No. 14–1152

IN THE

United States Court of Appeals for the Seventh Circuit

FREEDOM FROM RELIGION FOUNDATION, INC., ANNIE LAURIE GAYLOR, and DAN BARKER,

Plaintiffs-Appellees,

v.

JACOB J. LEW, in his official capacity as Secretary of the Treasury, and JOHN A. KOSKINEN, in his official capacity as Commissioner of Internal Revenue,

Defendants-Appellants.

On Appeal from the United States District Court
For the Western District of Wisconsin
Case No. 11–CV–0626
The Honorable Judge Barbara B. Crabb

BRIEF OF LIBERTY INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

1. The full name of every party that the attorneys represent in this case:

Liberty Institute

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

Kenneth A. Klukowski is a sole practitioner.

Kelly J. Shackelford, Jeffrey C. Mateer, Matthew J. Kacsmaryk, Hiram S. Sasser III, and Justin E. Butterfield are attorneys with Liberty Institute, a public-interest law firm in Texas.

3. For all *amici curiae* that are corporations:

i. Identify all parent corporations for all *amicus* parties:

None.

ii. List any publicly held company that owns 10% or more of any *amicus* party's stock:

None.

/s/ Kenneth A. Klukowski
Kenneth A. Klukowski

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INTEREST OF *AMICUS CURIAE*[1]

Liberty Institute is a non-profit, public interest law firm dedicated to defending and restoring religious liberty in the United States. Liberty Institute provides pro bono legal advice and representation to churches, religious schools, faith-based ministries, and faith-based businesses that desire to operate autonomously, without governmental intrusion into their religious practices.

The outcome of this case will determine the extent to which Liberty Institute's client churches and ministers may assert the parsonage exemption without regard to their church structure and without intrusive governmental review of their religious practices.

SUMMARY OF ARGUMENT

The Internal Revenue Code provides numerous housing exemptions, some of which are applicable to ministers. Absent I.R.C. § 107, many ministers who live in church-owned parsonages would be able to exempt their housing under I.R.C. § 119. Internal Revenue Code § 119, however, requires that the government determine whether the housing is "for the convenience of the employer," which would require the government to consider the internal affairs of the churches and their relationships with their ministers in violation of the ecclesiastical abstention doctrine. Furthermore, if ministers had to rely on I.R.C. § 119 or I.R.C. § 107(1) without I.R.C. § 107(2), ministers of churches that do not own parsonages—whether

[1] Letters of consent from all parties for the filing of this brief are attached hereto. *Amicus Curiae* states that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *Amicus Curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

for reasons of doctrine, church polity, or finances—would be disadvantaged. Internal Revenue Code § 107, in its entirety, is an elegant, effective, and permissible accommodation that solves the tax code's potential problems with the ecclesiastical abstention doctrine and ensures that all ministers are treated equally with respect to whether their housing is taxable.

ARGUMENT

INTERNAL REVENUE CODE § 107(2) IS A PERMISSIBLE ACCOMMODATION OF RELIGION IN FURTHERANCE OF THE FIRST AMENDMENT'S ECCLESIASTICAL ABSTENTION DOCTRINE.

The United States Supreme Court has long recognized that the First Amendment requires accommodation, not separation or mere toleration, in the state's attitude towards religion. As the Supreme Court explained in *Lynch v. Donnelly*:

> It has never been thought either possible or desirable to enforce a regime of total separation. . . . Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the "callous indifference" we have said was never intended by the Establishment Clause. Indeed, we have observed, such hostility would bring us into "war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion."

465 U.S. 668, 673 (1984) (internal citations omitted). Internal Revenue Code § 107(2) (*i.e.,* 26 U.S.C. § 107(2)) exemplifies this concept of accommodation by recognizing and respecting the unique status and protections granted by the Constitution to religious organizations.

I. The ecclesiastical abstention doctrine prohibits the government from reviewing the internal operations of churches.

The Free Speech Clause and Free Exercise Clause of the First Amendment work together to limit the government's power to regulate or consider the internal affairs of churches or to decide matters of religious doctrine. For over one hundred years, civil courts have been barred from deciding "a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standards of morals required of them." *Watson v. Jones,* 80 U.S. (13 Wall.) 679, 733 (1871). The Supreme Court defined the core of this First Amendment restraint on civil authority in *Kedroff v. Saint Nicholas Cathedral,* 344 U.S. 94 (1952), determining that the First Amendment's restraint on civil authority acknowledges a "spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 116.

The foundational principle of this ecclesiastical abstention doctrine is that courts cannot reach the internal affairs of a religious organization. *See Serbian E. Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 708–09 (1976) (holding that "religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them"); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presbyterian Church,* 393 U.S. 440, 445–47 (1969); *Kedroff*, 344 U.S. at 114–16; *Gonzalez v. Roman Catholic Archbishop,* 280 U.S. 1, 16–17 (1929); *Watson,* 80 U.S. at 726–32;

cf. also NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 497–501 (1979); *New York v. Cathedral Acad.,* 434 U.S. 125 (1977). Any lesser standard, the Supreme Court determined, "would deprive [religious] bodies of the right of construing their own church laws, [and] would open the way to all the evils which we have depicted as attendant upon" a civil court's intrusion on religious matters. *Watson,* 80 U.S. at 733–34. As Justice Brennan asserted, ministries must be free to "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected." *Corp. of Presiding Bishop v. Amos,* 483 U.S. 327, 341 (1987) (Brennan, J., concurring); *see also Milivojevich.* 426 U.S. at 696 (church has interest in effectuating binding resolution of internal governance disputes).

II. Absent I.R.C. § 107, the findings necessary to determine whether a minister's housing is tax exempt would run afoul of the ecclesiastical abstention doctrine.

This ecclesiastical abstention doctrine protects churches and ministries from invidious intrusion by the government but also necessitates just the sort of accommodation provided by I.R.C. § 107(2). In addition to the parsonage exemption in I.R.C. § 107, the Internal Revenue Code directly or indirectly grants many housing tax breaks for Americans, including (1) members of the military, (2) members of the Foreign Service or the intelligence community, (3) persons living in low-income housing, (4) first-time home buyers, (5) members of the Peace Corps, and (6) employees whose lodging is provided for the convenience of the employer. I.R.C. §§ 134, 912, 42, 36, and 119, respectively. Many ministers who live in a

parsonage at a church would arguably fall within this last exemption, but determining whether a minister falls within I.R.C. § 119 would require that the courts determine whether the minister lives in the parsonage "for the convenience of the employer"—the sort of internal inquiry into the operations of the church that the ecclesiastical abstention doctrine seeks to avoid.

III. Both I.R.C. §§ 107(1) and (2) are necessary to avoid an Establishment Clause violation.

Additionally, if only I.R.C. § 119 and/or § 107(1) were available to ministers, the Tax Code would be granting an exemption to ministers who live at the church but not to those who live off-site, a distinction resulting from matters of church polity that is rife with theological implications. WILLIAM W. BASSETT ET AL., RELIGIOUS ORGANIZATIONS AND THE LAW § 3:6, at 3-22 (2011) ("Attorneys, on either side of litigation, should understand the churches as they see themselves. Primarily, organizational self-image is a manifestation of religious faith."). Church polity is "[t]he internal organizational framework of the churches, their patterns of association, cooperation, and governance, the structures by which the churches implement their doctrine and live their religious commitment." *Id.* at 3-21.

The issue of whether a parsonage exemption is available to only those ministers who live in church-owned housing or also to those who receive a housing allowance goes to one of the deepest divides in the modern Christian church: the authority of the institutional church to own property. The Roman Catholic Church places a strong emphasis on the central authority of the institutional church. *Id.* at 3-28 (noting that the Roman Catholic Church is an example of a hierarchical church and,

as such, "places ultimate power and authority in ecclesiastical superiors above the local congregation."). Therefore, the Roman Catholic Church generally owns and offers church-owned residences. *See* CARL ZOLLMANN, AMERICAN CIVIL CHURCH LAW 444–45 (Faculty of Political Sci. of Columbia Univ. ed., The Lawbook Exchange 2008) (1917) (noting that property used by Roman Catholic congregations is usually held by bishops either as corporations sole or individuals in trust for those congregations). Indeed, as a matter of canon law, "[t]he Roman Pontiff is the supreme dispenser and administrator of all ecclesiastical properties in virtue of his office." THOMAS F. DONOVAN, THE STATUS OF THE CHURCH IN AMERICAN CIVIL LAW AND CANON LAW STUDIES 75 (1966). The Methodist Episcopal Church similarly requires that congregations involved in the purchase of property insert certain clauses protecting the rights of the institutional church as superior to those of the local congregation. ZOLLMANN, *supra,* at 445–46. This practice's historical roots can be traced back to John Wesley, one of the founders of Methodism. *Id.*

Many Protestant denominations, on the other hand, are distrustful of a centralized church authority. The Protestant Reformation tended to eliminate "the system of hierarchical gradation and the identification of the Church with the priestly-sacramental clergy." PROTESTANTISM 242 (J. Leslie Dunstan ed., 1961). The Anabaptists and Quakers, for example, rejected "the visible church as a kind of 'trust foundation for supernatural ends.'" DONALD F. DURNBAUGH, THE BELIEVERS' CHURCH: THE HISTORY AND CHARACTER OF RADICAL PROTESTANTISM ix (1968) (quoting MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 144

(Talcott Parsons trans., Charles Scribner's Sons 1958) (1905)). Similarly, Walter Rauschenbusch, a key figure in the Social Gospel movement, noted that he was "against clericalism and against all hierarchies." DURNBAUGH, *supra,* at 285 (quoting WALTER RAUSCHENBUSCH, THE FREEDOM OF SPIRITUAL RELIGION 13 (1910)). Because of the decentralized nature of these churches and the rejection by some of the church as an independent entity, these congregations often prefer—or are even required by their religious beliefs—to offer a housing allowance instead of a church-owned parsonage. Additionally, when church property is owned at the local level, there is often less money with which to provide a parsonage.

Other theological debates are also relevant to the issue of whether a parsonage or a housing allowance is appropriate. For example, Roman Catholic priests, who remain chaste, do not have families, whereas many Protestant ministers, who usually are allowed to marry, will. This creates a dilemma for Protestant churches that offer parsonages rather than housing allowances. What should the congregation do with the minister's family once the minister dies? By offering a housing allowance instead of providing a church-owned property, the congregation does not have to deal with the prospect of evicting a minister's widow and children to make room for the new minister.

As can be seen, the decision of whether a church offers a church-owned parsonage or provides a housing allowance is not a decision of mere accounting or convenience, but rather a decision rich with theological and ecclesiastical underpinnings.

IV. I.R.C. § 107, in its entirety, is an effective, elegant, and permissible accommodation of religion that avoids the Establishment Clause violations that would result if the exemption did not exist.

The Internal Revenue Code, in I.R.C. § 107, provides a solution to these complicated problems by effectively recognizing that any minister's housing is likely used for the convenience and benefit of his employer while removing the need for unconstitutional and intrusive determinations of the internal workings of the church. By providing this benefit for both housing allowances as well as church-owned parsonages, the I.R.C. avoids "lend[ing] its power to one or the other side in controversies over religious authority or dogma," which it is prohibited from doing. *Emp't Div., Dep't of Human Res. of Or. v. Smith,* 494 U.S. 872, 877 (1990).

Ultimately, the structure provided by I.R.C. §§ 107(1), (2), is exactly the sort of accommodation that the Constitution not only permits, but requires. As Chief Justice Rehnquist noted for a plurality of the Court in another context:

> When the state encourages religious instruction or co-operates with religious authorities . . ., 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. To hold that it may not would be to find in the Constitution a requirement that the government show a callow indifference to religious groups. . . . [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

Van Orden v. Perry, 545 U.S. 677, 684 (2005) (second alteration in original) (plurality opinion) (quoting *Zorach v. Clauson,* 343 U.S. 306, 313–14 (1952)). Members of the Court have emphasized these principles in recent years. *See, e.g., Cnty. of Allegheny v. ACLU, Greater Pittsburgh Ch.*:

> [T]he Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society. Any

> approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious. A categorical approach would install federal courts as jealous guardians of an absolute "wall of separation," sending a clear message of disapproval. In this century . . . it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality.

492 U.S. 573, 657–58 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). To strike down I.R.C. § 107(2) just because it provides a tax benefit to some ministers in an attempt to accommodate differing religious traditions and avoid governmental intrusion into church polity is to establish not neutrality towards religion, but active hostility.

CONCLUSION

For the foregoing reasons, the judgment of the District Court for the Western District of Wisconsin should be reversed.

Respectfully submitted,

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April 9, 2014

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. RULE 32(a)

The undersigned counsel of record for *Amicus Curiae* affirms and declares as follows:

This brief complies with the type-volume limitation of Fed. R. App. P. Rule 32(a)(7) for a brief utilizing proportionally-spaced font, because the length of this brief is 2,359 words, excluding the parts of the brief exempted by Fed. R. App. P. Rule 32(a)(7)(B)(iii).

This brief also complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(b), and the type-style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in proportionally-spaced typeface using Microsoft Word in 12-point Century font, with footnotes in 11-point Century font.

Executed this 9th day of April, 2014.

/s/ Kenneth A. Klukowski
Kenneth A. Klukowski

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2014, I electronically filed the foregoing with the Clerk or the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Executed this 9th day of April, 2014.

/s/ Kenneth A. Klukowski
Kenneth A. Klukowski

LETTERS OF CONSENT

Wednesday, April 9, 2014 7:52:27 PM Central Daylight Time

Subject: Re: Amicus Consent in FFRF v. Lew, No. 14-1152
Date: Tuesday, April 8, 2014 11:32:51 PM Central Daylight Time
From: Richard L. Bolton
To: Justin Butterfield

Yes. Rich

Sent from my iPhone

On Apr 8, 2014, at 10:05 PM, "Justin Butterfield" <jbutterfield@libertyinstitute.org> wrote:

> Dear Mr. Bolton,
>
> My name is Justin Butterfield, and I am an attorney at Liberty Institute. Liberty Institute would like to file an amicus brief in Freedom From Religion Foundation v. Lew, Seventh Circuit No. 14–1152. Would you consent to our filing this amicus brief?
>
> Thank you,
> Justin Butterfield

Boardman & Clark LLP

Wednesday, April 9, 2014 7:54:27 PM Central Daylight Time

Subject: Re: Amicus Consent in FFRF v. Lew, No. 14-1152
Date: Wednesday, April 9, 2014 5:14:18 AM Central Daylight Time
From: Hagley, Judith A. (TAX)
To: Justin Butterfield
CC: Appellate (TAX)

Yes, I consent. Judith

Dear Ms. Hagley,

My name is Justin Butterfield, and I am an attorney at Liberty Institute, a non-profit, public interest law firm in Plano, Texas, that specializes in religious liberties defense. Liberty Institute would like to file an amicus brief in Freedom From Religion Foundation v. Lew, Seventh Circuit No. 14–1152. Would you consent to our filing this amicus brief?

Thank you,
Justin Butterfield