**Nos. 18-1277 and 18-1280**
**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

---

**ANNIE LAURIE GAYLOR; DAN BARKER; IAN GAYLOR, Personal Representative Of The Estate Of Anne Nicol Gaylor; and FREEDOM FROM RELIGION FOUNDATION, INC.,**

**Plaintiffs-Appellees,**

**v.**

**STEVEN MNUCHIN, Secretary of the United States Department of Treasury; DAVID J. KAUTTER, Acting Commissioner of the Internal Revenue Service; and the UNITED STATES OF AMERICA,**

**Defendants-Appellants,**

**and**

**EDWARD PEECHER; CHRIS BUTLER; CHICAGO EMBASSY CHURCH; PATRICK MALONE; HOLY CROSS ANGLICAN CHURCH; and the DIOCESE OF CHICAGO AND MID-AMERICA OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA,**

**Intervenor-Defendants-Appellants**

**ON APPEAL FROM THE JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN (No. 16-CV-215; Honorable Barbara B. Crabb)**

---

# *AMICUS CURIAE* BRIEF OF TAX LAW PROFESSORS IN SUPPORT OF APPELLEES

---

**Adam Chodorow**
***Counsel of Record***
**Beus Center for Law and Society**
**Mail Code 9520**
**111 E. Taylor Street**
**Phoenix, AZ 85004-4467**
**480-727-8574**
**Adam.Chodorow@asu.edu**

DISCLOSURE STATEMENT

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-1277 & 18-280

Short Caption: Gaylor v. Mnuchin

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Ellen P. Aprill, Reuven Avi-Yonnah, Linda M. Beale, Samuel Brunson, Neil H. Buchanan, Patricia A. Cain, Adam Chodorow, Mark Cochran, Bridget Crawford, Jonathan Forman, Gregory Germaine, David Herzig, Benjamin Leff, William H. Lyons, Roberta Mann, Lori McMillan, Joel Newman, Henry Ordower, Katherine Pratt, Daniel Schaffa, Erin A. Scharff, and Theodore P. Seto. Please see Appendix A for affiliations, which are included for identification purposes only

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

Adam Chodorow

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

No amicus has a parent corporation.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: /s/ Adam Chodorow Date: 6/22/2018

Attorney's Printed Name: Adam Chodorow

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes __ No X__

Address: Beus Center for Law and Society, Mail Code 9520, 111 E. Taylor St, Phoenix AZ 85004-4467

Phone Number: 480-727-8574 Fax Number: 480-965-6521

E-Mail Address: adam.chodorow@asu.edu

## TABLE OF CONTENTS

DISCLOSURE STATEMENT ..... i

TABLE OF AUTHORITIES ..... iv

I. INTEREST OF AMICI CURIAE. ..... 1

II. ORAL ARGUMENT. ..... 1

III. SUMMARY OF THE ARGUMENT. ..... 1

IV. ARGUMENT ..... 2

A. Section 107(2) is not part of a broad housing policy that naturally includes clergy. ..... 2

1. As a normative matter, housing benefits are properly included in income. ..... 3

2. Section 119 excludes certain housing from income tax on normative grounds because such housing is not properly considered income. ..... 4

3. Section 911 excludes housing for expatriates from income tax to avoid double taxation in the international context and to subsidize American business activities abroad. ..... 6

4. The exclusions for housing allowances provided to select government employees are distinguishable from Section 107(2). ..... 7

5. Section 107(2) does not implement the convenience-of-the-employer rule for ministers. ..... 9

B. Section 107(2) subsidizes religious actors. ..... 11

C. Section 107(2) is not an appropriate accommodation for religion. ..... 14

1. Exempting all ministerial housing ignores important differences in ministerial income. ..... 14

2. Section 107(2) requires significantly more church-state entanglement than Section 119. ..... 17

D. Holding Section 107(2) unconstitutional would not threaten other exemptions. ..... 21

V. CONCLUSION. ..... 22

APPENDIX A ..... 23

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7) ..... 25

CERTIFICATE OF SERVICE ..... 26

**TABLE OF AUTHORITIES**

**Cases**

Boyer v. Comm'r, 69 T.C. 521, 532 (1977) ..... 21

Commissioner v. Anderson 371 F.2d 59 (6th Cir. 1966) ..... 5

Gaylor v. Mnuchin, 278 F.Supp.3d 1081, 1084 (2017) ..... 2, 17

Gregory v. Helvering, 293 U.S. 465, 470 (1935) ..... 14

Jones v. United States, 60 Ct. Cl. 552, 574 (1925) ..... 10

Knight v Commissioner, 92 T.C. 199 (1989) ..... 22

Magness v. Comm'r, 247 F.2d 740, 744 (5th Cir. 1957) ..... 10

Old Colony Tr. Co. v. Comm'r, 279 U.S. 716, 729 (1929) ..... 14

Reed v. Comm'r, 82 T.C. 208, 212-13 (1984) ..... 22

Salkov v. Comm'r, 46 T.C. 190 (1966) ..... 21

Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 14 (1989) ..... 14

U.S. v. Gotcher, 401 F.2d 118, 119-20 (5th Cir. 1968) ..... 6

Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 674 (1970) ..... 3, 13, 20

Winchell v. United States, 564 F.Supp. 131 (D.Neb.1983), aff'd without op.,
725 F.2d 689 (8th Cir.1983). ..... 6

**Statutes**

26 U.S.C. § 1 ..... 8

26 U.S.C. § 61(a)(1) ..... 4

26 U.S.C. § 105 ..... 19

26 U.S.C. § 106 ..... 19

26 U.S.C. § 107(1) ..... passim

26 U.S.C. § 107(2) ..... passim

26 U.S.C. § 112 ..... 10

26 U.S.C. § 119 ..... passim

26 U.S.C. § 134 ..... 3, 9, 10, 12

26 U.S.C. § 134(b)(1)(B) ..... 10

26 U.S.C. § 262 ..... 4

26 U.S.C. § 280A ..... 20, 24

26 U.S.C. § 401 ..... 19

26 U.S.C. § 501(c)(3) ..... 14

26 U.S.C. § 911 ..... 3, 7, 8

26 U.S.C. § 912 ..... 3, 9, 12

26 U.S.C. § 1402 ..... 24

26 U.S.C. § 1402(a)(8) ..... 7, 16

26 U.S.C. § 3121(1)(19) ..... 6

26 U.S.C. § 5000A(d)(2) ..... 25

26 U.S.C. § 7701(b)(1) ..... 8

Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, §§ 102, 111, 95 Stat. 172, 186, 190 .... 8

Revenue Act of 1926, ch. 27, §§ 209, 213(b)(14), 44 Stat. 9, 20, 26 ..... 7

Revenue Act of 1943, Pub. L. No. 78-235, § 125(a), 58 Stat. 21, 21, 46 (1944) ..... 9

**Regulations**

Treas. Reg. § 1.119-1(b)(3) ..... 5

Treas. Reg. § 1.1402(c)-5(b)(2) (as amended in 1968) ..... 21

**Other Authorities**


Adam Chodorow, *The Parsonage* Exemption, 51 U.C. Davis L. Rev. 849,861 (2018)..... passim

Edward A. Zelinsky, *Winn and the Inadvisability of Constitutionalizing Tax Expenditure Analysis*, 121 YALE L.J. ONLINE 25 (2011) ..... 15

H.R. REP. NO. 97-201, at 10-11 (1981) ..... 8

HENRY CALVERT SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 53 (1938) ..... 6

I.R.S. Gen. Couns. Mem. 36993 (Feb 3, 1977) ..... 21

I.R.S. Priv. Ltr. Rul. 5612265140A (Dec. 26, 1956) ..... 13

Note, *Section 911 of the Internal Revenue Code and the Foreign-Based Partner*, 74 YALE L.J. 956, 956-57 (1965) ..... 8

O.D. 265, 1 C.B. 71 (1919) ..... 5

OFFICE OF TAX ANALYSIS, U.S. DEP'T OF THE TREASURY, TAX EXPENDITURES: FISCAL YEAR 2017, at 23 (Nov. 11, 2015) ..... 1

Rev. Rul. 57-129, 1957-1 C.B. 313 ..... 22

RS, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 23 (Aug. 2015) ..... 7, 10

S. REP. NO. 78-627, at 24 (1944) ..... 9

S. REP. NO. 82-781, at 52-53 (1951) ..... 8

S. REP. NO. 97-144, at 36 (1981) ..... 8

Sarah Eekhoff Zylstra, *Are Pastors' Homes that Different?*, CHRISTIANITY TODAY (June 24, 2014) ..... 23

STAFF OF S. COMM. ON THE BUDGET, 109TH CONG., REP. ON TAX EXPENDITURES: COMPENDIUM OF BACKGROUND MATERIAL ON INDIVIDUAL PROVISIONS 352 (Comm. Print 2006) ..... 15

STANLEY SURREY, PATHWAYS TO TAX REFORM, THE CONCEPT OF TAX EXPENDITURES, at vii (1973) ..... 15

T.D. 2992, 1920-2 C.B. 76; O.D. 915, 4 C.B. 85-86 (1921) ..... 5

*Taxation — Exclusion Under Section 119 Granted Although Employee Was Charged for Value of Quarters Supplied*, 33 ST. JOHN'S L. REV. 408 (1959) ..... 5

## I. INTEREST OF AMICI CURIAE

*Amici* are professors of tax law interested in ensuring that federal tax law is properly understood. We believe that the government, intervenors, and supporting *amici* (collectively Supporters) have mischaracterized the nature and function of Code Section 107(2) and its relation to other purportedly similar provisions.[1] *Amici* (listed in Appendix A) join this brief on their own behalf and not as representatives of their universities.[2]

## II. ORAL ARGUMENT

*Amici* believe oral argument would be helpful to the court and request time at oral argument, should it be scheduled.

## III. SUMMARY OF THE ARGUMENT

Section 107 allows "ministers of the gospel" to exclude the value of housing benefits from income, whether provided in-kind or as a cash allowance, at a cost of approximately $9.3 billion in forgone taxes over a ten-year window.[3] The trial court dismissed the challenge to Section 107(1), which excludes in-kind housing, on standing grounds,[4] but that section remains relevant to the analysis of Section 107(2). Supporters argue that Section 107(2), which excludes cash allowances, comports with the First Amendment's Establishment Clause because (1) it is part of a broad policy expressed in a number of provisions that exempts housing provided for the convenience of the employer and (2) tax exemptions do not subsidize religious actors. Alternately, they argue that

---

[1] Unless otherwise indicated, all references to the Code, Tax Code, or Section refer to the Internal Revenue Code of 1986 (as amended).

[2] Pursuant to Fed. R. App. P. 29(a), petitioner and respondents have granted blanket consent to amicus briefs. Pursuant to Fed. R. App. P. 29(c)(5), none of the parties or their counsel authored any part of this brief or contributed money to fund the brief's preparation or submission, and no person or entity other than amici and their counsel made such a monetary contribution to this brief's preparation or submission.

[3] OFFICE OF TAX ANALYSIS, U.S. DEP'T OF THE TREASURY, TAX EXPENDITURES: FISCAL YEAR 2017, at 23 (Nov. 11, 2015) [hereinafter TAX EXPENDITURES], https://www.treasury.gov/resource-center/tax-policy/Documents/Tax-Expenditures-FY2017.pdf.

[4] *See* Gaylor v. Mnuchin, 278 F.Supp.3d 1081, 1084 (2017).

Section 107(2) is permitted as an accommodation for religion because it equalizes treatment of different religious groups and avoids church/state entanglement. Finally, they claim that eliminating Section 107(2) would imperil other exemptions.

Section 107 is a tax provision, and understanding how it functions within the Tax Code and differs from other facially similar provisions is critical to the constitutional analysis. Amici make four points.

First, Section 107(2) differs significantly from other tax provisions that exempt housing from income and is not part of a broad housing policy that naturally includes ministers.

Second, Section 107(2) subsidizes ministers, as reflected in both court decisions and the government's own admissions.

Third, Section 107(2) is not an appropriate accommodation for religion because it (1) disregards important differences in ministerial income that warrant different tax treatment, and (2) creates significantly more church/state entanglement than would the generally applicable rule.

Fourth, finding Section 107(2) unconstitutional would not imperil other exemptions.

## IV. ARGUMENT

### A. Section 107(2) is not part of a broad housing policy that naturally includes clergy.

Section 107 indisputably singles out ministers for a tax benefit. Nonetheless, Supporters argue that Section 107(2) comports with the Establishment Clause because it is part of a web of similar provisions that implement a broad neutral policy that happens to include ministers. These provisions purportedly exclude employer-provided housing provided for the convenience of the employer[5] and include Sections 119 (generally applicable), 911 (expatriates), 912 (overseas

[5] *See e.g.*, Brief for the Federal Appellants (Fed Brief) at 4, Gaylor v. Mnuchin, Nos. 18-1277 & 18-1280 (Apr. 19, 2018) [hereinafter Fed. Brief]; Brief of Intervening Defendants-Appellants at 5, Gaylor v. Mnuchin, Nos. 18-1277 & 18-1280 (Apr. 19, 2018) [hereinafter Intervenor Brief].

government officials), and 134 (military personnel). Supporters claim that the exemption is similar to that at issue in *Walz v. Tax Comm'n of N.Y.C*,[6] which excused charities, educational institutions, and churches from the state property tax.

Supporters cannot point to any other example of a broad, neutral policy contained in a variety of different provisions, adopted years apart without reference to one another, scattered throughout the Code, and providing different benefits to different types of taxpayers. However, the best evidence that these provisions are not part of some coherent housing policy implementing the-convenience-of-the-employer test is found by examining the different purposes these provisions serve. Section 107(2) stands out as a unique benefit for ministers when one views these provisions in their appropriate tax context.

### 1. As a normative matter, housing benefits are properly included in income.

Housing is generally considered personal consumption, and taxpayers may not deduct such costs.[7] Nor may they generally exclude the value of employer-provided housing from income.[8] Otherwise, taxpayers could avoid taxes simply by having their employers supply housing or cash allowances in lieu of salary. Nonetheless, Congress has crafted a limited number of exceptions to this general rule. Some are normative, reflecting the understanding that certain housing should not properly be considered income and therefore should not be taxed. Others are designed as subsidies. Still others form part of the unique employment agreement between the government and its

[6] 397 U.S. 664 (1970).
[7] *See* 26 U.S.C. § 262 (denying deductions for personal expenses).
[8] *See* 26 U.S.C. § 61(a)(1) (including fringe benefits in income).

employees. Efforts to justify Section 107(2) as part of a broad neutral policy on housing fall apart upon even cursory review of the purpose and function of these different provisions.

### 2. Section 119 excludes certain housing from income tax on normative grounds because such housing is not properly considered income.

Shortly after Congress enacted the income tax, the IRS had to decide whether employer-provided housing should be included in income. Despite the default rule, the IRS permitted seamen, hotel managers, and hospital workers, among others, to exclude housing from income on the theory that such housing was provided for the employer's convenience and not as compensation.[9] Over time, these rulings found their way into regulations, which explicitly focused on the employer's intent in providing housing.[10] This approach led to significant litigation because employers and employees could always cobble together some argument as to why housing was for the employer's convenience.

In 1954, the same year Congress expanded Section 107 to cover cash allowances, Congress enacted Section 119 to eliminate the formal inquiry into whether housing was intended as compensation. Instead, it adopted strict bright-line rules limiting the exclusion to situations where the housing was: (1) in-kind, (2) on-site, (3) mandatory, and (4) for the employer's convenience.[11] The regulations make clear that an employee may exclude housing only if "the employee could not perform the services required of him unless he is furnished such lodging."[12] Courts have strictly enforced these rules, rejecting claims that nearby housing was equivalent to on-site housing.[13]

---

[9] O.D. 265, 1 C.B. 71 (1919); T.D. 2992, 1920-2 C.B. 76; O.D. 915, 4 C.B. 85-86 (1921).

[10] *See, e.g.*, Treas. Reg. 118, § 39.22(a)-3 (1951). For a discussion of the history of section 119, see generally *Taxation — Exclusion Under Section 119 Granted Although Employee Was Charged for Value of Quarters Supplied*, 33 ST. JOHN'S L. REV. 408 (1959).

[11] *See* 26 U.S.C. § 119.

[12] Treas. Reg. § 1.119-1(b)(3).

[13] Commissioner v. Anderson 371 F.2d 59 (6th Cir. 1966); Winchell v. United States, 564 F.Supp. 131 (D.Neb.1983), aff'd without op., 725 F.2d 689 (8th Cir.1983).

Section 119's strict requirements reflect Congress's judgment that taxpayers should be allowed to exclude housing from income under the convenience-of-the-employer test only rarely. This, in turn, reflects a normative judgment. Seamen cannot work on a boat at sea and live elsewhere. Lighthouse keepers and others working at remote worksites cannot live elsewhere and do their jobs. In these limited circumstances, where employees must live on-site to do their jobs, housing should not be considered income. Rather, it more closely resembles an employer-provided office, also excluded from income, than compensation. Congress also excludes the value of such housing from payroll taxes.[14]

Tax theorists frame the issue of employer-provided housing as an inquiry into whether it is personal consumption. If so, it should be included in income; if not, it should be excluded. The economist Henry Simons addressed this question by reference to a hypothetical flügeladjutant[15] who receives not only salary, but also housing in the palace.[16] He must also attend opera and hunts with the prince.[17] Were the flügeladjutant to undertake these activities outside the work context, they would clearly be considered personal consumption. However, where they are required as part of his job, such amounts may properly be excluded from income either because they are "forced" consumption, or because it is administratively too difficult to measure the consumptive elements of these work-related activities.[18]

Section 119's strict limitations are all designed to ensure that exempted housing is forced consumption. In contrast, Section 107 does not tie the provision of housing to the ability to do

---

[14] *See* 26 U.S.C. § 3121(1)(19).

[15] *See* HENRY CALVERT SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 53 (1938).

[16] *Id.*

[17] *Id.*

[18] *Id. C.f.* United States v. Gotcher, 401 F.2d 118, 119-20 (5th Cir. 1968) (excluding the value of a business trip from income because it was for the employer's benefit).

one's job. It omits the on-site or and convenience-of-the-employer requirements and indeed expressly permits ministers to exclude housing "provided as part of his compensation." The Treasury Department has stated that these "[d]edicated payments and in-kind benefits represent accretions to wealth that do not differ materially from cash wages."[19] Congress treats ministerial housing as compensation for self-employment tax purposes, the analog to payroll taxes that ministers must pay.[20] Perhaps most telling, ministers may receive tax-free housing in retirement,[21] thoroughly undermining the claim that exempted housing is necessary for job performance. Finally, Section 107(2) permits ministers to live wherever they choose, including in houses they own. It is hard to imagine how living in one's own home can be for the employer's convenience.

**3. Section 911 excludes housing for expatriates from income tax to avoid double taxation in the international context and to subsidize American business activities abroad.**

Congress enacted Section 911's predecessor in 1926, permitting citizens who were "bona fide non resident[s] of the United States for more than six months during the taxable year" to exclude all their foreign-earned income from U.S. taxation.[22] The stated justification was to increase foreign trade by removing disadvantages faced by Americans working abroad.[23] In particular, foreigners living abroad faced only residence-based taxation, while U.S. citizens faced both foreign and U.S. taxes.[24] In addition, living abroad was seen to be a hardship worthy of a

---

[19] *See* TAX EXPENDITURES, *supra* note 3, at 12.

[20] 26 U.S.C. § 1402(a)(8).

[21] *See* INTERNAL REVENUE SERV., TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 23 (Aug. 2015) [hereinafter TAX GUIDE], https://www.irs.gov/pub/irs-pdf/p1828.pdf.

[22] Revenue Act of 1926, ch. 27, §§ 209, 213(b)(14), 44 Stat. 9, 20, 26. For a history of § 911, see Note, *Section 911 of the Internal Revenue Code and the Foreign-Based Partner*, 74 YALE L.J. 956, 956-57 (1965).

[23] *See* S. REP. NO. 82-781, at 52-53 (1951), *as reprinted in* 1951 U.S.C.C.A.N. 1968, 2023-24.

[24] The U.S. taxes citizens living abroad on all their income, regardless of where it is earned. *See* 26 U.S.C. §§ 1 & 7701(b)(1) .

subsidy.[25] Section 911 eliminated this double taxation and increased the take-home pay for expatriates.

In 1981, long after Congress amended Section 107 to allow for tax-free cash allowances, Congress amended Section 911 to exclude certain housing allowances from income as well.[26] As before, Congress suggested that doing so would promote foreign trade and that excluding housing allowances would ease the burden of living abroad.[27] The legislative history does not refer to the convenience-of-the-employer test or any other housing provision, significantly undercutting the claim that it is part of a broad, neutral housing policy that includes ministers. Instead, Section 911 operates as a normative rule designed to avoid double-taxation and to subsidize those living abroad.

#### 4. The exclusions for housing allowances provided to select government employees are distinguishable from Section 107(2).

Sections 912 and 134, which apply to select government employees, also differ in purpose and effect from Section 107(2) and therefore cannot provide it constitutional cover. The former applies to government officials living abroad, while the latter applies to military personnel.

Congress added Section 912's predecessor to the Code in 1943.[28] This section permits certain government officials working abroad to exclude housing allowances from income. The legislative history notes that these employees were forced to move overseas and that their efforts were critical to the war effort.[29] The high cost of living damaged morale and effectiveness, and the

---

[25] The government lists the exclusion as a tax expenditure. *See* TAX EXPENDITURES, *supra* note 3, at 29.
[26] 26 U.S.C. § 911(c); Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, §§ 102, 111, 95 Stat. 172, 186, 190. *See Foreign Housing Exclusion or Deduction*, IRS, https://www.irs.gov/individuals/international-taxpayers/foreign-housing-exclusion-or-deduction (last updated Feb. 18, 2018).
[27] S. REP. NO. 97-144, at 36 (1981); H.R. REP. NO. 97-201, at 10-11 (1981).
[28] Revenue Act of 1943, Pub. L. No. 78-235, § 125(a), 58 Stat. 21, 21, 46 (1944) (expanding the exemption in the Foreign Service Act of 1946, Pub. L. No. 79-724, § 1051, 60 Stat. 999, 999, 1032).
[29] S. REP. NO. 78-627, at 24 (1944)

State Department lacked the funds to increase their salaries. Congress decided to exempt housing allowances from income as a means of increasing their take-home pay.[30] In other words, the government excluded the benefit from taxation as a form of compensation.

Section 134 forms part of a web of tax provisions that favor active military and veterans.[31] It codifies the exemption for any benefits that were excludible from income on September 9, 1986,[32] including tax-free housing allowances. The Court of Claims had held such benefits to be tax-free because they were more in the nature of reimbursement than salary.[33] Today, reimbursement for non-deductible expenses would be included in income, but the exemption for military housing allowances survives. Congress and the courts have repeatedly noted that military are different from other types of taxpayers, worthy of special treatment, including the receipt of tax-free income.[34]

This is not the first time taxpayers have tried to extend tax-free military allowances to to other taxpayers. In *Magness v. Commissioner*, state policemen sought to exclude their meal allowances from income by reference to a purportedly similar exclusion for military families. In rejecting the claim, the Fifth Circuit Court of Appeals distinguished permitting tax-free military

---

[30] The Senate report reads in part:

> The Secretary of State has reported that at posts in the countries now associated with us in common war against the enemy and in those neutral states of supreme importance to us where the Foreign Service is performing a vitally important part in the Nation's war effort, the cost of living continues to mount higher and higher and the financial difficulties of our officers and employees grow progressively worse, threatening the efficiency and morale of this important group of personnel. The Department has neither the authority nor the funds to compensate such personnel for the extra burden which falls upon them by reason of the tax levied on cost of living allowances. The situation is acute and as the allowances are to meet official needs as distinguished from personal requirements, the exclusion of such allowances from tax consideration for this class of personnel is in the public interest. *Id*.

[31] *See, e.g.*, 26 U.S.C. § 112 (excluding combat zone pay from income).

[32] 26 U.S.C. § 134(b)(1)(B).

[33] Jones v. United States, 60 Ct. Cl. 552, 574 (1925).

[34] *See, e.g.*, Regan v. Taxation with Representation of Washington, 461 U.S. 540, 550–51 (1983).

benefits because it entailed "the peculiar situation wherein the United States, with one hand, as an employer, gives money to its employees, and with the other hand, as a tax collector, takes it back."[35] In other words, tax benefits afforded federal government employees differ from those provided to others because others do not have the same employment relationship with the federal government.

### 5. Section 107(2) does not implement the convenience-of-the-employer rule for ministers.

Supporters argue that the loose rules for ministers found in Section 107(2) are appropriate either because ministers will always meet the convenience-of-the-employer test or to account for ministers' unique working conditions.[36] Ministers often have people over to the house, are on call, need to live in the community where they work,[37] and are often moved from church to church.[38] As a result of these unique obligations and responsibilities, Supporters claim that ministers are entitled to categorical treatment similar to government officials living overseas and military personnel (and different from all other employees who face similar conditions), citing among other things the legislative history of the 2002 amendment to Section 107(2).[39] However, Section 107 does not simply adjust Section 119's requirements to account for the nature of ministerial employment;[40] it eliminates Section 119's requirements altogether, permitting clergy to receive housing as compensation and to live wherever they would like, including in homes they own.

As a factual matter, claims that ministers are unique are significantly overstated. Not all ministers use their homes for work, are on call, need to live near work, or are subject to being

---

[35] Magness v. Comm'r, 247 F.2d 740, 744 (5th Cir. 1957).
[36] *See* Intervenor Brief, *supra* note 5, at 32.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 17.
[40] *See, e.g., Amicus Curiae* Brief of Tax Law Professors in Support of Appellants at 9, Gaylor v. Mnuchin, Nos. 18-1277 & 18-1280 (Apr. 26, 2018).

moved by their superiors. Moreover, many lay employees work out of their homes, are on call, need to live near work, and are subject to being transferred. For instance, doctors, police and other emergency responders are subject to being called out and often must live near work. Corporate employees are often transferred from office to office, often to more expensive locations. Yet no one claims that these employees should get tax-free housing. Moreover, many ministers who receive the exemption do the exact same jobs as secular taxpayers and indeed for the same employers.[41] Taxing ministers differently violates the core value of horizontal equity, under which similarly compensated taxpayers should be taxed the same.

However, even accepting *arguendo*, that all these claims were true for ministers, and not also true for a large number of other occupations, ministers still would not be entitled to receive tax-free housing allowances under the convenience-of-the-employer test. No one contests that ministers work hard, do good deeds, or are sometimes called out in the middle of the night. However, none of these considerations converts their housing into forced consumption, exempt from taxation. Work often constrains housing choices, but Congress has declared that this is not enough by adopting the strict limitations found in Section 119.

Taxpayers can always argue that an employer-owned house across the street is equivalent to one on-site and then that one a few blocks away is equally sufficient. From there it is a short step to arguing that employer ownership is not really all that important and tax-free cash allowances should be allowed. Each step along this path moves away from the test's central purpose—to exclude only that housing that is truly necessary for an employee to do his job. This sort of special pleading and creeping incrementalism is precisely what Section 119, with its strict

[41] *See* Adam Chodorow, *The Parsonage* Exemption, 51 U.C. Davis L. Rev. 849, 861 (2018) (describing how ministers working as teachers, college administrators, and basketball coaches qualify for the exemption).

limitations, was designed to prevent. Unlike lighthouse keepers or sailors, who cannot do their jobs unless they live on-site, minsters can live in a variety of locations, including houses they own, and still do their jobs. Thus, they fall outside the convenience-of-the-employer test.

Some authorities suggest a convenience-of-the-employer rationale for both Sections 912 and 134 because covered personnel need to live near work, are subject to being moved for work, and might be called upon to work at any time.[42] Supporters argue that, Congress is free to exempt ministerial housing categorically because it provided a purportedly similar exemption to other taxpayers.[43] They further argue that Congress need not treat all similarly situated taxpayers the same and that Congress may therefore extend the benefit to ministers but not to other similarly situated taxpayers.[44] However, the First Amendment would have no force if Congress could escape its constraints by subsidizing a small subset of taxpayers and then using that subsidy to justify one for religion.

### B. Section 107(2) subsidizes religious actors.

Supporters rely on language in *Walz,*[45] to argue that Section 107(2) cannot raise Establishment Clause issues because no money is extracted from taxpayers and transferred to churches.[46] Rather, they argue, the decision not to tax reflects a determination to "leave religion alone." These arguments fail because (1) the Supreme Court has subsequently held that a targeted tax exemption can violate the Establishment Clause, and (2) ministers must already pay self-

---

[42] *See, e.g.*, I.R.S. Priv. Ltr. Rul. 5612265140A (Dec. 26, 1956); Rev. Rul. 60-66, 1960-1 C.B. 21, 1960 WL 13009.

[43] *See, e.g.,* Fed Brief, *supra* note 5 at 56.

[44] *See, e.g.*, Brief for Members of Congress as Amici Curiae in Support of Defendants-Appellants and Intervenor-Defendant-Appellants and Reversal at 27, Gaylor v. Mnuchin, No. 18-1277 (Apr. 26, 2018).

[45] Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 674 (1970).

[46] *See also* Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 126 (2011) (holding that direct expenditures differed from tax credits for standing purposes). Notably, the statute in *Winn* did not explicitly benefit religious organizations.

employment taxes on their housing allowances; excluding such amounts for income tax alone can hardly be considered leaving ministers alone.

In *Texas Monthly v. Bullock*, the court considered whether a sales tax that carved out an exception for religious publications violated the First Amendment. As Justice Brennan noted in a plurality opinion, exempting something from taxation provides no less a benefit than sending a check[47] because it is economically equivalent to imposing the tax and then returning the money as a direct grant. Justice Rehnquist acknowledged as much in *Regan v. Taxation With Representation of Washington,* in which the court considered whether Congress could revoke tax exemption for Section 501(c)(3) entities that engaged in substantial lobbying. Rehnquist wrote:

> Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions.[48]

Courts routinely look past the form of a transaction to its underlying economic reality in tax matters. They construct hypothetical cash flows to determine the true economic impact of transfers.[49] They disregard transactions that lack economic substance, even though they are structured to take advantage of tax benefits.[50] It is not clear why the Court should ignore economic reality in this context.[51]

---

[47] Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 14 (1989) (noting that a targeted exemption was equivalent to a direct subsidy).

[48] 461 U.S. 540, 544 (1983).

[49] *See, e.g.*, Old Colony Tr. Co. v. Comm'r, 279 U.S. 716, 729 (1929) (holding that a payment from an employer directly to the IRS should be understood to consist first of a transfer to the employee and then to the IRS).

[50] *See, e.g.*, Gregory v. Helvering, 293 U.S. 465, 470 (1935). This doctrine is now codified in I.R.C. § 7701(o).

[51] Some have argued that courts should not treat targeted tax breaks the same as indirect spending for Establishment Clause purposes because to do so would "constitutionalize" economic theory. *See, e.g.*, Edward A. Zelinsky, *Winn and the Inadvisability of Constitutionalizing Tax Expenditure Analysis*, 121 YALE L.J. ONLINE 25 (2011), http://yalelawjournal.org/forum/winn-and-the-inadvisability-of-

Indeed, the government has long conceded that targeted tax breaks in general—and the parsonage exemption in particular—are equivalent to direct government spending. Stanley Surrey, President Kennedy's Assistant Secretary for Taxation Policy at the Treasury Department, first championed this insight in the 1960s and 1970s.[52] This insight has since come to shape tax policy thinking. The Congressional Research Service and the Treasury Department now produce annual "tax expenditure" budgets showing how much spending Congress has buried in the Tax Code. In these reports, the government acknowledges that the parsonage exemption is a subsidy for religious actors. For instance, in 2006, the Congressional Research Service classified Section 107 as a tax expenditure, noting that "[t]he provision is inconsistent with economic principles of horizontal and vertical equity."[53] Moreover, "[m]inisters with higher incomes receive a greater tax subsidy than lower-income ministers because of their higher marginal tax rates."[54] The Treasury Department stated in its 2017 Tax Expenditure Budget that "[d]edicated payments and in-kind benefits represent accretions to wealth that do not differ materially from cash wages."[55] It estimated that the exemption cost $9.3 billion in forgone revenues over a ten-year period.[56]

Treating targeted exemptions differently from direct spending would permit Congress to subvert the First Amendment by offering refundable tax credits to churches, exempting all

---

constitutionalizing-tax-expenditure-analysis. However, failure to do so requires a willful disregard of economic reality.

[52] *See, e.g.*, STANLEY SURREY, PATHWAYS TO TAX REFORM, THE CONCEPT OF TAX EXPENDITURES, at vii (1973).

[53] STAFF OF S. COMM. ON THE BUDGET, 109TH CONG., REP. ON TAX EXPENDITURES: COMPENDIUM OF BACKGROUND MATERIAL ON INDIVIDUAL PROVISIONS 352 (Comm. Print 2006), https://www.gpo.gov/fdsys/pkg/CPRT-109SPRT31188/html/CPRT-109SPRT31188.htm.

[54] *Id.*

[55] *See* TAX EXPENDITURES, *supra* note 3, at 12.

[56] *Id.* at 23. The exemption's subsidy effect can also be seen in special pleading from ministers as to the potential impact on them of having to pay taxes on all their income. *See Amicus Curiae* Brief of Alliance Defending Freedom on Behalf of 8,899 Churches in Support of Appellants and Reversal of the District Court's Judgement at 3, Gaylor v. Mnuchin, No. 18-1277 (Apr. 26, 2018) [hereinafter ADF Brief].

ministerial income from tax, or exempting all religious people from the income tax. Such actions would constitute significant support for and signal government endorsement of religion. Any approach that countenances such actions under the First Amendment is deeply flawed.

Finally, the claim that Section 107(2) reflects the government's decision to leave religion alone cannot be sustained in this context.[57] Ministers already report the value of their regular salary for income and self-employment tax purposes. More important, they already pay self-employment taxes on their housing benefits.[58] Excluding a portion of ministerial income from the income tax does not leave ministers alone. It simply provides them a special benefit unavailable to others.

### C. Section 107(2) is not an appropriate accommodation for religion.

#### 1. Exempting all ministerial housing ignores important differences in ministerial income.

Supporters claim Section 107(2) is permitted as an accommodation because it ensures that all ministers are taxed equally, regardless of whether they receive in-kind housing or cash allowances.[59] To do otherwise, they argue, would privilege certain denominations. However, treating all ministers the same for tax purposes only makes sense if they are similarly situated. No one would suggest that a minister earning $100,000 should be taxed the same as one earning $40,000. Nor would anyone suggest that ministers who receive tax-exempt income in the form of employer-provided health insurance or pension contributions should be taxed the same as those who receive an all cash salary. Ministers who qualify under Section 119 properly exclude such amounts from income on normative grounds, while those who cannot meet Section 119's strict requirements receive compensation in the form of housing.[60] Treating all ministers the same

---

[57] *See* Lynch v. Donnelly, 465 U.S. 668, 688-89 (1984) (O'Connor concurring).
[58] 26 U.S.C. § 1402(a)(8).
[59] *See, e.g.,* ADF Brief, *supra* note 56 at 7.
[60] Those who receive cash allowances to pay the costs of homes they own are also different from those who rent. Ministers who own their homes build up equity and are entitled to any appreciation in their homes,

overlooks important difference in their income and therefore violates the core concepts of horizontal and vertical equity, which posit that similarly situated people should be taxed similarly, while those who are differently situated should be taxed differently.[61]

Supporters argue that Section 107(2) is appropriate not only because of Section 119, but also because of Section 107(1). Section 107(2) ensures that all ministers can receive tax-free housing. The trial court ruled that plaintiffs lacked standing to challenge Section 107(1).[62] However, it does not follow that Section 107(1) is constitutional or that Supporters should be allowed to bootstrap from it to Section 107(2). If, as Supporters claim, Section 107(1) simply broadens Section 119's convenience-of-the-employer test to address the unique circumstances of ministerial housing,[63] it is a normative rule. The same cannot be said for Section 107(2), which permits minister to live wherever they want. In other words, if Section 107(1) is normative, those who qualify under it are situated differently from those who qualify under Section 107(2), warranting different tax treatment.

However, Section 107(1) is not normative; it expressly exempts housing intended as compensation from income tax. Both it and Section 107(2) are subsidies. If the government sent every minister living in church-owned housing a check for $5,000, the constitutional violation would be clear. The appropriate solution would not be to treat all ministers the same by "leveling up" and sending all ministers $5,000. Rather, it would be to "level down" and eliminate the subsidy for all ministers. The same holds for a subsidy run through the tax code. Supporters' efforts to use an expanded Section 107(1) to justify a further expansion to cover *all* ministerial housing,

---

while renters own nothing.

[61] Exempting ministerial housing also violates horizontal equity with regard to laypeople. Ministers acting as teachers, administrators and coaches are entitled to the exemption, while laypersons doing the exact same job are not. Thus, ministers are taxed less than their equally-paid lay colleagues.

[62] *See* Gaylor v. Mnuchin, 278 F.Supp.3d 1081, 1084 (2017).

[63] *See* Intervenor Brief, *supra* note 5, at 33.

regardless of its connection to the employer's convenience or the employee's need to live in a specific location to do his job, should not be rewarded. Doing so places ministers in a distinctly different category from those who qualify under Section 119 and the convenience-of-the-employer test.

Nor can concern for poor churches justify Section 107(2). Churches wealthy enough to provide housing that qualifies under Section 119 (or the expanded Section 107(1) if one accepts Supporters' claims that it implements the convenience-of-the-employer test) are not taking advantage of a tax benefit. Such housing is not properly included in income. However, the result is the same even if these provisions are seen as subsidies. The Code is replete with provisions that only wealthy employers use. For instance, larger and wealthier organizations—including churches—are far more likely to provide tax-free compensation, such as health insurance[64] and tax-favored pensions,[65] than smaller, less wealthy organizations. No one claims that churches without the resources or inclination to provide these benefits should nonetheless be allowed to provide their employees tax-free compensation. As the Court noted in *Regan* (in the context of free speech), that for a taxpayer who "does not have as much money as it wants, and thus cannot exercise its [constitutional freedoms] as much as it would like, the Constitution 'does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.'"[66] Accepting, *arguendo*, that Section 107(1) is constitutional as a modified form of Section 119, the inability of some churches to avail themselves of it cannot justify tax-free housing for all ministers.

---

[64] *See* 26 U.S.C. §§ 105-106.
[65] *See, e.g.,* 26 U.S.C. § 401.
[66] 461 U.S. at 550 (Citing *Harris v. McRae*, 448 U.S. 297, 318 (1980)).

Finally, the claim that Section 107(2) leads to equal treatment of all religions, regardless of differences in doctrinal beliefs and practices, is clearly wrong. Some religions ordain only men, while others treat all believers as ordained. Some sponsor schools that qualify as "integral agencies," while others do not. The availability of an exemption depends very much on religious beliefs and practices.[67]

### 2. Section 107(2) requires significantly more church-state entanglement than Section 119.

Supporters also argue that exempting ministerial housing allowances from income tax is permissible under the First Amendment's Free Exercise Clause because it avoids church-state entanglement.[68] They raise three claims: first, that Section 107 leads to less entanglement than would Section 119; second, that the legislative history supports the entanglement argument;[69] and third, that Section 107 avoids entanglement under Section 280A, which applies to the business use of a home.[70]

As the court noted in *Walz*, some level of church-state interaction is unavoidable,[71] whether in applying the general law to religious actors or policing the boundaries of an exemption. In *Walz*, the Court was concerned that subjecting churches to property tax might lead to the government imposing liens or levies on churches or even foreclosing on them if they failed to pay property taxes.[72] No such concerns exist here. Rather, if Section 107(2) were deemed unconstitutional, ministers would simply be required to report *all* the compensation they receive for income tax purposes, as they already do for self-employment tax purposes.[73]

---

[67] *See,* Chodorow, *supra* note 41, at 856-73, 928.
[68] *See, e.g.*, Fed Brief, *supra* note 5, at 47.
[69] *Id.* at 40.
[70] *Id*.
[71] 397 U.S. 664, 670 (1970).
[72] *Id*. at 674.
[73] 26 U.S.C. § 1402(a)(8). Nor do the valuation issues noted in *Walz* apply to cash allowances.

More important, even a cursory review of how Sections 119 and 107 operate demonstrates that Section 107 requires significantly greater entanglement than would Section 119.[74] Section 107 requires the government to inquire into a number of religious doctrines and practices. For instance, the government must decide what qualifies as a legitimate religion. While this inquiry is easy for established religions, it is more difficult for new religious movements, such as the Pastafarians,[75] Church of Unlimited Devotion,[76] witch covens, and First Church of Cannabis, the latter two of which actually received tax exempt status.[77] Most religions have at their core non-verifiable beliefs that can be difficult for non-believers to accept. Requiring the IRS and then courts to determine which beliefs or purported beliefs should count as a religion for tax purposes is clearly entangling.

The government must also determine who qualifies as a minister. For established churches with clear ordination rules, this determination is straightforward. But it gets harder for churches with no clear ordination process or independent ministers with no established church behind them. Difficulties also arise with churches that have different levels of ordination. By way of example, the government has had to delve into Jewish religious doctrine and practices to determine whether cantors, in addition to rabbis, should qualify for the exemption. They do.[78]

---

[74] *See* Chodorow, *supra* note 41, at 856-73.

[75] *See Join, Church Flying Spaghetti Monster,* https://www.venganza.org/join/ (last visited June 1, 2018).

[76] *See* Don Lattin, *Rock Religion? A Religious Cult That Sprang from the Extreme Fringe of the Grateful Dead`s Following Is Drawing Critics Who Say Devotees Are Brainwashed* (Jan. 18, 1992), http://articles.sun-sentinel.com/1992-01-18/features/9201030888_1_dennis-mcnally-jerry-garcia-sect.

[77] *See* I.R.S. Gen. Couns. Mem. 36993 (Feb 3, 1977); I.R.S. Determination Letter to the First Church of Cannabis, Inc. (May 21, 2015).

[78] *See, e.g.*, Salkov v. Comm'r, 46 T.C. 190 (1966) (determining that a Jewish cantor commissioned by recognized national body and installed by local congregation with power to perform certain religious functions qualified under section 107 even though he could not perform all functions of ordained rabbi); *see also* Silverman v. Comm'r, No. 72-1336, 1973 WL 2493, at *2 (8th Cir. 1973); Rev. Rul. 78-301, 1978-2 C.B. 103.

For ministers who work outside a church, the government must decide whether the organization is an "integral agency" of the church[79] and, if not, whether the church made a bona fide assignment to its religious purposes.[80] Regardless of where the minister works, the government must also determine whether ministers claiming the exemption are performing ministerial functions.[81] Ministers serve in a variety of capacities, whether within a church or for affiliated entities or secular organizations. The IRS has already been called on to decide whether ministers working within church organizations as clerks and stenographers qualify as ministers for purposes of the exemption. They do not.[82] However, ministers working elsewhere as teachers, counselors, directors of business services and alumni relations, and as basketball coaches do qualify for the exemption.[83]

The IRS must also determine how much ministerial activity is necessary to qualify as a minister for Section 107 purposes. Does an ordained minister working as an executive director of a secular non-profit count as a minister if she gives one sermon a year? How about ten sermons? What if she volunteers in a soup kitchen or counsels youth in an after-school program? Does the amount of ministerial activity required vary based on the nature of the activity? After determining the quantum of ministerial work necessary, the government must also ensure that ministers actually perform that work.

In sum, Section 107 requires the government to investigate and oversee both churches and ministers, delving into both doctrine and practice. Indeed, the courts have had to create a 5-factor

---

[79] *See* Treas. Reg. § 1.1402(c)-5(b)(2) (as amended in 1968).

[80] *See* Boyer v. Comm'r, 69 T.C. 521, 532 (1977) (determining an assignment of a Methodist minister to teach at a state college was not bona fide for the purposes of section 107).

[81] *See* Chodorow, *supra* note 41, at 861-66.

[82] Rev. Rul. 57-129, 1957-1 C.B. 313 (ministers engaged in management are eligible; ministers acting as stenographers, mail clerks, and janitors are not).

[83] *See* Reed v. Comm'r, 82 T.C. 208, 212-13 (1984).

test specifically designed to address these questions.[84] This kind of inquiry is precisely the type of entanglement the Court was concerned with in *Walz*.

In contrast, if Section 119 were to apply to ministers, tax authorities could avoid most of these inquiries. As a preliminary matter, a large number of ministers currently receive cash allowances and would not be eligible for the exemption.[85] For such ministers, there would be no need to delve into any of the questions outlined above. Instead, they would simply be required to pay taxes on all their income, like everyone else.

For those receiving in-kind housing, tax authorities would have to determine whether the minister is an employee and whether the housing is: (1) on-site, (2) required by the employer, and (3) for the employer's convenience. There would be no need to determine whether the person was part of a recognized religion, should be considered a minister for tax purposes, or was performing sufficient ministerial acts to warrant an exemption. Only inquiries regarding on-site and employer convenience would arguably be entangling. Deciding whether housing is for the benefit of the employer depends on the minster's duties, just as with any lay employee. If the minister need not be available on the premises overnight for church business, the housing is not for the employer's convenience, and it should be taxed as compensation. These inquiries relate only lightly to religious doctrine, if at all, and they are far less intrusive than those required under Section 107.[86]

---

[84] *See* Knight v Commissioner*,* 92 T.C. 199 (1989) (addressing these questions in the self-employment tax context).

[85] *See* Sarah Eekhoff Zylstra, *Are Pastors' Homes that Different?*, CHRISTIANITY TODAY (June 24, 2014), http://www.christianitytoday.com/ct/2014/june/are-pastors-homes-that-different.html.

[86] Alternately, the feared entanglement might be that churches may change their housing practices to take advantage of Section 119 should section 107 be deemed unconstitutional. However, the same concerns exist for a wide variety of tax rules, such as employer-provided health insurance and pension plans. No one suggests that such provisions entangle church and state by creating incentives for churches to structure their compensation in certain ways.

Supporters also claim that the legislative history from the 2002 amendment to Section 107(2) confirms that the provision was intended as an accommodation.[87] However, this history post-dates the section's enactment by 48 years and arose in response to the Ninth Circuit's questioning the section's constitutionality in *Warren*. This history should be treated as a litigation position rather than evidence of Congressional intent. The legislative history from the time of enactment makes no mention of efforts to avoid church-state entanglement.[88] If anything, its focus on the desire to aid churches and ministers suggests the opposite.

Finally, Supporters argue that Section 107 was designed to avoid entanglement under Section 280A, which permits employees to deduct costs associated with the business use of their homes under limited circumstances.[89] The difficulty with this argument is that it does no such thing. Ministers who use their homes for work can still deduct costs under these sections, even if they receive tax-free housing allowances. Thus, the District Court's silence on these provisions in no way undermines its conclusions.

### D. Holding Section 107(2) unconstitutional would not threaten other exemptions.

Supporters point to other exemptions for religious organizations, such as those found in the Federal Insurance Contributions Act (FICA) and Affordable Care Act (ACA), as evidence that exemptions are appropriate and claim that invalidating Section 107(2) would threaten these exemptions.[90] The argument depends in part on the fact that the regulations under Section 107 incorporate the regulations under Section 1402, which apply to both self-employment taxes and

---

[87] *See, e.g.*, Intervenor Brief, *supra* note 5, at 17.
[88] *See* Chodorow, *supra* note 41, at 857-59.
[89] *See, e.g.,* ADF Brief, *supra* note 56 at 9.
[90] *See, e.g.,* Intervenor Brief, *supra* note 5, at 55.

the ACA.[91] Those regulations define who qualifies as a minister and what counts as ministerial. The difficulty with these arguments is that the exemptions for FICA and the ACA and the other provisions they cite are purportedly necessary to ensure that the government does not force people to take actions that violate their religious beliefs. No one argues that such concerns motivate Section 107.

Ministers are already subject to the income tax, and they already pay self-employment taxes on the value of housing and housing allowances. Requiring them to pay tax on *all* their income would not force anyone to violate a religious belief. Thus, the existence of these other exemptions does not bolster the case for Section 107(2). Nor would eliminating it put these other exemptions at risk.

## V. CONCLUSION

Section 107(2) uniquely subsidizes religion and leads to significant church-state entanglement. Accordingly, the judgment below should be affirmed.

Dated this 22nd day of June, 2018.

By: /s/ Adam Chodorow

Adam Chodorow
4620 E. Arcadia Lane
Phoenix, AZ 85028
602-296-4155

[91] 26 U.S.C. § 5000A(d)(2).

## APPENDIX A

All affiliations listed below are for identification purposes only.

Ellen P. Aprill, John E. Anderson Chair in Tax Law, Loyola Law School of Los Angeles

Reuven Avi-Yonnah, Irvin I. Cohn Professor of Law, Director of the International Tax LL.M. Program, University of Michigan Law School

Linda M. Beale, Professor of Law, Director of Graduate Studies, Wayne State University Law School

Samuel Brunson, Georgia Reithal Professor of Law, Loyola University of Chicago, School of Law

Neil H. Buchanan, Professor of Law, George Washington University School of Law

Patricia A. Cain, Professor of Law, Santa Clara University

Adam Chodorow, Willard H. Pedrick Distinguished Research Scholar, Associate Dean of Academic Affairs, Sandra Day O'Connor College of Law, Arizona State University

Mark Cochran, Professor of Law, Saint Mary's College of Law

Bridget Crawford, James D. Hopkins Professor of Law, Elisabeth Haub School of Law at Pace University

Jonathan Forman, Alfred P. Murrah Professor, University of Oklahoma College of Law

Gregory Germaine, Professor of Law, Syracuse University College of Law

David Herzig, Michael and Dianne Swygert Research Fellow, Valparaiso University Law School

Benjamin Leff, Professor of Law, American University Washington College of Law

William H. Lyons, Richard H. Larson Professor of Tax Law, Emeritus, University of Nebraska School of Law

Roberta Mann, Mr. & Mrs. L.L. Stewart Professor of Business Law, University of Oregon School of Law

Lori McMillan, Professor of Law, Washburn University School of Law

Joel Newman, Professor of Law, Emeritus, Wake Forest School of Law

Henry Ordower, Professor of Law, Saint Louis University School of Law

Katherine Pratt, Professor of Law, Sayre MacNeil Fellow, Loyola Law School of Los Angeles

Daniel Schaffa, Assistant Professor of Law, University of Richmond School of Law

Erin A. Scharff, Professor of Law, Sandra Day O'Connor College of Law, Arizona State University

Theodore P. Seto, Hon. Frederick J. Lower, Jr. Chair, Loyola Law School of Los Angeles

**CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)**

The undersigned, counsel of record for the Plaintiff-Appellees, furnishes the following in compliance with F.R.A.P Rule 32(a)(7):

I hereby certify that this brief conforms to the rules contained in F.R.A.P Rule 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 6,998 words.

Dated 22nd day of June, 2018.

By: /s/ Adam Chodorow

Adam Chodorow
4620 E. Arcadia Lane
Phoenix, AZ 85028
602-296-4155

## CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Counsel for all parties was served electronically by the Notice of Docket Activity transmitted by the CM/ECF system.

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

Dated this 22nd day of June, 2018.

By: /s/ Adam Chodorow

Adam Chodorow
4620 E. Arcadia Lane
Phoenix, AZ 85028
602-296-4155