NO. 20-199

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 2020

JOHN BURNS,

Petitioner,

and

CITIZENS AGAINST RELIGIOUS CONVICTIONS, INC.,

Petitioner-Intervenor,

v.

INTERNAL REVENUE SERVICE AND COMMISIONER OF TAXATION,

Respondents.

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

BRIEF FOR PETITIONER AND PETITIONER INTERVENOR
Team 15

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Questions Presented

I. Whether a teacher at a religious institution who plays a role integral to the functioning of the institution and frequently promotes religion in this role is a “minister of the gospel” under Section 107(2).

II. Whether a provision of the Internal Revenue Code that gives overt preferential treatment to religious groups is a violation of the Establishment Clause.

Statement of the Case

Petitioner Burns is a teacher and guidance counselor at Whispering Hills Academy (the "Academy"), a religious boarding school operated by and located next to the Whispering Hills Unitarian Church (the "Church"). (R. at 3). As a part of his employment, Burns teaches English, Renaissance Literature, and foreign languages as well as counsels students using a "faith-based approach." (R. at 8). He also created and leads an after-school club, Prayer After Hours. Additionally, he hosts "youth ministry"-like gatherings on the weekends for students who are unable to go home. (R. at 3). The students discuss faith and other topics with Burns at these events. (R. at 3).

After accepting the job, Burns moved into a home five minutes from the Academy to reduce his commute. (R. at 3). The Academy provided him a $2,500 moving credit and continues to include a rental allowance of $2,100 per month in his salary. This amount is equivalent to his home's fair rental value and expected utilities. (R. at 4). To lower his tax burden in 2017, Burns claimed the parsonage exemption under Section 107(2) of the Internal Revenue Code. However, Burns received a letter of denial from the Internal Revenue Service ("IRS"). (R. at 4). Accordingly, Burns sued the IRS in the District Court for the Southern District of Touroville, claiming he was eligible for the parsonage exemption as a "minister of the gospel." (R. at 4).

After learning about Burns's suit, Citizens Against Religious Convictions, Inc. ("CARC") filed a Motion to Intervene under Rule 24(a)(2) of the Federal Rules of Civil Procedure to challenge the constitutionality of 26 U.S.C. § 107(2). (R. at 2). CARC argues "that Section 107(2) has the primary effect of granting a direct subsidy" to religious groups in violation of the Establishment Clause of the First Amendment. (R. at 22). The District Court granted the motion. (R. at 2). Additionally, the Defendants filed a motion for summary judgment. (R. at 2). In denying

the Defendants' Motion, the District Court held "Burns is a 'minister of the gospel' because he actively performs sacerdotal functions, educates his students on secular matters as a part of the faith-based curriculum, and counsels students on personal and religious matters." (R. at 3). Additionally, the District Court held the parsonage exemption violates the Establishment Clause and is therefore unconstitutional. (R. at 3).

The IRS and the Commissioner of Taxation appealed the District Court's order denying the Motion for Summary Judgment. (R. at 15). The United States Court of Appeals for the Eighteenth Circuit reversed the District Court and granted summary judgment for the Defendants because Burns failed to prove his employer regarded him as a "minister of the gospel" and Section 107(2) is constitutional as it allegedly aids separation of church and state. (R. at 16). Burns and CARC filed a petition for certiorari in the Supreme Court of the United States. This Court granted the petition. (R. at 26).

Summary of the Argument

Churches create and fund religious schools to incorporate and emphasize faith in education. To achieve this goal, the schools must employ teachers that can further the church's message. Without teachers to monitor after school activities and teach the curriculum, a school cannot function. Accordingly, teachers at private, religious schools are integral to the church's conduct and maintenance. Further, religious schools often choose teachers for their ability to serve as a religious example. A "minister of the gospel" in its most basic sense includes individuals who maintain part of the church and lead others in the faith. Therefore, Burns is a "minister of the gospel."

Although Burns is a "minister of the gospel" under the Internal Revenue Code, CARC argues that the parsonage exemption is unconstitutional under the Establishment Clause of the First Amendment. Religious freedom is the cornerstone of American government. An integral part of that freedom is the neutrality of the government in the practice of religion. The government providing a subsidy to churches and their ministers is not government neutrality; it is direct government support of religion over non-religion. Because the parsonage exemption violates the fundamental ideals of religious freedom promised by the Constitution, this Court should hold it unconstitutional.

Argument

I. Burns is a "minister of the gospel" and is entitled to the exemption.

"Ministers of the gospel" can exclude from their gross income rental allowance received as part of their compensation. 26 USC § 107(2). A taxpayer must meet two requirements to qualify for this deduction. First, the rental allowance must be payment for "services which are ordinarily the duties of a 'minister of the gospel.'" 26 CFR § 1.107-1(a). Tax Regulation 1.107-1 provides

examples of duties of a "minister of the gospel" and incorporates rules provided in 26 CFR 1.1402(c)-5 for determining when other services are ordinarily the duties of a "minister of the gospel." *Id.* Second, the taxpayer must be a duly ordained, commissioned, or licensed "minister of the gospel." *Id*. Although Burns is not an ordained "minister of the gospel," he is a commissioned and licensed "minister of the gospel."

A. Burns's rental allowance is payment for services which are ordinarily the duties of a "minister of the gospel."

IRS Regulations 1.107-1 and 1.1402(c)-5 clarify what a "minister of the gospel" is under Section 107(2). *Chevron* deference applies to tax regulations, meaning this Court must defer to the Regulations if Congress has not directly addressed the precise question at issue and the Regulations are reasonable. *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 56 (2011). Since Congress has not addressed the precise question at issue and Regulations 1.107-1 and 1.1402(c)-5 are reasonable, the Court must defer to them.

Under the *Chevron* analysis, courts first ask whether Congress has directly addressed the precise question at issue. *Id.* at 52. The precise question here is the meaning of "minister of the gospel." (R. at 5). Congress has not directly addressed this question because Congress did not define "minister of the gospel" and the statute in question is subject to more than one reasonable interpretation. 26 USCS § 107. First, "minister of the "gospel" could mean an ordained minister or similar religious official who is employed by a church or similar religious organization, regardless of the employee's duties. *Kirk v. Comm'r*, 425 F.2d 492, 494 (D.C. Cir. 1970), writ of cert. denied, 400 U.S. 853 (1970). Second, it could include a person who performs the duties of a minister such as hosting youth ministry, praying with students daily, counseling students on spiritual matters, and "administering and maintaining religious organizations and their integral

agencies." 26 CFR 1.107-1. Since the statute is subject to at least two reasonable interpretations, Congress has not directly addressed the question at issue.

If Congress has not directly addressed the precise question at issue, courts will only overturn arbitrary and capricious rules or rules that are manifestly contrary to the statute's meaning. *Mayo Found. for Med. Educ. & Research*, 562 U.S. at 53. If an agency's rule is reasonable, then it is not arbitrary and capricious in substance, or manifestly contrary to the statute's meaning. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984). Regulations 1.107-1 and 1.1402(c)-5 are reasonable because the plain language of Section 107(2) does not require an ordination litmus test. While an ordination litmus test is compatible with the plain languages, it improperly favors hierarchical religions over nonhierarchical religions. For example, Jewish cantors are not ordained like Rabbis, but they officiate public worship rituals, train boys for introduction into adult Jewish life, and control the congregation's music program. *Salkov v. Comm'r*, 46 T.C. 190, 191 (1966). These are duties traditionally performed by ministers of the gospel, and people who perform these duties should not be excluded from the parsonage exemption simply because they are not formally ordained. Additionally, the Regulations focus on the employee's duties, providing a reasonable amount of flexibility within the language of Section 107 without turning every employee into a minister. Therefore, Regulations 1.107-1 and 1.1402(c)-5 are entitled to *Chevron* deference.

An employee is a "minister of the gospel" if he performs duties ordinarily performed by a "minister of the gospel." 26 CFR § 1.107-1. Regulation 1.107-1 provides examples of duties of a "minister of the gospel" and incorporates § 1.1402(c)-5's rules for determining when other services are ordinarily the duties of a "minister of the gospel." *Id.* Some examples of services which are ordinarily the duties of a "minister of the gospel" are (1) the administration, maintenance of

religious organizations and their integral agencies, (2) the control, conduct, administration, and maintenance, of religious organizations and their integral agencies, (3) the performance of sacerdotal functions, and (4) the conduct of religious worship. 26 CFR § 1.107-1; 26 CFR § 1.1402(c)-5. As a guidance counselor and teacher at Whispering Hills Academy, Burns performs duties of a "minister of the gospel."

1. Burns controls, conducts, administers, and maintains Whispering Hills Academy, an integral agency of Whispering Hills Unitarian Church.

One way to prove that a taxpayer receives the rental allowance for services which are ordinarily the duties of a "minister of the gospel" is by establishing that the taxpayer administers, controls, conducts, and maintains an integral agency of a religious organization under the authority of a church. The taxpayer must first establish that his employer is an integral agency of a religious organization under the authority of a church. Then, the taxpayer must show that he controls, conducts, and maintains that integral agency.

a. Whispering Hills Academy is an integral agency of Whispering Hills Unitarian Church.

Whispering Hills Academy is an integral agency of the Church because it satisfies the eight-factor test in Revenue Ruling 72-606. This Court should adopt Revenue Ruling 72-606's test in determining whether a religious school is an integral agency of a religious organization because it is reasonable and will provide consistency in the application of Regulation 1.107-1.

This Court should adopt Revenue Ruling 72-606's eight-factor test because it is persuasive. Revenue Rulings are interpretive rules. *First Chi. NBD Corp. v. C.I.R.*, 135 F.3d 457, 459 (7th Cir. 1998). Interpretive rules are entitled to respect according to their persuasiveness but are not entitled to *Chevron* deference. *United States v. Mead Corp.*, 533 U.S. 200, 221 (2001). Revenue Ruling

72-606 supplies eight factors that the IRS uses to determine whether a school is an integral agency of a church. These factors all directly relate to the degree of control the church has over the school and the nature of the school-church relationship. By focusing on the relationship and degree of control, Revenue Ruling 72-606 produces consistent results, provides courts with a clear analytical framework, and prevents courts from excessive entanglement with religion. The test also gives taxpayers clarity about their tax liability. Accordingly, this Revenue Ruling is persuasive and entitled to some deference.

Additionally, every court addressing whether a school is a church's integral agency under Regulation 1.107-1 after Revenue Ruling 72-606 was adopted has used the ruling. *See, e.g., Flowers v. United States*, 1981 U.S. Dist. LEXIS 16758 (N.D. Tex. November 25, 1981); *Toavs v. Comm'r*, 67 T.C. 897 (1977). Further, both the District Court and the Court of Appeals in this case used Revenue Ruling 72-606. (R. at 7, 20). The support of all courts addressing this issue further demonstrates the Ruling's persuasiveness.

Burns has the burden of proving that he is entitled to the parsonage exemption. *U.S. v. Olympic Radio & Television, Inc.*, 349 U.S. 232, 236 (1955). Consequently, Burns must prove that Whispering Hills Academy is Whispering Hills Unitarian Church's integral agency. 26 CFR § 1.107-1. Since this case arose from the IRS's Motion for Summary Judgment, all factual inferences should be drawn in a manner most favorable to Burns. (R. at 2); *Anisetti v. Comm'r*, 2020 Tax Ct. Summary LEXIS 3, 5 (2020). The Court of Appeals erred by refusing to make reasonable inferences in Burns's favor when applying the factors and therefore not holding that the Academy is the Church's integral agency.

The first factor considers whether the church incorporated the school. Rev. Rul. 72-606. There is no direct evidence of this factor, but the Court can infer that the Whispering Hills

Unitarian Church incorporated the Academy since they share a name, the Academy is steps away from the Church, and the Academy teaches the Church's religion as part of its curriculum. (R. at 1-2, 3, 8). These facts, when viewed in a light most favorable to Burns, are sufficient to allow the Court to infer that the Church incorporated the Academy.

Burns satisfies the second factor, which considers whether the corporate name of the school indicates a church relationship. Rev. Rul. 72-606. The names of the Academy and Church, Whispering Hills Academy and Whispering Hills Unitarian Church, indicate a close relationship (R. at 1-2). Accordingly, this factor favors Burns.

Burns also satisfies the third factor, which considers whether the church continuously controls, manages, and maintains the school. Rev. Rul. 72-606. The Church governs the Academy, indicating a substantial degree of control. (R. at 1-2). Additionally, the physical proximity of the Church and Academy indicates a substantial degree of control as well. Moreover, Academy students attend Sunday services at the Church and the Academy teaches the Church's religion as part of its curriculum. (R. at 3, 8). Therefore, the Church continuously controls, manages, and maintains the school.

The fourth, fifth, and sixth factors are neutral and should not be held against Burns. The fourth factor considers whether the trustees or directors of the school are or must be approved by the church. The fifth factor considers whether the trustees or directors may be removed by the church. The sixth factor considers whether annual reports of finances and general operations are required to be made to the church. There is no evidence in the record to support either party on these factors. Inferences of fact should be made in Burns's favor. Since there is no evidence related to these factors, this Court should, at the very least, not hold these factors against Burns.

The seventh factor considers whether the church contributes to the school's support. Here, Academy students who cannot go home on the weekends attend Sunday services at the Church. (R. at 3). The Academy is on the Church's property, indicating that the Church supports the Academy by providing a place for the Academy to instruct students. (R. at 3). The Academy and Church have nearly identical names, indicating that the Church supports the Academy by sharing its reputation among the congregation and community. Finally, the Church allows Burns to hold his "youth ministry" at the Church after Sunday services, meaning that the Church provides a place for some of the Academy's extracurricular activities. (R. at 3). All of these facts indicate the Church's support of the Academy.

The eighth factor considers whether the school's assets would be turned over to the church if the school dissolved. Though there is no direct evidence of this factor, the Court can infer that if the Academy dissolved, its assets would be turned over to the Church because the Church likely incorporated the Academy, and the Academy is located on Church property. Because the Court should make all factual inferences in Burns's favor, this factor also favors him.

In sum, five of the eight factors favor holding that the Academy is an integral agency of the Church. The IRS has failed to provide evidence relating to the other four factors, indicating that the IRS considers these factors less important in this case. The five disputed factors show that the Church and Academy have a close relationship and that the Academy relies on the Church for support. Accordingly, Whispering Hills Academy is an integral agency of Whispering Hills Unitarian Church.

Additionally, the lower court's reliance on *Flowers* in this case is misplaced. *Flowers* stands for the premise that when there is no legal relationship and the church does not support the school, the school is not an integral agency of the church. *Flowers v. U.S.*, 1981 U.S. Dist. LEXIS

16758 (N.D. Tex. Nov. 25, 1981). There, no evidence of direct or indirect control existed, and the church's contributions were roughly one percent of the college's annual budget. *Id.* at 4. Those facts do not support a finding that a school is an integral agency of a church, but this case is different. Here, the Church's religion is a critical part of curriculum, students attend services at the Church, and the Church provides support by providing physical space for extracurricular worship activities, sharing its reputation with the Academy, and sharing its property with the Academy. Thus, *Flowers* is distinguishable from this case.

b. Burns controls, conducts, and maintains Whispering Hills Academy.

An employee is a "minister of the gospel" when he performs services which are ordinarily the duties of a "minister of the gospel". 26 CFR §1.107-1(a). The administration, maintenance, control, and conduct of a religious organization's integral agency is a service that is ordinarily the duty of a "minister of the gospel." *Id.*

As a teacher, Burns teaches language and literature classes in harmony with the Academy's faith. (R. at 3). A school would be impossible to maintain if teachers did not teach — what is the conduct of a school if not teaching? Therefore, as a teacher, Burns plays a key role in the maintenance of a religious organization's integral agency. Additionally, Burns ensures that students who cannot go home on the weekends have an opportunity to socialize, increasing the likelihood that they will not leave the Academy. Further, Burns founded the Prayer After Hours club, which provides a religious extracurricular activity for students and therefore maintains the Academy while promoting the Church's religious beliefs. Thus, in his role as a teacher, Burns performs duties ordinarily done by "ministers of the gospel."

Additionally, as a guidance counselor, Burns advises students on spiritual, personal, and educational matters. (R. at 3). Guidance counselors commonly have a variety of duties including

collaborating with teachers, administrators, and parents to help students succeed; maintaining records; and counseling individuals and small groups on the basis of student and school needs. WHAT SCHOOL AND CAREER COUNSELORS DO, https://www.bls.gov/ooh/Community-and-Social-Service/School-and-career-counselors.htm#tab-2 (last visited, Mar. 10, 2021). Guidance counselors are often viewed as administrators, which furthers the conclusion that Burns is an administrator at the Academy. By counseling students on spiritual matters, Burns is promoting the Church's beliefs and maintaining the Academy, and therefore, performing duties of a "minister of the gospel."

Some courts have concluded that an employee must perform specific religious activities and conduct of sacerdotal functions to qualify for the exemption. *See, e.g., Tanenbaum v. Comm'r*, 58 T.C. 1 (1972); *Lawrence v. Comm'r*, 50 T.C. 494 (1968); *Kirk v. Comm'r*, 425 F.2d 492 (D.C. Cir. 1970); (R. at 19). This approach misapplies Rule 1.107-1. Rule 1.107-1 requires the rental allowance to be payment for services which are ordinarily the duties of a "minister of the gospel." 26 CFR § 1.107-1. Some examples of services which are ordinarily the duties of a "minister of the gospel" 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.* Use of the word "and" here means that each of the listed services is itself a duty of a minister. The Rule does not facially or impliedly require that an employee perform sacerdotal functions or the conduct of religious worship, but instead provides those as examples of duties of a minister. *Id.* Accordingly, lack of evidence of Burns performing sacerdotal functions should not be decisive in this case.

Further, *Tanenbaum*, *Lawrence*, and *Kirk* are distinguishable from this case. In *Tanenbaum*, an ordained Rabbi employed by a non-religious organization to perform secular tasks

was ineligible for the parsonage exemption *Tanenbaum*, 58 T.C. at 2-4. When an employee is not employed by a religious organization or its integral agency, the employee is only eligible for the parsonage exemption if he performs "service in the conduct of religious worship or the ministration of sacerdotal functions." 26 CFR § 1.1402(c)-5. Here, Burns is employed by an integral agency of a religious organization and is employed to control, conduct, and maintain the integral agency. These facts invoke a completely different part of the Regulations. Therefore, this case is distinguishable from *Tanenbaum*.

In *Lawrence*, the issue also pertained to performance of sacerdotal functions. *Lawrence*, 50 T.C. at 496. Precedent determining whether an employee performs sacerdotal functions is inapplicable here because Burns is not paid to perform sacerdotal functions. Accordingly, *Lawrence* does not control the Court's analysis of this case.

Finally, the court in *Kirk* only determined whether a taxpayer performed sacerdotal functions. *Kirk*, 425 F.2 at 495. The Court of Appeal's reliance on *Kirk* as a reason to deny Burns the parsonage exemption is misplaced. Burns does not perform sacerdotal functions for his employer, but he does control, conduct, and maintain a religious organization's integral agency which makes him a "minister of the gospel" under Section 107(2). Thus, *Kirk* is also not controlling here.

B. Burns is a commissioned and licensed minister.

Regulation 1.107-1 incorporates Regulation 1.1402(c)-5's "duly ordained, commissioned, or licensed" requirement. "Ordained, commissioned, or licensed" is a disjunctive phrase, meaning that one can be an ordained minister, commissioned minister, or a licensed minister and fall within the scope of Regulation 1.1402(c)-5. *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018) (holding that the use of "or" to join two activities suggests that the exemption covers a person engaged in either activity); Rev. Rul. 78-301. Regulation 1.1402(c)-5 does not define

"commissioned" or "licensed," so this Court should give the phrases their ordinary meaning. *Encino Motorcars, LLC*, 138 S. Ct. at 1140. "Commission" means "an authorization or command to act in a prescribed manner or to perform prescribed acts." Merriam-Webster, https://www.merriam-webster.com/dictionary/commission (last visited March 10, 2021). Accordingly, the common meaning of commissioned "minister of the gospel" would be a person who is authorized or commanded to perform services ordinarily performed by a "minister of the gospel." As long as a person is employed to control, maintain, administer, and conduct an integral agency of a religious organization, the person would be a commissioned "minister of the gospel." Burns was hired to be a guidance counselor and a teacher, roles which require one to control, maintain, administer, and conduct school, an integral agency of a religious organization; therefore, Burns is a commissioned "minister of the gospel."

"License" means "permission or freedom to act." Merriam-Webster, https://www.merriam-webster.com/dictionary/license (last visited March 10, 2021). A licensed "minister of the gospel," for purposes of the parsonage exemption, would be an employee who has permission to control, maintain, administer, and conduct an integral agency of a religious organization. The school gave Burns permission to pray with students daily, give them spiritual advice as the school guidance counselor, and have his youth ministry with students after religious services. Accordingly, Burns is a licensed "minister of the gospel."

II. Section 107(2) is unconstitutional because it violates the Establishment Clause of the First Amendment.

Nothing is more central to the functionality of the United States government than the tax system. Similarly as integral, as shown by the First Amendment's text, is the separation of church and state. Although the language does not define the appropriate level of separation required, the

text prohibits dependency of one on the other. *Zorach v. Clauson*, 343 U.S. 306, 312 (1952). The Establishment Clause was adopted to prevent the Congress from interfering with the individual's "freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience." *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985). Likewise, the Framers believed that all religious beliefs are worthy of respect and the product of a voluntary choice, even if that choice is the belief in no God. *Id*. at 53. This Court must protect America's foundational beliefs and remain "firmly committed to a position of neutrality," *Sch. Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 226 (1963). More specifically, as this Court has stated that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 16 (1947). Further, in Mark 12:17, Jesus Christ told his people to "[r]ender to Caesar the things that are Caesar's, and to God the things that are God's" regarding paying taxes. *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 702 (7th Cir. 2005). Indeed, the United States Constitution, this Court, and even religion itself, stand for the separation of the church and the government when it comes to taxes.

Although the Constitution mandates separation of church and state, Section 107(2), known as the parsonage exemption, provides a special housing exemption for "ministers of the gospel," while not affording a similar exemption to other professions. *See Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 15-16 (1989) (noting that "if Texas sought to promote reflection and discussion about questions of ultimate value and the contours of a good or meaningful life, then a tax exemption would have to be available to an extended range of associations whose publications were substantially devoted to such matters..."). This housing exemption for religious leaders is completely contrary to the Establishment Clause, which the Framers designed to prevent the

government from favoring religion over non-religion. *United States v. Lee*, 455 U.S. 252, 263 (1982). Various congressional documents show the substantial benefit conferred upon ministers by the Federal government in direct violation of the United States Constitution. For example, without Section 107(2), America's clergy would face a "devastating tax increase of $2.3 billion over the next [five] years." 148 Cong. Rec. H1299-01 (2002). As the district court below noted, the government is losing billions of dollars by exempting ministers, so non-religious taxpayers are essentially "picking up the tab." (R. at 13). This Court should not allow this violation of the Establishment Clause to continue.

To determine whether the government has violated the Establishment Clause, this Court most commonly uses the *Lemon* test. When analyzing a government action under the *Lemon* test, the Court must consider three factors that have developed over many years. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). In this case, the statute does not have a clear secular legislative purpose, the effect of the statute is an advancement of religion, and the statute fosters an excessive government entanglement of religion and therefore fails the *Lemon* test. Accordingly, the Section 107(2) is unconstitutional.

A. Section 107(2) does not have a secular legislative purpose because it unduly protects "ministers of the gospel" at the expense of other taxpayers.

When analyzing the first prong of the *Lemon* test, the primary question is "whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Books v. City of Elkhart, Ind.*, 235 F.3d 292, 302 (7th Cir. 2000) (internal quotation marks omitted). Stated differently, "the government lacks a secular

purpose under *Lemon* only when 'there is no question that the statute or activity was motivated wholly by religious considerations.'" *Milwaukee Deputy Sheriffs' Ass'n v. Clarke*, 588 F.3d 523, 527–28 (7th Cir. 2009). Various writings during the drafting of Section 107(2) prove that the statute's actual purpose was to promote the spread of the Christian faith.

Lower courts have held that the federal income tax exemption granted solely to "ministers of the gospel" violated the Establishment Clause because a primary function of a "minister of the gospel" was to disseminate a religious message. *E.g. Freedom from Religion Found., Inc. v. Lew*, 983 F.Supp.2d 1051, (W.D. Wis. 2013); *Sch. Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 388 (1985), overruled on other grounds by *Agostini v. Felton*, 521 U.S. 203, 203 (1997). According to the legislative history and the context of the Section 107(2), the legislature was not motivated by a secular purpose. Even though the legislature attempted to disguise this religious motive by showing how ministers benefit the community, the legislature actually gave ministers of the gospel this tax benefit so that they have more funds to spread their religious doctrine. Furthermore, tax exemption provided only to ministers resulted in even greater preferential treatment for religious messages over secular ones, even though doing so was not necessary to alleviate a particular burden on religious exercise. *Id.* Because the underlying purpose of the statute is to promote religion rather than any secular purpose, it fails the first prong of the *Lemon* test and therefore violates the Establishment Clause.

1. **Legislative history demonstrates that the purpose of Section 107(2) is to encourage advancement of religion by ministers of the gospel.**

The legislative intent of Section 107(2) was to advance the ministers' missions in spreading their gospel to the un-churched. When Section 107(2) was enacted, multiple legislators made open comments about their desire to protect clergy because their religious teachings benefit the

community. In one report, a legislator stated that "our Nation's clergy are worthy of our continual appreciation and praise.... But more importantly, our Nation's clergy are worthy of our support." 148 Cong. Rec. E560-07 (2002). Another report admits that this tax break will encourage ministers to open their homes to the un-churched and provide a meeting space for church members, which undoubtedly promotes religion. 148 Cong. Rec. H1299-01 (2002). Further, the same report also outlined the challenges ministers face when trying to spread their religious doctrine. *See id.* The legislators claimed that ministers are worthy of a special housing exemption because they must "cultivate faith in a world that too often seems not to have the time or inclination to accommodate spiritual development." *Id.* The Promoters of this tax exemption believe that Christianity is the answer for all America's societal issues and wish to force it upon nonbelievers. The constitution compels the government to not give an unfair advantage to religious, especially at the expense of others. Additionally, in other reports, legislators tried to justify the government's advancement of religion by disguising its true religious objective with various secular purposes. The reports claim that "[n]ot only do [ministers] lead congregations in worship, but also they help combat such traumas as drug-addiction and domestic abuse." 148 Cong. Rec. E560-07 (2002). Although ministers do work with the greater community, an underlying message of religion always accompanies this work. These reports are a clear message from the legislature that the purpose behind the statute is far from secular.

In the present case, Burns teaches secular subjects at a religious school, but his actions outside the classroom give sufficient evidence that his main purpose is to spread his religious beliefs to his students. (R. at 3). Courts have noted that providing for the education of schoolchildren is a praiseworthy purpose; however, even such a praiseworthy purpose cannot validate government aid to parochial schools when the tax exemption has the effect of promoting

a single religion. *Sch. Dist. of City of Grand Rapids v. Ball*, 473 U.S. at 382. The Court also correctly stated that "just as religion throughout history has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions or sects that have from time to time achieved dominance." *Id.* The government cannot justify advancement of Christianity simply because ministers do good things for the community, including education, and must refrain from aiding the advancement of religion through Section 107(2).

1. The history of Section 107(2) makes clear that the legislature wrote this tax exemption to preserve the church by benefitting ministers of the gospel.

Similar to the legislative history of Section 107(2), the historical context of this tax exemption demonstrates that legislators were trying to disguise the advancement of religion as "benefitting the community." Even the author of the provision, Representative Peter Mack, declared that "in these times when we are being threatened by a godless and antireligious world movement, we should correct this discrimination against certain ministers of the gospel who are carrying on such a courageous fight against this foe. Certainly, this is not too much to do for these people who are caring for our spiritual welfare." Chemerinsky, *The Parsonage Exemption Violates the Establishment Clause and Should Be Declared Unconstitutional*, 24 WHITTIER L. REV. 707, 711 (2003) [hereinafter Chemerinsky]. Indeed, ministers are people that devote all their time to the work of the church and have no income except such as is paid by his congregation. Accordingly, the tax exemption acts as a supplement to ministers' income and aids their efforts in their religious work. *Id.* This is clear evidence of the exemption's underlying purpose. This Court should not allow such a violation of the Establishment Clause.

Supporters of Section 107(2) claim that the housing exemption should also be upheld because of its longstanding existence in American law. However, this alone does not mean that the Court should uphold it. Something more than "just history" must justify upholding an unconstitutional tax exemption. *Marsh v. Chambers*, 463 U.S. 783, 790 (1983). Accordingly, this is not decisive in the case at hand.

Further, in this case, the historical context of the Establishment Clause's drafting supports striking Section 107(2), not maintaining it. History shows how important taxation was to the writers of the Constitution. British citizens moved to the American colonies because they refused to give their tax dollars to the government church. *Everson,* 330 U.S. at 8-9 (Jackson, dissenting). The government compelled citizens to pay tithes and taxes in England to support the church. *Id.* Consequently, exemptions like Section 107(2) are contrary to why the United States initially became an independent nation. *Id.* During the formation of the federal government, Thomas Jefferson articulated that government aid to religion was against the foundational principles of this country. Chemerinsky. Jefferson wrote: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical: That even the forcing [of] him to support this or that teacher of his own religious persuasion, is depriving him of . . . comfortable liberty." *Id.* The tax break for ministers in Section 107(2), especially when combined with the clergy's ability to deduct the mortgage interest that they paid with tax-free dollars, has all taxpayers paying taxes to benefit "ministers of the gospel" and the religions that employ them. *Id.* at 721. This is precisely the type of forced "support" for "teachers of . . . religious persuasion" that Jefferson condemned. *Id.* at 721. Therefore, this Court should hold Section 107(2) unconstitutional because it has a religious purpose contrary to the longstanding principles of religious tolerance of this country and fails the first prong of the *Lemon* test.

B. The principal and primary effect of Section 107(2) is to advance religion because the tax exemption gives ministers of the gospel preferential treatment to further their religions.

The next factor of the *Lemon* test deals with the effect of the law in question rather than its actual purpose. The proper inquiry under the second prong is whether Congress has chosen a rational means to further a legitimate, secular end. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1987). Even if the parsonage exemption had an underlying secular purpose, which it does not, the exemption's effect allows "ministers of the gospel" to claim the tax break even if they never use their homes for religious purposes. *Id.* Moreover, Section 107(2) permits "ministers of the gospel" to be paid most or all of their salary in tax-free dollars, which renders the exemption overinclusive. *Id.* at 725. On the other hand, the parsonage exemption is also underinclusive because "countless taxpayers who are not clergy members use their homes for exactly the purposes identified in the briefs supporting the parsonage exemption." *Id.* at 726. Because Section 107(2) forces non-religious taxpayers to subsidize the church while benefitting ministers, it fails the second factor of the *Lemon* test.

1. The government aid is direct and substantial.

The government provides direct and substantial aid to ministers by giving ministers preferential tax treatment. The money the government and taxpayers could save if not for the parsonage exemption is substantial. Supporters of Section 107(2) claim that a tax exemption is not a preference to ministers of the gospel nor direct aid. However, when the government grants exemptions, all taxpayers are affected; the very fact of the exemption means that other taxpayers are the vicarious "donors." *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983). If the purpose of the exemption is to alleviate monetary burdens imposed on religious practice, which is

the case with the parsonage exemption, the exemptions fail to include a much broader range of secular institutions. *Budlong v. Graham*, 488 F. Supp. 2d 1252, 1258 (N.D. Ga. 2007). A minister's potential public benefit does not justify forced donations by American citizens.

Moreover, government sponsorship of religion occurs when the government funds, directly or indirectly, any religious organization. The present case deals with a fully private, religious school that provides no benefit to the secular, public community. The court below recognized this distinction and noted that "[b]y implementing a tax scheme that favors only religion, the government is essentially promoting the activity that it is subsidizing." (R. at 12). This "seeks to achieve the same basic goal of encouraging the development of certain organizations through the grant of tax benefits." (R. at 12, quoting *Bob Jones Univ. v. United States,* 461 U.S. 574 at 587). The Brookings Institution, writing in 1933, said about tax exemptions of religious groups: "Tax exemption, no matter what its form, is essentially a government grant or subsidy." The Brookings Institution, *Report on a Survey of Administration in Iowa: The Revenue System 33* (1933); quoted in *Walz v. Tax Comm'n of N.Y.C.*, 397 U.S. 664, 709 (1970).

Notably, this Court has stated that tax exemption functions in the same way as a government subsidy. *Tex. Monthly*, 489 U.S. at 15 (Brennan, J., plurality opinion). Other courts guided by this statement have noted that, although the government chose to provide financial aid through exemptions from taxable income under tax code rather than through direct grants, the tax benefits by their very terms accrued directly to religious authorities. *Freedom from Religion Found., Inc. v. Geithner*, 715 F.Supp.2d 1051, 1061 (E.D. Cal. 2010). Many supporters of Section 107(2) use *Walz* as evidence that this Court allows tax exemptions for religious leaders, but the exemption in *Walz* is clearly distinguishable from the present case. Chemerinsky. In *Walz*, a property owner sought an injunction to prevent the New York City Tax Commission from granting

tax exemptions to religious organizations for properties used solely for religious worship, and this Court upheld the exemption. *Walz,* 397 U.S. at 666-67. However, the tax exemption at issue in *Walz* applied to both religious and non-religious organizations, but the parsonage exemption benefits only religion. Chemerinsky. Therefore, a tax exemption can unconstitutionally endorse religion, especially when the outcome only benefits religious institutions from that exemption.

The most effective way to establish any institution is to finance it; church groups reflect this truth in appeals for public funds to finance their religious schools. *Schempp*, 374 U.S. at 229 (Douglas, concurring). Even though the religious institution in the present case is a school, the church is an "inseparable whole," strengthened by support for any department by contributions from other than its own members. *Id.* Thus, the government may not make contributions even to a minor degree without violating the Establishment Clause. *Id.* at 230. Therefore, the tax exemption's effect is to advance religion and fails the second prong of the *Lemon* test.

2. **The effect of Section 107(2) is discriminatory because it unconstitutionally favors some religions over others.**

Above all else, the government's attitude toward religion, as this Court has previously stated, must be one of neutrality. *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, concurring). However, neutrality requires that "government neither engage in nor compel religious practices, that it shows no favoritism between religion and nonreligion, and that it works deterrence of no religious belief." *Schempp*, 374 U.S. at 249 (Goldberg, concurring). A warning from this Court's precedent that tax exemptions can, in fact, be discriminatory to certain groups drove the court below. (R. at 13). This Court has previously made clear that tax exemptions that are discriminatory, and thus not neutral in practice, place a burden on one group but give special treatment to the next. *CSX Transp., Inc. v. Ala. Dept. of Revenue*, 563 U.S. 277, 287-289

(2011). Section 107(2) fits this description precisely because it not only requires non-religious taxpayers to involuntarily subsidize religion but also singles out a particular majority faith.

In *Texas Monthly, Inc. v. Bullock,* this Court found a tax exemption for religious publications in violation of the Establishment Clause. *Tex. Monthly, Inc.*.489 U.S. at 5 (Brennan, J., plurality opinion.) Similar to Section 107(2), the only groups that benefit from the narrow tax exemption are those that have the goal of advancing a particular religious doctrine. *Id.* Since other non-religious institutions do not get this benefit, the statute's effect was clearly to advance the gospel. *Id.* This Court expresses its concern in *Texas Monthly* with how expansive an exemption must be not to violate the Establishment Clause. *Id.* at 15. The Court concluded the exemption's permissibility depends on the government's secular aim in granting such an exemption. *Id.* at 15-16.. If the State chose to subsidize, by using tax exemption, all groups that contributed to the community's cultural, intellectual, and moral betterment, then the exemption for religious publications could be retained, provided that the exemption swept as widely as the property tax exemption upheld in *Walz. Id.* at 15-16. However, this is not the case for Section 107(2). The amount of taxes due by ministers directly influences their ability to advocate for their particular religious doctrine. In the concurring opinion in *Texas Monthly*, Justice Blackmun agreed that "the Establishment Clause... suggests that a State may not give a tax break to those who spread the gospel that it does not also give to others who actively might advocate disbelief in religion." *Id.* This principle works both ways.

If this Court does not render Section 107(2) unconstitutional, the exemption would result in "double-dipping" for religious institutions and ministers not available to any other profession, even within a religious organization. Because clergy's housing is significantly cheaper due to the parsonage exemption, the exemption benefits the churches that employ them and pays for the

housing. *Id.* This results in a "substantial windfall" for designated clergy that no one else receives. *Id.* The vast majority of employees in other professions must pay taxes on housing allowances. Accordingly, Section 107(2) essentially puts ministers in a better position than most other employees, who may also provide the same benefits to the community. Adam Chodorow, *The Parsonage Exemption*, 51 U.C. DAVIS L. REV. 849, 904 (2018). The government's role is not to equalize church resources or to support those churches with limited resources through a tax exemption when other nonreligious nonprofits face the same struggles without receiving the same benefit. *Id.* at 906. Indeed, this is direct evidence that the parsonage exemption's effect is discrimination against other religious and secular institutions.

3. Furthermore, the term "minister" does not encompass all religions, which means Section 107(2) is even discriminatory amongst religions.

The presence of discrimination even within the religious spectrum is additional evidence that Section 107(2) violates the Establishment Clause. This Court has made it clear that the federal government can neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 193 (2012). Not only does the exemption discriminate against those who do not believe in religion, but it also primarily supports Christians. When drafting the exemption, the government chose the primarily Christian term "ministers" in order to describe who is eligible for the parsonage exemption. In the concurring opinion in *West Lynn Creamery, Inc. v. Healy*, Justice Scalia commented that an exemption, even from a "neutral tax" that favors some over others is "no different in principle than a discriminatory tax... imposing a higher liability on disfavored persons." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210-11 (1994) (Scalia, J., concurring).

Therefore, the discriminatory effect of Section 107(2) directly conflicts with the Establishment Clause.

Although the term "minister" has been interpreted in such a way that every religion is covered under it, the use of "minister" is evidence of Congress' preferential treatment of Christianity. The term, as the writers of this tax exemption knew, is commonly used by many Protestant denominations to refer to members of their clergy. Catholics, Jews, Muslims, Hindus, or Buddhists rarely if ever use the term in this way. *Hosanna-Tabor,* 565 U.S. at 198 (2012) (Alito, J., concurring). Thus, this tax exemption clearly violates the Establishment Clause by discriminating against non-majority religions as well as non-religions. Additionally, this Court recognized that "minister" discriminates against newer religions, which are not affiliated with a national church or which do not have a history of ordaining ministers. *Id.* As one constitutional law scholar stated, Section 107(2) discriminates against religions in so many ways that it undermines any claim that it is justified as a way of treating religions equally. Chemerinsky. Furthermore, the majority of Americans, around four-fifths of people surveyed in a national poll, identify themselves as Christian. Alice Guy, McCreary County v. ACLU: *A Neutral Interpretation of the Establishment Clause That Allows Nonbelievers' Views to Count,* 28 WHITTIER L. REV. 771, 784 (2006). This Court should not allow this favoritism to a majority religion to stand. Because evidence shows the principal and primary effect of Section 107(2) is to give ministers of the gospel preferential treatment, it fails the second element of the *Lemon* test and is therefore unconstitutional.

C. Section 107(2) fosters an excessive government entanglement with religion.

The final prong of the *Lemon* test is to determine whether the government is excessively entangled with religion. *Lemon v. Kurtzman,* 403 U.S. at 613. This Court must examine the

character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. *Id.* at 615. In *Lemon,* the Court noted that the religious program in question required the government to examine the school's records in order to determine how much of the total expenditures are attributable to secular education and how much to religious activity. *Id*. at 620. If the IRS did not perform this inquiry, the government could not keep track of who is a "minister" and who is claiming to be a minister for the sake of the tax break. The alternative option would be to force ministers to comply with the far more detailed and particular, and thus more entangling, requirements of another tax exemption. *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008). Either way, Section 107(2) cannot possibly be interpreted in a way the does not violate the Establishment Clause.

As previously demonstrated, the Academy's purpose in this case is to advance religion, and tax exemptions are a form of government subsidy. Thus, the Court must finally focus on the relationship between the government and the religious institution here. The relationship between the private, religious school in question and the government is one that requires the IRS to determine who is a "minister of the gospel." Because the government wants to maintain some degree of separation between church and state, the legislature should not tell a church whom to ordain (or retain as an ordained minister), how to allocate authority over the affairs of the church, or which rituals and observances are authentic. *Id.* This is precisely what the government must do in order to determine who is eligible for the Section 107(2) parsonage exemption. Therefore, the government is excessively entangled with the church and should not enforce Section 107(2). Section 107(2) requires the government to determine which persons are "ministers of the gospel" by analyzing religious doctrine in each case.

In conclusion, the clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another. *Larson v. Valente*, 456 U.S. 228, 244, (1982). Section 107(2) provides an enormous financial benefit to clergy, and to the religious institutions that employ them, which is not available to any other taxpayers or employers. Chemerinsky. Even in a parochial school such as the Academy, the government's aid, through the parsonage exemption, unconstitutionally benefits the church. Most parochial schools teach all subjects with the ultimate goal of religious education. *Lemon*, 403 U.S. 602 at 634. To authorize the government's subsidization of ministers could potentially put these religious groups in a strong enough political position to write their own religious preferences and prejudices into the law. *Allen,* 392 U.S. at 251 (1968) (Black, J., dissenting). This would link state and churches together by controlling the lives of our citizens, which are made up of many different religions and beliefs. *Id.* As Justice Black noted in his dissent in *Zorach v. Clauson,* "the spiritual mind of man has thus been free to believe, disbelieve, or doubt, without repression, great or small, by the heavy hand of government.... The First Amendment has lost much if the religious follower and the atheist are no longer to be judicially regarded as entitled to equal justice under law." *Zorach v. Clauson*, 343 U.S. at 19-320 (1952) (Black, J., dissenting). This Court should render Section 107(2) unconstitutional and leave the matter of religion up to the individual, the family, and private schools rather than force taxpayers to subsidize private religious institutions with their tax dollars. *People of State of Ill. ex rel. McCollum v. Bd. of Ed. of Sch. Dist. No. 71, Champaign County, Ill.*, 333 U.S. 203, 204–05 (1948).

Conclusion

For the above reasons, Petitioner and Petitioner-Intervenor respectfully ask this Court to reverse the decision of the Court of Appeals for the Eighteenth Circuit.