tax Comm’n*, 397 U.S. at 678 (quoting *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (Holmes, J.)); *see also* *Walz*, 397 U.S. at 681 (Brennan, J., concurring) (“The existence from the beginning of the Nation’s life of a practice, such as tax exemptions for religious organizations, is not conclusive of

its constitutionality. But such practice is a fact of considerable import in the interpretation of abstract constitutional language.”).

When asked to reconsider an established constitutional principle, a court is expected to consider “whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling.” *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (joint opinion). In this context—far more than in *Texas Monthly*—the reliance interests are particularly strong. For almost 50 years, the churches of America and their ministers have been assured that they could receive the benefit of the housing-allowance exclusion without constructing and maintaining church-owned parsonages on the premises of their place of worship. If section 107(2) is held unconstitutional, churches that acted in reliance on this statute—and on the century and a half of constitutional jurisprudence that supported it—would be trapped. In many cases, because of the scarcity of land, it is no longer possible to construct an on-premises parsonage. In other cases, it would be prohibitively expensive.

Moreover, most ministers have arranged their affairs (purchasing property, establishing and funding pensions) in accordance with the tax rules established by Congress. They will find their circumstances severely straitened, and their hopes for a tolerable retirement in jeopardy. Indeed, the practical consequences are particularly severe as they affect retirement. As an indirect result of section

107(2), a portion of retirement benefits paid to retired ministers may be excluded from the ministers' gross income. Rev. Rul. 75-22, 1975-1 C.B. 49 (1975). If section 107(2) were held unconstitutional, retired ministers could find their retirement benefits severely reduced, and active ministers see their plans for retirement dashed. Older ministers, who have contributed to their retirement plans throughout their ministerial careers in order to provide a certain level of after-tax income during retirement, may be unable to contribute enough over their remaining working years to make up for the shortfall.

These consequences, which would be felt by institutions and individuals of limited resources, and who have dedicated themselves to a higher calling, are gravely unjust. The benefits to other taxpayers of invalidating section 107(2), by contrast, would be minimal. In the words of the Court in *Casey*, 505 U.S. at 856, the "Constitution serves human values, and while the effect of reliance on [section 107] cannot be exactly measured, neither can the certain cost of overruling [it] for people who have ordered their thinking and living around [it] be dismissed."

CONCLUSION

For the above reasons, the Church Alliance respectfully submits that if this Court finds it necessary to consider the constitutionality of section 107(2), it should conclude that section 107(2) is constitutional.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, under Fed. R. App. P. 29(d) and Ninth Circuit Rule 32-1, that the attached *amicus curiae* brief is proportionally spaced, has a typeface of 14 points or more, and contains fewer than 7,000 words as determined by the word-count feature of Word 2000 for Windows.

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