
Government Appeals Decision on Clergy Housing Allowance Exclusion.

The government filed a brief in the Seventh Circuit arguing that a district court erred when it held that section 107(2), which excludes the rental allowance paid to a minister from income, was an unconstitutional violation of the establishment clause, maintaining that the plaintiffs lacked standing and the law is constitutional.

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUITON 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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GLOSSARY

APA	Administrative Procedure Act
The Code	Internal Revenue Code
Commissioner	Commissioner of Internal Revenue
FFRF	Freedom from Religion Foundation, Inc.
IRS	Internal Revenue Service
Plaintiffs	FFRF, Annie Gaylor, and Dan Barker
Secretary	Secretary of the Treasury

STATEMENT REGARDING ORAL ARGUMENT

In this case, the District Court struck down the longstanding exclusion for a parsonage allowance under § 107(2) of the Internal Revenue Code as a violation of the Establishment Clause, at the behest of plaintiffs, an atheist advocacy organization and two of its members. Issues of great administrative importance regarding the constitutionality of the exclusion and plaintiffs' standing to sue are presented. Counsel for the appellants respectfully inform the Court that they believe that oral argument is essential to the disposition of this appeal.

STATEMENT OF JURISDICTION

Freedom from Religion Foundation, Inc. (FFRF) and its co-presidents Annie Gaylor and Dan Barker (together, plaintiffs) brought this suit for declaratory and injunctive relief against the Secretary of the Treasury and the Commissioner of Internal Revenue. (Doc1,13.)[1] FFRF, a Wisconsin corporation, has its principal place of business in Madison, Wisconsin. (*Id*.) The gravamen of the complaint was that § 107 of the Internal Revenue Code, which excludes from federal income taxation certain housing benefits provided to ministers, violates the Establishment Clause of the First Amendment to the United States Constitution and the Equal Protection component of the Constitution's Due Process Clause. Plaintiffs sought (i) a declaration that § 107 is unconstitutional and (ii) an injunction against the continued allowance of the exclusion. Although plaintiffs invoked the District Court's jurisdiction under 28 U.S.C. § 1331, the Government maintains that the court lacked subject matter jurisdiction. Because they failed to seek the exclusion provided by § 107, plaintiffs lack standing to challenge it. *See* Argument I, below.The District Court rendered a final judgment on November 26, 2013, disposing of all claims of all parties. (App44-45.) The Government filed its notice of appeal on January 24, 2014, within the 60 days allowed by Fed. R. App. P. 4(a)(1)(B). (Doc58.) *See* 28 U.S.C. § 2107(b). This Court's jurisdiction over the appeal rests upon 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether plaintiffs have standing to challenge the constitutionality of the exclusion for a parsonage allowance under § 107(2), when they have neither sought nor been denied the exclusion.2. If plaintiffs have standing, whether § 107(2) violates the Establishment Clause.

STATEMENT OF THE CASE

A. Procedural overview Plaintiffs brought this suit against the Secretary and the Commissioner, seeking (i) a declaration that § 107 violates the Establishment Clause and (ii) an injunction barring the allowance of the exclusion. Because plaintiffs did not themselves seek the benefits of § 107, the Government moved to dismiss the case, contending that plaintiffs lacked standing. The District Court denied the motion. (A1-20.) The Government later moved for summary judgment, renewing its argument that plaintiffs lacked standing and contending that § 107 does not violate the Establishment Clause. Plaintiffs did not contest the motion insofar as it concerned their standing to challenge the exclusion under § 107(1) for housing furnished in kind. But they opposed the motion insofar as the exclusion under § 107(2) for a cash parsonage allowance was concerned. The court granted the Government summary judgment regarding § 107(1). After concluding that plaintiffs had standing to challenge the latter exclusion (App1-15), the court granted plaintiffs summary judgment *sua sponte* regarding § 107(2), striking down the statute as unconstitutional (App15-42). The Government now appeals.

B. Background: § 107

Section 107 is one of several statutory exclusions from gross income for employment-connected housing benefits. Taxpayers who are furnished housing by their employers may exclude the value of that housing from their gross income where (among other things) the housing is furnished for the

"convenience of the employer." § 119. Taxpayers who furnish their own housing, but use it for business purposes for the "convenience of [the] employer," may deduct from income expenses related to that housing. § 280A(c)(1). In addition, certain federal employees may exclude from gross income cash provided to them for housing purposes. § 134 (military housing allowance); § 912 (foreign housing allowance for Foreign Service, the CIA, etc.).

Section 107 provides an analogous exclusion for housing or its cash equivalent provided to a "minister of the gospel" by his employing church.[2] Specifically, when furnished or paid to him "as part of his compensation," a minister's gross income does not include "(1) the rental value of a home" or "(2) the rental allowance paid to him . . . 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," plus utilities. § 107.

Section 107 has its origins in the Revenue Act of 1921, which created an exclusion for "[t]he rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of his compensation." Pub. L. No. 98, sec. 213(b)(11), 42 Stat. 227, 239. This exclusion was carried forward in successive revenue acts and was incorporated into the Internal Revenue Code of 1939 without substantive change. *See* Section 22(b)(6) of the 1939 Code, 53 Stat. 10. When the exclusion was reenacted as § 107(1) of the Internal Revenue Code of 1954, the addition of § 107(2) allowed ministers to exclude "rental allowance[s]."

Although the legislative history of the 1921 Revenue Act does not explain why the in-kind exclusion was introduced, the treatment of clergy housing under prior law sheds light on Section 213(b)(11)'s purpose. Immediately before its enactment, the Treasury Department had allowed some employees — but not clergy — to exclude the value of employer-provided housing from income pursuant to the "convenience of the employer" doctrine. *See Commissioner v. Kowalski*, 434 U.S. 77, 84-90 (1977) (describing history of exclusion for such employer-provided housing). Those benefiting included seamen living aboard ships, workers living in "camps," cannery workers, and hospital employees. *Id.* In 1921, the Treasury announced that ministers would be taxed on the fair rental value of parsonages provided as living quarters, O.D. 862, 4 C.B. 85 (1921), even though ministers traditionally resided in parsonages for the church's convenience (A37-51). Shortly thereafter, Congress changed that treatment by enacting Section 213(b)(11), thereby placing ministers on an equal footing with other employees who already enjoyed an exclusion for housing provided for the employer's convenience.

When the parsonage exclusion was enacted, churches had differing traditions and practices that influenced how they provided parsonages to their ministers. (A37-65,68-73.) Older or more hierarchical churches tended to furnish church-owned parsonages to ministers; newer churches favored providing ministers cash housing allowances. (*Id*.) But either way, the minister's housing was generally used for the church's religious purposes. (A37-39,41-42,50-51,70-71,73.)

When churches that did not own parsonages provided ministers with cash housing allowances in lieu of in-kind housing, the Treasury ruled that the statutory exclusion was limited to in-kind housing and that housing allowances were includable in gross income. I.T. 1694, C.B. II-1, at 79 (1923). The Treasury noted, however, that the allowance would be deductible by the minister as a business expense, to the extent it was used for "expenses attributable to the portion of the parsonage which is devoted to professional use." *Id.* Several courts disagreed. They held that, in order to treat similarly situated ministers equally, cash allowances must also be considered excludable under the statutory parsonage exclusion. *E.g., Williamson v. Commissioner*, 224 F.2d 377, 380 (8th Cir. 1955); *Conning v. Busey*, 127 F. Supp. 958 (S.D. Ohio 1954); *MacColl v. United States*, 91 F. Supp. 721 (N.D. Ill. 1950). Whether paid in cash or in kind, the benefits were considered provided for the church's "convenience" and therefore excludable.*Williamson*, 224 F.2d at 380.

In 1954, Congress resolved the dispute by codifying the prevailing judicial view in § 107, which excludes compensatory housing furnished to ministers in cash as well as in kind. In doing so, Congress sought to remove "discrimination" against ministers who were paid cash allowances, as the House and Senate Reports explained. H.R. Rep. No. 1337, at 15 (1954); S. Rep. No. 1622, at 16 (1954).

In 2002, Congress amended § 107(2) to clarify that the exclusion was limited to the fair rental value of the parsonage. Pub. L. No. 107-181, 116 Stat. 583. The bill that introduced the proposed amendment reiterated that one of the purposes of § 107 was to "accommodate the differing governance structures, practices, traditions, and other characteristics of churches through tax policies that strive to be neutral with respect to such differences." Clergy Housing Allowance Clarification Act, H.R. 4156, 107th Cong. § 2(a)(4) (as introduced April 10, 2002). In addition to preventing discrimination, § 107 was also designed, according to this legislative history, to avoid "intrusive inquiries by the government into the relationship between clergy and their respective churches" entailed by the generally available convenience-of-the-employer doctrine codified elsewhere in the Code. *Id*. at § 2(a)(5). Section 107 avoids such potential church-state entanglement by eliminating any need for the minister to demonstrate that the parsonage or allowance therefor is being used for the church's convenience under § 119 or § 280A(c)(1), respectively.

C. FFRF

FFRF is a nonprofit membership corporation that promotes the separation of church and state and educates on matters of "non-theism." (A3.) Gaylor and Barker, FFRF's co-presidents, are "nonbeliever[s]" who are "opposed to government preferences and favoritism towards religion."[3] (Doc13 at 3.) FFRF provides Gaylor and Barker (formerly an ordained minister) with housing allowances not exceeding housing-related expenses. Plaintiffs complained that the § 107 exclusion, being limited to "ministers of the gospel," subsidizes, promotes, and endorses religion in violation of the Establishment Clause. (Doc13 at 5.) Although they complained of unequal treatment, neither Gaylor nor Barker had personally sought or been denied the exclusion before filing suit, either by claiming it on their income tax returns or by filing claims for refund with the IRS challenging the statute as unconstitutional unless it applied to them. (A22-23,30.)

D. The proceedings below

The Government moved to dismiss for lack of subject matter jurisdiction. (Doc12,16-17.) It contended that plaintiffs lacked standing to sue under Article III of the Constitution. The Government contended that there was no injury-in-fact because neither Gaylor nor Barker had personally sought or been denied the exclusion, and it was insufficient merely to allege that it is illegal for third parties to enjoy it. (Doc12 at 17-22.) The Government further contended that entertaining plaintiffs' claims, and recognizing a waiver of sovereign immunity under the Administrative Procedure Act, 5 U.S.C. § 702, would also be at odds with the highly articulated structure of tax litigation, which generally precludes the issuance of declaratory and injunctive relief and confines disputes regarding tax treatment to deficiency actions and suits for refund brought by the affected taxpayers. (Doc27 at 4-7.)

In response, plaintiffs contended that they had standing to challenge § 107(2). They argued that, having received housing allowances, they were similarly situated to clergy enjoying the exclusion. (Doc20.)

The District Court denied the Government's motion. (A1-20.) The court considered it "clear" that plaintiffs are not entitled to the exclusion and that there was no reason to require them to undergo the "futile" exercise of seeking the exclusion. (A2.)

The Government moved for summary judgment. (Doc44,54.) Besides renewing its jurisdictional arguments (Doc44 at 5-25), the Government defended the constitutionality of § 107 (*Id.* at 25-52). It contended that § 107 does not violate the Establishment Clause because it has the secular purpose and effect of eliminating discrimination against, and among, ministers, and of limiting government entanglement with religion. (Doc44 at 3.)

Plaintiffs opposed the motion, but only as it related to § 107(2). They argued that the District Court had jurisdiction and that § 107(2) violates the Establishment Clause. (Doc52.)

The District Court granted the Government summary judgment regarding § 107(1). Respecting § 107(2), however, the court granted summary judgment to plaintiffs *sua sponte*. (App1-3.) The court reaffirmed its conclusion that plaintiffs had standing to challenge § 107(2), finding it "clear from the face of the statute that plaintiffs are excluded from an exemption granted to others." (App2.) The court further held that § 107(2) violates the Establishment Clause because it "provides a benefit to religious persons and no one else, even though doing so is not necessary to alleviate a special burden on religious exercise." (App2.) The court held that the case was controlled by the plurality opinion in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), striking down a sales tax exemption for religious periodicals. (App2.) The court rejected the Government's argument that § 107(2) was enacted for the secular purpose of avoiding discrimination among ministers. Although the court observed that other Code provisions provide tax benefits for employer-provided housing, it did not consider whether § 107(2) avoids the potential church-state entanglement posed by ministers being forced to rely upon generally available tax benefits for housing used for an employer's convenience. (App29-37.)

SUMMARY OF ARGUMENT

Plaintiffs — an advocacy organization promoting atheism and the separation of church and state, and its co-presidents — challenge the constitutionality of § 107(2), a longstanding exclusion for a cash parsonage allowance paid by a church to its minister. Plaintiffs do not themselves seek the exclusion, but only to nullify its enjoyment by ministers who are not parties to this action. The District Court held that plaintiffs had standing to challenge § 107(2) and that the statute violates the Establishment Clause. Both rulings are flawed.1. Under Article III, a plaintiff lacks standing to sue unless he alleges a personal injury fairly traceable to the defendant's alleged unlawful conduct. A mere interest in a problem or a grievance shared in common with the public does not suffice. Where, as here, a plaintiff alleges an injury from unequal treatment, he lacks standing unless and until he personally seeks and is denied the benefit at issue. Without the personal denial of equal treatment, the plaintiff raises only a generalized grievance, not a case or controversy. Plaintiffs here have not personally asked for the § 107(2) exclusion, nor are they litigating their own tax liabilities. Because they seek only to deprive others of the exclusion, they have suffered no actual personal injury at the hands of the Government.

Prudential concerns and statutory limitations under the APA also counsel dismissal. Congress has erected a highly articulated structure that confines tax litigation to suits by taxpayers contesting their *own* tax liabilities in Tax Court deficiency actions or suits for refund in the district courts and Court of Federal Claims. Injunctive and declaratory relief is generally precluded where federal taxes are concerned. To recognize a plaintiff's standing to challenge the tax liability of third parties not before the court would disturb this carefully crafted statutory scheme.

2. If the Court were to reach the merits, it should uphold § 107(2) as constitutional. Section 107(2) has a secular purpose and effect and avoids excessive church-state entanglement. The clergy have long been provided with homes at or near their places of worship and use them in connection with their ministries. Just as it has done for lay employees furnished housing for the employer's

convenience under § 119, Congress has merely exercised the discretion that accompanies its taxing power to exempt the value of such professionally used parsonages from taxation. Extension of this "refusal to tax" to the cash equivalent of in-kind housing under § 107(2) merely "eliminates the discrimination," in the words of the drafters, that would otherwise exist against ministers, and between churches that have historically provided parsonages in kind and those that do not. Permitting ministers to exclude parsonage allowances under § 107(2), rather than forcing them to rely on the generally available deduction for the business use of the home under § 280A(c)(1), may also prevent more intrusive Government inquiries into the church-minister relationship, and avoid the need to evaluate whether activities in a minister's home are secular or religious. These statutory purposes comport fully with the restraints of the Establishment Clause.

In striking down the law, the District Court erred. It failed to come to grips with the reasons Congress enacted § 107 in the first place. It also disregarded the fact that the housing exclusions provided to ministers are merely part of a larger Congressional design providing exclusions or deductions for certain employer-provided housing benefits for all taxpayers. Given the unique history and context of § 107(2), the plurality opinion in *Texas Monthly* by no means "controls" this case, as the District Court erroneously assumed (App19). That case concerned a distinctly different tax exemption that lacks the redeeming features present here.

ARGUMENTI

Plaintiffs lack standing to sue

Standard of review

A plaintiff's standing to sue presents a question of law reviewable *de novo*. *Love Church v. Evanston*, 896 F.2d 1082, 1085 (7th Cir. 1990).**A. Introduction**

The standing doctrine has both constitutional and prudential aspects. The "core component" of standing, derived directly from the "cases" or "controversies" requirement of Article III of the Constitution, is grounded on the separation of powers. *Allen v. Wright*, 468 U.S. 737, 750-752 (1984). It requires the plaintiff to "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id*.at 751. The injury, moreover, must be "concrete, particularized, and actual or imminent (instead of conjectural or hypothetical)." *Am. Fed'n of Gov't Employees v. Cohen*, 171 F.3d 460, 466 (7th Cir. 1999). "[G]eneralized grievances" "do not present constitutional 'cases' or 'controversies.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, __ S. Ct. __, 2014 WL 1168967, at *6n.3 (Mar. 25, 2014).

In addition to these constitutional requirements, there are also certain prudential limitations on the exercise of federal jurisdiction. This inquiry includes "whether the constitutional or statutory provision" in question "properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

In this case, the District Court struck down § 107(2), which has been on the statute books for some 60 years, at the behest of plaintiffs who have not been injured by the statute, though they object to § 107(2) as a matter of principle. There is no dispute that the individual plaintiffs, Gaylor and Barker, have never sought the very tax benefit about which they complain. Nor do they seek to litigate their own tax liabilities.[4]

The Supreme Court has "always insisted on strict compliance with [the] jurisdictional standing requirement," because the "'law of Art. III standing is built on a single basic idea — the idea of

separation of powers.'" *Raines v. Byrd*, 521 U.S. 811, 819-820 (1997) (citation omitted). The Court also has repeatedly "[w]arn[ed] against premature adjudication of constitutional questions." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997). In our tripartite system of government, a court does not act as a "constitutional check" on a Congressional enactment unless a bona fide dispute involving an actually injured litigant requires the court to pass on the validity of a statute.

As demonstrated below, the District Court's ruling is at odds with settled law regarding constitutional standing. In contravention of prudential standing limitations, moreover, the ruling also bypasses the proper channels for tax litigation enacted by Congress that confine tax litigation to suits by taxpayers contesting their own tax liabilities, after the taxpayer first seeks the tax benefit in question from the Internal Revenue Service. These restrictions are by no means "arbitrary" rules (A15) that "waste" time (A8). They are critical components of a constitutional design that ensures that courts are the "'last'" — not the first — "'resort.'" *Allen*, 468 U.S. at 752 (citation omitted).

B. Plaintiffs lack standing under Article III

Here, although they contend that they are similarly situated to the ministers who enjoy it, plaintiffs do not seek to enjoy the parsonage exclusion themselves. Instead, they seek to deprive the ministers of the benefit, even though the clergy are not before the court. Because plaintiffs do not seek to improve their own economic situation, the apparent gravamen of their claim is that they have been stigmatized by the Government's failure to provide them with equal treatment on account of their atheism. The Supreme Court has held, however, that an injury of this type "accords a basis for standing *only* to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *Allen*, 468 U.S. at 755 (emphasis added) (quoting *Heckler v. Mathews*, 465 U.S. 728, 739-740 (1984)). Without the personal denial of equal treatment, the plaintiff raises only a "generally available grievance about government," which "does not state an Article III case or controversy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-574 (1992). Insisting on a personalized injury, the Supreme Court "has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction in federal court." *Allen*, 468 U.S. at 754.

In *Allen*, the Supreme Court held that the parents of African-American children lacked standing to sue Treasury officials to challenge the tax-exempt status of racially discriminatory schools, because they had not been "personally denied equal treatment" by the Government, but were merely seeking to litigate another person's tax liability. 468 U.S. at 754-756. Similarly, in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-167 (1972), the Court held that an African-American plaintiff lacked standing to challenge a racially discriminatory membership policy because he "never sought to become a member."

In *Heckler*, by contrast, a widower was found to have standing to challenge a law requiring his spousal Social Security benefits to be offset against his Civil Service pension unless he demonstrated that he had been his late wife's dependent, where no such showing was required for a widow to escape the offset. The Court stressed, however, that the plaintiff "personally has been denied benefits that similarly situated women receive." 465 U.S. at 740 & n.9. Given that personal denial, the Court explained, "there can be no doubt about the direct causal relationship between the Government's alleged deprivation of appellee's right to equal protection and the personal injury appellee has suffered — denial of Social Security benefits solely on the basis of his gender." *Id.*

Applying these principles, the Fifth Circuit, sitting *en banc*, held that plaintiffs lacked standing to pursue an "injury of unequal treatment," based on their ineligibility for special transition rules extended to other taxpayers that temporarily preserved certain repealed tax benefits. *Apache Bend*

Apartments, Ltd. v. United States, 987 F.2d 1174, 1177-1178 (5th Cir. 1993). The court held that "plaintiffs have not suffered any direct injury in the sense that they personally asked for and were denied a benefit granted to others."[5] *Id.* In so ruling, the court distinguished the injury in *Heckler*, emphasizing that the plaintiff there had constitutional standing because he "specifically sought benefits for himself," was "*personally*" denied those benefits, and raised "his equal protection argument in the context of litigating *his* right to receive Social Security benefits." *Id.* at 1178 n.3. Unlike the plaintiff in *Heckler*, the plaintiffs in *Apache Bend* "were not *personally denied* benefits" under the tax provision at issue, and "never even sought such benefits." *Id.*Consequently, the asserted harm was no more than a "generalized grievance" that could not support standing. *Id.* at 1178.

These principles apply no less in the Establishment Clause context. The "Establishment Clause does not exempt clergy or lay persons from Article III's standing requirements." *In re U.S. Catholic Conference*, 885 F.2d 1020, 1024 (2d Cir. 1989). In *Winn*, for example, the Supreme Court held that the plaintiffs lacked standing to challenge a tax benefit under the Establishment Clause because they had not personally "been denied a benefit on account of their religion," but were merely complaining in their capacity as taxpayers that the challenged provision unlawfully benefited religious groups. 131 S. Ct. at 1440, 1449. Similarly, in *Catholic Conference*, certain clergy plaintiffs alleged that the Government's failure to revoke the tax exemption of the Catholic Church for electioneering against abortion violated the Establishment Clause. The Second Circuit held that the plaintiffs lacked standing because they "do not complain about their own tax status" and had "neither been personally denied equal treatment under the law nor in any way prosecuted by the IRS." *Id.* at 1022, 1024-1026. As the court emphasized, it is "not enough to point to an assertedly illegal benefit flowing to a third party that happened to be a religious entity." *Id.* at 1025.

As these decisions make clear, a plaintiff alleging unequal treatment lacks the requisite personal injury unless and until the person seeks — and is denied — equal treatment. Until that point, he complains only of a generalized grievance. Put another way, a person does not have standing to ask that *another* person's tax benefit be *taken away* without first seeking and being denied the benefit himself. Any injury would otherwise be too abstract and diffuse.

Although a would-be litigant lacks standing to deprive others of a tax benefit he eschews, he indubitably would have standing, by contrast, to challenge the exaction of an unconstitutional tax from himself, which results in a direct and personal "economic injury." *Hein v. FFRF*, 551 U.S. 587, 599 (2007). But in order to have standing to challenge a tax benefit as unconstitutional, the taxpayer must actually seek the tax benefit himself, placing his own liability in suit. *E.g., Texas Monthly*, 489 U.S. at 8 (recognizing the standing of a general-interest magazine to raise an Establishment Clause challenge to a tax exemption limited to religious periodicals, where it "paid" the tax and sought a "refund"); *Droz v. Commissioner*, 48 F.3d 1120, 1122 & n. 1 (9th Cir. 1995) (recognizing that taxpayer had standing to raise Establishment Clause challenge to a religious exemption from the self-employment tax under § 1402(g) for sects opposed to certain insurance, where he claimed, and was denied, the exemption); *Moritz v. Commissioner*, 469 F.2d 466, 467 (10th Cir. 1972) (addressing Equal Protection challenge brought by a single male who claimed a dependent-care expense deduction that the statute limited to married or widowed men, but allowed to women regardless of marital status); *Warnke v. United States*, 641 F. Supp. 1083 (E.D. Ky. 1986) (addressing Establishment Clause challenge to regulations under § 107 by taxpayer who claimed, and was denied, the § 107(2) exclusion). In these cases, the taxpayers actually sought the tax benefit from the taxing authority and then litigated their own tax liability, either by way of a deficiency proceeding in Tax Court (as in *Droz* and *Moritz*) or by filing a refund suit (as in *Texas Monthly* and *Warnke*).

So, too, here, Gaylor and Barker could have sought the § 107(2) exclusion by claiming it on their

returns and then petitioning the Tax Court if the IRS were to disallow the exclusion. § 6213(a). Alternatively, they could have paid the resulting taxes due, claimed refunds from the IRS, and then sued for refund if their claims were rejected or not acted upon for six months. §§ 6511, 6532(a)(1), 7422; 28 U.S.C. §§ 1346(a)(1), 1491. Either way, plaintiffs would have standing to litigate their entitlement to the exclusion and to raise an Establishment Clause challenge in that regard. But perhaps preferring to wreak a greater impact — wresting the benefit from ministers nationwide — Gaylor and Barker did neither. (A22-23,30.)

Although plaintiffs "identify their injury as the alleged unequal treatment they have received from" the IRS and Treasury (A6), they, in fact, have received *no* treatment from those agency-defendants. As plaintiffs concede, they have not contacted the IRS or Treasury about their housing allowances. They have neither personally sought nor been denied equal treatment. (A24,27,31.) Without that critical step, plaintiffs' claim is reduced to the allegation that § 107(2) violates the Establishment Clause. But as the Supreme Court has emphasized — and the District Court ignored — plaintiffs have "no standing to complain simply that their Government is violating the law." *Allen*, 468 U.S. at 755.

Plaintiffs' suit suffers from the same flaw that precluded standing in *Allen*, *Winn*, *Apache Bend*, and *Catholic Conference*. Plaintiffs contend that the Government violates the Establishment Clause by permitting ministers to claim the § 107(2) exclusion. But just as in those cases, plaintiffs here are not litigating their own tax liabilities. They are merely suing to have the Government act in accordance with their view of the law. Because plaintiffs have not sought, and been denied, the § 107(2) exclusion, they have not suffered an actual, concrete, and particularized injury. Without such an injury, plaintiffs lack Article III standing.

This Court recently made a like point when FFRF sought to challenge the constitutionality of a federal statute creating the National Day of Prayer as violating the Establishment Clause. *FFRF v. Obama*, 641 F.3d 803 (7th Cir. 2011). The Court held that FFRF lacked standing because — even if the statute violated the Establishment Clause — FFRF was not personally "injure[d]" by the statute, explaining that FFRF's "offense at the behavior of the government, and a desire to have public officials comply with (plaintiff's view of) the Constitution, differs from a legal injury." *Id.* at 805, 807. A legal injury, the Court emphasized, requires "an invasion of one's own rights to create standing." *Id.* at 806. Similarly, in *FFRF v. Zielke*, 845 F.2d 1463 (7th Cir. 1988), the Court held that FFRF lacked standing to challenge a Ten Commandments display because FFRF failed to allege an actual, concrete injury. As the Court explained, FFRF's commitment "to the principle of separation of church and state . . . alone does not satisfy the standing doctrine." *Id.* at 1468 n.3. The same is true here.

C. Plaintiffs' lawsuit also runs afoul of other limitations on standing

Plaintiffs' complaint also runs afoul of other limitations on standing. To surmount the prudential principles that limit standing in a suit brought (as here) under the APA, plaintiffs must show not only that they fall within the zone of protected interests, but that there is no "evidence that Congress intended to preclude the plaintiff from suing," such as "'the structure of the statutory scheme.'" *City of Milwaukee v. Block*, 823 F.2d 1158, 1166 (7th Cir. 1987) (citation omitted). These limitations counsel against the exercise of jurisdiction and disclose that the APA does not waive sovereign immunity here.

To begin with, although a person who actually claims a tax benefit might arguably fall within the zone of interests protected by the statute conferring it, plaintiffs here fall short. Eschewing any claim to the § 107(2) exclusion they seek to nullify, they likewise cede any claim to being within the statute's penumbra. To say, moreover, that they fall within the zone of interests protected by the

Establishment Clause, merely because of their interest in the separation of church and state, would not meaningfully set them apart from masses of other citizens who also wish the Government to abide by the law.

In any event, the intent of Congress *not* to allow plaintiffs to contest the tax liability of third parties is manifest. As we explain below, "Congress has created a highly articulated and exclusive structure of federal tax litigation that limits judicial review of tax matters to precisely defined channels." (Doc27 at 5.) Plaintiffs are attempting to litigate outside of those established channels.

Congress has authorized taxpayers to bring deficiency actions in the Tax Court to obtain review of asserted deficiencies in income, gift, estate and certain excise taxes without first having to pay the amount in dispute. §§ 6211, 6212, 6213(a). Alternatively, Congress has permitted taxpayers to sue for a refund in a federal district court or in the Court of Federal Claims after the taxpayer has duly filed an administrative refund claim and the claim either has been denied or not acted upon for six months. §§ 6511, 6532(a)(1), 7422(a). These remedies are adequate and specific remedies under 5 U.S.C. §§ 703 and 704 that foreclose review under the APA.

Congress has otherwise generally precluded "any person, whether or not such person is the person against whom such tax was assessed," from maintaining a suit "for the purpose of restraining the assessment or collection of any tax" (§ 7421(a)), and has likewise generally barred declaratory relief in all actions "with respect to Federal taxes" (28 U.S.C. § 2201(a)). To be sure, the Anti-Injunction Act may not apply of its own terms here, because the effect of plaintiffs' suit would be to increase tax collections. *Cf. Hibbs v. Winn*, 542 U.S. 88, 104 (2004) (construing Tax Injunction Act, 28 U.S.C. § 1341). Nevertheless, taken as a whole, this concerted structure generally confines tax disputes to challenges by taxpayers in deficiency actions and refund suits. It expressly — or at least impliedly — forecloses review. 5 U.S.C. §§ 701(a)(1), 702(1), (2).

Against this backdrop, "[i]t is well-recognized that the standing inquiry in tax cases is more restrictive than in other cases." *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995). The standing inquiry becomes particularly "restrictive" (*id.*) where a plaintiff seeks to litigate the tax liability of third parties who are not before the court. In that context, the courts have recognized "the principle that a party may not challenge the tax liability of another." *United States v. Williams*, 514 U.S. 527, 539 (1995). As this Court has observed, "[o]rdinarily a person does not have standing to complain about someone else's receipt of a tax benefit." *Flight Attendants Against UAL Offset v. Commissioner*, 165 F.3d 572, 574 (7th Cir. 1999).

These principles apply with special force where, as here, a plaintiff seeks to increase the tax liabilities of third parties who are not before the court. It would be passing strange to allow plaintiffs, who have not sought the exclusion for themselves, to harness the injunctive power of the court to require the IRS to deny the exclusion to other persons. The better view is that Congress intended no such thing. *See Louisiana v. McAdoo*, 234 U.S. 627, 632 (1914) (declining to adjudicate third-party challenge to favorable tax treatment for another taxpayer, because the maintenance of such actions "would operate to disturb the whole revenue system of the government").

Tellingly, the Fifth Circuit, sitting *en banc*, denied standing in a similar situation in *Apache Bend*. There, as noted above, the plaintiffs challenged preferential transition relief granted to other taxpayers not before the court. But they did not "seek transition relief for themselves" or "to litigate their own tax liability." 987 F.2d at 1177. Instead, they "asked only that transition relief be denied to the favored taxpayers." *Id.* The Fifth Circuit held that prudential concerns counseled dismissal, explaining that "Congress has erected a complex structure to govern the administration and enforcement of tax laws, and has established precise standards and procedures for judicial review of tax matters." *Id.*

Those same concerns counsel dismissal here. As the Fifth Circuit pointed out in *Apache Bend*, the highly articulated structure of federal tax litigation painstakingly designed by Congress counsels dismissal of a case of this ilk. It is unquestionably "evidence that Congress intended to preclude the plaintiff[s] from suing" outside of that structure.*Block*, 823 F.2d at 1166. By respecting Congress's structure, the Fifth Circuit declined to expand its judicial power. The District Court should have exercised the same restraint here.

D. The District Court's standing analysis cannot withstand scrutiny

The District Court relaxed the standing requirements described above because — in its view — those requirements were "arbitrary" (A15) and a "waste" of "time" (A8). The court considered it "clear" that plaintiffs could not qualify for the exclusion and saw "no reason" to put them through the "futile" exercise of seeking the benefits themselves. (A2.) This approach is flawed for several reasons.

1. As we have already explained, a plaintiff making an unequal-treatment claim has not been injured for standing purposes unless he has sought, and been denied, the benefit at issue. The District Court's contrary ruling is at odds with this established principle. In *Heckler*, the Supreme Court held that the plaintiff had standing precisely because he "personally has been denied benefits that similarly situated women receive," and therefore was not merely asserting a generalized grievance. 465 U.S. at 740 n.9. In *Allen*, by contrast, the Court held that a plaintiff did not have standing to challenge another's tax liability. It distinguished *Heckler* on the basis that the plaintiff there was "'personally denied equal treatment.'" 468 U.S. at 755 (citation omitted). Where, as here, a plaintiff makes an unequal-treatment claim without contesting his own tax liability, the plaintiff, by definition, is attempting to contest the tax liability of another taxpayer. As the courts held in *Allen*, *Winn*, *Catholic Conference*, and *Apache Bend*, he lacks standing to do so. Far from being an "arbitrary" step, presenting a "formal claim" to the IRS regarding one's own tax liability (A2,15), and then having that personal claim denied, provides the concrete and personal injury that Article III requires.

There is no basis for the District Court's attempt to excuse plaintiffs from seeking and being denied the exclusion by the IRS on the theory that it would be "futile." (A2.) To begin with, the court was speculating in concluding that the IRS would deny such a claim. But in any event, Article III's standing requirements must be "strict[ly] compli[ed] with," *Raines*, 521 U.S. at 819-820. Moreover, there is no "futility" exception in federal tax litigation, as it was long ago established in the analogous situation regarding the requirement of filing an administrative refund claim under § 6511 before suit. *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 273 (1931). Applying this fundamental principle, this Court has held that it lacks the "authority to excuse [the taxpayer's] failure to make a claim as required by section 7422(a), notwithstanding our certainty that the IRS ultimately will reject her claim." *Bartley v. United States*, 123 F.3d 466, 469 (7th Cir. 1997). Similarly, here, the court lacked the authority to excuse plaintiffs from personally seeking, and being denied, the § 107(2) exclusion, and to have allowed the plaintiffs to litigate their claims outside the structure that Congress has designed for tax litigation, on grounds of futility.

Other taxpayers whose challenges to the constitutionality of the tax laws have been heard have first sought the tax benefit at issue, even where doing so was arguably futile. For example, in *Texas Monthly*, a nonreligious magazine sought the exemption provided for "religious" periodicals by paying the tax "under protest" and then suing "to recover those payments in state court." 489 U.S. at 6. Similarly, in *Moritz*, the taxpayer claimed the dependent-care expense deduction available to all women regardless of marital status, notwithstanding that he was ineligible for it as an unmarried man, and then brought suit in Tax Court to contest the resulting deficiency determined against him. 469 F.2d at 467. In both cases, seeking the tax benefit may have been futile. But once the benefit

was denied, the taxpayer had sustained the requisite injury concerning his own tax liability that gave rise to his standing to sue.

The District Court's reliance (App7) on *Finlator v. Powers*, 902 F.2d 1158 (4th Cir. 1990), is misplaced. That decision is both incorrect and distinguishable. There, the court concluded that taxpayers had standing to challenge a state tax exemption, notwithstanding that they had not taken any "minimal steps" to allow the State to "preclude or redress their injuries *ab initio*," such as contesting the liability, refusing to pay, paying under protest or suing for refund. *Id.* at 1161. The court "decline[d] to read such an implicit requirement into" *Texas Monthly*, "absent a clear statement by the Supreme Court to that effect." *Id.* at 1162. This ruling was misconceived. As the court explained in*Fulani v. Brady*, 935 F.2d 1324, 1328 (D.C. Cir. 1991), standing was recognized in *Texas Monthly* because the plaintiff there "petitioned for a refund of its own taxes," and therefore "sought to litigate . . . its own liability." As we have already explained, the Supreme Court has made it clear, in cases such as *Heckler* and *Allen*, that the plaintiff must seek from the defendant (and personally be denied) the benefit at issue in order to have standing to litigate an unequal-treatment claim. Moreover, the court in *Finlator* concluded that there were no "prudential concerns" that militated against finding standing in that state tax case. 902 F.2d at 1162. By contrast, there *are* prudential concerns that counsel against recognizing standing in this federal tax case. above.

2. The District Court's conclusion that following the formal rules of standing would be a "waste" of "time" (A8) fails to appreciate the importance of those rules. Article III is "not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 476(1982). "In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be *more* careful to insist on the formal rules of standing, not *less* so." *Winn*, 131 S. Ct. at 1449 (emphasis added). In its eagerness to entertain the suit, the District Court disregarded these important constitutional principles and erroneously engaged in "premature adjudication of constitutional questions." *Arizonans for Official English*, 520 U.S. at 79.

The District Court's exercise of jurisdiction in this federal tax case, where the plaintiffs did not first present the issue to the IRS, is particularly troubling. Whether the § 107 exclusion extends to atheists presents a question of statutory interpretation of apparent first impression. Notably, this Court has held that "atheism" is a "religion" for "Establishment Clause" purposes. *Kaufman v. McCaughtry*, 419 F.3d 678, 684 (7th Cir. 2005). Although the District Court had its own views regarding the matter (App8-14), it is the Secretary and the Commissioner, not the courts, who are charged with the responsibility for enforcing the tax laws in the first instance. The court should have allowed them the opportunity to determine whether an atheist could qualify. The court's arrogation of this Executive Branch prerogative raises serious constitutional concerns.

3. The District Court's rationales for relaxing the standing requirements are unfounded. The court's reliance (A7-9) on cases permitting preenforcement challenges is misplaced. "To satisfy the injury-in-fact requirement in a preenforcement action, the plaintiff must show 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution thereunder.'" *ACLU v. Alvarez*, 679 F.3d 583, 590-591 (7th Cir. 2012) (citation omitted). Plaintiffs cannot satisfy that standard.

To begin with, unlike the situations presented in the cases cited by the District Court (A7-9), no conduct is proscribed by § 107(2), nor do plaintiffs face a "credible threat of prosecution" under it. And the court's concern that plaintiffs might be "vulnerable to civil sanctions" (A9) for seeking the

exclusion does not excuse a taxpayer from seeking a tax benefit from the IRS first.[6] A taxpayer whose position has colorable merit need not fear that a penalty will be imposed against him. Moreover, the District Court's reservations in this regard are fundamentally at odds with its ultimate conclusion that plaintiffs are similarly situated to the ministers reaping the benefit, but for an invidious and unconstitutional restriction (according to the court) that the compensation so excluded be earned in a religious endeavor.

Similarly lacking in merit is the District Court's suggestion that the plaintiffs would lack "standing to challenge § 107(2) in the context of a proceeding to claim the exemption." (App6 (citing *Templeton v. Commissioner*, 719 F.2d 1408 (7th Cir. 1983), among others).) That aspect of *Templeton* has since been overruled. In *Templeton*, this Court held that a taxpayer lacked standing to challenge the underinclusiveness of a tax exemption under the Establishment Clause because the injury was not redressable: if the taxpayer did not qualify, the most he could achieve was to deprive the favored class of the benefit, rather than improve his own situation. *Id*. at 1412. That rationale, however, was later "rejected" by the Supreme Court in *Texas Monthly*, because it would "'effectively insulate underinclusive statutes from constitutional challenge.'" 489 U.S. at 8 (citation omitted). But the plaintiff in*Texas Monthly* had standing to challenge the underinclusive tax exemption at issue there precisely because it had paid the tax and sought a "refund," thereby presenting a "live controversy" for the Court to adjudicate. *Id*. The District Court erred in allowing plaintiffs here to bypass that route.

IISection 107(2) does not violate the Establishment Clause

Standard of review

The District Court's grant of summary judgment to plaintiffs on their Establishment Clause claim is reviewed *de novo*. *Books v. Elkhart County, Ind*., 401 F.3d 857, 863 (7th Cir. 2005).**A. Introduction**

1. The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I, cl. 1. Generally speaking, the First Amendment's Free Exercise Clause prohibits Congress from interfering with religious practices and institutions, while the Establishment Clause prohibits Congress from inappropriately advancing religion. Between the "two Religion Clauses," there is a middle ground — "room for play in the joints" — within which Congress may accommodate religion "without sponsorship and without interference." *Walz v. Tax Commission*, 397 U.S. 664, 668-669 (1970).

The Supreme Court has "'long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.'" *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (citation omitted); *see Cutter v. Wilkinson*, 544 U.S. 709, 719-720 (2005) (upholding Religious Land Use& Institutionalized Persons Act as a "permissible legislative accommodation of religion," even though it was not "compelled by the Free Exercise Clause"); *Gillette v. United States*, 401 U.S. 437, 450 (1971) (upholding religion-specific exemption from military draft).

2. To determine whether the Government's accommodation of religion is permissible under the Establishment Clause, courts generally apply the three-pronged test set forth by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which "'remains the prevailing analytical tool for the analysis of Establishment Clause claims.'" *Doe v. Elmbrook Sch. Dist*., 687 F.3d 840, 849 (7th Cir. 2012) (*en banc*) (citation omitted), *petition for cert. filed*, No. 12-755 (Sup. Ct. Dec. 20, 2012). In order to comport with the Establishment Clause, (i) "the statute must have a secular legislative

purpose," (ii) "its principal or primary effect must be one that neither advances nor inhibits religion," and (iii) it "must not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 612-613 (citation omitted).

A comparison of *Amos* and *Walz* (upholding religious exemptions) to *Texas Monthly* (invalidating such an exemption) illustrates the contours of permissible accommodation of religion. In *Amos*, the Supreme Court addressed whether the exemption for religious organizations from the prohibition against religious discrimination under Title VII violates the Establishment Clause. The Court upheld the exemption as a permissible accommodation, even though it was not required by the Free Exercise Clause. 483 U.S. at 336. The Court concluded that the exemption satisfied the *Lemon* test. First, it served the secular purpose of minimizing governmental interference "with the decision-making process in religions." *Id.* Second, it did not advance religion but merely removed a regulatory burden imposed thereon. *Id.* at 338. Third, it avoided excessive entanglement by "effectuat[ing] a more complete separation" of church and state. *Id.* at 339. The Court expressly rejected the complaint "that [the exemption] singles out religious entities for a benefit." *Id.* at 338. As the Court explained, "[w]here, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities." *Id.*

In *Walz*, the Supreme Court held that exempting religious organizations from a generally applicable property tax did not violate the Establishment Clause. The Court emphasized that the tax exemption served the permissible purpose of "sparing the exercise of religion from the burden of property taxation." 397 U.S. at 673-674. The exemption, moreover, by no means sponsored religion, but "simply abstains from demanding that the church support the state."*Id.* at 675. And it "create[d] only a minimal and remote involvement between church and state and far less than taxation of churches." *Id.* at 676. Although the Court observed that the property tax exemption was also available to other nonprofit organizations, its conclusion that the exemption was a "permissible state accommodation to religion" did not depend on that fact. *Id.* at 673. As the Court explained, the Establishment Clause prohibits government "sponsorship" of "religious activity," and a property-tax exemption — unlike a "direct money subsidy" — does not run afoul of that prohibition because the "government does not transfer part of its revenue to churches." *Id.* at 675.

Finally, in *Texas Monthly*, the Supreme Court addressed a state sales-tax exemption for periodicals distributed by a "religious faith" that promoted the "teachings of the faith." 489 U.S. at 5-6. A divided majority of the Court held that this differentiation of literature based upon religious content violated either the Establishment Clause (all but White, J.) or the Press Clause of the First Amendment (White, J.). *Id.* at 17-25 (Brennan, J., joined by Marshall and Stevens, JJ.); *Id.* at 25-26 (White, J., concurring in the judgment); *Id.* at 26-29 (Blackmun, J., joined by O'Connor, J., concurring in the judgment). Justice Blackmun's concurrence provides the rationale for the Court because it provides the narrowest grounds on which the decision is based. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (observing that"[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds'") (citation omitted). Justice Blackmun believed that, although "some forms of accommodating religion are constitutionally permissible" (citing *Amos* as an example), the Texas sales-tax exemption was not, because it entailed "preferential support for the communication of religious messages" without any secular justification for doing so. 489 U.S. at 28.

3. As demonstrated below, § 107 is a permissible accommodation of religion under *Lemon*. Like the exemptions in*Amos* and *Walz*, § 107 lifts a burden on religious practice by eliminating governmental discrimination against (§ 107(1)) — and between (§ 107(2)) — religions, and by minimizing

governmental interference with a church's internal affairs, without burdening third parties. Unlike the exemption in *Texas Monthly*, § 107 does not endorse a religious message. It merely adapts the Code's general exemptions for certain types of employer-provided housing to the unique context of a church and its minister. *See* Legg, *Excluding Parsonages from Taxation: Declaring a Victor in the Duel between Caesar & the First Amendment*, 10 Georgetown J. of Law &Public Policy 269, 271 (2012) (concluding that "the parsonage exclusions are constitutional when (necessarily) viewed as one element of a larger congressional plan to extend tax relief to recipients of employer-provided housing as a principal feature of their employment").

4. Before turning to those arguments, however, we first highlight three aspects of § 107(2) that are crucial to an understanding of its constitutional soundness. First, § 107(2) involves an exemption from tax, rather than the grant of a direct subsidy. As a general rule, the "grant of a tax exemption is not sponsorship" prohibited by the Establishment Clause, despite the "indirect economic benefit" that goes with it. *Walz*, 397 U.S. at 674-675. Unlike a "direct money subsidy," the "government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Id*. at 675. Moreover, the Government's refusal to "impose a tax" on religion does not impose a burden on third parties. *Winn*, 131 S. Ct. at 1447.

Second, § 107(2) provides an exclusion from gross income for employment benefits provided by a church to its minister. The courts have been particularly solicitous of governmental accommodation regarding the "employment relationship between a religious institution and its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 705 (2012). In *Hosanna-Tabor*, the Supreme Court held that "there is a ministerial exception grounded in the Religion Clauses of the First Amendment" that precludes the government from applying generally applicable anti-discrimination laws to a church's minister, even though such laws may be applied to the church's other employees. *Id*. at 707. As the Court explained, the church-minister relationship concerns "the internal governance of the church," given that the minister "personif[ies] its beliefs," and a church's decisions regarding its ministers "affects the faith and mission of the church itself." *Id*. at 706-707. Indeed, this Court refers to the "ministerial exception" as the "internal affairs" doctrine because the exception is designed to prohibit governmental interference "in the internal management of churches." *Schleicher v. Salvation Army*, 518 F.3d 472, 474-475 (7th Cir. 2008) (applying doctrine to reject ministers' claim that church violated minimum-wage laws).

Third, § 107(2) is but a single provision in a larger Congressional scheme that exempts qualifying employer-provided housing from taxation. As noted above (at pp. 3-4), and described more fully below, the Code contains several tax benefits for housing used by a taxpayer in the business or for the convenience of his employer, including §§ 119 and 280A(c)(1). Section 107 merely adapts those provisions to the unique church-minister context, so as to avoid the entanglement problems that could arise if ministers had to rely on those provisions to exclude or deduct the value of church-provided housing. "When viewed in the context of other employer-provided housing provisions — both historic and currently-existing — [§ 107(2)] hardly singles out religion for an exclusive benefit in violation of the Constitution." Legg, above, at 297.

B. Section 107 is a permissible accommodation of religion

As demonstrated below, § 107(2) does not violate the Establishment Clause because it satisfies each part of the*Lemon* test.

1. Section 107(2) has a secular legislative purpose

In reviewing an Establishment Clause challenge, it is critical to consider the historical context of the statute and the specific sequence of events leading to its passage. *See Salazar v. Buono*, 130 S. Ct. 1803, 1816 (2010) (reversing determination that law violated Establishment Clause where the "District Court took insufficient account of the context in which the statute was enacted and the

reasons for its passage"). The legislative history and context of § 107(2) demonstrates that the manifest purpose of the statute is to achieve parity among clergy and denominations, irrespective of a minister's housing arrangements, and to avoid interference in a church's internal affairs.**a. The history and context of § 107**Church-provided housing is a tradition that dates back at least to the 13th century. Savidge, *The Parsonage in England* 7-9 (1964). The patterns of housing members of the clergy in America have deep histories in the churches of Western Europe. The most common feature of this long-held tradition is that clergy lived in housing (called a parsonage) on the church grounds or nearby on church-owned property. (A68-69.) The parsonage system provided a critical means for churches to ensure that the spiritual needs of their congregations were met by housing the clergy in a place available to the congregation that could accommodate the church business conducted there. (A73.)In 1921, when Congress first enacted the parsonage exclusion, most religious denominations in the United States furnished parsonages to ministers in kind. (A72.) The denominations that did not do so were generally very small or were newer sects. (A72,76.) The latter denominations found it more convenient or feasible to furnish parsonages for their ministers by providing them with cash in lieu of the use of a church-owned building. (A72,76.)

Whether provided by means of cash or in kind, parsonages are furnished to ministers for the church's "convenience." *Williamson*, 224 F.2d at 380. Since a minister "will personify" his church, *Hosanna-Tabor*, 132 S. Ct. at 706, his residence is traditionally more than mere housing (A70). It is an extension of the church itself and is typically used for "religious purposes such as a meeting place for various church groups and as a place for providing religious services such as marriage ceremonies and individual counseling." *Immanuel Baptist Church v. Glass*, 497 P.2d 757, 760 (Okla. 1972); *see* Brunner, *Taxation: Exemption of Parsonage or Residence of Minister, Priest, Rabbi or Other Church Personnel*, 55 A.L.R.3d 356, 404 (1974) (observing that "[m]ost ministerial residences can be expected to be incidentally used to some considerable extent as an office, a study, a place of counseling, a place of small meetings, such as boards or committees, and a place in which to entertain and lodge church visitors and guests").

Against this historical backdrop, Congress enacted an exclusion from gross income for parsonages in 1921, just eight years after the modern federal income tax was authorized by the 16th Amendment to the Constitution. *See*Revenue Act of 1921, Section 213(b)(11). Section 213(b)(11) — the precursor to § 107(1) — excluded from income "[t]he rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of his compensation." 42 Stat. 227, 239. Immediately before the enactment of Section 213(b)(11), the Treasury Department had allowed some employees — but not clergy — to exclude the value of employer-provided housing from income under the "convenience of the employer" doctrine.[7] *See*, above, pp. 5-6. In response, Congress enacted Section 213(b)(11). Ministers were thereby placed on an equal footing with other types of employees who were already enjoying the Treasury's recognition of an exclusion for housing provided for the employer's convenience. It also spared them the prospect of undergoing an intrusive inquiry regarding the church's convenience.

Ministers whose churches chose to furnish them with parsonages by way of providing cash allowances for that purpose sought to exclude the parsonage allowance under Section 213(b)(11). The Treasury determined that Section 213(b)(11) "applies only to cases where a parsonage is furnished to a minister and not to cases where an allowance is made to cover the cost of a parsonage." I.T. 1694. The Treasury advised, however, that such ministers could deduct their payments for the parsonage to the extent that the parsonage was used for "professional" rather than personal reasons.[8] *Id.*

Several courts, however, rejected the Treasury's determination and permitted ministers to exclude from income the value of parsonages furnished to them in cash as well as in kind. *See*, above, p. 7.

As the Eighth Circuit explained, when a church provides a minister a parsonage allowance in lieu of a parsonage, it was "manifestly for the convenience of the employer," and such housing should be excluded from income, whether furnished in cash or in kind. *Williamson*, 224 F.2d at 380.

In 1954, Congress codified those decisions by enacting § 107(2) as an additional exclusion to the existing one, which was redesignated as § 107(1). The statute as a whole leaves it to churches to determine how to provide parsonages — in cash or in kind — free from any influence from the tax laws. As the House and Senate Reports explained (using identical language), the rationale for the new provision was as follows:

- Under present law, the rental value of a home furnished a minister of the gospel as a 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 large salaries (which are taxable) to compensate them for expenses they incur in supplying their own home.

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. 1337, at 15 (emphasis added); S. Rep. No. 1622, at 16 (emphasis added). Congress had been alerted to the discrimination in existing law by officials from various religious denominations who complained that the existing "discriminatory" tax provision benefited some clergy and churches but not others. Hearings on Forty Topics Pertaining to the General Revision of the Internal Revenue Code at 1574-1575 (Aug. 1953) (Statement of Hon. Peter Mack). Section 107(2) was enacted "to equalize the disparate treatment among religious denominations." Legg, above, at 275.Those purposes of preventing discrimination and preserving neutrality were confirmed in 2002, when Congress amended § 107(2) to clarify that the exclusion is limited to the fair rental value of the parsonage. 116 Stat. 583. The bill introducing the proposed amendment explained that § 107 was designed to "accommodate the differing governance structures, practices, traditions, and other characteristics of churches through tax policies that strive to be neutral with respect to such differences." H.R. 4156, 107th Cong. § 2(a)(4). The bill further confirmed that § 107 was also intended to minimize "intrusive inquiries by the government" into a church's internal affairs by obviating the convenience-of-the-employer inquiry required by §§ 119 and 280A(c)(1). *Id*. at § 2(a)(3), (5).

b. The statute's history and context disclose the secular purpose of eliminating discrimination against, and among, ministers and of minimizing interference with a church's internal affairs Far from seeking to provide religion a *special* benefit, Congress enacted § 107(1) and its statutory predecessors to ensure that ministers received the *same* tax benefit that similarly situated secular employees had received pursuant to the convenience-of-the-employer doctrine (now codified in § 119). All employees — religious or lay — are entitled to exclude from gross income the value of "lodging furnished to him" by his "employer for the convenience of the employer." § 119. When the convenience-of-the-employer doctrine was initially developed, the Treasury applied it to many secular employees, but not to ministers. By allowing secular employees, but not ministers, to exclude employer-provided housing from income, the Treasury's 1921 ruling raised serious constitutional concerns. *E.g., McDaniel v. Paty*, 435 U.S. 618, 629 (1978) (determining that law permitting all persons, except for "ministers," to participate in political conventions violated the First Amendment). Congress quickly reacted to that ruling by enacting Section 213(b)(11) of the Revenue Act of 1921, the predecessor of § 107(1). Consequently, § 107(1) simply levels the playing field between ministers and other types of employees. It is manifestly constitutional.[9]After eliminating discrimination *against* ministers who were furnished housing in kind by their churches, Congress next eliminated discrimination *among* ministers. It addressed the

problem that some churches furnished parsonages by providing parsonages in kind, while others did so by providing cash for that purpose. Congress enacted § 107(2) to ensure that all ministers who were similarly situated were treated equally by the Government, tax-wise. Because § 107(2) has the permissible secular purpose of avoiding governmental discrimination among religions, it furthers one of the core purposes of the Establishment Clause. *See Larson v. Valente*, 456 U.S. 228, 246 (1982) (determining that law that applied to some, but not all, religions violated the Establishment Clause by running afoul of the "principle of denominational neutrality").

Moreover, by enacting § 107(2), Congress removed tax-related impediments to a church's decision whether to furnish a parsonage to its minister in cash or in kind, thereby avoiding interference in the church's internal affairs.*See* H.R. 4156, 107th Cong. § 2(a)(3) (observing that one purpose of § 107 is to "minimize government intrusion into internal church operations and the relationship between a church and its clergy"). "Under the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, 483 U.S. at 335. Section 107(2) allows each church to decide whether and how best to furnish a parsonage to its ministers.

Finally, § 107 also serves the secular purpose of avoiding problems of entanglement between church and state that could result from administering the convenience-of-the-employer doctrine where ministers are concerned. As Congress and the courts have recognized, the minister's home is used for the "convenience of the employer," whether the home is owned by the church or its minister. *Williamson*, 224 F.2d at 380; 148 Cong. Rec. 4671 (Apr. 16, 2002) (observing that § 107 recognizes "that a clergy person's home is not just shelter, but an essential meeting place for members of the congregation"). By providing an exclusion for housing provided by churches to ministers, regardless of the form in which it is furnished, § 107 avoids the intrusive convenience-o--the-employer inquiry required by § 119 (when taxpayers seek to exclude employer-provided housing) or § 280A(c)(1) (when taxpayers seek to deduct the cost of housing used in the employer's business). *See* H.R. 4156, 107th Cong. § 2(a)(5) (observing that one purpose of § 107 is to accommodate the fact that "clergy frequently are required to use their homes for purposes that would otherwise qualify for favorable tax treatment, but which may require more intrusive inquiries by the government into the relationship between clergy and their respective churches with respect to activities that are inherently religious"). Avoiding entanglement is a secular purpose. *See Amos*, 483 U.S. at 336.

c. The District Court ignored the statute's history and context In concluding that § 107(2) lacked a "secular purpose" (App31), the District Court ignored the statute's history and context, including Congress's articulation of its anti-discrimination purpose in the 1954 House and Senate reports quoted above. That primary purpose has been recognized by the courts and commentators. *E.g., Warnke*, 641 F. Supp. at 1087 (observing that § 107(2) was enacted "to eliminate discrimination"); 1 Mertens Law of Fed. Income Taxation § 7:196 n.71 (2013) (same). For purposes of the first prong of the *Lemon* test, the District Court should have deferred to Congress's articulation of its secular purpose, unless it determined that purpose to be a "sham."*McCreary County v. ACLU*, 545 U.S. 844, 865 (2005). The District Court did not — and could not — find that Congress's articulated purpose here was a "sham."The District Court's error in disregarding the secular purpose asserted by Congress is magnified by the fact that the law in question is a tax statute. The Supreme Court has emphasized that, even in Establishment Clause cases, "'[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes,'" and that courts must give "substantial deference" to a legislative "judgment" regarding a "tax" provision that is challenged under the Establishment Clause. *Mueller v. Allen*, 463 U.S. 388, 396 (1983) (citation omitted).

The District Court nevertheless opined that § 107(2) was intended "to assist disadvantaged churches and ministers" and held that doing so could not be considered a secular purpose when like benefits were withheld from secular organizations and employees. (App34.) In so holding, the court lost sight of the fact (i) that Congress created the exclusion for cash parsonage allowances to "remove[ ] the discrimination in existing law" *among* ministers, H.R. Rep. No. 1337, at 15; S. Rep. No. 1622, at 16, and (ii) that the original parsonage exclusion was intended to alleviate discrimination *against* ministers, who had not been accorded the favorable treatment extended to other, secular employees who had also been furnished lodging for the employer's convenience.[10]

There is no merit to the District Court's further suggestion (App32) that any concern about discrimination was unfounded because § 119 treats "secular" employees who purchase their own housing differently than secular employees who receive employer-provided housing. Treating secular employees differently does not raise First Amendment concerns, while treating churches and their ministers differently *does*. The "principle of denominational neutrality," which applies to legislation that may "effectively" distinguish between "well-established churches" that own parsonages and "churches which are new" that do not, *Larson*, 456 U.S. at 246 & n.23, has no parallel with regard to secular organizations and their employees.

By enacting § 107(2), Congress intended to lift the burden of discriminatory tax treatment that had been imposed on churches and ministers by allowing *all* ministers to exclude the value of the parsonage from income, no matter how each church chooses to provide that housing. In providing that equal treatment, the statute by no means "discriminates against those religions that do not *have* ministers," as the District Court protested. (App33.) If a religion has no ministers, then, *a fortiori*, there is no taxation of a minister's housing that needs to be accommodated.*See* Legg, above, at 292 (observing that "religions without clergy have no leaders needing the benefit of the exclusion"). Nor does § 107(2) create an "imbalance" between ministers who receive housing in kind and those who receive a housing allowance, as the court posited. (App33.) The fact that a minister who uses his housing allowance to buy a home may also benefit from the Code's deductions available to homeowners is not a consequence of § 107(2), but flows from the minister's independent decision to use the housing allowance to purchase, rather than rent, a home.

2. Section 107(2) does not have the primary effect of advancing or inhibiting religion

To determine whether a law has the primary effect of advancing or inhibiting religion, this Court considers whether "'irrespective of government's actual purpose,'" the "'practice under review in fact conveys a message of endorsement or disapproval.'" *Sherman*, 623 F.3d at 517 (citation omitted). A "reasonable observer" would not "view § 107(2) as an endorsement of religion," as the District Court assumed. (App37.) To the contrary, a reasonable observer, *i.e.*, one who is familiar with "'the text, legislative history, and implementation of the statute,'" *McCreary*, 545 U.S. at 862 (citation omitted), would understand that § 107(2) is a tax exemption, not a subsidy, and that it was designed not only to eliminate discrimination among religions, but also to further separate church and state.**a. Section 107 does not endorse religion, but merely minimizes governmental influence on, and entanglement with, a church's internal affairs**In ruling that § 107(2) lacked a secular effect, the District Court failed to appreciate that § 107(2) minimizes governmental interference with a church's internal affairs. The limited nature of the exclusion in § 107 — which applies only to ministers and not to all religious employees — confirms that its primary effect is not to advance religion, but to preserve the autonomy of churches. Section 107 preserves the "autonomy" of churches by permitting them to determine how best to furnish parsonages to their ministers (whether with cash or in kind) "under the ecclesiastical doctrine of each church," free of discriminatory tax laws and without any adverse tax consequences hinging on that determination. Legg, above, at 291. In this regard, the § 107 exclusion is similar to the "ministerial exception," or "internal-affairs doctrine," that the courts have applied to generally applicable employment laws. Like that doctrine, which minimizes governmental interference "in the internal management of

churches," *Schleicher*, 518 F.3d at 475, § 107 minimizes both governmental influence on a church's decision regarding how to furnish a parsonage, and governmental evaluation of church activities that take place in the parsonage.The effect of the § 107 exclusion must also be judged in the context of other housing-related exclusions and deductions provided in the Code. *See* Zelinsky, *The First Amendment & the Parsonage Allowance*, Tax Notes 5-8 (Dec. 2013) (critiquing District Court's opinion for analyzing "section 107 in isolation from other code provisions," and explaining how applying § 119 to religious employers creates church-state entanglement problems). Section 107 is "similar to other housing provisions in the Tax Code offered to workers who locate in a particular area for the convenience of their employers, and military personnel who receive a tax exclusion for their housing." 148 Cong. Rec. 4670 (Apr. 16, 2002). All taxpayers may exclude certain employer-provided housing from income. § 119. Likewise, all taxpayers may deduct the cost of their housing to the extent that it is used for their employer's business and convenience. § 280A(c)(1); I.T.1694. In addition, certain employees of the federal government are entitled to exclude their housing allowance without first demonstrating that the housing was being used for the employer's convenience. *See* § 134 (military members); § 912 (civil servants on foreign postings). Section 107 provides similar tax benefits to ministers, but does so in a way that avoids the intrusive inquiries implicit in the employer's convenience and business exigency requirements inherent in §§ 119, 162, and 280A(c)(1).

Ministers who are furnished parsonages in kind could rely on the Code's exclusion for housing furnished "for the convenience of the employer" that "the employee is required to accept . . . on the business premises of his employer as a condition of his employment." § 119. Similarly, ministers who receive parsonage allowances could rely on the Code's deduction for housing used for the employer's business and convenience. §§ 162, 280A(c)(1); I.T. 1694. Ministers' claims of the exclusion or deduction, as the case may be, would raise questions regarding the church's "convenience," the scope of the church's "business premises," and the terms of the minister's employment. It has been argued that the "blanket exclusion" under § 107 "does not 'prefer' religion but merely reduces the administrative burden of applying § 119 to clergymen." Bittker, *Churches, Taxes & the Constitution*, 78 Yale L. J. 1285, 1292 n.18 (1969);[11] *see* Legg, above, at 292 (explaining that § 107 prevents "entanglement" problems under § 280A(c)(1) by "avoid[ing] the need to have the IRS make case-by-case determinations of whether the parsonage was truly granted 'for the convenience of the employer' based on the church's ecclesiastical doctrine or instead granted as a form of compensation not directly for the benefit of the church"); Note, *The Parsonage Exclusion under the Endorsement Test*, 13 Va. Tax Rev. 397, 418-419 (1993) (comparing§ 107(2) to § 119). If it were necessary for such questions to be answered, it might "require[e] the Government to distinguish between 'secular' and 'religious' benefits or services, which may be 'fraught with the sort of entanglement that the Constitution forbids.'" *Hernandez v. Commissioner*, 490 U.S. 680, 697 (1989) (citation omitted). By obviating the resolution of such questions, § 107 has a salutary effect. Each prong of § 107 removes the potential for entanglement by eliminating the intrusive inquiries that could arise if ministers were forced to rely upon § 119 or § 280A(c)(1). The statute therefore has an indisputably secular effect.

b. Section 107(2) does not subsidize religion, as the District Court erroneously concluded Besides having a secular effect, § 107(2) does not provide government funding for any religious activity, but only a tax exemption for housing. The Supreme Court has made it clear that the "grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Walz*, 397 U.S. at 675. Indeed, observing the long history in the United States of exempting church property from taxation, the Court concluded that "[n]othing" in the "two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of

religious belief."*Id.* at 678.Ignoring the analysis of tax exemptions in *Walz*, the District Court instead based its decision on the proposition that "'[e]very tax exemption constitutes a subsidy.'" (App18 (quoting *Texas Monthly*, 489 U.S. at 14-15).) The court's reliance on this statement from *Texas Monthly* is misplaced. The quoted language, endorsed only by Justices Brennan, Marshall, and Stevens, did not overrule the majority opinion in *Walz*, where the Court held that a "tax exemption" is not a "subsidy," and does not advance religion because there "is no genuine nexus between tax exemption and establishment of religion." 397 U.S. at 675. The Supreme Court continues to recognize the ruling in*Walz* that, for "Establishment Clause" purposes, "there is a constitutionally significant difference between subsidies and tax exemptions." *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 590 (1997). In disregarding that critical difference, the District Court erred.

3. Section 107(2) does not produce excessive entanglement

Section 107 does not produce excessive entanglement with religion. Indeed, the District Court did not find otherwise. (App41.) To "constitute excessive entanglement, the government action must involve 'intrusive government participation in, supervision of, or inquiry into religious affairs.'" *Vision Church v. Village of Long Grove*, 468 F.3d 975, 995 (7th Cir. 2006) (citation omitted). As a tax exemption, § 107(2) does not raise this concern. As the Court noted in *Walz,* a tax "exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches." 397 U.S. at 676.Moreover, by adapting the tax benefits generally available to taxpayers in §§ 119 and 280A(c)(1) to the unique circumstances of ministers, § 107 prevents the entanglement that would ensue if the tax benefit were contingent on whether the minister acts for the "convenience of the employer" in using his home. By making such scrutiny unnecessary, the exclusion provided in § 107(2) avoids entanglement and promotes the statute's secular purposes.

Because § 107(2) satisfies each part of the *Lemon* test, it does not violate the Establishment Clause. For the same reasons, § 107(2) does not violate the Equal Protection component of the Fifth Amendment's Due Process Clause, an issue raised by plaintiffs but not reached by the District Court (App2). *See Amos*, 483 U.S. at 338-339 & n.16 (rejecting equal-protection claim for the same reasons that the Court rejected Establishment Clause claim).

4. *Texas Monthly* is not controlling because it is distinguishable in crucial respects

In concluding that § 107(2) violates the Establishment Clause, the District Court relied almost solely on the *Texas Monthly* plurality opinion. (App19.) Far from being "control[ling]" (*id.*), *Texas Monthly* is readily distinguishable.First, in contrast to the situation in *Texas Monthly*, where only religious publications could avoid the tax on periodical sales, here, all taxpayers are permitted to exclude, or deduct, the costs of housing provided by the employer for its convenience (§ 119) or by the employee for the employer's convenience (§ 280A(c)(1)). Section 107 provides tax benefits similar to those provided in §§ 119 and 280A(c)(1), but tailors the benefit to avoid entanglement with the church-minister relationship. Section 107's "exclusions are similar to the property tax exemption at issue in *Walz*because the exclusions flow to ministers as a part of a larger congressional policy of not taxing qualifying employer-provided housing." Legg, above, at 288. And "[u]nlike *Texas Monthly*'s narrowly tailored religious publication exemption, the parsonage exclusions in § 107 are part of a larger scheme that more closely aligns with the employer discrimination exception at issue in *Amos*." *Id.* at 290. When § 107(2) is examined as merely one component of a larger, integrated tax code, Congress has by no means provided a tax benefit to religious organizations and "no one else" (App2), as occurred in *Texas Monthly*.

Second, unlike § 107(2), which has a long history and effect of eliminating discrimination and minimizing entanglement between church and state, the religion-specific exemption in *Texas Monthly* lacked *any* secular purpose or effect. An objective observer could only conclude that the government was endorsing the subject of the tax exemption — the promotion of a religious message.

Here, in sharp contrast, by eliminating discrimination and entanglement problems, § 107(2) would be understood by an objective observer to "alleviate a special burden on religious exercise." (App2.)

Finally, § 107(2) does not require the Government to determine whether "some message or activity is consistent with 'the teaching of the faith,'" as was true in *Texas Monthly*, 489 U.S. at 20. To the contrary, it precludes such questions from arising by eliminating inquiries into the extent to which the minister's home is used for religious rather than secular purposes.

CONCLUSION

The judgment of the District Court, as it relates to § 107(2), should be vacated, and the case remanded with instructions to dismiss for lack of jurisdiction. Alternatively, that aspect of the judgment should be reversed.

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FOOTNOTES

[1] "Doc" references are the documents in the original record, as numbered by the Clerk of the District Court. "A" and "App" references are to appellants' separately bound record appendix and the appendix bound with this brief, respectively. Unless otherwise indicated, all " § " references are to the Internal Revenue Code, as currently in effect. Pertinent statutes are set forth in the Statutory Addendum.[2] Although § 107 "is phrased in Christian terms" to apply to a "minister of the gospel," "Congress did not intend to exclude those persons who are the equivalent of 'ministers' in other religions." *Salkov v. Commissioner*, 46 T.C. 190, 194 apply to a "minister of the (1966) (holding that a Jewish cantor was a "minister of the gospel"). The Commissioner interprets "religion" to include "beliefs (for example, Taoism, Buddhism, and Secular Humanism) that do not posit the existence of a Supreme Being." Internal Revenue Manual § 7.25.3.6.5(2) (Feb. 23, 1999). Moreover, the employer need not be a church or religious organization, as long as the minister is compensated for ministerial services. Treas. Reg. § 1.1402(c)-5(c)(2) (26 C.F.R.).

[3] Although Gaylor and Barker also alleged that they were "federal taxpayers," they did not attempt to maintain suit as taxpayers under *Flast v. Cohen*, 392 U.S. 83 (1968). (A5.) In a previous attempt to invalidate § 107 brought by FFRF and others, the district court held that the plaintiffs had standing as taxpayers to sue under the Establishment Clause. *FFRF v. Geithner*, 715 F. Supp. 2d 1051, 1059-1061 (E.D. Cal. 2010). But after the Supreme Court held that taxpayers lacked standing to challenge tax benefits under the Establishment Clause unless they personally have "been denied a benefit on account of their religion," *Ariz. Christian School Tuition Org. v. Winn*, 131 S. Ct. 1436, 1440 (2011), the parties stipulated to dismissal without prejudice. (A29-30.)

[4] Because FFRF alleges no injury to itself, its standing depends on that of its members, the individual plaintiffs. The District Court recognized as much. (A4.)

[5] The Fifth Circuit framed its decision in terms of prudential standing. It nevertheless observed that its prudential concerns about allowing the plaintiffs to litigate "generalized grievances" outside the normal channels of litigating their own tax liabilities were "closely related to the constitutional requirement of personal 'injury in fact,' and the policies underlying both are similar." 987 F.2d at 1176. Decisions such as *Allen* and *Heckler* confirm that the matter likewise affects constitutional standing in the first instance. As the Supreme Court recently opined, "generalized grievances" do not pass muster under Article III. *Lexmark*, 2014 WL 1168967, at *6 n.3.

[6] To be sure, a taxpayer may be liable for a penalty for making a "frivolous" submission to the IRS. § 6702. The accuracy-related penalty under § 6662 with which the court was apparently concerned (A9), however, applies only to underpayments, § 6662(a), not to refund claims, and even then only to positions taken without reasonable cause and good faith, § 6664(c)(1).

[7] The convenience-of-the-employer rationale for excluding housing furnished in kind was at first recognized only in Treasury rulings and regulations, but was ultimately codified by Congress in 1954 as § 119. *See Kowalski*, 434 U.S. 77.

[8] Prior to 1976, the costs associated with the business use of the taxpayer's residence were deductible on the same terms as any other "ordinary and necessary" business expense. *E.g.*, Revenue Act of 1921, § 214(a)(1); § 162. In 1976, however, Congress enacted § 280A, which must be satisfied, in addition to § 162, in order to deduct such expenses. Section 280A(c)(1) requires the residence to be used "for the convenience of [the] employer," just as the employer-furnished housing must be so used in order to qualify for the coordinate exclusion under § 119.

[9] Due to plaintiffs' uncontested lack of standing, § 107(1) is not even challenged here.

[10] Moreover, whether any particular legislator might actually have wished to grant a particular

advantage to churches would not have undermined Congress's legitimate anti-discrimination purpose. *See Sherman v. Koch*, 623 F.3d 501, 510 (7th Cir. 2010) (observing that "'what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law'") (citation omitted).

[11] Although Professor Bittker adverted only to § 119 at this point, the same logic would also apply to claims of deductions for the minister's use of the home for church business under § 280A(c)(1), which is likewise infused with the convenience-of-the-employer doctrine.

END OF FOOTNOTES

Citations: Freedom From Religion Foundation Inc. et al. v. Jacob J. Lew et al.; No. 14-1152