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No. 00-71217

UNITED STATES COURT OF APPEALS

FOR THE

NINTH CIRCUIT

RICHARD D. AND ELIZABETH WARREN,

***Petitioner-Appellees*,**

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellant

On Appeal from the United States Tax Court

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE* IN SUPPORT OF THE CONSTITUTIONALITY OF SECTION 107(2)

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MOTION FOR LEAVE TO FILE BRIEF FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE* IN SUPPORT OF THE CONSTITUTIONALITY OF SECTION 107(2)

The National Jewish Commission on Law and Public Affairs ("COLPA") hereby applies pursuant to Rule 29 of the Federal Rules of Appellate Procedure for leave to file the appended *amicus curiae* brief in support of the constitutionality of Section 107(2) of the Internal Revenue Code, 26 U.S.C. § 107(2).

COLPA represents, in this matter, all the major national Orthodox Jewish organizations in the United States. The Orthodox Jewish community has a strong and lasting interest in the continued application of Section 107(2) of the Internal Revenue Code because it affects the welfare of congregational rabbis. The statute in question achieves equity and fairness by giving the same tax treatment to rabbis who must find and lease their own homes as is given to the clergy of major wealthy churches that can afford to purchase and maintain parsonages in which their ministers reside.

The appended *amicus curiae* brief provides a perspective and supporting data that is not likely to be provided by any other party or *amicus curiae*.

The Appellee has consented to the filing of this brief. The Appellant neither consents nor objects. For the foregoing reasons, leave for COLPA to file a brief *amicus curiae* should be granted.

Respectfully submitted

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INTEREST OF THE *AMICUS CURIAE*

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers and social scientists that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. COLPA has filed numerous *amicus* briefs in the Supreme Court and in United States Courts of Appeals on issues arising under the Establishment and Free Exercise Clauses of the First Amendment.

COLPA submits this *amicus curiae* brief supporting the constitutionality of Section 107(2) of the Internal Revenue Code on behalf of the following national organizations that represent and speak for the Orthodox Jewish community of the United States:

- **Agudas Harabonim of the United States and Canada –** The oldest Orthodox Jewish rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.
- **Agudath Israel of America –** The nation's largest grassroots Orthodox Jewish organization, with chapters in numerous Jewish communities throughout the United States and Canada.
- **National Council of Young Israel –** coordinating body for more than 300 Orthodox Jewish synagogue branches in the United States and Israel that is involved in matters of social and legal significance to the Orthodox Jewish community.
- **The Rabbinical Alliance of America –** An Orthodox Jewish rabbinical organization with more than 400 members that has, for

many years, been involved in a variety of religious, social and educational causes affecting Orthodox Jews.

- **The Rabbinical Council of America –** The largest Orthodox Jewish rabbinical organization in the world with a membership that exceeds one thousand rabbis and is deeply involved in issues related to religious freedom.

- **Torah Umesorah-National Society for Hebrew Day Schools –** The coordinating body for more than 600 Jewish Day Schools across the United States and Canada.

- **The Union of Orthodox Jewish Congregations of America ("U.O.J.C.A.") –** The largest Orthodox Jewish synagogue organization in North America, representing nearly one thousand member congregations. Through its Institute for Public Affairs, the U.O.J.C.A. represents the interests of its national constituency on public policy issues.

The constitutional issue that the Court is proposing to consider is of great significance to the American Orthodox Jewish community. There are more than 4000 Orthodox synagogues across the country, and virtually all of them employ one or two rabbis. Since observance of Jewish religious law is all-encompassing and affects Orthodox Jews all waking hours of the day, seven days a week, Orthodox rabbis are "on call" around the clock. Religious observances pertaining to birth, death and critical health situations arise 24 hours a day, and an Orthodox rabbi must always be accessible to minister to those who need his services.

In addition, Orthodox observance of Jewish Law forbids automobile transportation on the Sabbath and on Jewish Holidays. Hence an Orthodox rabbi

must live close to the synagogue so that he can comfortably walk to Sabbath and Holiday Services.

For these reasons, the location of the home or lodging of a rabbi is of crucial importance to the members and leadership of an Orthodox synagogue. Although it would be highly desirable, very few Orthodox synagogues can afford to own or maintain residences that are permanently committed to their rabbis and cantors. Consequently, synagogues today provide housing allowances with which their clergy defray all or part of the costs of housing they arrange on their own.

The residence of a rabbi is, however, by Jewish tradition, very much an extension of the synagogue building itself. A rabbi in an American pulpit is now expected to invite congregants and visitors to his home for Sabbath and holiday meals, to entertain out-of-town visitors who keep the dietary laws of *kashruth*, to conduct small classes and seminars in his home, and to provide counseling at his home for those who are encountering life's crises. Because Section 107(2) has, for almost half a century, provided tax relief to American rabbis for the expense of their residences, it has permitted them to devote more time to their pastoral duties and has increased their standard of living. Retention of this tax provision -- which is justified by fairness and equity, for the reasons specified in this Brief -- is extremely important to the Orthodox Jewish community of the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

This *amicus* brief addresses Question (3) of the Court's Order of March 5, 2002:

> (3) Is section 107(2) constitutional under the Establishment Clause? Cf. Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

We are submitting this brief to inform the Court of considerations affecting the constitutionality of the parsonage rental allowance provision of the Internal Revenue Code that uniquely affect the Jewish community in the United States, and particularly those who are Orthodox and strictly observant of Jewish ritual. In order to avoid duplication of constitutional arguments that are more universal, we adopt the constitutional arguments presented to the Court in the *amicus* brief filed by Professor Michael McConnell on behalf of the Church Alliance.

Our additional argument is simple and straightforward, and it may be summarized with the following propositions:

(1) It was, and remains, entirely indisputable that Congress acted permissibly under the Establishment Clause when, in 1921, it authorized the exclusion from gross income of the rental value of a home furnished in kind by a church to its minister as part of his compensation. In other words, the current Section 107(1) is universally assumed to be constitutional.

(2) Limiting such an exclusion from gross income to ministers whose employers own or lease a residence provided in kind to their clergy discriminates against churches, synagogues, mosques or other equivalent institutions that cannot, for economic or other reasons, provide an in-kind residence to their clergy.

(3) Jewish religious institutions in the United States, including synagogues, have historically been unable to afford to build homes or to maintain designated apartments for their rabbis.

(4) By Jewish tradition and ritual, the home of a rabbi and other clergy employed by a synagogue is an auxiliary site of religious observance and teaching. And since Jewish religious law prohibits travel on Sabbaths and many holidays, a rabbi's home must be in close proximity to the synagogue.

(5) Congress' authorization in 1954 of a parsonage rental allowance exclusion from gross income was a constitutionally mandatory and permissible means of providing for the clergy of Jewish institutions, *inter alia*, the same tax treatment as the 1921 law provided to wealthier and more established churches.

ARGUMENT

I

JEWISH COMMUNITIES IN THE UNITED STATES HAVE NOT HISTORICALLY BEEN ABLE TO

PROVIDE RESIDENCES FOR RABBIS AND OTHER CLERGY ON THE SYNAGOGUE'S PREMISES

The first synagogue in the American Colonies was established in rented quarters on Mill Street (known as "Jews Alley") in New York in the early 1700's. In 1728, a parcel of land was purchased on Mill Street for 100 pounds sterling, a loaf of sugar, and a pound of bohea tea. A synagogue building was constructed, and it opened in April 1730. Its dimensions were 35 feet square and 21 feet high (including the women's gallery). Saul Bernstein, *The Orthodox Union Story* 5 (Jason Aaronson 1997). It has been described as "a little stone building with a fence around it." Tina Levitan, *First Facts in American Jewish History* 16 (Jason Aaronson 1996).

The only synagogue built during colonial times that survives to this day is the classic building in Newport, Rhode Island, also known as the "Touro Synagogue." It was constructed in 1763 and has been a National Historic Site since 1946. *Id.*, at 7. The building was constructed on a "small plot" and it consists of one hall that is 35 feet by 40 feet. Geoffrey Wigoder, *The Story of the Synagogue* 127, 129 (Harper & Row 1986); *see also* Brian deBreffny, *The Synagogue* 123, 140 (Macmillan 1978). There was no parsonage or other structure on the property.

Jewish communities in the United States grew slowly until the mid-nineteenth century. Between 1850 and 1860, the Jewish population of the United States increased from 50,000 to approximately 150,000. And by 1860, according to the authoritative history of the American Jewry authored by Professor Abraham Karp, "there were perhaps two hundred congregations, permanent and temporary (meeting for the High Holy Days only), in more than one hundred cities and towns." Abraham Karp, *A History of the Jews in America* 63 (Jason Aaronson 1997). Professor Karp quotes a contemporary description in 1857 of the largest Orthodox synagogue in New York City (*id.*, at p. 64):

> Its founders were few, and they established it in poverty. . . . in affliction, deprivation and straightness they watched over its early rise. . . . Now it is supported by about eighty men in Israel.

With the large immigration of Jews from Eastern Europe in the late-Nineteenth Century to the United States and to the Lower East Side of New York City came a proliferation of synagogues (Irving Howe, *World of Our Fathers* 191 (Harcourt Brace Jovanovich 1976):

> Some synagogues were fairly imposing; most were ramshackle and improvised. During the 1890's and 1900's the East Side had numerous tenement synagogues, often several of them occupying neighboring apartments and consisting of members who in the old country had lived in adjacent towns.

In their "Documentary History of Immigrant Jews in America" titled *How We Lived: 1880-1930* (Richard Marek 1979), Irving Howe and Kenneth Libo said (p. 103):

> Early immigrant congregations often met in basements, tiny apartments, ramshackle stores; God, it was assumed, cared about the authenticity of worship more than the grandeur of architecture.

An 1899 report by the University Settlement Society, quoted in the Howe and Libo volume, describes a "canvass" of 25 streets in New York City that showed 100 congregations "of sufficient size and permanence to display a sign over the door" and reported that there were "at least as many more which meet in tenement houses" and "a host of others which, at holiday time, spring up in lodge rooms, dance halls, and lofts." *Id.* at 103. Obviously, none had a parsonage.

When the Association of American Orthodox Hebrew Congregations determined in 1888 to hire a Chief Rabbi who was recruited in Europe and was brought to the United States from Lithuania, he was paid $2,500 per annum and was provided a "suitable apartment." Karp, *supra*, at 103. But the rabbis occupying less prestigious positions were not provided residences. Rabbi Eliezer Silver -- who ultimately rose to become President of the Agudas Harabonim of the United States and Canada -- was offered a rabbinical position in 1907 in Harrisburg, Pennsylvania, at a salary of six dollars per week. The sum was raised

by individuals donating a quarter a week or on alternating weeks, and the rabbi had to find his own residence. Aaron Rakeffet-Rothkoff, *The Silver Era in American Jewish Orthodoxy* 53 (Yeshiva University Press 1981).

To this day, there are few Jewish congregations in the United States that own or maintain residences for their rabbis. Orthodox synagogues must be located within close proximity of the homes of their congregants because Jewish religious law prohibits riding in cars or public transportation on Sabbaths and most Jewish holidays. Real estate prices in such heavily populated areas are usually high, and synagogues cannot afford to build or purchase homes for their clergy in such costly neighborhoods. And most synagogues in the United States have modest budgets and no endowments. Owning a home for the rabbi is a luxury that few can afford. Consequently, a Jewish congregation that is seeking to have a rabbi can, at best, offer a housing allowance as part of a compensation package.

II

A RABBI'S HOME IS AN AUXILIARY TO THE SYNAGOGUE FOR RELIGIOUS OBSERVANCE AND TEACHING

The observance of Judaism requires much more than attendance and worship in the synagogue. Jewish religious law and ritual affects the everyday life of its adherents and prescribes certain conduct at specified times. Friday evenings and

Saturdays are set aside for prayer, religious ritual, and rest. Study of sacred texts is an intrinsic part of Jewish observance. And events that are part of ordinary human existence such as birth, death and various aspects of family life have religious significance that generates prescribed observances.

A rabbi's service to his congregation is not limited, therefore, to his presence and conduct within the synagogue's structure. Besides presiding over and supervising prayer services and other events in the synagogue building, a traditional rabbi is expected to use his home as a source of example and teaching.

It is commonplace today for Orthodox rabbis to invite congregants and visitors to their homes for Sabbath and holiday meals so that the invitees can learn the proper format for the observance of rituals surrounding these meals. It is also usual for rabbis to conduct in their homes educational sessions in which the Torah, the Talmud, or Codes of Jewish Law are studied in keeping with the instruction in *Ethics of the Fathers* (chapter 1, para. 4) to "make your home a meeting place for sages." A rabbi's home frequently has to be available for private confidential discussions on sensitive subjects affecting religious observance, to console the bereaved, or comfort those in distress. And it is routinely a bed-and-breakfast for observant Orthodox visitors to a community who need a kosher home in which to spend a night.

In their volume describing "pioneer Jews and the westward movement of America" between 1630 and 1930, Kenneth Libo and Irving Howe quoted the following description of a rabbi's residence by Nathan Pelkovitz, the son of a Columbus, Ohio rabbi in the 1920's (Kenneth Libo & Irving Howe, *We Lived There Too* 320 (St. Martin's/Manek Press 1984):

> Our house was used as more than a parsonage. It was a wailing wall, a refuge for the disturbed, a hostel for visiting mendicants and collectors for *yeshivot*. But more important, the rabbi was busy in *kashruth* [dietary laws] -- examining the entrails of chickens surrounded by the *shulchan aruch* [a sixteenth-century legal compendium] code to see if he couldn't tease out a verdict of "kosher" while the poor housewife stood apprehensive that the foul was flawed; in marital affairs, ranging from counselor to president of a Jewish divorce court; in business affairs, since it was still not uncommon for civil disputes about money matters to be taken to the rabbi as arbiter in a *din torah* [court]. . . . The week before Passover congregants would troop in on a dual mission -- to sell their *chometz* [leavened food] and chat about communal affairs and to purchase the jug of sacramental concord grape wines (sometimes also muscatel and for favored folk my mother would make a gift of her homemade honey-based mead).

An Orthodox rabbi's residence must be located in the proximity of the synagogue so that he can walk to services and so that the congregants will be able to walk to the rabbi's house on Sabbaths and holidays. The location of the residence-- even if not on the synagogue's own premises -- is, therefore, very much for the benefit of the congregation.

III

CONGRESS MAY CONSTITUTIONALLY EQUALIZE THE IMPACT OF THE FEDERAL INCOME TAX ON MINISTERS OF POOR AND WEALTHY CONGREGATIONS

In light of the circumstances we have heretofore described, the secular purpose and effect of Section 107(2) are obvious. Religious congregations that have the means to build a residence for their ministers on church grounds or to lease permanently a dwelling to be used by the clergyman they employ were able, before subsection (2) was added to Section 107, to offer tax-free lodging under Section 107(1) to their religious leaders. Those that could not make a substantial capital investment or commit to a long-term lease were unable to do so.

The Senate Report that accompanied the enactment of Section 107(2) in 1954 noted that existing law was "unfair" to ministers "who are not furnished a parsonage" but are given a rental allowance as part of their salaries. S. Rep. No. 83-1622 (1954), at 16. And the Tax Court has recognized that subsection (2) was added "to equalize the situation between those ministers who received a house rent free and those who were given an allowance that was actually used to provide a home." *Fred B. Marine*, 47 T.C. 609, 613 (1967).

The experience of Jewish congregations in the United States illustrated the inequity that existed before the 1954 amendment. By and large, rabbis were

required before 1954 to pay taxes on the portion of their salaries that they used to rent their homes or apartments in the proximity of the synagogue because synagogues did not own or maintain permanent residences for their rabbis.

Rabbis' homes have traditionally been near their synagogues in order to serve the convenience of the employer -- the congregation. Section 119 of the Internal Revenue Code, 26 U.S.C. § 119, excludes from an employee's gross income the value of food and lodging provided to an employee for the benefit of the employer on the employer's premises. The policy of Section 119 extends to a rabbi's residence, even if it is not on the synagogue's premises, because the rabbi's residence is customarily utilized for the benefit of the congregation. A rabbi is on call virtually 24 hours a day and is required to respond to emergencies within his congregation such as deaths, serious illnesses, and births. When subsection (2) of Section 107 was enacted to allow ministers to exclude from gross income any salary allowance used by the minister to purchase or rent a residence, it applied the wholly secular policy of Section 119 to the particular situation of ministers, and it equalized the tax burden between well-endowed landowning churches and those, like most Jewish synagogues, that operate on a shakier financial footing.

Indeed, the Constitution demands no less. *Larson v. Valente*, 456 U.S. 228 (1982), prohibits statutory discrimination among religious faiths or denominations. All must be treated equally under the law. Permitting churches that own

parsonages or provide other permanent residences to their ministers to offer their employees tax-free lodging while denying similar tax treatment to poorer houses of worship that can only provide housing allowances to their clergy violates the non-discrimination rule of *Larson v. Valente*. It favors rich churches over the poor, and it benefits those who minister to the wealthy while disadvantaging those who serve the middle class. In light of the history we have outlined, it effectively discriminates against the Jewish faith in favor of Christian denominations.

IV

SECTION 107(2) PASSES THE THREE-PART TEST OF *LEMON v. KURTZMAN*

A. Equalization of Treatment Is a Permissible Secular Purpose.

Congress recognized in 1921 that ministers are on call around-the-clock and that it is to their congregations' benefit that they reside on the congregation's property. The constitutionality of Section 107(1) is not in issue in this case because it is entirely plain that Section 107(1) is nothing more than a particularized application of the wholly secular policy expressed in Section 119. A minister's residence in a home furnished by his congregation is, under any and all circumstances, presumed to be for the convenience of his congregation. Indeed, one scholar has observed that "nearly any minister could qualify [under section

119] if section 107 did not exist." Dean T. Barham, *The Parsonage Exclusion Under the Endorsement Test: Last Gasp or Second Wind?*, 13 Va. Tax Rev. 397, 418 (1993).

Having provided particularized tax relief, for permissible secular reasons, to a defined class of "ministers of the gospel" -- *i.e.*, those that reside in homes furnished by their employers -- Congress was permitted in 1954 to afford equal treatment -- for the secular purpose of prescribing an equitable and fair tax system -- to the class of ministers whose congregations provided them with housing allowances in place of in-kind housing.

This justification is more than adequate to meet the "plausible secular purpose" test that governs this prong of *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). See *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). To be sure, a church or synagogue may be helped by the limited tax relief afforded its minister. The total compensation paid by the congregation to the clergyman may, because of this "tax break," be less than it would otherwise have to be. But the fact that a statute "aids an institution with a religious affiliation" does not invalidate the law. *Mueller v. Allen*, 463 U.S. 388, 393 (1983); *see also Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987). Indeed, the opinion of Justice Brennan in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 10 (1989), said, "The nonsectarian aims of government and the interests of religious groups often overlap, and this

Court has never required that public authorities refrain from implementing reasonable measures to advance legitimate secular goals merely because they would thereby relieve religious groups of costs they would otherwise incur." The 1954 amendment that added subsection (2) was a "reasonable measure to advance legitimate secular goals," and it is not rendered invalid merely because religious institutions can and do benefit from its administration.

B. Extending the Parsonage Exclusion to a Cash Housing Allowance Does Not Endorse Religion.

Lemon's second prong concerns the appearance given by the challenged government action: Does it advance or inhibit any single religion or all religions? As refined by majorities of the Supreme Court in recent cases, the issue in this case is whether the challenged statute "conveys a message of endorsement" or amounts to "state sponsorship of religious beliefs."

Section 107(2) does not have the prescribed "endorsement" effect insofar as it incrementally extends Section 107(1). If a Catholic or Presbyterian "minister of the gospel" may permissibly live tax-free in a parsonage on the church grounds, no rational person would view a law that gives a rabbi or a Baptist minister equal treatment for a housing allowance that he uses to rent his own home as "endorsement" of Judaism or of the Baptist Church. A "reasonable observer" would surely understand that equity and fairness, and not some religious fervor,

have motivated the national legislature. The only "endorsement" that may be discerned, in these circumstances, in the enactment of subsection (2) is an "endorsement" of tax fairness -- taxpayers whose economic positions are functionally and practically identical should be treated identically by the federal tax law.

In fact, as we have noted, the Constitution more pointedly prohibits discrimination among religions than discrimination in other areas of modern life. In *Larson v. Valente*, 456 U.S. 228 (1982), the Supreme Court unequivocally condemned any "denominational preference" -- *i.e.*, the official preference of one religion over another. This, said the Court, was "[t]he clearest command of the Establishment Clause." 456 U.S. at 244.

A distinction for tax-law purposes between ministers who live in residences owned by their churches and those who live in homes they rent with funds provided by the church is a "denominational preference" in favor of the more established and wealthy church denominations. As we have demonstrated, it discriminates against rabbis and against Jewish congregations.

The Minnesota statute that was invalidated in *Larson v. Valente* did not name any religious denominations. It imposed registration and reporting requirements on denominations that received more than fifty percent of their funds from nonmembers. The Supreme Court held that it discriminated against churches

like the Unification Church that received substantial contributions from non-members. The Court said that the "fifty percent rule" challenged in that case did not pass the "strict scrutiny" test because it was not justified by a compelling governmental interest and was not "closely fitted to further the interest that it assertedly serves." 456 U.S. at 246-48. If Congress had failed in 1954 to remedy the discrimination effected by Section 107(1) to include ministers receiving housing allowances, the tax-code provision excluding the value of in-kind parsonages would have been unconstitutional under *Larson v. Valente*.

C. Excluding a Minister's Housing Allowance Avoids Governmental Entanglement With Religion.

The final *Lemon* prong concerns the degree to which there is "excessive entanglement" between government and religion. In *Lemon* itself, the Court relied on "comprehensive, discriminating, and continuing state surveillance" as a basis for invalidating the financial-assistance program in that case. 403 U.S. at 619. If "entanglement" is still an independent third prong (*but see Mitchell v. Helms*, 530 U.S. 793, 807-08 (2000); *Agostini v. Felton*, 521 U.S. 203, 232-33 (1997)), it is surely not present in Section 107(2). In fact, the exclusion of a housing allowance results in negligible "entanglement," and the exclusion of a parsonage from gross income actually *minimizes* the involvement of governmental personnel in religious affairs.

Under Section 107(2), the IRS conducts no examination of the faith community that hires the minister or of the details of his job. The only relevant questions are whether the taxpayer is a "minister of the gospel" (a term that has been given exceptionally broad definition to include clergy of all faiths), whether he receives a "rental allowance" as part of his compensation, and whether that allowance is used "to rent or provide a home." None of these is an intrusive religious inquiry.

Moreover, by directing that the full rental allowance be excluded from gross income, the statute avoids the entanglement that would result if some more limited tax relief had been granted based on the extent to which the residence is actually used for religious teaching or observance. Just as a tax exemption is a means of avoiding entanglement (*see Walz v. Tax Commission*, 397 U.S. 664 (1970)), allowing the cost of a minister's residence to be tax-free recognizes the separation between church and state.

V

THE *TEXAS MONTHLY* CASE IS DISTINGUISHABLE

In *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), a Supreme Court majority invalidated a Texas law that taxed all publications except those that

"consist wholly of writings sacred to a religious faith." 489 U.S. at 5. Speaking for only three Justices, Justice Brennan held that this amounted to "an endorsement of religion that is offensive to the principles informing the Establishment Clause." 489 U.S. at 16.

The rationale of Justice Brennan's opinion does not apply to the constitutionality of Section 107(2), which is justifiable, as we have demonstrated, on a wholly secular basis. The Texas sales tax provision that was in issue in the *Texas Monthly* case could not rationally be justified on any ground other than as a special religion-based exemption for "writings promulgating the teaching of the faith" and/or "writings sacred to a religious faith." There was no objective characteristic of such "writings" that justified treating them differently for sales-tax purposes than other "writings" that lacked religious content. Hence the exclusion was, in Justice Brennan's view, a preference for religion. There is, by contrast, secular justification for treating the home of a person who is hired to minister to a congregation differently from the home of a salesclerk or a corporate executive. And there is more than ample secular justification for the incremental step taken by Congress in 1954 -- extending the tax exclusion from in-kind housing to an allowance included in a minister's compensation package.

Section 107(2) does not, of course, involve the Press Clause of the First Amendment. Hence Justice White's rationale for concurring in the judgment in the

Texas Monthly case is inapplicable. *See* 489 U.S. at 25-27. Nor can it be said that Section 107(2) is "[a] statutory preference for the dissemination of religious ideas" -- which was the rationale of the concurring opinion of Justices Blackmun and O'Connor. Consequently, even disregarding the fact that two of the three Justices whose views were expressed by Justice Brennan's opinion are no longer on the Supreme Court, the *Texas Monthly* decision is not a precedent for invalidating Section 107(2).

Recent decisions that have upheld statutory exceptions for churches from local zoning or construction ordinances demonstrate the inapplicability of the legal principle underlying the *Texas Monthly* decision. In *Ehlers-Renzi v. Connelly School of the Holy Child, Inc.*, 224 F.3d 283 (4th Cir. 2000), *cert. denied*, 531 U.S. 1192 (2001), a county zoning ordinance that exempted parochial schools located on church-owned land from requirements of public notice and hearing and local zoning board approval was held to be constitutional. A majority of the Fourth Circuit held that there were "plausible secular purposes" for this exemption and that government did not, by the exception, "advance" the religious objective of a school entitled to claim it. 224 F.3d at 288-291. The ordinance also was found to have "a disentangling aspect" that qualified under *Lemon's* third prong. 224 F.3d at 291. *See also Cohen v. City of Des Plaines*, 8 F.3d 484 (7th Cir. 1993); *Forest*

Hills Early Learning Center, Inc. v. Grace Baptist Church, 846 F.2d 260 (4th Cir. 1988)..

In *Concerned Citizens of Carderock v. Hubbard*, 84 F. Supp. 2d 668 (D. Md. 2000), the District Court rejected a constitutional challenge to a zoning ordinance enacted by a County Council that included, among other "permitted uses," the construction of "churches . . . and other places of worship." At the same time, the ordinance denied similar status to "private clubs" and to other "charitable or philanthropic institutions." The District Court quoted the language of the *Texas Monthly* case that permits the implementation of "government policies with secular objectives . . . [that] incidentally benefit religion," and it sustained the ordinance against the constitutional challenge.

The same rationale that has been applied in these cases distinguishes Section 107(2) from the Texas sales-tax exemption that was invalidated in the *Texas Monthly* case. Neither Justice Brennan's opinion for three Justices nor the holding of *Texas Monthly* supports the invalidation of Section 107(2).

CONCLUSION

For the foregoing reasons, this Court should sustain the constitutional validity of Section 107(2) of the Internal Revenue Code.

Respectfully submitted

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CERTIFICATION

Pursuant to Rule 32(a)(7)(c) of the Federal Rules of Appellate Procedure, I hereby certify that, by the word count of the word-processing system used to prepare this Brief, it contains 5,334 words exclusive of those portions that are excluded under Rule 32(a)(7)(B)(iii).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Leave to File and Brief for the National Jewish Commission on Law and Public Affairs ("COLPA") as Amicus Curiae in Support of the Constitutionality of Section 107(2) was served on May 2, 2002, by Federal Express, on the following individuals:

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