No. 20-199

IN THE

Supreme Court of the United States

OCTOBER TERM 2021

JOHN BURNS,

Petitioner,

and

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 THE RESPONDENTS

MARCH 12, 2020

TEAM NUMBER 14
COUNSEL FOR
RESPONDENTS

QUESTIONS PRESENTED

I. Whether an individual who was hired as a guidance counselor and teacher of secular subjects by a religious private school is considered a "minster of the gospel" under 26 U.S.C § 107.

II. Whether the tax exemption found in 26 U.S.C. § 107(b) is constitutional under the Establishment Clause when similar categorical exemptions are offered to secular employees under other provisions, and States have granted religious property-tax exemptions for over two centuries.

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STATEMENT OF THE CASE

Factual Background. Whispering Hills Academy (the "Academy") is a religious boarding school associated with, and located next to, the Whispering Hills Unitarian Church in upstate Touroville. Record at 3. In 2016, the Academy hired John Burns to teach English, Renaissance Literature, several foreign languages to high school juniors and seniors. R. at 3. He is now also one of many school guidance counselors. R. at 3. In his free time, Burns runs an afterschool club, "Prayer after Hours," and hosts informal gatherings after Church on Sundays. R. at 3.

When Burns accepted the job, he decided to reduce his travel time to work by moving to a house five minutes away from the Academy. R. at 3. The Academy generously provided an initial $2,500 to Burns to help cover the costs of the move. R. at 3. The Academy also agreed to raise Burns's annual salary by over $25,000—divided and included with the rest of his monthly paycheck—as a housing allowance. R. at 4. The Academy calculated the amount to reflect the home's fair rental value and Burns's expected utility costs. R. at 4.

In 2017, Burns decided he wanted to pay less in income taxes. R. at 4. Because he moved to reduce his commute and receives a housing allowance from the school, he sought to find a way to exempt that amount to lower his tax liability. R. at 4. A co-worker, Pastor Nick, suggested that Burns look into claiming the parsonage exemption under 26 U.S.C. § 107(2). R. at 4. Section 107(2) allows "ministers of the gospel" to exclude rental allowances paid as part of their compensation from their gross income. 26 U.S.C. § 107(2).

Pastor Nick rationalized that Burns may also qualify for the exemption because Burns was employed by a religious institution, prayed with his students in his afterschool club, and claimed to incorporate his spiritual beliefs into his secular duties as a guidance counselor. R. at 4. Burns took Pastor Nick's advice, investigated this exemption, and claimed the same on his 2017 tax return R. at 4.

Pastor Nick had explained to Burns how he claimed the exemption under section 107(2) every year and was able to pay lower taxes. R. at 4. However, unlike Nick, Burns is a schoolteacher and guidance counselor—not a Pastor. R. at 3–4. In the summer of 2018, Burns received a letter of denial from the IRS and Commissioner of Taxation disqualifying him for the exemption since he could not prove that he was a "minister of the gospel." R. at 4. As a result, Burns owed additional money to the IRS. R. at 4.

Procedural History. After learning that he would have to pay income tax on his full annual salary, Burns brought suit in the District Court for the Southern District of Touroville, claiming that he is a "minister of the gospel" eligible to claim the parsonage exemption. R. at 4. Citizens Against Religious Convictions, Inc. ("CARC"), a local organization, learned of the pending lawsuit and decided that the parsonage exemption Burns sought under §107(2) violated the Establishment Clause of the First Amendment because the statute favored religion over non-religion. R. at 4. CARC filed a motion with the district court asserting its right to intervene and establishing standing to claim that §107(2) is unconstitutional. R. at 4. The district court held that Burns qualified as a minister under the §107(2)

exemption and that §107(2) was unconstitutional under the Establishment Clause. R. at 8, 13. On appeal, the United States Court of Appeals for the Eighteenth Circuit reversed, finding that Burns is not a minister under §107(2) and that §107(2) is constitutional. R. at 20. Unsatisfied with this ruling, Burns and CARC filed a certiorari petition, which this Court granted. R. at 26.

SUMMARY OF THE ARGUMENT

A. Burns is not a minister of the gospel under 26 U.S.C. § 107 (2).

Petitioner John Burns seeks to overturn an Internal Revenue Service decision and exclude a large portion of his annual salary from his gross income because he claims to be a "minister of the gospel" by virtue of his employment as a private school teacher. R. at 4. Yet, it is well-established that income tax exclusions are matters of "legislative grace; and only as there is clear provision therefor can any particular deduction be allowed." *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440 (1934).

Both the Internal Revenue Service (the "IRS") and the Eighteenth Circuit rightfully rejected Burns's novel contention that all private school teachers who participate in religious activities tangential to their employment are "ministers of the gospel" within the meaning of §107(2). To hold otherwise would fly directly in the face of the clear Congressional intent to grant the §107(2) exclusion to ministers of the gospel and ministers of the gospel alone.

The relevant IRS regulations establish two requirements that a claimant must satisfy to be eligible for the §107(2) exclusion. First, §107(2) applies only to

ministers who are duly ordained, licensed, or commissioned. At no point has Burns been ordained, licensed, or commissioned by any religious denomination. Second, §107(2) requires that the housing allowance be granted for the minister's services "in the exercise of his ministry." Burns received the housing remuneration for his duties as a private school teacher and guidance counselor. Thus, he cannot qualify for the exclusion under §107(2).

B. 26 U.S.C. § 107 (2) does not violate the Establishment Clause.

Petitioner-Intervenor CARC argues that §107(2) is unconstitutional under the Establishment Clause because it is available to ministers of the gospel alone. R. at X. That position, however, overlooks that §107(2) is simply one of many *per se* rules in the Internal Revenue Code that provide a tax exemption to employees with unique work-related housing requirements.

This Court has traditionally employed the infamous three-pronged *Lemon* test to analyze a government action's constitutionality under the Establishment Clause, and §107(2) passes with flying colors. Section 107(2) meets all three requirements under *Lemon*: (1) it has not one but two secular legislative purposes, (2) it does not have the principal or primary effect of advancing religion, and (3) does not foster an excessive government entanglement with religion. Moreover, this Court has also emphasized the integral role that history and tradition play when analyzing a challenged practice. States have granted varying forms of property-tax exemptions to churches for over 200 years.

The necessary result of Petitioner-Intervenor's position violates the Establishment Clause. Without §107(2), ministers would have no choice but to seek their property tax exemptions under §119. Such an outcome would bring about the very consequence Petitioner-Intervenor claims to be avoiding—a violation of the Establishment Clause. Thus, not only is 26 U.S.C. § 107(2) *constitutional*, but to hold otherwise would be *unconstitutional*.

ARGUMENT

I. Burns is not a "minister of the gospel" under 26 U.S.C. § 107(2).

The parsonage exclusion was not granted to some broad class of persons; it was instead granted by legislative grace to ministers of the gospel alone. *See Kirk v. Comm'r.*, 425 F.2d 492, 495 (D.C. Cir. 1970). To qualify as a minister of the gospel, Burns must prove that he was: (1) duly ordained, licensed, or commissioned and (2) performed services "in the exercise of his ministry." Treas. Reg. § 1.1402(c)-5.[1] Because Burns cannot meet either of these regulatory requirements, he cannot qualify as a minister under 26 U.S.C. § 107(2).

A. Burns is not duly ordained, licensed, or commissioned.

The regulations' first requirement is that only "a duly ordained, commissioned, or licensed minister of a church or a member of a religious order" can qualify for the statutory exclusion of § 107(2). Treas. Reg. § 1.1402(c)-5; *Knight v.*

[1] Treasury Regulations, despite lacking the force of a statute, are entitled to Chevron deference. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (holding that courts must defer to an agency's reasonable construction of a statute that the agency is charged with administering). In the present case, there is no suggestion that either Treas. Reg. § 1.1402(c)-5 or Treas. Reg. § 1.107–1 is an unreasonable interpretation of §107 of the Internal Revenue Code.

Comm'r, 92 T.C. 199, 204 (1989) ("the statute, of course, requires he be ordained, commissioned, or licensed as a minimum"); *Salkov v. Comm'r.*, 46 TC 190, 196 (1966) (*acq.*) (noting that the purpose of this requirement is to exclude self-appointed ministers). Courts do not require that the ordination, commissioning, or licensing come from some higher ecclesiastical authority. *Salkov*, 46 TC at 196. In a religious discipline having lay organizations, this ministerial authority can be conferred by the church or congregation itself. *Id.* Formal ordination is obviously sufficient to meet this requirement. *See id*. In the absence of a formal ordination, a minister may be commissioned if a congregation or body of believers is committed to their charge. *Kirk*, 425 F.2d at 495. In determining if an employee is "commissioned," some courts have also considered whether a religious body has held the employee out as a minister. *See Wingo* v. *Comm'r.*, 89 T.C. 922, 934 (1987). A license may be any official document or other indicia of permission, formally conferred, to perform sacerdotal functions. *See Kirk*, 425 F.2d at 495.

Here, Burns concedes that he is not ordained. R. at 1, 8, 20. Nor does he claim to have any official document or other indicia of permission from Whispering Hills Unitarian Church permitting him to perform sacerdotal functions. Even under the flexible "commissioned" standard, Burns has clearly not been commissioned by Whispering Hills Unitarian Church. At no time did Whispering Hills Unitarian Church commit a congregation to Burns's charge, nor did it formally grant him the duty of spreading the gospel. R. at 3. Whispering Hills *Academy*, a private school,

hired Burns to teach the subjects of English, Renaissance Literature, and foreign languages and be a school guidance counselor. R. at 3.

Performing secular services for a church-affiliated organization dedicated to spreading the "gospel" is insufficient to meet this requirement. *Kirk*, 425 F.2d at 495. In *Kirk*, the court held an employee of the General Board of Christian Social Concerns ("GBCSC") of the Methodist Church to be "merely a non-ordained church employee" and denied him the benefit of the §107(2) exclusion. *Id*. The court expressly found that despite GBCSC's undisputed status as a religious organization dedicated to spreading the message of Methodism, the employee's claim failed because he was not ordained, licensed, or commissioned as a minister.

Burns attempts to argue, however, that he is a minister because he incorporates his faith into his guidance counseling, attends required worship services, and voluntarily hosts small group sessions after those services. R. at 3. Burns later attempts to use these same facts to argue that he meets the other requirement of §107—that he received the housing remuneration for services in the exercise of his ministry. Even if we assume *arguendo* that the services Burns actually performs are services "in the exercise of his ministry," they do nothing to help Burns meet the independent condition that he be ordained, licensed, or commissioned. Employment as private-school teacher is not a substitute for being duly ordained, licensed, or commissioned as a minister as §107 requires.

B. Burns did not receive the remuneration for services in the exercise of his ministry.

In addition to being considered a minister, §1.107-1(a) of the Income Tax Regulations provides that to qualify for the exclusion, the rental allowance must be provided as remuneration for services that are ordinarily the duties of a minister of the gospel. Treas. Reg. § 1.107–1. The IRS has identified three classes of duties that a minister of gospel ordinarily performs in the exercise of his ministry: "(1) the ministration of sacerdotal functions, (2) the conduct of religious worship, and (3) service in the control, conduct, and maintenance of religious organizations (including the religious boards, societies, and other integral agencies of such organizations), under the authority of a religious body constituting a church or church denomination." Treas. Reg. § 1.1402(c)-5(b)(2); *Wingo v. Comm'r.*, 89 T.C. 922, 934 (1987); *Tanenbaum v. Comm'r.*, 58 T.C. 1, 8 (1972).

Burns was given the housing allowance in exchange for his services as a secular teacher and as a guidance counselor. Because Burns has not received the remuneration for duties that fall within any of the three categories outlined in the treasury regulations, Burns also fails the second requirement of the §107 exemption.

1. Burns does not receive the housing allowances for the ministration of sacerdotal functions or the conduct of religious worship.

The meaning of "ministration of sacerdotal functions" or "conduct of religious worship" depends on the tenets and practices of the particular religious body constituting his church or church denomination. Treas. Reg. § 1.1402(c)-5(b)(2)(i).

However, the teaching of a secular subject is clearly not a sacerdotal function. *Flowers*, No. CA 4-79-376-E, 1981 WL 1928, at *6 (N.D. Tex. Nov. 25, 1981). Neither is the performance of counseling functions. *Id*. In contrast, a classic example of a sacerdotal function is the performing of a marriage. *Id.* Other examples include performing a funeral, administering the rites of baptism, or performing the Lord's supper. *See Colbert v. Comm'r.*, 61 T.C. 449, 452 (1974); *Wingo v. Comm'r.*, 89 T.C. 922, 932 (1987). Even teaching religion classes at "Sunday school" is not considered a sacerdotal function. *Lawrence* v. *Comm'r.*, 50 T.C. 494 (1968).

The relevant inquiry is whether the Academy paid Burns the housing allowance to perform sacerdotal functions or religious worship. It is undisputed that the Academy hired Burns to teach secular subjects and to be a guidance counselor—neither of which are sacerdotal functions nor religious worship. R. at 3. It is axiomatic that when Burns was hired, the Academy provided the housing allowance to Burns as payment for his services as a teacher and counselor. R. at 4. The fact that Burns, of his own volition, hosts small group gatherings after church and incorporates his faith into his guidance counseling cannot alter that conclusion.

Employees receive remuneration for performing the job they were hired to do, not for any other religious functions they may perform by their own personal desires. *Tanenbaum,* 58 T.C. 1, 8 (1972). The tax court in *Tanenbaum* held that an ordained rabbi employed by the American Jewish Committee was not entitled to the §107 exemption. Among the services the rabbi provided to the organization's members included: officiating at weddings and funerals, providing spiritual

counseling, conducting prayer services, and delivering invocations. Yet, the court held that the housing remuneration was paid to the rabbi for the secular work of interpreting religious trends and relationships for which he was hired to do.

Petitioner Burns was not hired to host students after church, lead his students in prayer, or create an afterschool club regardless of those activities' nature. Any functions that could arguably qualify as religious worship or "sacerdotal functions," he performed entirely of his own volition. *Id*. Thus, Burns does not receive his housing remuneration for duties that could be considered religious worship or the ministration of sacerdotal functions.

2. Burns did not receive the housing remuneration for the conduct, control, or maintenance of a religious organization or integral agency of such organization.

The Treasury Department states in §1.1402(c)-5 that a third category of a minister's duties in the exercise of his ministry is "service in the control, conduct, and maintenance of a religious organization or its integral agency." Treas. Reg. § 1.1402(c)-5. The IRS has clarified what constitutes an integral agency in Revenue Ruling 72-606, which lays out criteria that control "whether a church-related institution is an integral agency of a religious organization." Rev. Rul. 72-606, 1972-2 C.B. 78. As the Court of Appeals acknowledged, Burns has not pleaded facts to prove that the Academy is an integral agency of the Unitarian Church. R. at 20.

i. The eight-factor test from Revenue Ruling 76-606 determines if an entity if an integral agency of a religious organization under *Skidmore*.

Revenue rulings promulgated by the IRS are entitled to *Skidmore* deference which is contingent on the thoroughness evident in the IRS's consideration, the

validity of its reasoning, and its consistency with earlier and later pronouncements. *Omohundro*, 300 F.3d 1065, 1068 (9th Cir. 2002); *United States v. Mead Corp.*, 533 U.S. 218, 234–235 (2001) (explaining that under *Skidmore*, "an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires") (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 124 (1944), and citing to additional authority).

Here, the IRS published the interpretative rule at issue in 1972 and has consistently utilized the criteria laid out since then with no changes. *See* I.R.S. P.L.R. 201023008 (June 11, 2010). In fact, the 1972 ruling merely expands upon the application that the IRS had already used in a 1970 ruling. *Compare* Rev. Rul. 72-606, 1972-2 C.B. 78, *with* Rev. Rul. 70-549, 1970-2 C.B. 16. The ruling offers several criteria to consider, that each goes to whether the religious organization maintains actual control over the other institution. Rev. Rul. 72-606, 1972-2 C.B. 78. Thus, Revenue Ruling 72-606 governs under *Skidmore*, and Burns must plead facts to meet the eight factors outlined in the ruling.

ii. The Academy is not an integral agency of the Unitarian Church under the facts presented to this Court.

Tax exemptions are to be construed narrowly, and Burns carries the burden to raise facts that sufficiently establish that the Academy is an integral agency of the Unitarian Church. *Toavs v. Comm'r of Internal Revenue*, 67 T.C. 897, 904 (1977). The Academy is an integral agency of the Unitarian Church only if the

Academy operates under the Unitarian Church's control. *See id*; Rev. Rul. 72-606, 1972-2 C.B. 78; I.R.S. P.L.R. 200925001 (June 19, 2009). To determine if the Academy was under the Unitarian Church's control, courts look to the eight-factor test outlined in Rev. Ruling 72-606 as discussed above.[2] As the District Court pointed out, no one factor weighs heavier than another. R. at 7. "The absence of one of the [criteria] will not necessarily be determinative in a particular case." Rev. Rul. 72-606, 1972-2 C.B. 78. Instead, courts must consider the totality of the circumstances. *Id; Flowers*, 1981 WL 1928, at *4.

A close relationship between a school and an affiliated church is insufficient to demonstrate the element of control required for the school to be considered an integral agency of the church. *See Flowers*, 1981 WL 1928, at *5. In *Flowers*, the private school met only two of the eight criteria outlined in the revenue ruling: (1) the school and the church shared a common name, and (2) the church contributed financially to the school. *Id.* at *4. The court found this insufficient to show control. *Id*. The *Flowers* court stressed that the church could not legally force the school to take or not take a particular course of action. *Id*. at *5.

[2] The eight factors are: (1) whether the religious organization incorporated the institution; (2) whether the corporate name of the institution indicates a church relationship; (3) whether the religious organization continuously controls, manages, and maintains the institution; (4) whether the trustees or directors by the institution are approved by or must be approved by the religious organization or church 5) whether trustees or directors may be removed by the religious organization or church 6) whether annual reports of finances and general operations are required to be made to the religious organization or church 7) whether the religious organization or contributes to the support of the institution; and (8) whether in the event of dissolution of the institution its assets would be turned over to the religious organization or church. Rul. 72-606, 1972-2 C.B. 78 (1972).

In the present case, Burns has pleaded only a handful of facts to satisfy his burden to prove that the Unitarian Church had control over the Academy. Burns first points out that the Academy and the Unitarian Church share the "Whispering Hills" name in their respective titles. The district court used this fact to infer a corporate relationship between the Academy and the Church. R. at 8. Next, Burns posits that the Academy students must attend religious services and learn basic tenants of the common faith. R. at 8. The district court deduced that the Unitarian Church had imposed this requirement from the existence of the requirement alone. R. at 1, 8, 20. Lastly, the Academy is located on Unitarian Church's property. R. at 8, 20. The district court used this to support its finding that the Unitarian Church likely contributed to the school financially.

As was the case in *Flowers*, at best, two out of the eight factors from the revenue ruling are met here. There is no evidence that the Unitarian Church incorporated the Academy, had the authority to approve or remove the Academy's directors, had the power to control the Academy, was entitled to annual financial reports from the Academy, was entitled to the Academy's assets upon dissolution, or could legally force the Academy to take a course of action. Even the shared name of "Whispering Hills" is less probative than the inclusion of "Christian" in the name of the university in Flowers, as the names of unrelated enterprises frequently include identical geographic identifiers.

At the end of the day, Burns has not pleaded any facts that prove that the Unitarian Church had actual control over the Academy. The Academy may have

been founded by Unitarian Church members, be supported by the Unitarian Church, or maintain a close relationship with the Unitarian Church. Proving connection does not prove control. Even if the title "Whispering Hills" and the Academy's location plausibly meet the corporate relationship and financial support factors, the Burns's failure to plead facts meeting any of the other six criteria laid out in ruling 72-606 is fatal to his argument. As a result, Burns has failed to carry his burden to demonstrate that he received his housing allowance for services in the control, conduct, and maintenance of a religious organization or its integral agency. Because Burns did not receive the remuneration for services that fall in any the three categories of services in the exercise of his ministry, he is not entitled to the §107 exclusion.

II. 26 U.S.C. § 107 (2) does not violate the Establishment Clause of the First Amendment.

Current Establishment Clause jurisprudence incorporates two tests when evaluating a government action's constitutionality: (1) the traditional *Lemon* test and (2) Justice O'Connor's Endorsement test. Section 107(2) is constitutional under either inquiry. Furthermore, it is not necessary to define the Establishment Clause's precise boundary where history shows that the specific practice is permitted, particularly a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change. *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 576 (2014). As a result, §107(2) is not examined under Establishment Clause scrutiny as if Congress passed it today, but rather in reference to its historical significance, making it clearly constitutional.

Additionally, if the exemption is eliminated—as Petitioner-Intervenors demand—the government would be forced to engage in a constitutionally impermissible inquiry to fit church employees into a general employee exemption. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). Such a result would run counter to the Establishment Clause's purpose by triggering excessive government inference. *Id.* Thus, not only is 26 U.S.C. § 107(2) *constitutional*, but to hold otherwise would be *unconstitutional*.

A. 26 U.S.C. § 107(2) is constitutional and passes scrutiny under both the *Lemon* and Endorsement tests.

This Court has articulated several tests to consider in determining whether the constitutional challenger—CARC, in this case—has met the burden of proving that the tax exemption violates the Establishment Clause. While traditionally this Court has utilized the *Lemon* test, modern trends have directed courts towards Justice O'Connor's Endorsement test. Under either test, CARC cannot meet its burden of proving that 26 U.S.C. § 107(2) violates the Establishment Clause.

1. The parsonage exemption does not violate the Establishment Clause under the *Lemon* Test as it is traditionally applied.

In *Lemon*, this Court summarized prior case law into a three-prong test: (1) the statute must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; (3) the statute must not foster an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612–13. This test is not cumulative: §107(2) violates the Establishment Clause if it fails any of the three Lemon prongs. *Id.*

26 U.S.C. § 107(2) clearly satisfies each prong of Lemon and thus, does not violate the Establishment Clause. The exemption satisfies the first prong because it serves the sincere legislative purposes of eliminating discrimination against ministers and avoiding excessive entanglement with religion. The second prong is satisfied because this Court has already held that "[t]he grant of a tax exemption is not sponsorship . . ." *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 675 (1970) The third prong is likewise satisfied because §107(2) not only abstains from excessive government entanglement but aims to protect from that very evil. Because §107(2) has a secular legislative purpose, its principal effect is neither to endorse nor to inhibit religion, and it does not cause excessive government entanglement, the exemption does not violate the Establishment Clause under the *Lemon* test. *Lemon*, 403 U.S. at 612–13.

i. 26 U.S.C. § 107(2) has secular purposes of eliminating discrimination against ministers and avoiding excessive entanglement with religion.

The first prong of *Lemon* requires that a statute have a principal or primary effect that neither advances nor inhibits religion. *Lemon*, 403 U.S. at 612. A law protecting a valid secular interest is not invalid as one "respecting an establishment of religion" merely because it also incidentally benefits one or more religions or because it incidentally enhances religious institutions' capability to survive in society. *Comm. for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). It directly follows that a law's purpose does not have to be unrelated to religion to pass constitutional muster. *See Corp. of Presiding Bishop of Church of Jesus Christ of*

Latter-day Saints v. Amos, 483 U.S. 327, 335 (1987). A statute is only unconstitutional under this prong when there is no question that the statute was wholly motivated by religious considerations. *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984). This Court announced that deference is afforded to a government's sincere articulation of secular purpose, so long as that purpose is indeed genuine and not a sham. *Edwards v. Aguillard*, 482 U.S. 578, 586–87 (1987).

Here, Section 107(2) has two sincere secular legislative purposes: (1) to eliminate discrimination against ministers; and (2) to avoid excessive entanglement with religion. Because there is not only one, but two secular purposes to this legislation, §107(2) satisfies the first prong of *Lemon*. *Lemon*, 403 U.S. at 612–13.

a. Congress's objective in enacting 26 U.S.C. § 107(2) was to eliminate discrimination against ministers, which is a sincere secular purpose.

Congress enacted §107 to put ministers on equal footing with secular employees receiving the same benefits; in other words, to eliminate discrimination against ministers. *See Gaylor v. Mnuchin*, 919 F.3d 420, 428 (7th Cir. 2019). Several tax-code provisions apply categorical exclusions that are tailored to address issues presented by certain types of employment. 26 U.S.C. § 119. Section 107(2) is no different. Religious employment presents unique issues that require special attention. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C*, 565 U.S. 171, 181 (2012). Thus, Congress's policy choice to apply a categorical exclusion to eliminate discrimination against ministers is a secular purpose not "motivated wholly by religious considerations." *Lynch*, 465 U.S. at 680.

Under the "convenience-of-the-employer" doctrine, housing provided to employees for their employer's convenience has historically been exempt from taxable income. 26 U.S.C. § 119(a). In 1921, ministers, however, were explicitly denied the ability to claim this benefit. *Gaylor*, 919 F.3d at 424. Recognizing this unfairness, Congress enacted §107 to exclude church-provided parsonages from a minister's taxable income. *Id.* Today, minister housing allowances are still understood to be provided for the church employer's "convenience." *Williamson v. Comm'r*, 224 F.2d 377, 380 (8th Cir. 1955).

In the Southern District of Touroville, Judge Cruz determined that because the exemption requirements under §107 and §119 differ, there has been a message of endorsement. R. at 10. Yet, §107 contains requirements different from §119 not to disadvantage secular employees but to make its application more practical. For example, §107(2) recognizes that ministers often use their homes as part of their ministry, unlike the lay employee whose home and work are entirely separate. *See* 26 U.S.C. § 107(2). The difference is sensible, not seditious. In fact, §119—the exemption Petitioner-Intervenors so painfully settle for—does precisely the same thing as §107(2) by carving out categorical exemptions for specific classes of secular employees. *E.g.*, 26 U.S.C. § 119(c) (exempting employees living in a foreign camp from needing to fulfill the "business premises" and "condition of employment" requirements); 26 U.S.C. §119(d) (exempting teachers and university employees from the convenience-of-the-employer doctrine altogether).

Read in context, §107(2) is simply one of many *per se* rules that provide a tax exemption to employees with work-related housing requirements. 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." *Lynch*, 465 U.S. at 680.

b. Congress Enacted 26 U.S.C. § 107(2) to avoid excessive government entanglement with religion, a sincere secular purpose.

Section 107(2) was also enacted to serve the valid secular purpose of avoiding excessive entanglement with religion. *Gaylor*, 919 F.3d, at 432; *Amos*, 483 U.S. at 335 ("it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."). This Court confirmed that avoiding an intrusive inquiry into religious belief does indeed prevent entanglement. *Id.* at 339. "To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation . . . which the policy of neutrality seeks to minimize." *Walz*, 397 U.S. at 674. Recognizing the potentially excessive entanglement threatened by the application of §119(a)(2) to ministers, Congress enacted a less-entangling tax exemption under §107. *Gaylor*, 919 F.3d at 432.

Congress's decision to exempt ministers from the proof requirements of Section 119(a)(2) prevents the IRS from conducting intrusive inquiries into how religious organizations use their facilities. Because seeking to avoid government entanglement is a secular legislative purpose under *Lemon*, there is not one but two secular purposes to 26 U.S.C. § 107(2). *Amos*, 483 U.S. at 335.

ii. As confirmed by this Court in *Walz*, the primary effect of 26 U.S.C. § 107(2) is not to advance or inhibit religion.

The second prong of *Lemon* requires that a statute have a principal or primary effect that neither advances nor inhibits religion. *Lemon*, 403 U.S. at 612. This effect involves "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz*, 387 U.S. at 668. This Court has distinguished laws that create direct benefits based on religion from laws that exempt religious groups from otherwise applicable legal requirements. *Amos*, 483 U.S. at 327. A law that exempts religious groups from otherwise applicable legal requirements is constitutional. *Id.*

Moreover, this Court has already held that providing a tax exemption does not "connote sponsorship, financial support, and active involvement of the [government] in religious activity." *Id.* ("[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state"). In other words, the primary effect of §107(2) is not to advance religion on behalf of the government but to allow churches to advance religion, which is their very purpose. *Amos*, 483 U.S. at 337.

There is a fundamental difference between a state actor donating cash to a church and a tax exemption such as §107(2). Even if the cash donation is the same amount as the money saved by the exemption, there is clearly a difference in "endorsement." This analogy clarifies that the key difference is whether the government proactively sought to endorse religion by funding it or if the religion has

availed itself of some government benefit. Here, the IRS is not delivering piles of cash to Whispering Hills Academy; instead, John Burns is attempting to help himself to a benefit that is similarly available across all types of employment. R. at 1.

Notably, at the District Court, Judge Cruz decided that §107(2) provides an impermissible subsidy to religious establishments. R. at 9. Petitioner advances the same argument. R. at 22. As the Eighteenth Circuit correctly noted, to succeed on that argument, Petitioner-Intervenor must prove that the government has "advanced religion through its own activities and influence." R. at 22; *Amos*, 483 U.S. at 337. However, this overlooks the fact that this Court has held that tax exemptions for religious institutions do not qualify as subsidies, regardless of the incidental "economic benefits" they may offer churches. *Walz*, 397 U.S. at 674–75. A housing exemption cannot be a subsidy because "the government does not transfer part of its revenue to churches . . . [it] simply abstains from demanding that the church support the state." *Id.* at 675. Permitting housing allowances to ministers in a way that puts them on equal footing with secular employees does not constitute government action or influence that advances or endorses religion. *See id.*

Despite this Court's absolute clarity on the issue, Judge Cruz cites *Texas Monthly v. Bullock*—a sales-tax exemption case—and surmises that "[a]ny tax that essentially endorses [solely] religious belief will fail the *Lemon* test." R. at 10. Nowhere in *Texas Monthly* did this Court make that determination. *See generally, Texas Monthly v. Bullock*, 489 U.S. 1 (1989). What this Court *does* say in *Texas Monthly* is that the sales-tax exemption lacked a secular objective which is why it

failed *Lemon*—not because all tax exemptions that benefit religion are *per se* unconstitutional. *Texas Monthly*, 489 U.S. at 17.

To be sure, *Texas Monthly v. Bullock* does not supersede, nor does it contradict, well-established principles from *Lemon* and *Walz*. Challengers to §107(2) advance the argument that because "[t]he Supreme Court [in *Texas Monthly*] held that a tax exemption granted only to religion violates the Establishment Clause," that §107(2) is consequently unconstitutional. Erwin Chemerinsky, *The Parsonage Exemption Violates the Establishment Clause and Should Be Declared Unconstitutional*, 24 Whittier L. Rev. 707, 714 (2003). Such an argument is hyperbolic. This Court ruled in *Texas Monthly* because the exemption—exempting sales tax on periodicals promoting religion—failed the *Lemon* test. *Texas Monthly*, 489 U.S. at 25. Just because the religious organization lost in that case does not mean that it must here too.

Walz unmistakably and precisely answers all facets of this issue with three points. First, providing a tax exemption does not "connote[] sponsorship, financial support, and active involvement of the [government] in religious activity." *Walz*, 387 U.S. at 668. Second, "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Id.* at 675. And third, tax exemptions for religious institutions do not qualify as subsidies, regardless of the incidental "economic benefits" they may offer churches. *Id.* at 674–75. Because a tax exemption is neither a sponsorship of religion nor a granted subsidy, §107(2) has a

primary effect that neither advances nor inhibits religion and thus passes under *Lemon's* second prong.

iii. Because 26 U.S.C. § 107(2) 's purpose is to avoid excessive government entanglement with religion, it does not foster excessive government entanglement with religion.

The final prong of the *Lemon* test considers whether the law fosters an excessive government entanglement with religion. *Lemon*, 403 U.S. at 613. Because some level of church-state interaction is unavoidable, entanglement is a question of kind and degree. *Lynch*, 465 U.S. at 684. Similarly, any financial interaction between religion and government, such as this, will inescapably demand some degree of entanglement. But only *excessive* entanglement violates the Establishment Clause. *Walz*, 397 U.S. at 674. Under the *Walz-Lemon* framework, §107(2) does not rise to the level of excessive entanglement because it expressly disassociates itself from the intricate tax inquiries that other possible tax exemptions would require.

Inevitably, §107(2) does require the IRS to determine whether a taxpayer qualifies as a minister. This would fall under the category of entanglement that is unavoidable and far from excessive. Indeed, this Court has already approved of this exact kind and degree of entanglement. *Hosanna-Tabor*, 565 U.S. at 190–95. In *Hosanna-Tabor*, this Court engaged in a fact-bound inquiry to determine whether the petitioner qualified as a minister for purposes of the minister exception. *Id.* This Court would not have so inquired if it was violative of the Establishment Clause. *Gaylor*, 919 F.3d at 432. This inquiry is identical in kind and degree to the minister classification required by §107(2). Thus, this Court has already approved of this

level of unavoidable government entanglement. *Hosanna-Tabor*, 565 U.S. at 190–95.

2. 26 U.S.C. § 107(2) is constitutional under the Endorsement test because a tax exemption is not a sponsorship of religion.

There is debate among Members of this Court about the *Lemon* test's continuing validity. *Freedom from Religion Found., Inc. v. Concord Cmty. Sch.*, 885 F.3d 1038, 1045 n.1 (7th Cir. 2018) (also noting that the dissenting Justices in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2031 n.4 (2017), suggested that "the endorsement test is still with us"). Even though this Court has yet to clarify which test should take precedence going forward, the current lack of constitutional clarity does not affect the present case's outcome because §107(2) is likewise constitutional under the Endorsement test.[3]

A law will fail the Endorsement Test if a reasonable observer—being familiar with the context and facts—would conclude that Congress passed the law to promote a religion. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J. concurring).

This closely resembles the second prong from *Lemon*. Luckily, this Court has already concluded that "[t]he grant of a tax exemption is not sponsorship [of

[3] Because §107(2) can satisfy the requirements of both the *Lemon* and Endorsement tests, this case presents the unique opportunity for this Court to command its Establishment Clause jurisprudence. For reference, in *American Legion*, Justice Gorsuch referred to *Lemon* as a "misadventure" and recognized that "not a single member of the court even tries to defend *Lemon* against these criticisms—and they don't because they can't." *American Legion v. American Humanist Association*, 139 S. Ct. 2067, 2101 (2019) (Gorsuch, J. concurring). Similarly, Justice Kavanaugh wrote, "the *Lemon* test is not good law and does not apply to Establishment Clause cases . . . " *Id.* at 2093 (Kavanaugh, J. concurring). If these two authors and this Court were to do away with *Lemon* finally, it could do so here with no prejudice to the parties, as the outcome under both tests here is the same.

religion] . . .” and a reasonable observer would not conclude that Congress passed § 107(2) to promote religion in any way. *Walz,* 397 U.S. at 675. Section 107(2) is in no way an endorsement of any religion or religious practice. Indeed, “[t]here is no genuine nexus between tax exemption and establishment of religion.” *Walz* at 675. Thus, §107(2) passes constitutional muster under the Endorsement test.

B. Religious tax exemptions are historically significant and have withstood over two centuries of political and cultural scrutiny.

When examining an Establishment Clause challenge, “the Establishment Clause must be interpreted by reference to historical practices and understandings.” *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 576 (2014). Specifically, this Court has held that “[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. In other words, whether analyzed under the *Lemon* or Endorsement test, the exemption is constitutional if the challenged practice is historically significant. *Id.*

For over two centuries, the states have implemented church-property tax exemptions in various forms. *See* John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?* 64 CAL. L. REV. 363, 3880 (1991). When challenged on establishment grounds, such tax exemptions have historically been upheld. *See, e.g.*, *Trustees of Griswold College v. State*, 46 Iowa 275, 282 (1877) As early as 1885, this Court acknowledged and accepted religious property tax exemptions. *Gibbons v. District of Columbia*, 116 U.S. 404 (1886). Consequently,

there is no evidence that provisions such as §107(2) were historically viewed as establishing religion.

In *Lemon*, this Court referenced *Walz*. It was argued—much like it is argued by Petitioner-Intervenors here—that a tax exemption for places of religious worship would prove to be the first step in an inevitable progression leading to the establishment of a state religion. *Lemon*, 403 U.S. at 624. However, nothing in two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion. *Walz*, 397 U.S. at 678; *Town of Greece*, 572 U.S. at 577. This Court went on to summarily add that the challenger's "claim could not stand up against more than 200 years of virtually universal practice imbedded in our colonial experience and continuing into the present." *Id.*

History shows that a case strong enough to justify doing away with centuries of practice and tradition is lacking here. "[A]n unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside." *Walz,* 397 U.S. at 678. Consequently, the historical significance of this exemption raises the bar for Petitioner-Intervenor's constitutional challenge. This was true when *Walz* was decided in 1970, when *Lemon* agreed in 1971, and it is most certainly true today with an additional 50 years of tradition to add to the tally. Given this record, §107(2) is undoubtedly constitutional.

C. Eliminating 26 U.S.C. § 107(2) and forcing ministers to apply for exemption under another employee housing section would trigger excessive government entanglement.

The consequence of CARC's argument—requiring ministers to seek exemption under traditional employer-employee exemptions—is, in fact, unconstitutional. Eliminating 26 U.S.C. § 107 (2) forces ministers to comply with the far more detailed and particular—and thus more entangling—requirements of §119(a)(2). This was confirmed in *Walz*: "[e]limination of exemption would tend to *expand* the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts what follow in the train of those legal processes." *Walz*, 397 U.S. at 674 (emphasis added).

Take, for example, a minister whose housing is viewed as an extension of the Church itself, used for various religious purposes such as a meeting place for various church groups, or to provide religious services. *E.g.*, *Immanuel Baptist Church v. Glass*, 497 P.2d 757, 760 (Okla. 1972). To satisfy the requirements of Section 119(a)(2), the IRS would have to determine the "business" of the Church and where and how far the "premises" of the Church extends. This could require the interrogation of ministers or attempting to define what constitutes "worship." *Lemon* especially warns against these types of programs "whose very nature is apt to entangle the state in details of administration." *Lemon*, 403 U.S. at 615 (quoting *Walz*, 397 U.S. at 695).

As this Court found in *Walz*, and as is present here, the §107(2) exemption "gives rise to some, but yet a lesser, involvement than taxing [the churches]." *Walz*, 397 U.S. at 675. "The exemption creates only a minimal and remote involvement

between church and state and *far less than taxation of churches*." *Id.* (emphasis added). Eliminating 26 U.S.C. § 107(2) would frustrate decades of fundamental Establishment Clause precedent and lead to excessive government entanglement in clear violation of the First Amendment.

CONCLUSION

The court of appeals did not err in deciding that Petitioner Burns is not a minister of the gospel within the meaning of 26 U.S.C. § 107(2) and that 26 U.S.C § 107(2) is constitutional under the Establishment Clause. Therefore, we respectfully ask that this Court affirm the Eighteenth Court of Appeals.

Respectfully submitted,
Team 14
Counsel for Respondents
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