

No. 00-71217

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD D. and ELIZABETH K. WARREN,

Petitioners-Appellees,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellant.

ON APPEAL FROM THE DECISION
OF THE UNITED STATES TAX COURT

APPELLEES' SUPPLEMENTAL BRIEF

John C. Eastman
THE CLAREMONT INSTITUTE CENTER
FOR CONSTITUTIONAL JURISPRUDENCE
c/o Chapman Univ. School of Law
One University Drive
Orange, California 92866
Tel. No.: (714) 628-2587
Fax No.: (603) 908-7774

Arthur A. Oshiro
SAAVEDRA & ZUFELT
One World Trade Center, Suite 2160
Long Beach, CA 90831-2160
Tel. No.: (562) 436-7097
Fax No.: (562) 437-3089

REQUEST FOR ADDITIONAL ORAL ARGUMENT

Appellees Richard D. and Elizabeth K. Warren request additional oral argument to address the issues discussed in this supplemental brief. The highly unusual order by this Court of March 5, 2002, appointing an amicus curiae and directing the parties to brief issues that were not in controversy between the parties, standing alone, suggests that additional oral argument is appropriate. Moreover, the significance of the third question presented by the Court—the constitutionality of a federal tax exemption that has been largely unchallenged since it appeared in the statute books a half century ago and, indeed, since it was recognized by federal tax authorities shortly after the income tax was first implemented more than 80 years ago, and around which literally hundreds of thousands of churches nationwide have organized the compensation and retirement structure for their ministers—warrants additional argument. As the Court noted during initial oral argument, “the constitution probably warrants more than a 30-second discussion.” If this Court holds that it has jurisdiction to reach the constitutional question at all, additional oral argument on the merits is also warranted now that the parties and the court have had the benefit of full briefing on the subject.

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SUPPLEMENTAL BRIEF FOR THE APPELLEES

INTRODUCTION

By order dated March 5, 2002, the Court appointed Professor Erwin Chemerinsky to serve as an amicus curiae and invited the parties and amici to submit by April 19, 2002 (subsequently extended to May 3, 2002) supplemental briefs of not more than 10,000 words on the following three questions:

- 1) Does the Court have the authority to consider the constitutionality of IRC § 107(2)?
- 2) If so, should the Court exercise that authority?
- 3) Is section 107(2) constitutional under the Establishment Clause?

For the reasons stated below, Appellees contend that this Court does not have jurisdiction to consider an issue not in controversy between the parties; that even if this Court assumes jurisdiction, it would not be prudent to reach a major constitutional issue not disputed by the parties; and that, in any event, section 107(2) is not only constitutional under the Establishment Clause but may well be constitutionally compelled to avoid discrimination among religions and to avoid excessive entanglement of government with religion.

ARGUMENT

I. Apart From Questions Of Jurisdiction, This Court Has No Authority Under Article III of the Constitution To Decide Issues Over Which There is No Controversy Between the Parties.

It is axiomatic—and a key command of Article III of the Constitution—that a federal court only has authority to decide “cases or controversies” properly brought to it by adversary parties who have a personal stake in the outcome of the decision. “The purpose of the case-or-controversy requirement is to ‘limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.’” *GTE Sylvania, Inc. v. Consumers Union of U. S., Inc.*, 445 U.S. 375, 382 (1980) (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)); *see also Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) (“The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them”).

The controversy between the Warrens and the Commissioner at issue in this case is whether the housing allowance exemption permitted by Section 107(2) of the Internal Revenue Code is limited to fair market rental value, as the Commissioner contends, or to actual expenditures, as the taxpayers contend. Because the discrete controversy presented “can be” resolved without reaching the constitutionality of Section 107(2), as Judge Reinhardt acknowledged during initial oral argument,¹ consideration of issues not presented by the parties, particularly those not even disputed by the parties, would fall outside this Court’s Article III jurisdiction.

This jurisdictional rule was followed in *Kirk v. Commissioner of Internal Revenue*, 425 F.2d 492, 495 (D.C. Cir.), *cert. denied*, 400 U.S. 853 (1970), which involved a routine question of construction of the same statute at issue here. There, as here, the “proceeding was instituted in the Tax Court by a ‘petition for redetermination of the deficiency set forth by the Commissioner . . . in his notice of a deficiency.’ It [was] not an action by a taxpayer challenging alleged unconstitutional federal taxing or spending programs.” *Id.*, at 495. As a result, the Court held that it would be improper for it to consider the constitutionality of section 107 (although it assumed “that appellants as taxpayers could in a proper action raise the constitutional issues”). *Id.* at 495 and n.10 (citing *Flast v. Cohen*, 392 U.S. 83 (1968); *Protestants and Other Americans, etc. v. Watson*, 407 F.2d 1264 (1968)).

¹ See Audio tape of initial oral argument, *Warren v. Commissioner*, No. 00-71217 (9th Cir., Dec. 3, 2001), at 9:54 (Ms. Tebbets: “. . . either way this case can be resolved without [addressing the constitutionality of Section 107].” The Court: “Yes, it can be.”). The audio tape is available at http://www.nacba.net/audio/warren_oral.wma (visited April 27, 2002). The time listed here and in subsequent citations to the Oral Argument below refers to the point of time from the beginning of oral argument at which the discussion quoted in the text begins, utilizing the time clock feature on a standard Microsoft Windows Media Player (ver. 6.4).

This Circuit has also held in an analogous context that it does not address constitutional questions not presented by the parties (unless involving the Court’s own jurisdiction). In *Spaulding v. Univ. of Washington*, 740 F.2d 686 (9th Cir.), *cert. denied*, 469 U.S. 1036 (1984), this Court decided a controversy over the relevant standard of review required when a district court reviews a decision of a magistrate judge under the Equal Pay Act, without addressing whether the Act itself was constitutional under the Tenth Amendment, as interpreted by the Supreme Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976).² The Court expressly noted that it did not reach the constitutional issue because “the parties neither raise[d] the issue nor contend[ed] that it affect[ed] [the Court’s] jurisdiction.” *Id.*, at 694 n. 2.

United States v. Dickerson, 530 U.S. 428 (2000), in which the Supreme Court addressed the constitutionality of 18 U.S.C. § 3501 despite the fact that the statutory argument was not pressed either by the government or the defendant, is not to the contrary, for two reasons. First, as the Fourth Circuit noted when the case was before it, the Government *did* raise the statutory argument in its motion for reconsideration (although it subsequently declined to brief the issue on appeal). *United States v. Dickerson*, 166 F.3d 667, 680 (4th Cir. 1999), *rev’d*, 530 U.S. 428 (2000). Second, and more fundamentally, the parties clearly had a dispute about the issue before the court—whether Dickerson’s confession was admissible. By considering not just the Supreme Court’s decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), but the post-*Miranda* statute enacted by Congress as

² *Spaulding* was decided before *National League of Cities* was overruled by *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985)

well, the Court considered an *argument* not raised by the government in defense of its position; it did not decide a new *issue*. Consideration of arguments not raised by the parties or addressed by the lower courts has never been viewed as an improper judicial activity. *See, e.g., Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (“When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties”).³

A comparison of the possible outcomes in *Dickerson* and in the instant case will highlight the difference. If the Court upheld § 3501 in *Dickerson*, the government’s attempt to introduce Dickerson’s confession would be upheld, albeit based on a different *argument* that the government had proffered. If it held the statute inapplicable or unconstitutional, Dickerson’s attempt to suppress the confession would be sustained. Throughout the litigation, therefore, the parties remained adverse on the *issue* before the Court, and neither the Fourth Circuit’s nor the Supreme Court’s consideration of the § 3501 *argument* eliminated that adversity.

In the instant case, on the other hand, a ruling upholding the constitutionality of section 107(2) would still leave unresolved the underlying *issue* in dispute between the parties. Likewise, a holding that section 107(2) was unconstitutional would moot the statutory interpretation question, but it would not resolve it. (Congress could, for example, re-enact the exemption, addressing any constitutional problems identified by the Court, and have the newly-enacted exemption apply retroactively to this

³ *See also* N. Devins, “Asking The Right Questions: How The Courts Honored The Separation Of Powers By Reconsidering *Miranda*,” 149 U. Pa. L. Rev. 251, 282 (Nov. 2000) (“When an *issue* is squarely before the court (as was the admissibility of Dickerson’s confession), courts must look to the law, not just the *arguments* of the parties before it”) (emphasis added).

case; the same statutory dispute currently before the Court would still need to be addressed). In sum, the contention that section 107(2) is unconstitutional is simply not an *argument* that furthers the position of either party; it is an entirely new *issue*, not presented by either party.⁴

Of course, one prominent constitutional law scholar—the court-appointed amicus curiae in this case—has argued that the Fourth Circuit and the Supreme Court in *Dickerson* were without jurisdiction to decide the constitutionality of section 3501 because courts are without jurisdiction to address either *issues* or *arguments* not raised by the parties (except for issues of subject matter jurisdiction).⁵ Because those courts nevertheless addressed

⁴ Similarly, the Court in *United States Nat'l Bank v. Indep. Ins. Agents*, 508 U.S. 439, 447-48 (1993), considered, without request of the parties, an argument about the existence of a statute that furthered the outcome requested by one of the parties. In contrast, the argument invited by the Court here that section 107(2) is unconstitutional does not further the outcome requested by either party and, indeed, contravenes the long-standing practice of the Executive Branch to defend the constitutionality of federal laws wherever possible. *See, e.g., United States v. Lee*, 106 U.S. 196, 220 (1882); *see also Recommendation That The Department Of Justice Not Defend The Constitutionality Of Certain Provisions Of The Bankruptcy Amendments And Federal Judgeship Act Of 1984*, 8 U.S. Op. OLC 183, 183, 199 (Aug. 27, 1984) (arguing, as a “rare exception” to the “usual practice of defending the constitutionality of federal statutes,” that the executive should not enforce a law that intrudes upon the President’s appointment power). Plaintiffs in *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988), asserted both constitutional and statutory claims, so that case is inapposite. *See id.*, at 443. Moreover, the question whether the court should have reached the constitutional issue without explicitly deciding that the relevant statutes did not provide the full measure of relief sought with the constitutional claim was a prudential one, not a jurisdictional one, and even then the Supreme Court found it reasonably likely that the constitutional claims had to be considered because the structure and wording of the district court’s order “suggest that the statutory holdings would not have supported all the relief granted.” *Id.*, at 446-47.

⁵ *See* E. Chemerinsky, “The Court Should Have Remained Silent: Why the Court Erred in Deciding *Dickerson v. United States*,” 149 U. Pa. L. Rev. 287, 302 (Nov. 2000) (“Except for issues of subject matter jurisdiction, it is not for the courts to raise arguments themselves”).

the constitutionality of section 3501 in *Dickerson*, one might contend that there must no longer be a jurisdictional bar to courts addressing either issues or arguments not disputed or even raised by the parties. Although the contention has a sort of Lilliputian appeal to it,⁶ it is foreclosed by long, firmly-established and well-reasoned Supreme Court precedent. “When questions of jurisdiction have been passed on in prior decisions *sub silentio*, [the] Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before [it].” *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 119 (1984) (quoting *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974)).⁷ Because “[n]ot a single justice in *Dickerson* questioned whether it was appropriate for the federal courts to invoke § 3501 when the federal prosecutors had expressly chosen not to do so,” E. Chemerinsky, “The Court Should Have Remained Silent,” 149 U. Pa. L. Rev., at 291, it cannot serve as precedent even if it is indistinguishable from the instant case.

During initial oral argument, Judge Reinhardt also expressed concern that unless the Court reached the constitutional question on its own, “no one

⁶ See Jonathan Swift, *Gulliver’s Travels* 256 (1950) (“[Stare decisis] is a maxim among . . . lawyers, that whatever has been done before may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind”).

⁷ See also *United States v. More*, 7 U.S. (3 Cranch) 159, 172 (1805) (Marshall, C.J.) (“No question was made, in that case, as to the jurisdiction. It passed *sub silentio*, and the court does not consider itself as bound by that case”); *King Mfg. Co. v. Augusta*, 277 U.S. 100, 134-135, n. 21 (1928) (Brandeis, J., dissenting) (“It is well settled that the exercise of jurisdiction under such circumstances [namely, when counsel did not question and the court did not address the jurisdiction of the court] is not to be deemed a precedent when the question is finally brought before us for determination”) (citing *More, supra*; *Snow v. United States*, 118 U. S. 346, 354 (1886); *Cross v. Burke*, 146 U. S. 82, 86 (1892); *Louisville Trust Co. v. Knott*, 191 U. S. 225, 236 (1903); *Arant v. Lane*, 245 U. S. 166, 169 (1917)).

is ever going to challenge the constitutionality of it.” Oral Arg., at 9:15. Even if true, that concern does not confer jurisdiction upon the Court. *Cf. United States v. Richardson*, 418 U.S. 166, 168-69 (1974) (holding that plaintiff lacked standing to challenge constitutionality of secret CIA budgets because he only asserted a generalized grievance, rejecting the argument that if plaintiff “is not permitted to litigate this issue, no one can do so”); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974) (“The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing”). Moreover, because the Supreme Court has recognized general taxpayer standing to challenge expenditures in violation of the Establishment Clause, *see Flast v. Cohen*, 392 U.S. 83 (1968), it is at least arguable that a taxpayer-based challenge to the tax exemption at issue here would be permitted. *See Kirk*, 425 F.2d, at 495 (assuming but not deciding that taxpayers would have standing as taxpayers to challenge section 107 exemption); *cf. Streight v. Ragland*, 655 S.W.2d 459, 461 n.6 (Ark. 1983) (suggesting that *Flast* would support a taxpayer challenge to a state tax exemption); *but see Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471 (S.D.N.Y.1982) (denying taxpayers standing to challenge Catholic Church’s tax exemption).

In sum, what Professor Chemerinsky has previously argued with respect to *Dickerson* is even more true here: “[T]he courts excee[d] the appropriate judicial role in raising a major constitutional issue not presented by the parties that in no way concerned the jurisdiction of the federal courts to hear the matter.” Because the constitutionality of section 107 was not presented by the parties and does not concern the court’s jurisdiction to decide the statutory construction issue that has been presented, Article III bars this Court from considering the constitutionality of section 107.

II. Even Assuming that Addressing the *Constitutionality* of a Statute Is Within the Outer Limits of Article III Jurisdiction Whenever the Parties Present a Dispute About *Interpretation* of the Statute, Prudence and Judicial Self-Restraint Counsel Against Exercising Jurisdiction.

More than a half century ago, Justice Brandeis articulated what is perhaps the classic statement of prudential limits on a court's authority: "Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandies, J., concurring) (quoting *Blair v. United States*, 250 U.S. 273, 279 (1919)); *see also Davis v. United States*, 512 U.S. 452, 464 (1994) (Scalia, J., concurring) ("it is 'a sound prudential practice' for us to avoid issues not raised by the parties"). Thus, even if this Court holds that consideration of a constitutional question not pressed or even disputed by the parties is within the outer limits of its Article III jurisdiction, it should consider whether prudential concerns counsel against reaching the constitutional question. Here, there are several strong prudential reasons for not doing so.

First, the parties both agree that the statute is constitutional, so the adversity between parties that the court typically relies on to sharpen the issues is lacking, and the appointment of an amicus curiae who presumably holds a contrary view does not wholly mitigate the lack of adversity. The amicus does not have a personal stake in the outcome of the litigation, nor is he in a position to help develop a factual record that would crystallize the issue for the court. *See, e.g., Baker v. Carr*, 369 U.S. 186, 204 (1962)

(describing, in the related context of standing, the requirement that one have “such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions”). Indeed, courts have typically appointed amici to ensure *continued* adversity, not to *create* adversity where it has not previously existed. *See Bousley v. United States*, 523 U.S. 614 (1998) (inviting private party to file an amicus brief and to participate in oral argument when Government declined to defend ruling in its favor); *Obgomon v. United States*, 519 U.S. 805 (1996) (inviting amicus to brief and argue the case in support of judgment below); *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 829 n.3 (1988) (“Respondent elected not to appear in this Court, and we appointed an *amicus curiae* to defend the judgment below”); *Bob Jones Univ. v. United States*, 461 U.S. 574, 585 n. 9, 599 n. 24 (1983) (same). Similarly, courts often appoint amici to help address collateral issues that arise in the course of litigation and that may even continue after one or both of the principal parties to the litigation have departed. *See McKinney v. Indiana Michigan Power Co.*, 113 F.3d 770, 772 n. 2 (7th Cir.1997) (appointing amicus “so that [the court] might have the benefit of an adversary presentation of the issues raised by the appeal” involving jury costs being taxed to plaintiff’s attorney); *United States v. Chagra*, 701 F.2d 354, 366 (5th Cir.1983) (appointing amicus “to ensure that this appeal [by two newspapers and a reporter challenging a sealed bond reduction hearing] continues to be presented in an adversary context” after a plea bargain agreement resolved the remaining charges against the defendant). But neither of these lines of cases support the appointment of an *amicus curiae* to

address non-jurisdictional issues not raised by the parties, not contested by the parties, and not ruled on at any prior stage of the litigation.⁸

The benefits that flow from adversity between the parties are particularly strong when the issues to be addressed involve the Establishment Clause, which this Court has noted are particularly difficult because “modern Establishment Clause jurisprudence is famously indistinct.” *Gentala v. City of Tucson*, 244 F.3d 1065, 1074 (9th Cir. 2001). Among the inquiries that would need to be undertaken is whether the government’s action could “be perceived as a governmental endorsement” of religion. *Id.*, at 1077 (citing *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995)). Determining “whether a government subsidy to religion constitutes ‘actual or perceived endorsement,’ . . . requires a highly fact-specific inquiry, directed at the question ‘whether an objective observer, acquainted with the text, . . . history, and implementation of the [program] would perceive it as a state endorsement’ of religious observance.” *Id.*, at 1078 (citing *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 307-08 (2000)).

Here, since neither party ever raised the constitutional issue, the “highly fact-specific inquiry” never occurred. There is no fact in the record which would allow this Court to make any finding concerning whether section 107(2) could be viewed as governmental endorsement of religion by a disinterested third party. Consequently, the Court should not consider the

⁸ It might be argued that the Fourth Circuit appointed an amicus curiae in *Dickerson* to create adversity where none existed. As noted above, there was adversity on the *issue* in the case; the amicus curiae was appointed to address an alternative *argument*. Moreover, the government’s refusal to defend the constitutionality of § 3501 undermined, rather than supported, the traditional presumption of constitutionality due acts of Congress. *See infra*, at 12.

issue at all in the absence of a well-developed factual record that would be required to permit it to make such an analysis.⁹

Second, reaching a constitutional issue not raised by the parties would undermine the traditional presumption of constitutionality afforded to acts of Congress. *See, e.g., United States v. Watson*, 423 U.S. 411, 416 (1976) (“Because there is a ‘strong presumption of constitutionality due to an Act of Congress, . . . (o)bviusly the Court should be reluctant to decide that . . . the Act was therefore unconstitutional’”) (quoting *United States v. Di Re*, 332 U.S. 581, 585 (1948)); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (“It is well-established that acts of Congress enjoy a strong presumption of constitutionality”). As Judge Reinhardt noted during initial oral argument, his question about the court’s authority to consider the constitutionality of section 107(2) in the circumstances of this case “assum[ed]” that the statute was unconstitutional. Oral Arg., at 9:33, 11:06, 12:22. That assumption is flatly inconsistent with the traditional presumption afforded Congress, and should not serve as the basis for addressing an issue not presented by the parties.

Third, reaching constitutional issues not presented by the parties would essentially authorize the courts to “sit as self-directed boards of legal inquiry and research” rather than “as arbiters of legal questions presented and argued by the parties before them.” *Carducci*, 714 F.2d, at 177. As a

⁹ Remanding the issue to the Tax Court with the direction that the parties supplement the record on this issue would not remedy the defect, as the parties would still not be adverse, and no party would find it in its interest to develop a factual record contrary to the position it has taken in this litigation.

result, any dispute about the interpretation of a federal spending statute or its conditions could give rise to a constitutional challenge to the spending program itself, even where both parties agree that the spending is constitutional. *Compare Board of Educ. of Oak Park and River Forest High School Dist. No. 200 v. Kelly E.*, 207 F.3d 931 (7th Cir. 2000) (interpreting requirements of the Individuals with Disabilities Education Act), *with* Lynn A. Baker, “Conditional Federal Spending After *Lopez*,” 95 COLUM. L. REV. 1911, 1913-14 (1995) (arguing that spending clause doctrine has to be revisited in light of *United States v. Lopez*, 514 U.S. 549 (1995)). Any case questioning the government’s compliance with the procedural requirements of the Endangered Species Act, the Clean Water Act, or the Clean Air Act could result in wholesale reconsideration of the constitutionality of those acts in the wake of *United States v. Lopez*, even though neither party raised the commerce clause challenge. *See, e.g., Biodiversity Legal Foundation v. Badgley*, 284 F.3d 1046 (9th Cir. 2002) (action brought by environmental group alleging that the U.S. Department of the Interior and the Fish & Wildlife Service failed to comply with deadlines imposed by the Endangered Species Act); *National Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722 (9th Cir. 2001) (action by environmental group under the National Environmental Policy Act challenging National Park Service’s failure to prepare an environmental impact statement addressing certain endangered species before increasing number of cruise ship entries into national park). And any dispute over the applicability of the Fair Labor Standards Act’s overtime provisions or workplace safety regulations promulgated pursuant to the Occupational Health & Safety Act could result in renewed challenges to the constitutionality of those acts, again in light of *Lopez*. *See, e.g., Lambert v. Ackerley*, 180 F.3d 997 (9th Cir. 1999). Such litigation, whether initiated

by amici curiae or by the courts themselves, could quickly overwhelm the resources of the federal judiciary and make a mockery of the Supreme Court's carefully-wrought standing doctrine. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

Fourth, because Section 107 has been on the statute books for nearly 50 years, relied upon by literally hundreds of thousands of ministers and churches in the structuring of salary and retirement programs over several generations, a ruling that Section 107 was unconstitutional would be tremendously disruptive. *See Moritz v. C.I.R.*, 469 F.2d 466, 470 n.5 (10th Cir. 1972) (noting the “disruption [that] the invalidation of the entire section [107] would bring about”). Reaching an issue with the potential to have such disruptive consequences should not be undertaken lightly, particularly where, as here, the court's jurisdiction even to consider the matter is so questionable.

Finally, as has already been noted by Judge Tallman in his dissent from the Court's order requesting supplemental briefing, by addressing a constitutional issue neither raised by the parties nor necessary to the resolution of their dispute, the Court would become an active participant in the litigation rather than a passive decisionmaker, undermining the appearance of fairness that is a core component of our adversary system. “Indeed, such judicial passivity, with judges solely deciding the issues raised by the parties, is *crucial* to maintaining the fairness and integrity of the justice system.” E. Chemerinsky, “The Court Should Have Remained Silent,” 149 U. Pa. L. Rev., at 302 (emphasis added) (citing Stephan Landsman, Readings on Adversarial Justice: The American Approach to Adjudication 2 (1988)).

Thus, even if this Court believes that Article III does not prohibit it from addressing the constitutionality of section 107(2), prudential considerations strongly counsel against taking that step.

III. Section 107(2) Does Not Violate the Establishment Clause and May Well Be Constitutionally Compelled to Prevent Discrimination Among Religions and to Avoid Excessive Government Entanglement With Religion.

A. This Tax Exemption Does Not Amount to a Constitutionally-Prohibited Subsidy of Religion.

In one of its leading cases addressing property tax exemptions for church property, the Supreme Court in 1970 distinguished between impermissible government subsidies to religion and permissible exemptions from taxes imposed by government, holding that “[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state.” *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 675 (1970). “The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.” *Walz*, 397 U.S., at 676.

Of course, as this Court’s March 5 order requesting supplemental briefing recognized, *Walz* must be read in light of the Supreme Court’s subsequent decision in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). In that case, Justice Brennan, writing for a plurality, wrote that “[e]very tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become ‘indirect and vicarious ‘donors.’”” *Texas Monthly*, 489

U.S., at 14 (quoting *Bob Jones University*, 461 U.S., at 591). Justice Brennan’s assertion proves too much. Quite apart from the fact that it simply cannot be reconciled with the majority’s holding in *Walz* or even with Justice Brennan’s own statement in *Walz* that “[t]ax exemptions and general subsidies . . . are qualitatively different,” *Walz*, 397 U.S., at 690 (Brennan, J., concurring)), Justice Brennan’s plurality assertion in *Texas Monthly* would require treating as an unconstitutional compelled religious donation any tax exemption, whether the exemption was available only to the church (as in *Texas Monthly*) or to a “broad array of nonsectarian groups as well as religious organizations.” In either case, nonqualifying taxpayers could be said to be “indirect and vicarious donors.” The Supreme Court has never accepted such a proposition, and it did not do so in *Texas Monthly*. As noted, Justice Brennan wrote only for a plurality; a majority of the Court—Justice Blackmun, joined by Justice O’Connor, concurring in the judgment, and Justice Scalia, joined by Chief Justice Rehnquist and Justice Kennedy, dissenting—did not subscribe to Justice Brennan’s assertion that tax exemptions constitute subsidies. *See* 489 U.S., at 28 (Blackmun, J., concurring in the judgment) (contending that the Texas sales tax exemption violated the Establishment Clause because it was a “statutory preference for the dissemination of religious ideas”); *id.*, at 34, 36 (Scalia, J., dissenting) (describing the *Walz* Court’s conclusion that the indirect economic benefits provided by tax exemptions are “significantly different” than the direct benefits provided by state subsidies for Establishment Clause purposes to be “utterly dispositive of the Establishment Clause claim” in *Texas Monthly*).

Subsequent to *Texas Monthly*, the Supreme Court has reiterated “that there is a constitutionally significant difference between subsidies and tax exemptions.” *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*,

520 U.S. 564, 590 (1997) (citing *Walz*, 397 U.S., at 675); *see also id.* at 590 n.25 (“Tax exemptions and general subsidies . . . are qualitatively different”) (quoting *Walz*, 397 U.S. at 690 (Brennan, J., concurring)); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 881 n.7 (1995) (Souter, J., dissenting) (describing as “critical” to the holding in *Walz* the principle that “tax exemptions [as opposed to direct funding] did not involve the expenditure of government funds in support of religious activities”).¹⁰ *Texas Monthly* must be viewed, therefore, not as repudiating the distinction between exemptions and direct subsidies, but as holding, as Justice Blackmun contended, that in some circumstances, an otherwise permissible tax exemption can amount to an unconstitutional “statutory preference for the dissemination of religious ideas.” 489 U.S., at 28; *see also Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds”) (internal quotation marks omitted).

Unlike the sales tax exemption for the sale of religious literature at issue in *Texas Monthly*, the income tax exemption in section 107(2) does not directly advance the communication of religious messages. It is an

¹⁰ Although Justice Souter was in dissent in *Rosenberger*, the majority held that it was permissible to provide even direct subsidies to religious organizations, as long as they were part of a generally available governmental benefit program. The “critical” difference between exemptions and subsidies, therefore, is not that direct religious subsidies are never permissible and religious exemptions are only permissible if part of a broad-based exemption, but rather that direct subsidies to religion are permissible as part of a broad-based benefit program and exemptions are permissible even if available only to religions (at least, if they are designed to accommodate rather than endorse religion).

exemption on payments made for housing expenses, nothing more, and it may be claimed even if no religious messages are communicated in the housing acquired by the tax-exempt payments. As a result, the holding in *Walz* is much more on point than the holding in *Texas Monthly*: The grant of this tax exemption is not an unconstitutional sponsorship of religion “since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state.” *Walz*, 397 U.S., at 675.

B. Even if *Texas Monthly* is read broadly to bar all tax exemptions that benefit only religion, Section 107(2) is permissible when read *in pari materia* with sections 119, 134, and 911 of the Internal Revenue Code.

Even if one looks to the exemption-is-subsidy proposition from Justice Brennan’s *Texas Monthly* plurality opinion (rather than communication-of-religious-messages holding from Justice Blackmun’s more narrow, and therefore controlling, opinion concurring in the judgment), Section 107(2) passes constitutional muster. Key to Justice Brennan’s analysis was that the Texas sales tax exemption applied *only* to religious groups, unlike the property tax exemption upheld in *Walz*, which “applied to religious properties no less than to real estate owned by a wide array of nonprofit organizations.” *Texas Monthly*, 489 U.S., at 11. The housing and housing allowance exemptions available to ministers under Section 107 are also available under other comparable provisions of the Internal Revenue Code to a wide array of taxpayers, employed by non-profit, for-profit, and even governmental entities.

Section 119, for example, exempts from income the value of any lodging provided to an employee on the employer’s premises when provided

for the convenience of the employer and as a condition of employment. I.R.C. § 119. This exemption is comparable to the exemption available to ministers under Section 107(1) (albeit absent some of the conditions, in order to avoid excessive entanglement concerns discussed below).

Similarly, two provisions of the Internal Revenue Code provide exemptions for housing allowances that are comparable to the housing allowance allowed ministers under Section 107(2). Section 134 exempts from income tax both “allowances” and “in-kind benefits” made to members of the military that were “excludable from gross income on September 9, 1986, under any provision of law, regulation, or administrative practice which was in effect on such date.” I.R.C. § 134(b)(1). Cash housing allowances were excludable by virtue of the 1925 Court of Claims ruling in *Jones v. United States*, 60 Ct. Cl. 552 (1925). In addition, Section 911 excludes from income payments made by employers for housing expenses over a specified threshold amount incurred by U.S. citizens working abroad. I.R.C. §§ 911(a)(2), (c)(1), (c)(3)(A).

Thus, it is simply not the case that only ministers are entitled to a housing or housing allowance exemption. When Section 107 is read *in pari materia* with other relevant provisions of the Internal Revenue Code, as is appropriate when the issue is how broad is the class of taxpayers entitled to a housing or housing allowance exemption, the exemption available to ministers is simply part of an exemption available to a “wide array” of taxpayers.

C. Section 107(2) May Well Be Constitutionally Compelled, in order to avoid discrimination among religions and excessive governmental entanglement with religion.

Even if one focuses on the housing allowance exemption of Section 107(2) at issue in this case, and even if one ignores the comparable exemptions for military personnel and U.S. employees working overseas (or deems the latter exemptions insufficiently broad), Section 107(2) must still be viewed as constitutional. Indeed, troubling constitutional questions could be raised if it did not exist.

One of the key requirements of the Establishment Clause is that “government must be neutral when it comes to competition between sects.” *Zorach v. Clausen*, 343 U.S. 306, 314 (1952). Indeed, this anti-preferential view was a mainstay of Establishment Clause understanding long before the Supreme Court in *Everson* expansively interpreted the clause to extend call into question aid to all religions, *see Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 49 (1815) (Story, J.); *Everson v. Board of Education*, 330 U.S. 1, 15 (1947), and it remains so today. As the Court noted in *Walz*, ““We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.”” 397 U.S., at 669 (quoting *Zorach*, 343 U.S., at 313); *see also Rosenberger*, 515 U.S., at 855 (Thomas, J., concurring) (reviewing the different scholarly interpretations of the Establishment Clause and finding “much to commend” “the view that the Framers saw the Establishment Clause simply as a prohibition on governmental preferences for some religious faiths over others”).

The parsonage exemption now codified at I.R.C. § 107(1) is essentially unchanged from the statute initially adopted in 1921 to afford

ministers the same tax benefits available to other taxpayers under the common law “convenience of the employer doctrine,” absent the intrusive inquiries into the minister’s duties that threatened both Free Exercise and Establishment Clause principles. *See* Revenue Act of 1921, §213(b)(11), Pub. L. No. 67-98, ch. 136, 213, 42 Stat. 227, 239 (1921). By the time Congress decided to codify the general convenience of the employer doctrine, it had become clear that the statutory parsonage exemption actually discriminated among religions, favoring those (often more established and hierarchical) religions that were able to provide on-site housing to their clergy, arguably in violation of the Establishment Clause. As the report of the Senate Finance Committee makes clear, Congress’s primary purpose in enacting Section 107(2) was to eliminate this discrimination among religions:

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

Sen. R. No. 1622, 83rd Cong., 2d Sess. 16 (1954); *see also* H. Rept. 1337, 83rd Cong., 2d Sess. 15 (1954); *Reed v. Commissioner*, 82 T.C. 208, 214 (1984). Congress’s decision to eliminate this discrimination among religions may well have been mandated by the Establishment Clause. It

would be odd indeed to hold that the cure was itself an Establishment Clause violation.

Moreover, avoiding a potentially unconstitutional discrimination among religions was not the only Establishment Clause problem avoided by Section 107(2). Many religious sects, particularly those that subscribe to a communitarian Christian theology, adhere to the view that “church” is wherever “two or more are gathered in God’s name.” David L. Gregory, “Where To Pray? A Survey Regarding Prayer Rooms In A.B.A. Accredited, Religiously Affiliated Law Schools,” 1993 B.Y.U. L. Rev. 1287, 1307 (1993) (quoting *Matthew* 18:20). The minister’s home, then, may be much more than just a private residence; it may be a satellite church, entitled (if structured properly) to the parsonage exemption of Section 107(1). Such a regime could well lead to intrusive inquiries by the government into the theology of the religion, how much “church” actually occurred at the minister’s home, etc. Avoiding the excessive entanglements that would follow, as Section 107(2) does, might itself be required by the Establishment Clause. *See Walz*, 397 U.S., at 676 (“exemption[s] creat[e] only a minimal and remote involvement between church and state and far less than taxation of churches,” and in operation “ten[d] to complement and reinforce the desired separation insulating” church and state); *id.*, at 674 (rejecting analysis that “would introduce an element of governmental evaluation and standards . . . , thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize . . . [and that] could escalate to constitutional dimensions”); *Texas Monthly*, 489 U.S., at 20 (plurality opinion) (“[There exists an] overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims. The risk that governmental

approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude”) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring in judgment)); see also *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971); *Agostini v. Felton*, 521 U.S. 203, 233 (1997) (addressing entanglement issues under “effects” prong of the *Lemon* test). Necessarily, then, Section 107(2) should at least be sustained as a permissible accommodation of religion. “Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities.” *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338 (1987); see also *Texas Monthly*, 489 U.S., at 18 n.8 (plurality opinion) (reaffirming the decision in *Amos* upholding Title VII’s religious exemption because the exemption prevented “serious encroachments on protected religious freedoms”).

Quite simply, avoiding such entanglement problems is a constitutionally permissible accommodation of religion, even if not mandated by either the Establishment Clause or the Free Exercise Clause. “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; see also *Texas Monthly*, 489 U.S., at 18 n.8 (plurality opinion) (“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”); *id.*, at 906 (Blackmun, J., concurring in judgment) (same); *Children's Healthcare Is a Legal Duty, Inc.*

v. Min De Parle, 212 F.3d 1084 (8th Cir.2000) *cert. denied*, 121 S.Ct. 1483 (2001) (upholding exemption from Medicaid requirements for “religious nonmedical health care institutions” as a permissible accommodation of religion). In the space between what is constitutionally compelled to avoid discrimination among religions and excessive entanglement with religion, on the one hand, and what is constitutionally forbidden by the Establishment Clause, on the other, there must be “room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.” *Walz*, 397 U.S., at 669. Section 107(2) easily qualifies as a constitutionally permissible example of “benevolent neutrality” toward religion.

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CONCLUSION

For the reasons noted above, this Court does not have jurisdiction to consider the constitutionality of Section 107(2) in this litigation. Because that issue was not raised by the parties or even in dispute, there is no Article III case or controversy. Moreover, even if there were Article III jurisdiction, there are strong prudential reasons for the Court to decline to exercise jurisdiction in the circumstances presented here. Assuming *arguendo* that the Court nevertheless reaches the constitutional issue not raised by the parties, the tax exemption at issue here is not only permitted by the Establishment Clause, but it may well be constitutionally compelled.

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Respectfully submitted,

John C. Eastman
THE CLAREMONT INSTITUTE CENTER
FOR CONSTITUTIONAL JURISPRUDENCE
c/o Chapman Univ. School of Law
One University Drive
Orange, California 91711
(714) 628-2587

Arthur A. Oshiro
SAAVEDRA & ZUFELT
One World Trade Center, Suite 2160
Long Beach, CA 90831-2160
Tel. No.: (562) 436-7097
Fax No.: (562) 437-3089

Attorneys for Petitioners/Appellees