

**No. 14-1152**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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**FREEDOM FROM RELIGION FOUNDATION, INCORPORATED,  
ANNIE LAURIE GAYLOR and DAN BARKER,****Plaintiffs-Appellees****v.****JACOB J. LEW, in his official capacity as Secretary of the Treasury,  
and JOHN A. KOSKINEN, in his official capacity as  
Commissioner of Internal Revenue,****Defendants-Appellants**

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**ON APPEAL FROM THE JUDGMENT AND ORDER OF  
THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN  
(No. 11-cv-0626; Honorable Barbara B. Crabb)**

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**APPENDIX FOR THE APPELLANTS**

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**Circuit Rule 30(d) Certification**

All of the materials required by Seventh Circuit Rule 30(a) are included in the appendix bound with the appellants' brief. All of the materials required by Seventh Circuit Rule 30(b) are included in this separately bound Appendix.

/s/ Judith A. Hagley  
Judith A. Hagley  
*Attorney for Appellants*

April 2, 2014

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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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FREEDOM FROM RELIGION FOUNDATION, INC.,  
ANNIE LAURIE GAYLOR, ANNE NICOL GAYLOR  
and DAN BARKER,

Plaintiffs,

OPINION AND ORDER

11-cv-626-bbc

v.

UNITED STATES OF AMERICA,

Defendant.  
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Plaintiffs Freedom from Religion Foundation, Inc., Annie Laurie Gaylor, Anne Nicol Gaylor and Dan Barker brought this lawsuit under the Administrative Procedure Act, 5 U.S.C. § 702, to challenge the constitutionality of 26 U.S.C. § 107, which gives a tax exemption to any “minister of the gospel” for compensation received related to certain housing expenses. In particular, plaintiffs contend that § 107 violates their rights under the establishment clause of the First Amendment and the equal protection component of the Fifth Amendment. They seek to enjoin the government from “continuing to grant or allow preferential and discriminatory tax benefits under §107 of the Internal Revenue Code exclusively to religious clergy.” Am. Cpt., dkt. #13, at 12.

In an order dated June 28, 2012, dkt. #24, I questioned whether plaintiffs could sue under § 702 because that statute is limited to challenges of “agency action” and requires the

plaintiffs to name “the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance” with plaintiffs’ proposed injunction. I agree with the parties that any failure by plaintiffs to comply with § 702 may be resolved by naming as defendants Timothy Geithner (Secretary of the Department of the Treasury) and Douglas Shulman (Commissioner of the Internal Revenue Service), who are in charge of the agencies responsible for administering § 107. Because plaintiffs seek to name Geithner and Shulman in their official capacities as agents of the United States, I may amend the caption to include them without requiring plaintiffs to file a new complaint. E.g., Jaros v. Illinois Dept. of Corrections, 684 F.3d 667, 670 (7th Cir. 2012).

With that question resolved, I turn to defendant’s motion to dismiss for lack of subject matter jurisdiction on the ground that plaintiffs have not been injured by § 107 and therefore lack standing to sue. In response, plaintiffs say that their injury is the unequal treatment they receive under the statute. Because a portion of their salary is designated as a housing allowance, they say that they would be entitled to an exemption under § 107 but for the limitation to “ministers of the gospel.” Defendant acknowledges that the denial of a tax exemption constitutes an adequate injury for the purpose of standing, but it argues that plaintiffs cannot file a federal lawsuit until they claim an exemption on their tax returns and the IRS denies the claim.

I am denying defendant’s motion to dismiss. Because it is clear from the face of the statute that plaintiffs are not entitled to the exemption, I see no reason to make their standing contingent on the futile exercise of making a formal claim with the IRS.

## ALLEGATIONS OF FACT

Plaintiff Freedom from Religion Foundation is a non-profit membership organization that “advocates for the separation of church and state and educates on matters of non-theism.” The foundation’s principal office is in Madison, Wisconsin.

Plaintiffs Annie Laurie Gaylor and Dan Barker are the co-presidents of the foundation; Anne Nicol Gaylor is the president emerita. The foundation’s executive council provides each of the individual plaintiffs a housing allowance that does not exceed plaintiffs’ housing-related expenses.

Plaintiffs are challenging the constitutionality of 26 U.S.C. § 107, which is titled “Rental value of parsonages” and provides:

In the case of a minister of the gospel, gross income does not include--

(1) the rental value of a home furnished to him as part of his compensation;  
or

(2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home and to the extent such allowance does not exceed the fair rental value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities.

Plaintiff Barker is a former ordained minister who previously excluded his housing allowance from his taxable income, but no longer does so. The individual plaintiffs believe they would be entitled to claim the § 107 exemption if it were not limited to ministers of the gospel.

## OPINION

The sole issue raised by defendant's motion to dismiss is whether plaintiffs have standing to challenge the constitutionality of 26 U.S.C. § 107; defendant does not challenge the merits of plaintiffs' complaint at this stage of the case. The standard for determining standing under the Constitution is well established: plaintiffs must show that they suffered an injury in fact that is fairly traceable to the defendant's action and capable of being redressed by a favorable decision from the court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Because each of the individual plaintiffs is a member of the foundation and a purpose of the foundation is related to plaintiff's claims in this lawsuit, the foundation's standing rises and falls with the members'. Sierra Club v. Franklin County Power of Illinois, LLC, 546 F.3d 918, 924 (7th Cir. 2008).

### A. Injury in Fact

#### 1. Taxpayer standing

Most of defendant's opening brief is devoted to arguing that plaintiffs do not have what courts refer to as "taxpayer standing." Under that theory, the plaintiff objects to a particular government expenditure and claims as an injury the misuse of the plaintiff's tax dollars. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 343-44 (2006) ("[T]he alleged injury is based on the asserted effect of the allegedly illegal activity on public revenues, to which the taxpayer contributes."). This theory has been rejected by the Supreme Court in most cases on the ground that "interest in the moneys of the Treasury . . . is shared with

millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.” Frothingham v. Mellon, decided with Massachusetts v. Mellon, 262 U.S. 443, 486-87 (1923). See also Arizona Christian School Tuition Organization v. Winn, 131 S. Ct. 1436, 1439 (2011) (“[T]he mere fact that a plaintiff is a taxpayer is not generally deemed sufficient to establish standing in federal court.”).

I need not consider whether plaintiffs have taxpayer standing because they are not asserting that argument in this case. The foundation raised it in a previous challenge to § 107 brought in the Eastern District of California and received a favorable ruling from the court after the government filed a motion to dismiss. Freedom From Religion Foundation, Inc. v. Geithner, 715 F. Supp. 2d 1051 (E.D. Cal. 2010). However, the parties later agreed to dismissal of the case without prejudice under Fed. R. Civ. P. 41(a)(1)(A)(ii) after the Supreme Court decided Winn, reversing a decision from the Court of Appeals for the Ninth Circuit on which the district court had relied for its ruling on taxpayer standing. Case No. 2:09-2894-WBS-DAD (C.D. Cal.), dkt. ##87-88. Plaintiffs have not included a theory of taxpayer standing in their complaint or their brief in this case.

## 2. Ideological injuries

Defendant raises a second argument for plaintiffs’ lack of standing, which is that plaintiffs’ alleged injury is their disagreement with the government’s conduct, a claim that



is not sufficient to confer standing. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 483 (1982); United States v. Richardson, 418 U.S. 166, 176-77 (1974). This is another strawman. It is undoubtedly true that plaintiffs object to § 107 because they believe it violates the establishment clause and that this may be the primary reason they filed the lawsuit, but that is not the injury plaintiffs are alleging for the purpose of showing standing.

### 3. Unequal treatment

Plaintiffs identify their injury as the alleged unequal treatment they have received from defendant: “ministers of the gospel” may receive a tax exemption for certain housing expenses, but plaintiffs may not. Thus, plaintiffs’ injury is not just that they object to the exemption that ministers of the gospel receive, but that plaintiffs are being denied the same benefit.

The parties agree that a person who is denied a tax exemption that others receive has suffered an injury in fact. That much is established by Supreme Court precedent. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 7-8 (1989) (general interest magazine had standing to challenge state tax exemption received by religious publications); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 224-25 (1987) (same). See also Winn, 131 S. Ct. at 1439 (“[P]laintiffs may demonstrate standing on the ground that they have incurred a cost or been denied a benefit on account of their religion. Those costs and benefits can result from alleged discrimination in the tax code, such as when the availability of a tax exemption

is conditioned on religious affiliation.”). The question presented by defendant’s motion is whether a plaintiff’s injury arises from the allegedly discriminatory statute itself or not until the plaintiff claims the exemption and the Internal Revenue Service denies it. Texas Monthly and Arkansas Writers’ Project both involved plaintiffs that had been denied a tax refund by state authorities, but the Court did not say in either case whether seeking a refund was required to establish standing, so those cases do not help to resolve the dispute.

a. Is a pre-enforcement challenge appropriate in this case?

Distilled, defendant’s objection is that plaintiffs do not have standing to bring a pre-enforcement challenge to 26 U.S.C. § 107, but are limited to challenging the statute as applied to them. However, there is no categorical bar under federal standing doctrine from challenging a statute on its face before it is applied, although special concerns may apply. Brandt v. Village of Winnetka, Illinois, 612 F.3d 647, 649-50 (7th Cir. 2010) (“[P]re-enforcement challenges [to a potential First Amendment violation] are within Article III.”). See also Santa Fe Independent School District v. Doe, 530 U.S. 290, 313-14 (2000) (considering facial challenge under establishment clause to policy that had not yet been enforced); Virginia v. American Booksellers Association, Inc., 484 U.S. 383, 393 (1988) (concluding that plaintiffs had standing to bring pre-enforcement challenge); Owner-Operator Independent Drivers Association, Inc. v. Federal Motor Carrier Safety Administration, 656 F.3d 580, 586-87 (7th Cir. 2011) (same). In general, “[c]hallenges to statutes as written, without inquiring into their application, are appropriate when details of implementation are

inconsequential.” Harp Advertising Illinois, Inc. v. Village of Chicago Ridge, Illinois, 9 F.3d 1290, 1291-92 (7th Cir. 1993). In other words, plaintiffs have standing to challenge a statute before it has been applied to them when the injury to their First Amendment rights is clear from the face of the statute. That is the situation in this case.

What purpose would it serve for plaintiffs to attempt to claim the exemption before challenging it in court? If the meaning of § 107 as applied to plaintiffs were in doubt, then defendant might have a valid point that plaintiffs’ claims of injury are premature. E.g., Warnke v. United States, 641 F. Supp. 1083, 1084-85 (E.D. Ky. 1986) (self employed minister sought refund under § 107, arguing that statute did not require him to be employed by third party). However, there is no plausible argument that plaintiffs could make that they qualify as “ministers of the gospel,” so it would be pointless to require plaintiffs to jump through the hoop of filing a claim to prove that they are not entitled to the exemption. Cf. California Medical Association v. Federal Electric Commission, 453 U.S. 182, 192 (1981) (concluding that plaintiffs had standing, noting that they “expressly challenge the statute on its face, and there is no suggestion that the statute is susceptible to an interpretation that would remove the need for resolving the constitutional questions raised”); American Civil Liberties Union of Illinois v. Alvarez, 679 F.3d 583, 593-94 (7th Cir. 2012) (“This is not a case in which the threat of prosecution hinges on a highly attenuated claim of speculative future events or unknowable details about the manner in which the statutory violation will be committed or enforced.”).

The purpose of standing rules is not to waste the plaintiffs’ and the government’s time

and resources in unnecessary busy work that will lead to an obvious outcome. Just as courts have held that plaintiffs need not engage in conduct clearly prohibited by a statute before challenging the statute, e.g., Ezell v. City of Chicago, 651 F.3d 684, 695-96 (7th Cir. 2011); Schirmer v. Nagode, 621 F.3d 581, 586 (7th Cir. 2010), I see little reason to require plaintiffs to claim an exemption that they would have no good faith basis to claim, an act that could make plaintiffs vulnerable to civil sanctions. Mulcahy, Pauritsch, Salvador & Co., Ltd. v. Commissioner, 680 F.3d 867, 872 (7th Cir. 2012) (understatement of tax liability without good faith basis may subject taxpayer to monetary penalties).

In a footnote in its reply brief, defendant argues that it is “conceivable” that plaintiffs could qualify for the exemption under § 107 because the IRS does not require “that an individual maintain theistic beliefs in order to perform functions that may be considered the duties of a minister of the gospel.” Dft.’s Br., dkt. #23, at 10 n.3. It does not cite any regulations or decisions for this proposition, but rather a popular nonfiction book. Id. (citing Alain de Botton, Religion for Atheists (Pantheon ed., Mar. 6, 2012)). Regardless whether the statute requires “theistic beliefs” to qualify for the exemption, there is no reasonable interpretation of the statute under which the phrase “minister of the gospel” could be construed to include employees of an organization whose purpose is to keep religion out of the public square.

Nothing in the implementing regulations or decisions of the IRS or the federal courts suggests a different interpretation. Although the tax courts have construed § 107 expansively to include non-Christian religions, e.g., Silverman v. Commissioner, 57 T.C. 727, 731

(1972); Salkov v. Commissioner, 46 T.C. 190, 194 (1966), a person does not qualify for the exemption unless his or her “ministry includes the ministration of sacerdotal functions and the conduct of religious worship, and the control, conduct, and maintenance of religious organizations (including the religious boards, societies, and other integral agencies of such organizations), under the authority of a religious body constituting a church or church denomination.” 26 C.F.R. § 1.1402(c)-5(b)(2). See also Carter v. United States, 973 F.2d 1479, 1481 (9th Cir. 1992) (§ 107 applies to “members of the clergy”); Flowers v. United States, 1981 WL 1928, \*6 (N.D. Tex. 1981) (upholding denial of exemption because housing allowance was for educational rather than sacerdotal functions); Colbert v. Commissioner, 61 T.C. 449 (1974) (taxpayer did not qualify for exemption because his “primary emphasis . . . was in warning and awakening people to the dangers of communism and in educating them as to the principles of communism” rather than “religious instruction in the principles laid down by Christ”). A church is similarly defined as an organization with duties that “include the ministration of sacerdotal functions and the conduct of religious worship.” 26 C.F.R. § 1.511-2(a)(3). See also Whittington v. Commissioner, 2000 WL 1358652, \*3 (U.S. Tax Ct. 2000) (“At a minimum, a church includes a body of believers or communicants that assembles regularly in order to worship.”).

Defendant does not address the language of the statute and implementing regulations, much less explain how the individual plaintiffs could meet the definition for “ministers” or the foundation could meet the definition for “church.” Thus, it seems that the only way that plaintiffs could receive an exemption for housing expenses would be for the IRS to flagrantly

violate § 107 and disregard its own interpretative regulations. I decline to assume that this is a realistic possibility.

b. Other cases addressing a party's standing to challenge tax exemptions

Although neither the Supreme Court nor the Court of the Appeals for the Seventh Circuit has addressed the particular question raised by defendant's motion, the Court of Appeals for the Fourth Circuit has rejected the view that a plaintiff does not have standing to challenge a discriminatory tax exemption until she makes an unsuccessful attempt to claim the exemption. In Finlator v. Powers, 902 F.2d 1158 (4th Cir. 1990), the court stated, "[w]e do not believe that this additional requirement would improve the vigorousness or quality of the parties' advocacy, would enhance the posture of this case, would clarify the legal issues presented for review, would strengthen the justiciability of the appellants' claims, or would contribute in any way to our ability to decide a question presented and contested by parties having a demonstrated interest and stake in its resolution." Id. at 11-62. The court reaffirmed this view in Planned Parenthood of South Carolina Inc. v. Rose, 361 F.3d 786, 791-92 (4th Cir. 2004), in which it concluded that plaintiffs objecting to a "Choose Life" license plate did not have to request a pro-choice license plate to obtain standing because the statute at issue made it clear that they would not be able to obtain one. See also Budlong v. Graham, 414 F. Supp. 2d 1222, 1227 (N.D. Ga. 2006) (plaintiffs had standing to challenge tax exemption; they were "forced to endure a tax because the literature they seek to purchase and sell does not meet state-imposed religion and content requirements");

Flamer v. City of White Plains, New York, 841 F. Supp. 1365, 1372 (S.D.N.Y. 1993) (plaintiff had standing to challenge resolution banning religious displays on public property even though he had not submitted personal request to erect display).

Defendant suggests that Finlator is no longer good law in light of Winn, but its argument is not persuasive. The question in Winn was whether taxpayers had standing to challenge a state statute granting a tax credit to individuals who made a contribution to a “student tuition organization.” The plaintiffs were not arguing that they were unable to qualify for the credit or that the credit itself was discriminatory. Id. at 1447 (“Respondents are likewise able to contribute to an STO of their choice, either religious or secular. And respondents also have the option of contributing to other charitable organizations, in which case respondents may become eligible for a tax deduction or a different tax credit.”). Rather, their argument was that they were injured because other taxpayers had the option of making a contribution to a religious student tuition organization, which meant that the credit had the effect of “us[ing] State income-tax revenues to pay tuition for students at religious schools.” Id. at 1441. In other words, the plaintiffs were objecting to the government’s use of their tax dollars. Because plaintiffs are not claiming taxpayer standing in this case, Winn is not instructive.

The only contrary case defendant cites is Apache Bend Apartments, Ltd. v. United States through IRS, 987 F.2d 1174 (5th Cir. 1993), a case in which the plaintiffs were challenging the constitutionality of the transition rules of the Tax Reform Act of 1986, which gave specified exemptions to a small number of taxpayers. In a split decision the

majority held that “prudential concerns convince us that the plaintiffs have not alleged an injury that is appropriate for judicial resolution.” Id. at 1177. Although defendant’s reliance on this case is limited to a string citation, I will address the majority’s reasoning because it is the only similar case that supports defendant’s position and many of defendant’s and the majority’s arguments overlap.

The majority identified a number of reasons for its decision: (1) “the injury of inequality alleged by the plaintiffs essentially is nothing more than a claim to ‘an asserted right to have the Government act in accordance with law,’” id. at 1179 (citing Allen v. Wright, 468 U.S. 737, 754 (1984)); (2) only a small number of taxpayers could claim the tax exemption at issue, so the plaintiffs had a “generalized grievance . . . that they share with all taxpayers,” id. at 1178; (3) if the court “accept[ed] the plaintiffs’ claim of standing [as sufficient] in this case, there would be no principled basis upon which to deny standing to any taxpayer wishing to challenge any of the countless provisions of the federal tax laws which treat some taxpayers more favorably than others,” id. at 1180; (4) “Congress has erected a complex structure to govern the administration and enforcement of the tax laws, and has established precise standards and procedures for judicial review of tax matters,” id. at 1177; and (5) “the relief the plaintiffs seek, if granted, would seriously disrupt the entire revenue collection process.” Id.

I have already addressed the first reason: plaintiffs’ allegation of discriminatory treatment is distinct from a simple disagreement with the government’s conduct. In none of the cases cited by the court in Apache Bend or by defendants did the plaintiffs identify



as their injury the denial of a benefit provided to a similarly situated third party. E.g., Whitmore v. Arkansas, 495 U.S. 149, 160 (1990) (injury was “the public interest protections of the Eighth Amendment”); Richardson, 418 U.S. at 176-77 (rejecting claim of taxpayer standing); Ex parte Levitt, 302 U.S. 633, 634 (1937) (injury was disagreement with Justice Black's appointment to Supreme Court); Hein v. Freedom from Religion Foundation, Inc., 551 U.S. 587 (2007) (rejecting claim of taxpayer standing); Freedom from Religion Foundation, Inc. v. Obama, 641 F.3d 803 (7th Cir. 2011) (injury was “offense at the behavior of the government”).

The strongest objection is the second, which is that plaintiffs’ injury is simply a “generalized grievance” because it is widely shared with other taxpayers. Defendant repeats this argument in its briefs. Like the dissenting judges in Apache Bend, plaintiffs argue that the denial of a tax benefit is not a generalized grievance because their injury is shared only by others who are similarly situated, which plaintiffs identify in this case as employees who are provided a home or a housing allowance as part of their compensation for their employment. Apache Bend, 987 F.2d at 1182 (Goldberg, C.J., dissenting) (“class of aggrieved taxpayers is limited to those taxpayers who are similarly situated to the taxpayers who are treated more favorably”). This would be one way to limit the class of plaintiffs with standing, though it is not clear whether it is consistent with Supreme Court precedent because it suggests that a plaintiff does not have standing unless she can show that she would be successful in obtaining the benefit in the absence of the challenged provision. E.g., Northeastern Florida Chapter of Associated General Contractors of America v. City of

Jacksonville, Florida, 508 U.S. 656, 665-66 (1993) (“The ‘injury in fact’ in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.”).

Regardless whether standing is limited as plaintiffs suggest, I disagree with defendant that plaintiffs lack standing because they have a “generalized grievance.” The Supreme Court has rejected the view that a plaintiff does not suffer an injury in fact simply because it is “widely shared.” Massachusetts v. EPA, 549 U.S. 497, 522 (2007) (“That these climate-change risks are ‘widely shared’ does not minimize Massachusetts’ interest in the outcome of this litigation”); Federal Election Commission v. Akins, 524 U.S. 11, 24 (1998) (“[W]here a harm is concrete, though widely shared, the Court has found ‘injury in fact’”). Rather, the question is whether plaintiffs’ injury is sufficiently “concrete.” As noted above, the parties agree that the denial of a tax benefit meets that standard. Further, requiring taxpayers to seek a refund would not limit the potential class of people who would have standing to sue; it would simply put an arbitrary barrier in their way. To the extent that a large number of taxpayers have standing to challenge § 107, that is due less to the nature of the injury and more to the small number of people that receive the tax benefit. Under defendant’s view, if the government gave a tax exemption limited to Caucasians of Norwegian descent, taxpayers with other ancestries could not challenge the exemption simply because they greatly outnumber the favored group.

The third objection is related to the second: the majority noted that the tax code contains many exemptions for many different groups of people, so it would cause judicial

chaos to allow disfavored groups to sue to challenge those exemptions. However, simply because a person has standing to sue does not mean that his lawsuit is likely to follow. It is well established that any conceivable rational basis is enough to justify most government classifications, Nordlinger v. Hahn, 505 U.S. 1, 15 (1992), so the vast majority of lawsuits challenging allegedly discriminatory tax exemptions would be frivolous on their face. Many people may have standing to challenge a wide variety of laws affecting a large number of people, such as traffic regulations or state insurance requirements, but challenges to such laws are few and far between, presumably because the government's authority to enact them is clear.

The fourth objection, that allowing plaintiffs to sue would “disrupt” the operation of the government, seems to be misguided. First, the case cited for this proposition, Louisiana v. McAdoo, 234 U.S. 627 (1914), was about sovereign immunity; it had nothing to do with standing. Second, if plaintiffs prevailed on their claims, it would not place any additional burdens on the government; it would eliminate a tax exemption. Thus, the primary effect would be to increase the funds retained by the federal government. Budlong, 414 F. Supp. 2d at 1227 (“Were it to enjoin the enforcement of such tax exemptions, this Court would actually enrich the State of Georgia's coffers, not deplete them.”).

The fifth objection is that Congress has enacted a number of procedures for challenging provisions of the tax code. Again, that is not an objection to standing. More important, defendant cites no statute that prohibits plaintiffs from bringing this action. As defendant acknowledges, the Anti-Injunction Act, 26 U.S.C. § 7421, bars suits that seek to

enjoin the government from assessing or collecting a tax, not from eliminating an exemption, so it does not apply to this case. Cf. Hibbs v. Winn, 542 U.S. 88, 107-08 (2004) (challenge to state tax exemption not barred by Tax Injunction Act, which is state corollary to Anti-Injunction Act). Defendant suggests that the Declaratory Judgment Act may be read as forbidding all lawsuits related to taxes, but it acknowledges that the Court of Appeals for the Seventh Circuit has interpreted that act as being coextensive with the Anti-Injunction Act. Tomlinson v. Smith, 128 F.2d 808, 811 (7th Cir. 1942).

It is true that the tax code provides particular mechanisms for challenging deficiencies and seeking refunds, but neither the majority in Apache Bend nor defendant cited any authority for the proposition that a court may refuse to exercise jurisdiction over a claim because Congress has limited federal jurisdiction over a *different* claim. Although there may be good reasons for requiring litigation related to any tax statute to be brought in tax court, that does not mean that courts may limit their own jurisdiction when Congress declined to do so. Rather, the general rule is that federal courts must exercise jurisdiction over cases arising under federal law unless it is unmistakably clear that Congress intended to withdraw that jurisdiction. Mims v. Arrow Financial Services, LLC, 132 S. Ct. 740, 748-49 (2012) (when “the claim arises under federal law, . . . federal-question jurisdiction under § 1331 . . . endures unless Congress divests federal courts of their § 1331 adjudicatory authority”).

Finally, although neither side raises this issue, one might argue that plaintiffs do not have standing to challenge their alleged unequal treatment unless they allege that in fact they would claim the exemption in the absence of the “minister of the gospel” limitation. Cf.

Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 182-83 (2000) (plaintiffs had standing to challenge defendant's discharge of pollutants into river by alleging that they would use river but for defendant's conduct); Babbitt v. United Farm Workers National Union, 442 U.S. 289 (1979) (plaintiff challenging statute before enforcement establishes standing by "alleg[ing] an intention to engage in a course of conduct . . . proscribed by a statute"). Plaintiffs do not allege explicitly that they would apply for the exemption if they qualified for it, but I may reasonably infer at this stage that they would from their allegations that plaintiff Barker claimed the exemption in the past when he was a minister and that the remaining individual defendants believe they would qualify but for the religious limitation. E.g., Ord v. District of Columbia, 587 F.3d 1136, 1143 (D.C. Cir. 2009) (inferring intent to engage in conduct from allegation that plaintiff had engaged in conduct in past but cannot do so now because of restriction). However, at summary judgment, plaintiffs may need to come forward with more specific evidence on this point.

#### B. Redressability

With respect to the other requirements of standing, there does not seem to be any genuine dispute that plaintiffs' injury may be traced to § 107 and defendant's implementation of it and that plaintiffs' injury could be redressed by invalidating § 107. In its opening brief, defendant argued that plaintiffs' alleged injury was not redressable because they cannot obtain a refund in this lawsuit or an injunction stopping the government from collecting a tax. However, in its reply brief, defendant acknowledges that nullifying § 107

would be an appropriate remedy. This is consistent with several cases in which the Supreme Court has held that the government's denial of a benefit to the plaintiff does not have to be redressed by awarding the benefit to the plaintiff; rather, the injury may be redressed by eliminating preferential treatment to others. Heckler v. Mathews, 465 U.S. 728, 740, (1984) ("We have often recognized that the victims of a discriminatory government program may be remedied by an end to preferential treatment for others."). Accord Texas Monthly, 489 U.S. at 7-8; Orr v. Orr, 440 U.S. 268, 271-72 (1979).

### C. Sovereign Immunity

At the end of its brief in chief, defendant argues that plaintiffs' claims are barred by sovereign immunity, but it does not deny that 5 U.S.C. § 702 waives immunity for claims seeking prospective relief. Rather, its immunity argument is that plaintiffs cannot bring a claim under § 702 because they lack standing to sue. Because I have rejected defendant's standing argument, its sovereign immunity argument necessarily fails as well.

### ORDER

IT IS ORDERED that

1. Defendant United States of America's motion to dismiss, dkt. #16, is DENIED.
2. The motion to amend the caption of the complaint filed by plaintiffs Freedom from Religion Foundation, Inc., Annie Laurie Gaylor, Anne Nicol Gaylor and Dan Barker, dkt. #26, is GRANTED. The caption is AMENDED to include Timothy Geithner and

Douglas Shulman in their official capacities.

3. Because the deadlines in this case have been stayed pending this order, the clerk of court is directed to set up a new scheduling conference with the magistrate judge.

Entered this 29th day of August, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge

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<p>1 IN THE UNITED STATES DISTRICT COURT</p> <p>2 FOR THE WESTERN DISTRICT OF WISCONSIN</p> <p>3</p> <p>4 -----x</p> <p>5 FREEDOM FROM RELIGION :</p> <p>6 FOUNDATION, INC., ANNE NICOL :</p> <p>7 GAYLOR, ANNIE LAURIE GAYLOR, :</p> <p>8 and DAN BARKER, :</p> <p>9 Plaintiffs, : Case No. 11-CV-626</p> <p>10 -vs- :</p> <p>11 UNITED STATES OF AMERICA, :</p> <p>12 Defendant. : VOLUME I</p> <p>13 -----x</p> <p>14</p> <p>15 DEPOSITION OF:</p> <p>16 ANNIE LAURIE GAYLOR</p> <p>17</p> <p>18 Milwaukee, Wisconsin</p> <p>19 April 23, 2013</p> <p>20 1:20 p.m. to 3:35 p.m.</p> <p>21</p> <p>22 PHYLLIS KAPARIS, RPR</p>	<p>1 INDEX</p> <p>2</p> <p>3 WITNESS: ANNIE LAURIE GAYLOR PAGE</p> <p>4 By Ms. Healy Gallagher 5</p> <p>5</p> <p>6</p> <p>7</p> <p>8 EXHIBITS</p> <p>9 NUMBER DESCRIPTION PAGE</p> <p>10 Exhibit 1 Amended Complaint 74</p> <p>11 Exhibit 2 Plaintiffs' Responses to Defendant's</p> <p>12 First Set of Requests for Production</p> <p>13 of Documents..... 10</p> <p>14 Exhibit 3 Plaintiffs' Answers to Defendant's</p> <p>15 First Set of Written Interrogatories 68</p> <p>16 Exhibit 8 Barker and Gaylor W-2, 2012 38</p> <p>17 Exhibit 9 1040 tax return 2012 39</p> <p>18 Exhibit 11 1040 tax return 2011; FFRF 41</p> <p>19 Exhibit 12 1040 tax return 2011; GOVT 41</p> <p>20 Exhibit 15 1040 tax return 2010; FFRF 43</p> <p>21 Exhibit 16 1040 tax return 2010; GOVT 44</p> <p>22</p>
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<p>1 APPEARANCES:</p> <p>2 BOARDMAN &amp; CLARK LLP</p> <p>3 One South Pinckney Street</p> <p>4 Fourth Floor</p> <p>5 Madison, Wisconsin, 53701-0927</p> <p>6 BY: MR. RICHARD L. BOLTON</p> <p>7 (rbolton@boardmanclark.com),</p> <p>8 appeared on behalf of the Plaintiffs.</p> <p>9</p> <p>10 U.S. DEPARTMENT OF JUSTICE</p> <p>11 TAX DIVISION</p> <p>12 P.O. Box 7238</p> <p>13 Ben Franklin Station</p> <p>14 Washington, D.C. 20044</p> <p>15 BY: MS. ERIN HEALY GALLAGHER</p> <p>16 (erin.healygallagher@usdoj.gov)</p> <p>17 appeared on behalf of the Defendant.</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>	<p>1 PROCEEDINGS</p> <p>2 ANNIE LAURIE GAYLOR, called as a</p> <p>3 witness herein, having been first duly sworn on</p> <p>4 oath, was examined and testified as follows:</p> <p>5</p> <p>6 MS. HEALY GALLAGHER: We are on the</p> <p>7 record in the case of Freedom From Religion</p> <p>8 Foundation, et al., versus United States. It is</p> <p>9 April 23, 2013, at about 1:20 p.m. Central.</p> <p>10 We met earlier this morning. My name</p> <p>11 is Erin Healy Gallagher of the United States</p> <p>12 Department of Justice in the Tax Division. I'm</p> <p>13 appearing on behalf of the United States.</p> <p>14 Mr. Bolton, would you make your</p> <p>15 appearance?</p> <p>16 MR. BOLTON: Attorney Rich Bolton</p> <p>17 appearing for the plaintiffs and with the witness</p> <p>18 Annie Laurie Gaylor.</p> <p>19 MS. HEALY GALLAGHER: All right. This</p> <p>20 deposition will be governed by the Federal Rules</p> <p>21 of Civil Procedure, and any pertinent local rules</p> <p>22 of the Western District of Wisconsin.</p>



<p style="text-align: right;">Page 45</p> <p>1 compensation for 2010?</p> <p>2 A. Yes.</p> <p>3 Q. And again there's no dollar figure</p> <p>4 reported in Box 14, right?</p> <p>5 A. That's right.</p> <p>6 Q. Do you incur like expenses for your</p> <p>7 personal credit card or personal bank account on</p> <p>8 behalf of FFRF?</p> <p>9 A. I try not to.</p> <p>10 Q. So Mr. Barker travels, so he submits</p> <p>11 expenses to the organization --</p> <p>12 A. Well, we have an office credit card.</p> <p>13 Q. Okay.</p> <p>14 A. So we keep them distinct from personal</p> <p>15 --</p> <p>16 Q. Okay.</p> <p>17 A. -- credit card.</p> <p>18 Q. So do you, too, submit receipts --</p> <p>19 A. Yes.</p> <p>20 Q. Sorry.</p> <p>21 A. We try hard --</p> <p>22 Q. Let me finish the question.</p>	<p style="text-align: right;">Page 47</p> <p>1 active because all the UPS charges go on her</p> <p>2 credit card, and that way it's cleaner. So we</p> <p>3 pass our credit cards out to trusted staff for</p> <p>4 things like ordering software. We don't have</p> <p>5 another office credit card at the moment, but it</p> <p>6 seems to work out.</p> <p>7 Q. In the event, though, that you did for</p> <p>8 some reason use your personal credit card to</p> <p>9 purchase something on behalf of FFRF --</p> <p>10 A. Yes.</p> <p>11 Q. -- would you then submit that receipt</p> <p>12 and be reimbursed?</p> <p>13 A. Yes, I would try to do that. It</p> <p>14 happens once in a while.</p> <p>15 Q. Okay. If you could turn to Exhibit 15,</p> <p>16 please. This is the copy of your Individual</p> <p>17 Income Tax Return for 2010 that was produced by</p> <p>18 your counsel. Again, if you take a look through</p> <p>19 this tax return, it appears that you did not</p> <p>20 report any self-employment income in 2010; is</p> <p>21 that right?</p> <p>22 A. Yes, I did not. I'm not self-employed.</p>
<p style="text-align: right;">Page 46</p> <p>1 A. -- to keep the -- I'm sorry.</p> <p>2 Q. Let me finish the question.</p> <p>3 If you incur an expense on behalf of</p> <p>4 FFRF, do you then submit receipts to the</p> <p>5 organization?</p> <p>6 A. Yes.</p> <p>7 Q. And that --</p> <p>8 A. As I said, we try hard. Once in a</p> <p>9 while something goes wrong with a receipt, but we</p> <p>10 have the credit card also, receipt.</p> <p>11 Q. Sure. And so then FFRF reimburses you</p> <p>12 if necessary or --</p> <p>13 A. We try not to do that. We have an</p> <p>14 office credit card, so we're trying to use the</p> <p>15 FFRF credit card for anything related to FFRF.</p> <p>16 Our CPA and I frown on a lot of reimbursements</p> <p>17 going out, and I try to discourage that even with</p> <p>18 our other staff, but sometimes it happens.</p> <p>19 Q. So then when someone travels, like is</p> <p>20 there one office credit card or is there --</p> <p>21 A. No. Dan has one, and I have one at the</p> <p>22 moment. And my mother had one, and we've kept it</p>	<p style="text-align: right;">Page 48</p> <p>1 Okay.</p> <p>2 Q. On each of these tax returns there has</p> <p>3 been income reported from what appears to be a</p> <p>4 family trust?</p> <p>5 A. Uh-huh.</p> <p>6 Q. Yes?</p> <p>7 A. Yes.</p> <p>8 Q. Other than your compensation from FFRF</p> <p>9 and the income from the family trust, do you have</p> <p>10 any other sources of income for, for example,</p> <p>11 2012?</p> <p>12 A. No.</p> <p>13 Q. Any other sources of income for 2011?</p> <p>14 A. No.</p> <p>15 Q. Any other sources of income for 2010?</p> <p>16 A. No.</p> <p>17 Q. Have you ever exempted your housing</p> <p>18 allowance from your income?</p> <p>19 A. No.</p> <p>20 Q. Have you ever filed a claim for refund</p> <p>21 --</p> <p>22 A. No.</p>

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1 Q. Sorry. I take pauses. It can be  
2 confusing.  
3 So have you ever filed a claim for  
4 refund to claim an income tax refund on the taxes  
5 that you did pay on the amount of your housing  
6 allowance?  
7 A. No.  
8 Q. So, Ms. Gaylor, what is the -- you  
9 allege that the IRS is discriminating against you  
10 by its enforcement of Section 107. What is the  
11 discrimination that's happening? What facts do  
12 you have to support that?  
13 A. I pay more taxes --  
14 Q. And --  
15 A. -- than if I were allowed to claim the  
16 housing exemption.  
17 Q. And what facts do you have to support  
18 that statement?  
19 A. Well, it's true.  
20 Q. So you're looking at this solely from  
21 the perspective of Section 107.  
22 A. Well, I guess you -- could you rephrase

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1 the question? I'm not quite sure what you're  
2 asking me.  
3 Q. Sure. So it sounds to me -- correct me  
4 if I'm wrong -- that you believe you pay more in  
5 taxes. Is that generally, or in income tax, or  
6 your ultimate -- your bottom line tax bill is  
7 greater than someone who can claim the exemption  
8 under 107?  
9 A. Well, I mean, it's all relative. I  
10 can't say for every single person who claims the  
11 housing exemption that I pay more taxes than they  
12 do. But I know that I pay more taxes because I'm  
13 not allowed to take the housing allowance that  
14 FFRF is offering me because I'm not a minister of  
15 the gospel.  
16 Q. Have you done any calculations?  
17 A. You mean on how much less we'd be  
18 paying?  
19 Q. Right.  
20 A. I'm not very good at math. So I  
21 haven't done it in my head, no, but I know it  
22 would be less.

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1 Q. How do you know it would be less?  
2 A. Because I would be allowed to exempt  
3 from my taxable income substantial amounts of my  
4 salary.  
5 Q. Again, is this from a perspective of  
6 your income tax only, or your entire federal tax  
7 bill, because your entire federal tax bill has  
8 other components to it. I should say, have you  
9 looked at the housing allowance in that  
10 perspective?  
11 A. I guess I don't know how to answer that  
12 question. I read the 107 statute. I read, you  
13 know, Chimerinsky's amicus to the Ninth Circuit.  
14 I'm not a tax expert, but I know that I cannot  
15 claim the allowance that is being given to me  
16 because I'm not a minister of the gospel, and  
17 that this is favoritism to ministers of the  
18 gospel, quote, unquote, because of who they are.  
19 Because Peter Mack, who introduced this  
20 legislation, said it was to reward ministers for  
21 fighting godlessness. And, so in other words,  
22 all these ministers around the country are given

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1 this huge tax benefit because they're fighting  
2 FFRF, and me, and other nonbelievers. And I feel  
3 that is terribly wrong, and it's discriminatory,  
4 and it is offensive.  
5 It's not just -- you know, it's not  
6 just a pocketbook injury. It's also an affront  
7 that the government would be favoring ministers  
8 for fighting godlessness. And FFRF wants to  
9 reward its leaders for promoting godlessness, and  
10 we are not allowed to do that.  
11 MR. BOLTON: As the author of the  
12 Amended Complaint, if it will help to simplify  
13 things, I believe from the perspective of the  
14 claim we are just looking at it from the income  
15 tax perspective of Section 107.  
16 MS. HEALY GALLAGHER: So the bottom  
17 line is the pocketbook injury.  
18 MR. BOLTON: The 107 relative to that  
19 the ministers are allowed to take it, so there's  
20 discrimination as between the two groups. But in  
21 terms of --  
22 MS. HEALY GALLAGHER: So income tax

<p style="text-align: right;">Page 73</p> <p>1 salary.</p> <p>2 Q. Okay. Similar questions for 2012.</p> <p>3 Your salary was -- or your compensation was</p> <p>4 \$88,778, right?</p> <p>5 A. Yes.</p> <p>6 Q. And that included any amount of housing</p> <p>7 allowance that was designated by FFRF?</p> <p>8 A. Yes. Again, the base salary is the</p> <p>9 same, and this would be including bonus and some</p> <p>10 royalties in there.</p> <p>11 Q. Sorry. So the base salary is 85,000?</p> <p>12 A. Yes. The salary has been the same.</p> <p>13 Q. Taking a look at Interrogatory No. 6 at</p> <p>14 the bottom of Page 7, have you ever spoken with</p> <p>15 the IRS in any way about the housing allowance</p> <p>16 under 107?</p> <p>17 A. No.</p> <p>18 Q. Have you ever spoken with the secretary</p> <p>19 of the Treasury or the Treasury Department about</p> <p>20 it?</p> <p>21 A. No.</p> <p>22 Q. Have you spoken to anyone in the United</p>	<p style="text-align: right;">Page 75</p> <p>1 Q. No, you don't have any other facts?</p> <p>2 A. Well, there are other facts.</p> <p>3 Q. What are they?</p> <p>4 A. The administrative code, the way that</p> <p>5 this law is administered. But I don't -- I mean,</p> <p>6 I think on its face 107 clearly discriminates for</p> <p>7 religion and for ministers and against everyone</p> <p>8 else.</p> <p>9 Q. Do you have any facts other than the</p> <p>10 statute or regulatory codes to support that</p> <p>11 allegation?</p> <p>12 A. Like I said, I really don't think you</p> <p>13 need more.</p> <p>14 Q. That's not my question, ma'am. Do you</p> <p>15 have any other facts?</p> <p>16 A. I personally, no.</p> <p>17 Q. Other than personally?</p> <p>18 A. I'm not quite sure what you're -- your</p> <p>19 question seems to almost imply that it doesn't</p> <p>20 exist somehow. I mean, 107, the statutory</p> <p>21 language clearly differentiates ministers of the</p> <p>22 gospel from every other taxpayer. And that's a</p>
<p style="text-align: right;">Page 74</p> <p>1 States government about the housing allowance</p> <p>2 under 107, except me?</p> <p>3 A. No. I think you're the first.</p> <p>4 Q. Have your tax returns during or since</p> <p>5 2009 been subject to audit at all?</p> <p>6 A. No.</p> <p>7 Q. Handing you what's been marked as</p> <p>8 Exhibit 1, which is the Amended Complaint in this</p> <p>9 case. Do you recognize the Amended Complaint?</p> <p>10 A. Yes.</p> <p>11 Q. Take a look at Paragraph 19. This</p> <p>12 paragraph alleges that an exemption under 107 is</p> <p>13 discriminatorily denied to other taxpayers who</p> <p>14 receive similar housing allowances. What are the</p> <p>15 facts that you have to show that this exemption</p> <p>16 is discriminatorily denied other taxpayers?</p> <p>17 A. The way that it's -- that 107 is</p> <p>18 written discriminates.</p> <p>19 Q. Do you have any other facts other than</p> <p>20 the text of the statute?</p> <p>21 A. I don't think I need any other facts,</p> <p>22 but, no.</p>	<p style="text-align: right;">Page 76</p> <p>1 fact.</p> <p>2 Q. All I'm asking -- the purpose for this</p> <p>3 deposition is just to find out what facts you</p> <p>4 have in support of your allegations, so that's</p> <p>5 all I'm asking.</p> <p>6 So aside from the language of the</p> <p>7 statute aside, from the regs, do you have any</p> <p>8 other facts that support your allegation that 107</p> <p>9 discriminatorily denies a tax benefit to other</p> <p>10 taxpayers?</p> <p>11 A. I guess not, because I don't -- like I</p> <p>12 said, I don't think you need more facts than</p> <p>13 that.</p> <p>14 MR. BOLTON: She's not trying to be</p> <p>15 difficult.</p> <p>16 MS. HEALY GALLAGHER: I'm not trying to</p> <p>17 be difficult either.</p> <p>18 MR. BOLTON: I know.</p> <p>19 BY MS. HEALY GALLAGHER:</p> <p>20 Q. You don't have any other facts; do you?</p> <p>21 A. Well, I mean -- I guess not. I think</p> <p>22 that the question doesn't quite seem valid to me,</p>

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1 Q. And in your mind -- just asking you as  
2 a factual matter -- what's the difference between  
3 entanglement and excessive entanglement between  
4 government and religion?

5 A. Well, I think that Dan answered it  
6 already, and I would agree with his analysis that  
7 something that makes the government come in and  
8 make decisions pertaining to how religious or how  
9 sacred some action is by a church, versus a  
10 content neutral kind of regulation. One is just  
11 required to maintain society, the other is  
12 intrusive.

13 Q. Take a look at Paragraph 47. Paragraph  
14 47 discusses obligations imposed on you as an  
15 individual plaintiff that are not imposed on  
16 ministers. What are the obligations that are  
17 imposed on you?

18 A. Paying -- not being allowed to use our  
19 housing allowance in reducing our tax burden.  
20 And, you know, maybe it's not quite fair to say  
21 it, but even having this deposition today is --  
22 each minister who claims a housing allowance

1 described, that you are otherwise similarly  
2 situated to a minister who could claim 107?  
3 A. No. But I could say one year Madison  
4 Magazine -- this is back in the 1990's -- named  
5 my mother, who was then the president of FFRF, as  
6 Madison's favorite religious leader. She won the  
7 contest. It was a joke, but, I mean, she got the  
8 most votes as an irreligious person. So there's  
9 -- you know, we're sort of in an opposite  
10 position, but known for our freethinking views.

11 Q. Any other ways that you're similarly  
12 situated to ministers who you believe could claim  
13 107?

14 A. Well, you know, we really are kind of  
15 -- I don't think in our movement people are real  
16 hierarchical, but, you know, for example,  
17 irreverence has its own, not rituals, but Dan  
18 does de-baptisms. He's in demand to do that as  
19 an ordained minister. We have a de-baptism  
20 certificate that he signs. People can download  
21 one for free, but if they want a pretty one  
22 that's signed by Dan and has got the certificate,

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1 isn't being asked all these questions, for  
2 example.

3 Q. Are there any other burdens?

4 A. I think that covers it.

5 Q. Paragraph 49, the allegation is that  
6 you as an individual plaintiff is otherwise  
7 similarly situated to ministers who receive the  
8 benefit of the exemption. Tell me how you are  
9 similarly situated to a minister who can claim  
10 the exemption under 107.

11 A. As the head of a national organization,  
12 it's a membership organization where we have  
13 services for our members, provide services,  
14 support, you know, we're a group for like-minded  
15 people who are free from religion to join. We're  
16 called on to be hosts, to provide sometimes more  
17 personal support for people. And, you know, we  
18 represent the organization. We're the known --  
19 two people who are the most known. So we are  
20 kind of figureheads. And --

21 Q. Are there any other ways, aside from  
22 like the tasks of the job that you've just

1 they can order it from FFRF. It's like the --  
2 you know, the opposite of what ministers do.

3 Q. Okay. Any other ways that you are  
4 similarly situated to a minister who could claim  
5 the exemption under 107?

6 A. No, I don't think -- I can't think of  
7 anything in particular.

8 Q. Also in Paragraph 49 it says you as an  
9 individual plaintiff would otherwise qualify for  
10 the housing exemption of Section 107 except for  
11 the application of religious criteria.

12 Are you familiar with all the  
13 requirements to qualify?

14 A. You mean from 107?

15 Q. Right.

16 A. Well, I've read it.

17 Q. So what facts do you have to support  
18 the idea that you would otherwise qualify for the  
19 housing exemption under 107?

20 A. Well, for example, if 107 said all the  
21 directors of 501(c)(3) organizations could -- if  
22 they were paid in a housing allowance could



Page 1

1 IN THE UNITED STATES DISTRICT COURT  
 2 FOR THE WESTERN DISTRICT OF WISCONSIN  
 3  
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 5 FREEDOM FROM RELIGION :  
 6 FOUNDATION, INC., ANNE NICOL :  
 7 GAYLOR, ANNIE LAURIE GAYLOR, :  
 8 and DAN BARKER, :  
 9 Plaintiffs, : Case No. 11-CV-626  
 10 -vs- :  
 11 UNITED STATES OF AMERICA, :  
 12 Defendant. :  
 13 -----x  
 14  
 15 DEPOSITION OF:  
 16 DAN BARKER  
 17  
 18 Milwaukee, Wisconsin  
 19 April 23, 2013  
 20 9:00 a.m. to 12:23 p.m.  
 21  
 22 PHYLLIS KAPARIS, RPR

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 6 BY: MR. RICHARD L. BOLTON  
 7 (rbolton@boardmanclark.com),  
 8 appeared on behalf of the Plaintiffs.  
 9  
 10 U.S. DEPARTMENT OF JUSTICE  
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 15 BY: MS. ERIN HEALY GALLAGHER  
 16 (erin.healygallagher@usdoj.gov)  
 17 appeared on behalf of the Defendant.  
 18  
 19 ALSO PRESENT:  
 20 Annie Laurie Gaylor  
 21 Rebecca Markert  
 22 Patrick Elliott

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1 PROCEEDINGS  
 2 DAN BARKER, called as a witness herein  
 3 by the Defendant, after having been first duly  
 4 sworn, was examined and testified as follows:  
 5  
 6 MS. HEALY GALLAGHER: We are on the  
 7 record in the case of Freedom From Religion  
 8 Foundation, et al., versus United States on April  
 9 23, at about 9:00 a.m.  
 10 My name is Erin Healy Gallagher of the  
 11 United States Department of Justice in the Tax  
 12 Division, and I'm appearing on behalf of the  
 13 United States. We have a court reporter here to  
 14 record the proceedings.  
 15 Mr. Bolton, would you please make your  
 16 appearances?  
 17 MR. BOLTON: Rich Bolton from the  
 18 Boardman Clark law firm, here representing the  
 19 witness and the plaintiffs. And the witness is  
 20 here, Dan Barker.  
 21 Also present are two staff attorneys  
 22 from the plaintiff FFRF, Rebecca Markert and

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1 you review, if any, to help respond to those  
 2 interrogatories?  
 3 A. None, other than I mentioned before, I  
 4 have knowledge of the minutes and resolutions of  
 5 the Foundation, but did not physically touch  
 6 them.  
 7 Q. Okay. The third Request for Production  
 8 is, all documents concerning your housing  
 9 allowance as identified in the Amended Complaint.  
 10 Again, any documents other than your  
 11 tax returns that you have in your possession that  
 12 are related to your housing allowance?  
 13 A. The documents that I looked at are in  
 14 our files for our filing of taxes, which included  
 15 the tax returns and checks and bills and receipts  
 16 needed to file our taxes for those years.  
 17 Q. Did those bills and checks and receipts  
 18 have to do with your housing allowance?  
 19 A. It had to do with the taxes we paid for  
 20 our property.  
 21 Q. So property taxes.  
 22 A. Yes.

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1 Q. Okay.  
 2 A. And the documents we received on our  
 3 mortgage, when it comes to the interest on our  
 4 mortgage, those kinds of documents that I looked  
 5 at, which are in those files for preparing our  
 6 taxes for those years. And additional documents  
 7 as well, canceled checks for documenting  
 8 household expenses and so on.  
 9 Q. Okay. The fourth Request for  
 10 Production is, all documents concerning  
 11 communication between you and the IRS regarding  
 12 your housing allowance.  
 13 And the response is, there are none. Is  
 14 that correct to your knowledge today?  
 15 A. That's correct, yes.  
 16 Q. Request for Production No. 5, all  
 17 documents concerning your status as an employee  
 18 of FFRF or as a self-employed person for federal  
 19 tax purposes.  
 20 A. I did not look at any physical  
 21 documents regarding my employment. I don't know  
 22 if Lisa provided to you any.

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1 Q. I'm just asking about what you did.  
 2 A. No.  
 3 Q. So if you didn't, that's fine.  
 4 And we talked about Request for  
 5 Production No. 6, your federal income tax  
 6 returns, including all supporting documentation,  
 7 that were required to be filed during the  
 8 relevant time period and for tax year 2012.  
 9 MS. HEALY GALLAGHER: And actually the  
 10 relevant time period was defined as 2009, but I  
 11 think we have that.  
 12 MR. BOLTON: Right. I hadn't  
 13 recognized that --  
 14 MS. HEALY GALLAGHER: Right.  
 15 MR. BOLTON: -- but I think we did  
 16 produce the 2009 as well.  
 17 MS. HEALY GALLAGHER: Okay.  
 18 BY MS. HEALY GALLAGHER:  
 19 Q. So it sounds like there are additional  
 20 documents in your possession that go to the  
 21 actual housing expenses that you've incurred for  
 22 the time that you've had a housing allowance; is

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1 that right?  
 2 A. Related to what we actually stated to  
 3 the employer, no. We could perhaps come up with  
 4 more to -- but what we stated to Freedom From  
 5 Religion Foundation, our justification for the  
 6 amount of the housing allowance, no, is house  
 7 payments, mortgage interest, taxes, those things  
 8 that I mentioned to you.  
 9 Q. Right. And you have documents showing  
 10 how much you paid in property taxes, right?  
 11 A. Yes.  
 12 Q. And you have documents showing how much  
 13 you paid for your mortgage, right?  
 14 A. Yes.  
 15 Q. And for landscaping, right?  
 16 A. Yes.  
 17 Q. Other --  
 18 A. For some of it, yes.  
 19 Q. Other things related to the house.  
 20 A. Yes.  
 21 Q. Okay. Mr. Barker, did you withhold any  
 22 documents that were responsive to those requests?

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1 record producer, which was barely a living wage,  
 2 but it was a living wage when it all added up, I  
 3 had begun working as a -- well, it didn't start  
 4 off as a computer programmer -- but for a company  
 5 that was doing computer programming. And I can't  
 6 remember the name of that first company. It was  
 7 in California, building monitoring systems for  
 8 the petroleum industry where I started doing  
 9 programming and computer analysis for them.  
 10 And then 80 -- I suppose it was 1984, I  
 11 don't remember, I went to work for Safetran in  
 12 California; Cucamonga, California. Safetran  
 13 built -- I don't know if they still exist --  
 14 dispatching systems for the railroads, and I was  
 15 a programmer and analyst for those systems that  
 16 moved trains around the tracks, which were mainly  
 17 in the Midwest, Indiana and Illinois was where  
 18 the systems I was working on. And I did that for  
 19 about two years. And was just employed just as a  
 20 nonminister, just as a programmer until 1987.  
 21 Q. And you mentioned that you had done  
 22 consulting work for FFRF before you were hired on

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1 as an employee.  
 2 A. Yes. It was small, it was  
 3 computer-related. FFRF asked me to set up their  
 4 very first computer database. It must have been  
 5 in 1986. I don't remember exactly when, '85,  
 6 '86. And it was small consulting work. I was a  
 7 member of the Foundation and a volunteer for the  
 8 Foundation, and did a lot of free volunteer work  
 9 on weekends, you know, besides my regular job.  
 10 And the consulting was -- well, I just remember  
 11 that one database consulting job, but there must  
 12 have been others.  
 13 Q. When did you join Freedom From  
 14 Religion?  
 15 A. 1984, as a member.  
 16 Q. So what were you hired to do when you  
 17 were first employed full-time?  
 18 A. It was mid 1987, probably June, PR  
 19 director.  
 20 Q. Before we move on to your employment  
 21 with Freedom From Religion Foundation, for all of  
 22 the jobs that we've talked about from when you

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1 left Azusa to 1987, were you ever fired from any  
 2 job?  
 3 A. Nope.  
 4 Q. Tell me about the history of your  
 5 employment with Freedom From Religion Foundation.  
 6 A. 1987, PR director, on the staff, on the  
 7 payroll. And over the years continued until 19 --  
 8 until 2004 as PR director formally. That was the  
 9 title, but the duties were much more varied than  
 10 that.  
 11 Q. What were your tasks as PR director?  
 12 A. Writing, promotion, public speaking,  
 13 editing, helping around the office in proofing,  
 14 working also with the computer system and  
 15 database which I had helped to set up originally.  
 16 It basically was doing anything that needed to be  
 17 done. Everyone on the staff, especially at that  
 18 time, was doing every possible thing. So we all  
 19 pitched in.  
 20 Formally PR director, which means I did  
 21 a lot of public speaking. As a former minister,  
 22 preacher, it was a good fit to be out as a public

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1 -- I can't use the word preacher, but if I use  
 2 it, I'll put it in quotes -- as a "preacher" for  
 3 atheism and agnosticism.  
 4 And I often would then, of course, deal  
 5 with members of the Foundation. I wouldn't call  
 6 it counseling in a religious sense, but it was a  
 7 parallel to that, viewing members of the  
 8 foundation somewhat as members or congregants in  
 9 a sense that many of them had questions or  
 10 problems with how do I deal with religious  
 11 relatives, how do I announce the news that I am  
 12 no longer a believer, morality with God --  
 13 basically doing much of what I used to do as a  
 14 minister, but now for a totally different  
 15 message, for a nonminister of the gospel type of  
 16 message. And it was, of course, much more than  
 17 that. Every week and every day a different task  
 18 or duty or problem would come up in a small,  
 19 growing organization, but primarily for me it was  
 20 PR.  
 21 Q. So you mentioned sort of a stopping  
 22 point or perhaps transitional point in 2004.

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1 projects as they come up through designated --  
 2 you know, people designate billboard campaigns.  
 3 Over the years we've had projects -- in fact, our  
 4 newspaper started off as a project. Freethought  
 5 Today was a fundraising project. We have an  
 6 ongoing legal fund project to raise money for the  
 7 legal activities of the Foundation, and various  
 8 projects like that as the years go and the months  
 9 pass.

10 The legal fund and general fund are  
 11 ongoing. And then we have special projects twice  
 12 a year that we raise money for this or for that.  
 13 Way back in the early years we had a special  
 14 project to buy a company vehicle, and people  
 15 donated to that. So it's that kind of a thing.

16 Could I clarify?

17 Q. Please.

18 A. I have spoken on the telephone from our  
 19 home to a number of these people, but not  
 20 physically in the home.

21 Q. Is there any reason it was necessary  
 22 for you to speak to them from your home?

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1 A. They called me. They found me, and  
 2 they called, and especially people in Madison who  
 3 would find me.

4 Q. So what about the rest of your tasks  
 5 that you perform as co-president of Freedom From  
 6 Religion Foundation, what, if any, tasks are  
 7 required to take place at your home?

8 A. None are required.

9 Q. Is your current home or your housing  
 10 allowance -- actually I'll withdraw that.

11 Is there any reason that you're  
 12 required to live where you live for the  
 13 convenience of Freedom From Religion Foundation?

14 A. There is no formal reason for that.

15 Q. Are there any informal reasons?

16 A. It's nice to be close, for example, the  
 17 alarm system goes off, if we need to get to the  
 18 office for some reason. We have occasionally  
 19 entertained members of the foundation at our home  
 20 and housed them on occasion. It's not required,  
 21 but it is informally nice for us to have a home  
 22 pretty close to the office so that we can be

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1 available for those occasions as they arise.

2 Q. About how far is your home from the  
 3 Freedom From Religion Foundation office?

4 A. We walk to work from our home and back.

5 It's about two and a half miles. So it's a  
 6 walkable distance, and a very quick ride, very  
 7 quick drive. You can almost see it from here.

8 Q. What is the actual physical address for  
 9 FFRF?

10 A. 304 West Washington Avenue.

11 MR. BOLTON: It's actually just a  
 12 couple blocks from here.

13 MS. HEALY GALLAGHER: That is close.

14 MR. BOLTON: Can we take a quick break?

15 MS. HEALY GALLAGHER: We can.

16 (A recess was taken.)

17 BY MS. HEALY GALLAGHER:

18 Q. Let's go back on the record, please.

19 Let's speak for a little bit about the  
 20 housing allowance that you allege has been  
 21 designated for you by Freedom From Religion  
 22 Foundation. How did the idea for a housing

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1 allowance come up?

2 A. We started a lawsuit -- I forget what  
 3 year it was -- in California.

4 Can I ask Rich for confirmation about  
 5 that, or is that okay?

6 Q. It's just to your recollection.

7 A. Okay. And because of the taxpayer  
 8 standing we pulled out of that, and realized that  
 9 in order to challenge what we think is an  
 10 unconstitutional special tax advantage to  
 11 ministers of the gospel, we would need to show  
 12 that the injury that results from that  
 13 unconstitutional advantage is a real injury. So  
 14 while what I do at FFRF is not ministry -- it's  
 15 what you might call an anti-ministry I suppose --  
 16 in order to demonstrate that there was an  
 17 advantage that the government is giving to clergy  
 18 that nonclergy don't get, it would be clearer for  
 19 the Foundation then, at least on paper, to  
 20 designate for me and Annie Laurie -- and, I  
 21 suppose, potentially anyone else who might fall  
 22 under that -- a housing allowance, to show that



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1 discrimination.

2 So it was part of the process of  
3 establishing standing. It wasn't because I want  
4 the exclusion. I can't speak for Annie Laurie,  
5 but I don't want the exclusion. It would be  
6 nice, you know, to be able to drop your tax  
7 liability that clergy get to do. But to document  
8 the actual harm, material harm, to someone like  
9 me; whereas, before I used to take advantage of  
10 such a break, tax break, now because my views  
11 have changed, I don't get to take advantage of  
12 that, the only way to show that would be a  
13 document that we also have housing expenses. So  
14 that to my understanding at least is why we  
15 decided to move to our Executive Council that  
16 they adopt a resolution, which they eventually  
17 did, designating a housing allowance.

18 Q. When you say you moved the Executive  
19 Council --

20 A. Made a motion.

21 Q. Right. Is that motion reflected in  
22 minutes of any meeting?

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1 A. Yes, it is. I don't recall though --

2 MR. BOLTON: Just for my understanding,  
3 and I asked in terms of anything that's  
4 memorialized, I think everything I have defined  
5 in writing in terms of the resolution and  
6 whatnot, we produced.

7 MS. HEALY GALLAGHER: Right. I would  
8 be curious, though, to see the minutes of that  
9 meeting that reflects this motion --

10 MR. BOLTON: Okay.

11 MS. HEALY GALLAGHER: -- to seek the  
12 housing allowance in the first instance.

13 BY MS. HEALY GALLAGHER:

14 Q. And this may have been part of the  
15 motion, but to your recollection how did you  
16 determine the amount of the housing allowance  
17 that you requested?

18 A. House payments, taxes, looking at the  
19 documents that we mentioned earlier related to  
20 actual expenses of maintaining our home,  
21 interest, all of those things, and came up with  
22 what we considered to be a reasonable amount to

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1 reflect what it costs us to maintain our own  
2 home.

3 Q. And --

4 MR. BOLTON: Can we -- you may have  
5 asked this, and I wasn't listening -- just so the  
6 record is clear.

7 When you refer to us, Annie Laurie  
8 Gaylor and you have been married since --

9 THE WITNESS: Since '87.

10 MR. BOLTON: Okay. And you may have  
11 said that, and I just. So the "us" is you and  
12 Annie Laurie Gaylor.

13 THE WITNESS: Our household, yeah, as  
14 co-presidents and as co-homeowners, I guess, of  
15 the same home.

16 BY MS. HEALY GALLAGHER:

17 Q. Was there -- does anybody else receive  
18 a housing allowance on paper so designated from  
19 Freedom From Religion Foundation?

20 A. Anne Gaylor, who is the president  
21 emerita, is also designated a housing allowance.

22 Q. Is there anybody else?

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1 A. No, not to my knowledge, unless I slept  
2 through one of those meetings.

3 Q. Is the housing allowance in addition to  
4 any salary that you were already earning, or did  
5 it become part of the salary?

6 A. It's not in addition to any salary we  
7 are already earning. It's an allowance on paper  
8 only. We did not get a raise. It did not affect  
9 our income in any way.

10 Q. So have you ever exempted from your  
11 income tax any amount of your housing allowance  
12 designated by FFRF?

13 A. No. I wouldn't know how to do that. I  
14 wouldn't know what the mechanism would be to do  
15 that. But, no, I never have.

16 Q. And you've never filed a claim for  
17 refund with the IRS requesting a refund in the  
18 amount of the income tax that you paid on what's  
19 been designated as your housing allowance?

20 A. No. Again, if I had wanted to, I  
21 wouldn't know how to do that, what is the  
22 procedure or mechanism. I have never wanted to.

<p style="text-align: right;">Page 101</p> <p>1 A. No.</p> <p>2 Q. If we take a look at paragraph little i</p> <p>3 at the bottom of Page 3.</p> <p>4 MR. BOLTON: Which page?</p> <p>5 MS. HEALY GALLAGHER: 3 of Exhibit 3.</p> <p>6 BY MS. HEALY GALLAGHER:</p> <p>7 Q. It asks for your yearly wages during</p> <p>8 the relevant time period.</p> <p>9 And the response for you is that you</p> <p>10 received \$87,550 in 2011. Now, just so I'm</p> <p>11 clear, that amount includes the \$5,500 that you</p> <p>12 were designated as a housing allowance in 2011;</p> <p>13 is that right?</p> <p>14 A. Yes, it does.</p> <p>15 Q. And this \$87,550 in 2011, that would</p> <p>16 have been your salary regardless?</p> <p>17 A. That's true.</p> <p>18 Q. The same question for 2012. It says</p> <p>19 that you received \$91,690 in 2012. And that</p> <p>20 would have been your salary regardless of any</p> <p>21 housing allowance in 2012, right?</p> <p>22 A. That is true, to my knowledge. I can't</p>	<p style="text-align: right;">Page 103</p> <p>1 that.</p> <p>2 MR. BOLTON: I think when you're</p> <p>3 talking about -- I think he's considering simply</p> <p>4 the return itself being a communication as</p> <p>5 opposed to --</p> <p>6 MS. HEALY GALLAGHER: That's fine. I</p> <p>7 mean, we'll start with that.</p> <p>8 MR. BOLTON: Okay.</p> <p>9 BY MS. HEALY GALLAGHER:</p> <p>10 Q. We'll start with that. So you're</p> <p>11 taking the return claiming a housing allowance as</p> <p>12 communicating with the IRS regarding Section 107.</p> <p>13 A. I don't know. If that qualifies as</p> <p>14 communicating -- is that interacting or</p> <p>15 communicating? If it's interacting, I -- there</p> <p>16 was no interaction.</p> <p>17 Q. I'm not trying to mince words.</p> <p>18 A. Okay. I just don't want to say</p> <p>19 anything that's not clear.</p> <p>20 Q. I understand.</p> <p>21 A. To my --</p> <p>22 MR. BOLTON: Other than the filing, did</p>
<p style="text-align: right;">Page 102</p> <p>1 speak for what Counsel might decide, but to my</p> <p>2 knowledge that is true, yeah.</p> <p>3 Q. If you take a look at Interrogatory No.</p> <p>4 6 at the bottom of Page 7, Identify all</p> <p>5 communication between you and the IRS regarding</p> <p>6 your housing allowance identified in Amended</p> <p>7 Complaint, Paragraph 13.</p> <p>8 The response is, no such communications</p> <p>9 have occurred because Section 107 IRC exclusion</p> <p>10 is only available to ministers of the gospel.</p> <p>11 So, Mr. Barker, you've never had any</p> <p>12 interaction with the IRS regarding Section 107;</p> <p>13 is that right?</p> <p>14 A. Not currently. If you consider that I</p> <p>15 excluded the income way back then, does that</p> <p>16 count as interaction with the IRS?</p> <p>17 Q. Well, we can start with that, if you</p> <p>18 think that that's --</p> <p>19 A. Is that called interaction, or is that</p> <p>20 just --</p> <p>21 Q. Well, I'm just asking for your thoughts</p> <p>22 and your opinion on this. So we'll start with</p>	<p style="text-align: right;">Page 104</p> <p>1 you have any communications?</p> <p>2 THE WITNESS: No. There was no two-way</p> <p>3 interaction between me and the IRS regarding</p> <p>4 housing allowance.</p> <p>5 BY MS. HEALY GALLAGHER:</p> <p>6 Q. Sure. How about -- and so that was in</p> <p>7 the early 80's you submitted an income tax return</p> <p>8 excluding certain income --</p> <p>9 A. That's right.</p> <p>10 Q. -- from your gross income to the IRS.</p> <p>11 A. And if you call that interaction, yes.</p> <p>12 But I don't know if you would define that as</p> <p>13 interaction. But other than that, there has been</p> <p>14 no interaction.</p> <p>15 Q. Okay. So with respect to the housing</p> <p>16 allowance that Freedom From Religion Foundation</p> <p>17 has designated on your behalf, have you had any</p> <p>18 communication with the IRS whatsoever?</p> <p>19 A. No.</p> <p>20 Q. I'm handing you what's been marked</p> <p>21 Defendant's Exhibit 1, which is the Amended</p> <p>22 Complaint in this case. Do you recognize the</p>

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1 Saddleback Church, about the reasoning for the  
 2 exclusion in his salary and his ordination. So  
 3 evidence would include the actual ordination  
 4 documents. And I think that's significant. It's  
 5 a significant amount of evidence.  
 6 Q. Anything else?  
 7 A. That's all.  
 8 Q. That's all. So just the information  
 9 that you have from the Rick Warren investigation,  
 10 right?  
 11 A. Yes. This is a legal Complaint, but,  
 12 yes, you're right.  
 13 Q. So you don't have any personal  
 14 knowledge of the evidence that's required?  
 15 A. I was not audited for those years that  
 16 I claimed that exclusion, so I wouldn't have any  
 17 personal -- that would be the only way to have  
 18 any personal evidence, I think.  
 19 Q. Well, have you heard from anybody else  
 20 that they've been required to show evidence to  
 21 the IRS?  
 22 A. I have not heard that, no.

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1 Q. Paragraph 36, The inquiries under  
 2 Section 107 require complex inquiries into the  
 3 tenets of religious orthodoxy.  
 4 What facts do you have to support that  
 5 contention?  
 6 A. Well, again, this is a Complaint. I  
 7 don't have any facts about how the IRS does its  
 8 business, so I can't say either way. But from  
 9 the wording that the IRS uses in the section and  
 10 sacerdotal functions and so on, this is our  
 11 contention. But I don't have any direct facts  
 12 about the internal workings of the IRS.  
 13 Q. Same question for Paragraph 37. The  
 14 IRS is regularly required to make purely  
 15 religious determinations in administering Section  
 16 107.  
 17 Do you have any facts to support that  
 18 contention?  
 19 A. I don't have any personal facts, only  
 20 my knowledge there have been cases where the IRS  
 21 has challenged. And I can't bring you those  
 22 documents now, but stories, you know, news

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1 stories.  
 2 Q. Do you have any information from other  
 3 than news stories?  
 4 A. No, I don't.  
 5 Q. In Paragraph 47 the allegation is, The  
 6 discriminatory benefits allowed by Section 107 as  
 7 administered by the IRS and Treasury Department  
 8 imposes obligations on the individual plaintiffs  
 9 that are not imposed on ministers.  
 10 What are the obligations that are  
 11 imposed upon you that are not imposed upon  
 12 ministers?  
 13 MR. BOLTON: As the draftsman of the  
 14 Complaint, by the way, I don't know necessarily  
 15 whether he knows what the draftsman of the  
 16 Complaint intended by this phrase.  
 17 THE WITNESS: But I can answer it, I  
 18 think.  
 19 MR. BOLTON: Sure.  
 20 THE WITNESS: I'm obligated to pay all  
 21 my taxes. I'm obligated to pay taxes on all of  
 22 the wages and income that I received from the

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1 Freedom From Religion Foundation. Ministers of  
 2 the gospel don't have that obligation.  
 3 BY MS. HEALY GALLAGHER:  
 4 Q. Any other obligations?  
 5 A. No. We're just challenging a tax code.  
 6 Q. Are you aware of any obligations that  
 7 may be imposed on ministers that are not imposed  
 8 on you?  
 9 A. Well, they are obligated to prove that  
 10 they are in fact ministers. I suppose if the IRS  
 11 audits them or questions their exclusion, then  
 12 they are obligated to prove that fact. That's an  
 13 obligation.  
 14 Q. Paragraph 49, if you want to take a  
 15 second to read it. I'd like to paraphrase one  
 16 section. There's an allegation that the  
 17 individuals are otherwise similarly situated to  
 18 ministers who receive the benefit of Section 107.  
 19 What facts, if any, do you have that  
 20 show that you are similarly situated to ministers  
 21 who receive the benefit of Section 107?  
 22 A. I'm not a minister of the gospel

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1 anymore, but in my own personal life the things  
 2 that I am doing today are similar to what I was  
 3 doing before as a minister. I don't call it  
 4 preaching. It's lecturing or debating. I don't  
 5 call it spiritual counseling. It is  
 6 psychological counseling. I don't call it  
 7 traveling evangelism anymore, but I call it  
 8 traveling promotion for freethought. Writing  
 9 music, I don't write religious music anymore. I  
 10 write irreverent music, which is similar, like  
 11 the flip side of a coin.  
 12 So I'm not doing ministry or ministry  
 13 of the gospel. What I am doing is as a human  
 14 being the same thing, promoting, convincing,  
 15 counseling, persuading, PR, all of that. So in  
 16 my current position at the Freedom From Religion  
 17 Foundation I'm not a minister. I'm certainly not  
 18 a minister of the gospel, but I am doing very  
 19 much the same natural material things that  
 20 ministers of the gospel do in their own religious  
 21 duties, which -- because I haven't changed. I'm  
 22 still speaking what I think is the truth. But

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1 the fact that my opinion has changed now makes me  
 2 not a minister or religious officiant anymore,  
 3 but because my opinions on religion have changed,  
 4 the very same duties that I'm doing now that  
 5 would have been qualified for the exclusion under  
 6 this section, now no longer qualify because it's  
 7 not in the promotion of the gospel, but it is  
 8 questioning the gospel. It is countering the  
 9 gospel. So I'm doing very much similar things to  
 10 what I did before.  
 11 Q. So the similarity it sounds like is in  
 12 the tasks that you do. Is that right?  
 13 A. That's right, yes.  
 14 Q. Are there any other similarities  
 15 between you and ministers of the gospel that you  
 16 think would qualify --  
 17 A. Besides tasks that we --  
 18 Q. Hang on one second.  
 19 A. I'm sorry.  
 20 Q. Let me get the question clear for the  
 21 record.  
 22 Is there any other way that you are

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1 similarly situated to ministers who can claim the  
 2 Section 107 exemption?  
 3 A. We are both hired by nonprofits, by  
 4 501(c)(3) nonprofit organizations, which is a  
 5 similarity. Regardless of what we do, we are  
 6 working for a nonprofit organization. Besides  
 7 that and the actual tasks, I can't imagine any  
 8 other similarity, except sometimes people tell me  
 9 I look like a preacher. I don't know if that  
 10 counts.  
 11 Q. So other than the tasks that you  
 12 perform and that you're hired by a nonprofit, and  
 13 that perhaps there's a physical resemblance at  
 14 times, any other way that you're similarly  
 15 situated to someone who could exempt income under  
 16 Section 107?  
 17 A. I own a home. I suppose there's a  
 18 similarity there. And at this time I can't think  
 19 of any other similarities.  
 20 Q. So the tasks you perform, hired by a  
 21 nonprofit, occasional physical resemblance, and  
 22 owning a home. Anything else?

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1 A. At this time there's nothing else. I  
 2 might think of something else later, but not now.  
 3 Q. So in Paragraph 52 if you want to take  
 4 a look at it. I'll ask you a question about sort  
 5 of the latter half where the allegation is, the  
 6 individual plaintiffs are otherwise qualified for  
 7 the housing allowance exemption except for  
 8 religious criteria.  
 9 Is there any other way that you might  
 10 be qualified for this exemption, other than what  
 11 we've just talked about, with respect to being  
 12 similarly situated to ministers?  
 13 A. Let me read the whole sentence again.  
 14 Q. Sure.  
 15 A. I'd say, no.  
 16 Q. Paragraph 54, The actions of the  
 17 defendant have the effect each year of excluding  
 18 hundreds of millions of dollars from taxation,  
 19 and this exclusion is available only to ministers  
 20 of the gospel.  
 21 How do you know that Section 107  
 22 excludes hundreds of millions of dollars a year

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WISCONSIN

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**FREEDOM FROM RELIGION  
FOUNDATION, INC.; ANNIE LAURIE  
GAYLOR; ANNE NICOL GAYLOR; and DAN  
BARKER**

Plaintiffs,

v.

Case No. 11 CV 0626

**UNITED STATES OF AMERICA; TIMOTHY  
GEITHNER, in his official capacity; and  
DOUGLAS SHULMAN, in his official capacity,**

Defendants.

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**DECLARATION OF JAMES HUDNUT-BEUMLER**

Pursuant to 28 U.S.C. § 1746, I, James Hudnut-Beumler, declare that:

**I. Statement of Qualifications**

1. I am the Anne Potter Wilson Distinguished Professor of American Religious History at Vanderbilt University and dean of Vanderbilt's Divinity School.
2. I have served as Dean since 2000.
3. Prior to coming to Vanderbilt in 2000, I was dean of the faculty at Columbia Theological Seminary, a program associate for the Lilly Endowment, and administrative director of the undergraduate program in Public and International Affairs at Princeton University.
4. I earned my Ph.D. in Religion from Princeton University as well.



5. As a historian of American religion I have spent the years since 1990 mostly studying the economics of American religion and carefully attending to the ways in which a multi-religious culture has balanced the freedom of religious expression with official state neutrality toward any particular faith.
6. I am the author of several works on economic and social developments in American religious life, including the books *In Pursuit of the Almighty's Dollar: An Economic History of Protestantism* (2007) *Generous Saints: Congregations Rethinking Money and Ethics* (1999) and *Looking for God in the Suburbs: The Religion of the American Dream and Its Critics, 1945-1965* (1994), each of which provide background for my testimony.
7. I teach the History and Historiography of American Religion, Material History, History of Religion in the American South, and courses for ministerial candidates in the Presbyterian Church (USA).
8. Attached as Exhibit A is my curriculum vitae.
9. Attached as Exhibit B is a list of articles I have written in the past 10 years.

## **II. Background for My Testimony**

10. The United States has retained me to examine and analyze and testify about the historical context of ministers' parsonages and parsonage allowances, and their treatment under the internal revenue laws of the United States.

11. Throughout this Declaration, I note materials that I relied upon to reach my conclusions.
12. In addition to those specific items, I also relied on the items listed in the attached Bibliography (Exhibit C).

### **III. The Historical Context of Ministers' Parsonages and Parsonage Allowances, and Their Treatment under the Internal Revenue Laws of the United States.**

#### **A. Introduction**

13. The religious practice of housing ministers in parsonages<sup>1</sup> antedates the Internal Revenue Code by more than a millennium.
14. The decision to tax cash income, and its equivalents, in the early 20th century led to questions that potentially posed fundamental challenges to the way religious institutions had provided for their religious ministries for centuries.
15. Though the Income Tax as we know it had to be delayed in its implementation from 1909 until the passage of the 16th amendment in 1913, the introduction of the tax posed all kinds of new questions to long-standing social practices: did sailors have to pay income tax for their room and board while they did their jobs envoyage? Did ranch hands have to pay income tax on their bunks and beans? Did soldiers have to pay

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<sup>1</sup> Throughout this report the term "minister" is used inclusively to represent all professional religious leaders of whatever faith groups, and the term "parsonage" is used inclusively to represent housing, of whatever form, supplied to such leaders in order to enable the ministry of the religious group, usually a congregation

income tax for the value of their base housing, and did officers' wives have to pay income tax on the value of rent while they waited stateside to see if their men returned from the Philippines and war with Filipino insurgents?<sup>2</sup>

16. None of these questions would have mattered so long as the United States relied principally on sales and excise taxes.
17. To these novel concerns were added the question and what of the clergy? They lived next door to their churches in houses and rectories. Did they need to pay a tax on the value of the housing or was it a part of the job—an offer said members of the cloth "could not refuse?"
18. Administrative rulings, courts, and Congress have recognized that ministerial parsonages, and later, cash allowances in lieu of parsonages, are a key dimension of the way religious groups with professional ministries have provided for their sacramental and pastoral affairs.

**B. Parsonages Before the Income Tax in the United States**

19. The patterns of housing members of the clergy in America have deep histories in the churches of Western Europe. The most important and common feature of religious organizations' approach to housing members of the clergy is the basic assumption that the clergy would live in housing

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<sup>2</sup> In this, and preceding examples, I am speaking of the Federal Income Tax and not SECA, which was later applied to such forms for compensation



on the premises of the church grounds or nearby on ecclesiastically-owned property.

20. The historical record shows that underlying this assumption were four religiously motivated reasons for congregations to provide housing for their spiritual leaders.

21. Doing so enabled them to more freely exercise their religious beliefs than if they did not provide housing. Those reasons are:

- a. First, the ecclesiastical employer required priests and ministers to live nearby to the location of their work at all hours of the day and night, particularly at the unpredictable moments when parishioners may be *in extremis* and in need of immediate pastoral care.<sup>3</sup>
- b. Second, by controlling the living arrangements of clergy, the church can reinforce the faith's expectations for simple living, or holiness among the clergy; that is, members of the clergy should thereby live no better and no worse than their church authorities have arranged for them to live.<sup>4</sup>

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<sup>3</sup> A clear example of this is the Catholic *Code of Canon Law*, which provides in Canon 883, 3, that each priest has the faculty to carry out the anointing of the sick, and in Canon 1003, § 2 provided: "All priests to whom the care of souls has been committed have the duty and the right to administer the anointing of the sick to all the faithful committed to their pastoral office."

<sup>4</sup> "The Priest, Pastor and Leader of the Parish Community," accessed March 30, 2013, [http://www.vatican.va/roman\\_curia/congregations/cclergy/documents/rc\\_con\\_cclergy\\_doc\\_20020804\\_istruzione-presbitero\\_en.html](http://www.vatican.va/roman_curia/congregations/cclergy/documents/rc_con_cclergy_doc_20020804_istruzione-presbitero_en.html).

- c. Third, by having the church own the living premises instead of the minister owning his housing, the clergy were freed from temporal burdens (like home repair, yard work, and the like) to engage in spiritual work.<sup>5</sup>
  - d. Fourth, by owning housing for their clergy, congregations, dioceses and other church entities were freed from the difficulties associated with resettling clergy when the time came for personnel redeployment.<sup>6</sup>
22. These four religiously motivated reasons for a congregation to provide housing for its spiritual leader or leaders remain as relevant to religious practice today as they were to religious practice when the first settlers came to the colonies that would become the United States.
23. Even after King Henry VIII in England closed monasteries and seized vast church holdings for the crown in the 1530s, a standard ecclesiastic housing practice prevailed among the English-speaking peoples, for the four reasons mentioned above: a clergyman assigned to a parish had a yearly income fixed and additionally lived in a parish-owned rectory for the course of his ministry in that particular place.<sup>7</sup>

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<sup>5</sup> Russell E. Richey, *American Methodism: a Compact History* (Nashville: Abingdon Press, 2012), p. 53.

<sup>6</sup> "Priestly Celibacy in Patristics and Church History," accessed March 10, 2013, [http://www.vatican.va/roman\\_curia/congregations/ccclergy/documents/rc\\_con\\_ccclergy\\_doc\\_01011993\\_chisto\\_en.html](http://www.vatican.va/roman_curia/congregations/ccclergy/documents/rc_con_ccclergy_doc_01011993_chisto_en.html); Richey, *American Methodism*, 53; and Russell E. Richey, *The Methodist Conference in America: a History* (Nashville: Kingswood Books, 1996), 174.

<sup>7</sup> Alan Savidge, *The Parsonage in England ; Its History and Architecture* (London: S. P. S. K, 1964), 7-9.

24. This was the standard ecclesiastic housing practice that, in various forms, the several denominations of Christians forming the overwhelming majority of American colonists brought with them into the United States at the founding of the independent republic.<sup>8</sup>
25. The colonial history of the American continent contains the physical evidence of religious life, with parsonages built by towns and congregations for their ministers, and with larger chapter houses built for the early religious orders of catholic priests and sisters. For example:
- a. The Keith House was built in 1662 by the proprietors of what was originally called the Duxborough Plantation, later called Old Bridgewater, Massachusetts for the first settled minister James Keith, who served the area from 1664 to 1719.<sup>9</sup>
  - b. The Manor House of St. Thomas Manor (1741) in Maryland is the oldest Jesuit residence in continuous use in the world. Clergy from this house served St. Ignatius Church in addition to other duties.<sup>10</sup>
  - c. Old Lutheran Parsonage (1743) Schoharie County, New York is one of the oldest religious buildings of any kind remaining in New York State.<sup>11</sup>

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<sup>8</sup> Michael McConnell, "Establishment at the Founding" in *No Establishment of Religion: America's Original Contribution to Religious Liberty* (New York: Oxford University Press, 2012), 50.

<sup>9</sup> Eric B. Schultz and Michael J. Tougas, *King Philip's War: The History and Legacy of America's Forgotten Conflict* (The Countryman Press, 2000).

<sup>10</sup> Earl Arnett, Robert J. Brugger, and Edward C. Papenfuss, *Maryland: A New Guide to the Old Line State* (Johns Hopkins University Press, 1999), 116.

- d. The Old Dutch Parsonage, built in 1751 by three different Dutch Reformed Congregations in New Jersey for the use of their pastor, still stands in Somerville, New Jersey.<sup>12</sup>
26. Such homes for clergy went by various names - rectory, parsonage, or manse - but amounted to the same thing: a home that accomplished the four religiously motivated purposes for a congregation to provide a parsonage with which I opened this report.
27. Because of heating and cooling concerns, and because most early church buildings were not open during the week, the parsonages were used for more than simply housing the minister.
28. Ordinarily the pastor's study was located in the parsonage.
29. The pastor counseled church members in the study; and meetings with the pastor for prayer and to conduct church business with lay leadership were customarily conducted in the parlor.<sup>13</sup>
30. The parsonage system was in very wide use in the nineteenth and early twentieth centuries.<sup>14</sup>

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<sup>11</sup> Historic American Buildings Survey (Library of Congress) <http://www.loc.gov/pictures/item/ny0752>

<sup>12</sup> Brochure, "The Old Dutch Parsonage & Wallace House" (New Jersey Department of Environmental Protection, Division of Parks & Forestry).

<sup>13</sup> James David Hudnut-Beumler, *In Pursuit of the Almighty's Dollar: A History of Money and American Protestantism* (Chapel Hill: University of North Carolina Press, 2007), 132

<sup>14</sup> Ralph Almon Felton, *The Home of the Rural Pastor* (Madison, N.J.: Dept. of the Rural Church, Drew Theological Seminary, 1948), 9 documents usage in 1171 pastorates in 12 denominations in the first half of the twentieth century, where all but .3% of pastors lived in church owned 95.9% or rented 3.8% housing

31. For the Roman Catholic Church and Methodist Episcopal churches (north and south) the practice of providing rectories and parsonages, respectively, was virtually universal and hardwired into their deployment models for clergy. Both religions established parsonages at or very near their houses of worship.
32. In both religions, the bishop of a diocese or conference could, and did, send ministers to different parishes according to the religious needs of the Church as a whole.<sup>15</sup> Providing housing on-site to the ministers enabled them to move freely according to their denomination's religious needs without having to extricate themselves from a private tenancy or a home that they owned only to have to find new accommodations where they were called.<sup>16</sup>
33. For example, the three Plenary Councils of Baltimore (1852, 1866, and 1884) of America's Roman Catholic Church hierarchy each stressed the importance of "bricks and mortar" in building up parishes with schools, rectories, and convents, not just houses of worship, as important to helping Roman Catholic Americans keep the Catholic faith in an overwhelmingly Protestant land; this guidance largely proved a roadmap

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<sup>15</sup> Code of Canon Law, Can. 391 §1; *The Book of Discipline of the United Methodist Church: Specific Responsibilities of Bishops*, Para. 529-533

<sup>16</sup> "Time to Bring Back the Parsonage?," *SBC Voices*, accessed April 9, 2013, <http://sbcvoices.com/timeto-bring-back-the-parsonage/>.



for the continuing practice of the American Catholic church over the next century.<sup>17</sup>

34. As for the Methodists, as early as the 1830s, the influential churchman Nathan Bangs was urging his brethren to give up their horses and endless circuits for houses of worship and parsonages, saying, "it had long been evident to many of our ministers and people that for the want of having a preacher stationed in all important places, we had lost much of the fruits of our labor."<sup>18</sup>
35. By the late nineteenth century, the historical record suggests that the Methodists had taken this advice to heart. Methodist ministers' wives wrote of the shabbiness of church-provided homes and the heartbreak of laboring to make a home livable over a series of months only to learn that one's husband's Methodist bishop had reassigned him to another church with another parish with a parsonage full of peeling wallpaper and threadbare furniture.<sup>19</sup>

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<sup>17</sup> Jay P. Dolan, *The American Catholic Experience: a History from Colonial Times to the Present*, 1st ed (Garden City, N.Y: Doubleday, 1985), 350-3.

<sup>18</sup> Nathan Bangs, as quoted in Richey, *American Methodism*, 53

<sup>19</sup> For an extended treatment of the difficulties associated with living as a member of a minister's family see the eighth chapter of James Hudnut-Beumler, *In Pursuit of the Almighty's Dollar: A History of Money and American Protestantism*. (Chapel Hill: University of North Carolina Press, 2007); for contemporaneous accounts of the difficulties of parsonage living in the 19<sup>th</sup> century, see: Anonymous, *The Minister's Wife; or, What Becomes of the Salary* (Boston, James M. Usher, 1861); A. H. Redford, *The Preacher's Wife* (Nashville: Publishing House of the Methodist Episcopal Church, South, 1877); Mary Orme Tucker, *Itinerant Preaching in the Early Days of Methodism* (Boston, B. B. Russell, 1872); and Leonard I. Sweet, *The Minister's Wife: Her Role in Nineteenth-Century American Evangelicalism* (Philadelphia: Temple University Press, 1983)

36. The logic and religious importance of housing ministers at or near their congregations was even clear to churches like the African Methodist Episcopal Church (AME), which for various reasons struggled to house its pastors and maintain vital ministries.
37. An article in the African-American *Christian Recorder* in 1867 celebrated the achievement of an AME church in Zanesville, Ohio, that led the way in showing that AME congregations could provide for their ministries on the same basis as their white counterpart denomination. Without parsonages it was harder to expect itinerating ministers in the AME, the author believed, to attend to the needs of the congregations with their whole beings.<sup>20</sup>
38. By 1910 the parsonage was an established feature of the Methodist Episcopal Church's ministry, but its bishops were quick to point out that they did not understand the parsonage to be a form of secular compensation so much as religious support for a nonsecular calling. Their comments illustrate the third of the four religious motivations for providing ministerial housing. They wrote: "Methodist preachers are 'supported,' not hired. The difference is vital, a 'support' is the sum estimated, for a pastor already appointed, by an authorized committee after consultation with the pastor, as sufficient to furnish himself and

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<sup>20</sup> J. A. Warren, "Church Parsonages -Progress at Zanesville" in *The Christian Recorder*, May 25, 1867.

family a comfortable livelihood. Under this plan consecration is not compromised, and the preacher's message may weigh its full gospel value."<sup>21</sup>

39. Therefore, the historical record demonstrates that two of the largest American churches overseen by bishops entered the 20th century determined to use clergy housing principally as a tool for pastorally effective, spiritually focused, and ecclesially accountable ministry. And, using the Zanesville AME church example, other less established and less populous churches struggled to do the same.
40. For wider societal evidence of the extent of parsonage use, however, there were three censuses of religious bodies conducted in 1906, 1916, and 1926 by the U. S. Bureau of the Census. These censuses were of the nosy sort ("How much is your house worth and how much do you make?") that historians so value years later.
41. From them we know the value, by denomination, for every county and state, of church buildings, both of the primary places of worship, church halls, and of parsonages.
42. The 1916 census (the census with information closest in time before Congress exempted the value of a parsonage from federal income tax)

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<sup>21</sup> "The Episcopal Address," 1912, Methodist Episcopal Church General Conference, as quoted in Richey, *Methodist Conference*, 174.



provides several pieces of important historical evidence about the extent of the utilization of parsonages by American religious bodies and their ministers at the dawn of the income tax era.

43. First, the evidence obtained from the Census of Religious Bodies conducted by the U.S. Bureau of the Census of the Department of Commerce shows incremental change with respect to most categories, including parsonage utilization, compared to the Census of 1906. For instance, there was only a 3.2% growth in the percentage of congregations reporting a parsonage.<sup>22</sup>
44. Second, it supports the idea that, in the absence of any rulings about the tax status of parsonages with respect to income to clergy, they were in wide usage by the largest, most well-organized faith groups of the day.
45. At first the statistics do not seem to evidence a high rate of parsonage utilization because, while the nation in 1916 had 199,634 church edifices, the religious bodies only reported 65,272 parsonages in use.<sup>23</sup>
46. However, the authors of the report on parsonages noted that 69 out of the 202 reporting denominations listed no parsonages.<sup>24</sup>
47. The denominations for which there were no parsonages reported were generally very small, either having no regular ministry, or being faiths

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<sup>22</sup> United States, *Religious Bodies: 1916* (Washington: Govt. Print. Off, 1919), Vol.1, 142-3

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

whose ministers were part-time and expected to engage in other principal full-time work.<sup>25</sup>

48. The statistics also failed to take account of situations in which a minister might serve more than one church, and as many as five churches, in a circuit, but live in the parsonage of only the largest church, a common practice in then-rural Protestant America.<sup>26</sup>
49. In my opinion, the best historical perspective on the relationship between ministers and parsonages in 1916 must consider both the religious census's data on parsonages and its data on ministers of the various faiths.
50. Out of the 95,702 ministers reporting their work to the census, 80,435 reported engaging in pastoral work, with 64,899 engaging exclusively in pastoral work.<sup>27</sup>
51. Then, as now, many ordained clergy worked as teachers, chaplains, as denominational or evangelical or philanthropic workers, or were retired.<sup>28</sup>
52. I infer that congregations were interested in housing principally the clergy who actively performed sacramental duties for them. Here then the

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<sup>25</sup> Ibid. 53.

<sup>26</sup> Ralph Almon Felton, *The Home of the Rural Pastor* (Madison, N.J.: Dept. of the Rural Church, Drew Theological Seminary, 1948)., provides the best documentation of the utilization of parsonage in rural ministry, including a single parsonage being used by a minister in the service of several congregations. As for the statistics failing to take account of these situations, the very nature of aggregate statistics tends to mask what is happening in individual cases

<sup>27</sup> *Religious Bodies* 142-3

<sup>28</sup> Ibid., 69.

relationship becomes much stronger between ministers in the various traditions in 1916 and their respective traditions' parsonages.

53. Looking at Roman Catholics, the Methodist Episcopal Church, and the Presbyterian Church in the United States of America, three of the largest denominations of that era with very high rates of response to the Census from both ministers and from churches on the parsonage question in 1916,<sup>29</sup> we discover the following: the Roman Catholic Church had 15,120 church edifices, 8,976 parsonages, with 11,482 priests engaged in pastoral work and 7,943 clergy engaged exclusively in pastoral work.<sup>30</sup>
54. The Methodist Episcopal Church reported 28,406 church edifices and 14,262 parsonages, with 10,193 ministers engaged in pastoral work, and 9,611 engaged exclusively in pastoral work.<sup>31</sup>
55. Finally, the Presbyterian Church in the United States of America with 4,536 congregations reporting parsonages had 5,165 ministers engaged in pastoral work with 4,886 clergy engaged exclusively in pastoral work.<sup>32</sup>
56. In each case, in my opinion, the close correspondence between the number of parsonages and the number of clergy engaged exclusively in parish work is revealing of the relationship between a congregation and its desire

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<sup>29</sup> Ibid., 142-3

<sup>30</sup> Ibid

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

to organize itself in such a way to facilitate the full-time presence of its minister.

57. Residual over/under counts can be explained by extra parsonages for assistants, vacant parsonages, and so forth.
58. These conclusions are supported by records from the General Assembly of the Presbyterian Church in United States of America in 1921, for example: nearly every church that year lists that it has a manse or that it is sharing its minister with another church that has a manse, and the value of that manse.<sup>33</sup>
59. The pattern reveals the old Western European Church practice that the successful congregations led by professionally ordained and set apart full-time clergy continued to be housed at the congregation's pleasure and expense.
60. In combination with the foregoing Census information, a 1919 analysis of the information provided for the entire United States from the Income Tax Returns for 1916 sheds additional light on the religious needs to provide housing for ministers.
61. The 1919 analysis noted that less than 1% of all people who self-reported as ministers reported an income above \$3,000.<sup>34</sup> The journal also noted

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<sup>33</sup> Presbyterian Church in the U.S.A, *Minutes of the General Assembly of the Presbyterian Church in the United States of America* (New York: Presbyterian Board of Publication, 1921).

<sup>34</sup> "Ministers' Salaries," *Christian Education* 2, no. 13 (May 1, 1919), 4

that "taking the [ministers'] profession as a whole two out of three men are paid less than \$1,000 a year."<sup>35</sup>

62. These low prevailing wages would have created another set of problems for ministers in the early twentieth century had they been required to find housing of their own - the lack of a modern real estate industry and mortgage financing suitable to most minister's needs and capabilities.
63. Throughout the early 1900s, mortgages "featured variable interest rates, high down payments, and short maturities....[B]efore the Great Depression, homeowners typically renegotiated their loans every year."<sup>36</sup>
64. These facts indicate, that \$5,000-\$6,000 and more homes were out of reach to clergy earning an average of \$1,500 per year, who would have been expected to put down half of the purchase price, pay a floating interest rate, and come up with a balloon payment at the end of five years. This would be especially true if clergy had to re-sell the home after short tenures of less than five years in particular churches because of an ecclesiastical imperative to move to where they were needed.
65. In my opinion, these historical records show that the parsonage system provided a critical means for churches to ensure that the spiritual needs of their congregations were met by providing for their clerics' needs for a

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<sup>35</sup> Ibid.

<sup>36</sup> Richard K. Green and Susan M. Wachter, "The American Mortgage in Historic and International Context" *The Journal of Economic Perspectives*, volume 19, number 4 (Autumn 2005) 93-114.

place to live so that they could be immediately available to the congregation and to live in a much larger home to accommodate the church business conducted there.

**C. Parsonages and the United States Income Tax**

66. All of the foregoing sets the stage for Congress's decision, in adopting the "Revenue Act of 1921," to exempt from taxation "the rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of his compensation" in Section 213(b)(11).
67. From the foregoing data, I, as a historian of American religion, can only conclude that most citizens in the late 1910s and early 1920s would have understood the place and function of parsonages in American religious life.
68. I note that the Revenue Act of 1921 did not exempt all clergy income from income taxation.
69. Instead, the historical record suggests that it was a recognition that people who lived in houses not of their own choosing, over which they had neither property rights nor a right to refuse were not being offered "compensation" on the same terms as the other income that was being taxed under the 1921 Act.
70. Supporting this analysis is the fact that Section 213(b), which listed the items to be excluded from gross income, include a mostly common sense

list of items, the results of which including them as income would be perverse (such as double taxation, taxation of insurance payouts, government payouts for injury, or lawsuit payouts).

71. Further, the historical context suggests that lawmakers in 1921 would have readily acceded to the premise that it would have been odd to tax a minister on the rental value of a parsonage in which he was obliged by his employer, the church, to live and work.
72. The Bureau of Internal Revenue had earlier established what is commonly called the “for the convenience of the employer doctrine” starting with an office ruling, O.D. 265, 1 C B 71 (1919).
73. It held that the shipboard food and board given to seamen in addition to their wages did not count as income for tax purposes. But a 1921 decision by the same office, O.D. 862, 4 C B 85 (1921) held that “When in addition to the salary paid a clergyman he is permitted to use the parsonage living quarters free of charge the fair rental value of the parsonage considered a part of his compensation for services rendered and as such should be reported as income.”
74. The inclusion of Section 213(b)(11) in the Revenue Act of 1921, later the same year, can be seen as an explicit congressional disagreement with the Bureau’s view that the “convenience of the employer doctrine” (or something like it) did not apply to the clergyman and his parsonage.

75. By adding to the qualifier “or something like it” I mean to signal while it is clear that Congress reversed the direction of O.D. 862, they did not offer any rationale that explicitly put clergy housing under the rubric of housing provided for the convenience of the employer, nor did they create such a category in the 1921 Act.
76. Not even the President of the United States living in the White House received an explicit carve-out in the 1921 Act, it can be noted.
77. But, due to the similarities of wording, in my opinion, the intent of the congressional action was to reverse the Bureau’s construal of parsonage living as income.
78. One can imagine that Congress would have done the same for President Harding had he been charged the full rental value of living in his nice, big white house with its attendant duties and headaches by virtue of an Internal Revenue Office Decision.
79. Congress may also have viewed it as odd to tax clergy for living in a property that was exempt from property tax in most localities by long custom so long as it was occupied for the intended purpose of religious activity.



80. Parsonages were, after all, often the site of a minister's study, the place where prayer groups met during weekdays, and meetings were held with lay leaders of the church and parishioners counseled.<sup>37</sup>
81. All we know for certain from the Congressional Record from November 2, 1921 is that when the senator from South Carolina's proposed amendment "to exempt the rental value of a dwelling house and the appurtenances thereof furnished to a minister of the gospel as part of his compensation from gross income" on the floor of the Senate, the committee chair Senator Penrose accepted the amendment and the Senate agreed to it without discussion.<sup>38</sup>

**D. The Introduction of Parsonage Housing Allowances and Their Exemption from Federal Income Tax**

82. The parsonage income tax exclusion worked well for clergy of established, mainstream, and populous churches who could afford to purchase (or already owned) a manse or parsonage for their clergy.
83. But there were other churches, just as there had been throughout the history of the United States, with paid clergy who did not benefit from this exemption.<sup>39</sup>

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<sup>37</sup> John Witte, Jr. "Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice? *Southern California Law Review*, Jan, 1991, Vol.64 (2), 378.

<sup>38</sup> 62 S Congressional Record November, 2, 1921 (p. 7162)

<sup>39</sup> Ralph Almon Felton, *The Salary of Rural Pastors* (Madison, N.J: Dept. of the rural church, Drew theological seminary, 1946), 27. J. A. Warren, "Church Parsonages -Progress at Zanesville" in *The Christian Recorder*, May 25, 1867; United States, *Religious Bodies*.

84. Yet the four religiously motivated reasons to provide housing to ministers were just as true for these minority religions.
85. Thus, the first three decades of the parsonage exemption applied only to clergy of more established churches with fulltime clergy serving communities with enough accumulated capital to build or acquire a parsonage.
86. Because a dwelling is a complete unit (either you have one or not; you can't have half a parsonage) the provision made for a relatively high barrier of entry to newer and less affluent congregations seeking to provide for the temporal needs of their clergy so that the clergy could tend to the spiritual needs of the congregation.
87. The parsonage exemption, therefore, was available to some kinds of congregations rather than others, a situation that would only intensify in succeeding decades as religious diversity, and residential mobility increased.<sup>40</sup>
88. In some instances churches lacking readily available parsonages provided their ministers with cash in lieu of a parsonage.<sup>41</sup>
89. Such ministers eventually were successful in claiming they were entitled to a tax-free housing allowance on the analogy of the one that that had

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<sup>40</sup> Robert Wuthnow, *The Restructuring of American Religion: Society and Faith Since World War II*, Studies in Church and State (Princeton, N.J.: Princeton University Press, 1988)

<sup>41</sup> *MacColl v. United States*, 91 F. Supp. 721 (E.D. Ill. 1950)

been already established as available to military officers who lived off base under the convenience of the employer doctrine.

90. In a series of cases federal courts ruled that a minister's cash housing allowance was excluded from taxable income under Section 22(b)(6) of Internal Revenue Code of 1939 (see *MacColl v. United States*, 91 F. Supp. 721 (E.D. Ill. 1950) and *Conning v. Busey*, 127 F.Supp. 958 (E.D. Oh. 1954)).
91. These factors set the stage for Congress's 1954 articulation of Section 107 of the Internal Revenue Code, which explicitly recognized both a parsonage and cash provided in lieu of a parsonage as exempt from income tax.
92. What had happened historically to religious institutions that made this not only desirable for particular ministers so that they could continue to provide religious services to their congregations, but intelligible to lawmakers and the public? The four religiously motivated reasons to provide minister's housing remained relevant, but the way in which they were put into effect changed with the rapid post-war social change, especially in residential housing patterns, suburbanization, and domestic prosperity after WWII.

93. Accompanying these social changes was the so-called revival of religious interest.<sup>42</sup>
94. Taking each of these in turn we can see that the 1954 Internal Revenue Code Sec 107(2) provision allowing clergy to accept income tax exempt cash housing allowances accommodated more institutions and clergy combinations.
95. Importantly, instituting the parsonage allowance option eliminated discrimination<sup>43</sup> between traditional, colonial era denominations' style of providing for their ministries and the part-time ministers and rabbis who were characteristic of smaller, newer, and less affluent religious groups such as Pentecostals, evangelical churches, and independent African-American congregations.<sup>44</sup>
96. After the close of WWII in 1945, the existing pent-up demand for housing, which having gone unmet while wartime production had gone into

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<sup>42</sup> James David Hudnut-Beumler, *Looking for God in the Suburbs: The Religion of the American Dream and Its Critics, 1945-1965* (New Brunswick, N.J.: Rutgers University Press, 1994)

<sup>43</sup> The House Ways and Means Committee wrote in its Report to accompany the 1954 revision of the Internal Revenue Code: "Under present law, the rental value of a home furnished a minister of the gospel as part of his salary is not included in his gross income. This is unfair to those ministers who are not furnished a parsonage, but who receive larger salaries (which are taxable) to compensate them for expenses they incur in supplying their own home." It continued, "Your committee has removed the discrimination in existing law by providing that the present exclusion is to apply to rental allowances paid to ministers to the extent used by them to rent or provide a home." H.R. Rep. No. 83-1337 (1954), p.15 see also S. Rep. No. 83-1622, at 186 (1954) for the Senate's parallel report on its version of the bill.

<sup>44</sup> Two articles provide the contrast between styles of ministry: "Mainline Protestant Ministers Turning From the Inner City - New York Times," *New York Times*, accessed April 2, 2013, <http://www.nytimes.com/1990/05/31/nyregion/mainline-protestant-ministers-turning-from-the-innecity.html?pagewanted=all&src=pm>. and "In Poor Areas, Street Churches Give Cohesion; Street Churches Help Poor Areas Cohere," accessed April 2, 2013, <http://www.nytimes.com>

military manufacturing, combined with a baby boom to drive a sustained 20-year process of residential suburban housing starts.<sup>45</sup>

97. Accompanying all these new suburbanites were tens of thousands of new churches from mainline Protestant groups, the Roman Catholic Church, and from the Conservative and Reformed branches of Judaism, all of which were often approached by developers to locate new congregations and even given land on the condition that they build houses of worship.<sup>46</sup>
98. One example of this is Protestant suburban church "planting." Often, a denomination sent the minister into a community first to live and gather a church congregation which might meet in a school for a time before building a house of worship.<sup>47</sup> In this instance, there was no "parsonage" to live in because a congregation would have been too new to purchase a home for its minister.
99. Except for the Catholic parishes, very few of the new suburban churches included a parsonage or rectory on the premises (even once a house of worship was built).

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<sup>45</sup> James Hudnut-Beumler, "Suburbanization and Religion," *The Cambridge History of Religions in America Volume III: 1945 to the Present*, 108

<sup>46</sup> Hudnut-Beumler, *Looking for God in the Suburbs*, 2-8.

<sup>47</sup> See L. F. Dingman and Presbyterian Church in the U.S.A., "Church Extension Program, the Presbytery of Washington City" (Washington: Presbytery of Washington City, 1956); Richard A. Myers, *Cooperative Church Extension Planning* (Chicago: Church Federation of Greater Chicago, 1959); Methodist Church (U.S.), *Mid-century Report* (Philadelphia, Pa, 1950) for examples of churches' thinking about how to extend their ministries into the new suburban areas

100. Instead, it made sense, in light of the four religiously motivated reasons to provide housing for a minister, for suburban congregations to house their clergy in the community along with the rest of the community's residents<sup>48</sup> because their clergy could still be maximally available to parishioners.
101. Sometimes the congregation would own the home. Less frequently, they would enable the minister through a cash allowance to rent or purchase the home; particularly as clergy became older and nearer retirement.<sup>49</sup>
102. Even after 1965 suburbanization continued, though on a less dramatic pace, so that by the year 2000, people living in metropolitan areas, but outside the municipal boundaries of principal cities, constituted a majority of the population.<sup>50</sup>
103. Another feature of the housing boom was easier access to mortgages with far friendlier terms for consumers.<sup>51</sup>
104. Thus, although ministers' salaries had declined relative to general wages since the 1890s and their relative standard of living decreased accordingly,

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<sup>48</sup> A 1962 survey of pastors conducted found that 73% of respondents preferred a parsonage removed from the church building and in the neighborhood with other homes, in part to raise children with a minimum of distinctions from others in the community. Methodist Church (U.S.), *Planning* ([Philadelphia, Pa: Division of National Missions of the Board of Missions of the Methodist Church], 1963), 7

<sup>49</sup> Methodist Church (U.S.), *Planning*, 5

<sup>50</sup> Hudnut-Beumler, "Suburbanization and Religion," 119

<sup>51</sup> James Hudnut-Beumler, "Suburbanization and Religion," *The Cambridge History of Religions in America Volume III: 1945 to the Present*, 108

<sup>52</sup> it was easier for them to get a mortgage for a home of their own and easier to sell quickly if called to a new congregation.

105. In addition to suburbanization, the historical record shows that a major social change pushing an increasing number of clergy towards the acceptance of a cash allowance to purchase their own homes in place of living in a manse or parsonage was the changing view of retirement in American society.
106. Initially, ministers were excluded from Social Security.
107. Under 1954 amendments to the Social Security Act, ministers were first permitted to elect to contribute to, and be covered by, Social Security as self-employed workers.
108. Then, 1967 amendments to the Social Security Act automatically included ministers in Social Security as self-employed workers unless they

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<sup>52</sup> Hudnut-Beumler, *In Pursuit of the Almighty's Dollar*, 91. For this reason and in keeping with the social changes of the 1970s and 1980s, many ministers' wives began working outside the home. This in itself created a shift away from a traditional parsonage in which the minister's wife has a key role in maintaining and running the home in a way that met the spiritual needs of the congregation. For examples of this literature about the difficulties of parsonage life see: John H. Morgan and Linda B. Morgan, "Wives of Priests" (Notre Dame, IN: The Parish Life Institute), 1980; Charlotte Ross, *Who is the Minister's Wife?* (Philadelphia: Westminster, 1980; Mary Owens Fitzgerald, *The North Carolina Conference Parsonage System: Insights and Alternatives* (privately published, 1979; Robert W. and Mary Frances Bailey, *Coping with Stress in the Minister's Home* (Nashville: Broadman Press, 1979); Frederick Leonard Smoot, "Self perceived Effects of the Parsonage System on United Methodist Clergy and Spouses' Sense of Becoming in Growth in the Parish Ministry." Ph.D. Dissertation, Claremont School of Theology, 1978, for a full account of the negative psychological effects of continuing the parsonage system into the late 20<sup>th</sup> Century; and Cameron Lee and Jack O. Balswick, *Life in a Glass House: The Minister's Family in Its Unique Social Context* (Grand Rapids, Mich.: Ministry Resources Library, 1989).



individually claimed an exemption based on conscience or religious principles.<sup>53</sup>

109. Clergy, like other Americans of the middle 20th century, were now beginning to think more and more about retirement as a phase of life for which provisions needed to be made, rather than dying on the job.<sup>54</sup>
110. And religious institutions, which once had homes for superannuated and dying ministers, began to fund pensions that coordinated with Social Security and assumed that ministers would eventually retire, living out some golden years happily like anyone else.<sup>55</sup>
111. This then raised the question of where were these ministers to live, and clergy began to be more interested in building equity towards having a home they would own in retirement; and, as eventual retirement became a temporal need of clergy, religious bodies began to adapt so as to keep their clergy focused on the spiritual aspects of their work.<sup>56</sup>

**E. The Role of Housing in the Contemporary Practice of Ministry**

112. The four religious motivations for providing housing for a minister have remained relevant, whether a congregation opts to provide a parsonage for its spiritual leader or a housing allowance.

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<sup>53</sup> *Social Security Bulletin*, April 1985, volume 48, number 4, 38

<sup>54</sup> Norman Lobsenz, *The Minister's Complete Guide to Successful Retirement* (Great Neck, New York: Channel Press, 1955).

<sup>55</sup> *Ibid.*, 46

<sup>56</sup> *Ibid.*, 126-134



113. The changing demographics and social trends of the United States since World War II have impacted that choice, but the religious motivations have not changed.
114. In surveying the contemporary scene, it is my opinion that the paramount consideration in utilizing church-owned housing, or providing an allowance, is still the congregations' need to house clergy in such a way so that the minister can live with his or her people. It is of the essence of the office of minister, priest, or rabbi, that one be near one's congregation.
115. In a rural area this may favor a church owning a parsonage because the availability and marketability of homes near a congregation's place of worship is poor.
116. And in a place like Manhattan, San Francisco, Chicago, or affluent areas in southern California, a church-owned parsonage or apartment may be the only way for a church to get its clergy men and women close to their place of ministry and members of their congregation.<sup>57</sup>
117. Indeed, because ministerial employment pays so little (national mean = \$46,880)<sup>58</sup> and real estate is worth so much in a place like the Upper East

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<sup>57</sup> The cost of housing in Brownsville, Texas, is 71% of the national average. The comparable figures for other areas are as follows: Charlotte, NC (79.5%), New York (Manhattan) (386.7%), San Diego (194.4%), and San Francisco (281%). *Source*: C2ER, Arlington, VA, ACCRA Cost of Living Index, Annual Average 2010

<sup>58</sup> Occupational Employment and Wages, May 2012 for organizationally employed clergy, <http://www.bls.gov/oes/current/oes212011.htm#nat>

Side of Manhattan, it is quite possible for the fair market rental value of someone's apartment to be worth much more than one's salary.

118. In cases like this, taxing the full market rental value of the high-value parsonage would, in my opinion, have the effect of raising the price of having a minister in particular neighborhoods near their congregations to unsustainable levels.
119. For example, 40 of the 57 Presbyterian congregations on Long Island still had manses as of April 2012 according to Mark Tammen, Long Island's general presbyter. Tammen reported that sky high housing costs "price pastors out of the market except for the largest congregations. If the person from God you want to call is in Minneapolis, if you don't have a manse, you can't call them," he said.<sup>59</sup>
120. The information officer for the Episcopal Diocese of Long Island, Rev. Canon Shawn Duncan, made a similar point, analytically, saying, "Nationally the trend is to have rectories in those areas that are expensive to live."<sup>60</sup>
121. In other instances, however, a cash allowance can give a religious congregation the flexibility it needs to better perform its religious functions at its own discretion.

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<sup>59</sup> "Parting with the Parsonage," *New York Times*, April 8, 2012 RE 6

<sup>60</sup> Ibid.

122. For example, the conservative Temple Beth-El of Cedarhurst, Long Island sold the five bedroom home of its senior Rabbi Sholom Stern at his request and provided him a housing allowance instead for a smaller place when his children had grown up and left the home, using the proceeds to redirect funds to synagogue programming.<sup>61</sup>
123. A church of elderly congregants may not be up to being a landlord for a rambling manse.
124. Another congregation may wish to free its pastor of the temporal concerns of retirement, as in the case of Rev. Mark Bigelow, of the Congregational Church of Huntington, Long Island, age 52, who asked his church after 21 years of living in its parsonage to sell the three-bedroom home and pay him a cash allowance.<sup>62</sup>
125. A newer congregation of immigrants who are still working on where to establish their place of worship, may still use the housing allowance to support their minister's needs without having to commit to a particular property for a parsonage.
126. In this instance the availability of the parsonage allowance provision can be used by newer religions while reducing the discrimination between them and the older, more established religions that benefitted from the parsonage-only income tax exemption for ministers.

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<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

127. A cash allowance may allow the church and its minister to be flexible about accommodating family size, school district, special needs, disability access and so forth, again allowing a minister to ensure his or her family's needs are met and freeing the minister to provide spiritual guidance and counseling to the congregation.
128. In other words, then, both the income tax-free parsonage and the income tax-free housing allowance have useful functions in allowing congregations, in their discretion, to supply their needs for ministerial services.

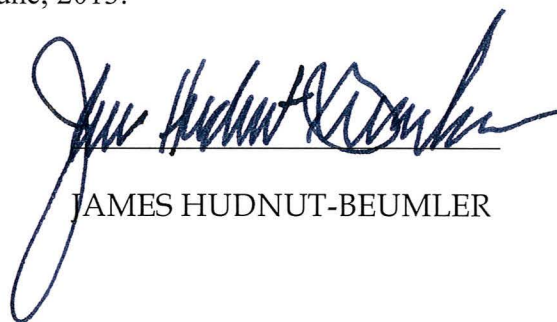
**F. Conclusion**

129. The historical record shows that both provisions of § 107 are important to allow religious groups to provide the sacramental and pastoral services necessary to their beliefs, traditions, and rituals in ways that respect the wide variety of economic and demographic realities of American society even now in the 21st century.
130. The parsonage exemption in § 107(1) allows a religious group to keep its spiritual leader near its place of worship and accountable to its ministry, as religious groups have done from time immemorial.
131. The extension of a cash allowance alternative, in § 107(2), for groups that could not provide such housing beginning in the 1950s eliminated discrimination between the older, more established and mainstream

religions in the United States and newer, less popular, minority faith groups and ministers in American society who could not use the parsonage exclusion but still had the same spiritual needs as the older religions.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Nashville, Tennessee on the 18th day of June, 2013.



JAMES HUDNUT-BEUMLER

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WISCONSIN

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FREEDOM FROM RELIGION  
FOUNDATION, INC.; ANNIE LAURIE  
GAYLOR, and DAN BARKER

Plaintiffs,

v.

Case No. 11 CV 0626

UNITED STATES OF AMERICA; TIMOTHY  
GEITHNER, in his official capacity; and  
DOUGLAS SHULMAN, in his official capacity,

Defendants.

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**PLAINTIFFS' RESPONSE TO UNITED STATES' STATEMENT  
OF PROPOSED FINDINGS OF FACT**

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The Plaintiffs respond to the Defendant's Proposed Finding of Fact in support of its motion for summary judgment as follows:

**I. PLAINTIFFS**

1. Plaintiff Freedom From Religion Foundation ("FFRF") is a non-profit, atheist membership organization that advocates for the separation of church and state and educates on matters of non-theism. (Doc. 13, Am. Compl., ¶ 7; Annie Laurie Gaylor Dep. 26:12-21, Apr. 23, 2013 (Doc. 37); FFRF 30(b)(6) Dep. 143:9-17, 180:10-19, Apr. 24, 2013 (Doc. 39).)

**RESPONSE:** Dispute. FFRF is not an atheist membership organization, and the record cited by Defendant does not say otherwise. (See also Barker Dec., ¶19.)

33. According to Mr. Barker, the designations of the housing allowances were "on paper only." (Barker Dep. 68:3-9.) Mr. Barker and Ms. Gaylor would have received the amounts anyway as part of their base salaries. (*Id.* 101:2-102:2 (referring to Ex. 3 Interrog. No. 3(i)); Gaylor Dep. 72:5- 73:12 (same); FFRF 30(b)(6) Dep., 168:12-17.)

**RESPONSE:** Dispute that record cite accurately and fully states testimony because housing allowances must be designated by employer and do not have to involve raise in salary.

34. Neither Mr. Barker nor Ms. Gaylor contend that FFRF owns a dwelling that they seek to use as their lodging, the fair rental value of which they would seek to exempt from their gross income for federal income tax purposes.

**RESPONSE:** No dispute.

35. Neither Mr. Barker nor Ms. Gaylor has had communication with the IRS regarding their housing allowances. (Ex. 3 Interrog. No. 6; *see also Id.* Interrog. No. 5.)

**RESPONSE:** No dispute.

36. Mr. Barker and Ms. Gaylor's tax returns for the years 2011 through 2013 have not been audited by the IRS. (FFRF 30(b)(6) Dep. 74:4-6.)

**RESPONSE:** No dispute.

37. FFRF has had no communication with the IRS regarding Mr. Barker's or Ms. Gaylor's housing allowances. (*Id.* 172:8-15; Ex. 5 Interrog. No. 7.)

**RESPONSE:** No dispute.

### **III. THE HISTORICAL CONTEXT FOR § 107**

#### **A. Parsonages Before the Income Tax in the United States**

38. "The patterns of housing members of the clergy in America have deep histories in



the churches of Western Europe. The most important and common feature of religious organizations' approach to housing members of the clergy is the basic assumption that the clergy would live in housing on the premises of the church grounds or nearby on ecclesiastically-owned property." (Decl. of James Hudnut-Buemerl ¶ 19.)

**RESPONSE:** No dispute

39. "The historical record shows that underlying this assumption were four religiously motivated reasons for congregations to provide housing for their spiritual leaders." (*Id.* ¶ 20.)

**RESPONSE:** Dispute that the opinion is supported by the referenced source.

40. Doing so enabled them to more freely exercise their religious beliefs than if they did not provide housing. Those reasons are:

a. First, the ecclesiastical employer required priests and ministers to live nearby to the location of their work at all hours of the day and night, particularly at the unpredictable moments when parishioners may be in extremis and in need of immediate pastoral care.

b. Second, by controlling the living arrangements of clergy, the church can reinforce the faith's expectations for simple living, or holiness among the clergy; that is, members of the clergy should thereby live no better and no worse than their church authorities have arranged for them to live.

c. Third, by having the church own the living premises instead of the minister owning his housing, the clergy were freed from temporal burdens (like home repair, yard work, and the like) to engage in spiritual work.

d. Fourth, by owning housing for their clergy, congregations, dioceses and other church entities were freed from the difficulties associated with resettling clergy

when the time came for personnel redeployment."

(*Id.* ¶ 21.)

**RESPONSE:** Dispute that the opinion is supported by the referenced source.

41. The overwhelming majority of American colonists were from Christian denominations.

(*Id.* ¶ 24.)

**RESPONSE:** No dispute.

42. Those colonists brought with them the standard ecclesiastic housing practice at that time, for the four reasons mentioned above: "a clergyman assigned to a parish had a yearly income fixed and additionally lived in a parish-owned rectory for the course of his ministry in that particular place." (*Id.* ¶ 23; *see also Id.* ¶ 24-26.)

**RESPONSE:** Dispute that the opinion is supported by the source as to the "four reasons mentioned."

43. A parsonage was "used for more than simply housing the minister." (*Id.* ¶ 27.)

**RESPONSE:** No dispute.

44. Often, church business was conducted in the parsonage. (*Id.* ¶¶ 27-29, 80.)

**RESPONSE:** No dispute.

45. "The parsonage system was in very wide use in the nineteenth and early twentieth centuries." (*Id.* ¶ 30.)

**RESPONSE:** No dispute.

46. "For the Roman Catholic Church and Methodist Episcopal churches (north and south) the practice of providing rectories and parsonages, respectively, was virtually universal and hardwired into their deployment models for clergy. Both religions established parsonages at

or very near their houses of worship." (*Id.* ¶¶ 31, 38.)

**RESPONSE:** No dispute.

47. "In both religions, the bishop of a diocese or conference could, and did, send ministers to different parishes according to the religious needs of the Church as a whole. Providing housing on-site to the ministers enabled them to move freely according to their denomination's religious needs without having to extricate themselves from a private tenancy or a home that they owned only to have to find new accommodations where they were called." (*Id.* ¶ 32; *see Id.* ¶¶ 33-35, 38.)

**RESPONSE:** No dispute.

48. "The logic and religious importance of housing ministers at or near their congregations was even clear to churches like the African Methodist Episcopal Church (AME), which for various reasons struggled to house its pastors and maintain vital ministries." (*Id.* ¶ 36.)

**RESPONSE:** Dispute that "providing for their ministries on the same basis as their white counterpart" constitutes evidence of religious importance.

49. "An article in the African-American Christian Recorder in 1867 celebrated the achievement of an AME church in Zanesville, Ohio, that led the way in showing that AME congregations could provide for their ministries on the same basis as their white counterpart denomination. Without parsonages it was harder to expect itinerating ministers in the AME, the author believed, to attend to the needs of the congregations with their whole beings." (*Id.* ¶ 37.)

**RESPONSE:** No dispute.

50. "[T]wo of the largest American churches overseen by bishops entered the 20th century determined to use clergy housing principally as a tool for pastorally effective, spiritually focused, and ecclesially accountable ministry. And, using the Zanesville AME church example,

other less established and less populous churches struggled to do the same." (*Id.* ¶ 39.)

**RESPONSE:** No dispute.

51. The 1906 Census and the 1916 Census "support[] the idea that, in the absence of any rulings about the tax status of parsonages with respect to income to clergy, they were in wide usage by the largest, most well-organized faith groups of the day." (*Id.* ¶ 44; *see Id.* ¶¶ 40-43, 48-58.)

**RESPONSE:** No dispute.

52. The "successful congregations led by professionally ordained and set apart full-time clergy continued to be housed at the congregation's pleasure and expense." (*Id.* ¶ 59.)

**RESPONSE:** No dispute.

53. "However, the authors of the report on parsonages noted that 69 out of the 202 reporting denominations listed no parsonages." (*Id.* ¶ 46.)

**RESPONSE:** No dispute.

54. "The denominations for which there were no parsonages reported were generally very small, either having no regular ministry, or being faiths whose ministers were part-time and expected to engage in other principal full-time work." (*Id.* ¶ 47; *see also Id.* ¶ 48.)

**RESPONSE:** No dispute.

55. A 1919 analysis of the information provided for the entire United States from the Income Tax Returns for 1916 "noted that less than 1% of all people who self-reported as ministers reported an income above \$3,000. The journal also noted that 'taking the [ministers'] profession as a whole two out of three men are paid less than \$1,000 a year.'" (*Id.* Tif 60-61.)

**RESPONSE:** No dispute.

56. "These low prevailing wages would have created another set of problems for

ministers in the early twentieth century had they been required to find housing of their own - the lack of a modern real estate industry and mortgage financing suitable to most minister's needs and capabilities." (*Id.* ¶ 62.)

**RESPONSE:** No dispute.

57. "Throughout the early 1900s, 'mortgages featured variable interest rates, high down payments, and short maturities....[B]efore the Great Depression, homeowners typically renegotiated their loans every year.' (*Id.* ¶ 63.)

**RESPONSE:** No dispute.

58. "These facts indicate, that \$5,000-\$6,000 and more homes were out of reach to clergy earning an average of \$1,500 per year . . . . This would be especially true if clergy had to re-sell the home after short tenures of less than five years in particular churches because of an ecclesiastical imperative to move to where they were needed. ." (*Id.* ¶ 64.)

**RESPONSE:** No dispute.

59. "[T]he parsonage system provided a critical means for churches to ensure that the spiritual needs of their congregations were met by providing for their clerics' needs for a place to live so that they could be immediately available to the congregation and to live in a much larger home to accommodate the church business conducted there." (*Id.* ¶ 65.)

**RESPONSE:** No dispute.

**B. Parsonages and the United States Income Tax**

60. "Though the Income Tax as we know it had to be delayed in its implementation from 1909 until the passage of the 16th amendment in 1913, the introduction of the tax posed all kinds of new questions to long-standing social practices: did sailors have to pay income tax for their room and board while they did their jobs en voyage? Did ranch hands have to pay income

tax on their bunks and beans? Did soldiers have to pay income tax for the value of their base housing, and did officers' wives have to pay income tax on the value of rent while they waited stateside to see if their men returned from the Philippines and war with Filipino insurgents?" (*Id.* ¶ 15.)

**RESPONSE:** Dispute that the opinion is supported by the source and otherwise constitutes speculation.

61. "To these novel concerns were added the question and what of the clergy? They lived next door to their churches in houses and rectories. Did they need to pay a tax on the value of the housing or was it a part of the job—an offer said members of the cloth 'could not refuse?' (*Id.* ¶ 17.)

**RESPONSE:** Dispute that the opinion is supported by the source and otherwise constitutes speculation.

62. In the "Revenue Act of 1921," Congress exempted from federal income taxation "the rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of his compensation" in § 213(b)(11) of the Revenue Act of 1921. (*Id.* ¶ 66.)

**RESPONSE:** No dispute.

63. There is no explicit explanation in the legislative history for the legislative intent behind § 213(b)(11) of the Revenue Act of 1921. (*Id.* TT 74-75, 81.)

**RESPONSE:** No dispute.

64. It is likely, however, that Congress, in enacting § 213(b)(11) of the Revenue Act of 1921, was aware of the foregoing historical context for the way in which religious employers used parsonages for their employees and would have thought it "odd to tax a minister on the rental value of a parsonage in which he was obliged by his employer, the church, to live and

work.. (*Id.* ¶ 71; *see Id.* TT 66-71, 75-81.)

**RESPONSE:** Dispute that the opinion is supported by the source and otherwise constitutes speculation.

65. In part, this is because the "Bureau of Internal Revenue had earlier established what is commonly called the 'for the convenience of the employer doctrine' starting with an office ruling, O.D. 265, 1 C B 71 (1919)." (*Id.* ¶ 72.) "It held that the shipboard food and board given to seamen in addition to their wages did not count as income for tax purposes. (*Id.*)

**RESPONSE:** Dispute that the proposed finding supports finding No. 64.

66. "But a 1921 decision by the same office, O.D. 862, 4 C B 85 (1921) held that 'When in addition to the salary paid a clergyman he is permitted to use the parsonage living quarters free of charge the fair rental value of the parsonage considered a part of his compensation for services rendered and as such should be reported as income.' (*Id.* ¶¶ 73, 80.)

**RESPONSE:** No dispute that the referenced decision was rendered but without consideration of or claim made under convenience of the employer doctrine.

**C. The Introduction of Parsonage Housing Allowances and Their Exemption from Federal Income Tax**

67. "The parsonage income tax exclusion worked well for clergy of established, mainstream, and populous churches who could afford to purchase (or already owned) a manse or parsonage for their clergy." (*Id.* ¶ 82.)

**RESPONSE:** Object as ambiguous as to what "worked well" means.

68. "But there were other churches, just as there had been throughout the history of the United States, with paid clergy who did not benefit from this exemption." (*Id.* ¶ 83.)

**RESPONSE:** No dispute.

69. "Yet the four religiously motivated reasons to provide housing to ministers were



just as true for these minority religions." (*Id.* ¶ 84.)

**RESPONSE:** Dispute. The opinion is not supported by the source.

70. "Thus, the first three decades of the parsonage exemption applied only to clergy of more established churches with fulltime clergy serving communities with enough accumulated capital to build or acquire a parsonage." (*Id.* ¶ 85-86.)

**RESPONSE:** No dispute.

71. "The parsonage exemption, therefore, was available to some kinds of congregations rather than others, a situation that would only intensify in succeeding decades as religious diversity, and residential mobility increased." (*Id.* ¶ 87.)

**RESPONSE:** Dispute that the parsonage exemption distinguished by congregation. The opinion is not support by the source.

72. "In some instances churches lacking readily available parsonages provided their ministers with cash in lieu of a parsonage." (*Id.* ¶ 88.)

**RESPONSE:** No dispute.

73. As a result of court decisions in 1950 and 1954, "[s]uch ministers eventually were successful in claiming they were entitled to a tax-free housing allowance on the analogy of the one that that had been already established as available to military officers who lived off base under the convenience of the employer doctrine." (*Id.* ¶ 89-90.)

**RESPONSE:** No dispute.

74. "The four religiously motivated reasons to provide minister's housing remained relevant, but the way in which they were put into effect changed with the rapid post-war social change, especially in residential housing patterns, suburbanization, and domestic prosperity after WWII" (*Id.* ¶ 92), and a revival of religious interest (*Id.* ¶ 93).

**RESPONSE:** Dispute that opinion is supported by source as to relevance of religiously motivated reasons.

75. Considering all of these facts, "the 1954 Internal Revenue Code Sec 107(2) provision allowing clergy to accept income tax exempt cash housing allowances accommodated more institutions and clergy combinations." (*Id.* ¶ 94; *see also Id.* ¶ 91-92.)

**RESPONSE:** Dispute that § 107(2) accommodated clergy by removing any substantial governmental-imposed burden. The opinion is not supported by the record source.

76. "Importantly, instituting the parsonage allowance option eliminated discrimination between traditional, colonial era denominations' style of providing for their ministries and the part-time ministers and rabbis who were characteristic of smaller, newer, and less affluent religious groups such as Pentecostals, evangelical churches, and independent African-American congregations." (*Id.* ¶ 95.)

**RESPONSE:** Dispute that the distinction between in-kind housing and cash allowances represented denominational preference. The opinion of discrimination is not supported.

77. "After the close of WWII in 1945, the existing pent-up demand for housing, which having gone unmet while wartime production had gone into military manufacturing, combined with a baby boom to drive a sustained 20-year process of residential suburban housing starts." (*Id.* ¶ 96.)

**RESPONSE:** No dispute.

78. "Accompanying all these new suburbanites were tens of thousands of new churches from mainline Protestant groups, the Roman Catholic Church, and from the

Conservative and Reformed branches of Judaism, all of which were often approached by developers to locate new congregations and even given land on the condition that they build houses of worship." (*Id.* 97.)

**RESPONSE:** No dispute.

79. "One example of this is Protestant suburban church 'planting.' Often, a denomination sent the minister into a community first to live and gather a church congregation which might meet in a school for a time before building a house of worship. In this instance, there was no 'parsonage' to live in because a congregation would have been too new to purchase a home for its minister." (*Id.* ¶ 98.)

**RESPONSE:** No dispute.

80. "Except for the Catholic parishes, very few of the new suburban churches included a parsonage or rectory on the premises (even once a house of worship was built)." (*Id.* ¶ 99.)

**RESPONSE:** No dispute.

81. "Instead, it made sense, in light of the four religiously motivated reasons to provide housing for a minister, for suburban congregations to house their clergy in the community along with the rest of the community's residents because their clergy could still be maximally available to parishioners." (*Id.* ¶ 100.)

**RESPONSE:** Dispute that the opinion as to "religiously motivated reasons" is supported by the source.

82. "Sometimes the congregation would own the home. Less frequently, they would enable the minister through a cash allowance to rent or purchase the home; particularly as clergy became older and nearer retirement." (*Id.* ¶ 101.)

**RESPONSE:** No dispute.

83. "Another feature of the housing boom was easier access to mortgages with far friendlier terms for consumers." (*Id.* ¶ 103.)

**RESPONSE:** No dispute.

84. "Thus, although ministers' salaries had declined relative to general wages since the 1890s and their relative standard of living decreased accordingly, it was easier for them to get a mortgage for a home of their own and easier to sell quickly if called to a new congregation." (*Id.* 104.)

**RESPONSE:** No dispute.

85. "In addition to suburbanization, the historical record shows that a major social change pushing an increasing number of clergy towards the acceptance of a cash allowance to purchase their own homes in place of living in a manse or parsonage was the changing view of retirement in American society." (*Id.* ¶ 105.)

**RESPONSE:** No dispute.

86. "Clergy, like other Americans of the middle 20th century, were now beginning to think more and more about retirement as a phase of life for which provisions needed to be made, rather than dying on the job." (*Id.* ¶ 109; *see id.* ¶¶ 106-08.)

**RESPONSE:** No dispute.

87. "And religious institutions, which once had homes for superannuated and dying ministers, began to fund pensions that coordinated with Social Security and assumed that ministers would eventually retire, living out some golden years happily like anyone else." (*Id.* ¶ 110.)

**RESPONSE:** No dispute.

88. "This then raised the question of where were these ministers to live, and clergy began to be more interested in building equity towards having a home they would own in retirement; and, as eventual retirement became a temporal need of clergy, religious bodies began to adapt so as to keep their clergy focused on the spiritual aspects of their work." (*Id.* ¶ 111.)

**RESPONSE:** No dispute.

**D. The Role of Housing in the Contemporary Practice of Ministry**

89. "The four religious motivations for providing housing for a minister have remained relevant, whether a congregation opts to provide a parsonage for its spiritual leader or a housing allowance." (*Id.* ¶ 112.)

**RESPONSE:** Dispute that "religious motivations" were or remained relevant.

The opinion is not supported by the source.

90. "The changing demographics and social trends of the United States since World War II have impacted that choice, but the religious motivations have not changed." (*Id.* ¶ 113.)

**RESPONSE:** Dispute the conclusion that "religious motivations have not changed." The opinion is not supported by the source.

91. "In surveying the contemporary scene, it is my opinion that the paramount consideration in utilizing church-owned housing, or providing an allowance, is still the congregations' need to house clergy in such a way so that the minister can live with his or her people. It is of the essence of the office of minister, priest, or rabbi, that one be near one's congregation." (*Id.* ¶ 114.)

**RESPONSE:** Dispute that the opinion is supported by the source.

92. "In a rural area this may favor a church owning a parsonage because the availability and marketability of homes near a congregation's place of worship is poor." (*Id.* ¶

**U.S. District Court  
Western District of Wisconsin (Madison)  
CIVIL DOCKET FOR CASE #: 3:11-cv-00626-bbc**

Freedom From Religion Foundation, Inc. et al v. Geithner,  
Timothy et al  
Assigned to: District Judge Barbara B. Crabb  
Referred to: Magistrate Judge Stephen L. Crocker  
Case in other court: Seventh Circuit, 14-01152  
Cause: 28:1331 Federal Question: Other Civil Rights

Date Filed: 09/12/2011  
Date Terminated: 11/26/2013  
Jury Demand: None  
Nature of Suit: 440 Civil Rights: Other  
Jurisdiction: Federal Question

**Plaintiff**

**Freedom From Religion Foundation,  
Inc.**

represented by **Richard L. Bolton**  
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**Plaintiff**

**Annie Laurie Gaylor**

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**ATTORNEY TO BE NOTICED**

**Plaintiff**

**Anne Nicol Gaylor**  
*TERMINATED: 06/18/2013*

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**ATTORNEY TO BE NOTICED**

**Plaintiff**

**Dan Barker**

represented by **Richard L. Bolton**  
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**ATTORNEY TO BE NOTICED**

V.

**Defendant**

**Timothy Geithner**  
*Secretary of the United States Department  
of the Treasury*  
*TERMINATED: 11/07/2011*

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**Defendant**

**Douglas Shulman**  
*Commissioner of the Internal Revenue  
Service*  
TERMINATED: 11/07/2011

represented by **Erin Healy Gallagher**  
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LEAD ATTORNEY  
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**Richard Adam Schwartz**  
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**Defendant**

**United States of America**

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**Defendant**

**Timothy Geithner**  
*in his official capacity as Secretary of the  
Department of the Treasury*

represented by **Erin Healy Gallagher**  
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**Defendant**

**Douglas Shulman**  
*in his official capacity as the  
Commissioner of the Internal Revenue  
Service*

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**Leslie K. Herje**  
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**Richard Adam Schwartz**  
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LEAD ATTORNEY



Date Filed	#	Docket Text
09/13/2011	<u>1</u>	COMPLAINT against Timothy Geithner, Douglas Shulman. ( Filing fee \$ 350 receipt number 0758-836319.), filed by Freedom From Religion Foundation, Inc., Annie Laurie Gaylor, Dan Barker, Anne Nicol Gaylor. (Attachments: # <u>1</u> JS-44 Civil Cover Sheet, # <u>2</u> Summons) (Bolton, Richard) (Entered: 09/13/2011)
09/14/2011		Case randomly assigned to Magistrate Judge Stephen L. Crocker. (krj) (Entered: 09/14/2011)
09/14/2011		Standard attachments for Magistrate Judge Stephen L. Crocker required to be served on all parties with summons or waiver of service: <u>Briefing Guidelines</u> , <u>Corporate Disclosure Statement</u> , <u>Order Regarding Assignment of Civil Cases</u> , <u>Notice of Assignment to a Magistrate Judge and Consent/Request for Reassignment</u> , <u>Order on Dispositive Motions</u> . (krj) (Entered: 09/14/2011)
09/14/2011	<u>2</u>	Summons Issued as to Timothy Geithner, Douglas Shulman. (krj) (Entered: 09/14/2011)
09/19/2011	<u>3</u>	Corporate Disclosure Statement by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor (Bolton, Richard) (Entered: 09/19/2011)
11/07/2011	<u>4</u>	Joint Motion to Substitute Party by Defendants Timothy Geithner, Douglas Shulman. Response due 11/14/2011. (Attachments: # <u>1</u> Text of Proposed Order) (Healy Gallagher, Erin) (Entered: 11/07/2011)
11/07/2011	<u>5</u>	Unopposed Motion for Extension of Time to File Answer re <u>1</u> Complaint, by Defendants Timothy Geithner, Douglas Shulman. Response due 11/14/2011. (Attachments: # <u>1</u> Text of Proposed Order) (Healy Gallagher, Erin) (Entered: 11/07/2011)
11/07/2011	6	<b>** TEXT ONLY ORDER **</b> ORDER granting <u>4</u> Motion to Substitute Party. United States of America added. Timothy Geithner and Douglas Shulman terminated. Signed by Magistrate Judge Stephen L. Crocker on 11/7/11. (krj) (Entered: 11/07/2011)
11/07/2011	7	<b>** TEXT ONLY ORDER **</b> ORDER granting <u>5</u> Motion for Extension of Time to Answer. United States of America answer due 12/23/2011. Signed by Magistrate Judge Stephen L. Crocker on 11/7/11. (krj) (Entered: 11/07/2011)
11/07/2011		Set Telephone Pretrial or Status Conference: Telephone Pretrial Conference set for 11/29/2011 at 02:00 PM before Magistrate Judge Stephen L. Crocker. Counsel for Plaintiff responsible for setting up the call to chambers at (608) 264-5153. [ <u>Standing Order Governing Preliminary Pretrial Conference</u> attached] (krj) (Entered: 11/07/2011)
11/08/2011		Case randomly reassigned to District Judge Barbara B. Crabb and Magistrate Judge Stephen L. Crocker. (lak) (Entered: 11/08/2011)
11/22/2011	<u>8</u>	Notice of Appearance filed by Richard Adam Schwartz for Defendant United States of America (Schwartz, Richard) (Entered: 11/22/2011)
11/23/2011	<u>9</u>	Preliminary Pretrial Conference Report by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor, Defendant United States of America (Bolton, Richard) (Entered: 11/23/2011)
11/29/2011		Minute Entry for proceedings held before Magistrate Judge Stephen L. Crocker: Telephone Preliminary Pretrial Conference held on 11/29/2011 [:10] (cak) (Entered: 11/29/2011)
12/01/2011	<u>10</u>	Pretrial Conference Order – Amendments to Pleadings due 2/3/2012. Dispositive Motions due 9/7/2012. Settlement Letters due 12/21/2012. Court Trial set for 2/4/2013 at 09:00 AM. Signed by Magistrate Judge Stephen L. Crocker on

		11/30/11. (krj) (Entered: 12/01/2011)
12/23/2011	<u>11</u>	<b>MOTION TO DISMISS</b> by Defendant United States of America. Brief in Opposition due 1/13/2012. Brief in Reply due 1/23/2012. (Healy Gallagher, Erin) (Entered: 12/23/2011)
12/23/2011	<u>12</u>	Brief in Support of <u>11</u> Motion to Dismiss by Defendant United States of America (Healy Gallagher, Erin) (Entered: 12/23/2011)
01/13/2012	<u>13</u>	AMENDED COMPLAINT against United States of America, filed by Freedom From Religion Foundation, Inc., Annie Laurie Gaylor, Dan Barker, Anne Nicol Gaylor. (Bolton, Richard) (Entered: 01/13/2012)
01/18/2012	<u>14</u>	Motion for Extension of Time <i>to Answer or Otherwise Respond to the Amended Complaint</i> by Defendant United States of America. Motions referred to Magistrate Judge Stephen L. Crocker. Response due 1/25/2012. (Attachments: # <u>1</u> Text of Proposed Order) (Healy Gallagher, Erin) (Entered: 01/18/2012)
01/20/2012	15	<b>** TEXT ONLY ORDER **</b> ORDER granting <u>14</u> Motion for Extension of Time. Response to amended complaint due 2/24/12. Signed by Magistrate Judge Stephen L. Crocker on 1/19/12. (krj) (Entered: 01/20/2012)
02/24/2012	<u>16</u>	<b>MOTION TO DISMISS <i>Amended Complaint</i></b> by Defendant United States of America. Brief in Opposition due 3/16/2012. Brief in Reply due 3/26/2012. (Healy Gallagher, Erin) (Entered: 02/24/2012)
02/24/2012	<u>17</u>	Brief in Support of <u>16</u> Motion to Dismiss <i>Amended Complaint</i> by Defendant United States of America (Healy Gallagher, Erin) (Entered: 02/24/2012)
03/23/2012	<u>18</u>	Unopposed Motion for Extension of Time <i>for Leave to File Response Brief</i> by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor. Motions referred to Magistrate Judge Stephen L. Crocker. (Bolton, Richard) (Entered: 03/23/2012)
03/23/2012	19	<b>** TEXT ONLY ORDER **</b> ORDER granting <u>18</u> Motion for Extension of Time. Brief in Opposition due 3/29/2012. Brief in Reply due 4/9/2012. Signed by Magistrate Judge Stephen L. Crocker on 3/23/12. (krj) (Entered: 03/23/2012)
03/29/2012	<u>20</u>	Brief in Opposition by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor re: <u>16</u> Motion to Dismiss filed by United States of America (Bolton, Richard) (Entered: 03/29/2012)
04/04/2012	<u>21</u>	Unopposed Motion for Extension of Time <i>to Reply in Further Support of its Motion to Dismiss Plaintiffs' Amended Complaint</i> by Defendant United States of America. Motions referred to Magistrate Judge Stephen L. Crocker. (Healy Gallagher, Erin) (Entered: 04/04/2012)
04/05/2012	22	<b>** TEXT ONLY ORDER **</b> ORDER granting <u>21</u> Motion for Extension of Time. Brief in Reply due 4/20/2012. Signed by Magistrate Judge Stephen L. Crocker on 4/4/2012. (lak) (Entered: 04/05/2012)
04/20/2012	<u>23</u>	Brief in Reply by Defendant United States of America in Support of <u>16</u> Motion to Dismiss <i>Amended Complaint</i> (Healy Gallagher, Erin) (Entered: 04/20/2012)
06/28/2012	<u>24</u>	ORDER that plaintiffs have until 7/16/12 to show cause why case should not be dismissed on ground that 5 U.S.C. 702 does not waive defendant's sovereign immunity; defendant response due 7/23/12. Signed by District Judge Barbara B. Crabb on 6/28/12. (krj) (Entered: 06/28/2012)
07/16/2012	<u>25</u>	Declaration of Richard L. Bolton filed by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor re: <u>24</u> Order, (Attachments: # <u>1</u> Exhibit A – IRS Website Material) (Bolton, Richard) Modified exhibit on 7/17/2012 (mmo). (Entered: 07/16/2012)

07/16/2012	<u>26</u>	Motion to Amend and Response to <u>24</u> Order by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor. (Bolton, Richard) Modified event text on 7/17/2012 (mmo). (Entered: 07/16/2012)
07/18/2012		Set/Reset Briefing Deadlines as to <u>26</u> Motion to Amend and response to <u>24</u> order. Response due 7/23/2012. (krj) (Entered: 07/18/2012)
07/23/2012	<u>27</u>	Response to Order to Show Cause by Defendant United States of America (Healy Gallagher, Erin) (Entered: 07/23/2012)
08/03/2012	<u>28</u>	Unopposed Motion to Stay <i>Deadlines Pending Decision on Motion to Dismiss</i> by Defendant United States of America. (Schwartz, Richard) Modified on 8/6/2012 (krj). (Entered: 08/03/2012)
08/06/2012	29	<b>** TEXT ONLY ORDER **</b> The parties' agreed motion to stay deadlines pending a decision on the motion to dismiss <u>28</u> is granted. If further scheduling is needed after the court decides the motion, then the court will convene a telephonic scheduling conference. Signed by Magistrate Judge Stephen L. Crocker on 8/6/12. (krj) (Entered: 08/06/2012)
08/29/2012	<u>30</u>	ORDER granting <u>26</u> Motion to Amend Caption of complaint; denying <u>16</u> Motion to Dismiss. Signed by District Judge Barbara B. Crabb on 8/29/12. (krj) (Entered: 08/29/2012)
08/29/2012		Set/Reset Hearings: Telephone Scheduling Conference set for 9/20/2012 at 02:30 PM before Magistrate Judge Stephen L. Crocker. Counsel for Plaintiff responsible for setting up the call to chambers at (608) 264-5153. (krj) (Entered: 08/29/2012)
09/10/2012	<u>31</u>	Unopposed Motion for Extension of Time to File Answer re <u>30</u> Order on Motion to Amend/Correct, Order on Motion to Dismiss, <u>13</u> Amended Complaint by Defendants Timothy Geithner, Timothy Geithner, Douglas Shulman, Douglas Shulman, United States of America. Motions referred to Magistrate Judge Stephen L. Crocker. (Attachments: # <u>1</u> Text of Proposed Order) (Schwartz, Richard) (Entered: 09/10/2012)
09/11/2012	32	<b>** TEXT ONLY ORDER **</b> ORDER granting <u>31</u> Motion for Extension of Time to Answer. Answer due 9/21/2012. Signed by Magistrate Judge Stephen L. Crocker on 9/11/12. (krj) (Entered: 09/11/2012)
09/20/2012		Minute Entry for proceedings held before Magistrate Judge Stephen L. Crocker: Telephone Scheduling Conference held on 9/20/2012 [:10] (cak) (Entered: 09/20/2012)
09/21/2012	<u>33</u>	AMENDED Scheduling Order: Dispositive Motions due 6/28/2013. Settlement Letters due 11/22/2013. Court Trial set for 1/6/2014 at 09:00 AM. Signed by Magistrate Judge Stephen L. Crocker on 9/20/12. (krj) (Entered: 09/21/2012)
09/21/2012	<u>34</u>	ANSWER to Amended Complaint by Defendants Timothy Geithner, Douglas Shulman, United States of America. (Schwartz, Richard) Modified docket text on 9/21/2012 (mmo). (Entered: 09/21/2012)
06/17/2013	<u>35</u>	Disregard – refiled as entry <u>36</u> ; Modified on 6/17/2013; wrong caption/case number on document. (mmo). (Entered: 06/17/2013)
06/17/2013	<u>36</u>	STIPULATION of Dismissal [ <i>of Plaintiff Anne Nicol Gaylor – Corrected</i> ] by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor, Defendants Timothy Geithner, Timothy Geithner, Douglas Shulman, Douglas Shulman, United States of America. (Bolton, Richard) (Entered: 06/17/2013)
06/18/2013		Party Anne Nicol Gaylor terminated pursuant to Fed. R. Civ. P. 41(a)(1) without further order of the court. (krj) (Entered: 06/18/2013)
06/28/2013	<u>37</u>	Deposition of Annie Laurie Gaylor taken on Apr. 23, 2013 (Healy Gallagher, Erin) (Entered: 06/28/2013)
06/28/2013	<u>38</u>	Deposition of Dan Barker taken on Apr. 23, 2013 (Healy Gallagher, Erin) (Entered: 06/28/2013)

06/28/2013	<u>39</u>	Deposition of Freedom From Religion Foundation, Inc. (30(b)(6)) taken on Apr. 24, 2013 (Healy Gallagher, Erin) (Entered: 06/28/2013)
06/28/2013	<u>40</u>	<b>MOTION FOR SUMMARY JUDGMENT</b> by Defendants Timothy Geithner, Douglas Shulman, United States of America. Brief in Opposition due 7/19/2013. Brief in Reply due 7/29/2013. (Healy Gallagher, Erin) (Entered: 06/28/2013)
06/28/2013	<u>41</u>	Proposed Findings of Fact filed by Defendants Timothy Geithner, Douglas Shulman, United States of America re: <u>40</u> Motion for Summary Judgment (Healy Gallagher, Erin) (Entered: 06/28/2013)
06/28/2013	<u>42</u>	Declaration of Barbara Cantrell filed by Defendants Timothy Geithner, Douglas Shulman, United States of America re: <u>40</u> Motion for Summary Judgment (Attachments: # <u>1</u> Exhibit 3 – Plaintiffs Annie Laurie Gaylor and Dan Barker's Answers to Defendant United States of America's First Set of Written Interrogatories, # <u>2</u> Exhibit 5 – Plaintiff Freedom From Religion Foundation Inc.'s Answers to Defendant United States of America's First Set of Written Interrogatories, # <u>3</u> Exhibit 30 – Publication 1828: Tax Guide for Churches and Religious Organizations: Benefits and Responsibilities Under the Federal Tax Law, # <u>4</u> Exhibit 31 – Ministers Audit Techniques Guide, # <u>5</u> Exhibit 32 – Publication 517: Social Security and Other Information for Members of the Clergy and Religious Workers, # <u>6</u> Exhibit 33 – Form 4361: Application for Exemption From Self-Employment Tax for Use by Ministers, Members of Religious Orders and Christian Science Practitioners, # <u>7</u> Exhibit 34 – I.R.M. § 4.19.6: Examining Process/Liability Determination/SSA Correspondence, Minister Waivers, and Application for Exemption from Social Security, # <u>8</u> Exhibit 36 – I.R.M. § 1.11.6, Using and Researching the Internal Revenue Manual (IRM, # <u>9</u> Exhibit 37 – I.R.M. § 4.76.7: Examining Process/Exempt Organizations Examination Guidelines/Church Tax Inquiries and Examinations – IRC § 7611, # <u>10</u> Exhibit 38 – I.R.M. § 7.25.3: Rulings and Agreements/Exempt Organizations Determinations Manual/Religious, Charitable, Educational, Etc. Organizations, # <u>11</u> Exhibit 40 – I.R.M. § 4.76.6: Examining Process/Exempt Organizations Examination Guidelines/Religious Organizations, # <u>12</u> Exhibit 41 – Solstice Tribute, # <u>13</u> Exhibit 42 – Losing Faith In Faith: From Preacher To Atheist, # <u>14</u> Exhibit 43 – Faith-free Clergy Struggle to Escape Pulpit, # <u>15</u> Exhibit 44 – DeBaptismal Certificate, # <u>16</u> Exhibit 45 – Just Pretend: A Freethought Book for Children, # <u>17</u> Exhibit 46 – Friendly Neighborhood Atheist 2 CD Album, # <u>18</u> Exhibit 47 – Beware of Dogma CD, # <u>19</u> Exhibit 48 – Adrift on a Star: Irreverent Songs by Dan Barker, # <u>20</u> Exhibit 49 – Dan Barker's Ordination Certificate, # <u>21</u> Exhibit 50 – In Defense of "Godlessness", # <u>22</u> Exhibit 51 – Secular Memorials and Funerals Without God, # <u>23</u> Exhibit 52 – "Let's Dispense with Christian Funerals") (Healy Gallagher, Erin) (Entered: 06/28/2013)
06/28/2013	<u>43</u>	Declaration of Dean James Hudnut-Beumler filed by Defendants Timothy Geithner, Douglas Shulman, United States of America re: <u>40</u> Motion for Summary Judgment (Attachments: # <u>1</u> Exhibit A – CV, # <u>2</u> Exhibit B – Publications, # <u>3</u> C – Bibliography) (Healy Gallagher, Erin) (Entered: 06/28/2013)
06/28/2013	<u>44</u>	Brief in Support of <u>40</u> Motion for Summary Judgment by Defendants Timothy Geithner, Douglas Shulman, United States of America (Healy Gallagher, Erin) (Entered: 06/28/2013)
07/17/2013	<u>45</u>	Unopposed Motion for Extension of Time for <i>Plaintiffs To Respond To Defendants' Motion For Summary Judgment</i> by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor. Motions referred to Magistrate Judge Stephen L. Crocker. (Bolton, Richard)



		(Entered: 07/17/2013)
07/18/2013	<u>46</u>	<b>** TEXT ONLY ORDER **</b> ORDER granting <u>45</u> Motion for Extension of Time. Brief in Opposition due 7/26/2013. Brief in Reply due 8/12/2013. Signed by Magistrate Judge Stephen L. Crocker on 7/17/13. (krj) (Entered: 07/18/2013)
07/26/2013	<u>47</u>	Declaration of Annie Laurie Gaylor filed by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor re: <u>40</u> Motion for Summary Judgment (Attachments: # <u>1</u> Exhibit 001, FFRF Bylaws, # <u>2</u> Exhibit 002, FFRF 2012 Year In Review, # <u>3</u> Exhibit 003, FFRF FAQ Page, # <u>4</u> Exhibit 004, FFRF Website Page, # <u>5</u> Exhibit 005, FFRF DeBaptismal Certificate) (Bolton, Richard) (Entered: 07/26/2013)
07/26/2013	<u>48</u>	Declaration of Dan Barker filed by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor re: <u>40</u> Motion for Summary Judgment (Attachments: # <u>1</u> Exhibit 001, FFRF Bylaws, # <u>2</u> Exhibit 002, FFRF Year In Review, # <u>3</u> Exhibit 003, FFRF FAQ Page, # <u>4</u> Exhibit 004, FFRF Website Page, # <u>5</u> Exhibit 005, DeBaptismal Certificate) (Bolton, Richard) (Entered: 07/26/2013)
07/26/2013	<u>49</u>	Response to Proposed Findings of Fact filed by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor re: <u>40</u> Motion for Summary Judgment (Bolton, Richard) (Entered: 07/26/2013)
07/26/2013	<u>50</u>	Proposed Findings of Fact by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Annie Laurie Gaylor (Bolton, Richard) (Entered: 07/26/2013)
07/26/2013	<u>51</u>	Affidavit of Richard L. Bolton filed by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor re: <u>40</u> Motion for Summary Judgment (Attachments: # <u>1</u> Exhibit 001, Erwin Chemerinsky Article, # <u>2</u> Exhibit 002, Texas Monthly Decision, # <u>3</u> Exhibit 003, Report Staff of Joint Committee, # <u>4</u> Exhibit 004, Crt. of Appeals 9th Cir. – Motion for Leave, # <u>5</u> Exhibit 005, Lloyd Mayer Article, # <u>6</u> Exhibit 006, Tax Court Decision, # <u>7</u> Exhibit 007, Eighth Circuit Decision, # <u>8</u> Exhibit 008, IRS Letter, # <u>9</u> Exhibit 009, Rep. Mark Comments) (Bolton, Richard) Modified exhibit description on 7/29/2013 (mmo). (Entered: 07/26/2013)
07/26/2013	<u>52</u>	Brief in Opposition by Plaintiffs Dan Barker, Freedom From Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor re: <u>40</u> Motion for Summary Judgment filed by Douglas Shulman, Timothy Geithner, United States of America (Bolton, Richard) (Entered: 07/26/2013)
08/12/2013	<u>53</u>	Brief in Reply by Defendants Timothy Geithner, Douglas Shulman, United States of America in Support of <u>40</u> Motion for Summary Judgment (Healy Gallagher, Erin) (Entered: 08/12/2013)
08/12/2013	<u>54</u>	Reply in Support of Proposed Findings of Fact filed by Defendants Timothy Geithner, Douglas Shulman, United States of America re: <u>40</u> Motion for Summary Judgment (Healy Gallagher, Erin) (Entered: 08/12/2013)
08/12/2013	<u>55</u>	Response to Proposed Findings of Fact filed by Defendants Timothy Geithner, Douglas Shulman, United States of America re: <u>40</u> Motion for Summary Judgment (Healy Gallagher, Erin) (Entered: 08/12/2013)
11/22/2013	<u>56</u>	ORDER granting in part and denying in part <u>40</u> Motion for Summary Judgment by defendants Timothy Geithner and Douglas Schulman, now succeeded by Jacob Lew and Daniel Werfel. The motion is GRANTED with respect to plaintiffs'

		challenge to 26 U.S.C. § 107(1); plaintiffs' complaint is dismissed as to that claim for lack of standing. The motion is DENIED as to plaintiffs' challenge to 26 U.S.C. § 107(2). On the court's own motion, summary judgment is GRANTED to plaintiffs as to that claim. It is DECLARED that 26 U.S.C. § 107(2) violates the establishment clause of the First Amendment and defendants are ENJOINED from enforcing § 107(2). The injunction shall take effect at the conclusion of any appeals filed by the defendants. Signed by District Judge Barbara B. Crabb on 11/21/2013. (arw) (Entered: 11/22/2013)
11/26/2013	<u>57</u>	JUDGMENT entered in favor of Defendants Jacob Lew and Daniel Werfel dismissing plaintiffs' claim challenging the constitutionality of 26 U.S.C. § 107(1); entered in favor of plaintiffs Annie Laurie Gaylor, Dan Barker and Freedom from Religion Foundation, Inc. on their claim challenging the constitutionality of 26 U.S.C. § 107(2). It is declared that 26 U.S.C. § 107(2) violates the establishment clause of the First Amendment. Defendants are enjoined from enforcing 26 U.S.C. § 107(2). The injunction shall take effect at the conclusion of any appeals filed by defendants or the expiration of defendants' appeal deadline. (BBC/LAK) (arw) (Entered: 11/26/2013)
01/24/2014	<u>58</u>	NOTICE OF APPEAL by Defendants Timothy Geithner, Timothy Geithner, Douglas Shulman, Douglas Shulman, United States of America as to <u>57</u> Judgment. Appeal filed by USA. Docketing Statement filed. (Attachments: # <u>1</u> Docketing Statement) (Healy Gallagher, Erin) (Entered: 01/24/2014)
01/24/2014	<u>59</u>	Appeal Information Packet. (krj) (Entered: 01/24/2014)
01/24/2014	<u>60</u>	Transmission of Notice of Appeal, Docketing Statement, Appeal Information Sheet, Docket Sheet and Judgment to Seventh Circuit Court of Appeals re <u>58</u> Notice of Appeal. (Attachments: # <u>1</u> appeal information sheet, # <u>2</u> docketing statement, # <u>3</u> judgment, # <u>4</u> docket sheet) (krj) (Entered: 01/24/2014)
01/24/2014		USCA Case Number 14-1152 for <u>58</u> Notice of Appeal, filed by Douglas Shulman, Timothy Geithner, United States of America. (krj) (Entered: 01/24/2014)
01/31/2014	<u>61</u>	Designation of Record on Appeal by Defendants Timothy Geithner, Timothy Geithner, Douglas Shulman, Douglas Shulman, United States of America re <u>58</u> Notice of Appeal, (Healy Gallagher, Erin) (Entered: 01/31/2014)
01/31/2014	<u>62</u>	Transcript Request Form by Defendants Timothy Geithner, Timothy Geithner, Douglas Shulman, Douglas Shulman, United States of America re <u>58</u> Notice of Appeal, (Healy Gallagher, Erin) (Entered: 01/31/2014)
02/03/2014	<u>63</u>	Court Reporter Certification of Seventh Circuit Transcript Information Sheet re <u>58</u> Notice of Appeal, (jat) (Entered: 02/03/2014)

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing separately bound appendix for the Appellants with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system on April 2, 2014, and that 10 paper copies were sent to the Clerk by First Class Mail. Counsel for the appellees 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.

/s/ Judith A. Hagley  
JUDITH A. HAGLEY  
*Attorney for appellants*