No. 20-199

IN THE

Supreme Court of the United States

JOHN BURNS,

Petitioner,

and

CITIZENS AGAINST RELIGIOUS CONVICTIONS, INC.,

Petitioner-Intervenor,

v.

INTERNAL REVENUE SERVICE AND COMMISSIONER OF TAXATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighteenth Circuit

BRIEF FOR RESPONDENTS
Team 12

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QUESTIONS PRESENTED

1. Whether an individual who is not an ordained, commissioned or licensed minister, and who has not been conferred with any similar religious authority, qualifies as a "minister of the gospel" under 26 U.S.C. § 107(2).

2. Whether the Parsonage Exemption—a long-standing provision that modifies a generally available tax benefit for religious organization in order to avoid potential Establishment Clause concerns—violates the First Amendment's Establishment Clause.

STATEMENT OF THE CASE

Petitioner John Burns ("Petitioner") was hired by Whispering Hills Academy ("the School") in 2016 to teach English, Renaissance Literature, and foreign languages. (R. at 3). When Petitioner accepted the job, he moved to a new house just a few minutes away from the school. (R. at 3). At that time, Petitioner negotiated with the School to provide him with a monthly rental allowance of $2,100 that would cover the fair rental value and the cost of utilities of his new house. (R. at 3). In 2017, Petitioner was encouraged by his co-worker, Pastor Nick, to deduct the rental allowance from his gross income by claiming the parsonage exemption when he filed taxes. (R. at 4). Pastor Nick told Petitioner that he should claim the exemption because "he was employed by a religious institution, held daily prayer sessions with his afterschool club, and provided spiritual counseling to the students." (R. at 4). As one of several guidance counselors, Burns uses mental health techniques and spiritual teachings to counsel students. (R. at 3). In additional to his official job duties, Petitioner runs an after-school club called "Prayer After Hours" and hosts casual gatherings for students who do not go home during the weekends at the on-campus church after Sunday services. (R. at 3).

Petitioner claimed the exemption under 26 U.S.C. § 107(2), but the Commissioner of Taxation denied his claim on the basis that Petitioner could not prove he was a "minister of the gospel." (R. at 4). Petitioner filed suit against the Internal Revenue Service and Commissioner of Taxation ("Defendants") in the District Court for the Southern District of Touroville. (R. at 1). Plaintiff-Intervenor, Citizens Against Religious Convictions, Inc. ("CARC"), was added as plaintiff-intervenor party and is contesting the constitutionality of 26 U.S.C. § 107(2). (R. at 2). Defendants filed a motion for summary judgment on both claims, which was denied by the District Court. (R. at 2). The District Court held that Petitioner is eligible for the parsonage

allowance exemption because he qualifies as a "minister of the gospel." (R. at 2). However, the District Court also held that the parsonage allowance exemption is unconstitutional because it fails the Lemon test. (R. at 2).

Defendants appealed to the Eighteenth Circuit Court of Appeals. (R. at 15). The Circuit Court reversed the District Court's denial of summary judgment, and held that Petitioner is not a "minister of the gospel" and that 26 U.S.C. § 107(2) is constitutional. (R. at 24). Petitioner and CARC filed a petition for certiorari in this Court, which was granted. (R. at 26).

SUMMARY OF THE ARGUMENT

Tax exemptions are acts of legislative grace, and taxpayers have the burden of proving they are eligible for any exemptions they claim. Petitioner does not qualify for the parsonage allowance exemption in 26 U.S.C. § 107(2) because he cannot prove that he is a "minister of the gospel." Under existing Treasury Department regulations, I.R.S. interpretations, and caselaw, a "minister of the gospel" is 1) an ordained, licensed, or commissioned minister 2) who performs ministerial duties 3) under the authority of a religious body constituting a church or church denomination. Petitioner does not meet the first two requirements, which precludes him from claiming the parsonage allowance exemption. The Treasury Department regulations and I.R.S. interpretations of 26 U.S.C. § 107 deserve deference. However, if this Court does not find that these regulations and interpretations warrant deference, the legislative grace canon still instructs the Court to construe 26 U.S.C. § 107 narrowly.

Moreover, § 107 is Constitutional for three independent reasons. Firstly, strictly as a matter of precedent, the Parsonage Exemption is analogous to the property tax scheme upheld in *Walz v. Tax Com. of New York*, 397 U.S. 664, 669 (1970). Second, the Parsonage Exemption comports with the three prongs of the test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (hereinafter "*Lemon Test*"). The Parsonage Exemption advances the secular purposes that led to its adoption while simultaneously limiting the government's intrusion into religious affairs. Lastly, the Parsonage Exemption satisfies the Historical Practices test. Tax exemptions for religious organizations are long-standing practices that are historically significant because they reduce the entanglement between government and religion.

Accordingly, the Court should affirm the Eighteenth Circuit and hold that Petitioner is not a "minister of the gospel" and that 26 U.S.C. § 107(2) is constitutional.

ARGUMENT

I. PETITIONER IS NOT A "MINISTER OF THE GOSPEL."

A. Only Individuals Who Are an Ordained, Commissioned, or Licensed Minister are Considered "Ministers of the Gospel" by the Treasury Department and Courts for 26 U.S.C. § 107 Purposes.

The federal parsonage allowance exemption, found in Section 107 of the Internal Revenue Code ("I.R.C."), allows "minister[s] of the gospel" to exclude the following from their gross income:

> (1) the rental value of a home furnished to him as part of his compensation; or
> (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home and to the extent such allowance does not exceed the fair rental value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities.

26 U.S.C. § 107.

The term "minister of the gospel" is not directly defined in the I.R.C. or by regulations promulgated by the U.S. Treasury Department ("Treasury"). However, the Treasury has stated that section 1.1402(c)-5 of the Code of Federal Regulations is applicable when assessing section 107 eligibility, 26 C.F.R. § 1.107-1 (2017), and section 1.1402(c)-5 uses the phrase "duly ordained, commissioned, or licensed minister of a church" interchangeably with the term "minister." *Id.* § 1.1402(c)-5(a)(2) (2017). Additionally, no example published in section 1.1402(c)–5 contemplates ministerial tax exemptions applying to anyone but a "duly ordained minister." *See Id.* § 1.1402(c)-5(b)(2)(iii)–(v) (examples).

If an individual is an ordained, commissioned, or licensed minister, the Treasury considers additional factors to determine whether that individual is appropriately considered a "minister of the gospel," namely whether the rental allowance was provided as compensation for "services which are ordinarily the duties of a minister of the gospel," *Id.* § 1.107-1, and whether the services were performed "under the authority of a religious body constituting a church or

church denomination," *Id.* § 1.1402(c)-5. The Treasury states that these duties include "the performance of sacerdotal functions, the conduct of religious worship, the administration and maintenance of religious organizations and their integral agencies, and the performance of teaching and administrative duties at theological seminaries." *Id.* § 1.107-1.

The Tax Court has developed a similar test for determining eligibility for the parsonage allowance exemption. In *Wingo v. Commissioner of Internal Revenue*, 89 T.C. 922 (Tax 1987), the Tax Court considered five factors when determining whether an individual qualifies as a "minister of the gospel," one of which is whether the individual is an ordained, commissioned, or licensed minister.[1] The Tax Court characterized this analysis as a balancing test, but it noted that an individual must satisfy the "ordained, commissioned, or licensed" factor before the Tax Court will consider the other factors. *Knight v. Comm'r of Internal Revenue.*, 92 T.C. 199, 204 (Tax 1989) (holding that a licensed pastor was a "minister of the gospel") ("The statute, of course, requires that he be 'ordained, commissioned, or licensed' as a minimum.").

The I.R.S. also ends its inquiry into a parsonage exemption claim once it determines that the individual is not an ordained, commissioned, or licensed minister. *See, e.g.*, Rev. Rul. 78-301, 1978-2 C.B. 103 (1978) ("[T]o qualify for the exclusion under section 107 of the Code, [a minister] must be ordained, commissioned, or licensed . . . ."). This is true even when the I.R.S. finds that an individual performs sacerdotal duties. *See, e.g.*, Rev. Rul. 59-270, 1959-2 C.B. 44 (1959) (finding that because the individuals were not ordained, commissioned, or licensed ministers, they could not claim the parsonage allowance exemption despite "performing some of

[1] In *Wingo*, the Court considered 1) whether the individual is ordained, licensed, or commissioned; 2) whether the individual is considered a spiritual leader by his or her religious community; 3) whether the individual administers sacerdotal functions; 4) whether the individual conducts worship services; and 5) whether the individual performs these services in the control, conduct and maintenance of a religious organization. *Knight v. Comm'r of Internal Revenue*, 92 T.C. 199, 204 (Tax 1989) (citing *Wingo v. Commr. of Internal Revenue*, 89 T.C. 922 (Tax 1987)).

the services relating to the office and functions of a minister of the gospel"). If a religion does not have a formal ordination process, licensed or commissioned ministers are considered "ministers of the gospel" as long as they "perform substantially all of the religious functions within the scope of the tenets and practices of their religious denominations." Rev. Rul. 78-301, 1978-2 C.B. 103 (1978); *see also Salkov v. Comm'r of Internal Revnue*, 46 T.C. 190 (Tax 1966) (holding that a Jewish cantor qualified for the parsonage exemption because he acted as a "sui generis minister"); *Silverman v. Comm'r of Internal Revenue*, 57 T.C. 727, 732 (Tax 1972), *aff'd, Silverman v. Comm'r of Internal Revenue.*, 72-1336, 1973 WL 2493 (8th Cir. July 11, 1973) (holding that a Jewish cantor qualified for the parsonage exemption because he was "called to his congregation" and "performed ministerial duties").

Official agency interpretations of section 107 and the Tax Court are in agreement: proving one's status as an ordained, commissioned or licensed minister is a threshold issue that must be determined before the I.R.S. or courts consider any other factors in the "minister of the gospel" analysis. Thus, whether Petitioner meets this requirement is the only issue that must be considered today in the determination of his eligibility for the parsonage exemption.

B. Petitioner is Not an Ordained, Licensed, or Commissioned Minister, and Thus is Not a "Minister of the Gospel" for Section 107 Purposes.

The I.R.S. and courts have repeatedly and consistently determined that individuals who are not ordained, commissioned, or licensed ministers are ineligible for the parsonage exemption. *See, e.g.*, *Lawrence v. Comm'r of Internal Revenue*, 50 T.C. 494 (Tax 1968) (holding that a church employee fulfilling primarily educational duties, and who was not an ordained, licensed, or commissioned minister, was not a "minister of the gospel"); *Kirk v. Comm'r of Internal Revenue*, 51 T.C. 66 (Tax 1968), *aff'd, Kirk v. Comm'r of Internal Revenue*, 425 F.2d 492 (D.C. Cir. 1970) (finding that a self-proclaimed minister—who was neither an ordained, licensed, nor

commissioned minister—was not a "minister of the gospel"); *Salkov v. Comm'r of Internal Revenue*, 46 T.C. 190 (Tax 1966) ("Certainly the minister must be ordained, commissioned, or licensed.").

In the case before this Court, Petitioner is not an ordained, commissioned, or licensed minister of a church. (R. at 18). Petitioner cannot claim the *Salkov*/*Silverman* exception to the general requirement that he be an ordained minister because he has not provided any evidence that he is licensed or commissioned to perform "substantially all of the religious functions" that Pastor Nick performs. Additionally, the Tax Court has implied that the existence of another pastor decreases the likelihood that an individual will be considered a "minister of the gospel" within the same church. *See Silverman*, 57 T.C. at 730 (explaining that in *Lawrence v. Comm'r of Internal Revenue*, 50 T.C. 494 (Tax 1968), the petitioner was denied the parsonage exemption because he "was not an ordained minister and the church with which he was connected had a regular pastor who was an ordained minister").

The District Court's inquiry into Petitioner's section 107(2) eligibility should have ended here because Petitioner did not satisfy his burden of proving that he is an ordained, licensed or commissioned minister. *See Welch v. Helvering*, 290 U.S. 111, 115 (1933) ("[The Commissioner of Internal Revenue's] ruling has the support of a presumption of correctness, and the petitioner has the burden of proving it to be wrong."). The District Court erred in continuing its analysis by analogizing *Flowers v. United States* to the case at hand. In *Flowers*, the plaintiff was an ordained minister—unlike Petitioner in this case—thus, the court needed to further consider the other *Wingo* factors. *Flowers v. United States*, No. CA 4-79-376-E, 1981 U.S. Dist. LEXIS 16758 (N.D. Tex. Nov. 25, 1981). The District Court below incorrectly found that Petitioner was a "minister of the gospel" because it mistakenly claimed that the I.R.S. ruled "*any* teacher or

board member who exercises control over some aspect of the [integral, church-controlled] school is entitled to the parsonage exemption." (R. at 7) (emphasis added). This is a fundamental mischaracterization of Revenue Ruling 70-549, which simply states that "the rental allowance of an *ordained minister* serving on the faculty as a teacher or administrator at a college which is, in practice, operated as an integral agency of the church is excludable from gross income." Rev. Rul. 70-549, 1970-2 C.B. 16 (1970) (emphasis added). Like every other revenue ruling issued by the I.R.S. on this issue, Revenue Ruling 70-549 does not extend the parsonage exemption to people who are not ordained, licensed, or commissioned ministers.

C. The Treasury Department's Regulations and I.R.S.'s Interpretations of "Minister of the Gospel" are Entitled to Judicial Deference.

This Court has held that *Chevron* deference, as modified by *United States v. Mead Corp.*, 533 U.S. 218 (2001), is applicable to Treasury regulations. *Mayo Found. for Med. Educ. and Rsch. v. United States*, 562 U.S. 44, 57 (2011). *Chevron* deference demands that when interpreting unclear statutes, "legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). This excerpt from *Chevron* appears to imply that interpretative rules and regulations issued under an agency's general authority are entitled to less deference than legislative regulations promulgated under a specific grant of authority. However, this distinction between legislative regulations and interpretative regulations has since been rejected by this Court. *See Mead*, 553 U.S. at 229 (noting that in the absence of a specific grant of authority, Congress may still want an agency to resolve unclear statutes with the force of law); *see also Mayo*, 562 U.S. at 56 ("Our inquiry in that regard does not turn on whether Congress's delegation of authority was general or specific."). *Mayo* affirms that "the ultimate question is whether Congress would have intended, and expected, courts to treat [the regulation] as within,

or outside, its delegation to the agency of 'gap-filling' authority." 553 U.S. at 58 (internal quotation marks omitted) (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007)). Thus, I.R.S. revenue rulings are not precluded from receiving *Chevron* deference simply because they are considered interpretive rather than legislative rulings.

In order to receive *Chevron* deference, an agency rule or regulation must pass two steps: first, the interpreted statute must be ambiguous, and secondly, the agency's interpretation must be "a permissible construction of the statute." *Chevron*, 467 U.S. at 842–43. When conducting an analysis under step two, courts should consider whether the rule or regulation binds third parties, how decentralized the rule or regulation issuance process is, and how frequently the agency issues similar rules or regulations. *Mead*, 553 U.S. at 233–34. Additionally, courts should look to the agency's level of expertise, the complexity of the statute being administered, the importance of the interpretation to that administration, and the agency's approach to the statute over time. *Barnhart v. Walton*. 535 U.S. 212, 222 (2002).

In cases where agency rules or regulations do not meet the standard for *Chevron* deference, they may still satisfy the requirements for *Skidmore* deference, which gives weight to agency interpretations commensurate with "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Relatedly, an agency's interpretations of its own regulations may receive deference unless it is "'plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). This level of deference is similar in strength to *Chevron* deference, but its applicability was recently narrowed in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), which declined to

overrule *Auer* deference but placed limits on its applicability. The *Kisor* Court clarified that *Auer* deference only applies when an agency interprets a genuinely ambiguous regulation; the agency's interpretation is reasonable; the interpretation is not an unfair surprise to regulated parties; the interpretation represents the agency's careful and considered expert opinion; and the interpretation is not a post hoc rationalization or convenient litigating position. *Id.* at 2416–18.

1. The Meaning of "Minister of the Gospel" in 26 U.S.C. § 107 is Ambiguous.

While "minister" and "gospel" can be easily defined individually, there is no standard definition of "minister of the gospel." Without a clear, plain meaning to apply, the Court should review the legislative history of the statute to determine if Congress considered an explicit meaning of "minister of the gospel" when passing the law. The Tax Court has previously bemoaned the lack of legislative history regarding the phrase "minister of the gospel." *See, e.g.*, *Salkov v. Comm'r of Internal Revnue*, 46 T.C. 190, 194 (Tax 1966) ("Unfortunately the legislative history of the statute is brief and not helpful."). The federal parsonage allowance exemption was originally codified in 1921, but the phrase "minister of the gospel" was not defined or explained. Revenue Act of 1921 § 213(b)(11) (1921); *Salkov*, 46 T.C. at 194. When Congress modified the exemption in 1954 to clarify that both in-kind housing and rental allowances could be exempted from a minister of the gospel's gross income, it did not modify or define "minister of the gospel." *Salkov*, 46 T.C. at 194. The most recent amendment came in 2002, after the Tax Court held that the parsonage exemption permitted allowances beyond the fair value of a home or rent. Clergy Housing Allowance Clarification Act of 2002, Pub. L. No. 107–181, 116 Stat. 583 (2002) (superseding *Warren v. Comm'r of Internal Revenue*, 114 T.C. 343 (Tax 2000)). Again, Congress did not provide an explanation or definition of the phrase

"minister of the gospel." Because Congress has not directly spoken on the meaning of "minister of the gospel," there is sufficient ambiguity in section 107 to meet the first step of *Chevron*.

2. *Treasury Regulations Addressing 26 U.S.C. § 107 Deserve Chevron Deference Because They Carry the Force of Law and Are Permissible Constructions of an Ambiguous Statute.*

The Internal Revenue Code grants authority to the Treasury Secretary to create "the necessary rules and regulations for enforcing the Internal Revenue Code." 26 U.S.C. § 7805. In *Mayo*, this Court declared that section 7805 is an "express congressional authorization" to promulgate rules and regulations, and that this clear delegation is a "very good indicator" that the agency's interpretations deserve *Chevron* deference. 562 U.S. at 57 (quoting *Mead*, 553 U.S at 229). The only remaining question, then, is whether the Treasury regulations interpreting section 107 are arbitrary and capricious. These regulations should not be considered arbitrary and capricious because they are similar to its interpretations in *Mayo* and other cases in which the Supreme Court has upheld the Treasury's interpretations of the I.R.C. *See, e.g.*, *Mayo,* 562 U.S. at (upholding Treasury regulation); *Bingler v. Johnson*, 394 U.S. 741 (1969) (holding that Treasury regulations interpreting an ambiguous tax statute was proper.). Thus, they should receive deference from this Court.

3. *I.R.S. Revenue Rulings Interpreting 26 U.S.C. § 107 Deserve Chevron Deference Because Congress Authorizes the I.R.S. to Enforce the I.R.C. and the Rulings Satisfy Mead and Barnhart Factors.*

The I.R.S. is a federal agency tasked with carrying out the responsibilities of the Treasury Secretary. 26 U.S.C. § 7801(a)(1). Revenue rulings are the I.R.S.'s official interpretations of the I.R.C. and are published in the Internal Revenue Bulletin. 26 C.F.R. § 601.601(d)(2)(i)(a) (2017). They are "issued only by the National Office" and are published publicly "to promote correct

and uniform application of the tax laws by [I.R.S.] employees and to assist taxpayers in attaining maximum voluntary compliance." *Id.* at § 601.601(d)(2)(ii)–(iii).

Mead and *Barnhart* are the two most relevant cases in determining whether I.R.S. revenue rulings interpreting section 107 should receive deference. In *Mead*, this Court refused to apply *Chevron* deference to a Customs Service ruling that was non-binding on third parties, especially because more than 10,000 Customs rulings were issued by the Customs Service each year and because the rulings were issued by 46 different Customs offices. 553 U.S at 233–34. Though some have compared revenue rulings to the Customs service ruling in *Mead*, I.R.S. revenue rulings are more similar to the Social Security ruling that was granted *Chevron* deference in *Barnhart*. In *Barnhart v. Walton*, the Court held that an interpretation by the Social Security Administration issued in a Social Security Ruling and other informal publications should receive *Chevron* deference, based on "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time . . . ." 535 U.S. 212, 222 (2002).

I.R.S. revenue rulings are much more akin to the Social Security interpretations granted *Chevron* deference in *Barnhart* than the Customs ruling in *Mead*. Unlike the more than 10,000 rulings issued by the Customs office in *Mead*, the I.R.S. National Office issues very few revenue rulings every year: it only issued 25 revenue rulings in 2017. I.R.S., *Internal Revenue Bulletin No. 2017-52*, Dec. 26, 2017. Additionally, revenue rulings are issued through a centralized process by the I.R.S. National Office. Like the Social Security Administration, the I.R.S. has expertise in its field; the question at issue is central to the I.R.S.'s ability to administer section 107; and the I.R.S. has remained consistent in its interpretation of "minister of the gospel" for

decades. Granting deference is consistent with the fact that the I.R.S. treats revenue rulings as binding on itself. *See, e.g.*, 26 C.F.R. § 601.601(d)(2)(v)(d) (2017) ("Revenue Rulings . . . provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose."); David J. Kautter & Brent J. McIntosh, *Policy Statement on the Tax Regulatory Process*, Department of the Treasury (March 5, 2019) ([T]he IRS will not take positions inconsistent with its subregulatory guidance when such guidance is in effect.").

The primary argument against granting *Chevron* or *Auer* deference to revenue rulings is because the Treasury Department currently does not seek *Chevron* or *Auer* deference when arguing before the Tax Court. David J. Kautter & Brent J. McIntosh, *Policy Statement on the Tax Regulatory Process* 2, U.S. Dep't of Treasury (March 5, 2019). However, adopting a piecemeal approach can lead to uneven enforcement of the tax code. Currently, there is a circuit split regarding what levels of deference I.R.S. revenue rulings should receive. *See, e.g., Aeroquip-Vickers, Inc. v. Comm'r of Internal Revenue,* 347 F.3d 173 (6th Cir. 2003) (holding that a revenue ruling expressing a long-standing I.R.S. interpretation deserved "substantial deference"); *Bankers Life and Cas. Co. v. U.S.*, 142 F.3d 973, 978 (7th Cir. 1998) ("Revenue rulings receive the lowest degree of deference."). In the interest of promoting predictable, consistent tax code enforcement, and because revenue rulings are substantially more like the *Barnhart* ruling than the ruling in *Mead*, this Court should find that I.R.S. revenue rulings interpreting section 107 warrant *Chevron* deference. Additionally, based on its consistent approach to interpreting Treasury and its own regulations, revenue rulings meet *Kiser's* requirements for *Auer* deference.

4. *By Not Amending the Statute, Congress has Expressed its Approval of the Treasury Department's and I.R.S.'s Interpretation of 26 U.S.C. § 107.*

This Court has declared that "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are

deemed to have received congressional approval and have the effect of law." *U.S. v. Correll*, 389 U.S. 299, 305–06 (1967). This is applicable to the Treasury's regulations and I.R.S.'s revenue rulings regarding section 107. The Treasury and I.R.S. have not changed their interpretations of "minister of the gospel" in decades. If Congress disagreed with the Treasury and I.R.S.'s interpretation of section 107(2), it would have clarified the meaning when it amended the statute in 2002. This Court should defer to their definition of "minister of the gospel" because Congress gave its implicit approval when it amended the statute twenty years ago.

D. The Legislative Grace Canon Requires that 26 U.S.C. § 107 Be Narrowly Construed.

Tax exemptions are construed narrowly by courts under the "familiar rule that an income tax deduction is a matter of legislative grace and that the burden of clearly showing the right to the claimed deduction is on the taxpayer." *Interstate Transit Lines v. Comm'r of Internal Revenue*, 319 U.S. 590, 593 (1943) (holding that the Commissioner of the I.R.S. correctly denied a business's tax deduction "in the absence of affirmative proof to the contrary").

Interpreting 26 U.S.C. § 107(2) as applying to a larger group of individuals than those currently identified by the I.R.S. and the Tax Court would be inconsistent with this canon. The Tax Court failed to follow this directive in *Driscoll v. Commissioner*, which held that section 107 did not prevent a minister from excluding a parsonage allowance used to pay for two residences. 135 T.C. 557 (Tax Court 2010), *rev'd and remanded*, *Comm'r of Internal Revenue v. Driscoll*, 669 F.3d 1309 (11th Cir. 2012). The Eleventh Circuit reversed the Tax Court, finding that the ambiguity in the statute needed to be construed narrowly. *Driscoll*, 669 F.3d at 1313. Thus, to the extent that section 107 is unclear, any ambiguity should be resolved in favor of the I.R.S.'s determination that Petitioner failed to prove his eligibility for the parsonage exemption.

II . THE PARSONAGE EXEMPTION IS CONSTITUTIONAL.

The First Amendment provides, in pertinent part, that "[c]ongress shall make no law respecting the establishment of religion". U.S. CONST. amend. I. This Court has acknowledged that "there is room to play in the joints", *Walz*, 397 U.S. at 669 (1970), when addressing the constitutionality of government action that implicates religious belief. The Parsonage Exemption, a federal income tax exemption for "ministers of the gospel" that is part of a broader statutory scheme that provides similar benefits to hundreds of thousands of secular employees, is a permissible use of government power that does not violate the Establishment Clause. Necessarily, this Court should affirm the Eighteenth Circuit's decision and uphold the constitutionality of the Parsonage Exemption.

A. The Parsonage Exemption is Constitutional Under the Supreme Court's Religious Tax Exemption Cases.

This Court has long held that Congress may accommodate religion "without sponsorship and without interreference" and foster a "benevolent neutrality" towards religion. *Walz*, 397 U.S. at 668-69. Because the Parsonage Exemption is a small part of a broader statutory scheme—the convenience of the employer doctrine as codified by Congress in 26 U.S.C § 119—it is a permissible accommodation of religion and, therefore, constitutional.

1. The Parsonage Exemption is Presumptively Constitutional under Walz Because it is Part of a General Statutory Scheme and Does Not Direct Government Revenue to Religious Organizations.

The Parsonage Exemption is constitutional under *Walz*. Generally applicable tax exemptions that provide incidental tax benefits for religious organizations are constitutional. *See id.* at 674. In *Walz*, the Court emphasized that the property tax exemption was not limited to religious organization: indeed, it extended to many non-religious organizations, including hospitals, libraries, playgrounds, and scientific, professional, historical, and patriotic groups. *Id.*

The Parsonage Exemption, much like the religious property exemption upheld in *Walz*, is a part of a general statutory scheme that provides benefits to hundreds of thousands of secular employees. The convenience of the employer doctrine, codified as 26 U.S.C. § 119, allows *all taxpayers* to exempt or deduct the costs of their housing so long as it provided for the convenience of their employer. § 119. The Parsonage Exemption extends this tax benefit to ministers in a manner that limits the entanglement between government and religion, thereby complying with the commands of the Establishment Clause. Furthermore, unlike a tax subsidy which "involves the direct transfer of public monies to the subsidized enterprise", *id.* at 691, a tax exemption does not involve a direct transfer of state revenue to religious organizations. It simply relieves "a privately funded venture of the burden of paying taxes." *Id.* at 690. Because § 107 is part of a general statutory scheme that does not directly transfer aid from the government to religious organizations, *Walz* is controlling and strongly points towards the constitutionality of the Parsonage Exemption.

2. Justice Brennan's Plurality in Texas Monthly is Not Controlling Because Justice Blackmun Concurred on Narrower Grounds.

Petitioner's may assert that *Walz* was implicitly overruled by this Court's decision in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). However, Petitioner's reliance on *Texas Monthly* is unpersuasive for two reasons. First, the Court recently reaffirmed the subsidy-tax exemption distinction. In *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 140-41 (2011), the Court explained that the Establishment Clause forbids the "extract[ion] and spend[ing] of 'tax money' in aid of religion in violation of [an individual's] conscience.". *Id*. In stark contrast, "[w]hen the government declines to impose a tax, … there is no such connection between a dissenting taxpayer and alleged establishment.". *Id* at 142. Because the Court has

recently reaffirmed the principle first articulated in *Walz*, it is still considered good law and is relevant to the disposition of this case.

Second, Justice Brennan's plurality opinion, which stated "every tax exemption constitutes a subsidy that affects nonqualifying taxpayers." *Texas Monthly*, 489 U.S. at 14 (Brennan, J. plurality opinion), only enjoyed the assent of two other Justices. According to the test announced in *Marks v. United States*, "[w]hen … no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. 188, 193 (1977). Justice Blackmun's concurrence in *Texas Monthly* did not adopt Justice Brennan's sweeping language. Justice Blackmun concluded that "a tax exemption *limited* to the sale of religious literature by religious organizations violates the Establishment Clause.". *Texas Monthly*, 489 U.S. at 28 (Blackmun, J., concurring) (emphasis in original). Because Justice Blackmun decided *Texas Monthly* on the specific facts of the case, it is narrower in scope than Justice Brennan's plurality, and therefore, constitutes the holding of the Court.

3. Moreover, the Sales Tax at Issue in Texas Monthly is Distinguishable from the Parsonage Exemption.

Even if the Court were to find that *Texas Monthly* is controlling, it is readily distinguishable. The sales tax in *Texas Monthly*, was narrowly tailored to only benefit religious organizations. The Parsonage Exemption, in contrast, is a part of a broader statutory scheme. All taxpayers are allowed to exclude, or deduct, the cost of housing provided by their employer for its convenience (§ 119), a proposition that even Justice Brennan stated was in line with the command of the Establishment Clause. *Texas Monthly* at 489 U.S. at 14 (Brennan, J. plurality opinion) (stating "[i]nsofar as that subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of [a] secular end … does not deprive the subsidy of

[a] secular purpose.") Because the Parsonage Exemption is part of a broader, general statutory scheme, it is distinct from the unconstitutional sales tax in *Texas Monthly*. Therefore, this Court's decision in *Walz* leads to the conclusion that the Parsonage Exemption.

B. Moreover, the Parsonage Exemption is Constitutional Because it Satisfies All of the Requirements of the Lemon Test.

The Parsonage Exemption facilitates and advances the secular purposes that led to its adoption while simultaneously limiting the government's entanglement and intrusion into religious affairs. To determine whether a statute is constitutional under the Establishment Clause, courts employ the test first articulated in *Lemon v. Kurtzman*. *Lemon,* 403 U.S. at 612-13 (1971). Under the *Lemon Test*, the government must show that "the statute: (1) has a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) finally, the statute must not foster an excessive government entanglement with religion.". *Id.* Because the Parsonage Exemption advances two distinct secular purposes while simultaneously limiting the entanglement between government and religion it satisfies all of the requirements of the *Lemon* Test and, therefore, is constitutional.

1. The Parsonage Exemption has Two Secular Legislative Purposes and Therefore Satisfies the First Prong of the Lemon Test.

The Parsonage Exemption's two secular legislative purposes are sufficient to satisfy the first prong of the *Lemon Test*. The government violates the first prong of the *Lemon Test* when it "acts with the ostensible and *predominant* purpose of advancing religion." *McCreary v. ACLU*, 545 U.S. 844, 860 (2005) (emphasis added); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 330 (1987) (rejecting the argument that in order for a law to comply with the Establishment Clause it must be completely unrelated to religion). For example, the Court in *McCreary* held that displays of the Ten Commandments in public schools

and in courthouses had no secular purpose because they were first hung in isolation and then displayed with other Christian documents.

However, a statute is only rendered unconstitutional when "there is no question that the statute… was motivated *wholly* by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1987). The Court in *Lynch*, for instance, upheld the constitutionality of a creche displayed in a public park during the holiday season, noting that it served the secular purpose of informing and teaching the public of the historical origins of the Christmas holiday. *Id. See also Mayle v. United States*, 81 F.3d 680, 686 (7th Cir. 2018) (stating that "having just one secular purpose is sufficient to pass the *Lemon Test*."). Notably, courts defer to the government's sincere articulation of a secular purpose and only dispute that articulation if, and only if, the challengers can prove that the articulation is an insincere sham. *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987). By relying on *clear and uncontroverted* legislative history, the Court in *Edwards* held that the purported purpose behind Louisiana's "balanced treatment" statute, protecting academic freedom, was a sham because it was designed to a promote religious belief rather than foster comprehensive science education. *Id.*

a. The Parsonage Exemption places Religious employees on equal footing with Secular employees.

Congress's primary purpose in enacting the statute was to give ministers the *same* tax benefit that similarly situated secular employees had received pursuant to the convenience-of-the-employer doctrine. Prior to the enactment of the Parsonage Exemption, the Treasury Department only applied the convenience-of-the-employer doctrine to secular employees and, in 1921, ruled that it did not apply to ministers. *Gaylor v. Mnuchin*, 919 F.3d 420, 424 (7th Cir. 2019). Congress reacted to the Treasury's decision by passing the Revenue Act of 1921, which provided for the exclusion of "the rental value of a dwelling house and appurtenances thereof

furnished to a minster of the gospel as part of his compensation." Pub. L. No. 98, sec. 213(b)(11), 42 Stat. 227, 239. Section 213(b)(11) was the precursor to § 107, which was ultimately adopted following the passage of the Internal Revenue Code of 1954. Therefore, by placing ministers on an equal playing field with secular employees, § 107 does not favor religion over non-religion. Rather, it actively combats discrimination against religion— a secular legislative purpose.

b. The Parsonage Exemption Eliminates Discrimination Amongst Ministers of Different Faiths.

Not only does the Parsonage Exemption eliminate discrimination between secular and religious employees, it also eliminates discrimination amongst different religious groups. Legislatures have a duty to ensure that laws do not discriminate amongst religious groups. *Larson v. Valente*, 456 U.S. 228, 246 (1982). In *Larson*, the Court found that the Minnesota's Charitable Solicitations Act that provided a reporting exemption for religious organizations that received more than half of their contributions from their affiliated members violated the Establishment Clause because similarly situated religious organizations would be treated differently. *Id.* Prior to enacting § 107(2), the Parsonage Exemption only applied to ministers who received their housing "in-kind" not to those ministers who received cash-allowances for housing. *Gaylor*, 919 F.3d, at 423-24. Typically, older, more established religious organizations provide housing in-kind, while newer and poorer religious organizations provide housing in cash. *Id.* Prior to the enactment of § 107(2), ministers who worked for poorer religious denominations would not have been able to enjoy the same benefits as their similarly situated counterparts at wealthier denominations. If this were to continue, it would raise serious constitutional questions, since similarly situated ministers would incur different tax liability based solely on which religious denomination they serve. Congress sought to eliminate this discriminatory policy by

enacting § 107(2), thereby ensuring that all similarly situated ministers of the gospel would be treated equally in terms of their federal income tax liability. Because § 107(2) eliminates discrimination between different religious groups, it furthers a fundamental purpose of the Establishment Clause and is, consequently, secular in nature.

Petitioners may cite out of context language by Representative Peter Mack to prove that the government's offered secular legislative purposes are a sham—they fail in their efforts. Petitioners point to the end of a long soliloquy on the House floor where Rep. Mack stated: "[c]ertainly, in these times when we are being threatened by a godless and antireligious world movement we should correct this discrimination against certain ministers who are carrying on such a courageous fight against this foe." *Hearings Before the H. Comm. on Ways and Means Concerning the Taxability of a Cash Allowance Paid to Clergymen in Lieu of Furnishing Them a Dwelling*, 83d. Cong. 1576 (1953) (statement of Hon. Peter F. Mack, Jr., on H.R. 4275), (hereinafter "*Hearings*"). These comments, however, are far less clear than the detailed public comments made by the sponsoring state legislator in *Edwards*. *Edwards*, 482 U.S. at 587 ("My preference would be that neither [creationism nor evolution] be taught."). Petitioners conveniently ignore statements made by Rep. Mack which strongly indicate secular motivation. For instance, he stated that the "present tax laws are discriminatory among our clergy", *Hearings* at 1574-75, and believed that "a serious injustice was being done to those ministers who must provide their own home.". *Id.* at 1576. Therefore, when read in context, Rep. Mack's statement shows that he was primarily motivated by secular concerns, namely, eliminating discrimination amongst ministers of different faiths.

Moreover, this Court has noted the unreliability and limited probative value of legislative history, even statements made by sponsors of legislation. *See CPSC v. GTE Sylvania*, Inc., 447

U.S. 102, 118 (1980) (stating "ordinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history."). Even if this the Court were to find that Rep. Mack was primarily motivated by religious concerns, it would be fallacious to extend his motivations to the remaining 434 members of the House of Representatives. Indeed, there is evidence in the Congressional record to highlight this point. Specifically, Representative Ray G. McKennan stated that the proposal to add § 107(2) would "create an equitable condition for ministers similarly situated." *Hearings* at 1574. These conflicting statements illustrate the unreliability of legislative history. More importantly, it shows that petitioners have failed to meet their heavy burden of proving that the government's articulated secular purpose is a "sham". Necessarily, the Court must grant deference to the government's articulated legislative purposes and find that the first prong of the *Lemon Test* has been satisfied.

2. The Primary Effect of the Parsonage Exemption is the Advancement of its Secular Purposes, Not the Endorsement of Religion over Non-Religion.

The Parsonage Exemption primarily advances the underlying secular purposes that led to its enactment and therefore satisfies the second prong of the *Lemon Test*. In order for a law to comport with the commands of the *Lemon Test* its "principal or primary effect" must be one "that neither advances nor inhibits religion." *Lemon*, 403 U.S. at 612. When analyzing whether a law's primary effect is the endorsement of religion, courts strongly consider the surrounding context of the act: in particular, when the government's action includes both religious and secular components, it is far less likely to violate the second prong of the *Lemon Test*. *Lynch* 465 U.S at 680. For example, the Court in *Lynch* found that the display of a nativity scene together with secular objects, such as a Santa Clause house did not sufficiently endorse religion to run afoul of the *Lemon Test's* second prong. *I; see also Gaylor* 919 F.3d at 429 (stating "[b]ut

reading [§ 107(2)] in context, as we must, [it] is simply one of many *per se* rules that provide a tax exemption to employees with work-related housing requirements."); Martha Legg, *Excluding Parsonages from Taxation: Declaring a Victor in the Duel between Caesar & the First Amendment*, 10 GEORGETOWN J. OF LAW & PUBLIC POLICY 269, 271 (2012) (arguing that "the parsonage exclusions are constitutional when (necessarily) viewed as one element of a larger congressional plan").

Moreover, in order for a law to endorse religion under the *Lemon Test* "it must be fair to say that the *government itself* has advanced religion through its own activities and influence. *Amos*, 483 U.S. at 337. (emphasis in original). In *Amos*, for instance the Court rejected the argument that the § 702 of the Civil Rights Act was unconstitutional because it better allowed religious organizations to advance their purpose and message. *Id.* The government typically advances religion through its own activities through "sponsorship, financial support, and active involvement of the sovereign of religious activity. *Gaylor*, 919 F.3d at 432 (quoting *Walz*, 397 U.S. at 668). Notably, the 7th Circuit in *Gaylor* held the Parsonage exemption does not amount to religious endorsement since it does not directly transfer aid from the government to religious organizations.

a. The Parsonage Exemption must be read in light of the Convenience of the Employer Doctrine.

Similar to the nativity scene in *Lynch*, whose constitutionality stemmed from the fact that it was displayed along with secular object, the Parsonage Exemption must be viewed as a small part of a larger statutory scheme. As mentioned in section IA of this brief, *supra*, pursuant to 26 U.S.C. § 119, *all taxpayers*, regardless of profession, who are furnished housing by their employers to exclude the value of that housing from their gross income, if the housing is furnished for the convenience of the employer. 26 U.S.C. § 119. Section 107(2) is not the only

categorical exemption from § 119(a)(2)'s proof requirements. Indeed, hundreds of thousands of non-religious, secular employees are entitled to similar categorical exclusions, including individuals in the military (§ 134), members of the Foreign Service, CIA, and other similar situated federal employees (§ 912), and U.S. citizens or residents living abroad (§ 911). 26 U.S.C §§ 134, 911, 912. When read within this context, it is apparent that § 107 is a small part of a neutral and general statutory scheme that extends to hundreds of thousands of secular employees. Necessarily, it does not endorse religion and satisfies the second prong of the *Lemon Test.*

b. Furthermore, The Parsonage Exemption does not directly transfer government revenue to religious organizations.

The Parsonage Exemption, like the property tax exemption at issue in *Walz*, does not connote a direct financial relationship between the government and religious organizations. Although, in economic terms, a tax exemption and subsidy are similar, this Court has continued to recognize the constitutional difference between the two, namely, the lack of direct financial support that is apparent with a tax exemption. *Walz*, 397 U.S at 690-91. (stating "an exemption […] assists the exempted enterprise only *passively*.") (emphasis added). This passive assistance does not rise to the level of direct financial support since government funds and revenue are not transferred from the state to religious organizations. Although the exemption makes it easier for religious organizations to advance their message, under *Amos,* that is constitutionally permissible since the *government itself* is not advancing the religious message. Because the Parsonage Exemption does not directly transfer funds from the government to religious organizations, it does not directly support or advance religion. Therefore, the Parsonage Exemption satisfies the second prong of the *Lemon Test.*

3. The Parsonage Exemption Limits the Government's Entanglement with Religion by Exempting Religious Organizations from the More Intrusive Inquiry Required by 26 U.S.C § 119.

The Parsonage Exemption, as it is currently formulated, leads to a minimal and acceptable level of entanglement between government and religion. Since a complete separation of church-state interaction is impossible, the "entanglement is a question of kind and degree." Gaylor, F.3d at 434 (quoting *Lynch*, 465 U.S. at 684). In *Gaylor*, the 7th Circuit held that the Parsonage Exemption "avoids excessive entanglement by providing ministers and their churches certainty as to whether their housing allowances will be exempt from tax." *Id.* at 432. Engaging in a fact-bound analysis to determine whether or not religious employees qualify for certain statutory exemptions has been held to be a permissible level of government entanglement. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 190-92 (2012). In *Hosanna-Tabor*, this Court inquired into the facts underlying Cheryl Pirch's employment in order to determine whether she qualified as a minister—a level of entanglement that the Court would not have exercised if it violated the Establishment Clause. *Id.* However, government intrusion into the internal affairs of religious organizations is excessive entanglement and violates the Establishment Clause. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-20 (1976). In *Milivojevich*, for instance, the Court held that interfering with the decisions of ecclesiastical tribunal interfered with internal church affairs and violated the Establishment Clause. *See also Lemon*, 403 U.S. at 621-22 (finding comprehensive state surveillance necessary to ensure statutory restrictions are followed was excessive entanglement).

Much like the analysis undertaken by the Court in *Hosanna-Tabor*, the IRS engages in a minimally intrusive, fact bound inquiry to determine whether or not an individual qualifies as a "minister of the gospel". Indeed, the analysis undertaken to determine whether an individual qualifies as a minister for purposes of applying the minstrel exception is almost identical to the analysis undertaken to determine whether an individual would qualify for the Parsonage

Exemption. *See Hosanna-Tabor*, 565 U.S. at 190-92 (identifying relevant factors such as whether the individual conducts religious activities, and whether they perform secular functions). In stark contrast, application of § 119(a)(2) would intrude upon the internal affairs of the church, leading to the same unconstitutional entanglement that was at issue in *Milijovojevich*. Under § 119(a)(2), the IRS would have to determine what the business of the religious organization is, a task that could only be accomplished by interrogating ministers about their day to day activities. Because the factual analysis undertaken does not lead to *excessive* entanglement, § 107(2) satisfies the third and final prong of the *Lemon Test.*

C. Lastly, the Parsonage Exemption is Constitutional Because it is a Long-Standing, Historically Significant Practice.

The long history of religious tax exemptions coupled with their independent secular significance strongly support upholding the constitutionality of the Parsonage Exemption. The Court has recently held that the "the Establishment Clause must be interpreted by reference to historical practices and understandings." *Town of Greece v. Galloway*, 572 U.S. 565, 572 (2012). In *Town of Greece*, the Court upheld the constitutionality of sectarian legislative prayer stating "[a]ny test the Court adopts [for the Establishment Clause] must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Id.* at 577. Although a long-standing practice "is not conclusive of [the practice's] constitutionality", it "is a fact of considerable import in the interpretation of abstract constitutional language." *Walz*, 397 U.S. at 681. The Court in *Walz* upheld New York City's religious property tax exemption in part because of the history of tax exemptions provided to religious organizations prior to and immediately after the founding of the Republic. Importantly, the Court has upheld government action that implicates religious practice, so long as the as the practice also promotes an independent, secular value. *Van Orden v. Perry*, 545 U.S. 677, 691-92 (2005) (plurality). In

upholding the constitutionality of the Ten Commandments placed at the Texas State Capitol, the Court in Van Orden acknowledged that "Moses was a law-giver" and that the commandments "represent[ed] the several strands in the State's political and legal history". *Id.*

Similar to the property tax exemption in *Walz*, the Parsonage Exemption follows a long line of other religious tax exemptions. Indeed, both state and federal practice indicate that the early leaders of the Republic thought the practice to be harmonious with Establishment Clause. As early as 1802 the federal government permitted the County of Alexandria to exempt church property from taxation. *See Gaylor*, 919 F.3d at 436, and only a year after Virginia passed an act to disestablish the Episcopal Church, the State re-enacted tax exemption for "any … houses [of] divine worship, or seminary learning." *Walz*, 397 U.S. at 683. Indeed, when Congress enacted the first income tax in 1894, it exempted religious organizations. Revenue Act, § 32, 28 Stat. 556 (1894). Moreover, similar to the Ten Commandment display in *Van Orden*, the Parsonage Exemption serves a historically significant, secular purpose: it reduces the entanglement between government and religion by greatly diminishing the inquiry the IRS and courts must conduct when determining whether an individual qualifies for the tax benefit, thereby satisfying the commands of the Historical Significance Test.

CONCLUSION

For the aforementioned reason, this Court should hold that Petitioner is not a "minister of the gospel" and uphold the constitutionality of the Parsonage Exemption.