UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

ANNIE LAURIE GAYLOR; DAN BARKER; IAN GAYLOR, Personal Representative of the estate of ANNE NICOL GAYLOR; AND FREEDOM FROM RELIGION FOUNDATION, INC.,

Plaintiffs,

v.

JACOB LEW, Secretary of the United States Department of Treasury; JOHN KOSKINEN, Commissioner of the Internal Revenue Service; and the UNITED STATES OF AMERICA,

Defendants,

and

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

Intervenor-Defendants.

Case No. 16-CV-215

INTERVENOR-DEFENDANTS' SUPPLEMENTAL BRIEF REGARDING REMEDIES

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INTRODUCTION

This Court has already issued a declaratory judgment that Section 107(2) is unconstitutional. That is the only form of relief that is appropriate here, as it grants Plaintiffs the relief they seek—the removal of a statutory barrier in their efforts to seek a tax refund. Any relief beyond that, such as an injunction, would create serious problems that Congress should be allowed to address in the first instance—including massive disruption to the tax code, discrimination among churches, and irreparable harm to thousands of ministers who have relied on the parsonage allowance for more than 60 years. Instead, the Court should remand the case to the IRS to further consider Plaintiffs' request for a refund in light of the Declaratory Judgment. If the Court grants any further relief, any such relief should apply only prospectively to future tax years. And any relief should be stayed pending appeal and for a period of time that would allow Congress to respond to the Court's ruling.

ARGUMENT

I. A declaratory judgment is the appropriate form of relief.

In cases like this, where Congress has already adopted a specific policy, courts must "adopt the remedial course Congress likely would

have chosen 'had it been apprised of the constitutional infirmity.'" *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1701 (2017) (quoting *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 427 (2010)). When choosing a remedy, courts must therefore consider congressional intent, *id.*, as well as "considerations of practicality and wise judicial administration," *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995).

Ever since enactment of the parsonage allowance in 1921, Congress has spoken with one voice in favor of broad housing allowances for ministers. While it is not clear precisely what Congress would have done had it known Section 107(2) would be declared unconstitutional, one thing is clear: it would not have left ministers like Intervenors on the hook for a potentially crippling sudden increase in tax burden. For over 60 years, ministers have relied on Section 107(2) in negotiating contracts, budgeting expenses, and planning for retirement. The sudden elimination of Section 107(2) would have a severe impact on the reliance interests of ministers such as Intervenors that serve in disadvantaged communities. Such ministers may be forced to relocate or be unable to continue serving. Even worse will be the impact on ministers that are retired or nearing retirement. Many retired ministers have worked for decades in reliance

on retirement plans that include a tax-free housing allowance, and without Section 107(2) they will be required to pay far more in taxes on each year's retirement income with no way to increase their income. *See* Rev. Rul. 75-22, 1975-1 C.B. 49 (allowing ministers to exclude a portion of retirement benefits from gross income). That could not have been Congress's intent.

As discussed below, each form of injunctive relief available to the court results in serious consequences that Congress specifically sought to avoid. In contrast, remanding the case to the IRS to reconsider Plaintiffs' refund request in light of the Court's declaratory judgment avoids those consequences, does not upset the status quo, and best addresses the needs of all parties moving forward. Declaratory relief also allows Congress or the IRS to respond and make needed changes to the law while temporarily preserving the status quo. "The express purpose of the Federal Declaratory Judgment Act was to provide a milder alternative to the injunction remedy." *Steffel v. Thompson*, 415 U.S. 452, 467 (1974) (internal citations omitted). Such a "milder alternative," *id.*, is appropriate when, as here, "the public interest [is] disserved by" permanent injunctive relief, *see eBay Inc. v. MercExchange, L.L.C.,* 547 U.S. 388, 391 (2006)

(discussing the factors for a permanent injunction).

Declaratory relief is appropriate in this case for two reasons. First, a Declaratory Judgment is most practical because it leaves "the Government . . . free" to "apply the statute" and protect the interests of pastors that have relied on Section 107(2). *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 155 (1963). Because a declaratory judgment is not "supplemented by continuing sanctions," it leaves the government with maximal flexibility to minimize harm. *See Steffel*, 415 U.S. at 482 (noting that "[a] declaratory judgment is simply a statement of rights, not a binding order supplemented by continuing sanctions"). Without such flexibility, thousands of ministers such as Intervenors, most of whom are not parties to this litigation, will face immediate financial harm and be forced to curtail their ministries. *See Taxation with Representation v. Regan*, 676 F.2d 715, 743-44 (D.C. Cir. 1982), *rev'd on other grounds sub nom. Regan v. Taxation with Representation*, 461 U.S. 540 (1983) ("Courts must always be cautious when dealing with the interests of those who have not had an opportunity to present their own arguments and defenses . . . .").

Second, declaratory relief is compatible with "wise judicial administration,"*Wilton,* 515 U.S. at 288, because it gives the IRS or Congress

the flexibility to craft a suitable remedy and may allow for the promulgation of regulations or the adoption of policies that eliminate the purported Constitutional violation. *See Pratt v. Wilson*, 770 F. Supp. 539, 546 (E.D. Cal. 1991) (granting a declaratory judgment but no further relief in part because there was new leadership at the state agency being sued that might take a different position on the budgetary issue in dispute). The taxing authority should be given the first chance to correct the purported Constitutional problem, whether by extending a benefit to the disfavored group or removing it from the favored group. *See McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Fla.,* 496 U.S. 18, 51-52 (1990) (leaving it to a state taxing authority to "satisfy [its] obligation through any form of relief . . . that will cure any unconstitutional discrimination"); *see also Regan*, 676 F.2d at 744 (declining to enjoin an unconstitutionally discriminatory tax exemption favoring veterans groups, and instead remanding to allow consideration of the interests of parties not before the court and further IRS or congressional input). Doing so allows the IRS to formulate uniform policies that will minimize undue disruption and allow measured implementation of the Court's order.

Declaratory relief alone will also sufficiently protect Plaintiffs' interest in not being unequally taxed on the basis of religion. There is a long-standing presumption "that officials of the Executive Branch will adhere to the law as declared by the court." *Comm. on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008). As a result, when the government is the defendant, a declaratory judgment is "the practical equivalent of specific relief such as injunction or mandamus." *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985). If the government does not take steps to correct the unconstitutionality, then the groundwork will have been laid to return and expeditiously receive an injunction. And after remanding to the IRS, Plaintiffs will have their refund requests reconsidered in light of this court's ruling. The IRS would be able, in the first instance, to determine whether Plaintiffs now qualify for a refund. So Plaintiffs can continue to seek what they have always wanted—a tax refund. And Defendants and the general public are far better off.[1]

[1] If other parties claim a tax refund based on the reasoning of the court's declaratory judgment, then the IRS can likewise deal with those claims on a case-by-case basis, increasing flexibility and reducing the risk of widespread harm.

When faced with complex legal issues that will certainly be resolved on appeal, other district courts have exercised judicial restraint and chosen to issue only a declaratory judgment. For instance, when the Northern District of Florida declared the individual mandate in the Affordable Care Act to be unconstitutional, the court held that "declaratory relief [was] adequate and separate injunctive relief [was] not necessary." *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1305 (N.D. Fla.), *order clarified*, 780 F. Supp. 2d 1307 (N.D. Fla.), *and aff'd in part, rev'd in part sub nom. Florida ex rel. Atty. Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *aff'd in part, rev'd in part sub nom. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). The court explained that "injunctive relief is an extraordinary and drastic remedy," and "is even more so when the party to be enjoined is the federal government." *Id.* (citations and internal quotation marks omitted). The court there concluded that separate injunctive relief was unnecessary since it is presumed that "officials of the Executive Branch will adhere to the law as declared by the court[.]" *Id.* (internal quotation marks omitted). Declaratory relief is the most prudent course in this case as well.

II. Injunctive relief creates serious problems that Congress should be permitted to address in the first instance.

Although the Court has identified several possible options for injunctive relief, they all involve either broadening or narrowing federal law in ways that create new problems.

Narrowing Section 107. First, this Court could narrow Section 107 by enjoining Section 107(2) alone. *See, e.g.*, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985) (noting "the normal rule that partial, rather than facial, invalidation is the required course"). But as this Court has acknowledged, the Congressional Record shows that Congress enacted Section 107(2) to eliminate discrimination among churches. *Corrected Op. & Order,* Dkt. 87 at 27 (citing to H.R. Rep. No. 1337, at 15, available in U.S. Code Congressional and Administrative News, 83rd Congress, Second Session, at 4040 (1954) ("purpose of § 107(2) is to 'remove[]' or 'correct' the 'discrimination' in existing law between ministers who live in parsonages and those who receive housing allowance")). Specifically, "well-established churches" with "financial support" can afford to purchase a parsonage and provide tax-free housing to ministers. *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982). But "churches which are new and

lacking in a constituency" cannot. *Id.* Still other churches have theological reasons for using (or not using) parsonages. Thus, Congress enacted Section 107(2) to eliminate discrimination against churches on financial or theological grounds.

Enjoining Section 107(2) alone, however, would reimpose the same discrimination Congress wanted to eliminate. Thus, it cannot be said that "Congress likely would have chosen" to eliminate Section 107(2) 'had it been apprised of the constitutional infirmity.'" *Sessions*, 137 S. Ct. at 1701.

Eliminating Section 107. Alternatively, the Court could eliminate Section 107 altogether by enjoining both Sections 107(1) and 107(2). But this, too, would conflict with congressional intent. Congress enacted the in-kind parsonage allowance almost immediately after the federal income tax was enacted. Revenue Act of 1921, Pub. L. No. 98, § 213(b)(11), 42 Stat. 227, 239 (overturning O.D. 862, 4 C.B. 85 (1921)). That provision provided a bright-line rule against taxing the value of a parsonage made available to a minister in connection with the minister's post at the church; today, it eliminates the entanglement and denominational dis-

crimination that would result from applying the multi-factor "convenience of the employer" test, as subsequently codified in Section 119, to ministers. *See Intervenor-Defs.' Reply Br. in Supp. of Their Mot. for Summ. J.* Dkt. 53 at 19-21. Enjoining both Sections 107(1) and 107(2), then, would reintroduce the very entanglement that Congress eliminated. It would also, as this Court explained, "stretch the limits of judicial power, particularly because a statute similar to § 107(1) existed without § 107(2) for more than 30 years." Dkt. 87 at 45. And it would be particularly inappropriate to impose such a remedy when this Court has held that FFRF lacks standing to challenge Section 107(1). *Id.* at 1-2. Moreover, the Court's holding that Section 107(2) was unconstitutional was reached in light of the fact that Section 107(1) was not under attack. *See e.g. Id.* at 33-34 (rejecting Intervenor-Defendants' analogy to Section 119 since Section 107(1) was "not at issue in this case").

Expanding Section 107. Third, the Court could expand Section 107 by requiring the Government to apply it to other types of employees besides ministers. Generally speaking, "extension, rather than nullification" of "underinclusive federal benefits statutes" is the "proper course."

Califano v. Westcott, 443 U.S. 76, 89 (1979). But "[w]henever a court extends a benefits program to redress unconstitutional underinclusiveness, it risks infringing legislative prerogatives." *Id.* at 92; *Florida ex rel. Bondi*, 780 F. Supp. 2d at 1305 ("It is Congress that should consider and decide these quintessentially legislative questions, and not the courts."). That is equally true here, where expanding Section 107 to include other types of employees creates difficult line-drawing problems. As in *Califano*, the Court is "ill-equipped both to estimate the relative costs of various types of coverage, and to gauge the effect that [it would have]." *Califano*, 443 U.S. at 93.

Furthermore, in the tax context, the Court is strictly constrained in its ability to provide an injunction forcing the government to grant tax benefits. The Tax Anti-Injunction Act, 26 U.S.C. § 7421, provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a). Here, any injunction prohibiting the IRS from collecting housing allowances from a class of secular workers would directly restrain the IRS from collecting tax, and would thus be prohibited.

The Tax Anti-Injunction Act rejects pre-collection injunctions in favor of post-collection refund claims. Thus, the proper way for the Court to expand Section 107(2) would be to issue a precedential ruling determining that the Gaylors and Barkers are entitled to their refunds (presumably because they are sufficiently similar to religious ministers according to some set of criteria set by the Court). While this would be far less disruptive than suddenly depriving all ministers of the benefits of Section 107(2), it would force the Court to grapple with (or leave the public to grapple with) difficult questions about the contours of the expanded benefit. Do all leaders of 501(c)(3)s now qualify for a refund, or only leaders of certain types of church-like (but not necessarily religious) organizations? Ordering a refund without providing guidance as to who else qualifies would open the floodgates to demands for a refund, or create uncertainty that would make it difficult for individuals filing their returns to know whether to claim the benefit. All of this can be avoided by issuing only a declaratory judgment, and leaving the IRS and Congress to consider whether to expand the scope of the exception in the first instance.

III. Any relief denying ministers the benefits of Section 107(2) should be prospective only.

Any injunctive relief that the Court grants should also apply only prospectively to future tax years. With retroactive relief, any filed tax returns still within the statute of limitations could either be subject to an audit and the demand for back taxes, or to demands for refunds from all individuals similarly situated to the Gaylors and Barkers. In contrast, with prospective-only relief, no one would be able to seek a refund or demand taxes for years already filed. So income earned by ministers while this case remains pending would be treated as it has been up to this point, while income earned in tax years after this case concludes would be subject to the Court's ruling.

Such prospective-only relief is appropriate in cases when 1) a decision "establishe[s] a new principle of law"; 2) prospective-only application would "further" rather than "retard" the purpose of the principle of law at question; and 3) when retroactive application "could produce substantial inequitable results." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971). Seventh Circuit precedent is clear that selective prospective application (*i.e.* applying the holding to the parties before the Court but not to other parties), is impermissible, but that it is possible to "announc[e]

a rule with wholly prospective force, inapplicable to the parties in the case that announces the rule." *Felzen v. Andreas*, 134 F.3d 873, 877 (7th Cir. 1998), *aff'd sub nom. Cal. Pub. Emp. Retirement Sys. v. Felzen,* 525 U.S. 315 (1999)*; see also Glazner v. Glazner*, 347 F.3d 1212, 1219 (11th Cir. 2003) ("[W]e conclude that we must still determine whether a newly announced rule in civil cases should apply retroactively or prospectively in the first instance and that *Chevron Oil* governs such a determination").

Courts also retain authority in "exceptional cases" to shape narrower relief "in light of disruption of important reliance interests or the unfairness caused by unexpected judicial decisions." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 761 (1995) (Kennedy J., concurring); *Ryder v. United States*, 515 U.S. 177, 184-85 (1995) (recognizing that when "grave disruption or inequity" will result from retrospective application of relief, prospective only application may be appropriate).

This case is a prime candidate for the application of prospective-only relief. Section 107(2) has stood for over 60 years and has never been invalidated, except by this Court. Intervenor-Defendants and thousands

of other ministers and religious organizations have relied on the exemption in good faith. To abolish the housing allowance tax benefit retroactively would harm those that have relied on the tax code and potentially impose crippling financial penalties on the poorest class of religious ministers. Specifically, thousands of ministers that excluded housing allowances from their incomes may be subject to an audit and then be forced to pay taxes retroactively—potentially resulting in severe financial penalties and curtailment of their ministries. Thousands or millions more will find themselves having significantly higher tax liabilities for 2017, having had no chance to budget for that surprise increase. A retroactive ruling will also increase the risk of "tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." *Walz v. Tax Comm'n of N.Y.C.*, 397 U.S. 644, 674 (1970).

A prospective-only application, by contrast, will give religious organizations and ministers an opportunity to renegotiate contracts and determine whether an in-kind parsonage allowance under Section 107(1) would be feasible. Prospective-only application will also give the IRS time to enact relevant regulations, educate the public on the changes, and reduce uncertainty—all of which is in the public interest. Finally, this is an

exceptional case because the court's decision upends more than 60 years of reliance on settled law. All of these considerations support prospective-only application of any removal of the tax benefit for ministers' housing allowances. Indeed, the Court may wish to provide more extended relief to retired ministers, given their reliance on existing law and inability to alter savings patterns now.

The Court has flexibility to take ministers' reliance interests into account to provide transition relief. For instance, the Supreme Court has upheld a law perpetuating a discriminatory provision for five years because of retirees' reliance interests. *See Heckler v. Mathews*, 465 U.S. 728, 746 (1984) ("We have recognized, in a number of contexts, the legitimacy of protecting reasonable reliance on prior law even when that requires allowing an unconstitutional statute to remain in effect for a limited period of time."). Of course, as in *Heckler*, the need to balance competing policy considerations in developing appropriate transition rules may be a further reason to allow the legislative and executive branches to take the lead in determining how to correct any constitutional defect.

IV. Any relief should be stayed.

Intervenor-Defendants also request that any relief that this Court

orders should be stayed pending appeal and for a period of time after the expiration of all appeals to allow Congress to respond to the courts' rulings. Such a stay is warranted in light of the novelty of the Court's ruling, the massive disruption of the tax code, and irreparable injury to ministers who have relied on the exemption for decades.

A. A stay pending appeal is warranted.

Under the Federal Rule of Civil Procedure 62(c), there are four factors regulating the issuance of a stay:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). All four factors favor a stay here.

Likelihood of Success on Appeal. A stay is appropriate given the significant constitutional questions at issue and the likelihood that Section 107(2) may be upheld on appeal. "A party seeking a stay of the entry of an injunction pending an appeal need not show that it has a 'probability' of success on appeal in order to succeed on its motion. . . . It is sufficient that a party have a *substantial case on the merits*." *Lindell v. Frank*, No.

02-C-0021-C, 2003 WL 23198184, at *1 (W.D. Wis. Aug. 25, 2003) (Crabb, J.) (emphasis added). Here, Section 107(2) has been on the books for decades and has never been struck down, except by this Court. In addition, similar tax provisions providing fair treatment to churches have been upheld as constitutional. *See e.g. Walz*, 397 U.S. at 674. And Intervenor-Defendants have made a "substantial case" that Congress adopted Section 107(2) as a logical application of the convenience of the employer doctrine and in order to reduce discrimination and entanglement. *Lindell*, No. 02-C-0021-C, 2003 WL 23198184, at *1. Indeed, the Court acknowledged in its order that Intervenor-Defendants' argument had "surface appeal" and that the enactment of Section 107(2) when "[v]iewed from a distance . . . appear[s] to be [a] straightforward attempt[] to make the law more equitable." Dkt 87 at 27. Moreover, the Supreme Court's Establishment Clause jurisprudence has changed significantly since *Texas Monthly* was decided, and Establishment Clause cases tend to closely divide the courts of appeals and even the Supreme Court. *Cf. Florida ex rel. Bondi*, 780 F. Supp. 2d. at 1317 (granting stay where the case "raised some novel issues regard the Constitution[]" and "[i]t [was] likely that the Courts of Appeal [would] also reach divergent results and

that . . . the Supreme Court may eventually be split on this issue as well"). Thus, Defendants have made at least a substantial case on the merits.

Irreparable Injury. Without a stay, Intervenor-Defendants would suffer irreparable injury. They would be required to pay taxes on income they relied upon to remain tax-free, resulting in significant disruption to their lives and ministries.

The lack of a stay would also cause significant disruption to the tax system by requiring the IRS to make changes and issue new guidance to taxpayers. It is entirely possible that the Treasury Department would be required to make those changes only later to be required to revert to the old policy after an appeal. In such a situation, thousands of ministers may have paid taxes without claiming exclusions for housing allowances without the government having any way to know it, and by the time the rule is changed back, it may be too late for them to file refund claims. Given that developing an equitable solution "will require great wisdom and thoughtfulness," as well as "significant time and attention," "the public interest is best served by [granting a stay] before . . . officials devote attention to formulating and implementing a remedy." *Books v. City of*

Elkhart, 239 F.3d 826, 829 (7th Cir. 2001).

Injury to Other Parties. Denying a stay would also cause irreparable injury to ministers across the country, who have relied on the parsonage allowance for decades. Individuals who have dedicated their lives to public service will suddenly face significantly higher tax liability. As already discussed, that burden will be especially severe for ministers in or nearing retirement. Moreover, the change will come as a shock to those not party to this litigation who are suddenly impacted by it. By contrast, leaders of 501(c)(3)s like the Gaylors and Barkers have not relied on Section 107(2), so for them a stay will merely preserve the status quo. Thus, "the equities here support preserving the status quo while the [government's] appeal proceeds." *San Diegans For Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1303 (2006); *ACLU of Fla. v. Dixie Cty., Fla.*, No. 1:07-cv-00018 (N.D. Fla. Aug. 15, 2011) (concluding that a stay is "particularly appropriate where, as here, doing so would preserve the status quo").

Where the Public Interest Lies. Finally, the public interest supports a stay. Predictability and stability in the tax code are strongly in the public interest. *See Barker Bros. v. City of Los Angeles*, 76 P.2d 97, 99 (Cal. 1938) (explaining that "it is . . . important that [a] [tax] classification be

defined with reasonable certainty"); *see also* Adam Smith, 5 *The Wealth of Nations* Ch. 2 ("The tax which each individual is bound to pay ought to be certain, and not arbitrary."). The public also benefits from the work of organizations and individuals like Intervenors, who work with under-privileged members of society. Imposing additional tax burdens on those organizations and forcing them to curtail their work is not in the public interest.

B. The decision should be stayed to let Congress respond.

Any relief should also be stayed for at least 180 days after the expiration of all appeals (including any appeal to the U.S. Supreme Court). When, as here, a ruling will cause significant disruption and adverse consequences, it is appropriate to grant an extended stay of judgment to give Congress an opportunity to respond. For instance, in *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982), the Supreme Court held that Congress's grant of authority to the bankruptcy courts was incompatible with Article III, but stayed its judgment for more than three months after the opinion was issued in order to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of

the bankruptcy laws." *See also Buckley v. Valeo*, 424 U.S. 1, 143 (granting a thirty day stay of judgment to allow Congress to "reconstitute" the Federal Election Commission). Indeed, in cases involving legislative apportionment that violates the Equal Protection Clause, the Supreme Court has allowed an unlawfully elected legislature to remain in power until the next election—potentially a period of several years. *See Georgia v. United States*, 411 U.S. 526, 541 (1973) (explaining that since it was "inequitable" to require new elections, the Georgia house would remain in power until the next election despite having been elected contrary to the Constitution); *Fortson v. Morris*, 385 U.S. 231, 235 (1966) (allowing an unlawfully elected general assembly to remain in power so that it could elect a governor); *Toombs v. Fortson*, 241 F. Supp. 65, 73 (N.D. Ga. 1965), *aff'd*, 384 U.S. 210 (1966) (allowing the legislature to remain in power for more than 3 years even though the apportionment plan violated equal protection).

Other courts have adopted a similar approach when resolving difficult constitutional questions. *See Clifton v. Allegheny Cty.*, 980 A.2d 27, 29 (Pa. 2009) (Baer, J., dissenting) (collecting cases where the Pennsylvania Supreme Court had "stayed [its] decision to allow the legislature to

act to prevent unnecessary confusion following the declaration of a statute or action as unconstitutional"); *Comm. on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (granting a stay and refusing to expedite an appeal, because a delay would "ha[ve] the additional benefit of permitting the new President and the new House an opportunity to express their views on the merits of the lawsuit"); *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 676 (1964) (concluding that further court action was inappropriate unless "the legislature fail[ed] to enact a constitutionally valid . . . scheme in a timely fashion after being afforded a further opportunity by the courts to do so").

Here, a 180-day stay from the expiration of all appeals would give Congress sufficient time to respond to the courts' rulings. Such a stay is warranted given that the outcome of the case is of "potentially great significance" and there is "no pressing need for an immediate decision." *Comm. on Judiciary of U.S. House of Representatives*, 542 F.3d at 911. Such a stay would also allow the legislative and executive branches time to modify the parsonage allowance to satisfy any remaining constitutional concerns after appeal.

CONCLUSION

A declaratory judgment with remand to the agency is the appropriate form of relief. If the Court goes beyond that, any further relief should be prospective only and should be stayed until 180 days after the expiration of all appeals.

Dated: October 30, 2017

Respectfully submitted,

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**Admitted in Virginia, but not in D.C. Supervised by Ms. Smith and Mr. Goodrich, members of the D.C. Bar. Application for admission to the Western District of Wisconsin forthcoming.*

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2017, the foregoing memorandum was served on all parties via ECF.

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