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 T. MNUCHIN, ET AL.,
Defendants-Appellants,

and

EDWARD PEECHER, ET AL.,
Intervening Defendants - Appellants

On Appeal from the United States District Court for the
Western District of Wisconsin
Case No. 16-cv-215 (Honorable Barbara B. Crabb)

BRIEF *AMICUS CURIAE* OF FOUNDATION FOR MORAL LAW IN SUPPORT OF APPELLANTS AND FOR REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The Foundation for Moral Law is a 501(c)(3) non-profit corporation. The Foundation has no parent corporations, and no publicly held company owns ten percent (10%) or more of *amicus*. No other law firm has appeared on behalf of the Foundation in this or any other case in which it has been involved.

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STATEMENT OF IDENTITY AND INTERESTS

Amicus Curiae Foundation for Moral Law (the Foundation),[1] is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the unalienable right to acknowledge God and the strict interpretation of the United States Constitution according to the intent of its Framers.

The Foundation believes the Framers favored religious freedom and opposed an official state church. But they also recognized that religion plays an important role in the life of the nation and in the lives of individuals within the nation, and that, in the words of Justice Story, Christianity and religion in general "ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience and the freedom of religious worship."[2]

To this end, the Foundation hosts a website (morallaw.org), and its officers and employees frequently write and lecture about issues related to religion and law. Also to this end, the Foundation files numerous *amicus* briefs in cases involving the United States Constitution, religious liberty, and related matters.

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[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

[2] Joseph Story, II *Commentaries on the Constitution of the United States* 593 (1833).

SUMMARY OF ARGUMENT

The Framers opposed an official state church like the Church of England of which the king was the head. But they also recognized that religion plays a major and benevolent role in the life of a nation and they wanted to encourage and strengthen that role.

The *Marsh v. Chambers*, 463 U.S. 783 (1983), historical precedent test is an appropriate framework for the analysis of this case. Although the federal income tax did not exist before the ratification of the Sixteenth Amendment in 1916, the *Marsh v. Chambers* test should be applied broadly. Exempting religious institutions and officials from taxation has been common throughout American history from colonial times to the present. It was also the practice in England under the common law, going back to the Magna Carta and before. Roman law exempted pagan priests from taxation; the Song Dynasty of China exempted Buddhist property from taxation. Similar exemptions have been common throughout the ancient, medieval, and modern world. Nothing in the history or language of the First Amendment indicates that Congress intended to terminate this time-honored practice of which the housing allowance at issue in this case is an example.

ARGUMENT

Because accommodation for religion in general and tax exemption for religious institutions in particular is an unbroken tradition in this country that preceded the adoption of the First Amendment, the *Marsh v. Chambers* historical precedent test is the appropriate framework for analysis of this case.

I. The benevolent attitude of the Founders and their successors towards religion in general and Christianity in particular

In 1790 Congress passed the Residence Act authorizing President Washington to appoint commissioners to draw plans for the capital city that would later be known as Washington D.C. Washington appointed Major Pierre Charles L'Enfant, a French engineer who served the American cause during the War for Independence. L'Enfant's plan included "a great church ... intended for national purposes such as public prayer, thanksgiving, funeral orations, etc., and assigned to the special use of no particular sect or denomination, but equally open to all." Congress adopted most of the L'Enfant plan, including space for a national cathedral which was eventually constructed at a different location during the presidency of Theodore Roosevelt.[3] Appropriating space for "a great church ... for national purposes" caused no controversy in Congress, because Americans then recognized that although there was to be no official national church, churches were to play a prominent role in the life of the nation. In 1790 Congress saw no conflict

[3] https://cathedral.org/history/timeline.

between the "great church ... for national purposes" and the Establishment Clause of the First Amendment which the same Congress passed just the previous year.

Nor did Congress see any conflict between the First Amendment and the Northwest Ordinance of 1787 which stated: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[4]

Washington, who served as President of the Constitutional Convention in 1787 and as President when the First Amendment was passed by Congress and ratified by the states, understood the role religion played in the life of the nation. As he said in his Farewell Address,

> Of all the dispositions and habits which lead to political prosperity, Religion and Morality are indispensable supports. ... And let us with caution indulge the supposition that morality may be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.[5]

Joseph Story, Harvard Law Professor and U.S. Supreme Court Justice, whose *Commentaries on the Constitution of the United States* (1833) were the leading exposition of the Constitution in the first half of the nineteenth century, wrote:

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[4] Northwest Ordinance of 1787, Article 3.

[5] George Washington, Farewell Address, September 17, 1796; quoted by John C. Fitzpatrick, *George Washington Himself* (1933), P. 229.

> Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration, the general, if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation. ...[6]

Two decades later, Congress considered a challenge to the military chaplaincy. Both the Senate Judiciary and the House Judiciary Committee conducted exhaustive studies of the First Amendment, and their conclusions were similar. The Senate Judiciary Committee reported in 1853:

> The clause speaks of "an establishment of religion." What is meant by that expression? It referred, without doubt, to that establishment which existed in the mother country, its meaning is to be ascertained by ascertaining what that establishment was. ...
>
> Our fathers were true lovers of liberty, and utterly opposed to any constraint upon the rights of conscience. They intended, by this amendment, to prohibit "an establishment of religion" such as the English church presented, or anything like it. But they had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to send our armies and navies forth to do battle for their country without any national recognition of that God on whom success or failure depends; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of "atheistical apathy." Not so had the battles of the revolution been fought, and the deliberations of the revolutionary Congress conducted. On the contrary, all had

[6] Joseph Story, *Commentaries on the Constitution of the United States* 2nd Ed. (Boston: Charles C. Little and James Brown, 1851) II: Sections 1874, 1877, pp. 593, 594.

> been done with a continual appeal to the Supreme Ruler of the world, and an habitual reliance upon His protection of the righteous cause which they commended to His care.[7]

Thomas Cooley, federal judge and Harvard law professor, is often considered the leading constitutional scholar and expositor of the latter half of the nineteenth century, just as Justice Story was the leading expositor of the first half. In his work entitled *The General Principles of Constitutional Law in the United States of America* (1880) he stated:

> It was never intended that by the Constitution the government should be prohibited from recognizing religion, or that religious worship should never be provided for in cases where a proper recognition of Divine Providence in the working of government might seem to require it, and where it might be done without drawing any invidious distinctions between different religious beliefs, organizations, or sects.
>
> The Christian religion was always recognized in the administration of the common law; and so far as that law continues to be the law of the land, the fundamental principles of that religion must continue to be recognized in the same cases and to the same extent as formerly.[8]

The general benign attitude towards religion reflected in the above statements carried over to a disinclination to tax church bodies and ministers. Although *Marsh v. Chambers*, 463 U.S. 783 (1983), specifically addressed legislative prayer, its underlying methodology of historical analysis applies equally to the tax exemption issues in this case.

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[7] *The Reports of Committees of the Senate of the United States for the Second Session of the Thirty-Second Congress*, 1852-53, pp. 1-4.

[8] Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* (1880), pp. 205-06.

II. *Marsh v. Chambers* should be given a broad interpretation.

In *Marsh*, the Court upheld the employment of a Presbyterian clergyman as the Chaplain of the Nebraska unicameral legislature. Noting that colonial legislatures employed chaplains and the same Congress that adopted the First Amendment approved the provision of congressional chaplains, the Court reasoned:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. As Justice Douglas observed, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

Chambers, 463 U.S. at 792. *Marsh v. Chambers* is consistent with original-intent jurisprudence. The Establishment Clause should not be construed to prohibit practices that its Framers did not intend to prohibit.

Marsh has not been limited to cases involving legislative prayer. In *Van Orden v. Perry*, 545 U.S. 677 (2005), the Court adopted in part the *Marsh* historical-precedent analysis to uphold a Ten Commandments display on the Texas Capitol grounds. In *Van Zandt v. Thompson*, 839 F.2d 1215 (7th Cir. 1988), the Seventh Circuit applied *Marsh* to an Illinois House Resolution providing for a prayer room in the State Capitol, calling the district court's view that *Marsh* was a

one-time departure from the *Lemon* test "much too crabbed." *Id.* at 1219. In *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987), the Sixth Circuit invoked *Marsh* for the proposition that high school graduation invocations and benedictions are constitutionally permissible (although the Court also concluded on other grounds that the invocations and benedictions in that case were not sufficiently neutral).

Other cases not involving legislative prayer that have cited *Marsh* include *Kong v. Scully*, 341 F.3d 1009 (9th Cir. 2008) (constitutional challenge to Medicare and Medicaid amendments permitting payments for nonmedical care of persons whose religious convictions forbade medical services); *Books v. City of Elkhart, Indiana*, 235 F.3d 292 (7th Cir. 2000) (Ten Commandments monument held unconstitutional without mentioning *Marsh;* dissent relied on *Marsh*); *ACLU of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289 (6th Cir. 2001) (Ohio State Motto "With God all things are possible" upheld); *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991) (religious exemption for Native American religious use of peyote upheld); *Freethought Society of Greater Philadelphia v. Chester County*, 334 F.3d 247 (3rd Cir. 2003) (Ten Commandments display upheld using *Lemon* test; *Marsh* cited); *Newdow v. Rio Linda Union School District*, 597 F.3d 1007 (9th Cir. 2010) (Pledge of Allegiance upheld using *Lemon* test; *Marsh* discussed for historical context even though

Pledge was not composed until 1892; Court noted at 1035 concerning *Marsh*, "There, as the [Supreme] Court observed, the nation's historical practices can outweigh even obvious religious concerns under the Establishment Clause.").

To hold, as the District Court did, that the *Marsh* historical precedent test does not apply to the parsonage exemption because the federal income tax was not adopted until 1913 and the § 107(2) parsonage exemption was not enacted until 1954, is to apply a simplistic and overly narrow analysis. When considering tax exemption for churches or clergy, *Marsh* should be read in conjunction with *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970). Upholding tax exemption for churches, the Court stated: "The First Amendment ... does not say that in every and all respects there shall be a separation of Church and State." *Id.* at 669. *See also Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (stating that a requirement that the government show a callous indifference to religious groups ... would be preferring those who believe in no religion over those who do believe").[9] The Court further stated that tax exemption for churches need not be justified on the basis of the good works that some churches perform and the resulting social benefit.

[9] The increasing impact of government at all levels on the lives of the American people makes an absolute separation of church and state today far more difficult than in 1789. Attempts to enforce an absolute separation are thus likely to marginalize people of faith. The State may not "affirmatively oppos[e] or show[] hostility to religion." *Abington Township v. Schempp*. 374 U.S. 203, 225 (1963).

> Churches vary substantially in the scope of such services; programs expand or contract according to resources and need. ... The extent of social services may vary, depending on whether the church serves an urban or rural, a rich or poor constituency. To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize. Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions.

Walz, 397 U.S. at 675. Further, "[e]limination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." *Id.* at 674.

In a concurring opinion, Justice Harlan noted that exemptions, though similar in economic impact to subsidies, differ in that subsidies "must be passed on periodically and thus invite more political controversy than exemptions." *Id.* at 699. "Moreover," he wrote, subsidies usually "are granted on the basis of enumerated and more complicated qualifications and frequently involve the state in administration to a higher degree." *Id.* Whereas a subsidy requires direct government funding, an exemption does not.

Justice Brennan, also concurring, declared: "History is particularly compelling in the present case because of the undeviating acceptance given religious tax exemptions from our earliest days as a Nation. Rarely if ever has this

Court considered the constitutionality of a practice for which the historical support is so overwhelming." *Id.* at 681. He noted that Virginia's 1777 exemption for property of colleges, houses for divine worship, and seminaries was reaffirmed immediately before and after ratification of the First Amendment. Thus, "[i]t may reasonably be inferred that the Virginians did not view the exemption for 'houses of divine worship' as an establishment of religion." *Id.* at 683. New York in 1799 exempted churches, colleges, and schools from taxation. *Id*. Thomas Jefferson was President when tax exemption was first given churches in Washington D.C., and James Madison was a member of the Virginia General Assembly that voted for exemptions for churches. History does not record that either of them objected to those exemptions. As Justice Brennan observed: "It is unlikely that two men so concerned with the separation of church and state would have remained silent had they thought the exemptions established religion." *Id.* at 685. Justice Brennan concluded:

> Mr. Justice Holmes said that "(i)f a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.... *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31, 43 S. Ct. 9, 10, 67 L. Ed. 107 (1922). For almost 200 years the view expressed in the actions of legislatures and courts has been that tax exemptions for churches do not threaten "those consequences which the Framers deeply feared" or "tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent," *Schempp*, *supra*, 374 U.S., at 236, 83 S. Ct., at 1578 (Brennan, J., concurring.)

Construing *Marsh* and *Walz* together demonstrates that the historical-precedent test is not limited to legislative prayer but also applies to tax exemption and perhaps other issues as well. Furthermore, the test must be applied broadly to the issue of tax exemption in general, not simply to a clergy housing allowance which did not begin until 1921 simply because there was no federal income tax until 1913. The district court has failed to demonstrate any constitutionally valid reason for treating a clergy housing allowance different from a church property tax exemption.

III. Tax exemption for religious institutions and religious officials has an unbroken historical precedent, both in the United States and in other parts of the world.

The pastor's housing allowance cannot be traced back to 1789, because the federal income tax dates only to the ratification of the Sixteenth Amendment in 1913. Shortly thereafter, however, Congress by a large margin adopted the Revenue Act of 1921 that authorized clergy to exclude from taxable income housing furnished by their respective churches.[10] To eliminate the disparity between pastors of churches that owned parsonages and those that did not, Congress added a provision in 1954 to permit pastors to exclude from their taxable income a general housing stipend provided by their churches.[11]

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[10] Justin Butterfield, Hiram Sasser, and Reed Smith, *The Parsonage Exemption Deserves Broad Protection*, 16 Tex. Rev. L. & Pol. 251 (2013).

[11] *Id.* The 1921 parsonage exclusion is codified as 26 U.S.C. § 107(1) and the 1954

The practice of exempting religious institutions and personnel from certain forms of taxation precedes the adoption of the First Amendment. In 1791, when the First Amendment was ratified, four states had constitutional provisions requiring or allowing the exemption of church property from taxation. All of the remaining states exempted church property from taxation either by law or by practice.[12] "Those states without a codified exemption almost certainly did not believe codification to be necessary."[13]

In 1899 a Connecticut court observed that in 1699 the estates of "settled ministers" were exempted from taxation." *Yale University v. Town of New Haven*, 71 Conn. 316, 331, 42 A. 87, 91 (1899). The court further observed:

> [P]ublic buildings, whether belonging to the State or to some trustee appointed by the State, occupied as colleges, school-houses and churches, were not specifically named in the tax laws as exempted, because they were not included in 'ratable estate' as taxable property .... [T]hey had been placed in that class of property which ought not to be taxed, by virtue of a public policy too clear to be questioned, and which had been followed without any specific legislation by our government from its very beginning.

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housing allowance is codified as 26 U.S.C. § 107(2). FFRF originally challenged both § 107(1) and § 107(2) but subsequently narrowed their claim to only § 107(2). If § 107(2) is struck down but § 107(1) remains standing, the discrimination against pastors whose churches do not own parsonages will be reinstated, thus violating the basic equality principle that the FFRF and the District Court assert underlies the Establishment Clause. Further, a local church's decision to provide a parsonage or housing allowance is sometimes based upon denominational doctrine. *Id.* at 258-61.

[12] Butterfield, *Parsonage Exemption*, 16 Tex. Rev. L. & Pol. at 255.

[13] *Id.* at 255.

Id. 331-32. The opinion concluded:

> The reason of such a public policy is apparent. The principle that property necessary for the operation of State and municipal governments, and buildings occupied for those essential supports of government, public education and public worship, ought not to be the subject of taxation, has been with us accepted as axiomatic. It has been incorporated into the constitutions of several states. It has been inseparably interwoven with the structure of our government and the habits and convictions of our people since 1638.

Id. at 332.

The tradition of tax exemption for religious institutions was not unique to New England. South Carolina and Pennsylvania adopted new constitutions in 1790 (while the First Amendment was being ratified by the States) that included previous provisions exempting religious property from taxation.[14] Virginia provided much of the inspiration for the Bill of Rights including the First Amendment. The Virginia Supreme Court noted a century ago that "the policy of the state has always been to exempt property of the character mentioned and described in Sec. 183 of the Constitution ... [A]s to such property exemption is the rule and taxation the exception." *Commonwealth of Virginia v. Lynchburg YMCA*, 80 S.E. 589, 590 (Va. 1913). Even though the District of Columbia has been bound

[14] Butterfield, at 255.

by the Establishment Clause from its inception, the District has nonetheless always exempted religious property from taxation.[15]

This practice of exemption was not limited to America. Priests and/or religious property were exempt from taxation in ancient Egypt (Genesis 47:26), in ancient Persia (Ezra 7:24), in ancient Israel, (Numbers 18:21), and in the Roman Empire, Persia, and India.[16] The Song Dynasty of China (A.D. 960-1279) exempted Buddhist property, including income-producing property, from taxation.[17]

The very first Article of the Magna Carta (1215) began:

> "In the first place we have granted to God, and by this our present charter confirmed for us and our heirs forever that the English Church shall be free, and shall have her rights entire, and her liberties inviolate; ....[18]

In the centuries that followed, kings sometimes tried to encroach upon the liberty of the Church despite the Magna Carta's guarantees. On at least one occasion (1296) King Edward tried to impose a tax on the English clergy, and in *Clericis liacos* Pope Boniface VIII forbade English officials to impose taxes and

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[15] Butterfield, at 256, citing Chester James Antieau et al., *Religion Under the State Constitutions* 122 (1965).

[16] Butterfield, at 254, citing Antieau at 121-22.

[17] Craig G. Benjamin, *Foundations of Eastern Civilization Course Guidebook* 241 (2013).

[18] *The Magna Carta (The Great Charter)* (1215) Article I, http://www.contitution.org.

forbade English clergy to pay the tax upon penalty of excommunication. But in general the liberty of the Church remained inviolate, until King Henry VIII in 1534 pulled the Church of England out of the Roman Catholic Church and declared himself the supreme head of the church -- thus producing the union of church and state to which America's Founding Fathers registered their objection by adopting the First Amendment.

Generally, "priests in the middle ages were exempted from paying taxes because their work was considered noble."[19] Whether the reason for exemption was the character of their work, the benefit of their work upon society, or the jurisdictional limits of the authority of the State over the church, both Roman law and common law in the middle ages provided exemption from taxation for churches and clergy

When one considers the ancient roots of the practice of exempting religious institutions and religious officials from taxation and the continuance of the practice through medieval times, the colonial era, the Founding era, and on through American history up to the present time, it is clear that the intent of the Framers of the First Amendment was not to abolish tax exemption for churches and clergy. Because of this unbroken tradition, *Marsh v. Chambers* should control this case.

[19] Simon Newman, "Priests in the Middle Ages," *The Finer Times: Excellence in Content*, http://www.thefinertimes.com

IV. Upholding the district court's decision would convey the message that the government is not neutral but *hostile* toward religion, especially Christianity.

Since at least 2005, the Justices of the Supreme Court have warned that the government may send the message that it is *hostile* to religion by invalidating laws, symbols, and practices that have some religious element but are not repugnant to the Establishment Clause. In 2005, Justice Breyer warned that removing the 10 Commandments display from the Texas capitol would lead to "a hostility toward religion" that is contrary to the Establishment Clause. *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in judgment). Five years later, *Salazar v. Buono* cited Justice Breyer's concern when it upheld the constitutionality of a statute transferring land from the federal government to a private group on which a large white cross stood. *Salazar v. Buono*, 559 U.S. 700, 716-17 (2010) (plurality opinion) (citing *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in judgment). In his concurrence Justice Alito wrote,

> "The demolition of this venerable if unsophisticated, monument would also have been interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country's religious heritage."

Id. at 726 (Alito, J., concurring in part and concurring in judgment). Justice Alito believed that the cross was "the preeminent symbol of Christianity," *id.* at 725, but

still maintained that removing the cross would convey that the government was hostile toward religion.

In 2014, the Court upheld the constitutionality of a town opening its board meetings in prayer by local clergymen, all of whom were Christian. *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014). The lead opinion held that the town was free to "acknowledge the place that religion holds in the lives of many private citizens," noting that this alone "does not suggest that those who disagree are compelled to join the expression or approve of its content." 134 S.Ct. at 1825 (Kennedy, J., joined by Roberts, C.J., and Alito, J.). The concurring justices agreed that simply acknowledging the sovereignty of God through prayer, as long as the listeners were not physically or legally coerced to participate, was not an Establishment Clause violation. *Id.* at 1837-38 (Thomas, J., joined by Scalia, J.). All five of these justices were averse to the idea that an Establishment Clause violation exists simply because the government recognized the role that religion, particularly Christianity, played in our society.

Finally, the Court last year in *Trinity Lutheran Church, Inc. v. Comer* rejected the argument the Establishment Clause requires the state to reject a church from participating in a public benefit program for which it was otherwise qualified but for the fact that it was a religious institution. *Trinity Lutheran Church, Inc. v. Comer*, 137 S.Ct. 2012, 2024 (2017). Most of the Court's opinion focused on the

Free Exercise issue instead of the possible Establishment Clause issue. *Id.* at 2019-25. Again, it appears that the Court wanted to ensure that governments are not displaying hostility towards religion.

Thus, in *Van Orden*, *Salazar*, *Town of Greece*, and *Trinity Lutheran Church*, the Justices of the Supreme Court emphasized that government must not show hostility toward religion by applying an erroneous and hypersensitive Establishment Clause jurisprudence. The preceding sections of this brief demonstrate why upholding the law at issue in this case would not offend the Establishment Clause. Thus, affirming the district court's decision would not only be incorrect, but it would also send the message that the government is hostile towards religion—which is exactly what the Supreme Court would not do.

CONCLUSION

The clergy housing allowance is part of a time-honored tradition that does not violate the Establishment Clause. In keeping with this time-honored tradition, Congress enacted the clergy housing allowance in 1954. In reliance upon this statute, countless churches have divested themselves of their parsonages and provided housing allowances instead, and in reliance upon this, countless pastors have used their housing allowances to purchase homes. They should not now be punished for doing so.

The Foundation urges this Court to reverse the District Court and uphold the housing allowance.

Respectfully submitted this 25th day of April, 2018.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Cir. R. 29 because it contains 4,776 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in *Times New Roman* size 14.

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I certify that (1) all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and (2) the digital submissions have been scanned for viruses with the most recent version of McAfee Security Scan Plus and are free of viruses as reported by the software program.

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CERTIFICATE OF SERVICE

I certify that on April 25, 2018, I transmitted a digital submission of the foregoing to the Court for filing and transmittal of Notice of Electronic Filing in compliance with the Court's Emergency General Order of October 20, 2004, as last amended March 18, 2009 (*In Re: Electronic Submission of Documents and Conversion to Electronic Case Filing*).

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