

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**

---

**AMICI CURIAE SUPPLEMENTAL BRIEF**

---

**FRANK SOMMERVILLE  
HAMMAR & SOMMERVILLE  
1600 E. Pioneer Parkway  
Suite 520  
Arlington, Texas 76010  
(817) 795-5046  
(866) 391-7771 (fax)**

*Attorneys for National Association of Church Business Administration, et al  
in support of the affirming of the  
decision of the United States Tax Court*

## TABLE OF CONTENTS

<b>Rule 26.1 STATEMENT</b> .....	2
<b>STATEMENT OF JURISDICTION</b> .....	2
<b>SUMMARY OF ARGUMENT</b> .....	3
<b>ARGUMENT</b> .....	5
I.    IN THE MATTER BEFORE THIS COURT, THE COURT WOULD EXCEED ITS AUTHORITY IF IT CONSIDERED THE CONSTITUTIONALITY OF INTERNAL REVENUE CODE SECTION 107(2) .....	5
A.    The Issue Before The Court Is Very Narrow. ....	5
B.    Courts May Presume Constitutionality Of Statutes .....	6
C.    Courts Should Avoid Asserting Jurisdiction When The Parties Do Not Contest The Issue .....	7
D.    Raising The Constitutional Issue Gives Rise To Serious Public Policy Considerations .....	7
E.    The Cited Authority Does Not Support Expanding Jurisdiction To Include Non-Contested Issues .....	9
F.    Other Courts Have Not Stretched Jurisdiction To Reach The Constitutionality Of Internal Revenue Code Section 107 ...	11
II.   ASSUMING, <i>ARGUENDO</i> , THAT THIS COURT HAS THE AUTHORITY TO CONSIDER THE CONSTITUTIONALITY OF INTERNAL REVENUE CODE SECTION 107(2), IT SHOULD NOT EXERCISE THAT AUTHORITY .....	12
A.    This Court Should Not Analyze Internal Revenue Code Section 107(2) Because The Court Would Only Be Considering One Provision Which Is A Part Of The Overall Tax Plan For Employer Assisted Housing .....	12
B.    Facts Supporting The Free Exercise And Establishment Clauses Need Development .....	13
C.    This Court Should Not Consider The Constitutionality Of Internal Revenue Code Section 107(2) Because Of Public Policy Considerations .....	14

**III. INTERNAL REVENUE CODE SECTION 107(2) IS CONSTITUTIONALLY VALID** ..... 16

A. Employer Convenience Housing Has Always Been Tax-Favored ..... 16

B. Internal Revenue Code Section 107 Built A Wall Of Separation Between Religion And The State ..... 17

C. Internal Revenue Code Section 107(2) Enhanced Religious Accommodation ..... 19

D. *Texas Monthly* Supports Constitutionality Of I.R.C. §107(2) 21

E. Internal Revenue Code Section 107(2) Exceeds The Standards Announced In *Walz* ..... 23

**CONCLUSION** ..... 24

## TABLE OF AUTHORITIES

### Cases:

<i>Allegheny v. American Civil Liberties Union</i> , 492 U.S. 573 (1989) . . . . .	23
<i>Bowen v. Kendrick</i> , 487 U.S. 589, 617 (1988) . . . . .	6
<i>Ciraolo v. Madigan</i> , 443 F.2d 314, 321 (9 <sup>th</sup> Cir. 1971) . . . . .	6
<i>Conning v. Busey</i> , 127 F.Supp. 958 (E.D. Oh. 1954) . . . . .	19
<i>Dickerson v. United States</i> , 530 U.S. 428 (2000) . . . . .	9
<i>Flast v. Cohen</i> , 392 U.S. 83, 101 (1968) . . . . .	14
<i>Hittleman v. Commissioner</i> , No. 90-70582, 1991 U.S. App. LEXIS 24508 (9 <sup>th</sup> Cir. 1991) . . . . .	11
<i>Hormel v. Helvering</i> , 312 U.S. 552, 556 (1941) . . . . .	8, 14
<i>Kirk v. Commissioner</i> , 425 F.2d 492, 494 (D.C. Cir. 1970) . . . . .	11
<i>Jones v. United States</i> , 60 Ct. Cl. 552 (1925) . . . . .	18
<i>Lake County v. Rollins</i> , 130 U.S. 662 (1889) . . . . .	12
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971) . . . . .	13, 22
<i>Liverpool, New York and Philadelphia Steamship Co., v. Commissioners of Emigration</i> , 113 U.S. 33, 39 (1885) . . . . .	7
<i>Lynch v. Donnelly</i> , 465 U.S. 668, 691 (1984) . . . . .	22
<i>Lyng v. Northwest Indian Cemetery Protective Association</i> , 485 U.S. 439 (1988) . . . . .	9, 10
<i>MacColl v. United States</i> , 91 F. Supp. 721 (E.D. Ill. 1950) . . . . .	19
<i>Marsh v. Chambers</i> , 463 U.S. 783 (1983) . . . . .	23

<i>Page v. Commissioner</i> , 58 F.3d 1342, 1349 (8 <sup>th</sup> Cir. 1995) .....	11
<i>Rosenberger v. Rector &amp; Visitors of the University of Virginia</i> , 515 U.S. 819, 861 (1995) .....	11
<i>Tennant v. Smith</i> , H.L. 1892 Appeals Cases, 150 .....	17
<i>Texas Monthly, Inc. v. Bullock</i> , 489 U.S. 1, 10 (1989) .....	13, 21, 22, 23
<i>United States National Bank v. Independent Insurance Agents</i> , 508 U.S. 439 (1993) .....	9, 10
<i>United States v. Dickerson</i> , 166 F.3d 667, 680 (4 <sup>th</sup> Cir. 1999), <i>rev'd</i> , 530 U.S. 428 (2000) .....	9
<i>United States v. Harris</i> , 185 F.3d 999, 1003-04 (9 <sup>th</sup> Cir. 1999), <i>cert. denied</i> , 528 U.S. 1055 (1999) .....	6
<i>Walz v. Tax Commission</i> , 397 U.S. 664 (1970) .....	23
<i>Warren v. Commissioner</i> , 114 T.C. 343, 344 (2000) .....	13
<i>Welsh v. United States</i> , 398 U.S. 333, 340 (1970) .....	13, 24
<i>Williamson v. Commissioner</i> , 224 F.2d 377 (8 <sup>th</sup> Cir. 1955) .....	19

**Statutes:**

I.R.C. §22(b)(6) .....	18, 19
I.R.C. §107 .....	11, 14, 15, 17, 20, 22
I.R.C. §107(1) .....	12, 15, 18, 20
I.R.C. §107(2) .....	5, 6, 7, 9, 10, 11, 12, 14, 16, 19, 20, 21, 22, 23, 24
I.R.C. §119 .....	12, 20
I.R.C. §134 .....	12, 21

I.R.C. §265(a) .....	12
I.R.C. §911(a)(2) .....	12
Section 213(b)(11) of the Revenue Act of 1921, Pub. L. No. 67-98, ch. 136, 213, 42 Stat. 227, 239 (1921) .....	18
<b>Miscellaneous:</b>	
<i>General Explanation of the Tax Reform Act of 1986</i> .....	12
H.R. Rep. No. 1337, 83d Cong., 2d Sess., 18 (1954) .....	20
O.D. 11, 1 C.B. 66 (1919) .....	16
O.D. 265, 1 C.B. 71 (1919) .....	16
O.D. 514, 2 C.B. 90 (1920) .....	17
O.D. 814, 4 C.B. 84 (1921) .....	16
O.D. 914, 4 C.B. 85(1921) .....	16
O.D. 915, 4 C.B. 85 (1921) .....	17
Rev. Rul. 71-280, 1971-2 C.B. 92 .....	5, 7
S.Rep. No. 1622, 83d Cong., 2d Sess., 19 (1954) .....	20
T.D. 2992, 2 C.B. 76 (1920) .....	17
U.S. Const. Art. III, §2, cl. 1 .....	7

**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**

---

**IDENTITY OF AMICUS CURIAE**

---

This Brief is filed on behalf of the following organizations:

National Association of Church Business Administration  
100 North Central Expressway, Suite 914  
Richardson, TX 75080-5326

This is the largest national professional organization representing the interests of church business administrators. This nonprofit corporation's members come from over one thousand churches and are charged with the business administration of each church. The members represent virtually every major faith in America, including without limitation, United Methodist Church, Presbyterian Church (USA), The Episcopal Church in America, the Assemblies of God, Southern Baptist Churches,

The Disciples of Christ Church, certain Orders and dioceses of the Roman Catholic Church, Churches of Christ, The Congregational Church in America, the Brethren Church, the Evangelical Covenant Church, the Wesleyan Church, the American Baptist Churches, and others. The outcome of this proceeding will affect how each will perform his or her duties. Virtually every church will be affected by this court's decision. Affirming the Tax Court decision will greatly simplify their business administration.

Presbytery of New Covenant of the Presbyterian Church (USA)  
1110 Lovett Blvd.  
Houston, TX 77006

This is a local unit of the Presbyterian Church (USA). It is an association of Presbyterian churches in the Houston area. The member churches will be affected by this court's decision because many of its churches provide cash housing allowances to their ministers. Due to the housing market in Houston, it will cost the churches more to attract ministers if the Tax Court's decision is not affirmed.

Eagle Mountain International Church  
14355 Morris-Dido Road  
Newark, Texas 76071

This is a large, local independent church in the Dallas-Fort Worth area. It teaches that debt is to be avoided as evil. Its ministers are encouraged to pay cash for everything, including their personal residence. The ministers trained and ordained by this church will be impacted by this decision.

### **Rule 26.1 STATEMENT**

None of the Amicus Curiae are publicly traded, nor do they own 10% or more of any publicly traded company.

### **STATEMENT OF JURISDICTION**

The Amicus Curiae agree with the appellant's statement of jurisdiction.

## **SUMMARY OF ARGUMENT**

In the current matter, this court would exceed its authority if it considered the constitutionality of Internal Revenue Code §107(2) because the court lacks jurisdiction. This court faces a narrow issue. The parties only disagree about whether a fair rental value limitation should apply to the parsonage allowance exclusion. Any analysis beyond that requested by the parties would disregard fundamental principles of our legal system and the presumptions of fairness and constitutionality. Furthermore, absent extraordinary circumstances, the court may not expand its jurisdiction. This court would create bad public policy by raising constitutional validity questions.

Assuming, arguendo, that this court has the authority to consider the constitutionality of Internal Revenue Code §107(2), it should not exercise that authority because any analysis at this stage would be incomplete. This court is only analyzing one provision of an entire tax plan for employer-assisted housing while several other portions of the Internal Revenue Code also address the issue. The parties should develop facts to assist the court with its analysis of employer-assisted housing. The parties should further develop facts related to the constitutional rights of affected taxpayers. Again, the court would create bad public policy if it analyzed issues where no facts (pro or con) exist in the trial transcript.

Regardless of whether this court can, or should, consider the constitutionality of Internal Revenue Code §107(2), the statute is constitutionally valid. History shows that employer convenience housing has always been tax-favored. Internal Revenue

Code §107(2) results from factual circumstances that are unique to ministers. It was enacted to help build a wall of separation between religion and the state, and enhance the accommodation of religion. The Supreme Court's opinions support these conclusions. Therefore, the court should affirm the constitutionality of Internal Revenue Code §107(2).

## ARGUMENT

### **I. IN THE MATTER BEFORE THIS COURT, THE COURT WOULD EXCEED ITS AUTHORITY IF IT CONSIDERED THE CONSTITUTIONALITY OF INTERNAL REVENUE CODE SECTION 107(2).**

In the current matter, this court lacks the jurisdiction to consider issues not raised by the parties, and not contested by the parties. Therefore, this court exceeds its authority if it considers the constitutionality of Internal Revenue Code (“I.R.C.”) §107(2).<sup>1</sup>

#### **A. The Issue Before The Court Is Very Narrow.**

The lower court in this case decided whether I.R.C. §107(2) limited the exclusion from income tax for parsonage allowances to the fair rental value of Reverend Warren’s home. The Internal Revenue Service (“IRS”) imposed a fair rental value limit in 1971, some seventeen years after enactment of I.R.C. §107(2). Rev. Rul. 71-280, 1971-2 C.B. 92. After a 14-3 defeat in the U.S. Tax Court, the Commissioner of Internal Revenue appealed to this court, looking for deference to his 1971 revenue ruling. The lower court interpreted I.R.C. §107(2) based on the legislative history and did not address the constitutionality of the statute.

In sum, the issue appealed to this court is very narrow. That is, whether the I.R.C. §107(2) supports the Commissioner’s position expressed in his revenue ruling.

---

1 All references to the I.R.C. shall be to the Internal Revenue Code of 1986, as currently amended, unless otherwise noted.

By issuing the briefing order dated March 5, 2002, this court implies that it must determine whether I.R.C. §107(2) is constitutional before examining the revenue ruling. While at first blush, this concept seems fundamental, the court's order actually expands the case to include issues not in dispute. Both parties agree that I.R.C. §107(2) is constitutional. By expanding the inquiry into uncontested issues, the court dangerously stretches its jurisdiction beyond what is necessary to decide the parties' dispute. The doctrine of judicial economy requires the court to decide this case on its narrowest possible grounds. Any reference to the U.S. Constitution is unnecessary dicta to the actual dispute of the parties. Based on the authorities cited below, the court's jurisdiction should not include the constitutionality issue.

B. Courts May Presume Constitutionality Of Statutes.

A traditional presumption favors the constitutionality of statutes enacted by Congress. *E.g., Bowen v. Kendrick*, 487 U.S. 589, 617 (1988) (holding no Establishment Clause violation where a statute provided grants to religious organizations); *United States v. Harris*, 185 F.3d 999, 1003-04 (9<sup>th</sup> Cir. 1999), *cert. denied*, 528 U.S. 1055 (1999). Since this presumption exists and neither party to the case at hand wants a decision on this issue, this court exceeds its authority if it analyzes the constitutionality of I.R.C. §107(2). *See also Ciruolo v. Madigan*, 443 F.2d 314, 321 (9<sup>th</sup> Cir. 1971) (a rule prevents consideration of unnecessary constitutional questions).

C. Courts Should Avoid Asserting Jurisdiction When The Parties Do Not Contest The Issue.

The United States Constitution requires that cases and controversies exist to confer jurisdiction on a federal court of appeals. U.S. Const. Art. III, §2, cl. 1. A court “has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.” *Liverpool, New York and Philadelphia Steamship Co., v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885). In the present case, the legal rights of the litigants do not require a decision on the constitutionality of I.R.C. §107(2). The issue requiring resolution is whether Revenue Ruling 71-280 is within the scope of §107(2). The parties do not dispute how this provision fits in the tax code. They do not dispute power of the Commissioner to issue revenue rulings. They also do not dispute the constitutionality of I.R.C. §107(2). Thus, this court should avoid deciding an issue when neither of the litigants has asked this court to do so.

D. Raising The Constitutional Issue Gives Rise To Serious Public Policy Considerations.

Allowing a court to decide questions not asked by the parties represents very dubious public policy. Under bedrock legal principles, an impartial court decides the issues presented by the parties. If the court can reach out and decide an issue not presented by the parties, our adversarial legal system loses. In fact, such actions undermine the fairness that parties seek from an impartial tribunal. With this breach,

our courts transform from impartial tribunals into unwanted adversaries of justice.

The courts rely heavily on the lawyers to develop, frame and present the issues in dispute. In the name of justice, courts are free to initiate arguments that the parties omit, but only arguments related to the issues presented. The courts should not add issues, except in extraordinary circumstances. *Hormel v. Helvering*, 312 U.S. 552, 556 (1941) states: “Ordinarily an appellate court does not give consideration to issues not raised below.” The U.S. Supreme Court goes on to declare that this rule can be modified to avoid an injustice. *Id.* at 557. As discussed in Issues I and II, it would be an injustice not to follow that rule in this case.

The parties could raise the constitutional issue if they wanted the court to decide it. This fundamental rule guarantees that the parties have a personal stake in the outcome of the controversy. Without this rule, the courts may decide difficult constitutional questions without the impassioned presentation of both parties and without facts to support the arguments.

This court should not appoint a disinterested advocate to create a “case or controversy.” It does not matter what position the amicus takes, the amicus appointed by this court cannot and will not have a personal stake in the outcome. Without a constitutional “case or controversy,” the court’s opinion remains merely an advisory opinion. An advisory opinion would neither be a binding precedent on the parties, subject to the doctrine of stare decisis, nor decide the constitutionality of the statute.

E. The Cited Authority Does Not Support Expanding Jurisdiction To Include Non-Contested Issues.

This court has cited three cases for the parties to consider and address. *Dickerson v. United States*, 530 U.S. 428 (2000) (“*Dickerson*”); *United States National Bank v. Independent Insurance Agents*, 508 U.S. 439 (1993) (“*USNB*”); *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988) (“*Lyng*”). A detailed analysis shows that none of the cases authorizes consideration of the constitutionality issue.

In *Dickerson*, the court decided whether a Supreme Court precedent or a federal statute applied to the admissibility of testimony. *Dickerson*, 530 U.S. at 432. The Supreme Court held that Congress cannot enact statutes to override Constitutional rights as determined by the Supreme Court. *Id.* In the present case, when Congress enacted I.R.C. §107(2), it did not attempt to overrule any Supreme Court opinions. In *Dickerson*, the statute evaded judicial review for thirty years because the Justice Department refused to cite the statute to the courts. The statute was clearly applicable to *Dickerson* because, if applicable and valid, the evidence would be admitted. The court of appeals found the statute applicable and ruled on its validity. *United States v. Dickerson*, 166 F.3d 667, 680 (4<sup>th</sup> Cir. 1999), *rev'd*, 530 U.S. 428 (2000). Unlike the present case, the constitutionality of the statute in *Dickerson* was “squarely” before the court. *Dickerson*, 166 F.3d at 672. In the present case, the parties are not avoiding a clearly relevant statute. Instead, the parties simply do not dispute the constitutionality of §107(2). As a result, the

constitutionality of I.R.C. §107(2) is not squarely before the court.

In *USNB*, the Supreme Court decided the validity of a decision of the Comptroller of the Currency where the Comptroller relied upon a statute that may or may not have been repealed. *USNB*, 508 U.S. at 441. There, one of the parties specifically urged the lower court to decide the statutory validity issue in a supplemental brief. *Id.* at 444. As such, the parties conferred jurisdiction over the constitutionality to the court. Therefore, *USNB* is substantially different from this case. Here, no party asked this court to adjudicate the validity of I.R.C. §107(2). The parties have not conferred jurisdiction on this court to consider the constitutionality of I.R.C. §107(2). No constitutional case or controversy exists.

In *Lyng*, the Supreme Court analyzed the validity of a statute under the Free Exercise Clause, but the plaintiffs had actually claimed constitutional violations in their pleadings. *Lyng*, 485 U.S. at 443-4. Besides, the relief sought required invoking the constitution. Some American Indians had sued over the government's land use, and the lower court resolved the matter without addressing the constitutional issue in its opinion. *Id.* As a result, the Supreme Court might appear to have taken up the constitutional issue on its own, but it actually had been raised already. In our case, no possible interpretation of the parties' pleadings can imply a controversy over the constitutionality of I.R.C. §107(2). No constitutional case or controversy over its validity exists.

F. Other Courts Have Not Stretched Jurisdiction To Reach The Constitutionality Of Internal Revenue Code Section 107.

Several courts have addressed or acknowledged the existence of the parsonage allowance exclusion under I.R.C. §107 without questioning its constitutionality. *E.g. Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J. concurring); *Hittleman v. Commissioner*, No. 90-70582, 1991 U.S. App. LEXIS 24508 (9<sup>th</sup> Cir. 1991); *Kirk v. Commissioner*, 425 F.2d 492, 494 (D.C. Cir. 1970); *Page v. Commissioner*, 58 F.3d 1342, 1349 (8<sup>th</sup> Cir. 1995). This omission is telling.

In general, no controversy exists over the constitutionality of I.R.C. §107(2). Additionally, here neither party requires, or even wants, this court to adjudicate this issue. Consequently, the parties have not conferred jurisdiction on the court. This court should not issue a decision on the constitutionality of I.R.C. §107(2) because it would be an injustice to all the parties involved.

**II. ASSUMING, *ARGUENDO*, THAT THIS COURT HAS THE AUTHORITY TO CONSIDER THE CONSTITUTIONALITY OF INTERNAL REVENUE CODE SECTION 107(2), IT SHOULD NOT EXERCISE THAT AUTHORITY.**

If this court finds it has the authority to consider the constitutionality of I.R.C. §107(2), many reasons support the court declining that authority.

A. This Court Should Not Analyze Internal Revenue Code Section 107(2) Because The Court Would Only Be Considering One Provision Which Is A Part Of The Overall Tax Plan For Employer Assisted Housing.

A settled rule of statutory interpretation holds that if a provision is part of a single instrument, the court must construe that provision consistently with the whole instrument. *Lake County v. Rollins*, 130 U.S. 662 (1889). If the court seeks to interpret I.R.C. §107(2), it must interpret the statute in the context of Congress' overall tax plan for employer assisted housing.

I.R.C. §107(2) is one statutory part of a larger framework of exclusions for employees who are housed for the convenience of their employers. *See* Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1986*, (JCS-10-87) May 4, 1987, at {54} (in amending I.R.C. §265(a) “Congress concluded that it was appropriate to continue the long-standing tax treatment...claimed by ministers and military personnel who receive tax-free housing allowances”). Therefore, for a proper analysis, this court should examine all other statutory provisions addressing employer assisted housing. At a minimum, this court should analyze I.R.C. §107(2) in conjunction with I.R.C. §§ 107(1), 119, 134 and 911(a)(2); which are clearly not before this court. Since the court bases its decisions on facts presented, and the court

should analyze the aforementioned provisions collectively, the parties should at least have the opportunity to present facts about each relevant I.R.C. section's application. As a result, this court should either decline consideration of the constitutionality issue or remand the case back for the proper factual development.

B. Facts Supporting The Free Exercise And Establishment Clauses Need Development.

When evaluating a statute with religious impact, many times the courts balance the Religion Clauses of the First Amendment against each other. The seemingly contradictory clauses work together to assure government neutrality regarding religious issues. The Free Exercise Clause requires that a court analyze a tax exclusion to determine whether the tax burdens a taxpayer's freedom to exercise religious rights. *Welsh v. United States*, 398 U.S. 333, 340 (1970); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 10 (1989); *see also Lemon v. Kurtzman*, 403 U.S. 602 (1971) (providing the three-prong test for the validity of statutes under the Religion Clauses). These opinions hold that the parties must present evidence about a tax provision's impact, if any, to the free exercise of their religion. *Id.*

Additionally, the Establishment Clause requires that a court analyze a tax exclusion to determine whether any endorsement of religion has occurred. *Id.* The parties must present evidence on whether such a tax plan endorses religion.

The Tax Court heard this case based on stipulated facts. *Warren v. Commissioner*, 114 T.C. 343, 344 (2000). The parties presented no facts addressing the Free Exercise and Establishment Clauses. Thus, no facts relevant to these issues

exist in the trial court record. Without the relevant facts, this court cannot provide any meaningful evaluation of the constitutionality of I.R.C. §107(2). As stated in *Hormel v. Helvering*, 312 U.S. 552, 556 (1941),

“For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential that litigants may not be surprised on appeal by final decision there of issues upon which they had no opportunity to introduce evidence.”

This court should remand this matter for further factual development in lieu of attempting to render a decision in a factual vacuum.

C. This Court Should Not Consider The Constitutionality Of Internal Revenue Code Section §107(2) Because Of Public Policy Considerations.

The court’s decision in this case will effect hundreds of thousands of citizens. Furthermore, no other courts addressing I.R.C. §107 have elected to conduct an analysis. No pressing need exists to address it now. No one before the court has injuries caused by I.R.C. §107(2). No one is seeking relief that can only be granted by reference to the U.S. Constitution. Besides, if someone believes that I.R.C. §107(2) violates the U.S. Constitution, they may press their claim before both the courts and the Congress. The U.S. Supreme Court has given a blueprint to those who choose to challenge the constitutionality of a taxing statute. *See Flast v. Cohen*, 392 U.S. 83, 101 (1968). All the precedents and the U.S. Constitution require a case or

controversy before the court receives jurisdiction. More than forty-eight years have passed without a single constitutional challenge to I.R.C. §107. No new compelling reasons to rule on the statute's constitutionality are present here.

### **III. INTERNAL REVENUE CODE SECTION 107(2) IS CONSTITUTIONALLY VALID.**

One can best understand the constitutionality of I.R.C. §107(2) when one considers its context and history. I.R.C. §107(2) fits into the tax policy of lightening the tax burden of the recipients of employer-assisted housing. Regardless of the standard applied by the court, I.R.C. §107(2) stands out as constitutionally valid, and under some circumstances, the U. S. Constitution may even require its presence.

#### **A. Employer Convenience Housing Has Always Been Tax-Favored.**

When the 16<sup>th</sup> Amendment to the Constitution authorized an income tax, Congress, the Department of Treasury and the Bureau of Internal Revenue (as the Internal Revenue Service was then called) then determined the definition of taxable income. While highly theoretical in concept, the definition of taxable income has a very practical application: what is included in taxable income? The Bureau of Internal Revenue addressed employer-provided housing and meals very early. O.D. 265, 1 C.B. 71 (1919) (the value of the meals and lodging furnished a seaman was not taxable compensation). Dubbed the convenience of the employer doctrine, the concept looks at employees who had very little say in the place of their residence or where they ate meals. The basic premise: compensation does not include housing an

meals provided for the convenience of the employer.<sup>2</sup> Other governments typically excluded this type of benefit from taxable income. For example, the British income tax utilized this same doctrine. *Tennant v. Smith*, H.L. 1892 Appeals Cases, 150 (a bank teller who was required to live at the bank for security and convenience of the employer was not taxed on the value of the bank's quarters).

The concept covers a large number of employment situations. Seaman, ranchers, innkeepers, ministers,<sup>3</sup> military officers and the President of the United States all benefit from this doctrine. As stated in the prior paragraph, the Bureau of Internal Revenue followed the British version of the convenience of the employer doctrine when confronted with its case of first impression. In 1920, the year after the original pronouncement, the Treasury Department amended its income tax regulations to formalize this doctrine. T.D. 2992, 2 C.B. 76 (1920), *amending* Treas. Reg. 45, Art. 33. Later that same year, the Bureau of Internal Revenue also expanded the concept to include cash payments in lieu of in kind meals. O.D. 514, 2 C.B. 90 (1920) (the value of supper money given employees who worked late was not

---

2 Other convenience of the employer decisions about the same time include: O.D. 11, 1 C.B. 66 (1919)(Red Cross workers excluded "maintenance" paid to the extent spent on actual living expenses); O.D. 814, 4 C.B. 84 (1921)(fishing and canning employees excluded from taxable income employer provided lodging); O.D. 914, 4 C.B. 85(1921)(payments to employees of Indian Service excluded housing from taxable income); O.D. 915, 4 C.B. 85 (1921)(hospital employees quarters and meals excluded from taxable income).

3 This brief intends the term "minister" to include all forms of clergy, priests, rabbis, holy men, and other such terms used by various faiths to denote a religious leader.

compensation).

B. Internal Revenue Code Section 107 Built A Wall Of Separation Between Religion And The State.

The housing rulings discussed above had a great effect on ministers. The convenience of the employer doctrine announced by the Treasury Department in 1920 required inquiries into the duties required of the employee and how the employer-provided housing affected the employee's performance of those duties. As applied to ministers, the 1920 regulation required the Bureau of Internal Revenue to delve deeply into a minister's duties and responsibilities, entangling the Bureau with the inner workings of religion. By deciding the necessity of such housing, the Bureau was forced to judge how churches<sup>4</sup> conducted their religion. Thus, the results could have very easily violated the Free Exercise Clause.

In 1921, Congress prevented such inquiries by enacting the first minister housing exclusion. Section 213(b)(11) of the Revenue Act of 1921, Pub. L. No. 67-98, ch. 136, 213, 42 Stat. 227, 239 (1921). Section 213(b)(11) became the present I.R.C. §107(1), except for one change. The former statute referred to the minister's "dwelling house and appurtenances thereof" instead of his "home." Section 213(b)(11) prevented unconstitutional inquiries into the church's housing arrangement with the ministers, thereby fostering the separation of church and state.

---

4 This brief intends the term "church(es)" to include all forms of religious organizations that fill the same place that "church" does in Christianity. The term includes congregations, synagogues, temples, synods, denominations and conventions.

The Court of Claims expanded the convenience of the employer doctrine by holding that a cash housing allowance paid to military officers also qualified under the doctrine. *Jones v. United States*, 60 Ct. Cl. 552 (1925). In describing this concept, the Court of Claims held that the furnishing of the housing was an “inseparable incident of the office itself.” *Jones* at 574. This holding is very similar to the minister housing allowance, because the employer provides the housing as an incident to the office of the minister. With this decision, the court expanded the convenience of the employer doctrine to include cash allowances for housing. Section 213(b)(11) of the Revenue Act of 1921 became §22(b)(6) in the Internal Revenue Code of 1939. Eventually, ministers successfully claimed they were entitled to the same tax-free cash housing allowance that was available to the military and to secular employees under the convenience of the employer doctrine. *MacColl v. United States*, 91 F. Supp. 721 (E.D. Ill. 1950) (minister’s cash housing allowance excluded from taxable income under §22(b)(6) of Internal Revenue Code of 1939); *Conning v. Busey*, 127 F.Supp. 958 (E.D. Oh. 1954) (same result). In *Williamson v. Commissioner*, 224 F.2d 377 (8<sup>th</sup> Cir. 1955), the appellate court expressly relied on the convenience of the employer doctrine and §22(b)(6) on the Internal Revenue Code of 1939 to allow a minister to exclude from taxable income a cash housing allowance. The Internal Revenue eventually acquiesced to this decision. Rev. Rul. 56-68, 1956-1 C.B. 604. In reality, Congress simply codified what some courts had believed the law to be when it enacted I.R.C. §107(2).

C. Internal Revenue Code Section 107(2) Enhanced Religious Accommodation.

As stated in Section B above, the courts had already expanded the convenience of the employer doctrine to include minister cash housing allowance. The enactment of I.R.C. §107(2) simply codified the existing state of the law.

The convenience of the employer doctrine existed unchanged until 1954. By that time, many disputes had arisen under the common law doctrine.<sup>5</sup> Thus, in the 1954 amendments that became the Internal Revenue Code of 1954, Congress modified the convenience of the employer doctrine by adding I.R.C. §119 and amended I.R.C. §107. The result was that I.R.C. §119 merely added the condition that the employer-provided housing must be on the employer's premises. Such premises were defined as the place where a majority of the employer's activities occurred.

Noticeably, Congress excluded the minister and military housing allowances from the new restricted I.R.C. §119. In fact, Congress removed any doubt that remained about the minister cash housing allowance. Congress simply equalized the tax treatment of all ministers by making their cash housing allowance tax-free like the cash military housing allowance.

Before 1954, if a church owned a home (parsonage, rectory or manse), its

---

5 Congress was determined to end the confusion regarding the tax status of employer provided meals and lodging. H.R. Rep. No. 1337, 83d Cong., 2d Sess., 18 (1954); S.Rep. No. 1622, 83d Cong., 2d Sess., 19 (1954).

ministers paid less tax than those churches that did not own a home. I.R.C. §107(1) had dictated the form of compensation paid ministers and discriminated against churches that could not afford to own housing or that otherwise preferred minister owned housing for reasons of polity.

I.R.C. §107(1) gave incentives for churches to own real estate and exclude those residences from the local property tax rolls. Ministers in churches who did not own a home asked Congress for parity with their fellow ministers who lived in church-owned homes. I.R.C. §107(2) added many ministers' homes to the local property tax rolls.

D. *Texas Monthly*<sup>6</sup> Supports Constitutionality Of I.R.C. §107(2).

As the above discussion demonstrates, ministers, military officers and U.S. citizens working abroad<sup>7</sup> enjoy a tax-free cash allowance for housing.<sup>8</sup> Congress created these tax-free allowances within its discretion and to demonstrate a willingness to accommodate circumstantial differences between the classes of taxpayers who have little choice about their personal living space. Whether the employer provides a cash allowance or a home, each serves the same purpose; that is, often the employer's needs affect the living space needs of its employees. Many times, these classes of employees move frequently, preventing them from settling

---

6 *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 13 (1989).

7 The 1954 amendments to the Internal Revenue Code added U.S. citizens working abroad to the list of employees who could receive tax-free housing.

8 Besides I.R.C. §107(2), cash housing allowances are excluded from taxation by I.R.C. §§134 (military) and 911(a)(2) (U.S. citizens working abroad).

down and hindering long term close friendships. Further, the employers frequently require them to use their homes to conduct employer business. Additionally, the place of service may not be desirable. All these reasons support the constitutionality of I.R.C. §107(2) under the standards established the Supreme Court.

According to the Supreme Court, a court should rule a statute constitutional if it (1) reduces excessive entanglement between government and religion and (2) does not imply government endorsement or disapproval of religion. *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring opinion); *see also Lemon v. Kurtzman, supra*. While the discussion above clearly shows that I.R.C. §107(2) prevents entanglement, I.R.C. §107(2) must also not imply endorsement or disapproval of religion.

*Texas Monthly* implied that singling out religion for an exclusive tax break endorsed religion. *Texas Monthly*, 489 U.S. at 13. Three of the justices in *Texas Monthly* wrote that the state exemption statute at issue in that case was unconstitutional because it focused solely on religion. *Id.*

Given the nature of tax exemptions, the secular aim of a statute determines its constitutionality. *Id.* In this case, the tax exclusion applies regardless of the religion of the beneficiaries. This tax provision is aimed at taxpayers who surrender important personal rights in deference to their employer's needs. Military officers and U.S. citizens working abroad enjoy the same tax break. Since these workers share common characteristics exclusive of religion, government endorsement does not exist.

The minister may use his home for prayer, study, committee meetings, prayer meetings and counseling. In fact, the employer/church may dictate such uses, though the minister may own the home. Without I.R.C. §107, the IRS would review the specific uses of that home. In essence, the IRS then could determine whether the religion actually mandated such practices. This investigation requires the IRS to judge the religious practices of churches much like the State of Texas was required under its state statute in *Texas Monthly*. Just as the State of Texas judging of those facts rendered the state statute unconstitutional, *Texas Monthly* actually mandates that I.R.C. §107(2) exist to prevent such inquiries.

E. Internal Revenue Code Section 107(2) Exceeds The Standards Announced In *Walz*.<sup>9</sup>

The Supreme Court has held that a longstanding practice also demonstrates no government endorsement; i.e., prayer in congress, creche displays, property tax exemptions and legislative chaplains.<sup>10</sup> Since the beginning of the U.S. income tax, the convenience of the employer doctrine, along with the minister housing exclusion, exempts from taxation employee-assisted housing. This long-standing, unchallenged practice supports the constitutionality of I.R.C. §107(2).

If any doubt about the constitutionality remains after the above discussion, a reading of *Walz* will conclusively affirm the constitutionality of I.R.C. §107(2). *Walz*

---

9 *Walz v. Tax Commission*, 397 U.S. 664 (1970).

10 *Marsh v. Chambers*, 463 U.S. 783 (1983)(legislative prayer was permissible); *Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989)(creche was permissible).

established the standards for evaluating all tax exemptions. Since under limited circumstances an exemption could imply endorsement, the court in *Walz* guided the legislative branch in drafting tax exemptions. In *Walz*, the court examined legislative motive and the structural aspects of the tax exemption plan.

This court should conduct two inquiries: (1) what is the purpose and effect of the I.R.C. §107(2) and (2) whether those coming within the exemption are treated equal regardless of religious or non-religious affiliation.<sup>11</sup>

**1. Purpose and effect of Internal Revenue Code Section 107(2).**

The addition of I.R.C. §107(2) equalized the tax burden of all ministers with all other similarly situated employees. As observed *supra* those individuals share many common characteristics.

**2. Equal treatment of similarly situated citizens.**

When citizens give up important personal rights for the sake of employment, Congress may reasonably lighten their tax burdens. I.R.C. §107(2) is an example of such a class of employees who must reside where their employer requires and must frequently use their residence for employer business. Some employees sacrifice amenities that most citizens take for granted, such as long term stability in one locale. In the case of the ministers, they must accept church visitors, conduct prayer and sermon preparation and receive parishioner telephone calls at all hours. These reasons justify the lightened tax burden.

---

11 *Welsh v. United States*, 398 U.S. 333, 356 (1970).

## **CONCLUSION**

The court should not rule on the constitutionality of I.R.C. §107(2) because no case or controversy exists over its constitutional status. Assuming *arguendo* this court decides to review the constitutionality of I.R.C. §107(2), then it does not have the requisite facts to determine its validity. Under these circumstances, the court should remand the case for factual development. Once the parties have fully developed the relevant facts, the court can best decide the constitutionality matter. Whether it occurs now or after remand, the I.R.C. §107(2) meets all applicable constitutional standards.

CERTIFICATE OF COMPLIANCE  
Pursuant to Fed. R. App. 32(a)(7)(C) and Circuit Rule 32-1  
For Case Number 00-71217

I hereby certify that pursuant to Fed. R. App. P. 29(d) and 9<sup>th</sup> Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less. The brief also complies with the size-volume limitation established by separate court order dated March 5, 2002.

Respectfully submitted,

\_\_\_\_\_  
FRANK SOMMERVILLE

HAMMAR & SOMMERVILLE  
1400 Summit Tower  
Eleven Greenway Plaza  
Houston, TX 77046  
(713) 961-9045  
(713) 961-5341

Attorneys for the Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached brief was forwarded by third party common carrier, postage prepaid, on the \_\_\_\_\_ day of May 2002, to all parties, listed below, as required by FRAP 25(b).

Respectfully submitted,

---

FRANK SOMMERVILLE

HAMMAR & SOMMERVILLE  
1400 Summit Tower  
Eleven Greenway Plaza  
Houston, TX 77046  
(713) 961-9045  
(713) 961-5341

Attorneys for the Amici Curiae

Service Recipients:

Erwin Chemerinsky  
University of Southern California  
Law School  
University Park  
Los Angeles, CA 90089-0071

Arthur A. Oshiro  
Saavedra & Zufelt  
One World Trade Center, Suite 2160  
Long Beach, CA 90831-2160

John C. Eastman  
The Claremont Institute Center For  
Constitutional Jurisprudence  
c/o Chapman Univ. School of Law  
One University Drive  
Orange, CA 92866

Andrea R. Tebbets  
DOJT - U.S. Department of Justice  
Tax Division  
Room 7909  
601 D Street, NW  
Washington, D.C. 20004