No. 20-199

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2020

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
SUPREME COURT OF THE UNITED STATES

BRIEF FOR PETITIONER

TEAM 17

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QUESTIONS PRESENTED

1. Whether Petitioner John Burns is a "minister of the gospel" for purposes of 26 U.S.C. § 107(2) when his regular, full-time duties as a teacher and guidance counselor at a religious boarding school incorporate religious principles and his additional activities involve religious worship?
2. Whether 26 U.S.C § 107(2) violates the Establishment Clause of the First Amendment?

STATEMENT OF THE CASE

Petitioner John Burns is employed full-time as a guidance counselor and teacher at Whispering Hills Academy, a religious boarding school operated by Whispering Hills Unitarian Church. R. at 3. Burns' regular, full-time duties include providing academic and personal counseling to Whispering Hills' students in accordance with the school's religious principles, as well as teaching a range of subjects within the school's faith-based curriculum, including English, Renaissance Literature, and several foreign languages. R. at 3. As a guidance counselor, Burns combines both the school's religious tenets and common therapeutic techniques to craft a uniquely faith-based approach to adolescent therapy. R. at 3, 8. Although not an ordained minister, Burns was hired specifically to carry out these duties in furtherance of the school's religious mission. R. at 3, 8. Furthermore, in addition to his duties as a teacher and guidance counselor, Burns plays a prominent role in students' lives outside the classroom. He attends worship services with his students, hosts religious discussions, and leads an informal weekend youth ministry. R. at 3, 8. In recognition of his contributions, Whispering Hills has presented Burns with several awards. R. at 3. Based on these facts, Burns seeks to qualify as a "minister of the gospel" for purposes of claiming the parsonage exemption under 26 U.S.C. § 107(2).

In addition to Burns' claim under section 107, Citizens Against Religious Principles, Inc. (CARC) timely intervened pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure to challenge the constitutionality of section 107 under the Establishment Clause of the First Amendment. R. at 2. Because the statute renders CARC ineligible for the parsonage exemption, the district court found that CARC has a significant interest in the outcome of the case and was therefore entitled to standing. R. at 2.

SUMMARY OF THE ARGUMENT

I.

This Court should reverse the holding of the Eighteenth Circuit and hold that Petitioner John Burns is a "minister of the gospel" for purposes of 26 U.S.C. § 107(2). First, although Burns is not an ordained minister, he was nonetheless "commissioned" by Whispering Hills within the meaning of Treasury Regulation § 1.1402(c)-5(b) because he was hired specifically to provide services of a religious nature.

Second, Burns' regular, full-time duties as a guidance counselor and teacher are sacerdotal in nature. Burns incorporates religious teachings into his counseling sessions and classes. Furthermore, the classes themselves are part of Whispering Hills' faith-based curriculum. Furthermore, Burns' additional activities, such as hosting religious discussions and leading an informal weekend youth ministry, involve the conduct of religious worship.

Lastly, Whispering Hills Academy is an integral agency of Whispering Hills Unitarian Church because all subjects are taught with an emphasis on religious principles and religious living. Furthermore, the school and the church occupy the same premises and share the same name. Thus, there is sufficient evidence that the church incorporated the school and that the two entities maintain an ongoing relationship.

II.

This Court should hold that 26 U.S.C. § 107(2) is unconstitutional under the Establishment Clause of the First Amendment.

First, under *Texas Monthly*, section 107(2) is unconstitutional because it has the effect of only benefitting religion by only being offered to "ministers of the gospel." In 1989, the Supreme Court *decided Texas Monthly v. Bullock*, where the Court held a Texas Statute unconstitutional

under the Establishment Clause because it exclusively benefitted religion. Although *Texas Monthly* is a plurality opinion, the two statutes function identically, and thus section107(2) is unconstitutional under the Establishment Clause of the First Amendment because a tax exemption that has the effect of only benefitting religion inherently violates the Establishment Clause of the First Amendment. In conclusion, *Texas Monthly* is directly on point with the case at hand and under its controlling authority 26 U.S.C. § 107(2) is unconstitutional.

Second, even if the Court discounts *Texas Monthly*'s controlling authority, section 107(2) is unconstitutional because it fails the three prong test established by the Court in *Lemon v. Kurtzman*, and the historical significance test developed in *Marsh v. Chambers* and *Town of Greece v. Galloway*.

Section 107(2) violates the three prong *Lemon* test. First, section 107(2) lacks a secular purpose because it was enacted with the sole purpose of providing a benefit to "ministers of the gospel." Next, section 107(2) has the primary effect of advancing religion because tax breaks provided preferentially to ministers cannot be anything but an endorsement of religion. Further, section 107(2) fosters excessive government entanglement with religion because it requires the Internal Revenue Service to dig into religious doctrine to determine who constitutes a "minister of the gospel" for purposes of § 107(2). Therefore, section 107(2) is unconstitutional because it fails the *Lemon* test.

Additionally, § 107(2) violates the "historical significance" test of *Town of Greece*. While there is a history and tradition of providing tax exemptions for church owned property that dates back to the early days of Congress, section 107(2) only dates back to 1954 and there existed no analogous statute providing a personal tax income exemption for cash housing allowances for ministers of the gospel before then. Thus, section 107(2) fails the historical

significance test because there is no historical basis or tradition in this nation for providing such an exemption.

ARGUMENT

I. John Burns is a "minister of the gospel" for purposes of section 107(2).

A "minister of the gospel" is an individual who is "duly ordained, licensed or commissioned," Treas. Reg. § 1.1402(c)-5(b), and who performs services that are "ordinarily the duties of a minister of the gospel." Treas. Reg. § 1.107-1(a). Furthermore, examples of specific services, the performance of which will be considered duties of a minister for purposes of section 107, include the performance of sacerdotal functions and the conduct of religious worship. *Id.*

A. Although Burns is not an ordained minister, he nonetheless qualifies for the parsonage exemption because he was commissioned by Whispering Hills.

Although past IRS revenue rulings have imposed narrow restrictions regarding the requirement that a minister of the gospel be "ordained, licensed or commissioned," subsequent rulings have relaxed the requirement. *See* Rev. Rul. 78-301; Rev. Rul. 65-124. For example, the IRS ruled in 1965 that "[u]nordained members of a religious denomination which provides for ordination of ministers, who are commissioned by a church or a related religious organization without investing them with the authority of ordained ministers, do not qualify as ministers of the gospel for purposes of section 107." Rev. Rul. 65-124. However, the IRS subsequently modified the 1965 ruling to include an exception for an un-ordained, commissioned Jewish cantor. *See* Rev. Rul. 78-301. The latter ruling provided that, "[a]s modified, the Revenue Rulings allow commissioned or licensed ministers to be treated in the same manner as ordained ministers of the gospel when the commissioned or licensed ministers perform substantially all the religious functions within the scope of the tenets and practices of their religious denominations." *Id.* Thus, "the ultimate determination of whether or not a preacher is considered a minister of the gospel within the meaning of the Code and thus entitled to the parsonage exemption is based on the facts and circumstances of each particular case." Gabriel O. Aitsebaomo, *Challenges to Federal*

Income Tax Exemption of the Clergy and Government Support of Sectarian Schools Through Tax Credits Device and the Unresolved Questions After Arizona v. Winn: Is the U.S. Supreme Court Standing in the Way of Taxpayer Standing to Seek Meritorious Redress?, 28 Akron Tax J. 1 (2013).

In determining whether a minister has been "ordained, licensed or commissioned," courts have applied the terms in the disjunctive. *Salkov v. Comm'r*, 46 T.C. 190, 197 (1966). Although some court decisions have focused primarily on ordination, *see Lawrence v. Comm'r*, 50 T.C. 494, 500 (1968), more recent cases have confirmed that formal ordination is not a necessary condition for qualifying as a minister of the gospel where the individual is otherwise commissioned to carry out applicable duties. *See Silverman v. Comm'n*, 57 T.C. 727, 731 (1972). For example, the Tax Court held that a minister of education was not a "minister of the gospel" because he was not ordained during the years in question and failed to provide sufficient evidence that he performed the requisite services. *See Lawrence*, 50 T.C. at 499. In his dissenting opinion, Judge Dawson admonished the majority for improperly implying that ordination was the touchstone for qualification under section 107. *Id.* at 501 (Dawson, J., dissenting). Judge Dawson's dissenting opinion was later cited by the majority in *Silverman*, in which the Tax Court held that a Jewish cantor was entitled to the parsonage exemption despite being unordained. *Silverman*, 57 T.C. at 730-31. The court reasoned that the cantor was nonetheless "commissioned" because he was "called" by the congregation that desired his services. *Id.* at 731. Notably, the Tax Court distinguished *Silverman* from *Lawrence*, in part, on grounds that the record in *Lawrence* contained insufficient evidence to establish that the petitioner was a minister of the gospel. *Id.* Thus, *Silverman* should not be read as merely granting an exemption for the Jewish faith, which has "no formal 'ordinating' body which commissions its cantors." *See id.* at

732. Rather, the case illustrates an example of the Tax Court carefully examining the facts and circumstances of the individual case. *See id.* at 731. In sum, lack of formal ordination should not preclude qualification for the parsonage exemption where the evidence is otherwise sufficient to find that a petitioner is a minister of the gospel. *See Lawrence*, at 50 T.C. at 501-02 (Dawson, J., dissenting).

In the present case, Burns' unordained status should not automatically preclude qualification for the parsonage exemption under section 107(2), regardless of whether the Whispering Hills Unitarian Church provides for ordination of its ministers. *See* Rev. Rul. 78-301. To the contrary, the facts and circumstances of the case indicate that Whispering Hills hired Burns for the specific purpose of providing services of a religious nature. R. at 3, 8. Burns was therefore commissioned as a minister of the gospel for purposes of section 107(2). *See* Treas. Reg. § 1.1402(c)-5(b).

B. Burns was hired for the specific purpose of regularly providing counseling services that were sacerdotal in nature, and his additional activities involve the conduct of religious worship.

In determining whether an employee of a church-affiliated organization conducts qualifying sacerdotal functions or religious worship under section 107, courts have considered the degree to which the employee's activities are distinguishable from their secular equivalents, the regularity with which the activities are conducted, and the employer's expectations of the employee. *See Flowers v. United States*, 1981 U.S. Dist. LEXIS 16758, at *15 (N.D. Tex. November 25, 1981) (holding that neither the teaching of a secular college course at a college which is not an integral agency of a church nor the performance of secular counseling qualify as sacerdotal functions); *Tanenbaum v. Comm'r*, 58 T.C. 1, 8 (1972) (concluding petitioner was not hired to perform sacerdotal functions or to conduct religious worship); *Lawrence*, 50 T.C. at 499-

500 (holding that a minister of education's occasional, often minor role in various worship services was insufficient for qualification under section 107). For example, Northern District of Texas held that a professor and counselor did not perform "sacerdotal functions" by teaching a secular college course or offering counseling services to students. *Flowers*, 1981 U.S. Dist. LEXIS 16758, at *14. The court reasoned that "[t]he teaching of a secular college course at a college which is not an integral agency of a church is not a sacerdotal function." *Id.* at *14-15. Furthermore, because the plaintiff counselled students "in the same manner" as the school's non-minister professors, the professor did not perform a sacerdotal function by counseling students. *Id.* at *15.

Additionally, the Tax Court held that a minister of education who occasionally carried out religious duties nonetheless failed to qualify for the parsonage exemption. *Lawrence*, 50 T.C. at 499-500. Although the petitioner preached and led the congregation in worship, he did so only "on occasion," and only during unusual circumstances or emergencies. *Id.* at 496, 499. Furthermore, the petitioner's regular function during worship services was confined to making pulpit announcements and offering the opening prayer. *Id.* at 496. Thus, the court concluded the petitioner presented insufficient evidence to warrant a finding that he was a minister of the gospel. *Id.* at 499-500. Importantly, Judge Dawson, emphasizing that the petitioner regularly conducted evening worship services for an entire year, argued in dissent that the record contained adequate proof for the petitioner to qualify as a minister of the gospel. *Id.* at 501.

Lastly, the Tax Court denied the parsonage exemption to an ordained Jewish rabbi on grounds that he was not hired to perform sacerdotal functions or to conduct religious worship. *Tanenbaum*, 58 T.C. at 8. Although involved in numerous religious organizations and closely connected with clergymen and theologians, the petitioner's "principal function" in directing the

Interreligious Affairs Department of the American Jewish Committee was to "interpret the basic tenets of Judaism to the Christian leadership and the Christian community, as well as interpreting the relationship of Christianity to Judaism within the Jewish community." *Id.* at 4. In addition to his interreligious duties, the petitioner occasionally performed religious functions for the Committee's employees, including "counseling individuals with particular religious problems and "the performance of such other duties as the conducting of prayer services." *Id.* However, because these acts were "never . . . required of him in the performance of his duties," the Tax Court concluded that the petitioner failed to qualify as a minister of the gospel. *Id.*

The present case is readily distinguishable from each of the above cases. First, unlike the plaintiff in *Flowers*, who counseled students in a manner that was indistinguishable from that of an ordinary guidance counselor, Burns' duties as a guidance counselor are interwoven with the tenets of the school's faith. R. at 3, 8. In addition to relying on standard mental and behavioral health techniques, Burns incorporates religious teachings into his counseling sessions. R. at 3, 8. Thus, the sessions are distinctly religious in nature. Similarly, whereas the plaintiff in *Flowers* taught purely secular subjects, Burns incorporates religious principles into his classes. R. at 8. Furthermore, the classes themselves are part of Whispering Hills' broader faith-based curriculum. R. at 3. Second, unlike the minister of education in *Lawrence*, who only occasionally performed sacerdotal functions or religious worship and occupied only an ancillary position within the church's worship services, Burns' regular, full-time duties are central to the school's religious mission. R. at 8. As a full-time teacher and guidance counselor, Burns is a primary point of contact for students seeking religious education and guidance. R. at 3, 8. Moreover, Burns occupies an important role outside the classroom. He attends worship services alongside his students and hosts religious discussions at the services' conclusion. R. at 8. Likewise, he

regularly hosts an informal weekend youth ministry in which students gather to discuss the week's church services. R. at 3. In recognition of his contributions, Whispering Hills has presented Burns with several school awards for his after-school club, Prayer After Hours. R. at 3. Lastly, although Burns' leadership in numerous extracurricular activities is not a requirement of his employment at Whispering Hills, the school nonetheless hired him for the specific purpose of performing faith-based guidance counseling and teaching subjects in accordance with the school's faith-based curriculum. R. at 8. Thus, unlike the petitioner in *Tanenbaum*, Burns was hired to perform sacerdotal functions.

In sum, Burns was hired by Whispering Hills for the specific purpose of regularly performing sacerdotal functions in his role as a teacher and guidance counselor, and his additional activities, such as leading prayer sessions and facilitating religious discussions, undoubtedly involve the conduct of religious worship.

C. The school is sufficiently integrated with the church because it occupies the same premises, shares the same name, and emphasizes religious principles in its curriculum.

The IRS provides that teachers employed by educational institutions that are operated as "integral" agencies of a religious organization may claim the parsonage exemption. *See* Rev. Rul. 70-549. In determining whether an institution is sufficiently integrated with a religious organization, one relevant factor is whether the institution's curriculum is "taught with emphasis on religious principles and religious living." *Id.* Additional relevant criteria include

> (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 of 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 church

> 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.

Rev. Rul. 72-606. Although each factor is worthy of consideration, the absence of one or more factors is not necessarily determinative. *Id.*

Courts have not limited their analyses solely to Revenue Ruling 72-606's eight-factor test. *See Flowers*, 1981 U.S. Dist. LEXIS 16758, at *10-11. For example, in assessing all relevant factors under both Revenue Ruling 70-549 and Revenue Ruling 72-606, the Northern District of Texas found that a university was not an integral agency of a church. *Id.* at *11-12. The Texas Christian University failed to satisfy most of the criteria laid out in Revenue Ruling 70-549. *Id.* at *10. Importantly, the university's curriculum did not emphasize religious principles or religious living. *Id.* Furthermore, in applying the eight-factor test laid out by Revenue Ruling 72-606, the court found that only the second and seventh criteria were met. *Id.* at *11. Thus, the evidence was insufficient to conclude the university was an integral agency of the church. *Id.* at *11-12.

The present case is distinguishable from *Flowers* because there is sufficient evidence that Whispering Hills Academy is an integral agency of Whispering Hills Unitarian Church. First and foremost, unlike the university in *Flowers*, Whispering Hills' curriculum is explicitly faith-based. R. at 3. Otherwise-secular subjects such as English, Renaissance Literature, and foreign languages nonetheless involve religious principles. R. at 8. Consequently, "[a]ll subjects . . . whether in natural science, mathematics, social science, languages, etc., are taught with emphasis on religious principles and religious living." *See* Rev. Rul. 70-549. Furthermore, the school and the church occupy the same premises and share the same name. R. at 3. Thus, the record indicates both that the church incorporated the school and that the two entities maintain an

ongoing relationship. In sum, there is ample evidence to show that the school is an integral agency of the church.

For the foregoing reasons, this Court should hold that John Burns is a "minister of the gospel" for purposes of section 107(2).

II. 26 U.S.C. § 107(2) violates the Establishment Clause of the First Amendment.

A. Under *Texas Monthly*, § 107(2) is unconstitutional because it has the effect of only benefitting religion by exclusively being offered to "ministers of the gospel."

In 1989, the Supreme Court found unconstitutional a Texas state statute that exempted religious publications from state sales tax. *Texas Monthly v. Bullock*, 489 U.S. 1, 25 (1989). The Court held a tax exemption having the effect of only benefitting religion violates the Establishment Clause of the First Amendment. *Id.* at 5. Here, 26 U.S.C § 107(2) does the same thing because it provides a benefit to "ministers of the gospel" that no other group can obtain.

In *Texas Monthly*, the Court held that the Texas Tax Code Ann. 151.312 (1982) was unconstitutional under the Establishment Clause of the First Amendment because it exclusively benefitted religion. *Id.* Texas Tax Code Ann. 151.312 (1982) exempted from the state's sales tax "periodicals that are published or distributed by a religious faith and consist wholly of writings promulgated to the teaching of the faith and books that consist wholly of writings sacred to a religious faith." *Id.* The Court reasoned that a tax benefit that provides no similar benefit outside of religion inherently violates the Establishment Clause because it "provides unjustifiable awards of assistance to religious organization" and cannot but "convey a message of endorsement." *Texas Monthly*, 489 U.S. at 15 (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring)).

While *Texas Monthly,* is a plurality opinion, it is only one in name. *See Texas Monthly*, 489 U.S. at 26 (Blackmun & O'Connor, JJ., concurring). Justice's Blackmun and O'Connor

concurred in judgment, coming to the same conclusion of the opinion, but concurring rather than joining the opinion only because they didn't believe that the Free Exercise Clause needed to be discussed as done by Justice Brennan. *Id*. at 27. Thus, although a plurality, five justices held the same opinion that the Establishment Clause is violated by tax exemptions that only give tax breaks to religion.

Here, section 107(2) is identical to the Texas statute considered here. Like the Texas statute in *Texas Monthly*, which created an exemption for publications that "promulgate" religions doctrine, section 107(2) is a personal tax exemption only for religious clergy. Section 107(2) provides in relevant part, that for "ministers of the gospel," gross income does not include: "the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home and to the extent such allowance does not exceed the fair rental value of the home . . ." 26 U.S.C. § 107 (2002). Also like the Texas statute, which was only available to "periodicals that are published or distributed by a religious faith and consist wholly of writings promulgated to the teaching of the faith and books that consist wholly of writings sacred to a religious faith," section 107(2) can only be claimed by religious persons, specifically only those who qualify as "minister of the gospel." Thus, section 107(2) is unconstitutional because a tax exemption that has the effect of only benefitting religion inherently violates the Establishment Clause of the First Amendment.

In conclusion, *Texas Monthly* is directly on point with the case at hand, and under its controlling authority 26 U.S.C. § 107(2) is unconstitutional.

B. Even if § 107(2) is constitutional under *Texas Monthly*, it violates the Establishment Clause under the *Lemon* Test and the historical significance test.

The Establishment Clause of the First Amendment is simple: "Congress shall make no law respecting an establishment of religion ." U.S. Const. amend. I. This clause was enacted as a

way to address the concerns of our nation's founders who did not want the government to establish a state religion for the whole country. While opinions vary on the exact interpretation of the Clause, it is a well settled principle that the government may not "endorse" religion. However, in practice the Establishment Clause is anything but simple to interpret, as evidenced by the complicated nature of the Supreme Court's Establishment Clause jurisprudence.

Today, current Establishment Clause jurisprudence incorporates a number of tests when evaluating the constitutionality of government action. *See Town of Greece v. Galloway*, 572 U.S. 565, 570 (2013) (asserting a "historical significance test"); *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (plurality opinion) (creating a "neutrality" test); *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (establishing "coercion" test); *Lynch v. Donnelly*, 465 U.S. 668, 687-688, 691 (1984) (O'Connor, J. concurring) (proposing an "endorsement" test); *Lemon v. Kurtz*, 430 U.S. 603, 612-13 (1971) (creating a three prong test, known as the "*Lemon*" test). However, the Court has made clear that no one test can serve the purpose of analyzing all Establishment Clause cases. *See Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (emphasizing the Court's "unwillingness to be confined to any single test or criterion in this sensitive area"). Here, the United States Court of Appeals for the Eighteenth Circuit applied the court legal standard in using the *Lemon* test and "historical significance" test.

1. 26 U.S.C. § 107(2) violates the *Lemon* test because it lacks a secular purpose, has the effect of advancing religion, and fosters an excessive government entanglement with religion.

In evaluating an Establishment Clause claim, to be constitutional, a governmental action (1) "must have a secular legislative purpose;" (2) "its principal or primary effect must be one that neither advances nor inhibits religion;" and (3) "must not foster an excessive government entanglement with religion." *Lemon*, 430 U.S at 612-13 (1971). But "if a statute violates any of

these 3 principles, it must be struck down under the Establishment Clause." *Stone v. Graham*, 449 U.S. 39, 40-41 (1980). Here, 26 U.S.C. § 107(2) violates the Establishment Clause of the First Amendment because (a) it lacks a secular purpose (b) its primary effect advances religion and (c) it fosters an excessive government entanglement with religion.

a. 26 U.S.C. § 107(2) lacks a secular purpose because it was enacted with the sole purpose of providing a benefit to "ministers of the gospel."

When the government "acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible purpose is to take sides." *McCreary Cty v. American Civil Liberties Union*, 545 U.S. 844, 860 (2005). A statute is unconstitutional under this test "only when . . . there is no question that the statute . . . was motivated wholly by religious considerations." *Lynch*, 465 U.S. at 680. The Court will normally defer to the government's articulation of secular purpose, but "it is required thar the statement of such purpose be sincere and not a sham." *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987).

The Court held that state statutes did not violate the Establishment Clause because legitimate secular purpose by granting exemptions to a broad group of people and not just to religious groups. *See Mueller v. Allen*, 463 U.S. 388, 394-95 (1983) (holding that a state tax deduction for parents who send their children to parochial schools does not violate the Establishment Clause because it has a secular purpose of ensuring that the state's citizenry is well educated, as well as assuring the continued financial health of private schools, both secular and non-sectarian); *Walz v. Tax Com. Of New York*, 397 U.S. 664, 672 (1969) (finding a state's property tax exemption that encompassed " . . . all houses of religious worship within a broad class of property owne[rs]" had a secular purpose, reasoning that such organizations who "foster

[the communities] moral or mental improvement" should not be inhibited in their activities by property taxation or "the hazard of loss of those properties for nonpayment").

The Court also held that state statutes that authorize a specified time for religious worship in public schools for the purpose of bringing prayer into the classroom violated the Establishment Clause because it was wholly motivated by religious purposes. *See Wallace v. Jaffree*, 472 U.S. 38, 56-61 (1985) (holding an Alabama statute was not motivated by any clearly secular purpose when it authorized a one minute period of silence in all public schools "for mediation and prayer," reasoning that the laws' sponsors' only purpose was to use the law to bring religion back to public schools).

Here, section 107(2) has no secular purpose because it was expressly intended to advance and benefit religion, specifically "ministers of the gospel" by giving them a significant personal income tax exemption in the form of a cash housing allowance.

Like *Wallace*, where the statutes sponsor made statements indicating the law was purely for the purpose of bringing back religion to public school, the sponsor of section 107(2), Representative Mack expressed that the exemption was introduced to help out religious clergy during the Cold War. *See* H.R. Comm. on Ways and Means, Hearings on Forty Topics Pertaining to the General Revision of the Internal Revenue Code, 83d Cong. 1576 (Aug. 11, 1953). Mack stated: "Certainly in these times when we're 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" and added "[c]ertainly this is not too much to do for these people who are caring for our spiritual welfare." *Id*. Unlike the statute in *Walz* where the statute was implemented to benefit community as a whole and Cause benefitted broad range of groups, section 107(2) was intended to benefit religion only because it provides

additional tax benefits exclusively to ministers and no one else. Therefore, section 107(2) was wholly motivated by religious purposes.

For the reasons above, section 107(2) violates the Establishment Clause of the First Amendment because it fails the first prong of the *Lemon* test by lacking a valid secular purpose.

b. 26 U.S.C. § 107(2) has the primary effect of advancing religion because tax exemptions provided exclusively to ministers of the gospel are an endorsement of religion.

For a law to have "forbidden effects under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337. This consists of "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz,* 397 U.S. at 668 (1969).

The Court has held that laws violate the second prong of *Lemon* when they provide significant monetary benefits solely to religion or religious organizations. *See Estate of Thornton v. Caldor, Inc*., 407 U.S. 703, 709-11 (1985) (holding that a Connecticut law providing that no person may be required to work on their Sabbath "goes beyond having an incidental or remote effect of advancing religion," reasoning the law created an absolute unqualified right for individuals to not work for religious reasons and thus had the effect of favoring religions over all other interests); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973) (finding a New York program giving grants and tax reimbursements to low income families of private school students violated *Lemon's* second prong because by reducing expenses for religious schools the program had the primary effect of supporting religion). *But see Mueller v. Allen*, 463 U.S. 388, 396-402 (1983) (holding that a state tax deduction for parents sending their children to parochial schools did not have the primary effect of advancing sectarian aims of nonpublic schools, reasoning that it was available for educational expenses incurred by all

parents, whether the kids were attending private sectarian on nonsectarian schools or public schools).

Here, section 107(2) has the primary effect of advancing religion because the government has effectively sponsored religion by offering a significant financial benefit in the form of a tax exemption only to religious organizations.

Like the law at issue in *Estate of Thornton*, which went beyond an incidental or remote effect of advancing religion by creating a right for people to not work for solely religious reasons, section 107(2) functions the exact same way. Section 107(2) does not incidentally benefit religion, it *only* benefits religion; Its' entire purpose is to help specific clergy members who don't make a lot of money afford housing. This is evidenced by the fact that the only group who may claim this tax exemption are "ministers of the gospel," which requires specific job activities to qualify.

Additionally, like in *Estate of Thornton*, which provided no right to take off work for secular reasons but did nor religious reasons, there is no secular exemption that parallels 107(2). This indicates that not only does section 107(2) provide a financial benefit only to a specific sect of clergy members, and incidentally the religious institutions that employ them, but it is only available religion. Unlike the law in question in *Nyquist*, which was not aimed solely at families of students at religious schools but the majority of those benefitted were religious, section 107(2) exclusively provides a benefit to members of religious institutions and no one else. Thus, tax breaks provided preferentially to ministers cannot be anything but perceived as an endorsement of religion in violation of *Lemon*.

Based on the above reasons, section 107(2) violates the Establishment Clause of the First Amendment because it fails the second prong of the *Lemon* test.

c. 26 U.S.C. § 107(2) fosters excessive government entanglement with religion because it requires the Internal Revenue Service to review religious tenets and doctrine to determine who constitutes as a "minister of the gospel" for purposes of section 107(2).

A practice or law is excessive when it requires "comprehensive, discriminating, and continuing state surveillance." *Lemon*, 403 U.S. at 619. To constitute excessive entanglement, the government's actions must either be intrusive participation, supervision, or investigation into the affairs of the religious organization." *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 995 (7th Cir. 2006). Specifically, such "routine regulatory interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious body," and no "detailed monitoring and close administrative contact" between secular and religious bodies, "does not of itself violate the non-entanglement command." *Hernandez v. Commissioner*, 490 U.S. 680 (1989).

The Court has held that laws requiring the government to supervise the activities of religious organizations did not create excessive entanglement when the supervision was not intrusive and did not require constant or close surveillance. *See Mueller v. Allen*, 463 U.S. 388, 394-95 (1983) (holding that a state tax deduction for parents who send their children to parochial schools does not excessively entangle the state in religion, reasoning that the fact that state officials must determine whether particular textbooks qualify for the tax deduction and must disallow deductions for textbooks used in teaching religious doctrines is an insufficient basis for a finding of excessive entanglement); *Tilton v. Richardson*, 403 U.S. 672 686-89 (1971) (holding that the Higher Education Facilities Act of 1963 which provided construction grants to church-sponsored higher educational institutions did not excessively entangle the government with religion, reasoning that college students were less susceptible to religious indoctrination, that the aid was of "nonideological character," and that one-time grants did not require constant state

surveillance). *See e.g.*, *Walz v. Tax Com. Of New York*, 397 U.S. 664, 672 (1969) (finding a state's property tax exemption that encompassed ". . . all houses of religious worship within a broad class of property owne[rs]" reduced potential entanglement including the need to make determinations of property value).

Here, section 107(2) fosters excessive government entanglement with religion by requiring the Internal Revenue Service ("IRS") to make complex, intrusive, and subjective inquiries into religious matters. Unlike the case in *Walz*, which reduced potential entanglement including the need to make determinations of property value, section 107(2) increases the governments entanglement with religion. Section 107(2) requires fact sensitive and complex inquiries into patently religious matters, such as defining "ministers of the gospel," "sacerdotal functions," "integral agency" of a church or church denomination. 26 U.S.C. § 107 (2002). *See also* Treas. Reg. § 1.1402(c)-5. Similarly, unlike in *Mueller*, where the tax deduction merely required state officials to determine whether particular textbooks qualify for the tax deduction by deeming them as including religious doctrine or not, section 107(2) requires that every time someone attempts to claim the exemption, the IRS must go through a multi-step analysis to determine if the person is a minister of the gospel by looking into the specific tenets of the religion at issue to determine if there is an ordination processes, what that particular religion classifies as sacerdotal functions, and so on.

Specifically, 107(2) excludes from the gross income of a minister the cash rental or housing allowance paid as compensation**.** *Id*. This requires the IRS to first determine whether an individual qualifies as a "minister of the gospel," which is not a simple task. *Id*. Other administrative regulations require that ministers perform specific duties, like sacerdotal functions, conduct religious worship, administration and miniatous of religious organizations and

their integral agencies, and so on. Treas. Reg. § 1.1402(c)-5. Thus, what determines "religious worship" and "administration of sacerdotal functions" depends on the nature of the practices of the religious body at issue. Treas. Reg. § 1.1402(c)-5(b)(2)(i). In addition, a minister must be ordained, commissioned, or licensed by a church. *Id*. Consequently, the necessary determinations under 107(2) require significant evidence to show that a person is a "minister of the gospel" to even qualify for the exemption which requires delving into the religious tenets and doctrine of the particular religion of the person applying for the exemption. Therefore, by requiring the IRS to investigate the religious doctrine and inner workings of religious institutions to determine who qualifies as a "minister of the gospel," section 107(2) fosters excessive government entanglement with religion.

Thus, section 107(2) violates the Establishment Clause of the First Amendment because it fails the third prong of the *Lemon* test because the law fosters excessive entanglement between church and state.

Based on the above reasons, section 107(2) violates the Establishment Clause of the First Amendment because it fails all three prongs of the *Lemon* test.

2. 26 U.S.C. § 107(2) violates the "historical significance" test of *Town of Greece* because the statute was enacted in 1954 and is not part of a long historical tradition.

The Establishment Clause "must be interpreted 'by reference to historical practice and understandings.'" *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) (quoting *Cty. Of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part)). Thus, an "unbroken practice" is not something to be lightly cast aside. *Walz*, 397 U.S. at 678 (1970). However, no one "acquires a vested or protected right in violation of the Constitution by long use, even when

that span of time covers our entire national existence and indeed predates it" *Id*. Here, § 107(2) fails to establish that it is historically significant because it is not rooted in history or tradition.

The Court has held that the Establishment Clause was not violated when a religious display was rooted in historical tradition. *See Town of Greece v. Galloway*, 572 U.S. 565, 592 (2014); *Van Orden v. Perry*, 545 U.S. 677, 690 (2005) (plurality opinion); *Walz v. Tax Com. of N.Y.*, 397 U.S. 664, 680 (1970).

In *Walz*, the Court held that New York City property tax exemptions given to religious organizations did not violate the Establishment Clause because these exemptions are deeply rooted in "more than a century of our history and uninterrupted practice." *Id.* at 680. The New York City Tax Commission "granted property tax exemptions to religious organizations for religious properties used solely for religious ownership." *Id*. at 666; *see* N.Y. Const. art. XVI, § 1. The Court reasoned that these tax exemptions have been supported by Congress "from its earliest days," and "few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times . . ." *Id*. at 676-77. *See also Town of Greece v. Galloway*, 572 U.S. 565, 592 (2014) (finding a Town's recitation of a Christian prayer at monthly board meetings did not violate the Establishment Clause because the Town's practice reflected and embraced the tradition of legislative prayers and did not coerce non-adherents); *Van Orden v. Perry*, 545 U.S. 677, 690 (2005) (plurality opinion) (concluding that displaying a monument inscribed with the Ten Commandments at the Capital did not violate the Establishment Clause, reasoning that "simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the establishment clause").

Here, 26 U.S.C. § 107(2) is not part of a historical tradition because there is no tradition of providing religious clergy with tax free cash housing allowances to supplement their private own homes.

While tax exemptions for church property, including parsonages have history, this case is about personal income tax exemptions for the value of cash allowances, which do not have a long historical legacy. Private property owned by a "minister of the gospel" is not church property, even if he or she receives a cash housing allowance. Unlike the statute in *Walz*, which "granted property tax exemptions to religious organizations for religious properties used solely for religious ownership," section 107(2) permits "minister of the gospel" to designate a portion of their compensation as a housing allowance and then exclude that amount from their person income to the extent it was used to provide them with a home. Thus, section 107(2) is not a religious property tax exemption that is considered to be a tradition in this nation.

In addition, section 107(2) was only first recognized by Congress in 1954. Section 107(1) was originally included Revenue Act of 1921, Pub. L. No. 67-98, 213, 42 Stat. 227, 239 (1921). Section 213(b)(11) of the Revenue Act of 1921 was the same as present 107(1) and was limited to clergy members who were given houses owned by the church/religions orgs that employed them, but no provision in 1921 was analogous to the current section 107(2). *Id*. In 1954 Congress amended Internal Revenue Code and adopted the first version of 107(2), which permitted "minister of the gospel" to designate a portion of compensation as a housing allowance and to exclude that amount from income to the extent it was used to provide a home. *Id*. Pub. L. No. 83-1987, 68A Stat. 32 (1954). Thus, unlike the tax exemption in *Walz* which has been around since at least 1885, section 107(2) has only existed in our nation's tax code for sixty-six years. Consequently, section 107(2) has no historical legacy in our nation's tax code.

Therefore, for the above reasons, section 107(2) violates the Establishment Clause of the First Amendment by failing the "historical significance" test because it not a practice found in history, nor is it part of any tradition.

CONCLUSION

I.

In conclusion, for the foregoing reasons, this Court should reverse the judgment of the Eighteenth Circuit and hold that Petitioner John Burns is a "minister of the gospel" for purposes of 26 U.S.C. § 107(2).

II.

For the reasons stated above, the Petitioner-Intervenor respectfully requests that this Court reverse the decision of the Eighteenth Circuit and hold that 26 U.S.C. § 107(2) is unconstitutional under the Establishment Clause of the First Amendment.