Appeal No. 18-1277

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ANNIE L. GAYLOR, ET AL.,
Plaintiffs - Appellees

v.

STEVEN T. MNUCHIN, ET AL.,
Defendants - Appellants,

and

EDWARD PEECHER, ET AL.,
Intervening Defendants - Appellants

On Appeal from the Judgment and Order of the
United States District Court for the Western District of Wisconsin
Case No. 16-cv-215 (Honorable Barbara B. Crabb)

AMICUS CURIAE BRIEF OF ALLIANCE DEFENDING FREEDOM ON BEHALF OF _____ CHURCHES IN SUPPORT OF APPELLANTS AND REVERSAL OF THE DISTRICT COURT'S JUDGMENT

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RULE 26.1 DISCLOSURE STATEMENT

(1) The full name of every party that the attorney represents in the case:

Alliance Defending Freedom

(2) The names of all law firms whose partners or associates have appeared for the party in the in this case or are expected to appear:

Alliance Defending Freedom

Mauck & Baker, LLC

(3) Identify any parent corporations and list any publicly held company that owns 10% or more of amicus' stock:

None.

Dated: April __, 2018

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Alliance Defending Freedom (ADF) is an alliance-building, non-profit legal organization that advocates for the right of people to freely live out their faith. ADF files this brief on behalf of [number] churches and pastors nationwide who rely on the ministerial housing allowance exemption provided for under 26 U.S.C. § 107(2).[2] The [number] churches and pastors represented by this brief come from [number] different states. They represent a broad spectrum of the faith community, with denominational backgrounds including Assemblies of God, Baptist, Catholic, Episcopal, Lutheran, Methodist, Nazarene, and Presbyterian, as well as many independent, nondenominational churches. They also represent varied cultural and ethnic backgrounds and vary in size, ranging from a few congregants to large churches of thousands. Despite their varied backgrounds and faith traditions, each member of this broad coalition of churches and pastors relies upon the ministerial housing allowance and will be directly harmed should the exemption be struck down. A complete list of churches represented by this brief is attached as Exhibit A.

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[1] All parties have consented to the filing of this *amicus* brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution for it.

[2] *Amicus curiae* conferred with other *amici* before filing this brief to ensure that the perspective provided herein is unique and helpful to the Court in resolving this case.

ARGUMENT

Under 26 U.S.C. § 107(2), a "minister of the gospel" who does not live in a church-owned parsonage may exclude from his gross income a "rental allowance paid to him as part of his compensation" for housing.[3] The exemption, which has existed for over 50 years, does not transfer public monies to ministers or houses of worship, nor does it result in any administrative or financial relationship between the government and religion. Section 107(2) thus is a permissible accommodation of religion consistent with our Nation's longstanding practice of exempting churches and other religious organizations from government-imposed tax burdens.

The district court's conclusion to the contrary—that the ministerial housing allowance exemption alleviates no burdens and is nothing other than religious favoritism in violation of the Establishment Clause—is wrong for several reasons. First, the premise underlying the conclusion lacks support and defies common sense: the exemption plainly alleviates a burden on religious exercise, especially for those ministers and houses of worship of poorer, less-established religious groups. Second, even if the burden may be surmountable for some, the exemption serves other legitimate purposes—namely, ensuring the government treats all religious groups equally and avoids excessive entanglement with religion. Finally, in view of historical practices and understandings, the ministerial housing allowance exemption poses no real threat of a government-established religion.

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[3] The Internal Revenue Service has interpreted "minister of the gospel" broadly to include the commensurate religious leaders of all of the various faith groups in America. *See* Rev. Rul. 78-301, 1978-2 C.B. 103.

I. The ministerial housing allowance exemption alleviates a government-imposed burden on religious exercise and thus is a permissible accommodation of religion.

Section 107(2) relieves real burdens, and eliminating the exemption would have serious and immediate consequences for ministers and churches of all stripes. As the district court noted, while parsonages were "once ubiquitous," one study estimates that "87 percent of ministers now receive a cash allowance for housing." *Gaylor v. Mnuchin*, 278 F. Supp. 3d 1081, 1095 (W.D. Wis. 2017). Because taxing those payments would result in "significant governmental interference" with religious exercise, *id.* at 1102, Congress acted properly in granting an exemption. The district court's ruling should be overturned on that ground alone.

Notably, the district court refused to consider "the potential financial impact that the loss of a tax exemption might have on some ministers" in assessing the constitutionality of § 107(2). *Id.* at 1101. It is no wonder, then, that the district court's ruling concludes § 107(2) "could not be justified as a mere 'accommodation of religion.'" *Id.* at 1091. Nor does *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378 (1990), support its assertion that a generally applicable tax can never burden religious exercise. *See Gaylor*, 278 F. Supp. 3d at 1101–02. To the contrary, the Court there specifically noted that a generally applicable tax can "effectively choke off an adherent's religious practices." *Jimmy Swaggart Ministries*, 493 U.S. at 392.

That § 107(2) alleviates a burden on religious exercise for ministers and houses of worship cannot be seriously questioned. For example, according to one survey, the vast majority of churches have less than 200 people in weekly attendance, and

more than 60 percent of solo pastors lead a church with an average weekly attendance of 100 or less.[4] Without the exemption, many ministers would face tremendous financial pressure to forego their religious calling and pursue a full-time, secular job to earn higher pay. The pressure would be especially acute for part-time solo pastors, as the same survey shows that their median base salary is $14,400 and their median housing allowance is $12,000.[5] Furthermore, nearly all full-time solo pastors serve in churches with an annual income of $500,000 or less,[6] meaning that in many cases Section 107(2) makes it possible for houses of worship to hire the ministers needed to serve their congregations and communities and fulfill their religious mission. Simply put, religious exercise would be significantly curtailed—and even cease to exist entirely for some smaller, less-established religious groups—if the exemption is struck down as unconstitutional and another tax burden imposed.

To be sure, the religious exercise of large, wealthier houses of worship may not be as substantially affected if the Court eliminates the exemption. Some houses of worship may be able to increase their ministers' compensation and absorb the resulting financial blow. But finances must still be raised and used for this purpose rather than for ministry, and a burden on religion exists in either instance. Moreover, a religious exemption need not alleviate every burden in every instance

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[4] Matt Branaugh & Emily Lund, *A Closer Look at the Housing Allowance*, CHURCH LAW & TAX, Mar. 13, 2018, http://www.churchlawandtax.com/blog/2018/march/closer-look-at-housing-allowance.html.

[5] *Id.*

[6] *Id.*

to be constitutional. It is enough that § 107(2) relieves a burden on religious exercise for at least some ministers and houses of worship. *See World Outreach Conference Ctr. v. City of Chicago*, 591 F.3d 531, 539 (7th Cir. 2009) ("[W]hether a given burden is substantial depends on its magnitude in relation to the needs and resources of the religious organization in question.").[7]

Far from establishing a religion, § 107(2) simply removes a government-imposed burden on religious exercise. Congress properly recognized that the "power to tax" involves the "power to destroy," *McCulloch v. Maryland*, 17 U.S. 316, 391 (1819), and opted to accommodate religion instead of taxing it. That decision is a commendable and constitutionally permissible one. Government, after all, does not "establish religion by leaving it alone." Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Rights to Church Autonomy*, 81 Colum. L. Rev. 1373, 1416 (1981). In fact, when the government must choose between taxing or exempting religion, providing an exemption often is the least-entangling and most-neutral choice.

II. Alleviating a burden on the free exercise of religion is just one of many considerations justifying the ministerial housing allowance exemption.

At bottom, the district court's ruling assumes that a religious exemption equals impermissible religious favoritism if it extends to situations not involving a burden

[7] Establishing a tax framework that benefits only churches that own a parsonage would magnify the burdensome inequality that smaller, less affluent churches already face. This burden would increase exponentially if § 107(2) were eliminated because thousands of smaller churches and ministers have relied on the housing allowance exemption now for decades.

on religious exercise. The assumption is both incorrect and dangerous. First, the exemption here does alleviate a burden on religion in all instances, even if those burdens differ in scope. Second, the district court's ruling goes too far to suggest that § 107(2) violates the Establishment Clause if it is not "required by the free exercise clause." *Gaylor*, 278 F. Supp. 3d at 1100. The First Amendment is not so rigid.

Indeed, the Supreme Court has made clear that "[t]he limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 673 (1970). And the Court has a long history of rejecting Establishment Clause challenges to broad discretionary religious exemptions like the one at issue here. For example, the Court has upheld the constitutionality of:

- Exemptions from the draft during World War I pertaining to clergy, seminarians, and pacifists. *Arver v. United States*, 245 U.S. 366, 376 (1918);
- A law allowing students to leave their public schools to receive religious education. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952);
- A municipal property tax ordinance exempting religious nonprofit organizations. *Walz*, 397 U.S. at 673 (1970);
- A religious exemption from the military draft for those opposed to all wars. *Gillette v. United States*, 401 U.S. 437, 448–60 (1971);

- A religious exemption from federal employment discrimination laws. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); and
- A section of the Religious Land Use and Institutionalized Persons Act that increased the level of protection of prisoners' and other incarcerated persons' religious rights. *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005).

In so doing, the Supreme Court considered (and rejected) many of the same arguments relied upon by the district court here. In *Amos*, for example, the Court held that the government may exempt secular nonprofit activities of religious organizations from a prohibition on religious discrimination in employment, finding "unpersuasive" the lower court's argument that the exemption impermissibly "singles out religious entities for a benefit." 438 U.S. at 338. The Court noted that it had "never indicated that statutes that give special consideration to religious groups are *per se* invalid," explaining that such an approach "would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause." *Id.* Even though the exemption would inevitably protect some secular activity unrelated to the exercise of religion, the Court held that it did not have to be "packaged with benefits to secular entities" to pass constitutional muster where the "government act[ed] with the proper purpose of lifting a regulation that burdens the exercise of religion." *Id.*

Moreover, while some religious exemptions may focus solely on guaranteeing the free exercise of religion, the Supreme Court has routinely upheld the

constitutionality of exemptions that do not. That is because religious exemptions often have more than one legitimate aim or purpose, and there are indeed other reasons—besides alleviating burdens on religious exercise—warranting them. Two are particularly relevant here: (1) ensuring government neutrality and equal treatment of all religious groups; and (2) protecting against excessive governmental entanglement with religion.

First, enacting a broad religious exemption is permissible—and often required—to ensure that the government is treating all religious groups and denominations equally. Indeed, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Section 107(2) plainly serves this important interest. Under § 107(1), a minister may exclude from his income "the rental value of a home furnished to him as part of his compensation." But not every house of worship owns a home or parsonage for its ministers. Some cannot afford one; others choose not to own one for doctrinal or theological reasons. Regardless of the reasons for the disparity, Congress enacted § 107(2) to "eliminate discrimination between ministers who lived in parsonages and ministers who received a housing allowance." *Gaylor*, 278 F. Supp. 3d at 1096; *see also* H.R. Rep. No. 1337, at 15, available at U.S. Code Congressional Administrative News, 83rd Congress, Second Session, at 4040 (1954).[8]

[8] If left to stand alone, § 107(1) and the potential benefit it confers to religious groups that believe parsonages to be acceptable as a theological matter could effectively result in the government impermissibly "lend[ing] its power to one or the other side in controversies over religious authority or dogma." *Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S.

Religious exemptions also are justified when they seek to guard against government entanglement with religion. In *Walz*, for example, the Supreme Court highlighted the government's interest in avoiding entanglement when it upheld the constitutionality of a religious property tax exemption. The Court there explained that the tax exemption properly respected "the autonomy and freedom of religious bodies," "restrict[ed] the fiscal relationship between church and state," and "tend[ed] to complement and reinforce the desired separation insulating each from the other." *Walz*, 397 U.S. at 672, 676.

The Court's ruling in *Hosanna Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012), is also instructive. In that case, the Court upheld the "ministerial exception" to employment discrimination laws, holding that the Religion Clauses of the First Amendment precluded the application of such laws to claims involving the employment relationship between religious institutions and their ministers. While the Court noted that imposing an unwanted minister infringes the Free Exercise Clause, it also held that doing so violates the Establishment Clause because it interferes "with an internal church decision." *Id.* at 190. The Court thus made clear that the ministerial exception applies regardless of whether the minister was fired for religious or secular reasons. *Id.* at 194–95.

Here, a legitimate aim of the ministerial housing allowance exemption is to avoid government entanglement with religion. Indeed, if the exemption did not exist, many ministers would be forced to avail themselves of similar secular

872, 877 (1990). Section 107(2) thus is also warranted to prevent Congress from taking sides—real or perceived—in a religious controversy.

exemptions—most notably, 26 U.S.C. §§ 119 and 280A. Those exemptions allow employees to exclude from their gross income the value of lodging furnished by or on behalf of their employer "for the convenience of the employer" (§ 119), and to deduct housing expenses from their taxes if the home or a portion of it is "exclusively used on a regular basis" for business purposes (§ 280A(c)(1)). Because applying those exemptions would involve intrusive inquiries raising serious entanglement concerns, granting a blanket exemption for all religious ministers is permissible under the Establishment Clause. *Cf. Walz*, 397 U.S. at 698–99 (Harlan, J., concurring) ("Obviously the more discriminating and complicated the basis of classification for an exemption—even a neutral one—the greater potential for state involvement in evaluating the character of the organizations.").

When it comes to taxation, some degree of entanglement is inevitable. *Id.* at 692 (explaining that whether "[g]overnment grants or withholds" religious exemptions, "it is going to be involved with religion"). By enacting § 107(2), Congress opted for a broad religious exemption and removal of a government-imposed tax burden for ministers of all faiths. This is laudable, especially because "[g]overnments have not always been tolerant of religious activity, and hostility toward religion has taken many shapes and forms—economic, political, and sometimes harshly oppressive." *Id.* at 673. Instead of demonstrating religious favoritism, exemptions like § 107(2) "historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of … taxes" and "constitute[ ] a reasonable and balanced attempt to guard against those dangers." *Id.*; *see also* Edward A.

Zelinsky, *The First Amendment and the Parsonage Allowance* (January 27, 2014), Tax Notes, Vol. 142, No. 4, January 27, 2014. *available at* http://ssrn.com/abstract=2394132 (last visited April __, 2018).

III. In light of the long history of tax exemptions for religion, the housing allowance available to religious leaders of numerous and diverse faith groups does not constitute a real threat of government-established religion.

Early in its Establishment Clause jurisprudence, the Supreme Court held that "the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 308 (1963). Since then, the Supreme Court has reiterated that the line between real threat and mere shadow is not a matter of unbridled judicial discretion but rather must be drawn "by reference to historical practices and understandings." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (quoting *County of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989)) (internal quotations omitted). Any test therefore "must acknowledge a practice that was accepted by the Framers and has withstood critical scrutiny of time and political change." *Id.* Any other approach would risk creating an unmoored and inconsistent standard susceptible to political and cultural shifts about religion in America.

Here, the district court's proffered rule—that the government may not uniquely remove a government-imposed burden on religious persons—is simply at odds with historical practices that the Supreme Court has already blessed as constitutionally sound. Indeed, if broadly adopted, such a rigid rule would conflict with Supreme

Court decisions upholding various historical practices that accommodate, exempt, and even favor religious exercise. *See supra* pp. 5–6. These numerous historical practices are not indicative of a discriminatory intent but rather reflect the People's desire to promote the freedom *of* religion, not the freedom *from* religion. In fact, the "text of the First Amendment itself" offers religious organizations and persons "special solicitude" not otherwise afforded nonreligious organizations and persons. *Hosanna-Tabor*, 565 U.S. at 189. This is a feature rather than flaw of the Constitution, for while some governments were designed to exclude religion from public life, *see, e.g.*, *Constitution de la République française*, art. 1, the Founding Fathers adopted a constitution that accommodates religious exercise and anchors "the unalienable rights of man" in God. *Abington Twp.*, 374 U.S. at 213.

CONCLUSION

The district court's ruling overlooks the important difference between affirmatively assisting religious organizations and persons and lifting government-imposed burdens. The former presents a risk of establishment, the latter generally does not.[9] The legislative decision to relieve religious leaders of all faiths from the burden of income taxation via a housing allowance poses no real threat of a government-established religion. Section 107(2) has existed for over half a century,

[9] Religious exemptions are not fairly characterized as a direct subsidy because the "government does not transfer part of its revenue to churches." *Walz*, 397 U.S. at 674–76. As the Supreme Court has recognized, money that never passed into the government's coffers is money that never belonged to the government. *See Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 143–44 (2011) (rejecting argument that "income should be treated as if it were government property even if it has not come into the tax collector's hands").

and we are no closer to government-established religion than when the exemption was first enacted. For the foregoing reasons, *amicus curiae* respectfully urges this Court to reverse the district court's opinion and affirm the constitutionality of the minister's housing allowance under 26 U.S.C. § 107(2).

Respectfully submitted this __ day of April 2018,

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No. 18-1277

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(G)(1)

The undersigned counsel of record for *amicus curiae* hereby certifies that this brief conforms to the rules contained in F.R.A.P. Rule 32(g)(1) for a brief produced with a proportionally spaced font. The length of this brief as counted by the word-processing system used to prepare this brief is ____ words.

Dated: April __, 2018

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that on April __, 2018, he caused the foregoing *Amicus Curiae* Brief of Alliance Defending Freedom to be filed with the Seventh Circuit Court of Appeals electronic filing system, which electronically served notification and copies of such filing upon all attorneys who have appeared and are of record.

Dated: April __, 2018

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