No. 20-199

In the Supreme Court of the United States

JOHN BURNS,

Petitioner

CITIZENS AGAINST RELIGIOUS CONVICTIONS, INC.

Petitioner-Intervenor

v.

INTERNAL REVENUE SERVICE AND COMMISSIONER OF TAXATION

Respondents

On writ of certiorari to the United States Court of Appeals
for the Eighteenth Circuit

BRIEF FOR RESPONDENT

TEAM 10

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QUESTIONS PRESENTED

Section 107 of the Internal Revenue Code, otherwise known as the "parsonage exemption," exempts from income tax the value of both in-kind housing and cash housing allowances for "ministers of the gospel," a term understood to include all religious leaders. However, the question of who qualifies as a "minister of the gospel," and thus is eligible to receive the parsonage exemption, has become confused with the ministerial exception that exempts churches from complying with employment discrimination laws. Further, some lower courts have incorrectly held that the exemption violates the Establishment Clause of the First Amendment.

(1) Does a teacher qualify as a minister of the gospel under 26 U.S.C. § 107(2) when he does not teach religion or perform sacerdotal duties?

(2) Does 26 U.S.C. § 107(2) violate the Establishment Clause of the First Amendment?

INTRODUCTION

Section 107 of the Internal Revenue Code allows "ministers of the gospel" to exclude from their gross taxable income housing provided in-kind (section 107(1)) or as a cash allowance (section 107(2)) by their religious employers. This case concerns the fraught intersection of section 107(2) with the Establishment Clause.

Section 107, known colloquially as the "parsonage exemption," is not unique. In fact, several other provisions permit exclusion of employer-provided housing and housing allowances from gross income. Like the parsonage exemption, these other provisions are intended to exclude from taxation consumption that is directed not to increasing the employee's wealth or welfare but to accommodating the employer's requirements. Generally, these provisions are directed at employees whose choice of residence is limited by the needs of their employer; the doctrine underlying these exemptions has come to be known as the "convenience of the employer" doctrine.

The parsonage exemption fits squarely within the "convenience of the employer" doctrine. Churches and other religious institutions provide housing allowances not to enrich their ministers, but to ensure ministers can live where they are needed. However, the parsonage exemption is different from these other provisions. Most notably, many "convenience of the employer" provisions are complex, requiring specific factual findings. Section 107(2), by contrast, is short and simple, with only two requirements: that the taxpayer be a "minister of the gospel" and that the employing religious institution provide a designated housing allowance.

This simplicity arises from the other critical difference between section 107(2) and other "convenience of the employer" provisions: it implicates a fundamental constitutional right—the First Amendment's Establishment Clause. The bright-line rule created by section 107(2) is designed to avoid excessively entangling the government with religion, and thus violating the

Establishment Clause. The simple rule makes unnecessary detailed, intrusive inquiries into a religion's (or a congregation's) particular requirements for its ministers and their housing.

The arguments made by the appellants in this case, Mr. John Burns and Citizens Against Religious Convictions, Inc. (CARC), threaten to undermine this careful structure. Mr. Burns, who is a teacher of secular subjects at a religious school, argues that he is a "minister of the gospel" under section 107(2) and should be granted the parsonage exemption. CARC argues that the statute itself is unconstitutional because it impermissibly privileges religion over nonreligion, violating the Establishment Clause. Both of these claims distort the relationship between the Establishment Clause and section 107(2).

Mr. Burns's claim that he is eligible for the exemption stresses the statutory design by interpreting "minister of the gospel" too broadly. Accepting this interpretation will make nearly anyone employed by a religious organization a minister—from the janitor to the church secretary to the pastor. The bright-line rule will collapse under its own weight.

CARC's claim that the statute is unconstitutional simply misunderstands the role of section 107(2), in the tax code as a whole and with regard to the Establishment Clause. Requiring the IRS and the courts to engage in the detailed factual analyses required by other "convenience of the employer" provisions would actually produce more entanglement between government and religion.

For these reasons, both of these claims should be denied. This Court should affirm the court of appeals decision and hold that Mr. Burns is not a "minister of the gospel" and that section 107(2) does not violate the Establishment Clause.

JURISDICTION

Because this case raises an issue involving federal law and the U.S. Constitution, the U.S. District Court for the Southern District of Touroville had federal question jurisdiction under 28 U.S.C. § 1331. The district court also had tax refund jurisdiction under 28 U.S.C. § 1346(a) because Mr. Burns alleges he was erroneously denied an exemption, and thus was assessed amounts he does not owe. The Honorable Judge Cruz entered the final judgment of that court, denying the IRS and Commissioner of Taxation's motion for summary judgment and deciding that Mr. Burns is a "minister of the gospel" under 26 U.S.C. § 107(2) and that section 107(2) violates the Establishment Clause, on December 18, 2019.

The IRS and Commissioner of Taxation timely appealed the district court judgment to the U.S. Court of Appeals for the Eighteenth Circuit. The court of appeals had jurisdiction over the final decision of the district court under 28 U.S.C. § 1291. The court of appeals reversed the decision below on June 9, 2020. Mr. Burns and CARC subsequently petitioned this Court for a writ of certiorari. Having granted certiorari, this Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Section 107 provides an exemption from income taxes for housing or housing allowances provided to a "minister of the gospel."

Section 107 allows "ministers of the gospel" to exclude from gross income housing or cash housing allowances provided by the church they serve. What is now section 107(1),[1] which allows ministers to exclude the rental value of housing provided by the church, was added to the Revenue Code in 1921, just eight years after ratification of the Sixteenth Amendment. The

[1] Section 701 was originally codified as section 213(b)(11) of the Revenue Code.

statute was enacted in the wake of a series of Treasury Department decisions that made the rental value of parsonages taxable but allowed some other employees to exclude employer-provided housing and, in some cases, cash allowances for housing or meals, under the emergent "convenience of the employer" doctrine. *Comm'r v. Kowalski*, 434 U.S. 77, 84–86 (1977) (discussing the emergence of the "convenience of the employer" doctrine in U.S. Treasury regulations and case law); *see also* Martha M. Legg, *Excluding Parsonages from Taxation: Declaring a Victor in the Duel Between Caesar and the First Amendment*, 10 Geo. J.L. & Pub. Pol'y 269, 274 (2012).

Section 107(2) was added to the code in 1954 to resolve a conflict between Treasury, which included housing allowances for ministers in taxable income, and courts, which repeatedly held the opposite. *Id.* at 275. Significantly, the same set of amendments that added section 107(2) to the parsonage exemption also codified the "convenience of the employer doctrine" as section 119. Revenue Act of 1954, Pub. L. No. 83-591, 68A Stat. 39, § 119.[2]

A 2002 amendment narrowed the applicability of section 107(2), by limiting the exclusion to the fair market rental value of the housing.[3] That bill enumerated several purposes, including to create tax policy "that strive[s] to be neutral with respect to . . . differences" between churches and to minimize "intrusive inquiries by the government into . . . activities that are inherently religious." H.R. 4156, 107th Cong. § 2 (2002).

[2] The amendment that created section 107(2) also broadened section 107(1) by replacing "dwelling house or appurtenance thereof" with "home," making apartments and other living arrangements eligible.
[3] The amendment was designed to head off a constitutional challenge to section 107(2). *See* Erwin Chemerinsky, *The Parsonage Exemption Violates the Establishment Clause and Should Be Declared Unconstitutional*, 24 Whittier L. Rev. 707, 707–10 (2003); *Warren v. Comm'r*, 282 F.3d 1119 (9th Cir. 2002).

B. John Burns is a teacher at Whispering Hills Academy.

John Burns has worked as a high school teacher for Whispering Hills Academy, a boarding school operated by the Whispering Hills Unitarian Church, since 2016. (R. p. 3.) Mr. Burns teaches eleventh- and twelfth-grade English and Renaissance Literature, French, Italian, and Latin—all secular subjects. *Id*. He also serves as a school guidance counselor. *Id*. In that role, he provides advice to students, drawing on his knowledge of mental and behavioral health as well as the church's religious teachings. *Id.* In other words, Mr. Burns's official role at the school can be described as "jack of all trades"; however, none of those trades is minister, deacon, acolyte, or anything else directly related to the practice of religion.

Mr. Burns does perform some unofficial functions for the school. *Id*. He has created a well-received extracurricular club, Prayer After Hours. *Id.* On Sundays, he hosts social gatherings for students who cannot return home for the weekends. *Id*. The students who attend these events discuss the topics of the week's church service or "any other topic on their minds." *Id*. Mr. Burns leads the students in prayer at these events; the students describe these gatherings as a "sort of 'youth ministry.'" *Id*.

When Mr. Burns accepted the job at Whispering Hills, he moved to be closer to the school. *Id.* His new home is just five minutes from campus. *Id.* As part of his hiring package, the school paid him a $2,500 moving credit and provided a rental allowance of $2,100 per month. (R. p. 4.) That amount was determined by the rental value of Mr. Burns's home plus his projected utility costs. *Id.*

C. John Burns claims the parsonage exemption under Section 107(2).

In 2018, on advice from a co-worker, Mr. Burns claimed the parsonage exemption on his 2017 tax return. *Id.* He claimed that he was a "minister of the gospel" under section 107(2),

based on his employment by a religious institution, the daily afterschool prayer sessions he held with the Prayer After Hours group, the weekly post-church socials he hosted, and the spiritual counseling he provided as part of his guidance counselor duties. *Id.*

The IRS denied Mr. Burns's claim, rejecting his assertion of "minister of the gospel" status. *Id*. As a result, he owed additional taxes. *Id*.

D. Proceedings Below

1. District Court Proceedings

Mr. Burns brought suit in the District Court for the Southern District of Touroville, arguing that he was a "minister of the gospel" eligible for the parsonage exemption. *Id*. Upon a motion to intervene, CARC joined the suit as a plaintiff-intervenor to contest the constitutionality of the parsonage exemption. (R. p. 2.) CARC argued that section 107(2) favors religion over nonreligion and therefore violates the Establishment Clause of the First Amendment. *Id*.

The IRS and the Commissioner of Taxation moved for summary judgment, arguing that no dispute of material fact existed as to either Mr. Burns's or CARC's arguments. *Id*. The district court denied summary judgment and ruled for the plaintiffs, holding that Mr. Burns is a minister of the gospel and that section 107(2) is unconstitutional. (R. pp. 2–3.)

The district court first addressed Mr. Burns's claim that he is a "minister of the gospel" for purposes of section 107. (R. p. 5.) After affirming that it had discretion to "evaluate the status of religious employees as ministers," *id.*, the court determined, by examining prior cases, that Mr. Burns's status depended in part on the level of integration between the school and the church. (R. p. 7.) The court then invoked the eight-factor test laid out in a 1972 Revenue Ruling to determine whether the school and church were sufficiently integrated. *Id.* (citing Rev. Rul. 72-606 (Jan. 1, 1972)). The analysis was highly fact-specific, relying on details such as whether the

school was incorporated, what its corporate name was, and what degree of control the church exercised over the school. *Id.* The court admitted it lacked the information needed to apply every factor but nevertheless held, based solely on its own inferences about the school's relationship to the church, that "the school is sufficiently integrated with the church." (R. p. 8.)

The court then turned to Mr. Burns's role within the school. *Id.* The court noted that, although Mr. Burns teaches secular subjects, he "incorporates the faith-based ideals of Whispering Hills" into his teaching, attends required worship services, and hosts religious discussions. *Id*. The court also stated that Mr. Burns "was hired by Whispering Hills not merely to teach secular subjects to students, but also to teach those subjects in harmony with the precepts of its faith." *Id*.

The court then proceeded to hold that section 107(2) was unconstitutional under the Establishment Clause because it provides "differing treatment of religion as opposed to non-religion." (R. p. 9.) Applying the *Lemon* test, the court found "a glaring failure of neutrality in section 107(2) that violates the second" *Lemon* criterion. (R. pp. 9–10) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)). The court noted that the "convenience of the employer" exemption provided under section 119 was far more limited than the per se exemption provided by section 107(2). *Id*. As a result, the court reasoned, section 107(2) "could easily be construed as a message of endorsement of religion." *Id*.

The court also found that section 107(2) constituted an excessive entanglement of government with religion, which violated *Lemon*'s third criterion. (R. p. 11.) Notably, the court held that "[s]ection 107(2) requires the courts to undertake a fact-intensive inquiry to determine who qualifies as a 'minister of the gospel' in order to take advantage of the parsonage

exemption," *id.*—even though it had made a determination regarding Mr. Burns's status as a "minister of the gospel" without such a fact-intensive inquiry.

The court concluded its analysis by asserting that "the government is essentially promoting the activity that it is subsidizing" when it implements a tax scheme that "favors only religion." (R. p. 12.) Because "section 107(2) provides greater benefits to ministers than other exemptions provide to secular employees," the court held that section 107(2) was unconstitutional. *Id.*

2. Court of Appeals Decision

The Commissioner timely appealed the trial court's ruling. (R. p. 15.) On appeal, the United States Court of Appeals for the Eighteenth Circuit reversed the trial court's ruling and granted summary judgment to the IRS and Commissioner, holding that Mr. Burns was not a "minister of the gospel" and that section 107(2) does not violate the Establishments Clause of the First Amendment. (R. p. 24.)

First, the appellate court held that Mr. Burns "does not fit the role" of "minister of the gospel." (R. p. 17.) The court pointed to three prior cases in which an applicant was found not to meet the definition of a "minister of the gospel":

(1) An applicant who "was not an ordained minister, had no sacerdotal functions 'formally conferred upon him,' and 'no congregation or other body of believers was committed to his charge'";

(2) A Rabbi who was not "charge[d] with conduct of religious worship or any other sacerdotal function"; and

(3) An ordained minister, due to "insufficient evidence to show that the work he performed was equivalent to that of a minister performing traditionally sacerdotal functions."

(R. pp. 17–19.) The applicants in each of these examples had one commonality—the lack of any official sacerdotal functions. Because Mr. Burns "was [not] hired to be a minister, and [did not] actually perform[] the functions of a minister," the court held, he was not a "minister of the gospel." (R. p. 19.)

The circuit court also commented on the district court's failure "to apply many of the factors" in the Revenue Rulings on which the lower court purportedly relied. *Id.* The circuit court further noted that the facts did not provide sufficient evidence to support the district court's conclusions. (R. p. 20.)

For these reasons, the circuit court held that Mr. Burns was not a "minister of the gospel." *Id.*

Next, the circuit court, again reversing the district court, held that section 107(2) is constitutional. *Id.* After providing a brief history of the Establishment Clause, the circuit court stated that section 107(2) "satisfies the *Lemon* test and thus . . . passes muster under the Establishment Clause." (R. p. 21.) The court pointed out that "Congress's policy choice to ease the administration of the convenience-of-the-employer doctrine by applying a categorical exclusion is a secular purpose, not 'motivated wholly by religious considerations'" and noted that several other provisions in the tax code "provide exemptions to employees with work-related housing requirements." *Id.*

Furthermore, the circuit court noted that invalidating section 107(2) as unconstitutional would actually "forc[e] ministers to apply for exemption under one of the other employee

housing sections . . . trigger[ing] excessive government involvement in the form of intricate tax inquiries." (R. p. 22.) Thus, the court reasoned, section 107(2) actually functioned to prevent other provisions in the tax code from impinging on the Establishment Clause.

The appellate court also noted that, contrary to Mr. Burns's arguments, "the Supreme Court has held that tax exemptions for religious institutions do not qualify as subsidies regardless of the *incidental* 'economic benefits' they may offer churches." *Id*. (citing *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 674–75 (1970)). The court concluded by noting that government entanglement with religion is only unconstitutional when it becomes "excessive." (R. p. 23.) The circuit court held that section 107(2) is not an "excessive" entanglement. *Id.*

For these reasons, the court held that section 107(2) does not violate the Establishment Clause.

Mr. Burns and CARC petitioned the United States Supreme Court for writ of certiorari, which this Court granted. (R. p. 26.)

SUMMARY OF ARGUMENT

The Eighteenth Circuit correctly reversed the district court's ruling in holding that (1) Mr. Burns is not a "minister of the gospel" under section 107(2), and (2) section 107(2) is constitutional.

Mr. Burns simply does not meet the definition of "minister of the gospel." Although section 107 itself does not define "minister of the gospel," the implementing regulations—found in multiple Revenue Rulings and Treasury Regulations—provide a detailed definition. Those regulations require that a "minister of the gospel" be ordained, commissioned, or licensed as a minister *and* employed to perform religious services, which can include leading worship

services, administering sacraments, providing leadership to a religious organization, or providing religious education.

Mr. Burns does not meet either of these criteria. He is not ordained or educated specifically as a minister, and his terms of employment do not require him to perform any sacerdotal duties. He neither leads worship services nor administers sacraments, and his teaching is in entirely secular subjects: English literature and foreign languages. The religious activities he does engage in include an extracurricular club that meets after school and a Sunday afternoon discussion group. These activities are voluntary and outside of school hours. They are not part of his employment.

Furthermore, Mr. Burns is not a minister even under the broader criteria considered when the ministerial exception is at issue. The ministerial exception applies in employment actions; it may be applied to a broad set of roles—beyond those traditionally thought of as ministers—because it is designed to avoid government interference with a church's internal workings. A tax exemption, by contrast, is a matter of "legislative grace" rather than constitutional necessity, and thus its beneficiaries may be more narrowly defined.

This Court has defined the ministerial exception in two cases, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012), and *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). Those two cases have laid out a flexible, fact-dependent test to determine who falls into the exception. Both cases concern primary school teachers; in both cases, the teachers provided both secular and religious instruction and attended or led worship with their students. In *Hosanna-Tabor*, the teacher was also educated and certified as a minister. In both cases, the Court held that the teachers were

ministers, subject to the ministerial exception, because as the primary teachers of religions for their students, their work had religious significance.

Mr. Burns has none of the markers of minister status shared by these teachers. He is not ordained or certified as a minister. He teaches only secular subjects. When he does engage in prayer with his students, at his extracurricular club or his Sunday gatherings, it is outside of school hours. In other words, he has not been entrusted with a duty to serve as a teacher of the faith. As a result, he is not a minister under this test either.

Section 107(2) passes constitutional muster because it passes all three of this Court's tests for Establishment Clause violations: the *Lemon* test, the endorsement test (subsumed in the second element of the *Lemon* test), and the historical significance test. Furthermore, holding that section 107(2) is constitutional is consistent with other decisions concerning tax exemptions and the Establishment Clause.

The *Lemon* test examines three aspects of a provision: (1) whether its original purpose is secular or religious, (2) whether it tends to advance (or inhibit) religion, and (3) whether it fosters excessive government entanglement with religion. The legislative history of section 107(2) does not suggest any religious purpose. In fact, the history suggests that the provision was designed to eliminate two potential Establishment Clause violations: discrimination between religion and nonreligion and discrimination among religions. Its effect is to eliminate such discrimination, by putting religious employees on an equal footing with employees who can take advantage of the "convenience of the employer" provisions of the tax code and by putting all denominations on the same footing. Finally, section 107(2) does not foster excessive entanglement between government and religion. In fact, by simplifying the "convenience of the

employer" doctrine, it eliminates a potential source of entanglement in the detailed, fact-specific analyses required by similar provisions.

Section 107(2) is also deeply embedded in this country's history and tradition. Although income taxes have existed only since 1916, states and Congress have provided various tax advantages to churches since the founding. No historical evidence suggests that these exemptions were seen as establishments. In fact, the Virginia state legislature passed such an exemption without objection while James Madison, a primary author of the Bill of Rights, was a member. These facts demonstrate that the tax exemption provided by section 107(2) is deeply embedded in this country's history and tradition and thus passes the historical significance test.

Finally, holding that section 107(2) is constitutional is consistent with this Court's holdings in other tax cases involving the Establishment Clause. In the four cases it has considered in this category, this Court has consistently held that religious organizations are not entitled to special consideration, but neither are they barred from benefitting from neutrally applied programs. Section 107(2), which provides for ministers the same kinds of exemptions available to other employees whose housing choices are limited by their occupation, falls into that category. Rather than providing an extra benefit to religion, it merely puts ministers on an equal footing in a way that avoids violating the Establishment Clause.

For these reasons, Section 107(2) does not violate the Establishment Clause. This Court should sustain the Court of Appeals decision and hold that it is constitutional.

ARGUMENT

I. Mr. Burns Is Not a "Minister of the Gospel" Either as That Term Is Defined by IRS Regulations or Under the Broader Definition in the Ministerial Exception.

Mr. Burns does not qualify as a "minister of the gospel" because he has not been designated a minister and he does not perform the duties of a minister; that is, he does not teach religion, lead services, or deliver sacraments. As a result, he does not fit the definition of "minister of the gospel" provided by the IRS regulations that govern application of section 107. He also is not a minister under the broader definition of "minister" encompassed by the ministerial exemption to employment law, set forth in *Hosanna-Tabor* and *Our Lady of Guadalupe*.

A. Mr. Burns is not a minister under IRS regulations because he is not ordained, commissioned, or licensed as a minister and his job does not require him to perform sacerdotal duties.

Although section 107 does not define "minister of the gospel," the IRS's definition of "minister" in various contexts is instructive. Under those regulations, Mr. Burns is not a minister because he is not ordained, commissioned, or licensed, and he does not perform any of the duties of a minister.

The regulation implementing section 107 points to another regulation, this one defining "minister" for purposes of self-employment tax, for definition of "minister of the gospel." Treas. Reg. § 1.107-1(a) ("In general, the rules cited in § 1.1402(c)(5) will be applicable to" the determination whether the rental allowance is "provided as remuneration for services which are ordinarily the duties of a minister of the gospel" and thus eligible for the parsonage exemption.). That regulation defines a "minister" as "a duly ordained, commissioned, or licensed minister of a church or a member of a religious order" who performs sacerdotal functions, conducts religious worship services, administers a religious organization or its integral agencies, or performs

teaching and administrative duties at a theological seminary. Treas. Reg. §1.1402(c)-5(a), (b)(ii)(2).

Two revenue rulings have helped clarify the limits of the definition of minister of the gospel in the context of the rental allowance. The head of an education department of a college that "operated as an integral agency of the church" that sponsored it was allowed to exclude his rental allowance from income. Rev. Rul. 70-549 (Jan. 1, 1970). Because the college was closely controlled by the church, the agency ruled that any minister serving on the faculty was "performing service 'in the exercise of his ministry'" within the meaning of sections 1.107-1 and 1.1402(c)-5 of the Treasury Regulations. *Id.* On the other hand, ordained ministers employed by a religious organization not under the control of any church or denomination were not "performing services as ministers for purposes of section 107 of the Code" and thus were not eligible for the parsonage exemption. Rev. Rul. 63-90 (Jan. 1, 1963). Taken together, these rulings indicate that merely being ordained as a minister is not sufficient to qualify for the exemption; the taxpayer must be working as a minister in the context of a religious denomination.

Courts, properly relying on the guidance from the regulations,[4] have generally required that ministers of the gospel both be ordained, commissioned, or licensed ministers and be employed to perform religious services. *See, e.g., Kirk v. Comm'r*, 425 F.2d 492, 494–495 (D.C. Cir. 1970) (holding that a person employed to spread the gospel and the message of Methodism did not qualify for the exemption because he was not ordained).

[4] The courts' reliance is proper as a matter of *Chevron* deference because the statute itself does not provide a definition for "minister of the gospel," leaving the term ambiguous. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). When a statute is ambiguous, courts must defer to the implementing agency's interpretation of the provision, even if other interpretations are possible or even more reasonable. *Id.* at 842–44.

Mr. Burns is not ordained. Furthermore, his employment does not require him to perform any sacerdotal duties: he does not, in the course of his duties, lead worship services or administer sacraments. Neither does he provide management or administration for a religious organization, as defined by the regulation. Therefore, under the relevant regulations and case law interpreting the regulations, Mr. Burns is not a "minister of the gospel." He does not qualify for the parsonage exemption.

B. Mr. Burns is not a minister under the ministerial exception because he does not teach religion and he is not required to incorporate religion into his teaching.

Mr. Burns is also not a minister under the broader definition of "minister" implicated in the "ministerial exception" for employment actions. The ministerial exception necessarily encompasses a broader range of religious employees than the parsonage exemption does. Religious organizations need broad discretion in hiring and firing to ensure that ministers' preaching, teaching, counseling, and behavior conform to the church's tenets. *Our Lady of Guadalupe Sch. V. Morrissey-Beru*, 140 S. Ct. 2049, 2060 (2020). As a matter of "legislative grace," *Kirk*, 425 F.2d at 494, a tax exemption does not present the danger of interference with a religious organization's core beliefs posed by an employment regulation. Thus, it can be more narrowly applied without risking incursion into territory protected by the First Amendment or shielded by the ecclesiastical abstention doctrine. *See Puri v. Khalsa*, 844 F.3d 1152, 1162 (9th Cir. 2017).

The Supreme Court defined the ministerial exception in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012), and *Our Lady of Guadalupe*, 40 S. Ct. 2049. The exception derives from the principle that government interference with a church's power to determine who guides the group in its

faith violates the Establishment Clause. *Hosanna-Tabor*, 565 U.S. at 188–89. The selection of ministers is crucial to shaping a religious group's faith and mission, and implicates matters of doctrine and belief forbidden to judicial examination. *Id.* As a result, the courts do not have the power to adjudicate employment disputes between a church and its ministers. *Id.*

Recognizing this central principle, this Court has developed a flexible, fact-specific test to ensure that every church has the authority to hand-select each employee charged with conveying the tenets of the faith as part of his or her employment.

The Supreme Court first addressed the ministerial exception in *Hosanna-Tabor*, noting that the exception had long been recognized by the courts of appeals. 565 U.S. at 188. In that case, the Court laid out a four-factor test to determine whether the exception applied to a given employee: (1) whether the church gave the employee the title of minister; (2) whether the position required a significant degree of religious training followed by a formal commissioning process; (3) whether the employee held herself out as a minister of the church by accepting a formal call to religious service; and (4) whether the job duties reflected a role in conveying the church's message and carrying out its mission. *Id.* at. At 192.

In *Our Lady of Guadalupe*, the Court rejected the circuit courts' interpretations of that formula as too rigid, noting that the test was not to be interpreted as "a checklist." 140 S. Ct. 2067. Rather, the Court held, "a variety of factors may be important," *id.* at 2063, echoing its reluctance in *Hosanna-Tabor* "to adopt a rigid formula for deciding when an employee qualifies as a minister," 565 U.S. at 190.

The ultimate question is whether the religious organization has entrusted the employee with teaching the tenets of the faith. *Our Lady of Guadalupe.* At 2064 ("[T]he exception should include 'any "employee" who . . . serves as a messenger or teacher of its faith." (quoting

Hosanna-Tabor, 565 U.S. at 199 (Alito, J., concurring))). Answering this question requires a case-specific inquiry, not a rigid formula. *Id.* at 2069.

Even under the broad, flexible analysis called for in *Our Lady of Guadalupe*, Mr. Burns is not a minister. Both *Hosanna-Tabor* and *Our Lady of Guadalupe* concerned the status of teachers in religious schools; in both cases, the Court focused on what it means to serve as "a messenger or teacher of faith." In both cases, the schools employed the teachers for the specific purpose of "conveying the Church's message and carrying out its mission." *Hosanna-Tabor*, 565 U.S. at 204.

In *Hosanna-Tabor*, the teacher had many of the traditional markers of a minister. She was recognized as "having been called to [her] vocation by God through a congregation." *Id.* at 177. That recognition was the result of a process that included a religious education program, followed by an oral examination, after which she was required to seek the endorsement of her local church authority. *Id.* After she completed this process, the church gave her the title of "Minister of Religion," a title the teacher used in her work. *Id.* at 191–92. Pointing to all of these factors, the Court held that the teacher qualified as a minister and was covered by the ministerial exception.

In *Our Lady of Guadalupe*, the teachers had fewer of the traditional markers associated with being a minister, but the Court still found they fell under the ministerial exception. The Roman Catholic schools in *Our Lady of Guadalupe* drafted employment contracts that required the teachers to teach religion, even if religion was not the primary subject of their classes, and actively participate in Mass with their students. 140 U.S. at 2057, 2059. The teachers used textbooks designed for use in teaching religion and tested their students on tenets of the Roman Catholic faith. *Id.* They prayed with their students and taught them prayers. *Id.* at 2068. Religious

leaders evaluated the teachers on their incorporation of religious instruction and personal modeling of the faith. *Id.* Because the teachers were "their students' primary teachers of religion," a position "loaded with religious significance," the Court held that the teachers were ministers, subject to the ministerial exception. *Id.* at 2067, 2069.

Mr. Burns does not have any of the markers of minister status relied on in *Hosanna-Tabor* and *Our Lady of Guadalupe*. He has no particular title or special education, and he does not teach religion. He was neither required to incorporate religion into the secular subjects he teaches, nor evaluated on his incorporation of religion into his instruction. While he incorporated a religious perspective into his counseling of students, he was not required to do so by his employment terms. Unlike the teachers in *Our Lady of Guadalupe*, Mr. Burns was not required to participate in worship services or prayer with students. Rather, he took on these responsibilities voluntarily. The afterschool prayer program he created and the Sunday gatherings he hosted took place outside of traditional school hours and were not part of his duties as a teacher. In other words, he was not entrusted with a duty to serve as "a messenger or teacher of faith." *See Our Lady of Guadalupe*, 140 S. Ct. at 2064; *Hosanna-Tabor*, 565 U.S. at 199.

Thus, Mr. Burns is not a minister, even under the broad criteria of the ministerial exception.

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Because Mr. Burns is not an ordained minister and he does not perform worship services or provide sacraments, he is not a "minister of the gospel" under the Treasury Regulations that implement section 107(2). Because his position at the school does not bear any of the hallmarks of "a messenger or teacher of faith," he is also not a minister under the broader test created for the ministerial exception. As a result, he is not eligible for the parsonage exemption.

II. Section 107(2) does not violate the Establishment Clause of the First Amendment because it passes all three of this Court's tests for Establishment Clause violations.

The First Amendment to the U.S. Constitution provides, in part, "Congress shall make no law respecting an establishment of religion." This provision has been interpreted to forbid discrimination both between religion and nonreligion and among different religious practices. *Everson v. Board of Education*, 330 U.S. 1, 15 (1947). In fact, as this Court explained in *Everson*, its prohibitions reach well beyond what is sketched by its plain text:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

Id. at 15–16. The object is, as Jefferson put it, "to erect 'a wall of separation between church and State.'" *Id.* at 16.

In deciding whether particular government practices violate the Establishment Clause, this Court has formulated three tests: the multifactor *Lemon* test, the endorsement test, and the historical significance test. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Lynch v. Donnelly*, 465 U.S. 668, 687–94 (1984) (O'Connor, J., concurring) ("Every government practice must be judged . . . to determine whether it constitutes an endorsement or disapproval of religion."); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). In practice, courts have relied on the *Lemon* test and the historical significance test, interpreting the *Lemon* test's effect element to subsume *Lynch v. Donnelly*'s "perception of endorsement" test. *See, e.g., McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005); *Gaylor v. Mnuchin*, 919 F.3d 420, 426–37 (7th Cir.

2019); *Bronx Household of Faith v. Bd. of Educ. of N.Y.*, 650 F.3d 30, 41 (2d Cir. 2011); *Freedom from Religion Found., Inc. v. City of Marshfield,* 203 F.3d 487, 493 (7th Cir. 2000).[5]

Section 107(2) passes muster under both sets of tests.

First, because the statute's legislative history does not evidence a manifestly religious purpose and the statute itself does not advance or endorse any particular religion or foster excessive entanglement with religion, the statute clears the *Lemon* test and the endorsement test.

Second, churches and their ministers have long been exempted from various forms of taxation from this nation's beginning. Section 107(2) is simply another manifestation of the foundational understanding that refraining from taxing churches serves not to establish a government preference for religion but to expand the gap between Church and State.

Finally, finding that section 107(2) is not a violation of the Establishment Clause accords with this Court's decisions in other cases dealing with taxation and religion.

A. Section 107(2) passes the *Lemon* test and the endorsement test because it does not have a religious purpose, endorse religion, or foster excessive government entanglement with religion.

In *Lemon v. Kurtzman*, this Court gleaned from "consideration of the cumulative criteria developed . . . over many years" a three-part test designed to account for "the three main evils against which the Establishment Clause was intended to afford protection." 403 U.S. at 612. The "*Lemon* test" examines the full context of a statute, from its initial purposes to its actual and potential effects. *See Walz*, 397 U.S. at 674 ("Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the

[5] The Court appears to have abandoned the *Lemon* test in the context of government monuments and symbols, relying on some mix of historical significance and other factors, but it remains the predominant test in other contexts, including the tax context. Valerie Brannon, Cong. Rsch. Serv., LSB10315, Legal Sidebar: No More *Lemon* Law? Supreme Court Rethinks Religious Establishment Analysis 5–6 (2019).

inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion."). Under that test, to survive an Establishment Clause challenge, a statute must pass three bars: (1) it must have "a secular legislative purpose"; (2) its principal effect must "neither advance[] nor inhibit[] religion"; and (3) it must not foster "an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612 (quotation marks and citations omitted). If the statute fails under any of these criteria, it is unconstitutional as a violation of the Establishment Clause.

Justice O'Connor's endorsement test, proposed in her concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 687–94 (1984), is essentially captured under the second of the three *Lemon* criteria. Thus, a statute that passes the *Lemon* test will also pass the endorsement test.

Section 107(2) passes all three tests: (1) its legislative history does not evidence any religious purpose; (2) it does not advance religion over nonreligion, or endorse any particular religion; and (3) it in fact reduces the potential for government entanglement with religion.

1. The legislative history of the statute does not evidence any manifestly religious purpose.

The legislative history of section 107 is scant, but what history exists does not suggest any religious purpose. Rather, the legislative history makes clear Congress's intent, from the beginning of the income tax, to protect ministers from taxation on housing provided for the convenience of their churches.

Section 107(1) was added to the Revenue Code in a matter-of-fact proceeding that occupied just eleven lines of the record. *See* Theodore F. DiSalvo, *Relief for Preachers: The History of Parsonages and Taxation*, 16 U. St. Thomas L.J. 89, 97–98 (2019). Although the record offers no explicit justification for the new provision, its timing in relation to the Treasury Department's emerging regulatory posture is suggestive. Section 107(1) was added to the

Revenue Code after Treasury denied a housing exemption to ministers while allowing it to other employees. *See* Legg, *supra*, at 24. This sequence of events suggests that Congress designed section 107(1) not to privilege religion but rather to put it—and its employees—on an equal footing with other employers that provided housing.

The history of section 107(2) is similar; the provision was created after conflict emerged between Treasury rulings and court decisions. *See* Legg, *supra*, at 275. It was proposed and passed with almost as little fanfare as section 107(1) had attracted. What legislative history exists points to Congress's intent to eliminate discrimination between denominations: section 107(1) allowed exclusion only for church-provided housing; those whose churches provided cash payment for housing had to pay income tax on that allowance. *Id.* at 276. The House Report on the revisions to the Revenue Code recognized the unfairness of the provision "to those ministers who are not furnished a parsonage, but who receive large salaries (which are taxable) to compensate" for the cost of housing. H.R. Rep. No. 1337, at 4040 (1954). Section 107(2) put cash allowances on the same footing, for tax purposes, as in-kind housing, thus "correct[ing] . . . discrimination against certain ministers of the gospel." *General Revenue Revision: Hearings Before the H. Comm. on Ways & Means*, 83d Cong., 1576 (1953) (statement of Rep. Peter Mack, Member, H. Comm. on Ways & Means).

The 2002 amendment to section 107(2), which limited the exclusion to the fair market rental value of the housing, enumerated several purposes, including to create tax policy "that strive[s] to be neutral with respect to . . . differences" between churches and to minimize "intrusive inquiries by the government into . . . activities that are inherently religious." H.R. 4156, 107th Cong. § 2 (2002). This Court has specifically held that avoiding intrusion into

religious organizations' activities is a "permissible legislative purpose." *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987).

Furthermore, the effort to eliminate discrimination between religions, and between religion and other entities, is not merely allowable, but required by the Establishment Clause. *Everson*, 330 U.S. at 15. Excluding ministers from the "convenience of the employer" doctrine put religion at a disadvantage compared to other employers. And by allowing in-kind housing but not cash allowances to be excluded from income, the government provided a benefit to some religions but not others. Expanding the exemption to include cash allowances allowed all ministers to benefit from the "convenience of the employer" doctrine and removed the appearance that the government might be using tax policy to, effectively, pick winners.

Thus, although section 107(2) is directed at religion, its purpose was and is secular: to normalize the tax code in a way that does not privilege nonreligious employers over religious employers or religions that provide housing over those that do not.

2. Section 107(2) does not privilege religion over nonreligion or endorse any particular religion.

Section 107(2) does not privilege religion over nonreligion or endorse any particular religion, by its plain text or by its implementation.

The text of the statute excludes from the gross income of a "minister of the gospel . . . the rental allowance paid to him as part of his compensation . . . ." 26 U.S.C. § 107(2). Although the term "minister of the gospel" is drawn from Christian practice, it has been interpreted, by the Treasury Department and by courts, to apply to all religious leaders. *See* Treas. Reg. § 1.511-2(a)(3) (interpreting "church" to include non-Christian religious institutions); *see, e.g., Silverman v. Comm'r*, 57 T.C. 727, 731 (1972); *Salkov v. Comm'r*, 46 T.C. 190, 196 (1966). Thus, the provision does not endorse any one religion over any other.

The provisions do not constitute a subsidy for religion at the expense of nonreligious institutions for two reasons: (1) tax exemptions are not subsidies, and (2) the parsonage exemption is similar to tax exclusions allowed for other individuals whose employers provide housing.

First, this Court has rejected the equation of tax exemptions with subsidies. *Walz*, 397 U.S. at 690. Unlike subsidies, which create an unacceptable entanglement between government and church interests, a tax exemption "restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other." *Id.* at 676. This Court did characterize tax exemptions as subsidies in *Texas Monthly*. *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 14–15 (1989). However, that plurality opinion also affirmed *Walz*; furthermore, the subsidy argument in *Texas Monthly* was made in dicta, limiting its precedential value. *See id.* Subsequent decisions have walked back that shift. For instance, in *Arizona School Christian Organization v. Winn*, the Court denied plaintiffs taxpayer standing, distinguishing tax exemptions from cash benefits. 563 U.S. 125, 142–43 (2011). The government's refusal to impose a tax, the Court asserted, does not create a burden on another party. *Id.*

Second, the parsonage exemption is not a unique benefit accorded only to religion. In fact, it is part of a network of tax exemptions for individuals whose housing is tied to their employment.

Nonreligious employees may exclude housing expenses from income under section 119, which codifies the "convenience of the employer" doctrine, if they meet five criteria: the housing must be (1) furnished by the employer, (2) in kind (as opposed to a cash allowance), (3) on the employer's business premises, (4) for the convenience of the employer, and (5) as a condition of employment. 26 U.S.C. § 119(a)(2); *see also* Treas. Reg. 1.119-1(b). Other sections of the code

relax these requirements for specific categories of employees, in some cases providing the same kind of *per se* exclusion allowed under the parsonage exemption. For instance, members of the military can exclude housing allowances under section 134; government employees and other U.S. citizens living abroad can exclude housing, provided in kind or as a cash allowance, under sections 911 and 912; and employees of educational institutions required to live on campus can exclude the fair rental value of that housing under section 119(d). Self-employed individuals who work from their homes can deduct some housing expenses under section 280A(c)(1) of the Internal Revenue Code, colloquially known as the "home office deduction." Again, to be eligible to take the deduction, taxpayers must meet specific criteria, and the deduction is limited in some cases. *See* 26 U.S.C. § 280A(c)(5).

Ministers are like these special categories of employees in that "they are in a unique, non-commercial employment relationship with unique, job-related demands on their housing." Hannah C. Smith & Daniel Benson*, When a Pastor's House is a Church Home: Why the Parsonage Allowance is Desirable Under the Establishment Clause*, 18 Federalist Soc'y Rev. 60, 67 (2017). Consequently, their housing options are determined "by the needs of the church, not the personal consumption choices of the minister." *Id.*

Thus, examined in context, the parsonage exemption is not a unique benefit conferred only on religion, but one provision in a set of laws designed to normalize the tax code and ensure fair treatment for individuals who have "unique, non-commercial relationship[s]" with their employers that dictate their housing choices.

3. Section 107(2) actually reduces government entanglement with religion.

In *Lemon*, this Court defined the entanglement factor by noting that "our prior holdings do not call for total separation of church and state"; rather, an examination of "the form of the

relationship" is required as a way to illuminate its substance. *Lemon*, 403 U.S. at 614. This examination comprises three factors: "the purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Id.* at 615. The ultimate question is "whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance" *Walz*, 397 U.S. at 675.

In this case, while the parsonage exemption benefits both ministers and churches, the result is not a forbidden entanglement of government and religious interests. In fact, the parsonage exemption actually serves to reduce the potential for entanglement, by providing a bright-line rule in place of an intrusive, multifactor analysis of the specific circumstances around a minister's housing choices and limitations.

Section 107 reduces entanglement by limiting the inquiry to whether the taxpayer qualifies as a "minister of the gospel" under the Treasury Department's definition and whether the administrative requirements of the regulation have been met. This inquiry does not require any intrusion into substantive religious or doctrinal issues. Any "surveillance" is brief, not ongoing and not particularly intrusive.

Without the parsonage exemption, ministers might be eligible for exemptions under the "convenience of the employer" doctrine or the home office deduction. Ministers' housing is undeniably tailored to the "convenience of [the minister's] employer"—the church—in numerous dimensions. *See* Smith & Benson, *supra*, at 66–67. Furthermore, many ministers do at least some of their work from home, and so may be eligible for a "business use of the home" deduction. *See Bernstine v. Comm'r*, T.C. Summ. Op. 2013-19, 2013 WL 673061, at •4–•5 (Feb.

25, 2013) (unpublished) (ruling that a minister who worked from his home was eligible for the home office deduction even though the church provided an office on its premises).

However, the inquiries under those provisions are detailed and fact-intensive, and far more likely to stray into areas of religious substance. For instance, the "convenience of the employer" analysis requires, first, establishing that a minister is an employee under the IRS's detailed, and sometimes confusing, rules—an inquiry that could impinge on internal church operations and organization. Smith & Benson, *supra*, 69. This determination could hinge on matters of internal court operations. Whether the minister is an employee or not would depend on such factors as how much independence he or she has in the location and manner of working. *Id.* The answer may well differ by denomination. That inquiry would be even more complicated in instances where the entity providing the housing is not the same as the employer entity. For instance, in some cases, the congregation provides the housing (whether in kind or as a cash allowance) but the diocese or other regional authority is the nominal employer. *Id.*

Once the minister's employment status is established, the investigation would then have to proceed to an examination of whether the housing is provided for the employer's convenience. The answer to that question could easily involve the religious tenets underlying the minister's housing choices. Those decisions are often doctrinally based, leading almost inevitably to a consideration of the underlying ecclesiastical and theological matters. Furthermore, section 119 requires annual requalification, creating the exact kind of ongoing surveillance forbidden by the *Lemon* test. Legg*, supra*, at 296.

The business use of the home provision, which allows only a limited deduction, requires the same kind of intrusive consideration. The deduction is available only for spaces devoted exclusively to work, requiring a consideration of which of a minister's activities in the home

constitute work. *See* 26 U.S.C. § 280A(c)(1). Given the way in which the pastoral, social, and practical elements of a minister's work intertwine, even this apparently innocuous analysis could easily lead into doctrinal or ecclesiastical territory. And, like a section 119 deduction, that inquiry is made each year the exemption is claimed.

Section 107(2) reduces the potential for forbidden entanglement between the government and religion by eliminating the need for these intrusive, repeated inquiries. At the same time, it allows ministers access to the same tax advantages afforded to other employees whose housing choices are driven by their employers' needs. By providing a bright-line rule, section 107(2) minimizes the inquiry necessary to establish a minister's eligibility for the exemption. And because it depends on the minister's employment status, investigation is only required when the minister's employment status changes, eliminating the ongoing surveillance required by the other provisions.

B. Section 107(2) passes the historical significance test because it is deeply embedded in this country's history and tradition.

Section 107(2) is deeply embedded in the history and tradition of the United States, and thus passes the historical significance test outlined by *Town of Greece*, 134 S. Ct. 1811, and *Marsh v. Chambers*, 463 U.S. 783 (1983).

In a move that some scholars have read as a turn away from the *Lemon* test, the Supreme Court has held that "the Establishment Clause must be interpreted by reference to historical practices and understandings." *Town of Greece*, 134 S. Ct. at 1819. The historical significance analysis has been applied primarily to cases regarding legislative prayer and monuments. *See, e.g., Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019); *Van Orden v. Perry*, 545 U.S. 677 (2005). However, the Court's analysis of tax cases has also included consideration of the historical record regarding the contested practice. In *Walz*, for instance, the Court found "no

genuine nexus between tax exemption and the establishment of religion" in its survey of "our history and uninterrupted practice," which showed that "federal or state grants of tax exemptions to churches were not a violation of the Religion Clauses of the First Amendment." *Walz*, 397 U.S. at 675, 680. The plaintiff's argument in that case, that a property-tax exemption for churches was the first step down a slippery slope toward actual establishment, "could not stand up against 200 years of virtually universal practice imbedded in our colonial experience and continuing into the present." *Lemon*, 403 U.S. at 624.

Section 107(2) is simply another element in that now 250-year history. As the *Walz* Court noted, all fifty states provide tax exemptions for churches, many of them through constitutional guarantees. *Walz* at 676. These exemptions have deep historical roots, beginning with British common law and colonial practice and continuing through early congressional actions that exempted religious institutions from a wide range of taxes, including import duties on religious items and property taxes on church real estate in Washington, DC. *Id.* at 678. The state of Virginia passed a property tax exemption for churches at a time when both James Madison and Thomas Jefferson sat in the state legislature; the silence of both those men on the issue strongly suggest that the founders did not see tax exemptions as an establishment. *See id.* at 682–83 (Brennan, J., concurring).

These practices, and the attitudes underlying them, were based on an even longer history of tax exemptions for religious institutions. The Roman empire exempted churches from taxation on the theory that "property dedicated to religious use lost all of the quality of human ownership." Legg, *supra*, at 273. That philosophy prefigures the modern principle in U.S. law that only income representing an "accession to wealth" should be taxed. *See id.* at 281. In *Gaylor v. Mnuchin*, addressing the same provision at issue in the current case, the Ninth Circuit found

"substantial evidence of a lengthy tradition of tax exemptions for religion, particularly for church-owned properties," stretching back to the founding. 919 F.3d 420, 436 (9th Cir. 2019). The *Gaylor* court acknowledged that the exemption contemplated in section 107(2) is an income tax exemption, not a property tax exemption, but it also pointed out that, before 1913, no one's income could be taxed. *Id.* Congress's provision of the parsonage exemption just a few years after the ratification of the Sixteenth Amendment, and rapid action to protect the exemption when it was threatened, were simply a continuation of a "'historical practice[]' of exempting certain church resources from taxation." *Id.* (quoting *Town of Greece*, 572 U.S. at 576).

Because section 107(2) represents the continuation of a practice that is deeply embedded in the country's history and tradition, it passes the historical significance test.

C. Holding that section 107(2) does not violate the Establishment Clause is consistent with the holdings in other tax cases involving the Establishment Clause.

The Supreme Court has rarely addressed the intersection between taxation and the Establishment Clause. Since the 1970s, the Court has taken up cases asking whether a given tax exemption (or lack of exemption) implicates the Establishment Clause just four times. *See Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990); *Tex. Monthly,* 489 U.S. 1; *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Walz*, 397 U.S. 664.

In these cases, this Court has held that, while religious organizations are not entitled to special consideration, neither are they barred from benefiting from neutrally applied programs. Taxes do not, on their face, create entanglement, but taxes that privilege or disadvantage particular groups may violate the Establishment Clause. In the earliest of these cases, the Court found "no genuine nexus between tax exemption and establishment of religion." *Walz*, 397 U.S. at 675. On the contrary, by "restrict[ing] the fiscal relationship between church and state," tax

exemption "tends to complement and reinforce the desired separation," thus reducing entanglement. *Id.* at 676.

The Court has elsewhere rejected Establishment Clause claims in terms reminiscent of its reasoning in *Walz*. In *Bob Jones*, two schools whose tax-exempt status had been terminated because of their racially discriminatory policies filed suit, alleging that the IRS ruling violated both the Free Exercise and Establishment Clauses. The Court addressed the university's Establishment Clause claim in a footnote. Quoting the circuit court's decision, the Court noted that "the uniform application of the rule to all religiously operated schools *avoids* the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of a sincerely held belief." *Bob Jones University*, 461 U.S. at 604 n.30. In *Walz*, the provision of an exemption limited the entanglement between church and state; in *Bob Jones University*, the refusal to provide an exception to a generally applicable rule limited the potential for entanglement.

Similar to the holding in *Bob Jones University*, the Court has twice held that differential treatment of religious publications in sales tax regimes does violate the Establishment Clause. In *Texas Monthly*, the Court invalidated as unconstitutional a Texas law that exempted religious publications from a sales tax applied to all other publications, calling it a "blatant endorsement of religion" that produces "greater state entanglement with religion than the denial of an exemption." 489 U.S. at 20. And in *Jimmy Swaggart Ministries*, the Court emphatically rejected a religious organization's claim that the imposition of sales and use taxes violated the Establishment Clause. In fact, the Court said, the "undisputed core values [of the Establishment Clause] are not even remotely called into question" by a generally applicable tax. *Jimmy Swaggart Ministries*, 493 U.S. at 394.

Section 107(2) is constitutional under the reasoning of all these cases. Because the exemption is not unique to religion but part of a system of exemptions for a variety of individuals whose housing is determined by their occupation, it is more like a generally applicable exception than the endorsement of religion rejected in *Texas Monthly*. The bright-line nature of the rule, in contrast to the fact-intensive criteria that characterize similar housing exemptions, means that, like the exemption whose denial was upheld in *Bob Jones University*, the parsonage exemption—understood as the combination of sections 107(2) and 107(1)—is uniformly applied to all religions. That bright-line rule also makes it more like the property tax exemption in *Walz*, whose general application served to reduce entanglement. And, like the generally applicable tax upheld in *Jimmy Swaggart Ministries* and required by *Texas Monthly*, section 107(2) neither endorses religion nor fosters entanglement.

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Section 107(2) does not violate the Establishment Clause under any of the analyses endorsed by this Court. Because it passes the *Lemon* test, the endorsement test, and the historical significance test, this Court should hold that it is constitutional. Furthermore, holding that section 107(2) is constitutional would be consistent with this Court's other decisions concerning tax exemptions and the Establishment Clause.

CONCLUSION

Because section 107(2) does not violate the Establishment Clause under any of the prevailing tests, the Court should reject this challenge to its constitutionality and reverse the judgment of the Court of Appeals.

REQUEST FOR ORAL ARGUMENT

Respondents respectfully request oral argument on this appeal. Oral argument would help the Court decide the complex issues raised in this case.

Respectfully submitted,

CERTIFICATE OF SERVICE

I certify that on this 12th day of March, 2021, I filed the foregoing brief with the Clerk of Court using the CM/ECF system, which will automatically serve electronic copies on all counsel of record.

CERTIFICATE OF COMPLIANCE

I certify that this petition complies with the type-volume limitations of Supreme Court R. 33(1)(g) because it contains 10,136 words, excluding the parts of the petition exempted by Supreme Court R. 33(1)(d). This brief complies with the typeface and type-style requirements of Supreme Court R. 33(2). It has been prepared in 12-point Times New Roman font, as specified by the rules.