

No. 00-71217

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RICHARD D. and ELIZABETH K. WARREN,
Petitioners-Appellees,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellant.

On Appeal from the Decision
of the United States Tax Court

**BRIEF *AMICUS CURIAE* OF THE
BECKET FUND FOR RELIGIOUS LIBERTY
IN SUPPORT OF AFFIRMANCE**

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admission pending)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* states that it does not have a parent corporation or issue any stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTEREST OF THE <i>AMICUS</i>	1
ARGUMENT	2
I. I.R.C. § 107(2) IS AN EXAMPLE OF ACCOMMODATION OF PRIVATE RELIGIOUS PRACTICE FOR WHICH THE ESTABLISHMENT CLAUSE LEAVES “AMPLE ROOM.”	3
II. IRC § 107(2)’S ACCOMMODATION OF RELIGIOUS EXERCISE AND PROMOTION OF OTHER SECULAR OBJECTIVES DOES NOT ESTABLISH RELIGION AND SHOULD BE UPHELD.	12
A. I.R.C. § 107(2) Has a Secular Purpose.	12
1. Section 107 effectuates Congress’ general policy goal of excluding from income housing for the convenience of the employer.	14
2. Section 107 reduces church-state entanglement.	16
3. Section 107 promotes equal treatment among religions and avoids impermissible sect-preferences.	19
B. I.R.C. § 107(2)’s Principal Effect Does Not Advance Religion.	21
CONCLUSION.....	23

TABLE OF AUTHORITIES

Cases

<i>Adams v. C.I.R.</i> , 170 F.3d 173 (3d Cir. 1999)	10
<i>Agostini v. Felton</i> , 521 U.S. 203 (1997)	12
<i>Alamo v. Clay</i> , 137 F.3d 1366 (D.C. Cir. 1998)	10
<i>Barghout v. Bureau of Kosher Meat & Food Control</i> , 66 F.3d 1337 (4th Cir. 1995)	12, 13
<i>Benaglia v. Commissioner</i> , 38 B.T.A. 838 (1937)	14
<i>Board of Educ. of Kiryas Joel v. Grumet</i> , 512 U.S. 687 (1994).....	3
<i>Board of Educ. Of the Westside Community Schools v. Mergens</i> , 496 U.S. 226 (1990).....	14
<i>Caratan v. Commissioner</i> , 442 F.2d 606 (9 th Cir. 1971)	14, 15
<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997)	10
<i>Cohen v. City of Des Plaines</i> , 8 F.3d 484 (7 th Cir. 1993)	17
<i>Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos</i> , 483 U.S. 327 (1987)	4, 5, 12, 17, 22
<i>E.E.O.C. v. Catholic Univ. of America</i> , 83 F.3d 455 (D.C.Cir. 1996)	11
<i>Employment Division v. Smith</i> , 494 U.S. 872 (1990)	1, 5, 6, 7, 8
<i>Epperson v. Arkansas</i> , 393 U.S. 97 (1968).....	20
<i>Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church</i> , 846 F.2d 260 (4 th Cir. 1988).....	17
<i>Flores v. City of Boerne</i> , 73 F.3d 1352 (5th Cir. 1996), <i>overruled on other grounds</i> , 521 U.S. 507 (1997)	11
<i>Gillette v. United States</i> , 401 U.S. 437 (1971)	4
<i>Goldman v. Weinberger</i> , 475 U.S. 503 (1986)	9
<i>In re Young</i> , 141 F.3d 854 (8 th Cir. 1998).....	11
<i>Khalsa v. Weinberger</i> , 779 F.2d 1393 (9th Cir. 1985)	9
<i>Larson v. Valente</i> , 456 U.S. 228 (1982)	20
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971)	12, 22
<i>Lynch v. Donnelly</i> , 465 U.S. 668 (1984)	13
<i>Lyng v. Northwest Indian Cemetery Protective Association</i> , 435 U.S. 439 (1988).....	7
<i>Mockaitis v. Harclerod</i> , 104 F.3d 1522 (9 th Cir. 1997)	11, 18
<i>M'Culloch v. Maryland</i> , 4 Wheat. 416 (1819)	2
<i>Mueller v. Allen</i> , 463 U.S. 388 (1983).....	11, 13
<i>Olsen v. D.E.A.</i> , 878 F.2d 1458 (D.C. Cir. 1989)	8
<i>Peyote Way Church of God v. Meese</i> , 698 F. Supp. 1342 (N.D. Tex. 1988)	8
<i>Sasnett v. Sullivan</i> , 91 F.3d 1018 (7 th Cir. 1996)	11

<i>School District of Abington Township v. Schempp</i> , 374 U.S. 203 (1963).....	9, 10
<i>Selective Draft Cases</i> , 245 U.S. 366 (1918)	4
<i>Tennant v. Smith</i> , H.L. 1892 Appeals Cases 150.....	14
<i>Texas Monthly v. Bullock</i> , 489 U.S. 1 (1989).....	6, 7, 9, 18
<i>U.S. v. Carlson</i> , 959 F.2d 242 (9 th Cir. 1992).....	8
<i>U.S. v. Warner</i> , 595 F. Supp. 595 (D.N.D. 1984).....	8
<i>Wallace v. Jaffree</i> , 472 U.S. 38 (1985).....	13
<i>Walz v. Tax Comm. of the City of New York</i> , 397 U.S. 664 (1970).....	5, 6, 16, 17, 22, 23
<i>Zorach v. Clauson</i> , 343 U.S. 306 (1952)	2, 3

Statutes

I.R.C. § 107	<i>passim</i>
I.R.C. § 119	<i>passim</i>
I.R.C. § 134	18
I.R.C. § 911	18
10 U.S.C. § 774.....	9
Or. Rev. Stat. § 475.992(5).....	8
T.D. 2992, 2 C.B. 76 (1920).	14

Other Authorities

<i>Department of the Interior and Related Agencies Appropriations Bill</i> , 1989, H.R. Rep. No. 713, 100th Cong., 2d Sess. 72 (1988).....	8
Michael McConnell, <i>The Origins and Historical Understanding of Free Exercise of Religion</i> , 103 HARV. L. REV. 1409 (1990).....	3, 4

INTEREST OF THE *AMICUS*

Amicus respectfully submits this brief in support of the constitutionality of I.R.C. § 107(2). The Becket Fund for Religious Liberty is an interfaith, nonpartisan public interest law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund litigates in support of these principles in state and federal courts throughout the United States, both as *amicus curiae* and as primary counsel, representing a diverse range of religious traditions that has included Christians, Jews, Muslims, Sikhs, Native Americans and Buddhists.

The Becket Fund believes that government accommodation of private religious practice is not only permissible under the Establishment Clause, but is in our best traditions of pluralism and respect for religious freedom. This case has broad implications for the extent to which the government can accommodate private religious practice. In *Employment Div. v. Smith*, 494 U.S. 872 (1990), the Supreme Court cut back on the ability of courts to provide Free Exercise Clause exemptions to general laws, but at the same time emphasized the important role that legislatures play in protecting religious freedom values by crafting religious exemptions to statutes. This legislative function is particularly important in the area of tax exemptions, as the “power to tax involves the power to destroy.” *M'Culloch v. Maryland*, 4

Wheat. 416, 431 (1819). *Amicus* believes this brief adds a perspective that is not duplicated by the parties.

ARGUMENT

Congress is empowered to accommodate religious exercise to the extent that its enumerated powers permit it, so long as such accommodation does not violate the Establishment Clause. The Supreme Court has long held that when the government accommodates the private religious practices of its citizens, it “follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.” *Zorach v. Clauston*, 343 U.S. 306, 314 (1952). Indeed, the Supreme Court has increasingly emphasized the importance of legislative accommodations of religion, rather than an expansive judicial construction of the Free Exercise Clause, in protecting the fundamental values of religious pluralism and freedom. Given a history of statutory accommodations dating back to the founding, and the Supreme Court’s approval and sanction of such accommodations, I.R.C. § 107(2) is clearly consistent with the Establishment Clause.

I. I.R.C. § 107(2) IS AN EXAMPLE OF ACCOMMODATION OF PRIVATE RELIGIOUS PRACTICE FOR WHICH THE ESTABLISHMENT CLAUSE LEAVES “AMPLE ROOM.”

The Supreme Court has long held that when the government accommodates the private religious practices of its citizens, it “follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.” *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (upholding school board’s policy under which students were released from class early so they could attend religious instruction classes off school grounds). At the time of this Nation’s Founding, legislative religious exemptions were made to a wide variety of statutes. Religious exemptions from military conscription were made by the Continental Congress during the Revolutionary War, and this practice was continued by Congress after the Constitution’s ratification. *See Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 723 (1994) (Kennedy, J., concurring). Various colonies excused Quakers from swearing oaths as early as the Seventeenth Century, and by 1789 “virtually all of the states had enacted oath exemptions.” Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1468 (1990). Similarly, religious exemptions were made to the requirement that persons remove their hats while in court, *id.* at 1471-72,

among others. *Id.* at 1467-74.¹

More recently, the government’s ability under the Establishment Clause to “follow[] the best of our traditions” and accommodate private religious activities was affirmed in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338 (1987), in which the Court held that “there is ample room for accommodation of religion under the Establishment Clause.” The Court in *Amos* unanimously upheld Title VII’s exemption permitting religious organizations to make employment decisions on the basis of religion—an act forbidden by Title VII to all other employers. The Court observed that it “has long recognized that the government may (and sometimes must) accommodate religious practice and that it may do so without violating the Establishment Clause.” *Id.* at 334. The Court recognized that legislatures have an important role in accommodating private religious activity, stressing that there is no *per se* rule against “giv[ing] special consideration to religious groups” through legislative accommodations, *id.* at 338, and that “the limits of permissible state accommodation to religion are by no means coextensive

¹ See, e.g., *Selective Draft Cases*, 245 U.S. 366, 389-90 (1918) (upholding Congress’ grant of religious exemption from military conscription); *Gillette v. United States*, 401 U.S. 437 (1971) (same). See also McConnell, *Origins*, *supra* at 1420 (noting that Congress exempted sacramental wine from Prohibition).

with the noninterference mandated by the Free Exercise Clause.” *Id.* at 334 (quoting *Walz v. Tax Comm-r of the City of New York*, 397 U.S. 664, 673 (1970)).

Three years after *Amos*, the Court again emphasized and clarified the special role of the legislature as accommodator and protector of individuals’ religious liberty. See *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990). In *Smith*, the Court held that the Free Exercise Clause does not, by itself, provide citizens with a religious exemption from generally applicable criminal laws. This, the Court was careful to note, did not mean that the freedom to engage in a religious activity like sacramental peyote use was not a freedom contemplated by the Free Exercise Clause, nor one which the legislature may not act to accommodate. Instead, the Court in *Smith* expressly affirmed that ordinarily the legislature, rather than the courts, possesses the right under our system of separation of powers to craft religious exemptions to generally applicable criminal laws. The Court instructed:

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief

can be expected to be solicitous of that value in its legislation as well.

Smith, 494 U.S. at 890. The Court in *Smith* thus magnified its statement in *Walz* that the ability of legislatures to accommodate faith is not limited to what is required by the Free Exercise Clause. Indeed, *Smith* held that the Free Exercise Clause does not give the Court general power to protect people of faith from generally applicable laws. But, the Supreme Court instructs, people of faith still have a forum to protect their religious exercise—the legislature. In short, the government may—and should—accommodate private religious practice.²

² *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), is not to the contrary. *Texas Monthly* was decided two years after the Court's unanimous affirmance of the role of legislatures in accommodating religious exercise in *Amos*, and one year before *Smith* explicitly clarified that legislatures, rather than the courts, bear primary responsibility for protecting free exercise. In *Texas Monthly*, the Court struck down a statute that exempted sacred texts and periodicals promulgating a religious faith from taxation. The plurality opinion of three Justices found this to be an unconstitutional subsidy of religious organizations. *Id.* at 14-15. But the plurality stressed and reaffirmed the accommodation principle in stating that “we in no way suggest that all benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are required by the Free Exercise Clause.” *Id.* at 18 n.8 (citing *Amos* and *Zorach*). The concurring opinions of Justices White and O'Connor, which tipped the balance and invalidated the statute, focused on the fact that this law favored religious speech in commercial dealings in the public square. Justice White found that the fact that the statute was content discrimination in violation of the *Press Clause* of the First Amendment to be “the proper basis for reversing the judgment.” *Id.* at 26 (White, J., concurring). Justice O'Connor (joined by Justice Blackmun),

Smith's holding that the legislature retains the freedom to accommodate religious practice built not merely on the holding in *Amos*, but also grew out of a case decided one year after *Amos*: *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 435 U.S. 439 (1988). In *Lyng*, the Court held that the Free Exercise Clause did not require the federal government to halt a planned road and logging operations that would “have devastating effects on traditional Indian religious practices,” since the land was owned by the federal government. *Id.* at 451. The Court stated that “[w]hatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land.” *Id.* at 453. But the *Lyng* Court was careful to emphasize that “[t]he Government's rights to the use of its own land . . . *need not and should not discourage it from accommodating religious practices* like those engaged in by the Indian respondents.” *Id.* at 454 (emphasis added). In fact, after *Lyng* was decided, Congress promptly moved to fulfill its constitutional role as a protector of First Amendment values by de-funding the project at issue in *Lyng*, thereby preserving the sacred land and accommodating the Indians’

found the law to be “a statutory preference for the dissemination of religious ideas” and would have limited the holding to that principle. *Id.* at 28. I.R.C. § 107 suffers from no such infirmity. As explained *infra* at n. 9, the exemption at issue in *Texas Monthly* bears no relation to exemptions Congress has crafted in I.R.C. § 107.

religion. *Department of the Interior and Related Agencies Appropriations Bill*, 1989, H.R. Rep. No. 713, 100th Cong., 2d Sess. 72 (1988)

(“prohibit[ing] the use of funds for construction of the Gasquet-Orleans (G-O) road in California, pending further review of the issue of Indian religious rights that would be significantly affected by the road construction.”).

Such legislative reactions to court decisions declining to enforce fundamental religious liberty values are commonplace. While *Smith* rejected a Free Exercise Clause-mandated exemption to drug laws, religious peyote use accommodations have been made at both the federal and state levels. These are constitutional, even though others wishing to use peyote for secular reasons are not offered the exemption. *See Smith*, 494 U.S. at 890 (noting that “a number of States have made an exception to their drug laws for sacramental peyote use.”).³ Even Oregon legalized the religious use of peyote after the *Smith* decision. Or. Rev. Stat. § 475.992(5).

Another example involved the appropriate role of religious exercise in the military, where courts typically afford the government great deference.

³ *See also Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991) (exemptions from peyote laws for Native Americans did not violate the Establishment Clause); *U.S. v. Warner*, 595 F. Supp. 595 (D.N.D. 1984) (same); *U.S. v. Carlson*, 959 F.2d 242 (9th Cir. 1992) (exemption made for the religious use of peyote but not marijuana did not violate the Establishment Clause); *Olsen v. D.E.A.*, 878 F.2d 1458 (D.C. Cir. 1989) (same).

After the Supreme Court ruled that an Air Force psychotherapist had no right under the Free Exercise Clause to wear a yarmulke while on duty in *Goldman v. Weinberger*, 475 U.S. 503 (1986), Congress responded by statutorily enacting such a right in the National Defense Authorization Act for Fiscal Years 1988 and 1989 (10 U.S.C. § 774), a permissible accommodation of the religious liberty of service members. *See Texas Monthly*, 489 U.S. at 18 n.8 (plurality opinion) (“if the Air Force provided a sufficiently broad exemption from its dress requirements for servicemen whose religious faiths commanded them to wear certain headgear or other attire, *see Goldman v. Weinberger* . . . that exemption would not be invalid under the Establishment Clause even though this Court has not found it to be required by the Free Exercise Clause.”) (citation omitted). *See also Khalsa v. Weinberger*, 779 F.2d 1393, 1401 (9th Cir. 1985) (enlistee-s only recourse against military appearance regulations “may be through the political process, a path that those concerned with military regulations prohibiting the wearing of a yarmulke are now pursuing.”). *Cf. School District of Abington Township v. Schempp*, 374 U.S. 203, 226 n.10 (1963) (noting propriety of accommodating religious worship on military property), *id.* at 306 (Goldberg, J., concurring, joined by Harlan, J.) (recognizing “the propriety of providing military chaplains.”); *id.* at 297 (Brennan, J., concurring)

(providing chaplains and churches may be “necessary to secure to the members of the Armed Forces . . . those rights of worship guaranteed under the Free Exercise Clause.”); *id.* at 309 (Stewart, J., dissenting) (same).

The Supreme Court’s decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), is the most recent case to illustrate the Court’s recognition of the importance of legislative accommodations. In *Boerne*, the Court struck down the Religious Freedom Restoration Act (RFRA) as applied to the states, holding in a 6 to 3 decision that Congress had exceeded its power under Section 5 of the Fourteenth Amendment when it gave citizens exemptions from generally applicable laws and other state actions that substantially burden their religion, unless the state can show a compelling interest pursued in a narrowly tailored fashion. But the argument that RFRA’s accommodation of religious practice, as broad as they are, violated the Establishment Clause, garnered but a single vote on the Court. *See id.* at 536-37 (Stevens, J., concurring). And RFRA’s provision of accommodation of individuals’ religious practice remains in effect against the federal government, unhindered by any Establishment Clause concerns.⁴ Moreover, every federal court to consider the issue has rejected the argument that

⁴ *See Alamo v. Clay*, 137 F.3d 1366 (D.C. Cir. 1998) (assuming that RFRA still applies to federal agencies); *Adams v. C.I.R.*, 170 F.3d 173 (3d Cir. 1999) (same).

RFRA's accommodation of religious exercise violated the Establishment Clause. *See Mockaitis v. Harclerod*, 104 F.3d 1522 (9th Cir. 1997); *In re Young*, 141 F.3d 854 (8th Cir. 1998); *E.E.O.C. v. Catholic Univ. of America*, 83 F.3d 455, 468-70 (D.C. Cir.1996); *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996), *vacated and remanded on other grounds*, 521 U.S. 1114 (1997); *Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir. 1996), *overruled on other grounds*, 521 U.S. 507 (1997).

In sum, it is a “fixed” principle of the Supreme Court’s jurisprudence that a law that accommodates religion or “in some manner aids an institution with a religious affiliation” does not, for that reason alone, violate the Establishment Clause. *Mueller v. Allen*, 463 U.S. 388, 393 (1983). As discussed below, Congress’ enactment of I.R.C. § 107 falls squarely within the historic practice of the legislature “follow[ing] the best of our traditions” of accommodating religious exercise and is consistent with the Court’s invitation in *Smith* to enact laws protecting the free exercise values underlying the religious clauses. Such accommodation of religious exercise fits well within the range of laws permitted by the First Amendment.

II. IRC § 107(2) ACCOMMODATION OF RELIGIOUS EXERCISE AND PROMOTION OF OTHER SECULAR OBJECTIVES DOES NOT ESTABLISH RELIGION AND SHOULD BE UPHeld.

The Supreme Court applied the test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to analyze Congress's accommodation of religious organizations in *Bishop v. Amos*. As with *Amos* and the system of tax exemptions in *Walz*, the decision by Congress to accommodate religious exercise and exempt religious entities from taxation through I.R.C. § 107(2) is constitutional. Application of the *Lemon* test, as modified by the Supreme Court in *Agostini v. Felton*, 521 U.S. 203 (1997),⁵ requires a Court to answer two questions: Does the statute have a secular purpose and is its primary effect not to advance religion? I.R.C § 107(2) readily satisfies both of these inquiries.

A. I.R.C. § 107(2) Has a Secular Purpose.

The first question is whether § 107 has a “secular legislative purpose.” *Lemon*, 403 U.S. at 612. As refined in *Amos* for statutory exemptions, the issue is whether the government has “abandon[ed] neutrality and act[ed] with the intent of promoting a particular point of view in religious matters.” *Amos*, 483 U.S. at 335. This secular purpose prong presents a “fairly low hurdle,” *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337,

⁵ In *Agostini v. Felton*, 521 U.S. at 232-35, the Supreme Court noted that *Lemon*'s entanglement prong is best understood and treated as an aspect of the inquiry into a statute's “effect.”

1345 (4th Cir. 1995), which may be cleared by finding “a plausible secular purpose” on the face of the regulation, *Mueller*, 463 U.S. at 394-95.

Moreover, as the Supreme Court noted in *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) “[t]he Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations.” *See also Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (Although a statute that is motivated in part by a religious purpose may satisfy the first criterion, the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion.”) (citations omitted).

Section 107 of the Internal Revenue Code, of which § 107(2) is a part, has a number of secular purposes. First, it advances Congress’ general policy judgment reflected in a number of provisions that the class of employees who receive lodging for the convenience of the employer should not be taxed on the value of that lodging. Second, Section 107 serves to reduce church-state entanglement in the administration of this general policy goal. And third, § 107(2) in particular achieves the secular purposes of treating similarly situated parties alike and avoiding the risk of impermissible sect or denominational preferences.

1. *Section 107 effectuates Congress' general policy goal of excluding from income housing for the convenience of the employer.*

In order to understand the secular purposes Congress has effectuated in § 107, it is necessary to place § 107 within the larger framework of statutory exemptions for employees who receive housing for the convenience of their employers. I.R.C. § 119 sets forth Congress' general policy judgment that employees, no matter what their profession, may obtain an exemption for the value of their lodging received from their employer where that lodging was paid for by the employer as a condition of employment and was provided for the convenience of the employer.⁶ The basic premise of the convenience of the employer doctrine is that there are certain employees for whom the nature of their job duties, as defined by their employer, require them to be available at all times to satisfy those job duties. Because the employee must be constantly available for duty, any lodging the employer provides the employee is not so much income of the employee as it is simply incidental to the employee fulfilling his employer defined duties. *See, e.g., Caratan v. Commissioner*, 442 F.2d 606, 609 (9th

⁶ Although Congress' effectuation of the convenience of the employer doctrine is presently set forth in I.R.C. § 119, passed in 1954, the doctrine applied from almost the inception of the federal income tax and is derived from British common law. *See, e.g., Benaglia v. Commissioner*, 38 B.T.A. 838 (1937); T.D. 2992, 2 C.B. 76 (1920); *Tennant v. Smith*, H.L. 1892 Appeals Cases 150.

Cir. 1971) (convenience of the employer doctrine in § 119 recognizes that “if the employee must be available for duty at all times, the lodging is, practically speaking, indispensable to the proper discharge” of the employee’s duties). Thus Congress has deliberately chosen to favor such employees by not including the value of the employer provided lodging in calculating the employees’ gross income.

Viewed in the context of Congress’ general adoption of the convenience of the employer exemption in § 119, one identifiable secular purpose of I.R.C. § 107 becomes readily clear: it implements Congress’ policy judgment that employees who receive lodging for the convenience of the employer should not be taxed on the value of that lodging in the specific context of ministers employed by religious organizations. Put another way, Congress’ exemption in § 107 of the value of the home provided a minister or the cash allowance paid to the minister to provide a home is a permissible legislative judgment that ministers fall within the general class of employees who are expected as part of their job duties to make the home paid for by their employer available to serve the needs of their employer.

That Congress’ judgment was a rational one that advances that secular purpose is readily seen. The nature of a church’s or other religious institution’s “business” is that it seeks to satisfy the needs—spiritual,

secular, or a combination of both—of its congregants. It falls to the minister of the particular religious institution to take the lead in satisfying those needs, and such needs are ones that may arise at any time of day, any day of the week. To fulfill their job duties of caring for their congregants’ needs, ministers must be available for duty at all times, including at home. The minister’s home is a place where the congregations’ needs are filled as the minister provides religious instruction, counsels on spiritual and other matters from a religious perspective, plans and organizes religious activities, and provides a place for the needy to stay. In short, the minister’s home functions as a “business” place where the needs of the employer congregation are satisfied.⁷

2. *Section 107 reduces church-state entanglement.*

Another secular purpose served by § 107 is that it accommodates religion by reducing church-state entanglement. As the Supreme Court recognized in *Walz*, 397 U.S. at 678, tax exemptions to church-related entities can restrict the fiscal relationship between church and state and

⁷ Because in some cases it is unclear whether ministers would qualify for an exemption under § 119 (e.g., it may be difficult to determine if some ministers are employees of the church, who could potentially qualify under § 119, or independent contractors, who would not qualify under § 119), § 107 could also be viewed as having the purpose of an equalizing rule that ministers will be treated roughly equivalent to other, non-religious taxpayers who are not taxed for the lodging they receive for the benefit of their employers.

thereby operate “affirmatively to help guarantee the free exercise of all forms of religious belief.” *See also Walz*, 397 U.S. at 673 (“Grants of exemption historically guard against the danger of hostility toward religion”); *Cohen v. City of Des Plaines*, 8 F.3d 484, 490 (7th Cir. 1993) (exempting nursery schools in religious buildings from certain zoning requirements advances secular purpose of “minimizing governmental meddling in religious affairs”); *Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church*, 846 F.2d 260, 263-64 (4th Cir. 1988) (upholding exemption for religious daycare centers from licensing requirements because it is “a permissible and sufficient legislative purpose ‘to alleviate significant government interference with the ability of religious organizations to define and carry out their religious mission’”) (quoting *Amos*, 483 U.S. at 335).

Section 107’s *per se* exemption for ministers reduces church-state entanglement. For example, if ministers could only seek an exemption for the value of their lodging under § 119, there would be the potential in every such case for an intrusive inquiry by the IRS into whether the particular activities a minister undertakes at his home have a sufficient nexus to the religious duties required of him by his church to be found that those duties performed at home are indeed for the convenience of the employer. Section 107’s *per se* exemption avoids such an entangling church-state fiscal

relationship.⁸ To be sure, §107 does not remove the fiscal relationship between church and state entirely, as the IRS must still oversee the application of § 107. However, Congress is entitled (and is the branch of government best suited) to make a judgment that the IRS will have less cause to meddle in church religious and fiscal matters overseeing § 107 than it would overseeing § 119 as applied to ministers in the absence of § 107.⁹ *Cf. Mockaitis v. Harclerod*, 104 F.3d 1522, 1530 (9th Cir. 1997) (rejecting argument that the necessity of determining what is a religion in cases of an exemption for religion creates an excessive risk of entanglement).

⁸ Section 107 also avoids other potentially entangling church-state relationships in other ways. For example, it does so by abolishing the need to assess parsonage rental value. Parsonages are often physically attached to churches and thus would require segregation of church land, buildings, and unitary services such as heating, plumbing, and electricity to determine rental value. Disputes involving these issues would lead to inspection of records and files of ministers and churches.

⁹ The Supreme Court's decision in *Texas Monthly* provides no basis for finding § 107 unconstitutional. Although the fractured Court in *Texas Monthly* offered three different rationales, none of which commanded a majority, for striking down the exemption at issue, that exemption was limited to religious entities alone. In contrast, § 107's exemption is a subspecies of the convenience of the employer exemption that is available to a wide range of nonreligious employees in I.R.C. § 119. In addition, although § 119, unlike § 107(2), does not provide an exemption for a cash allowance used to provide a home, an exemption for such cash allowances is provided to other classes of non-religious employees, namely military officers, *see* I.R.C. § 134, and United States citizens working abroad, *see* I.R.C. § 911(a)(2).

3. *Section 107 promotes equal treatment among religions and avoids impermissible sect-preferences.*

The inclusion of § 107(2) in addition to § 107(1) ensures that similarly situated parties are treated similarly. Section 107(1) ministers who live in a church-owned parsonage and are expected to consistently make that home available to serve the needs of their congregants are in the exact same position as § 107(2) ministers who must also make their home available to serve their congregants as part of their job duties, but live in a home paid for by a “rental allowance” received from their congregation. Both must open up their homes for the convenience of their employer as part of their job. Moreover, the economic effect of exempting the rental value of a parsonage (§ 107(1)) is equivalent to the effect of exempting a cash allowance income (§ 107(2)) since that allowance is excluded only to the extent that it is actually used “to rent or provide a home.” Thus, the inclusion of both § 107(1) and § 107(2) treats similarly situated ministers alike. In doing so, it also avoids creating any artificial tax incentive for religious organizations to purchase rather than rent property, which in turn promotes a public policy goal of keeping more houses on the local tax roll since church-owned homes would be tax exempt.

The inclusion of both § 107(1) and § 107(2) in the statutory scheme also helps prevent impermissible sect or denominational preference and

ensures neutrality of treatment among religions. *See, e.g., Larson v. Valente*, 456 U.S. 228, 244 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“The First Amendment mandates governmental neutrality between religion and religion”). If § 107 did not include § 107(2), the statute would only provide an exemption for ministers living in a church-supplied parsonage. The effect of such a limited exemption would be to favor older, more established churches. Such churches are more likely to already have property on which both a church and a parsonage are located, or have the resources to purchase such a property. In contrast, start-up churches and non-traditional religious associations will often lack the resources to acquire sufficient property on which they could construct both a church and a parsonage. Because they cannot afford to acquire sufficient property, such churches, out of necessity, provide a rental allowance for their minister instead—a minister who will have his home available to congregants to the same extent as the minister living in the traditional parsonage. Without § 107(2), such churches and their ministers would be treated less favorably than the older, established churches.

Similarly, some churches and religious organizations feel called to locate churches in strip malls, storefronts, and other locations in business or other nonresidential districts of a city. The traditional, mainline image of a parsonage next door to a church is in such circumstances a physical or zoning-law-imposed impossibility. Absent § 107(2), such ministers would be treated worse than those of more traditional churches, though they would still have similar responsibilities to their congregations. In short, the inclusion of section 107(2) avoids the favoring of religious organizations that fall into a traditional vision of what a church should look like, and the discrimination against nontraditional religious assemblies.¹⁰

B. § 107(2)'s Principal Effect Does Not Advance Religion.

Alleviating the tax burden of ministers in a way that is similar to other employees who are paid lodging for the convenience of their employer does not have the effect of advancing religion. It merely reduces the potential for church-state entanglement, with less intrusion and oversight by the IRS as to how religious organizations carry out their missions, and reduces the risk of preferring certain types of religious assemblies over others. While this may enable ministers and their religious employers to more easily exercise their

¹⁰ This problem of discrimination against churches that do not own their own parsonage would not be solved by eliminating § 107 in its entirety, because many ministers living in church-owned parsonages would still qualify for an exemption under § 119's more general terms.

faith, “[a] law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden ‘effects’ under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence.” *Amos*, 483 U.S. at 337.

As the Court observed in *Walz*, “for the men who wrote the Religion Clauses of the First Amendment the ‘establishment’ of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.” 397 U.S. at 668. Here, the exemption at issue does not put the *government* in the business of engaging in religious activities or connote sponsorship. *Walz* emphasized this point. “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. . . . There is no genuine nexus between tax exemption and establishment of religion.” *Walz*, 397 U.S. at 675. Justice Brennan recognized this distinction as well: “Tax exemptions and general subsidies, however, are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other

hand, involves no such transfer.” *Id.* at 690 (Brennan, J., concurring).

CONCLUSION

For the reasons set forth above, *amicus* respectfully requests that this Court find § 107(2) to be constitutional.

Respectfully submitted,

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I hereby certify that two true and correct copies of the above and foregoing Amicus Brief of The Becket Fund for Religious Liberty was sent this 3rd day of May, 2002 by First Class Mail, postage pre-paid, to each of the following:

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