Nos. 18-1277 and 18-1280

In the United States Court of Appeals for the Seventh Circuit

ANNIE L. GAYLOR, et al.,

Plaintiffs-Appellees,

v.

STEVEN T. MNUCHIN, Secretary of the United States Department of Treasury, et al.,

Defendants-Appellants,

and

EDWARD PEECHER, et al.,

Intervening Defendants-Appellants,

On Appeal from the United States District Court
for the Western District of Wisconsin,
No. 3:16-cv-00215, Judge Barbara B. Crabb Presiding

REPLY BRIEF OF INTERVENING DEFENDANTS-APPELLANTS

Luke W. Goodrich
Joseph C. Davis
Daniel Ortner
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave. NW, Suite 700
Washington, D.C. 20036
(202) 955-0095
lgoodrich@becketlaw.org

Counsel for Intervening Defendants-Appellants

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INTRODUCTION

Section 107 is constitutional under both of the Supreme Court's leading tax cases: *Walz* and *Texas Monthly*. It is constitutional under *Walz* because it is an exemption, not a transfer of funds, and because it is consistent with "an unbroken practice" of providing similar exemptions to churches and ministers throughout "our entire national existence and indeed predat[ing] it." *Walz v. Tax Comm'n of the City of N.Y.*, 397 U.S. 664, 678 (1970). Plaintiffs don't seriously dispute either point. Instead, they dispute *Walz* itself, critiquing the distinction between exemptions and transfers and arguing that a "historical test" should have "no application in the present case." Resp. 42. But Plaintiffs' disagreement with Supreme Court precedent is no grounds for ignoring it. And more recent Supreme Court cases have reaffirmed *Walz* on both the exemption/transfer distinction and the centrality of history in applying the Establishment Clause.

Section 107 is also constitutional under *Texas Monthly* because it one of many tax provisions applying the convenience-of-the-employer doctrine to both religious and nonreligious employees, and it applies that doctrine to ministers in a way that reduces church–state entanglement and discrimination among religious groups. Plaintiffs don't deny the existence of the convenience-of-the-employer doctrine. They don't deny that ministers regularly face significant job-related demands on their housing. And they don't deny that the tax code exempts housing benefits for hundreds of thousands of nonreligious workers. Instead, they claim that all of these exemptions (except § 119(a)(2)) are random subsidies for various categories of employees without any link to the convenience-of-the-employer doctrine. But Plaintiffs of-

fer no evidence to support their random-subsidy theory, and Congress, commentators, the courts, and the IRS have all rejected it—repeatedly recognizing that these exemptions are rooted in the convenience-of-the-employer doctrine.

Ultimately, the only thing Plaintiffs and their *amici* have shown is that they disagree with § 107 as a policy matter—believing it would be better to subject ministers to § 119(a)(2) and have the IRS make case-by-case determinations on whether each minister's home is sufficiently "important" to her work. But Congress made a different policy judgment in adopting § 107—that a bright-line rule for ministers would work better. That policy judgment is grounded in longstanding tax principles that have prompted Congress to adopt similar bright-line rules for hundreds of thousands of nonreligious workers. That judgment was made in the context of "creating classifications and distinctions in the tax statutes"—a field where Congress "has especially broad latitude" and receives "substantial deference." *Mueller v. Allen*, 463 U.S. 388, 396 (1983). And that judgment is rooted in important constitutional considerations of nonentanglement and nondiscrimination. Accordingly, that judgment is not only well within Congress's discretion, it is fully constitutional.

ARGUMENT

I. Section 107 is constitutional under *Walz*.

Section 107 is presumptively constitutional under *Walz* for two reasons. First, it is a tax exemption, rather than a transfer of government revenue, so it does not "divert[] the income of [citizens] to churches." 397 U.S. at 691. Second, it is consistent with "more than a century of our history and uninterrupted practice" under the Establishment Clause. *Id.* at 680; Br. 23-29.

Plaintiffs and their *amici* try to resist *Walz* on several grounds, none convincing. First, they claim that *Walz*'s distinction between exemptions and transfers has been rejected in "subsequent decisions." Resp. 34-35; *see also Amicus Curiae* Br. of Tax Law Professors in Supp. of Appellees ("Profs.") 12. But far from rejecting that distinction, the modern Court has reaffirmed it. In *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011), the Court explained that the distinction between exemptions and transfers is rooted in "the history of Establishment Clause," which was meant to protect against the "extract[ion] and spen[ding]' of 'tax money' in aid of religion . . . in violation of [a dissenter's] conscience." *Id.* at 140-41. By contrast, "[w]hen the government declines to impose a tax, . . . there is no such connection between dissenting taxpayer and alleged establishment." *Id.* at 142. Plaintiffs and their *amici* do not even attempt to distinguish *Winn*.

Instead, they criticize it, arguing that *Walz* and *Winn* "ignore economic reality" because "[b]oth tax exemptions and tax deductibility are a form of subsidy." Profs. 12 (quoting *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 544 (1983)); Resp. 35. But the same argument was made and rejected in *Walz* and *Winn*. *See Walz*, 397 U.S. at 709 (Douglas, J., dissenting) ("Tax exemption, no matter what its form, is essentially a government grant or subsidy."); *Winn*, 563 U.S. at 151-57 (Kagan, J., dissenting) ("a subsidy is a subsidy," whether it "takes the form of a cash grant or a tax measure"). The Court in those cases didn't disagree that exemptions and transfers "have similar economic consequences." *Id.* at 141; *Walz*, 397 U.S. at 690 (Brennan, J., concurring) (both provide "economic assistance" to church-

es). It simply held that what matters under the Establishment Clause is whether a subsidy "implicate[s] individual taxpayers in sectarian activities." *Winn*, 563 U.S. at 142. A transfer does so, because "moneys have been extracted from a citizen and handed to a religious institution in violation of the citizen's conscience"; an exemption does not. *Id.* at 144; *see also Walz*, 397 U.S. at 690. Plaintiffs and their *amici* may dislike this distinction, but it remains binding. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 590 (1997) ("there is a constitutionally significant difference between subsidies and tax exemptions" under "the Establishment Clause").[1]

Alternatively, Plaintiffs claim that Justice Brennan "reject[ed] the distinction" between exemptions and transfers in *Texas Monthly*. Resp. 34; Profs. 12. But Justice Brennan's opinion on this point received only three votes; six Justices rejected it. And his opinion obviously predated the Court's reaffirmation of the distinction in *Winn*.

Unable to escape the key distinction in *Walz* and *Winn*, Plaintiffs turn to history, asserting that *Walz* was based "on a unique historical rationale relating to property tax exemptions," while "[i]ncome tax exemptions" are different. Resp. 14-15. But this misunderstands both *Walz* and the way the Court treats history under the Establishment Clause. *Walz* didn't limit its historical inquiry to property-tax exemp-

[1] For the same reason, Plaintiffs' reliance (at 34) on *CSX Transportation, Inc. v. Alabama Department of Revenue*, 131 S. Ct. 1101, 1109 (2011), and *Regan* is misplaced. Neither case involved concerns about taxpayers' conscience under the Establishment Clause.

tions; it considered a much broader tradition of tax exemptions for churches—including the 1813 exemption from federal import duties, an 1870 exemption from "any and all taxes" on churches in the District of Columbia, and (crucially for this case) the longstanding exemption of religious organizations from federal income tax. 397 U.S. at 678. The lesson *Walz* drew from this history—that tax exemptions are not a "first step toward 'establishment' of religion"—applies no less to income-tax exemptions than to property-tax exemptions. *Id.* at 678.

Plaintiffs' argument is also inconsistent with how the Supreme Court has treated history in other Establishment Clause cases. The Court doesn't limit itself to asking whether the challenged practice is *identical* to a practice engaged in at the founding; instead, it asks whether the challenged practice poses a "greater potential for an establishment of religion" than practices at the founding. *County of Allegheny v. ACLU*, 492 U.S. 573, 602 (1989) (Kennedy, J., concurring and dissenting in part); *see also Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (adopting this analysis); *Lynch v. Donnelly*, 465 U.S. 668, 682 (1984) (same). Here, then, the question is whether an income-tax exemption for churches is a "greater aid to religion" than the property-tax exemptions upheld in *Walz*. *Id.* And *Walz* answers that question in the negative, stating that an income-tax exemption is "an 'aid' to churches no more and no less in principle than [a] real estate tax exemption." *Walz*, 397 U.S. at 676.

Next, Plaintiffs argue that the historical analysis of *Town of Greece* is limited to the context of legislative prayer. Resp. 41-42. But *Town of Greece* itself said that its

historical analysis is not an "exception" for legislative-prayer cases, but the norm: "the Establishment Clause must be interpreted by reference to historical practices and understandings." 134 S. Ct. at 1818-19. Accordingly, the Court has relied on history in a wide variety of Establishment Clause contexts—including cases involving tax exemptions (*Walz*), religious displays (*Lynch*, 465 U.S. at 674-78, 682), and direct aid (*Everson v. Bd. of Educ.*, 330 U.S. 1, 14 (1947)).

Finally, Plaintiffs offer no evidence that provisions like § 107(2) were historically viewed as an establishment. To the contrary, as we and the state *amici* have explained, the "tradition of the parsonage system's tax-exempt treatment predates the Founding" and "runs through the intervening centuries." *Amicus Curiae* Br. of States of Wisconsin *et al.* 9-17; *see also* Br. 27-28 & n.19 (collecting examples). Indeed, the claim that parsonage exemptions constituted an establishment was rejected over 140 years ago. *See Trustees of Griswold Coll. v. State*, 46 Iowa 275, 282 (1877). Thus, like the property-tax exemption in *Walz*, Section 107 is fully consistent with the "historical practices and understandings" of the Establishment Clause, *Town of Greece*, 134 S. Ct. at 1818-19, and is therefore constitutional.

II. Section 107 is constitutional under *Texas Monthly*.

Section 107 is also constitutional under *Texas Monthly*. *Texas Monthly* recognized an exception to *Walz* for tax exemptions that benefit only religious groups, serve no secular purpose, and provide preferential support for the communication of religious messages. Section 107 does none of those things. Instead, it adapts the convenience-of-the-employer doctrine to ministers in a way that reduces church–state entanglement and discrimination among religious groups.

A. Section 107 applies the convenience-of-the-employer doctrine to ministers.

As explained in our opening brief (at 10-18), § 107 is just one of many tax provisions adapting the convenience-of-the-employer doctrine to various employees. The default rule is § 119(a), which requires employees to satisfy a multi-part test. Br. 38-42; Treas. Reg. § 1.119-1(b). But Congress has relaxed the default rule for various categories of employees that routinely face significant job-related demands on their housing—including employees living in foreign camps (§ 119(c)), employees of educational institutions (§ 119(d)), members of the military (§ 134), government employees living overseas (§ 912), citizens working abroad (§ 911), and employees temporarily away from home on business (§§ 162, 132). Br. 10-15. Congress adopted the same approach for ministers—recognizing that they face unique demands on their housing, and that regulating their housing under the fact-intensive test of § 119 would result in church–state entanglement and discrimination among religious groups.

Plaintiffs and their *amici* don't dispute that the tax code allows hundreds of thousands of nonreligious employees to receive tax-exempt housing every year. Br. 32. Nor do they dispute that the value of nonreligious housing exemptions dwarfs the value of § 107 to ministers. Br. 18. Instead, they dispute that these exemptions are part of a "broad neutral policy that exempts housing allowances from taxation." Resp. 22; Profs. 2-9. In their view, the only exemption embodying the convenience-of-the-employer doctrine is § 119(a)(2); all other exemptions are "subsidies" lacking any unifying rationale. Profs. 3-4. But their argument mischaracterizes how the rel-

evant exemptions actually work and contradicts decades of court decisions, IRS guidance, and the statements of Congress itself.

First, Plaintiffs' *amici* characterize § 119(a)(2) as a "strict" "bright-line rule[]" that applies "only rarely"—namely, to employees "who cannot do their jobs unless they live on-site," like "lighthouse keepers or sailors." Profs. 4-5, 11. From there, they argue that all other housing exemptions—including § 107—differ as a "normative" matter. *Id.* But *amici* mischaracterize how § 119(a)(2) works in practice. It is not a "strict bright-line rule[]"; as many courts have recognized, it requires "extraordinarily fact intensive" inquiries, *Alford v. United States*, 116 F.3d 334, 337 (8th Cir. 1997), that are "at best elusive and admittedly incapable of generating any hard and fast line." *Adams v. United States*, 585 F.2d 1060, 1065 (Ct. Cl. 1978) (internal quotation marks omitted); *see also, e.g., U.S. Jr. Chamber of Commerce v. United States*, 334 F.2d 660, 663-64 (Ct. Cl. 1964) (rejecting a "strict construction of § 119" and requiring "consideration of all the facts and circumstances of [each] case"). And § 119(a)(2) has not been applied "only rarely" to employees like lighthouse keepers and sailors "who cannot do their jobs unless they live on-site"; it has applied broadly to construction workers, nurses, prison wardens, apartment caretakers, museum directors, oil executives, non-profit presidents, state governors, school superintendents, and many more—far more often than § 107 has ever applied to ministers. Br. 10 (collecting cases). *Amici* may believe § 119(a)(2) *should* be applied "only rarely" as a normative matter; but that is not how it applies in practice.

Second, *amici* claim that § 107 differs from § 119 because ministers must pay "self-employment tax" on their housing allowances—which, in their view, shows that "Congress treats ministerial housing as compensation." Profs. 6. But this ignores the fact that ministers must pay self-employment tax on housing even if it is excluded from income under § 119 or § 911. 26 U.S.C § 1402(a)(8). This is because the tax code treats all ministers as self-employed—not because § 107 is treated as compensation and § 119 is not. Indeed, the fact that Congress expressly grouped §§ 107, 119, and 911 together in the same section of the tax code (§ 1402) confirms that they are part of a broad housing policy that naturally includes ministers.

Third, Plaintiffs claim that § 134 (for members of the military) and § 912 (for overseas government workers) are not applications of the convenience-of-the-employer doctrine; they are simply "a means of increasing the[] take-home pay" of federal employees. Resp. 22, Profs. 8. But this argument contradicts how the courts, the IRS, and Congress have uniformly understood these exemptions.

The first court to consider military housing allowances excluded them from income based on the convenience-of-the-employer doctrine—emphasizing that "the Government furnishes the quarters as a part of the military establishment itself," much like the "captain of a steamboat" or "a lighthouse keeper" receives lodging to carry out his job. *Jones v. United States*, 60 Ct. Cl. 552, 578, 576, 570 (1925); *see also Comm'r v. Kowalski*, 434 U.S. 77, 87 (1977) (*Jones* "appl[ied] the convenience-of-the-employer doctrine"). And when the IRS first interpreted the exemption for military housing allowances, it cited *Jones*, explaining that the allowances were exclud-

able because they were "not compensation." Mim. 3413, V-1 C.B. 30 (1926). Similarly, the first IRS decisions exempting overseas government workers invoked the convenience-of-the-employer doctrine—emphasizing that "[i]t is obvious from the character of their work" that their housing allowances were "for the benefit of the United States and not for the benefit of the recipient." I.R.S. Gen. Couns. Mem. 14,836 (Jan. 1, 1935) (customs agents); J. Patrick McDavitt, *Dissection of a Malignancy: The Convenience of the Employer Doctrine*, 44 Notre Dame Lawyer 1104, 1108 & n. 40 (1969) (collecting decisions). Likewise, when Congress codified the exemption for overseas government workers, it expressly invoked the convenience-of-the-employer rationale—stating that "the allowances are to meet official needs as distinguished from personal requirements." S. Rep. No. 78-627 at 24 (1944). Thus, not surprisingly, Plaintiffs' *amici* are forced to admit that "some authorities suggest a convenience-of-the-employer rationale for both Section 912 and 134." Profs. 11.

By contrast, *amici* cite no court or IRS decision that has ever treated these allowances as merely "a means of increasing [government employees'] take-home pay." Profs. 8. Nor would treating them that way make any sense. For one thing, *amici* fail to explain why Congress would provide tax-free housing allowances to *overseas* federal workers, but not domestic ones. Both have the same interest in increased take-home pay. The obvious difference is that overseas workers face job-related housing demands that domestic workers don't. Similarly, if Congress merely wanted to increase take-home pay, why would it provide a *housing* allowance rather than simply raising wages or offering a tax credit—both of which, by *amici*'s own

logic, would have the same effect? A housing allowance makes sense only if Congress agrees with the courts and the IRS that these workers face unique demands on their housing.

Fourth, Plaintiffs claim that § 911 (for citizens abroad) was motivated not by "employer convenience factors" but by the need to "address issues of double taxation." Resp. 22-23. But Congress addressed double taxation long ago by adopting the foreign tax credit (§§ 901-03, 960), which allows taxpayers to receive a dollar-for-dollar credit for any foreign taxes paid on their income, including taxes paid on any housing allowance. Melissa Redmiles & Jason Wenrich, Internal Revenue Service, *A History of Controlled Foreign Corporations and the Foreign Tax Credit* 129 (2007), http://www.irs.gov/pub/irs-soi/historycfcftc.pdf. So § 911 wasn't needed to address double taxation; rather, as *amici* admit, it was needed to address the unique "burden of living abroad." Profs. 7. But that is just another way of saying § 911 reflects the convenience-of-the-employer doctrine. Congress determined that, when an employer provides a housing allowance to offset "excess foreign living costs," S. Rep. No. 97-144, at 36 (1981), *as reprinted in* 1981 U.S.C.C.A.N. 105, 143, the allowance shouldn't be treated as income—just like reimbursement for a business trip isn't treated as income. Both are provided for the convenience of the employer. *See* Charles H. Gustafson *et al.*, *Taxation of International Transactions* 421-22 (4th ed. 2006) ("[C]ertain living costs for those working abroad should perhaps be characterized as particularly attributable to the foreign work so that taxpayers are, in a very general sense, living on the business premises of the employer, living there for the

convenience of the employer and required to live there as a condition of this particular employment.").

Fifth, Plaintiffs claim that the various housing provisions can't be part of the convenience-of-the-employer doctrine because they were "adopted years apart" and are "scattered throughout the Code." Profs. 3. But this is irrelevant; nothing in *Texas Monthly* requires that "similar tax breaks for nonreligious activities" be embodied in contiguous or contemporaneous code provisions. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 n.4 (1989) (plurality). Nor is it uncommon for tax policy to develop over time and be embodied in different parts of the code—just like the many tax provisions reducing religious entanglement and discrimination have been added over time and are scattered throughout the code. Br. 55-56. In any event, Plaintiffs simply ignore the fact that Congress passed § 107(2) *the same day* it passed § 119(a)—which Plaintiffs admit is a convenience-of-the-employer provision. They also ignore that § 107(2) was enacted to codify several federal court decisions holding that cash and in-kind housing for ministers were indistinguishable for purposes of the "convenience of the employer rule." *Williamson v. Comm'r*, 224 F.2d 377, 378-80 (8th Cir. 1955); *see also* Br. 15-16.

Finally, although Plaintiffs offer a few (weak) attempts to distinguish § 107 from §§ 911, 912, and 134, they simply ignore the other bright-line rules relaxing the requirements of § 119(a)(2) for various employees—including § 119(c) (employees in foreign camps), § 119(d) (employees of educational institutions), and §§ 162 & 132 (employees away from home for business). These rules underscore the basic fact

that Plaintiffs cannot escape: Congress allows hundreds of thousands of employees to receive tax-exempt housing every year even when they don't satisfy the fact-intensive test of § 119(a)(2). There is nothing unusual about the decision to extend the same treatment to ministers.

B. Section 107 reduces entanglement in religious matters.

Section 107 is also independently justified as a means of reducing government entanglement in religious questions. Absent § 107, the IRS would have to apply § 119 to ministers. This would require the IRS to conduct "extraordinarily fact intensive" inquiries into the relationship between the minister and the church, whether the minister performs "important" religious duties in the home, and whether the minister's use of the home is "necessary" to the church. Br. 39-44 (quoting *Alford v. United States*, 116 F.3d 334, 337 (8th Cir. 1997)). These sorts of inquiries—questioning "the centrality of [a] religious practice to [an] adherent's faith"—are constitutionally "prohibited." *Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013). Accordingly, Congress eliminated these entangling inquiries by adopting the bright-line rule of § 107.

Plaintiffs don't seriously dispute that applying § 119 to ministers would be entangling. *Cf.* Profs. 20 (admitting that the "inquiries regarding on-site and employer convenience would arguably be entangling"). Instead, they claim that § 107 is even more entangling because it requires the IRS to determine who is a "minister" and whether the minister is associated with a "church" or a "religious organization." Resp. 14, 36; Profs. 18-19. But these inquiries are staples of First Amendment law; in fact, in many cases, they are constitutionally required.

In *Hosanna-Tabor*, for example, the Supreme Court recognized the "ministerial exception," which bars the application of employment discrimination laws to claims between a "religious organization" and its "ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012). This doctrine, of course, requires the courts to determine what counts as a "religious organization" and a "minister." *See id.* at 188-90. But no Justice expressed concern that this inquiry was unduly entangling; rather, the Court unanimously agreed that the plaintiff was a minister. *Id.* at 190-96.

By contrast, the Court recognized that *not* applying the ministerial exception *would* result in impermissible entanglement. *Id.* at 188-89. As Justices Alito and Kagan explained, some cases would require "witnesses to testify about the importance and priority of the religious doctrine in question, with a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission." *Id.* at 205-06 (Alito, J., concurring). That is the same kind of entanglement that would occur if the IRS applied § 119 to ministers: Ministers would "testify about the importance" of their homes to their ministry, with the IRS "sitting in ultimate judgment" of "how important" the use of the minister's home "is to the church's overall mission." *Id.*; Br. 39-44.

Plaintiffs also criticize IRS regulations and decisions on who is a "minister." Resp. 34-36. But these regulations and decisions consider the same factors the Supreme Court approved in *Hosanna-Tabor*. For instance, Plaintiffs complain that the IRS considers whether a taxpayer has been officially "ordained, commissioned, or

licensed" by a church. Resp. 36. But *Hosanna-Tabor* likewise instructed courts to consider whether an employee "has been ordained or commissioned as a minister." 565 U.S. at 192-93. Similarly, Plaintiffs complain that the IRS considers the taxpayer's "function," looking to whether she "perform[s] specific duties, such as sacerdotal functions, conduct of religious worship, . . . and performance of teaching . . . at theological seminaries." Resp. 36. But *Hosanna-Tabor* likewise adopted a "functional" analysis, finding that the plaintiff there was a "minister" because her "job duties" included teaching sacred scripture and doctrine, leading others in prayer, and presiding over liturgy. 565 U.S. at 192; *see also id.* at 204 (Alito, J., concurring). In fact, Plaintiffs identify *no* difference between the tests applied by the IRS and the Supreme Court in *Hosanna-Tabor*.

Instead, they cite isolated outcomes they dislike, complaining that "teachers," "college administrators," and "even basketball coaches" have qualified for exemptions under § 107. Resp. 39; Profs. 10 & n.41, 19. But "teachers" and "administrators" routinely qualify as ministers under *Hosanna-Tabor*, because they are involved in "transmitting the . . . faith to the next generation." *Hosanna-Tabor*, 565 U.S. at 192 (teacher); *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 206-10 (2d Cir. 2017) (administrator). And the "basketball coach" Plaintiffs cite was an ordained minister who regularly "counsel[ed] students in spiritual [matters]," "performed marriages and baptisms," "sp[oke] from the pulpit on behalf of the [college]," and was "directly responsible for the conversion and baptism of several" students. Petition at 12, *Jobe v. Comm'r*, No. 33686-83 (T.C. Mar. 21, 1985), *available at*

https://drive.google.com/file/d/0B2e4-pmYYFdqNU1fTG1SSXh2UE0/edit. Even assuming the IRS got that case wrong, it doesn't mean the "minister" inquiry is unduly entangling or that § 107 should be struck down; it simply means the IRS can learn from the recent guidance of *Hosanna-Tabor*.

Finally, Plaintiffs ignore the fact that the question of what counts as a "church" or "minister" is littered throughout the federal tax code. Section § 3401(a)(9) exempts "church[es]" from withholding income taxes from "minister[s]." Sections 1402(c)(4), 1402(e), and 3121(b)(8) exempt "church[es]" from Social Security and Medicare taxes for wages paid to "minister[s]." Section 3309(b)(1) exempts "church[es]" and "minister[s]" from state unemployment insurance funds. Section 7611 protects "church[es]" in tax audits. Section 508(c) exempts "church[es]" from having to apply for tax-exempt status. And § 6033(a)(3) exempts "church[es]" from filing financial disclosures. If determining what counts as a "church" or "minister" is entangling, all of these provisions are suspect (and many more). But, of course, that is not the law, because it is difficult to "imagin[e] how" First Amendment "law would function if merely determining whether an organization is a religious organization, or associated with one, constituted impermissible entanglement." *Medina v. Catholic Health Initiatives*, 877 F.3d 1213, 1233 (10th Cir. 2017); *cf. Grussgott v. Milwaukee Jewish Day Sch.*, 882 F.3d 655, 657 (7th Cir. 2018) (determining that plaintiff was a "minister" and defendant was a "religious institution").

In short, § 107 replaces the constitutionally entangling inquiries of § 119 with the inquiries routinely conducted under the First Amendment and throughout the tax code. That is an independent basis for upholding § 107.[2]

C. Section 107 reduces discrimination among religious groups.

Section 107 is also constitutionally justified as a means of reducing discrimination among religious groups. Br. 44-49. As we explained, many churches have theological reasons for preferring in-kind parsonages over cash housing allowances (or vice versa). Br. 45-46. Wealthier churches, too, can more easily afford parsonages, while newer and poorer churches cannot. *Cf. Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982). In the 1950s, several federal courts ruled that this discrimination among religious groups was inappropriate. Br. 46 (collecting decisions). Congress then responded by enacting § 107(2) to "remove[] the discrimination." *Id.* (quoting legislative history). Congress also did the same for overseas employees and military service members, ensuring that cash and in-kind housing benefits under §§ 912 and 134 are treated equally. Br. 46-47.

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[2] Plaintiffs also claim that eliminating § 107(2) would not cause entanglement because ministers who receive cash allowances cannot qualify for an exemption under § 119. Resp. 7. But if § 107(2) were struck down, ministers could seek a deduction for home office expenses under § 280A, which is just as entangling. Br. 43. *Amici* say that ministers can do so anyway, "even if they receive tax-free housing allowances." Profs. 21. But this is incorrect: The code prohibits deductions on amounts that are already tax exempt. 26 U.S.C. § 265(a)(1); *Deason v. Comm'r*, 41 T.C. 465, 468 (1964) (prohibiting deductions related to housing under § 107). Plaintiffs also ignore the fact that eliminating § 107(2) would discriminate against churches that have theological or financial constraints on providing in-kind housing under § 107(1). *See infra* Part II.C.

Plaintiffs offer several responses, none persuasive. First, they claim that the discrimination Congress sought to eliminate is irrelevant, because § 107(1) "does not make distinctions between different religious organizations based on any creed or orthodoxy." Resp. 29-30. But the same was true of the law in *Larson*, and the Supreme Court still struck it down—noting that the law favored "well-established churches" with "financial support" over "churches which are new and lacking in a constituency." 456 U.S. at 246 n.23. In any event, enacting § 107(1) without § 107(2) *does* discriminate among churches based on religious doctrine—because many churches have theological reasons for favoring (or disfavoring) in-kind parsonages. Br. 45.

Next, Plaintiffs claim Congress can't eliminate discrimination *among* churches unless it makes "the resulting benefit" available "to similarly situated secular taxpayers." Resp. 29. In other words, Congress was required to "level down" by eliminating § 107(1), not "level[] up" by enacting § 107(2). Profs. 15-16. But neither Plaintiffs nor their *amici* cite any authority for this proposition, and multiple cases reject it.

Larson itself required the government to "level up" a religious exemption to eliminate discrimination. The statute there exempted religious organizations from registration and reporting requirements, but only if they received more than half of their total contributions from members. 456 U.S. at 231-32. Upon finding the exemption discriminatory, the Court did not "level down" by eliminating the exemption; it lev-

eled up by "expand[ing] [the] exemption" to "all 'religious organizations.'" *Id.* at 270 (Rehnquist, J., dissenting).

Similarly, in 1980, the IRS interpreted ERISA's "church plan" exemption to include plans established by a "church," but not plans established by "church-affiliated organizations." *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1661-62 (2017). After "[m]any religious groups protested that ruling," Congress "expand[ed] th[e] definition" to include both "churches and church-affiliated organizations"—ensuring that both types of organizations "would receive the same treatment." *Id.* at 1656, 1662. A variety of Plaintiffs challenged the expanded exemption under the Establishment Clause, arguing that Congress should have leveled down by eliminating it altogether. *Medina*, 877 F.3d at 1233. But the Tenth Circuit rejected that argument, holding that leveling down would discriminate among religious groups based on their decision "to adopt a particular structure." *Id.* at 1233-34. Other decisions have likewise approved (or even required) "leveling up" to eliminate religious discrimination. *See, e.g.*, *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 335-36 (1987) (upholding an exemption expanded from "religious activities" to all "activities" because the expanded exemption minimized "interference with [religious organizations'] decision-making process"); *Cohen v. City of Des Plaines*, 8 F.3d 484, 490-91 (7th Cir. 1993) (approving exemption for all church daycares, because a narrower exemption would require "governmental meddling in religious affairs").

Lastly, Plaintiffs' *amici* argue that Congress shouldn't try to "treat[] all ministers the same for tax purposes," because not all ministers are "similarly situated" in every respect—some earn higher salaries; others receive employer-provided health insurance; some buy houses; others rent. Profs. 14 & n.60. But this misses the key point: There is no sound reason to treat ministers who receive in-kind and cash housing differently. The distinction between in-kind and cash housing has been rejected by courts, commentators, and Congress. Br. 15, 46-47 (collecting authorities). It has been rejected for members of the military (§ 134), overseas government workers (§ 912), and citizens abroad (§ 911). And it makes particularly good sense to reject the distinction here, where it would create financial pressure on churches "to adopt a particular structure" "in order to receive the exemption's benefits." *Medina*, 877 F.3d at 1234. Eliminating this discrimination was well within Congress's "especially broad latitude in creating classifications and distinctions in tax statutes," and is entitled to "substantial deference" under the Establishment Clause. *Mueller*, 463 U.S. at 396; *see also Estate of Kunze v. Comm'r*, 233 F.3d 948, 954 (7th Cir. 2000) ("[P]erfect equality or absolute logical consistency between persons subject to the Internal Revenue Code is not a constitutional *sine qua non*.").

D. Section 107 satisfies both opinions in *Texas Monthly*.

Because § 107 applies the convenience-of-the-employer doctrine in a way that reduces entanglement and discrimination, it is permissible under both opinions in *Texas Monthly*. It satisfies Justice Blackmun's concurrence because it is not confined "exclusively to the sale of religious publications" and does not result in "preferential support for the communication of religious messages." 489 U.S. at 28. And

it satisfies the *Texas Monthly* plurality because it is "grounded in [a] secular legislative policy that motivate[s] similar tax breaks for nonreligious activities"—namely, the convenience-of-the employer doctrine, which provides tax-free housing to hundreds of thousands of nonreligious employees. Br. 49-52.[3]

In response, Plaintiffs suggest the Court cannot consider any tax provision beyond § 107, because the *Texas Monthly* plurality rejected Texas's attempt to "justify its sales tax exemption for religious publications by citing other sales tax exemptions in its Tax Code." Resp. 22. But the exemptions mentioned by the *Texas Monthly* plurality were unrelated to the sale of literature—they were for "sales of food, agricultural items, and property used in the manufacture of articles for ultimate sale," and there was no "overarching secular purpose" uniting them. 489 U.S. at 14 n.4, 17. The equivalent here would be to try to justify exemptions for housing based on

[3] This same analysis distinguishes the various nonbinding authorities Plaintiffs invoke, too. Resp. 9-11. *Haller* and *Budlong*, like *Texas Monthly*, involved exemptions solely for religious literature that lacked any secular purpose and were not part of any broader scheme of related exemptions. *Haller v. Pa. Dep't of Revenue*, 728 A.2d 351, 351, 356 (Pa. 1999); *Budlong v. Graham*, 488 F. Supp. 2d 1252, 1252-53, 1256 (N.D. Ga. 2007). And *Budlong* actually rested on the Press Clause. *Id.* In *New Orleans Secular Humanist Association*, the government "d[id] not argue" that the challenged exemptions were "grounded in some secular legislative policy" and "presented no law to support" a non-entanglement argument. *New Orleans Secular Humanists Ass'n, Inc. v. Bridges*, No. 04-3165, 2006 WL 1005008, at *1-2, 5 (E.D. La. Apr. 17, 2006) (citation and internal quotation marks omitted). *Catholic Health Initiatives* did not even resolve the constitutional question, and its Establishment Clause concerns were based on the fact that the exemption, unlike § 107, did not "serve a broad secular purpose." *Catholic Health Initiatives Colo. v. City of Pueblo, Dep't of Finance*, 207 P.3d 812, 818, 822 (Colo. 2009). Finally, *American Atheists* did not involve a tax exemption, and it *upheld* direct aid for churches. *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 282 (6th Cir. 2009).

unrelated exemptions for literature, food, or automobiles. Here, of course, Congress has enacted numerous exemptions for the same benefit—employer-provided housing—all united by the same overarching purpose: providing fair tax treatment to employees.

Regardless, even if § 107 weren't part of a broad class of provisions adapting the convenience-of-the-employer doctrine, it would *still* be permissible under the *Texas Monthly* plurality—because even a benefit "conferred exclusively upon religious groups" is permissible if it (1) does not "impose substantial burdens on nonbeneficiaries" or (2) is "designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause." 489 U.S. at 18 n.8; Br. 51-52. Here, § 107 imposes no "substantial burden" on nonbeneficiaries; indeed, hundreds of thousands of "nonbeneficiaries" still receive tax-exempt housing under § 119 and other convenience-of-the-employer provisions. And while Plaintiffs claim that § 107 reduces the government's tax revenue, Resp. 20, it is well settled that taxpayers do not suffer any cognizable "burden" from the mere fact that a law "depletes the funds of the [treasury] to which [they] contribute through their tax payments." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342-46 (2006).

Section 107 is also constitutional because it "alleviate[s] government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause." *Texas Monthly*, 489 U.S. at 18 n.8. Plaintiffs claim that this prong is not met because "paying taxes" is not "a recognizable burden on

free exercise rights." Resp. 24-25, 31-34. But this misunderstands Intervenors' position. As we have explained, the First Amendment bars the government from second-guessing a church's theological judgment about what is essential to a minister's job. Br. 40-42, 52. Section 107 "alleviates" the "government intrusion" on that judgment by enabling the IRS to apply a bright-line rule, rather than the intrusive inquiries of § 119. *Texas Monthly*, 489 U.S. at 18 n.8; *see also Amos*, 483 U.S. 327 at 336 ("[I]t is a significant burden on a religious organization to require it . . . to predict which of its activities a secular court will consider religious."); *Cohen*, 8 F.3d at 490-91 (7th Cir. 1993) (same). The First Amendment also protects a church's choice to restrict its ministers' housing and to object on theological grounds to owning a parsonage. Br. 52. Section 107(2) "alleviates" the financial pressure that would otherwise "deter" churches from making those choices if § 107(1) were enacted alone. *Texas Monthly*, 489 U.S. at 18 n.8; *see also Medina*, 1233-34. Plaintiffs simply ignore these arguments.

Lacking any support from the *Texas Monthly* majority, Plaintiffs rely on the *Texas Monthly* dissent, emphasizing that Justice Scalia mentioned § 107 in a parade-of-horribles argument highlighting other tax exemptions that might be "affected by" the majority's decision. Resp. 17-18. But of course, "Cassandra-like predictions in dissent are not a sure guide to the breadth of the majority's ruling." *Lee v. Kemna*, 534 U.S. 362, 386 (2002). That is especially true here, where the parade of horribles was expressly disclaimed by the plurality. *See* 489 U.S. at 18 n.8 (Court was "in no way suggest[ing]" that all religious tax exemptions are unconstitutional).

And because § 107 was not before the Court, Justice Scalia's dissent did not consider § 107 in the context of the many other tax provisions embodying the convenience-of-the-employer doctrine.

III. Section 107 is constitutional under *Lemon*.

For similar reasons, § 107 also satisfies the *Lemon* test. Plaintiffs' *Lemon* argument relies primarily on a snippet of Congressman Mack's floor statement about Communism, claiming that this shows the true purpose of § 107(2) was to "broadcast a message of support for religion during the Cold War." Resp. 28-30, 40. But Plaintiffs take this quote out of context. Br. 54. The line about Communism comes at the end of a lengthy statement otherwise devoted to arguing that § 107(2) would reduce discrimination among ministers. 99 Cong. Rec. A5372-73 (1953). The onus is on Plaintiffs to demonstrate that the government's articulated secular purpose is a "sham," *Sherman ex rel. Sherman v. Koch*, 623 F.3d 501, 507-08 (7th Cir. 2010), and a single floor statement from a single Member of Congress—"among the least illuminating forms of legislative history," *NLRB v. Sw. Gen., Inc.*, 137 S. Ct. 929, 943 (2017)—doesn't carry that burden.

Plaintiffs argument is also foreclosed by *Mayle v. United States*, 891 F.3d 680 (7th Cir. 2018). There, the Court rejected an Establishment Clause challenge to the words "In God We Trust" on the nation's currency, which were added in 1955. Although the plaintiff claimed that the words were added because of "religious sentiment" during the Cold War, the Court held that what the plaintiff interpreted as "religious sentiment" could just as easily be interpreted as a "celebrat[ion of] our tradition of religious freedom, as compared with the communist hostility to reli-

gion." *Id.* at 685-86. And "even if the motto was added to currency in part because of religious sentiment, it was also done to commemorate that part of our nation's heritage," and "having just one secular purpose is sufficient to pass the *Lemon* test." *Id.* Here, there is even more evidence of a secular purpose and effect than in *Mayle*.

IV. Plaintiffs' Establishment Clause theory would endanger scores of federal and state tax laws.

Finally, Plaintiffs' Establishment Clause theory endangers scores of tax provisions that, like § 107, facially single out churches and ministers in order to reduce entanglement and discrimination. Br. 55-57. Neither Plaintiffs nor their *amici* offer any coherent response to this problem. Far from providing a limiting principle, Plaintiffs double down on their theory, asserting that any exemption for religion that does not also "flow to a large number of non-religious groups" is unconstitutional unless it lifts a substantial burden on religion—and only "regulatory" (not tax) burdens count. Resp. 9-16, 31-34. This sweeping claim would invalidate the church- and minister-specific tax provisions we identified and many more (Br. 55-57)—a result Plaintiffs might hope for, but which is not required under the Establishment Clause.

Plaintiffs' *amici* fare no better. They claim that all of the provisions we cite "are purportedly necessary to ensure that the government does not force people to take actions that violate their religious beliefs"—citing an exemption for churches or ministers who conscientiously object to participating in Social Security or Medicare or obtaining health insurance. Profs. 22 (citing 26 U.S.C. § 5000A(d)(2)). But these exemptions for conscientious objectors are already supported by "long-settled prece-

dent," *Cutler v. U.S. Dep't of Health & Human Servs.*, 797 F.3d 1173, 1175, 1181-83 (D.C. Cir. 2015) (citing *United States v. Lee*, 455 U.S. 252, 260 (1982)), and we didn't rely on them. Instead, we identified nine examples of tax provisions that single out churches or ministers even when they *don't* have a conscientious objection. Br. 55-57. These include provisions allowing churches to treat all ministers as self-employed, providing heightened protections for churches in audits, exempting churches from filing various forms and disclosures, and allowing churches to provide certain types of benefit or insurance plans—not because the absence of these provisions would "force people to take actions that violate their religious beliefs," Profs. 22, but because these provisions reduce entanglement and discrimination. *Amici* offer no principled basis for distinguishing these provisions from § 107, because they have none.

Fortunately, the Establishment Clause doesn't require federal courts to invalidate dozens of longstanding tax provisions. Congress has "especially broad latitude in creating classifications and distinctions in tax statutes," *Mueller*, 463 U.S. at 396—and that includes latitude to classify churches and ministers in ways that reduce entanglement and discrimination. That is just what Congress has done in § 107. And it has done it in the context of the well-recognized convenience-of-the-employer doctrine, which extends similar benefits to hundreds of thousands of non-religious employees. Accordingly, § 107 is fully constitutional.

CONCLUSION

The district court's decision should be reversed.[4]

Respectfully submitted,

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s/ Luke W. Goodrich
Luke W. Goodrich
Joseph C. Davis
Daniel Ortner
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave. NW, Suite 700
Washington, DC 20036
(202) 955-0095
lgoodrich@becketlaw.org
Counsel for Intervening Defendants-Appellants

[4] This Court recently granted *en banc* rehearing to consider the propriety of nationwide injunctions like the one the district court issued here. *See* Order, *City of Chicago v. Sessions*, No. 17-2991 (7th Cir. June 4, 2018); App.50-51 ("nullifying § 107(2)" nationwide). If the Court holds that such injunctions are inappropriate, Intervenors request an opportunity for supplemental briefing on the proper scope of any injunction here.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the length limitation of Circuit Rule 32(c) because it contains 6,995 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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s/ Luke W. Goodrich
Luke W. Goodrich

Dated: July 30, 2018

CERTIFICATE OF SERVICE

I certify that on July 30, 2018, the foregoing brief was served on counsel for all parties by means of the Court's ECF system.

s/ Luke W. Goodrich
Luke W. Goodrich

Dated: July 30, 2018