Nos. 18-1277, 18-1280

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

ANNIE L. GAYLOR, ET AL.,
PLAINTIFFS-APPELLEES,

v.

STEVEN MNUCHIN, ET AL.,
DEFENDANTS-APPELLANTS

and

EDWARD PEECHER, ET AL.,
INTERVENORS-DEFENDANTS-APPELLANTS

On Appeal From The United States District Court
For The Western District Of Wisconsin
Case No. 3:16-cv-00215-bbc
The Honorable Barbara B. Crabb, Judge

BRIEF OF THE STATES OF WISCONSIN, ARIZONA, ARKANSAS, COLORADO, GEORGIA, INDIANA, KANSAS, LOUISIANA, MISSOURI, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, UTAH, AND WEST VIRGINIA, AND THE ATTORNEY GENERAL OF MICHIGAN AS *AMICI CURIAE* SUPPORTING DEFENDANTS-APPELLANTS AND REVERSAL

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IDENTITY AND INTEREST OF AMICI CURIAE

The *amici curiae* are the States of Wisconsin, Arizona, Arkansas, Colorado, Georgia, Indiana, Kansas, Louisiana, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Utah, and West Virginia, and the Attorney General of Michigan (hereinafter "the States"), which file this brief under Federal Rule of Appellate Procedure 29(a). The court below invalidated the federal parsonage allowance, 26 U.S.C. § 107(2), which is used by countless ministers and their religious-institution employers within the States, helping them fulfill their salutary missions of serving their congregations and communities.

The States' interests are threefold: First, many of the States have crafted their own income-tax codes to incorporate elements of the federal code, including the parsonage allowance. In Wisconsin, for example, calculation of state income tax begins with the taxpayer's federal adjusted gross income, Wis. Stat. § 71.05(6), and many States either do the same or begin with federal taxable income, *e.g.*, Ariz. Rev. Stat. § 43-1001(2.); Colo. Rev. Stat. § 39-22-104; Conn. Gen. Stat. § 12-701(a)(19)–(20); Del. Code tit. 30, § 1105; Ga. Code § 48-7-27(a); Ind. Code § 6-3-1-3.5(a); Iowa Code § 422.7 intro.; Kan. Stat. § 79-32,117*o*(a); Ky. Rev. Stat. § 141.010(10); La. Stat. § 47:293(1); Me. Stat. tit. 36, § 5121; Md. Code, Tax-Gen. § 10-203; Mich. Comp. Laws § 206.510(1); Minn. Stat. § 290.01, Subd. 19; Mo. Rev. Stat. § 143.121(1.); Mont. Code § 15-30-2110(1); N.J. Stat. § 54:8A-36(a); N.Y. Tax Law § 612(a); N.D. Cent. Code § 57-38-30.3(1.); Okla. Stat. tit. 68, § 2353(12.); R.I. Gen. Laws § 44-30-12(a); Utah Code § 59-2-1202(6)(a)(i)(A); Vt. Stat. tit. 32, § 5811(21); Va. Code § 58.1-322; W. Va.

Code § 11-21-12(a). This means that ministers in Wisconsin claiming the federal parsonage allowance on their federal return receive a state-equivalent tax exemption on their state return. Therefore, by invalidating Section 107(2), the district court's judgment partially invalidates all state tax-law provisions like Wis. Stat. § 71.05(6), since these provisions also extend tax exemptions to parsonage allowances via incorporation of federal law.

Second, in addition to the parsonage allowance, the States offer a number of other tax exemptions to religious organizations. *E.g.*, Wis. Stat. §§ 70.11(4)(a), 71.26(1)(a), 77.54(9a)(f). For example, Wisconsin exempts from "general property taxes" property "owned and used exclusively by . . . churches or religious [associations], . . . including property owned and used for housing for pastors and their ordained assistants, members of religious orders and communities, and ordained teachers." Wis. Stat. § 70.11 intro. & (4). The district court's judgment arguably threatens these numerous statutes.

Third, ministers and religious institutions within the States engage in significant charitable activity, which eases the States' own public-welfare burden. The district court's imposing additional financial burdens on these individuals and institutions will ultimately undermine the States' interests in promoting the common good.

INTRODUCTION

"[T]he Establishment Clause *must* be interpreted by reference to historical practices and understandings." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819

(2014) (emphasis added). Under *Town of Greece*'s historical test, the federal parsonage allowance passes muster. Parsonages, which are homes for ministers provided as conditions of their service to a church, have existed in England for over one-thousand years. The colonists brought the parsonage system with them to America, where it has thrived ever since. In the colonies (as in England), this religious property typically enjoyed tax-exempt status. Indeed, there is an unbroken history—before, during, and after the Founding—of such tax-exempt treatment, which the States, Congress, and the Supreme Court all have recognized. The federal parsonage allowance fits comfortably within that historical tradition, and so is constitutional.

By focusing on other, ahistoric Establishment Clause tests (which it misapplied), the district court went astray. Its ruling now casts a shadow over countless state statutes that accord religious institutions and ministers tax-exempt treatment. For these reasons, this Court should reverse.

ARGUMENT

I. The Establishment Clause Must Be Interpreted In Light of Long-Standing Historical Practice

For decades, the Supreme Court generally applied one of three tests to determine whether a law "respect[s] an establishment of religion" in violation of the First Amendment, U.S. Const. amend. I. *See Freedom From Religion Found. v. Concord Comm. Schs.*, 885 F.3d 1038, 1045 (7th Cir. 2018); *see generally* Daniel O. Conkle, *Religion, Law, and the Constitution* 157–66 (2016). One test looks to whether the government has taken some action "that communicates [its] endorsement of a religion or a particular religious belief," *Concord*, 885 F.3d at 1046, or made

"adherence to religion relevant to a person's standing in the political community," *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring in the judgment). Another test asks whether the challenged government action "coerce[s]" a person "to support or participate in religion or its exercise"—with coercion understood broadly to include "subtle coercive [psychological] pressure" in addition to formal legal coercion. *Lee v. Weisman*, 505 U.S. 577, 587–88, 592–93 (1992); *accord Concord*, 885 F.3d at 1048. Yet another standard—the infamous *Lemon* test—holds that (1) the government action "must have a secular [ ] purpose"; (2) "its principal or primary effect must be one that neither advances nor inhibits religion"; and (3) it "must not foster an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); *accord Concord*, 885 F.3d at 1049.

Whether those standards, particularly the *Lemon* test, remain good law is now in doubt. A number of Justices have recommended their reconsideration. *E.g.*, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 397–99 (1993) (Scalia, J., concurring) (criticizing *Lemon* and collecting cases in which Justices Thomas, Kennedy, O'Connor, Rehnquist, and White have done the same); *Lee v. Weisman*, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting); *Van Orden v. Perry*, 545 U.S. 677, 693 (2005) (Thomas, J., concurring); *see also Green v. Haskell Cty. Bd. of Comm'rs*, 574 F.3d 1235, 1244 (10th Cir. 2009) (Gorsuch, J., dissenting from denial of rehearing en banc) (noting the "critici[sms]" of *Lemon* and the "confusion about whether and to what extent *Lemon* continues to control"). Members of this Court have raised similar critiques. *E.g.*, *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 140 (7th Cir. 1987)

(Easterbrook, J., dissenting); *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 869 (7th Cir. 2012) (en banc) (Ripple, J., dissenting); *id.* at 869–72 (Easterbrook, C.J., dissenting); *id.* at 872–78 (Posner, J., dissenting). And respected scholars of the Religion Clauses agree. *E.g.*, Michael W. McConnell, *Accommodation of Religion*, The Supreme Court Review 1985, at 1–2 (1985); Conkle, *supra* at 157, 165; *Green*, 574 F.3d at 1244 n.2 (Gorsuch, J., dissenting from denial of rehearing en banc) (citing additional criticism from, among others, Profs. Gerard Bradley, Richard Garnett, Douglas Laycock, and Michael Stokes Paulsen).

Against this backdrop, the Supreme Court has in a recent line of cases tended to avoid the *Lemon*, endorsement, and coercion tests in favor of a more straightforward historical analysis. *See Van Orden*, 545 U.S. 677; *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 181 (2012); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). In *Van Orden*, the Court considered the "display of a monument inscribed with the Ten Commandments on the Texas State Capital Grounds." 545 U.S. at 681. Instead of applying *Lemon* (or any other "present" test), the Court engaged in "analysis [ ] driven both by the nature of the monument and by our Nation's history." *Id* at 683, 686. The *Lemon* test, the Court recognized, "point[s]" away from the "strong role played by religion and religious traditions throughout our Nation's history," and risks "evinc[ing] a hostility to religion by disabling the government from in some ways recognizing our religious heritage." *Id.* at 683–84. Under this historical analysis, the Court held that the monument did

comply with the Establishment Clause. *See id.* at 686–92 (discussing historical examples).

The history-based test gained even more prominence in *Hosanna-Tabor*. There, the Court unanimously held that the Establishment Clause "bar[s] the government from interfering with the decision of a religious group to fire one of its ministers," even under generally applicable employment-discrimination laws. 565 U.S. at 181. The Court interpreted the clause solely by reference to the deep historical "controvers[ies] between church and state over religious offices." *Id.* at 182–83. It recounted Magna Carta's assertion of the freedom of the Church of England from the King, "freedom . . . more theoretical than real"; sixteenth- and seventeenth-century laws extending the King's power over ministers; the "Puritans[] fl[ight] to New England, where they hoped to elect their own ministers;" and the "[c]ontroversies" over the "selection of ministers" in the colonies. *Id.* at 182–83. The Court explained that "the founding generation" adopted the First Amendment "against this [historical] background," *id.* at 183, "ensur[ing] that the new [f]ederal [g]overnment—unlike the English Crown—would have no role in filling ecclesiastical offices," *id.* at 184. Yet, in the case before it, the government ran directly contrary to that history, thus the Court decided the case against the government, *id.* at 188–89, without consideration of "endorsement," psychological "coercion," or *Lemon*.

Finally, in *Town of Greece*, the Court gave the history-based test its unqualified imprimatur. There, the Court considered whether a local government's practice of "opening its monthly board meetings with a prayer" complied with the Establishment

Clause. 134 S. Ct. at 1815 (applying *Marsh v. Chambers*, 463 U.S. 783 (1983)). To begin, the Court stated explicitly that "the Establishment Clause must be interpreted by reference to historical practices and understandings." *Id.* at 1819 (citation omitted); *Marsh*, 463 U.S. at 790 ("historical evidence sheds light . . . on what the draftsmen intended the Establishment Clause to mean"). "[W]here history shows that [a] specific [government] practice . . . was accepted by the Framers," the Court must not "sweep away" the practice under "any of the [other three] formal tests" announced under the Clause. *Town of Greece*, 134 S. Ct. at 1818–19. To declare unconstitutional "what has so long been settled would create [a] new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent." *Id.* at 1819. So when a challenged government practice arguably has a historical pedigree, "[t]he Court's inquiry [ ] must be to determine whether the [ ] practice fits within the tradition." *Id.* at 1819–20. If it does, then the practice does not violate the Establishment Clause, no matter what results would obtain under any of the three other tests. *See id.*

Applying this history-based test, the Court explained that legislative prayer had been "practiced by Congress since the framing of the Constitution"—the "First Congress made it an early item of business to appoint and pay official chaplains, and both the House and Senate have maintained the office virtually uninterrupted since that time." *Id.* at 1818–19 (citing extensive history recounted in *Marsh*, 463 U.S. at 787–92). While obviously "religious in nature," legislative prayer "has long been understood as compatible with the Establishment Clause." *Id.* at 1818. Thus, under

the history-based test, the Court affirmed the practice without regard to any other Establishment Clause test. *Id.* at 1820–28.

Town of Greece has given pride of place to the historical approach, demoting the three more amorphous tests described above. As the Court explained, the history-based test "must not be understood as permitting a practice that *would* amount to a constitutional violation [under the three other tests] if not for its historical foundation"; rather, the history-based test is how "the Establishment Clause *must be interpreted*." 134 S. Ct. at 1819 (emphasis added). This test is the correct decisional rule under the Establishment Clause; the three other tests are relevant, if at all, only when considering government practices without robust historical pedigrees. Restated, "if there is any inconsistency between any of [the Court's three prior] tests and the historic practice . . . , the inconsistency calls into question the validity of the test, not the historic practice." *Id.* at 1834 (Alito, J., concurring); *see also* McConnell, *Accommodation*, *supra*, at 2–3 ("if existing doctrine [is] contradictory [with history,] the Court would do without the doctrine"). As Justice Scalia explained in a dissent from denial of a petition for certiorari in *Elmbrook School District v. Doe*, 134 S. Ct. 2283 (2014), "*Town of Greece* left no doubt that the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Id.* at 2285 (Scalia, J., dissenting from denial of a petition for certiorari) (quoting *Town of Greece*, 134 S. Ct. at 1819). "*Town of Greece* abandoned the antiquated 'endorsement test,'" *id.* at 2284, the *Lemon* test, *see id.* at 2284 & n.*, and the broad-form coercion test,

id. at 2285. Now, to resolve Establishment Clause cases, courts must "conduct the historical inquiry mandated by *Town of Greece*." *See id.* at 2286.

Faithfulness to history is especially appropriate in the Establishment Clause context, since the Supreme Court "has always purported to base its Establishment Clause decisions on the original meaning of that provision." *Town of Greece*, 134 S. Ct. at 1834. (Alito, J., concurring); *accord Am. Jewish Cong.*, 827 F.2d at 137 (7th Cir. 1987) (Easterbrook, J., dissenting); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1413–14 (1990). When considering government action challenged under the Establishment Clause, "the line [the Court] must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring). The Court "looks to American historical practices to determine what the Establishment Clause allows and what it does not. History judges us in this area. We do not judge history." *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 521 (6th Cir. 2017) (en banc) (Sutton, J., concurring).

II. Under The Historical Test, The Parsonage Allowance Is Constitutional Because The Practice Of Granting Tax Exemptions For Religious Uses Of Property Runs Back To The Founding

Section 107 of the Internal Revenue Code provides that, "[i]n the case of a minister of the gospel, gross income does not include" either "(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 such allowance does not exceed

the fair rental value of the home." 26 U.S.C. § 107(1)–(2). Section 107(1) is known as the "parsonage exception," while Section 107(2) is known as the "parsonage allowance." Here, Plaintiffs challenge only this latter provision.

A. The Tradition Of The Parsonage System's Tax-Exempt Treatment Predates The Founding, Runs Through The Intervening Centuries, And Persists Today

A "parsonage" is a "priest's house or clergy house," a dedicated home for ministers "to live and work," which, "on [the minister's] retirement [from active ministry,] goes to [his] successor." Anthony Jennings, *The Old Rectory: The Story of the English Parsonage* 3, 253 (2009). Parsonages began in feudal England; traveled with the colonists to America; and enjoyed tax-exempt treatment before, during, and after the Founding.

1. The Origins Of The Parsonage System

The concept of the parsonage began "over a thousand years" ago, in feudal times, with the emergence of Christianity's parish organizational system. *Id.* at 23–24, 47. Owing to its feudal origins, the first parsonages were built by "the Lord of the Manor" if "he converted to Christianity." *Id.* at 24. A priest then had the duty to live in the parsonage house and use it for the "provision for the spiritual welfare of the lord and all those working on his estate." *Id.* Indeed, for centuries the parsonage house was regarded "as a focus for parish ministry." *Id.* at 177. The minister was to ensure that "the cure of souls" was conducted "in the parsonage house itself" because it was "provided to enable him to perform his spiritual duties" and his "duties of hospitality" to his congregation. *Id.* (citations omitted); *see also id.* at 201 (describing

the parsonage's "focus on the community" as its "'*raison d'être*'"). The minister would also use the parsonage house for more overtly charitable activities, such as caring for "orphans and widows, the sick and the handicapped, and victims of abuse and disaster." John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 S. Cal. L. Rev. 363, 378 (1991).

From the beginning, parsonages included a "glebe" in addition to the parsonage house. A "glebe" is land "constituting capital endowment providing income" for the parsonage's minister-occupant. Jennings, *supra*, at 24, 45, 253; *see generally* Glebe, *Black's Law Dictionary* (10th ed. 2014). Ministers would "live off" the glebe, either by farming it themselves or renting it to others. Jennings, *supra*, at 24, 45; Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2148 (2003). "Because the revenues of glebes were deemed a freehold interest of the minister" and not property of the Church or State, the glebe gave the minister a certain "independence" from both his congregation (from whom he received tithes) and his religious superiors. *Id.* And, as with the parsonage house, ministers would use the glebe for charitable endeavors, such as providing for "widows, sojourners, and elderly and incapacitated members of the community." Witte, *supra*, at 378; *see generally* 1 William Blackstone, *Commentaries on the Laws of England* 670, 825 (Hammond ed. 1890) (also describing parsonages and glebes).

The colonists brought this system with them to America. *See* McConnell, *Establishment*, *supra*, at 2148. In New England, for example, colonial governments

granted public lands to "churches for . . . parsonages," and "Anglican canon law" required each colonial parish to set aside land as a glebe for the minister's "support." *Id.* at 2148; Witte, *supra*, at 378. And while the practice of States granting land to religious groups for parsonages eventually ceased, McConnell, *Establishment*, *supra*, at 2150–51, the parsonages themselves remained in operation, *accord* Witte, *supra*, at 389–91 (discussing "modern" parsonage laws).

2. Parsonages Received Tax-Exempt Treatment Before, During, And After The Founding

Although in "both England and the colonies, the common law afforded no *automatic* [] tax exemption" for church properties, legislatures often granted exemptions for parsonages. Witte, *supra*, at 371–72 & n.25 (emphasis added). Indeed, tax exemption of church property, including parsonages, was part of the "broader set of ecclesiastical regulations" in England, many of which were "adopted or emulated in the American colonies." *Id.* at 369.

In the colonies, parsonages received tax exemption through both the colonial common-law courts and equity courts. *See id.* at 368–69 & n.26. Under the common-law system, colonial legislatures regularly granted tax exemption "privileges" to "colonial church properties," albeit with some restrictions. *Id.* at 371–72 & n.25. First, "only certain types of church property were considered exemptible," but parsonages and glebes were generally included. *Id.* at 372. Second, this property often received "general exemptions" only from "ecclesiastical taxes," not all property taxes. *Id.* at 373. That said, sometimes colonial church property did receive "universal exemption" from "all property taxes." *Id.* at 374. Finally, "tax exemption could be held in abeyance

in times of emergency or abandoned altogether" if the tax liability of others proved too burdensome. *Id.* Under the equity system, which the "colonial analogues" to the "English chancery courts" enforced, church properties could be exempted from taxation when used for charitable purposes. *Id.* at 375. As noted above, ministers often used both parsonage houses and glebe lands for such endeavors, so they "were entitled to receive charitable tax exemptions and subsidies at equity" for this property. *Id.* at 378.

"The colonial law of tax exemption of church property continued largely uninterrupted in the early decades of the American republic." *Id.* at 380; *see, e.g.*, *Franklin St. Soc. v. Manchester*, 60 N.H. 342, 349 (N.H. 1880) (describing "the long continued custom of exempting property devoted to public religious worship from taxation"); *Martin v. City Council of Charleston*, 34 S.C. Eq. 50, 57–58 (S.C. Ct. App. 1866) ("In the case of the *glebe lands*, by a long course of legislation, the general rule of the non-liability . . . to taxation, had been established, recognized, and expressly affirmed." (citations omitted)). But around the nineteenth century, when the now-States began disestablishing their churches, this exemption regime became "vulnerable to attack" on establishment grounds. Witte, *supra*, at 381; *see generally* Michael W. McConnell, *Religion and Its Relation to Limited Government,* 33 Harv. J.L. & Pub. Pol'y 943 (2010) (describing disestablishment in the early States).

Yet when plaintiffs litigated their challenges under state-level establishment clauses, state courts uniformly rejected their claims. Witte, *supra*, at 382–83 & n.71. For example, in *Trustees of Griswold College v. Iowa*, the Iowa Supreme Court held

that a "statute exempting church property from taxation" was not "in conflict with" the state constitutional provision providing that the "general assembly shall make no law respecting an establishment of religion." 46 Iowa 275, 282, 1877 WL 595 (Iowa 1877). That "constitutional prohibition extend[ed] only to the levying of tithes, taxes, or other rates for church purpose," *not* to "the exemption from taxation of such church property as the legislature may think proper." *Id.* Other courts reached similar conclusions: tax exemption of church property is allowable under establishment clauses because such an exemption only "encourage[s]" religion and serves to the "advantage of both society in general and the state in particular." Witte, *supra*, at 386–87 (citation omitted); *id.* at 383–87 & nn.71, 80–88 (citing 1800–1900 cases from New Jersey, Vermont, Connecticut, Kentucky, Georgia, New Hampshire, Nebraska, and Tennessee). Unlike the land grants to churches for glebes, *see supra* p. 12, the history of tax exemptions could not even arguably belong to the history of established religion, especially because before disestablishment such exemptions often extended to religious "dissenters" at the time of the Founding. Witte, *supra*, at 373 n.38; *accord Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 675–76 (1970) ("tax exemption is not sponsorship since the government does not transfer part of its [resources] to churches"). Importantly, tax exemptions for religious property were not constitutionally required; rather, they were simply within the "power of the legislature" to enact or repeal as it saw fit. *E.g.*, *Franklin*, 60 N.H. at 348–49.

Congress shared the view of the States. From "its earliest days," Congress recognized that the First Amendment authorizes "real estate tax exemption to

religious bodies." *Walz*, 397 U.S. at 677. "Few concepts are more deeply embedded in the fabric of our national life" than the State exercising this type of "benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference." *Id.* at 676–77 (this concept began in "pre-Revolutionary colonial times"). For example, in 1802, Congress granted tax exemptions for churches in its taxing statute for the County of Alexandria, which incorporated Virginia's "tax exemptions for churches." *Id.* at 677 (citing 2 Stat. 194). Indeed, Congress enacted related laws a few years prior, in 1798. *Id.* at 677 n.5. And in 1870, "Congress specifically ex[e]mpted all churches in the District of Columbia and appurtenant grounds and property from any and all taxes or assessments, national, municipal, or county." *Id.* at 677–78 (quoting Act of June 17, 1870, 16 Stat. 153); *accord id.* at 677 ("As early as 1813 the 12th Congress refunded import duties paid by religious societies on the importation of religious articles.").

The Supreme Court also looked favorably on tax exemptions for religious use. When it upheld state tax exemptions to churches, the *Walz* Court explained that "at least up to 1885," it had "accepted . . . the proposition that federal or state grants of tax exemption to churches were not a violation of the Religion Clauses of the First Amendment," a decision reflecting "more than a century of our history and uninterrupted practice." *Id.* (discussing *Gibbons v. District of Columbia*, 116 U.S. 404, 408 (1886)). As well-known legal commentator Thomas Cooley put it, "[w]hether or not it be wise or politic to exempt the property used for religious purposes from taxation, as is commonly done, it cannot be said to be in a legal sense unconstitutional

to do so," so long as the exemptions are "impartial as between sects." Thomas Cooley, *General Principles of Constitutional Law in the United States* 227 (1868) (footnotes omitted). In short, "selection of subjects for taxation" is always a matter of legislative "policy." *Id.*

The States shifted to "the modern law of tax exemption of church property" "in the latter half of the nineteenth century and the early part of the twentieth." Witte, *supra*, at 389. During this period, the States replaced the "isolated statutes [i.e., the common-law regime described above] and equitable customs inherited from colonial times" with either "new constitutional provisions that guaranteed exemptions to all religious groups" or "systematic statutory schemes that were either mandated by or validated under state constitutions." *Id.* at 389 & nn.89–90. Importantly, "more than half of the states" continued to give "exemptions to parsonages, rectories, glebe houses, and other living quarters" after shifting to the modern regimes. *Id.* at 391–92.

Today, the tax-exempt treatments for churches and parsonages, in addition to other tax benefits for religion, *see infra* p. 26, "remain firmly in place," Witte, *supra*, at 395. "All of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantees," *Walz*, 397 U.S. at 676–77, and many States continue to give parsonages in particular tax-exempt treatment, *see* Edward A. Zelinsky, *Taxing the Church: Religion, Exemptions, Entanglement, and the Constitution* 67 & n.1, 158–59 (2017); *see also, e.g.*, Wis. Stat. § 70.11(4); S.C. Const. art. X, § 3(c); Tex. Const. art. VIII, § 2(a); Va. Const. art. 10, § 6(a)(2); Wyo. Const.

art. 15, § 12; Alaska Stat. § 29.45.030(b)(1); Ark. Code § 26-3-303; Conn. Gen. Stat. § 12-81(15); Idaho Code § 63-602B(1); Kan. Stat. § 79-201, Seventh; Me. Stat. tit. 36, § 652(G.); Md. Code, Tax-Prop. § 7-204; Mass. Gen. Laws ch. 59, § 5, cl. 11; Nev. Rev. Stat. § 361.125(1)(a); N.H. Rev. Stat. § 72:23III; Vt. Stat. tit. 32, §§ 3802(4), 3832(2); Wash. Rev. Code § 84.36.020(2)(a); W. Va. Code § 11-3-9(a)(6); *Neb. Annual Conf. of United Methodist Church v. Scotts Bluff Cty. Bd. of Educ.*, 499 N.W.2d 543, 548 (Neb. 1993) (interpreting Nebraska Constitution to include a parsonage allowance).

3. The History Of The Federal Income Tax's Parsonage Allowance

Congress enacted "the modern income tax" in 1913. Sheldon D. Pollack, *Origins of the Modern Income Tax, 1894-1913*, 66 Tax Lawyer 295, 324, 327, 330 (2013) (citing 38 Stat. 114, 166–81). Before that year, Congress had enacted other income-tax regimes—the Revenue Act of 1861, the Revenue Act of 1862, and the Revenue Act of 1894. *Id.* at 305–06. Those regimes were short-lived and often had high personal-exemption limits, meaning "only the wealthy" were actually subject to the tax. Sheldon D. Pollack, *The First National Income Tax, 1861–1872*, 67 Tax Lawyer 311, 320 (2014); Pollack, *supra*, *Modern Income Tax*, at 306.

Congress first provided for income-tax exempt treatment for religion with the Revenue Act of 1894, which both "exempted religious institutions from tax collection" (along with "charitable" and "educational" organizations) and allowed a "deduction for charitable contributions including contributions to religious institutions." Erika King, *Tax Exemptions and the Establishment Clause*, 49 Syracuse L. Rev. 971, 980–

81 (1999). Every federal income-tax regime since that Act has retained these exemptions and deductions. *Id.* at 980–81; *see also Walz*, 397 U.S. at 676 n.4.

The Revenue Act of 1913 did not contain either the parsonage exception or the parsonage allowance—indeed, it did not even address whether *any* taxpayer "should include the value of employer-provided housing" as part of her taxable income. Adam Chodorow, *The Parsonage Exemption*, 51 U.C. Davis L. Rev. 849, 856 (2018). Through a series of early administrative rulings, however, the Treasury Department concluded that *secular* employer-provided housing could be excluded from taxable income when provided for employees to "perform their jobs." *Id.* at 856 & nn.26–28. Yet, in 1921, the Treasury Department reached the exact opposite conclusion for ministers: "[w]here in addition to the salary paid a clergyman he is permitted to use [a] parsonage for living quarters," the fair rental value of the parsonage must be "reported as income." I.R.S. Office Decision 1921-4 C.B. 85, 1921 WL 50793; Chodorow, *supra*, at 856–57.

Congress responded to the Treasury Department's unfavorable treatment of ministers that same year, 1921, with the statutory parsonage exemption. *See* Revenue Act of 1921, Pub. L. No. 67-98. § 213(b)(11), 42 Stat. 227, 239. This provision originally provided that "the term 'gross income' . . . [d]oes not include . . . [t]he rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of his compensation." *Id.* The parsonage exception was not controversial, perhaps due to the deeply rooted history of tax-exempt treatment of parsonages; no debate was had in Congress over the exemption, Matthew W. Foster,

Note, *The Parsonage Allowance Exclusion: Past, Present, and Future*, 44 Vand. L. Rev. 149, 150 n.6 (1991), and no objection was raised, Jerold L. Waltman, *Political Origins of the U.S. Income Tax* 92 (1985).

Congress added the parsonage allowance a few decades later in 1954, codifying it and the parsonage exemption at Section 107 of the Internal Revenue Code. *See* Internal Revenue Code of 1954, Pub. L. No. 591-736, 68A Stat. 32; *see generally* Clergy Housing Clarification Act of 2002, Pub. L. No. 107–181, 116 Stat. 583 (2002 amendment bringing law to current form). The parsonage allowance corrected a disparity between ministers caused by the parsonage exemption: Since the parsonage exemption applied only to ministers whose church-employer actually owned a parsonage dwelling, ministers who received a housing allowance from their church-employer, perhaps because their church was less affluent, were taxed on the value of that allowance. *See* Br. for Federal Appellants App. 16 (district court opinion, citing House Report) (hereinafter "App."). The parsonage allowance provision removes that disparity by exempting such allowances from taxation. As the parsonage allowance's House-sponsor stated, "[I]n these times when we are being threatened by a godless and anti-religious world movement *we should correct this discrimination against certain ministers of the gospel* who are carrying on such a courageous fight against this. Certainly this is not too much to do for these people who are caring for our spiritual welfare." App. 16–17 (citing hearings before House Committee on Ways and Means) (emphasis added).

B. Section 107's Parsonage Allowance Shares In The Deeply Rooted History Of Tax-Exempt Treatment For Parsonages And So Is Constitutional Under The Establishment Clause

The federal parsonage allowance "fits within" the deeply rooted tradition of offering tax benefits to parsonages, a tradition practiced by the Colonies and the early States, accepted by Congress and the Supreme Court, and still practiced today. *Supra* pp. 10–17. The federal parsonage allowance applies when a church-employer gives a housing benefit to a "minister of the gospel" as "part of his compensation." 26 U.S.C. § 107(2). This is the essence of the deeply rooted parsonage system: a church giving its minister a home to live in while he or she serves that church and its congregation. *See supra* pp. 10–11.

The federal parsonage allowance of course differs from the deeply rooted parsonage system in one respect—the allowance applies when churches give the housing benefit in cash, as opposed to the in-kind benefit under the parsonage system—but this difference does not remove the allowance from the historical tradition. As explained above, churches also gave glebe lands to ministers as part of the parsonage, which ministers used to generate personal income for their personal support. *Supra* p. 11. That fact did not alter the tax exemptions States extended to parsonages. *See supra* pp. 12–17. Accordingly, imposing a rigid in-kind requirement on the historical tradition would call for the kind of "mechanical line drawing" exercise that the Establishment Clause "does not tolerate." *Bormuth*, 870 F.3d at 512.

What is more, Congress' addition of the parsonage allowance to the parsonage exception also accords with another deeply rooted historical tradition, that of treating

all religions equally. *E.g.*, George Washington, Letter To The Hebrew Congregation in Newport, Rhode Island (August 18, 1790); *accord Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring) (explaining that use of "minister" in First Amendment's ministerial exception should not be understood to preclude the exception's application to "Catholics, Jews, Muslims, Hindus, [ ] Buddhists" or any other religious group). As the parsonage allowance's sponsor stated, the allowance was needed to "correct the discrimination against certain ministers of the gospel"—namely, those employed by religious groups that do not (or cannot) own housing themselves. *Supra* p. 19.

The district court ignored the applicability and weight of the deeply rooted history of tax exemption of parsonages for two reasons, both of which are erroneous.

First, the court stated that the tax exemption for parsonages, deeply rooted in history, was irrelevant to the parsonage allowance because this history "relates to church *property* tax exemptions, not to *income* tax exemptions." App. 40 (emphases added). But the proper level of framing of the historical tradition is tax exemption of parsonages *generally*, not *income* tax exemptions of parsonages. (After all, the income tax is a relatively new phenomenon. *See supra* p. 17.) This level of framing comports with the Supreme Court's approach in *Town of Greece*. There, the Court relied on the historical record of legislative prayer generally—including congressional legislative prayer, state legislative prayer, and prayer by paid chaplains—in affirming the practice of a local government board opening with prayer by citizen-volunteers. 134 S. Ct. at 1816, 1818–19. Had the Supreme Court required the level of specificity preferred by the district court, it could not have relied on the practices of Congress or

the States with paid chaplains, since those practices were not exactly identical to the legislative-prayer practice at issue there. *See Bormuth*, 870 F.3d at 512 ("The Establishment Clause does not tolerate . . . mechanical line drawing."). In any event, there is historical support for tax exemptions for religious organizations outside of the property-tax context: "[a]s early as 1813 the 12th Congress refunded import duties paid by religious societies on the importation of religious articles." *Walz*, 397 U.S. at 677.

Second and relatedly, the district court stated that the federal parsonage allowance "is not entitled to any special presumptions on account of history" because it dates back only to 1954, not the Founding. App. 41. But the proper inquiry is whether the challenged government action, whenever taken, "fits within" a historical tradition dating back to the Founding, not whether the specific challenged government action *itself* (e.g., the specific federal law challenged) has such a provenance. *See Town of Greece*, 134 S. Ct. at 1818–19. This is why in *Town of Greece*, the Supreme Court did not even consider in its analysis how long the town's practice had existed; rather, it looked only to whether the history of legislative prayer generally dated to the Founding. *See id.* at 1820–28 (explaining why the town's practice fit within this tradition); *see generally id.* at 1816 (mentioning in background section that the prayer practice existed since 1999). Were this not the rule, no legislature—other than Congress and the legislatures of the original 13 colonies—could engage in legislative prayer, a bizarre outcome that the Court has not even tangentially supported. *See Marsh*, 463 U.S. at 790. Moreover, the historical tradition

to which the federal parsonage allowance belongs is one of legislative prerogative, not constitutional duty. *See supra* p. 14. Based on the deep historical record, the original understanding of the Establishment Clause included a legislature's ability to exempt or not exempt parsonages from taxes at will—or even to suspend exemptions in time of emergency or other need. *Supra* p. 13. That Congress did not enact the parsonage allowance until 1954 typifies, not defies, this historical practice. Finally, the history of the federal income tax suggests that Congress was unaware of the law's effect on parsonages until 1921 (and was unaware of the parsonage exception's disparate impact on certain religious sects until 1954). The first few income-tax regimes were both short-lived and largely directed at the wealthy. *See supra* p. 17. And the Treasury Department first declared that the Revenue Act of 1913 applied to parsonages, despite reaching the opposite conclusion for secular employer-provided housing. Thus Congress should hardly be faulted for not acting until the twentieth century. *Accord Hosanna-Tabor*, 565 U.S. at 185 (recognizing historical status of First Amendment's ministerial exception although "it was some time before questions about government interference with a church's ability to select its own ministers came before the courts").

III. Nullifying State And Federal Parsonage-Allowance Laws Would Wreak Untold Harms Not Only On Religious Organizations But On Other Important State Interests

At the time of the Founding, "[e]ducation and charity . . . were almost exclusively regarded as within the purview of religion." Michael W. McConnell, *Religion and Its Relation to Limited Government*, 33 Harv. J.L. & Pub.

Pol'y 943, 949 (2010). While the States have now "come to bear much of the burden of education, relief for the poor, and other forms of social welfare," the "charitable services churches and other organizations render relieve the state of a portion of that burden." Witte, *supra*, at 409. Indeed, Congress specifically provides tax exemptions to charitable organizations, including religious institutions, because they serve this "useful public purpose" and "supplement or take the place of public institutions of the same kind." *Bob Jones Univ. v. United States*, 461 U.S. 574, 588 (1983). The district court's invalidation of the parsonage allowance most immediately places substantial financial burdens on religious organizations and their ministers. It will also inevitably strain the States because they must fill the gap that will form as these ministers and religious organizations truncate their pro-social activities, *see id.*; Witte, *supra*, at 409, to account for the district court's ruling.

Further, the effect of the district court's ruling will be magnified by the operation of state income-tax laws. Almost all of the States with personal income taxes design their tax codes to work with the federal income-tax system by incorporating the federal code into their state codes. *See* The Pew Charitable Trusts, *Tax Code Connections: How Changes to Federal Policy Affect State Revenue* 1 (Feb. 2016).[1] Many of these States accomplish this incorporation by either using federal adjusted gross income or federal taxable income as the starting point for the calculation of personal state income taxes. *See* Federation of Tax Administrators,

[1] http://www.pewtrusts.org/~/media/assets/2016/02/fiscalfed_federaltaxpolicychangesreport_v6_web.pdf.

State Personal Income Taxes: Federal Starting Points (Feb. 2018) (31 States use federal adjusted gross income, 6 states use federal taxable income);[2] *e.g.* Wis. Stat. § 71.05(6); *supra* p. 1 (citing laws of 25 other States). In Wisconsin, for example, computation of state income-tax liability begins with "federal adjusted gross income." *See* Wis. Stat. § 71.05(6) (within section titled "Income computation"); Wis. Dept. of Revenue, *Form 1, Income Tax Return (Long Form)* (2017).[3] So for ministers in Wisconsin claiming the federal parsonage allowance for their federal taxes, they receive a state-equivalent tax exemption for their allowance on their state return. Since state income-tax provisions like Wis. Stat. § 71.05(6) incorporate as a matter of state law the same federal parsonage allowance struck down by the district court, the district court's order also (albeit partially) invalidates these state provisions. Ministers who would have received the federal parsonage allowance but for the district court's order now therefore face increased federal *and* state income taxes, which simply exacerbates the social-welfare problem identified above. The Joint Committee on Taxation estimated the value of the "[e]xclusion of housing allowances for ministers" to be $4.1 billion from 2016 to 2020. *See* Joint Committee On Taxation, *Estimates of Federal Tax Expenditures For Fiscal Years 2016–2020* at 36 (JCX-3-17) (Jan. 30, 2017).[4] This does not take into account the effect of the state income-tax laws just identified.

[2] https://www.taxadmin.org/assets/docs/Research/Rates/stg_pts.pdf.

[3] https://www.revenue.wi.gov/TaxForms2017through2019/2017-Form1.pdf.

[4] https://www.jct.gov/publications.html?func=select&id=5.

Finally, the district court's interpretation of the Establishment Clause—which eschews the deeply rooted religious traditions of the Nation, *contra Town of Greece*, 134 S. Ct. at 1818–19—threatens many other state-law provisions extending tax exemptions to religion. "[R]eligious tax exemptions . . . permeate the state and federal codes, and have done so for many years." *Texas Monthly v. Bullock*, 489 U.S. 1, 30–33 & nn.2–3 (1989) (Scalia, J., dissenting). In addition to the state-level parsonage allowances, *supra* pp. 16–17, many States offer religious groups property-tax exemptions for other types of real property,[5] sales tax exemptions,[6] state income-tax exemptions,[7] real-estate transfer-tax exemptions,[8] and state unemployment-tax exemptions.[9] Each of these laws may be vulnerable to attack in light of the district court's opinion, causing incalculable disruption to the States and their citizens.

CONCLUSION

The judgment of the district court should be reversed.

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[5] Zelinsky, *supra*, at 25, 67 (34 states have constitutional provisions, and the other 16 have statutory provisions, including Wis. Stat. § 70.11(4)(a)).

[6] Zelinsky, *supra*, at 81–96 (*e.g.*, Wis. Stat. § 77.54(9a)(f)).

[7] Zelinsky, *supra*, at 97–98 (*e.g.*, Wis. Stat. § 71.26(1)(a)).

[8] Wisconsin, for example, imposes a real-estate transfer tax upon the conveyance of real property. Wis. Stat. § 77.22(1). Wisconsin Chapter 187, however, allows religious societies to avoid this tax under some circumstances by automatically vesting title to religious property in a specified entity or person when that society becomes defunct. *See, e.g.*, Wis. Stat. §§ 187.08 (general), 187.15(4) (Methodists) & 187.19(11) (Catholics).

[9] Zelinsky, *supra*, at 104–111 (describing complex "cooperative federalism" regime for unemployment taxes, including state efforts to accommodate religion).

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(c) because this brief contains 6989 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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Dated: April 26, 2018

/s/ Ryan J. Walsh
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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 2018, I filed the foregoing Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

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