COMMENT

RE-INTERPRETING THE PARSONAGE EXCLUSION: CONSTITUTIONAL CHALLENGES AND THE AGENCY RESPONSE IN THE WAKE OF *FREEDOM FROM RELIGION FOUNDATION, INC. V. LEW*

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INTRODUCTION

The Parsonage Exclusion (Parsonage Exclusion or Exclusion), which provides that taxable income does not include a home's rental value or housing allowances in the case of a "minister of the gospel," has developed a notorious reputation.[1] Parties have challenged the Parsonage Exclusion's constitutionality, claiming that it violates the Establishment Clause and illegally subsidizes religion.[2] The Parsonage Exclusion excludes housing expenditures from taxable income, but *only* to "ministers of the gospel."[3] Nevertheless, the Exclusion remains intact, mainly because legal challengers have lacked standing.[4] Therefore, the provision continues to save ministers and churches money in the form of foregone tax payments that other taxpayers are required to make.[5]

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1. *See, e.g.*, Erwin Chemerinsky, *The Parsonage Exemption Violates the Establishment Clause and Should Be Declared Unconstitutional*, 24 WHITTIER L. REV. 707, 710 (2003) (decrying the Parsonage Exclusion (Parsonage Exclusion or Exclusion) as an "impermissible violation of the Establishment Clause"); David Niose, *Americans Are Leaving Religion. Why Are We Still Subsidizing It?*, WASH. POST (Sept. 14, 2015), http://www.washingtonpost.com/news/in-theory/wp/2015/09/14/americans-are-leaving-religion-why-are-we-still-subsidizing-it/ (calling the Parsonage Exclusion "the most egregious example of religious privilege under the tax code"). Most recently, comedian John Oliver, on air, created his own satirical "church," calling it Our Lady of Perpetual Exemption Church, for the purpose of receiving the Parsonage Exclusion. *See Last Week Tonight with John Oliver: Episode 49* (Home Box Office, Inc. television broadcast Aug. 16, 2015).

2. *See* Freedom From Religion Found., Inc. v. Lew, 773 F.3d 815, 818, 823 (7th Cir. 2014) (noting that plaintiffs could not challenge the Parsonage Exclusion because they lacked standing); Warren v. Comm'r, 302 F.3d 1012, 1014, 1015 (9th Cir. 2002) (discussing the proceedings of a constitutional challenge to the Exclusion that ended in the passage of legislation specifically designed to prevent the court from analyzing the constitutionality of the Exclusion); Freedom From Religion Found., Inc. v. Geithner, 715 F. Supp. 2d 1051, 1063, 1066–67 (E.D. Cal. 2010) (reviewing the possible arguments challenging the Parsonage Exemption and allowing the plaintiff's challenge to the Exemption to move forward). *But see* Order on Stipulation of Dismissal, Freedom of Religion Found., Inc. v. Geithner, 715 F. Supp. 2d 1051 (E.D. Cal. 2010) (No. 2:09-CV-02894-WBS-DAD) [hereinafter *Geithner Dismissal*] (stipulating the dismissal of further proceedings and settling the case jointly).

3. *See* 26 U.S.C. § 107 (2012).

4. *See, e.g.*, *Lew*, 773 F.3d at 824 (holding that taxpayers would need to ask for the Exclusion to have standing to challenge the claim in court); Peter J. Reilly, *Clergy Housing Tax Break Withstands Challenge – Atheist Group Lacks Standing*, FORBES (Nov. 13, 2014, 3:22 PM), http://www.forbes.com/sites/peterjreilly/2014/11/13/minister-of-gospel-housing-tax-break-withstands-challenge-atheist-group-lacks-standing/ (claiming the ongoing problem for parties wishing to challenge the Exclusion has continually been the issue of standing); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (establishing a plaintiff's requirements for standing: plaintiff must suffer a concrete and particularized injury in fact; the injury must be traceable to the action in controversy; and it must be likely that the injury is redressable by a court).

5. *See* Chemerinsky, *supra* note 1, at 718–19 (discussing the benefit provided solely to ministers by taking advantage of the Exclusion).

However, a recent Seventh Circuit case, *Freedom From Religion Foundation, Inc. v. Lew*,[6] has laid a roadmap for groups to attain standing and successfully pursue constitutional challenges against the Parsonage Exclusion.[7] The Seventh Circuit determined that the Atheist leaders of the Freedom From Religion Foundation (the Foundation) did not have standing to bring suit only because they did not *claim* the Parsonage Exclusion.[8] The leaders of the Foundation, Anne Gaylor and Dan Barker, wanted to exclude the housing allowance paid to them by the Foundation from their incomes, just as clergy can.[9] Yet, Gaylor and Barker were not "ministers of the gospel," and so they did not claim the Parsonage Exclusion.[10] The United States District Court for the Western District of Wisconsin agreed with the two leaders, stating that forcing them to claim the Parsonage Exclusion would be futile and that Gaylor and Barker were sufficiently injured by the tax treatment to have standing.[11] The district court went on to hold that the Parsonage Exclusion violated the Establishment Clause of the First Amendment of the Constitution.[12] The case was then appealed to the Seventh Circuit, where the circuit court vacated and remanded the lower court's decision.[13] The Seventh Circuit

6. 773 F.3d 815 (7th Cir. 2014).

7. *Id.* at 823(holding that taxpayers have not suffered a "constitutionally cognizable injury" and thus do not have standing because they have not actually claimed the Exclusion).

8. *Id.* The Freedom From Religion Foundation, which has brought over forty lawsuits involving the First Amendment, calls itself "an educational, watchdog organization working to keep church and state separate." *Our Legal Work*, FREEDOM FROM RELIGION FOUND., http://ffrf.org/legal (last visited Aug. 21, 2015).

9. *See* Freedom From Religion Found., Inc. v. Lew, 773 F.3d 815, 818 (7th Cir. 2014); *see also* 26 U.S.C. § 107 (allowing the Exclusion only "in the case of a minister of the gospel").

10. *See Lew*, 773 F.3d at 823 (reviewing Gaylor and Barker's argument that the only reason they did not file for the Exclusion is because they are not actually ministers); *see also* Reilly, *supra* note 4 ("Since they would rather have you call them late for breakfast than 'minister of the gospel', they did not exclude the allowance from their income."); Brief for Appellees at 6, Freedom From Religion Found., Inc. v. Lew, 773 F.3d 815 (7th Cir. 2014) (No. 14-1152) (explaining that in no way could the Foundation's officers meet the qualifications to be a "minister of the gospel").

11. *See* Freedom From Religion Found., Inc. v. Lew, 983 F. Supp. 2d 1051, 1055–56 (W.D. Wis. 2013) (alteration in original) (quoting Finlator v. Powers, 902 F.2d 1158, 1162 (4th Cir. 1990)) (internal quotation marks omitted) (holding that nonexempt taxpayers had standing to challenge the Exclusion without first asking for the Exclusion because the plaintiff's "injury is created by the very fact that the [law] imposes additional [tax] burdens" on the nonexempt taxpayers). The Seventh Circuit later vacated and remanded the district court decision, distinguishing *Finlator* and finding that the Foundation's officers had to ask for and be denied the exclusion before they had standing. *See Lew*, 773 F. 3d at 823, 825.

12. *See Lew*, 983 F. Supp. 2d at 1054 (finding the statute to violate the Establishment Clause).

13. *Lew*, 773 F.3d at 823, 825 (holding the Foundation's leaders responsible for claiming the Exclusion in order to have standing in court).

found that the Foundation's leaders lacked standing to bring the case simply because they did not ask for the Exclusion and, thus, were not injured by the denial of that Exclusion.[14] The Seventh Circuit did not reach the question of the constitutionality of the Exclusion much to the dismay of the Foundation, which later accused the three-judge panel of being too timid to address the "blatant preference for ministers and churches."[15]

The Seventh Circuit's decision in *Freedom From Religion Foundation, Inc. v. Lew* provides a unique opportunity for the Internal Revenue Service (IRS) to address a controversial area prior to further impending litigation.[16] This Comment will set out the courses of appropriate action that the IRS could take in light of this decision. Part I of this Comment examines the history of the Parsonage Exclusion, highlights the various parties' rhetoric surrounding its purpose, and examines recent legal challenges to the Exclusion. Part II discusses the different arguments of the constitutionality of the Parsonage Exclusion and predicts the outcome of a constitutional challenge in the wake of the recent Seventh Circuit case. Part III addresses the need for IRS action, outlining the various options for such action. Finally, this Comment concludes by recommending IRS action and predicting the effects of such a decision.

I. THE EVOLUTION OF THE PARSONAGE EXCLUSION

A. History of the Parsonage Exclusion and the Surrounding Agency Rhetoric

Section 107 of the Internal Revenue Code (IRC), commonly known as the Parsonage Exclusion, allows a "minister of the gospel" the opportunity to exclude from gross income the rental value of a home, or the rental allowance earmarked to pay for that home, that was provided to the minister as compensation.[17] The tax-exempt treatment of clergy-provided

14. *Id.* at 821.

15. Freedom From Religion Found., Inc. v. Lew, 773 F.3d 815, 818 (7th Cir. 2014); Press Release, Freedom from Religion Found., FFRF Faults 7th Circuit Timidity on Clergy Privilege Case (Nov. 13, 2014), http://ffrf.org/news/news-releases/item/21760-ffrf-faults-7th-circuit-timidity-on-clergy-privilege-case (internal quotation marks omitted).

16. *Lew*, 773 F.3d at 823 (discussing the necessity for the Internal Revenue Service (IRS) and the Tax Court to interpret the constitutionality of the Parsonage Exclusion before a court does).

17. *See* 26 U.S.C. § 107 (2012). Today, the text of § 107 reads:

> In the case of a minister of the gospel, gross income does not include—(1) the rental value of a home furnished to him as part of his compensation; or (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home and to the extent such allowance does not exceed the fair rental value of the home, including furnishings and appurtenances such as a garage, plus

housing has been a government practice since 1921 when the Parsonage Exclusion was first codified.[18] At that time, § 213(b)(11) of the 1921 Revenue Act allowed one to exclude from gross income the rental value of any "dwelling house and appurtenances thereof" provided as compensation by a church.[19] After revisions to the IRC in 1954, the Parsonage Exclusion was codified at § 107, coming to resemble what it is today.[20] Section 107 of the 1954 IRC had two provisions: the first excluded from gross income the rental value of a home provided by a church; the second permitted a minister to mark part of his or her income as a "housing allowance" and exclude this amount from taxable income.[21] The Parsonage Exclusion remained largely unchanged until a 2002 amendment, called the Clergy Housing Clarification Act, which added the present wording to § 107(2) and clarified that the allowance exclusion may not "exceed the fair rental value of the home . . . plus the cost of utilities."[22]

The IRS has continually taken the stance that § 107 is a necessary provision to ensure equal treatment of churches as employers and to prevent entanglement into the affairs of churches, as prohibited by the Establishment Clause of the First Amendment.[23] The IRS likens § 107 to § 119, which allows one to exclude from gross income the value of housing when the housing is furnished for the "convenience of the employer," arguing that providing the Parsonage Exclusion to clergy ensures equal treatment of employees across the board.[24] Section 107, however, differs

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the cost of utilities.

Id. *See* Matthew W. Foster, Note, *The Parsonage Allowance Exclusion: Past, Present, and Future*, 44 VAND. L. REV. 149, 150 (1991) (describing the functionality of the Parsonage Exclusion).

18. *See* Foster, *supra* note 17, at 150–51 (detailing the history of the Parsonage Exclusion).

19. *See* Revenue Act of 1921 § 213(b)(11), 26 U.S.C. § 107 (2012); Foster, *supra* note 17, at 151 (quoting the text of the statute).

20. *See* Foster, *supra* note 17, at 151–52 (explaining the changes made to the statute after the 1954 code revision).

21. *See id.* (describing the significance of § 107(2) from the 1954 revisions); *see also* 26 U.S.C. § 107 (discussing the language before the 2002 amendment).

22. *See* Clergy Housing Allowance Clarification Act of 2002 § 2(a), 26 U.S.C. § 107(2); *see also* 26 U.S.C. § 107 (discussing the 2002 amendment).

23. *See* Brief for Appellants at 3–6, Freedom From Religion Found., Inc. v. Lew, 773 F.3d 815 (7th Cir. 2014) (No. 14-1152) (grouping § 107 into a category with other tax exemptions that provide housing exclusions and arguing that the provision places "ministers on an equal footing with other employees who already enjoyed" such an exclusion); *see also id.* at 8–9 (adding that the section was created to prevent "potential church-state entanglement"). The First Amendment of the Constitution provides, "Congress shall make no law respecting an establishment of religion," a phrase commonly known as the Establishment Clause. U.S. CONST. amend. I. For more discussion regarding the Establishment Clause of the First Amendment, see *infra* Part III.

24. *See* Brief for Appellants, *supra* note 23, at 5–6 (internal quotation marks omitted) (explaining that before the exclusion for clergy was enacted at § 213(b)(11) of the Revenue

from § 119 in some key respects: mainly, the Parsonage Exclusion provides for cash "allowances" to be given to ministers where no such allowances can be excluded by employees through § 119.[25] The IRS attributes this contrast to the need to "accommodate the . . . governance structures, practices, traditions, and other characteristics of churches," which may differ from other types of employers.[26] The Government argues that this accommodation avoids any potential entanglement between the government and churches by eliminating the need for a church to prove that it meets the qualifications of § 119.[27]

Even though § 107 on its face provides an exclusion only to a "minister of the gospel," the IRS has construed the provision broadly.[28] The IRS interprets the term "minister" to include someone who is "duly ordained, commissioned, or licensed by a religious body constituting a church or church denomination" and who has the "authority to conduct religious worship, perform sacerdotal functions, and administer ordinances or sacraments according to the prescribed tenets and practices of that church or denomination."[29] For example, ministers may include those who are the

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Act of 1921, the Treasury Department "had allowed some employees—but not clergy—to exclude the value of employer-provided housing . . . pursuant to the 'convenience of the employer' doctrine," and insinuating that Congress enacted the Parsonage Exclusion to place clergy on equal footing with employees that were afforded the § 119 exemption).

25. *Compare* 26 U.S.C. § 107(2) (2012) (expressly excluding cash allowances from gross income), *with* 26 U.S.C. § 119 (excluding the rental value of housing provided by the employer). *See also* Edward A. Zelinsky, *Do Religious Tax Exemptions Entangle in Violation of the Establishment Clause? The Constitutionality of the Parsonage Allowance Exclusion and the Religious Exemptions of the Individual Health Care Mandate and the FICA and Self-Employment Taxes,* 33 CARDOZO L. REV. 1633, 1637 (2012).

26. *See* Brief for Appellants, *supra* note 23, at 8 (citing Clergy Housing Allowance Clarification Act of 2002, H.R. 4156, 107th Cong. § 2(a)(4) (2002)). Specifically, the Government argued that some newer churches favored providing ministers the housing allowances in lieu of owning and maintaining a church parsonage and that providing an exclusion for these housing allowances—instead of simply an exclusion for the value of a provided in-kind parsonage—was Congress's way of eliminating "discrimination" experienced by these newer churches. *See id.* (citing H.R. REP. NO. 1337, at 15 (1954); S. REP. NO. 1622, at 16 (1954)).

27. *See* Brief for Appellants, *supra* note 23, at 8–9 (describing the lack of entanglement that § 107 affords). Section 119 of the Internal Revenue Code (IRC or Code) allows employers, for their own convenience, to provide tax-free housing and accommodations to their employees; however, the housing provided must be physical housing—not a housing allowance. *See* 26 U.S.C § 119. The Government argued that it would be too entangling to interfere in church affairs to try to determine what qualifies as church housing and that the housing allowance in § 107(2) provides churches the opportunity to provide their clergy with housing. *See* Brief for Appellants, *supra* note 23, at 8–9.

28. *See* Brief for Appellants, *supra* note 23, at 4 n.2 (internal quotation marks omitted) (stating the IRS's broad interpretation of "minister," "religion," and "church" for purposes of § 107).

29. *See* IRS, PUB. NO. 517, SOCIAL SECURITY AND OTHER INFORMATION FOR

equivalent of ministers in religions other than Christianity.[30] Additionally, the IRS interpretation of the term "religion" liberally includes "beliefs . . . that do not posit the existence of a Supreme Being."[31] The definition of a church is likewise fluid, as the IRS looks to certain characteristics and determines on a case-by-case basis whether an organization is a church. The IRS does not evaluate whether a particular organization's doctrine is "religious," but simply looks to whether the beliefs are "truly and sincerely held by those professing them."[32] Specifically, the IRS makes no commitment to what a church is for purposes of tax law, but says that it looks to a number of broadly-interpreted criteria in determining whether an organization is a "church," including a formal code of doctrine and discipline, literature of its own, regular congregations, and other facts and circumstances.[33] Thus, while the Parsonage Exclusion's codified language may seem limiting to non-Christians, the agency interpretation is quite broad and inclusive as to who is a minister, what is a religion, and how a church is defined.[34]

B. Recent Challenges to the Exclusion

Despite the IRS's broad application of the Parsonage Exclusion, some groups have still found it to be too limiting—even unconstitutionally discriminatory—and claimed it gives preferential treatment to religion in violation of the Establishment Clause of the First Amendment.[35] Where a government act has no secular purpose, endorses religion, or entangles the government with religion, the act will be found to violate the Establishment

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MEMBERS OF THE CLERGY AND RELIGIOUS WORKERS 3–4 (2015) [hereinafter INFORMATION FOR CLERGY]; *see also* IRS, PUB. NO. 1828, TAX GUIDE FOR CHURCHES & RELIGIOUS ORGANIZATIONS 27 (2013) [hereinafter TAX GUIDE FOR CHURCHES] ("The term minister denotes members of clergy of all religions and denominations and includes priests, rabbis, imams, and similar members of the clergy.").

30. *See* INFORMATION FOR CLERGY, *supra* note 29, at 3–4 (noting that "ministers" are persons licensed, ordained, or commissioned by a religious body); *see also* Salkov v. Comm'r, 46 T.C. 190, 194–96, 199 (1966) (extending the term "minister of the gospel" to a Jewish cantor of a synagogue).

31. Brief for Appellants, *supra* note 23, at 4 n.2 (citing I.R.M. 7.25.3.6.5(2)).

32. TAX GUIDE FOR CHURCHES, *supra* note 29, at 27 (explaining that the IRS does not evaluate the content of the organization).

33. *See id.*

34. See *supra* notes 28–33 and accompanying text for evidence of broad interpretation of terms.

35. *See* Brief for Appellees, *supra* note 10, at 12 (arguing that providing tax benefits only to religious clergy violates the Establishment Clause); *see also* Freedom From Religion Found., Inc. v. Geithner, 715 F. Supp. 2d 1051, 1055–56 (E.D. Cal. 2010) (challenging the Parsonage Exclusion as unconstitutional).

Clause.[36] The Foundation has taken on the bulk of First Amendment legal challenges to date, and since 2010 has led the push to declare the Parsonage Exclusion unconstitutional.[37] It claims that the tax benefit provided to clergy under the Parsonage Exclusion, which the Foundation's own "similarly situated" officers cannot claim because they cannot be deemed "ministers of the gospel," unfairly favors religion.[38] Seemingly, courts have yet to disagree with the general argument that the Parsonage Exclusion violates the Establishment Clause, but parties have so far not been able to bring a successful claim in court due to lack of standing.[39]

The Seventh Circuit in *Freedom From Religion Foundation* paved the way for an Atheist organization to ask for the Parsonage Exclusion and, if denied, to bring a successful suit by arguing that the Parsonage Exclusion violates the Establishment Clause.[40] Even if an Atheist organization asked for the Parsonage Exclusion and was granted the exclusion from income—confirming that the IRS could indeed acknowledge its leaders as "ministers of the gospel"—the Foundation would likely continue litigating the issue to ensure the government does not "give religious groups any special treatment."[41] It is only a matter of time until an organization follows the

36. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (forming the Supreme Court's standard, known as the *Lemon* test, of determining whether a statute violates the Establishment Clause).

37. *See Our Legal Work*, *supra* note 8 (stating that the Foundation has brought over forty First Amendment constitutional challenges since 1997 and has been more successful than any other organization in challenging "faith-based initiatives"—state-subsidized religious initiatives). A search for "Parsonage Exclusion" and related terms on Westlaw reveals that the Foundation has been the only group challenging the constitutionality of the Exclusion in recent years. *See generally* Freedom From Religion Found., Inc. v. Lew, 773 F.3d 815 (7th Cir. 2014) (challenging the constitutionality of the Exclusion in 2014); Freedom From Religion Found., Inc. v. Lew, 983 F. Supp. 2d 1051 (W.D. Wis. 2013) (challenging the constitutionality of the Exclusion in 2013); *Geithner*, 715 F. Supp. 2d 1051, 1055–56 (challenging the constitutionality of the Exclusion in 2010).

38. *See* Brief for Appellees, *supra* note 9, at 6–7 (citing and calling attention to Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989), which disallowed a tax break that simultaneously favored religion and was unavailable to other taxpayers and discussing how the Foundation's officers are similarly situated to ministers).

39. *See Lew*, 983 F. Supp. 2d at 1053 (concluding that the Foundation not only had standing, but that the Parsonage Exemption does in fact violate the Establishment Clause); *Geithner*, 715 F. Supp. 2d at 1059, 1063 (finding that the Foundation had standing to challenge the constitutionality and calling into doubt the constitutionality of the Exclusion). *But see Lew*, 773 F.3d at 818, 823 (vacating the case for lack of standing but making no decision on constitutionality); *Geithner Dismissal*, *supra* note 2 (dismissing the case because of a voluntary settlement).

40. *See Lew*, 773 F.3d at 823, 825 (finding that the Foundation did not have standing simply because it did not claim the Exclusion, but stating clearly that if it were to claim the Exclusion it would have suffered a cognizable injury sufficient to have had standing).

41. Bob Smietana, *Feds Say OK to Atheists on Religion Tax Break*, USA TODAY (Aug. 20, 2013, 4:50 PM), http://www.usatoday.com/story/news/nation/2013/08/20/atheist-

roadmap laid out by the Seventh Circuit and asks for the Parsonage Exclusion. Such a course of action could end with the determination that the Parsonage Exclusion is unconstitutional or could leave open the possibility of more First Amendment challenges.[42]

II. CONSTITUTIONALITY OF § 107: ARGUMENTS FOR AND AGAINST

Scholars on both sides of the debate vehemently denounce or defend the Parsonage Exclusion.[43] Only after the enactment of § 107(2) of the 1954 Act—excluding the rental allowances paid to "ministers of the gospel"—has the Parsonage Exclusion's constitutionality been called into question.[44] Section 107(1) has been safe from constitutional challenge; scholars are not concerned with the provision that essentially provides clergy with the equivalent of the "convenience to the employer" doctrine, as codified in § 119.[45] What concerns scholars arguing against constitutionality is the apparent favoritism the Parsonage Exclusion provides to clergy, but not to other taxpayers, by offering them the opportunity to exclude housing *allowances* paid as compensation, but earmarked for housing, from their gross income.[46] Still, proponents of the Parsonage Exclusion reject the argument that § 107 is unconstitutional, highlighting instead the "constitutional permissibility" of the statute because no other

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religion-tax-breaks/2678367/ (quoting Gaylor, in reference to the possibility of receiving the ability to exclude the value of the housing allowance from her taxable income, saying, "That's not what we are after").

42. *See* Mark A. Kellner, *'Parsonage Exemption' Safe, Federal Court Rules, Dismissing Atheists' Complaint*, DESERET NEWS NAT'L (Nov. 17, 2014), http://national.deseretnews.com/article/2796/parsonage-exclusion-safe-federal-court-rules-dismissing-atheists-complaint.html ("You have not heard the last of it . . . You'll be hearing from us."); *Press Release*, *supra* note 15 (quoting Barker saying that they "will continue to challenge this indefensible favoritism of religion" after the Seventh Circuit vacated the challenge).

43. *Compare* Zelinsky, *supra* note 25, at 1662 (defending the constitutionality of the Exclusion), *with* Chemerinsky, *supra* note 1, at 710 (decrying the Exclusion and calling for its invalidation), *and* Eric Rakowski, *Are Federal Income Tax Preferences for Ministers' Housing Constitutional?*, 95 TAX NOTES 775 (Apr. 29, 2002) (denying the constitutionality of the Exclusion), *and* Ellen P. Aprill, *Parsonage and Tax Policy: Rethinking the Exclusion*, 96 TAX NOTES 1243 (Aug. 26, 2002) (calling for an alteration to the Exclusion to bring it back into compliance with constitutional law).

44. *See* Chemerinsky, *supra* note 1, at 712–13 (arguing that § 107(1)—allowing ministers an exclusion if they live on church property—would be provided for under § 119, but § 107(2) is a benefit provided to religion that "no one else receives").

45. *See id.*; Rakowski, *supra* note 43, at 787 (arguing generally that § 107(2) is unconstitutional, but stating that there would be no constitutional issue if the statute's special focus on housing allowances applied to taxpayers covered under § 119).

46. *See* Chemerinsky, *supra* note 1, at 710 ("The parsonage exemption provides an enormous financial benefit to clergy, and to the religions that employ them, which is not available to any other taxpayers or employers.").

"disentangling tax alternatives" exist.[47]

Leading the charge against § 107(2)'s unconstitutionality is Erwin Chemerinsky.[48] Chemerinsky argues that § 107(2) provides a benefit to "ministers of the gospel" unavailable to other taxpayers and that such a benefit constitutes an unconstitutional subsidy to religion, as prohibited by the Establishment Clause.[49] He points to *Texas Monthly, Inc. v. Bullock*[50] in support of his argument that the Parsonage Exclusion is a benefit provided solely to religion in violation of the Constitution.[51] In *Texas Monthly*, the Supreme Court struck down a state statute, which Chemerinsky sees as "identical" to § 107(2), that provided a sales tax exemption for religious publications.[52]

Chemerinsky also distinguishes the property tax exemptions for religions organizations upheld in *Walz v. Tax Commission of New York*[53] from the Parsonage Exclusion and posits that analysis of *Walz* "reveals the clear unconstitutionality of section 107(2)."[54] He argues that the exemption in *Walz* applied to religious and non-religious organizations; thus, it had a secular purpose and was religiously neutral in its application.[55] Further, Chemerinsky notes that § 107(2) is unconstitutional after *Walz*, in which the Court made clear that subsidies to religion violate the Establishment Clause,[56] because Congress and the Court consider the Parsonage

47. *See* Zelinsky, *supra* note 25, at 1662–63 (concluding that no better alternatives to § 107 exist for taxing clergy under the Establishment Clause and that to ensure minimal entanglement of church and state, § 107 should remain constitutionally permissible). Zelinsky, however, does go on to admit that § 107(2), while constitutionally permissible given the alternatives, may not actually be a matter of good tax policy. *Id.* at 1667.

48. *See generally* Chemerinsky, *supra* note 1. Chemerinsky was asked to provide an amicus curiae brief in Warren v. Commissioner, 282 F.3d 1119 (9th Cir. 2002), alluding to his public status as a leader in Establishment Clause jurisprudence. *Id.* at 707; *see also Erwin Chemerinsky*, ABA J., http://www.abajournal.com/authors/9822/ (last visited Aug. 22, 2015) (hailing Chemerinsky as "one of the nation's top experts in constitutional law").

49. Chemerinsky, *supra* note 1, at 716.

50. 489 U.S. 1 (1989).

51. *See* Chemerinsky, *supra* note 1, at 714–15 (alteration in original) (quoting *Texas Monthly*, 489 U.S. at 3) ("When government directs a subsidy exclusively to religious organizations . . . [it] cannot but 'conve[y] a message of endorsement. . . .'")). Government endorsement of religion in any way, without a secular purpose, is a violation of the Constitution under *Lemon*. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

52. *See Texas Monthly*, 489 U.S. at 25 (striking down a statute, which provided a benefit to religion, as unconstitutional); Chemerinsky, *supra* note 1, at 714–15.

53. 397 U.S. 664 (1970).

54. *See* Chemerinsky, *supra* note 1, at 716.

55. *See id.* at 716–17 (describing the secular purpose of the statute in *Walz*); *see also Texas Monthly*, 489 U.S. at 12, 14–15 n.4 (distinguishing the statute in *Walz* from the Texas statute).

56. *See* Chemerinsky, *supra* note 1, at 718.

Exclusion to be a subsidy.[57] An additional factor distinguishing the Parsonage Exclusion from the statute upheld in *Walz* is that the Exclusion's housing allowance "increases government entanglement with religion."[58]

Finally, Chemerinsky proclaims that under any test the Supreme Court uses to determine whether a statute violates the Establishment Clause, the Parsonage Exclusion must be declared unconstitutional.[59] Looking to the *Lemon* test, the "neutrality test," and the "endorsement test," he claims that § 107(2) provides a benefit to clergy that is not provided to anyone else.[60] His analysis has gained strong support for constitutional invalidation of the Parsonage Exclusion,[61] but his prediction that "even the most conservative Justices" will have a hard time finding a justification for upholding the constitutionality of the Parsonage Exclusion has yet to be tested, as the issue has not yet made it to the Supreme Court.[62]

Even scholars supporting the Parsonage Exclusion concede that § 107(2), while constitutionally permissible, may not be the best law as a matter of tax policy.[63] Professor Edward Zelinsky has been an outspoken supporter of the constitutionality of the Parsonage Exclusion, maintaining that it stands today as a "constitutionally permissible" statute for a situation that lacks "disentangling alternatives."[64] Zelinsky admits that entanglement

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57. *See id.* (quoting Justice Brennan, "Every tax exemption constitutes a subsidy") (citing Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 14 (1989)); *see also id.* at 718–19 (explaining how the ability for clergy to exclude from their income both housing costs *and* mortgage interest is a considerable government subsidy).

58. *See id.* at 719–20 (arguing that the directive of § 107(2) as it stands today forces the government to make determinations about who is a "minister of the gospel" and in what type of activities that individual partakes).

59. *Id.* at 722–35.

60. *See id.* at 735. The *Lemon* test, established by the Supreme Court to avoid constitutional conflict, asks whether a statute has a secular purpose, whether its effect advances or inhibits religion, and whether it fosters excessive government entanglement with religion. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971). The "neutrality test," established in a more recent Supreme Court case, asks whether aid provided by the government to a religious organization is neutrally available to other non-religious or private organizations. *See* Mitchell v. Helms, 530 U.S. 793, 816 (2000). Finally, the "endorsement test" looks to whether the government shows an "endorsement or disapproval" of a particular religion. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 688–89 (1984).

61. *See generally* Rakowski, *supra* note 43 (challenging the constitutionality of the Exclusion); Aprill, *supra* note 43 (calling into question the constitutionality of the Exclusion and calling for a statutory change).

62. *See* Chemerinsky, *supra* note 1, at 735 (asserting that the Parsonage Exclusion would likely be invalidated if a challenge made it to the Supreme Court).

63. *See* Zelinsky, *supra* note 25, at 1665 ("That Section 107 is constitutional does not mean that Section 107 is compelling as a matter of tax policy. In terms of tax policy, there is no persuasive case for Section 107(2) and its exclusion of cash parsonage allowances.").

64. *Id.* at 1636, 1662 (arguing that the government's use of § 107 does produce entanglement, but "when taxes and churches collide, there are no disentangling alternatives, only imperfect trade-offs between different forms of entanglement.").

between the government and church is unconstitutional under the Establishment Clause as interpreted by the *Lemon* test, yet he posits that *Walz* allows religious tax exemptions as a "means of managing entanglement between church and state" and argues that § 107 is constitutionally plausible since there are no other options that would prevent entanglement between churches and the government.[65]

Simply put, Zelinsky argues that no better option exists for treating the issue of church taxation.[66] He describes the type of entanglement that § 107 presents as "borderline entanglement" since it requires the government to determine the borders of who is eligible and who is not eligible for the Exclusion.[67] Zelinsky analyzes the possible declaration of § 107 as unconstitutional and concludes that there are no disentangling alternatives; if Congress repealed § 107, the borderline entanglement it would cause would be replaced by the "enforcement entanglement" of ensuring the correct income tax is paid.[68] Furthermore, if courts invalidated § 107, some housing provided to clergy would be subject to § 119, shifting the borderline entanglement of § 107 to the similar borderline entanglement of deciding whether church premises were provided to the employee for the convenience of the employer pursuant to § 119.[69] Even if neither § 107 nor § 119 were prohibited to apply to churches and clergy, Zelinsky argues that this would raise other constitutional concerns[70] and would still produce entanglement by forcing the IRS to determine who maintains a religious institution and to intervene in internal church operations during audits.[71]

While Zelinsky concludes that § 107 is a constitutionally permissible construction, he makes the distinction that what is constitutionally permissible is not always the best policy.[72] He admits that the traditional

65. *Id.* at 1665 (making the argument that there are no disentangling alternatives to § 107). *Contra* Erika King, *Tax Exemptions and the Establishment Clause*, 49 SYRACUSE L. REV. 971, 973 (1999) (arguing that religious tax exemptions do not violate the Constitution, but they "may violate of the 'norm of equal treatment'" found in the Establishment Clause).

66. *See* Zelinsky, *supra* note 25, at 1665–66.

67. *See id.* at 1659 (defining "borderline entanglement" as the process of government determination of who is eligible for an exemption and where eligibility borders should be drawn).

68. *Id.* (implying that enforcement entanglement is no better than borderline entanglement).

69. *Id.* at 1660.

70. Specifically, Zelinsky claims that Free Exercise concerns would emerge. *See id.* at 1661 (citing U.S. CONST. amend. I, which provides that "Congress shall make no law . . . prohibiting the free exercise" of religion).

71. *See* Zelinsky, *supra* note 25, at 1662 (supporting his claim that there are no better alternatives).

72. *Id.* at 1665.

argument and IRS rhetoric—that the Parsonage Exclusion lessens discrimination between churches that can provide physical housing and churches that cannot—are not compelling.[73] Rather, he argues that the Clergy Housing Allowance Clarification Act, passed in 2002, further added entanglement problems in the form of increased compliance costs to the churches and enforcement costs to the IRS.[74] He thus concludes that, "as a matter of tax policy," but not as a matter of constitutionality, § 107(2) is "inadvisable."[75]

Nevertheless, courts, along with Chemerinsky, have had trouble stomaching the constitutionality of § 107(2). Important recent cases, such as *Warren v. Commissioner*,[76] *Freedom From Religion Foundation v. Geithner*,[77] and the district court's decision in *Freedom From Religion Foundation v. Lew*, have all called into question the constitutionality of § 107(2).[78] Judge Barbara Crabb of the Western District of Wisconsin was the first to hear the Foundation's argument and to declare definitively the Parsonage Exclusion unconstitutional.[79] While the Seventh Circuit in *Lew* vacated the district court's holding on the Parsonage Exclusion because the Foundation lacked standing,[80] Judge Crabb's opinion on the constitutionality of the Parsonage Exclusion was thorough and well supported.[81] More importantly, the district court's discussion of constitutionality went unmentioned in the Seventh Circuit's decision, as the Seventh Circuit tiptoed around the issue,

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73. *Id.* at 1666 ("There is no compelling argument for establishing tax parity among those ministers who receive in-kind housing and those who receive cash housing allowances as the Code creates no similar parity for nonclerical employees receiving taxable cash and nontaxable employer-provided lodging.").

74. *See id.* at 1666–67 (claiming that Congress's 2002 amendment to the Exclusion was "inadvisable," only complicating § 107 further and adding the level of an "allowance" to clergy-provided tax-free housing).

75. *See id.* at 1667 (concluding that the exclusion for parsonage allowances is not advisable as these cash allowances do not pose the same entanglement issues as an in-kind transfer of housing poses for taxpayers or the IRS).

76. 302 F.3d. 1012 (9th Cir. 2002).

77. 715 F. Supp. 2d 1051 (E.D. Cal. 2010).

78. *See Warren*, 302 F.3d. at 1013–15 (reviewing Professor Chemerinsky's request to intervene in a case challenging the Exclusion's constitutionality, providing a brief overview of Chemerinsky's argument, and denying his motion to intervene); Freedom From Religion Found., Inc. v. Lew, 983 F. Supp. 2d 1051, 1059 (W.D. Wis. 2013) (finding that the Parsonage Exclusion violated the Establishment Clause), *vacated*, 773 F.3d 815 (7th Cir. 2014) (vacating for lack of standing); *Geithner*, 715 F. Supp. 2d at 1063, 1068 (denying the Government's motion to dismiss plaintiff's challenge to the constitutionality of the Exclusion and addressing plaintiff's claim as plausible); *Geithner Dismissal*, *supra* note 2.

79. *See Lew*, 983 F. Supp. 2d at 1059.

80. *See Lew*, 773 F.3d at 823 (declining to speak on the constitutionality of the Parsonage Exclusion and vacating the decision of the lower court for lack of standing).

81. *See generally Lew*, 983 F. Supp. 2d 1051 (citing Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989), and Walz v. Tax Comm'n of New York, 397 U.S. 664 (1970)).

preferring to leave it up to the "IRS and the Tax Court" to determine the parameters of the Parsonage Exclusion.[82]

III. AGENCY ACTION: BUT WHICH APPROACH?

A. *The Need for Agency Action*

To review, the IRS's rhetoric surrounding the Parsonage Exclusion centers on ensuring parity among clergy and other taxpayers receiving exemptions under § 119.[83] Section 107(2) is further rationalized because the housing allowance is provided to clergy of churches that may not have the financial ability to own and maintain property.[84] This rationale has been sufficiently attacked, as it was in the district court's decision in *Lew*.[85] The Seventh Circuit, in vacating the decision of the district court, specifically called on the Tax Court and IRS to interpret the constitutionality of the Parsonage Exclusion, acknowledging that the court's decision would buy the IRS time to formulate this interpretation.[86]

But what exactly can the IRS do to formulate a better interpretation of the Parsonage Exclusion, and what outcome does it desire? Presumably the IRS would want to lessen litigation to reduce costs and provide reliable tax assessments to bring in revenue to support the country.[87] However, as Part I of this Comment outlines, the IRS has not yet articulated a view of the Parsonage Exclusion that could withstand the inevitable litigation to come, whether or not a non-clergy group asks for the Exclusion.[88]

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82. *See Lew*, 773 F.3d at 823 (barely discussing the constitutionality of the provision, and only opining that the court thought it "important to allow the IRS and the Tax Court to interpret the boundaries of a tax provision before [assessing] its constitutionality").

83. See *supra* Part I.A for a discussion of IRS rhetoric surrounding the Parsonage Exclusion and § 119.

84. *See id.* for a discussion of IRS rhetoric concerning the Parsonage Exclusion and discrimination.

85. Freedom From Religion Found., Inc. v. Lew, 983 F. Supp. 2d 1051 (W.D. Wis. 2013) (exemplifying a constitutional attack on the Parsonage Exclusion).

86. *See* Freedom From Religion Found., Inc. v. Lew, 773 F.3d 815, 822 (7th Cir. 2014) (recognizing that the IRS and Tax Court now have time to interpret and fortify the constitutionality of the Parsonage Exclusion).

87. For the purposes of this Article, the author assumes that the IRS would want to limit the expense of litigation and provide efficient tax services to the American people. *See* Aprill, *supra* note 43, at 1248, 1252 (suggesting a revision to § 107, expanding the scope to include people who provide "pastoral care," and implying generally that such a revision should provide more efficient taxing service and increased revenue to the IRS by eliminating a double deduction). *Cf. The Agency, It's Mission and Statutory Authority*, IRS, http://www.irs.gov/uac/The-Agency,-its-Mission-and-Statutory-Authority (last visited June 19, 2015) (boasting the agency's ability to save money, bring in revenue to the government, and assist taxpayer compliance).

88. *See supra* notes 35–47 and accompanying text (discussing the litigation that will

In its brief on appeal to the Seventh Circuit, the IRS argued that if the Foundation's officers had specifically claimed the Parsonage Exclusion—or had filed a refund claiming the Exclusion—the Foundation may have had standing to challenge the provision.[89] The district court highlighted the Government's argument that it could be "conceivable" that the chief Atheists of the organization could qualify as "ministers of the gospel," and thus they should be required to claim the Parsonage Exclusion first.[90] However, the court quickly shut down this argument,[91] calling on the IRS to abandon this line of reasoning because Judge Crabb saw no way by which the plaintiffs could meet the criteria needed to be considered a "minister" for purposes of § 107.[92] The Seventh Circuit actually found that, while possible, it is unlikely that the IRS could reasonably apply the Parsonage Exclusion to the officers of the Foundation.[93] Thus, if the Foundation takes the suggestion of the Seventh Circuit and claims the Exclusion, therein lies a decision for the IRS: whether to deny or allow the Parsonage Exclusion.[94]

Denying the Parsonage Exclusion will provide the taxpayers with standing to bring suit, and the IRS will face further litigation and a possible injunction against allowing § 107 to remain.[95] Some critics of the Parsonage Exclusion argue the proper course of action would be for the IRS to allow courts to invalidate the Parsonage Exclusion and enjoin the IRS from acting on the Parsonage Exclusion, thus forcing Congress's hand

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ensue depending on whether the IRS grants the Exclusion or denies the Exclusion because the Foundation believes the Exclusion itself is unconstitutional).

89. *See* Brief for Appellants, *supra* note 23, at 19 (setting forth the only circumstance under which the Foundation would have standing).

90. *See* Lew, 983 F. Supp. 2d at 1056 (internal quotation marks omitted) (agreeing with the Government that Atheists may qualify as ministers).

91. *See* Freedom From Religion Found., Inc. v. Lew, 983 F. Supp. 2d 1051, 1057 (W.D. Wis. 2013) (explaining that there is a difference between Atheism—which literally is a lack of faith—and a non-theistic "faith" such as Buddhism).

92. *See id.* (citing Knight v. Comm'r, 92 T.C. 199, 205 (1989)) (outlining the factors considered in *Knight* to determine if a plaintiff was a "minister" and concluding that the officers of the Foundation "do not come close to meeting any of these factors"). The *Knight* factors considering a minister's status are whether that minister (1) administers sacraments; (2) conducts services; (3) performs services in keeping with the religious organization; (4) is ordained, commissioned, or licensed; and (5) is considered a spiritual leader. *Knight*, 92 T.C. at 204.

93. *See* Freedom From Religion Found., Inc. v. Lew, 773 F.3d 815, 823 (7th Cir. 2014) ("We think it unlikely that § 107(2) will be interpreted [by the IRS] to apply to the plaintiffs in this case, but there may be many closer cases.").

94. *E.g.*, *id.* (toying with the possibility of whether the Parsonage Exclusion could apply to Atheists).

95. *See id.* at 825 (outlining what plaintiffs need to do to achieve standing); *Lew*, 983 F. Supp. 2d at 1055 (previewing what a case may look like when plaintiffs have standing and ask to enjoin the IRS from enforcing § 107).

in altering the statute.[96] Some scholars argue that courts should interpret "minister of the gospel" more expansively, so as to be covered by *Walz*,[97] but this would likely create separation of powers issues.[98] Furthermore, allowing the Foundation to claim the Parsonage Exclusion will open the door for all Atheist organizations, who can otherwise meet IRS interpretations of "church" and "minister of the gospel," to pay officers a housing allowance and pay less tax, thereby further reducing tax revenue. Assuming the IRS wants to avoid litigation and tax-revenue loss, none of these routes are desirable.[99]

B. Re-interpreting the Parsonage Exclusion to Withstand Constitutional Challenges

The IRS has the option to issue guidance interpreting the Parsonage Exclusion's scope or application prior to any litigation against it. If the IRS wants to prevent further litigation from the Foundation, it can interpret the Parsonage Exclusion in a way that will ensure secular organizations can claim the Exclusion, thus preventing a constitutional challenge to the provision based on the Establishment Clause.[100] Professor Ellen Aprill's suggestion—to expand the Parsonage Exclusion's scope to encompass more organizations but limit the people to whom it applies—posits one possible solution to the IRS's dilemma.[101]

Aprill suggests that Congress can broaden the definition of "minister of the gospel" to any tax-exempt organization but limit its application to employees who must be available to meet with "members, patients, or clients" at all times.[102] Aprill asserts that expanding the Exclusion to all charitable organizations would eliminate the Establishment Clause issue, as taxpayers could no longer argue that a benefit is given exclusively to

96. *See* Rakowski, *supra* note 43, at 787 (calling for the *Warren* court to enjoin the IRS from acting on the unconstitutional Exclusion so Congress could make a decision).

97. *See* Boyd Kimball Dyer, *Redefining 'Minister of the Gospel' to Limit Establishment Clause Issues*, 95 TAX NOTES 1809, 1813–14 (June 17, 2002) (arguing that courts should make this leap in interpreting the Exclusion).

98. *See* Rakowski, *supra* note 43, at 778 (suggesting that the determination of constitutionality of the Exclusion should be properly left up to Congress, not courts, so as not to violate the separation of powers).

99. See *supra* note 87 and accompanying text for an explanation of the assumption that the IRS seeks to avoid litigation and maintain tax revenue.

100. *See* Aprill, *supra* note 43, at 1243 (suggesting a change to the statutory language of § 107); *see also supra* note 87 (explaining assumption of IRS motives to avoid litigation and revenue loss).

101. *See* Aprill, *supra* note 43, at 1243 (calling for a statutory change to the Exclusion).

102. *See id.* at 1245 (suggesting that a new statute be formulated, thereby expanding the definition of "minister of gospel," narrowing the employees to whom the Exclusion applies, and capping the housing allowance).

religious organizations for no secular purpose.[103] Additionally, limiting the scope of the Exclusion to apply to people who must be available for emergency calls will account for revenue management[104] while also clarifying the purposes of the Exclusion and squaring justification with § 119 that is provided to other taxpayers.[105]

Aprill's suggestion to change the interpretation of the Parsonage Exclusion fulfills the wants and needs of the IRS because it avoids significant tax-revenue loss and litigation.[106] Her proposal calls for a switch from applying the Parsonage Exclusion solely to "ministers of the gospel" to applying it broadly to all employees who may be needed at a moment's notice for purposes of "pastoral care."[107] Aprill does not specifically define pastoral care or provide a list of eligible professions, but she describes these individuals as those who are "expected to be . . . called on regularly by those they serve," recognizing that these employees sacrifice their ability to have their home as their "sanctuary" because they are expected to leave their home when duty calls.[108]

With Aprill's proposed expansion, the Parsonage Exclusion would be safe against claims that it violates the Establishment Clause under the prevailing *Lemon* analysis.[109] Under the *Lemon* test, the expansion would have a secular purpose of evening out the housing exemption among charitable organizations. The expansion does not endorse religion because the Parsonage Exclusion could be claimed by religious and non-religious organizations alike; and the expansion provides for the least government entanglement—only to the extent that the IRS must determine the "borders" of what religious leaders can claim under the Parsonage Exclusion—but such entanglement, as Zelinsky argues, has no better alternative.[110] The IRS could thwart litigation questioning the

103. *See id.* at 1247.

104. *See id.* at 1248 ("In part, revenue concerns motivate this new requirement. . . . Some limits are needed to control the revenue loss.").

105. *Id.*

106. *See id.* at 1245; *see supra* Part III (discussing evidence that there needs to be some action or re-interpretation of the Parsonage Exclusion).

107. *See* Aprill, *supra* note 43, at 1248 (describing certain jobs that could be deemed to provide "pastoral care," such as hospice grief counselors, nurses, obstetricians, medical residents, social workers, and ministers).

108. *Id.* at 1248.

109. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (establishing the test generally applied to Establishment Clause inquiries).

110. *See id.* at 612–13 (providing that for a law to be constitutional under the Establishment Clause, it must have a secular purpose, must not endorse religion, and must not entangle the government in religious affairs); *see also* Zelinsky, *supra* note 25, at 1639 (describing "borderline entanglement" as constitutionally permissive when there are no "disentangling alternatives").

constitutionality of the Parsonage Exclusion in the future because Aprill's suggestion would expand eligibility to secular taxpayers who, therefore, could not successfully bring a claim of Establishment Clause violation.[111] Furthermore, the IRS could avoid revenue loss by narrowing the pool of people who may claim the Parsonage Exclusion to people who provide "pastoral" services, which Aprill posits are less than all ministers now allowed under the Exclusion.[112]

However, while Aprill's suggestion may help the IRS in the long term—that is, if Congress decides to pass a law changing an almost eighty-year-old provision—she does not suggest any plausible immediate agency action.[113] Without some action by the IRS along the lines of a Treasury Regulation, the Agency will face litigation in the near future.[114] Even if the IRS decides to allow the Foundation to exclude its officers' housing, the IRS could face tax-revenue loss, as more organizations try to model themselves after the Foundation to claim the Parsonage Exclusion.[115] Thus, even with Aprill's suggestion for Congress, the IRS is stuck with its original dilemma: deny or grant the Parsonage Exclusion to the Foundation?

This Comment suggests direct agency action to prevent the undesirable effects of denying or granting the Parsonage Exclusion to the Foundation as it stands today. Specifically, the IRS should take a serious look at Professor Aprill's argument and try to interpret her meaning of "pastoral care" into the existing IRS definition of a "minister."[116] Such an expansion could bring the IRS the security it seeks in thwarting impending litigation from the Foundation or against tax-revenue depletion should it allow the Parsonage Exclusion to all Atheist organizations.[117]

The IRS should make alterations to its interpretation and application of § 107.[118] Specifically, the IRS should expand the definition of "minister" to include someone who provides care at a moment's notice in times of

111. *See* Freedom From Religion Found., Inc. v. Lew, 773 F.3d 815, 825 (7th Cir. 2014) (asserting that the plaintiffs had to claim the Exclusion to have standing); Aprill, *supra* note 43, at 1245 (describing how the expansion avoids litigation under the Establishment Clause).

112. *See* Aprill, *supra* note 43, at 1248 (describing the expansion's propensity to avoid tax-revenue loss).

113. *See id.* at 1257 (admitting that Congress may not be eager to change the provision and making no suggestion for IRS action).

114. Kellner, *supra* note 42 (highlighting the Foundation's response that it will continue to challenge the Exclusion); *see infra* notes 135–137 and accompanying text.

115. *Cf.* Kellner, *supra* note 42 (noting that the Exception has saved clergy and church employees millions of dollars in tax increases).

116. *See* Aprill, *supra* note 43, at 1248 (describing pastoral care).

117. *Id.* (outlining the change needed to limit litigation and revenue loss for the IRS).

118. *See infra* note 119 (calling for IRS re-interpretation of the term "minister" to comply with Aprill's suggestion for Congress to restructure § 107 to those who provide "pastoral care").

need.[119] This interpretation brings the Parsonage Exclusion back to its foundations: an allowance for employees who may be inconvenienced, but for the convenience of the employer, in recognition that said employees must always be ready to work even when they are home.[120] Such an interpretation closely aligns with the "convenience of the employer" doctrine found in § 119 of the IRC but does not further entangle the agency in making determinations of who is or is not a minister, thus quelling Professor Zelinsky's entanglement concerns.[121] While this inclusion may widen the pool of people eligible to claim the Exclusion, which may slightly reduce tax revenue, Aprill argues that expanding the Exclusion to employees of social service organizations who provide care at a moment's notice benefits society so as to provide a "noncompensatory purpose" for the possible revenue loss.[122] This has strong policy incentives, as presumably the government desires to encourage professions that help the public at large.[123] Furthermore, this interpretation will provide a secular purpose by providing a tax accommodation to people, even of non-religious organizations, who act in a "ministerial" capacity of administering care to others.[124] Finally, expanding the definition of "minister" would envelope even non-religious parties, thus disallowing the possibility of Establishment Clause challenges, since secular parties can claim the Parsonage Exclusion.[125]

Re-interpretation of the term "minister" is not without restrictions—the IRS must maintain Congress's original statutory intent when interpreting the Parsonage Exclusion to withstand scrutiny under *Chevron*.[126] To be

119. *See* Aprill, *supra* note 43, at 1248 (describing pastoral care as care provided to members, clients, or patients at "any moment of the day or night").

120. *See id.* at 1248 (discussing the recognition that employees who provide immediate care are never able to enjoy their homes as sanctuary, as they can be called away at any moment).

121. *See* 26 U.S.C. § 119 (2012) (codifying the housing exemption provided for the convenience of the employer); *see also* Zelinsky, *supra* note 25, at 1636–38 (arguing that § 107 is more liberal than § 119, thus providing less entanglement of church and state). Someone who may be available at a moment's notice is a secular determination; it is not an inquiry into church affairs. *See* Aprill, supra note 43, at 1248.

122. *See* Aprill, *supra* note 43, at 1248 (explaining the policy considerations for this expansion of § 107 and discussing its societal benefits).

123. *See id.* (discussing policy implications of pastoral care).

124. *Id.* (implying the secular nature of providing care at a moment's notice).

125. *Id.* at 1245 (discussing the benefits of the changes to the provision in thwarting Establishment Clause challenges).

126. *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (explaining that an agency must interpret statutes based on a permissible construction of those statutes). The Supreme Court held in *Chevron* that where a statute is silent or ambiguous with respect to a specific issue, courts should defer to the agency interpretation if the interpretation is a permissible construction of the statute. *Id.* at 842–43.

clear, expansion of the term "minister" would *only* include those ministers who are required as part of their ministerial duties to provide care at a moment's notice in addition to employees of other organizations who provide care at a moment's notice.[127] This may mean that some ministers who do not provide care at a moment's notice, but perform other services ordinarily performed by ministers, will not receive the Exclusion.[128] Congress's statutory language, which exempts "ministers of the gospel" from paying tax on church-furnished housing or housing allowances, does not directly speak to the question of who can be a minister.[129] Subsequent interpretations of the term "minister" to include those people of all religions or spiritual faiths who act in ministerial capacity have been upheld as a permissible construction of the statute.[130] Thus, where Congress has not spoken to the question of who can be a minister, and pursuant to rules of statutory construction, courts will construe statutes to avoid constitutional problems.[131] Presumably, courts will uphold an IRS interpretation of the Parsonage Exclusion that avoids constitutional problems and sets forth a reasonable interpretation of Congress's intent.[132] The interpretation of "minister" as one who provides care at a moment's notice avoids constitutional problems because it provides a secular purpose of the statute

127. For an examination of how this exclusion of currently-covered ministers aligns with Aprill's suggestion, see *supra* notes 102–104 and accompanying text.

128. *See* TAX GUIDE FOR CHURCHES, *supra* note 29, at 19 (explaining that ministers who perform services that are ordinary duties of a minister may be exempt as the provision currently stands). Under the current interpretation, for example, "basketball ministers"—those members of The Churches of Christ who can be called ministers, but really perform teaching or coaching duties at a college—are permitted to claim the exemption. *See* Peter J. Reilly, *Benefit of Clergy – Why Special Tax Treatment for Ministers Needs to Go*, FORBES (Feb 9. 2014, 5:33 PM), http://www.forbes.com/sites/peterjreilly/2014/02/09/benefit-of-clergy-why-special-tax-treatment-for-ministers-needs-to-go/. The proposed interpretation of the term "minister" would exclude such people, as they do not provide pastoral care. *See* Aprill, *supra* note 43, at 1248 (discussing the application of "pastoral care").

129. *See* 26 U.S.C. § 107 (2012) (excluding all "ministers of the gospel" from paying tax on church-furnished housing or housing allowance). *But see* TAX GUIDE FOR CHURCHES, *supra* note 29, at 27 (clarifying that the term "minister" has been interpreted by the IRS in such publications to include clergy of religions other than Christianity as well).

130. *See* INFORMATION FOR CLERGY, *supra* note 29, at 3–4 (providing the IRS interpretation of minister); *see also* Salkov v. Comm'r, 46 T.C. 190, 199 (1966) (finding a Jewish cantor to be a "minister of the gospel").

131. *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 575 (1988) (discussing the rule of statutory construction which dictates that courts should interpret statutes to avoid constitutional problems). Construing the Parsonage Exclusion to permit *only* ministers to claim the Exclusion could pose constitutional problems. *See supra* notes 48–62 and accompanying text (explaining Chemerinsky's arguments against constitutionality of the Parsonage Exclusion).

132. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council Inc., 467 U.S. 837, 843 (1984) (explaining that courts will uphold permissible agency interpretations where such interpretations are permissible constructions of statutes). *See also supra* note 126.

and is a reasonable interpretation of the question of who is a minister.[133]

As a plan of action, then, the IRS should issue a publication with more weight than its prior publications, interpreting the meaning of a "minister" for taxpayer purposes.[134] A Treasury Regulation, which has the force and effect of law, is the most authoritative form of published guidance that the IRS can issue.[135] Each year, the IRS and the U.S. Department of Treasury develop a list of issues that should be addressed through published guidance in the coming year, taking into consideration suggestions from IRS Chief Counsel.[136] The regulation should state a re-interpretation of the terms specifically significant to the Parsonage Exclusion, such as "minister."[137] The term "minister" should be interpreted to mean an employee of a "church" who provides care at a moment's notice in a time of need.[138] Then, the Parsonage Exclusion would apply only to officers of those organizations who provide care at a moment's notice in times of need.[139] Such an interpretation of the terms specific to the Parsonage Exclusion would provide the IRS with the remedy to probable Establishment Clause challenges because the provision would cover secular or non-religious organizations.[140] This interpretation would also avoid tax-revenue loss,[141] as the pool of people capable of claiming a tax exclusion would include only those "ministers" who are required to be available at a moment's notice and who are officers of such secular and religious organizations alike.[142]

CONCLUSION

In the wake of the Seventh Circuit's decision in *Freedom From Religion Foundation, Inc. v. Lew*, the IRS must act swiftly and thoughtfully in interpreting the Parsonage Exclusion to ensure that it remains

133. *See supra* note 126 (explaining rules of statutory construction); *see also Chevron*, 467 U.S. at 842–43 (explaining *Chevron* deference).

134. *See* INFORMATION FOR CLERGY, *supra* note 29, at 5 (discussing interpretation of terms for clergy); TAX GUIDE FOR CHURCHES, *supra* note 29, at 27 (same).

135. *See* I.R.M. 32.1.1.4(2).

136. *See* I.R.M. 32.1.1.4.1(2) (describing the process by which guidance is selected for publication).

137. *See* I.R.M. 32.1.1.1 (describing that one of the purposes of the IRS publications is to determine the meaning of various IRC provisions).

138. *See supra* note 119 and accompanying text (suggesting a new definition for the term "minister" based loosely off of Aprill's description of "pastoral care").

139. *See id.*

140. *See supra* notes 125–133 (describing the method by which the IRS could avoid Establishment Clause challenges to the Parsonage Exclusion).

141. *See* Aprill, *supra* note 43, at 1248–49 (describing the possibility of tax-revenue loss if the pool of people eligible for the Exclusion were limited to those providing "pastoral care").

142. *See supra* notes 129–130 and accompanying text (arguing that the interpretation of the word "church" can include secular organizations).

constitutional, the agency avoids litigation, and the government does not lose revenue.[143] A re-interpretation of the Parsonage Exclusion's application would prevent the most litigation, have the added benefit of lessening the tax burden on American organizations that provide immediate care to people in need, and align with the IRS's tax-collection needs.[144] The expansion may even have a societal benefit, an analysis of which is outside the scope of this Comment, if such organizations, by claiming the Exclusion and saving tax dollars, have the opportunity to invest in higher-caliber employees by providing exclusions for housing. Regardless, the time is now for the IRS to take action on § 107 to prevent litigation and loss of tax revenue and to ensure the agency continues its mission of enforcing the tax law "with integrity and fairness to all."[145]

143. *See supra* Part III (concluding as such).
144. *See generally supra* Part III.
145. *See The Agency*, *supra* note 87.

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Statement of Ownership, Management, and Circulation (All Periodicals Publications Except Requester Publications)

1. Publication Title	2. Publication Number	3. Filing Date
Administrative Law Review (ISSN: 001-8368)	9 5 6 - 3 2 0	10/1/2015
4. Issue Frequency	5. Number of Issues Published Annually	6. Annual Subscription Price
Quarterly	Four	$10.00

7. Complete Mailing Address of Known Office of Publication *(Not printer) (Street, city, county, state, and ZIP+4®)*

321 N. Clark Street; Chicago, IL 60654-7598

Contact Person: Mark Fiorkowski

Telephone *(Include area code)*: 312-988-6310

8. Complete Mailing Address of Headquarters or General Business Office of Publisher *(Not printer)*

321 N. Clark Street; Chicago, IL 60654-7598

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor *(Do not leave blank)*

Publisher *(Name and complete mailing address)*

American Bar Association; 321 N. Clark Street; Chicago, IL 60654-7598

Editor *(Name and complete mailing address)*

Neil Murphy, American University Washington College of Law, Suite 622, 4801 Massachusetts Avenue, Washington, DC 20016

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13. Publication Title	14. Issue Date for Circulation Data Below
Administrative Law Review	August 2015 (67:2)

15. Extent and Nature of Circulation			Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
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b. Paid Circulation *(By Mail and Outside the Mail)*	(1)	Mailed Outside-County Paid Subscriptions Stated on PS Form 3541 (Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	4,778	4,633
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18. Signature and Title of Editor, Publisher, Business Manager, or Owner	Date
Robert Horowitz, Director American Bar Association	9/30/2015

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