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 COMMISSIONER OF TAXATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals

for the Eighteenth Circuit

Counsel for Respondent
Team No. 18

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QUESTIONS PRESENTED

I. Whether a teacher with non-sacerdotal duties and employed by an unintegrated church-school qualifies as a "minister of the gospel" under 26 U.S.C. § 107(2).

II. Whether 26 U.S.C. § 107(2), a statute that follows a long-standing tradition of granting tax exemptions to employees with work-related housing, violates the Establishment Clause when it grants those same exemptions to ministers in church-sponsored housing.

INTRODUCTION

This case concerns preserving the autonomy and the liberty of religious institutions. The First Amendment to the United States Constitution provides that Congress shall pass no law respecting the establishment of religion. U.S. CONST. amend. I. Shortly after receiving the power to tax income via the Sixteenth Amendment, Congress extended the long-standing tradition of religious property tax exemptions to income taxation, codifying the parsonage exemption as 26 U.S.C. § 107(2). *Gaylor v. Mnuchin*, 919 F.3d 420, 436 (7th Cir. 2019). In doing so, Congress sought to prevent government entanglement with the internal affairs of religious institutions and afford religious organizations the same categorical tax exemptions as military officers, overseas government employees, and other secular groups. *Id.* at 427. At present, Whispering Hills Unitarian Church has not exercised their autonomy to extend a title or duties to Petitioner, and the church is not in sufficient control of the nearby school. As such, this Court should affirm the Eighteenth Circuit's ruling and recognize that Petitioner is not a "minister of the gospel," and that 26 U.S.C. § 107(2) is a narrow, historical, and constitutional exercise of Congressional authority.

STATEMENT OF THE CASE

A. Factual Background

a. Petitioner is a teacher and guidance counselor at Whispering Hills Academy.

Petitioner John Burns is a teacher at Whispering Hills Academy, a religious boarding school with connections to Whispering Hills Unitarian Church, in the state of Touroville. R. at 3. At Whispering Hills Academy (school), Petitioner teaches several secular subjects, including eleventh and twelfth grade English, Renaissance Literature, French, Italian, and Latin. R. at 3. Petitioner neither holds the title of an ordained minister, nor has received training or ordination as a member of the clergy. R. at 5, 18. Petitioner also serves as a guidance counselor, advising

students on both educational and personal matters through mental and behavioral health counseling techniques, with some commonly understood religious teachings of the school's broader faith. R. at 3. Furthermore, Petitioner often hosts gatherings for students who are unable to return to their homes on weekends, providing food and social interactions. R. at 3, 5. These gatherings typically take place after the students complete their Sunday church services, and they provide a space for students to discuss anything that may be on their minds with one another. R. at 3, 5. Aside from his formal teacher and guidance counselor duties, Petitioner also created an after-school club for students, over which he continues to advise. R. at 3.

b. When Petitioner first accepted his teaching position at Whispering Hills Academy, he moved to a new home closer to the school.

Prior to accepting his teaching position at Whispering Hills Academy, Petitioner lived over an hour away from the school, but chose to relocate to a new home five minutes away upon accepting his teaching position in 2016. R. at 3. In an effort to help Petitioner relocate, Whispering Hills Academy provided a $2,500 credit to help cover his travel and moving expenses. R. at 4. Furthermore, the school calculated Petitioner's fair rental value of his home and his expected utility costs, and they agreed to increase his salary by $2,100 per month to help cover rent. R. at 4.

c. Petitioner attempted to exempt a part of his salary from his taxable gross income under 26 U.S.C. § 107(2).

In 2017, Petitioner started conducting research on possible tax exemptions so he could pay less in income taxes. R. at 4. One day, a colleague and friend, Pastor Nick, suggested that Petitioner should attempt to claim his rental allowance under 26 U.S.C. § 107(2) or the "parsonage exemption"—one of a number of tax code exemptions for work-related housing requirements. R. at 4, 21. Pastor Nick informed Petitioner that he paid lower taxes by claiming the parsonage exemption every year and encouraged him to do so as well, if he qualified. R. at 4.

Petitioner, heeding Pastor Nick's advice and thinking that the parsonage exemption could apply to him as well, attempted to claim the exemption for the rental allowance the school gave him on his 2017 tax return. R. at 4. In the summer of 2018, the Internal Revenue Service (IRS) responded to Petitioner's attempt, disqualifying Petitioner from the exemption because Petitioner failed to meet the requirements to be considered a "minister of the gospel" under the statute. R. at 4.

B. Procedural History

Following the IRS classification, Petitioner filed suit in the District Court for the Southern District of Touroville, alleging he is a "minister of the gospel" in his capacity as a teacher and guidance counselor. R. 3-4. Citizens Against Religious Convictions, Inc. (CARC) filed a motion to intervene under Rule 24(a)(2) of the Federal Rules of Civil Procedure, arguing that section 107(2) violates the Establishment Clause. R. 2. The district court both granted CARC's motion to intervene and denied Respondent's motion for summary judgment. R. 2. The district court held that Petitioner is a "minister of the gospel" under section 107(2), but that the exemption itself was unconstitutional. R. 3-4. Respondent appealed to the Eighteenth Circuit, which reversed, finding that Petitioner is not a "minister of the gospel" and section 107(2) is consistent with the Establishment Clause. R. 16. This appeal followed. R. 25-26.

SUMMARY OF THE ARGUMENT

First, Petitioner is not a qualifying minister under 26 U.S.C. § 107(2), meaning he cannot claim a parsonage tax exemption. He has failed to show (1) that his title or duties are those of a minister, and (2) a sufficient connection between the school and church. *See* 26 C.F.R. § 1.1402(c)-5; *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,* 565 U.S. 171, 192 (2012); *see, e.g.*, *Flowers v. United States*, No. CA 4-79-376-E, 1981 U.S. Dist. LEXIS 16758, at *14-15 (N.D. Tex. Nov. 25, 1981); *Kirk v. Comm'r*, 425 F.2d 492, 494-95 (D.C. Cir. 1970). Petitioner is employed as a secular teacher and counselor at a school with unclear church affiliation, and therefore, he cannot qualify for this exemption. R. at 3; § 1.1402(c)-5.

Second, 26 U.S.C. § 107(2) is a constitutional exercise of Congressional power under the First Amendment's Establishment Clause. This Court articulates two leading tests in its Establishment Clause jurisprudence. First, the predominant *Lemon* test requires that a law: (1) "have a secular legislative purpose," (2) have "a principal or primary effect that neither advances nor inhibits religion", and (3) "not foster *excessive* government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (emphasis added). Alternatively, the "historical significance" test upholds a law if the law follows a long-standing, historically rooted tradition followed by Congress and state legislatures. *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 577 (2014).

Regardless of the test this Court applies, section 107(2) satisfies the Establishment Clause. As evidenced by its legislative history, Congress did not codify the parsonage exemption to advance religion, but did so to eliminate discrimination and reduce government entanglement with religion in a greater tax scheme—both secular purposes that promote the principles underlying the freedom of religion. *See Larson v. Valente*, 421 U.S. 228, 244 (1982); *Corp. of*

Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 338 (1987). In addition, looking to the history of the United States, section 107(2) reflects a modern reiteration of the long-standing religious property tax exemptions. *See Gibbons v. District of Columbia*, 116 U.S. 404, 406 (1886). Thus, this Court should affirm the Eighteenth Circuit's grant of summary judgment for Respondent.

ARGUMENT

I. PETITIONER FAILS TO MEET THE DEFINITION OF A "MINISTER OF THE GOSPEL" AND THERE IS AN INSUFFICIENT CONNECTION BETWEEN THE CHURCH AND THE SCHOOL, MEANING PETITIONER CANNOT CLAIM AN EXEMPTION UNDER 26 U.S.C. § 107(2).

Petitioner is not a "minister of the gospel" because his responsibilities were non-sacerdotal and the school at which he worked was not sufficiently integrated with its parent-church. In *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, the Court outlined a loose framework of factors to consider when deciding if an employee was a qualifying "minister." 565 U.S. 171, 192 (2012); *see also Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2075-76 (2020). Congress extended this framework to the Tax Code through 26 U.S.C. § 107(2), which carved out an exemption for the living expenses of ministers as paid-for by their religious employers to eliminate discrimination against and between ministers. *See Gaylor v. Mnuchin*, 919 F.3d 420, 430, 431-32 (7th Cir. 2019).

For religious school employees seeking exemption under section 107(2), courts look to the definition of a minister under 26 C.F.R. § 1.1402(c)-5. This definition considers whether: (1) the claimant's duties were of religious worship sacerdotal in nature, (2) a minister claimant's denomination assigns him to a non-worship or sacerdotal posting in furtherance of his ministry, and (3) the claimant's service is to a religious organization dedicated to advancing a governing church body's tenets of faith. *See* 26 C.F.R. § 1.1402(c)-5; *Toavs v. Comm'r*, 67 T.C. 897, 903-

04 (1977). The second factor is not at play here; Petitioner is not an ordained minister and has received no official posting. R. at 17; *see* § 1.1402(c)-5. Therefore, this Court must only consider if: (1) the duties of the claimant are sacerdotal or worship-based, and (2) there is a sufficient connection between the school that employs Petitioner and the church in question. *See* § 1.1402(c)-5. Petitioner neither has the requisite title or duties, nor does the school that employs him have an adequate connection with a governing church. *See id.*

A. Petitioner was an untitled school teacher whose duties were non-sacerdotal, indicating that he failed to show the first factor required in a "minister of the gospel" determination.

To fully define the duties of Petitioner, this Court and lower courts look to his lack of title and status, and secular employment duties. 26 C.F.R. § 1.1402(c)-5; *Hosanna-Tabor,* 565 U.S. at 192; *see, e.g.*, *Boyer v. Comm'r*, 69 T.C. 521, 523 (1977); *Colbert v. Comm'r,* 61 T.C. 449, 452, 455 (1974); *Kirk v. Comm'r*, 425 F.2d 492, 494-95 (D.C. Cir. 1970). Petitioner had no official title and was employed to teach secular eleventh and twelfth grade English, Renaissance Literature, French, Italian, and Latin, and to serve as a guidance counselor. R. at 3, 5. These roles, and his extra-contractual activities, do not rise to a sufficient sacerdotal nature to claim an exemption under section 107(2). R. at 3, 5*; see Boyer*, 69 T.C. at 523; *Colbert*, 61 T.C. at 452, 455; *Tanenbaum*, 58 T.C. at 8; *Kirk*, 425 F.2d at 494-95.

1. Petitioner had no title and received no formal recognition by the church or school beyond his secular employment duties.

Petitioner fails to demonstrate his status as a minister within the church and school, so this Court cannot consider him a minister for the purposes of section 107(2). *Silverman v. C.I.R.*, No. 72-1336, 1973 WL 2493, at *1, *3 (8th Cir. July 11, 1973)*; Kirk,* 425 F.2d at 494-95; *see also* § 1.1402(c)-5. If an employee is not ordained, commissioned, or licensed as a minister, and the associated church retains such designations, then the employee is not entitled to the

parsonage exemption under the tax code. § 107(2); *Kirk*, at 494-95; *see also Silverman*, No. 72-1336, 1973 WL 2493, at *1, *3. The *Kirk* court reviewed claimant's petition and found that, while he had the same duties as ordained co-members of a Methodist social services board, his lack of ordination–with the lacking sacerdotal nature of his duties–barred him from the section 107(2) exemption. 425 F.2d at 494-95. The Methodist Church commonly ordains and titles their ministers and had not done so for the claimant in *Kirk*, so the court held that the exemption could not cover this claimant. *See id; see also Silverman*, 1973 WL 2493, at *3 (holding that claimant was entitled to a section 107(2) exemption despite not being ordained, because ordinations are uncommon in the Jewish religion and his duties were those of a minister). This indicates that, if a claimant could have been ordained as a minister and was not, he may not be considered as a minister under section 107(2). *Kirk*, 425 F.2d at 494-95.

In this case, the school titled Petitioner only as a secular teacher. R. at 3. The associated church was in the practice of ordaining individuals and naming them pastors, such as Petitioner's friend and colleague, Pastor Nick, but chose not to exercise this ability for Petitioner. R. at 4.; § 107(2); *Silverman*, 1973 WL 2493, at *3; *Kirk*, 425 F.2d at 494-95. Petitioner contends that the qualifying decision ought to be left to the school, but even the institution has rejected any ministerial status through its failure to coordinate any ordination. R. at 5; *see Silverman*, 1973 WL 2493, at *3; *Kirk*, 425 F.2d at 494-95. Further, by failing to give Petitioner an official title or religiously-based roles, the school did not hold Petitioner out as a minister. *See Kirk*, 425 F.2d at 494-95.

Still, under *Hosanna-Tabor* and its tax-related progeny, such an official designation is not exhaustive; a petitioning employee must show that he is functionally a minister to receive the

exemption under § 107(2). *See Hosanna-Tabor*, 565 U.S. at 192; *Kirk*, 425 F.2d at 494-95. Petitioner has not done so.

2. Because Petitioner does not perform sufficient sacerdotal duties in his role at the school, he cannot claim the exemption under section 107(2).

Petitioner fails to show that he has performed sufficient "important religious" duties to serve as a minister, even without a title or status as a minister. *See Hosanna-Tabor*, 565 U.S. at 192; *see, e.g.*, *Boyer*, 69 T.C. at 523; *Colbert*, 61 T.C. at 452, 455; *Tanenbaum*, 58 T.C. at 8. His teaching position and volunteerism with students falls short of the duties required of a minister. R. at 3. *See Boyer*, 69 T.C. at 523; *Colbert*, 61 T.C. at 452, 455; *Tanenbaum*, 58 T.C. 1, 8; *Lawrence*, 50 T.C. at 499-500.

The Tax Court contemplated how far the section 107(2) exemption can extend, ruling that it did not extend to many secular teachers without sacerdotal duties. In *Boyer*, a Methodist minister attempted to obtain a tax exemption while employed as a data processing professor at a state university. 69 T.C. at 523. The Tax Court held that, since his duties to the secular institution were unrelated to his role in the Methodist Church, he could not claim a tax exemption under section 107(2). *Id.* at 533. The claimant's duties were not related to his ordained status or affiliated church, but resembled those of any secular teacher. *Id.*

Similarly, the Tax Court in *Tanenbaum* rejected a Jewish claimant's petition because of the secular focus of his employment contract. *Tanenbaum v. Comm'r*, 58 T.C. 1, 8 (1972). There, the claimant was hired to encourage interfaith understanding of Jewish history and ideals, rather than sacerdotal duties relating to worship. *Id.*; *see also Kirk*, 425 F. 2d at 493 (holding that a member of a Methodist social services board had no duties that were sacerdotal or worship-related was barred from exemption).

The Tax Court in *Lawrence* compared the duties of a "minister of education" at a Baptist school to those of a traditional Baptist minister. *Lawrence v. Comm'r*, 50 T.C. 494, 499-500 (1968). There, claimant's duties included the "administration of the educational and service organizations of the church," including Sunday School and volunteer groups, and making announcements and the opening prayer at Sunday Services. *Id.* at 495-96. Because these duties did not include participating in "religious rites and ceremonies," the claimant could not qualify for an exemption under section 107(2), despite having an official title and some involvement in religious activities. *Id.*

Further, the claimant in *Colbert*, an ordained Baptist minister, preached against Communism with the Anti-Communism Crusade, but he performed no religious ceremonies such as Baptism or the Lord's Supper, which are the primary functions of Baptist ministers. 61 T.C. at 452, 455. The claimant taught against Communism based on a belief that Baptists had a "responsibility" to "expose the errors and deceitful methods of Communism." *Id.* at 451. Still, the Crusade employed him to preach against communism, not for his sacerdotal duties, so the court determined that he was not a qualifying minister under section 107(2). *Id.* at 454-55.

At present, the school employs Petitioner to teach eleventh and twelfth grade English, Renaissance Literature, and foreign languages and to serve as a guidance counselor—secular duties, rather than sacerdotal. R. at 3, 5. His employment as a teacher is like that of the claimant in *Boyer*, who was a data processing professor. *See* 69 T.C. at 523. Like data processing, the secular teaching of English, literature, and languages are unrelated to Christian teachings, and instead are common subjects at various American schools. *See id.* Further, Petitioner's contracted position as a counselor is comparable to the anti-Communist preachings of the *Colbert* claimant. 61 T.C. at 452, 455. There, the claimant taught against Communism from a

basis of his faith; he believed that Baptists had a responsibility to teach against this ideology, but the Tax Court found this perspective insufficient to sustain ministerial status. *See id.* at 451, 454-55. Here, Petitioner relies on mental and behavioral health techniques and may incorporate common religious teachings, but this does not make him a minister. R. at 3; *see id.* Using one's faith in his profession does not make that person a minister of his faith. *Colbert*, 61 T.C. at 451, 454-55.

Finally, the extra-contractual duties of Petitioner are not related to his employment and are non-sacerdotal, like the duties of claimants in *Tanenbaum* and *Lawrence.* R. at 3-5; *Tanenbaum*, 58 T.C. at 8; *Lawrence*, 50 T.C. at 494, 499-500. In *Tanenbaum,* the Tax Court noted what the claimant was contracted to do: promote interfaith understanding, not to lead worship events and perform sacraments. 58 T.C. at 8. In *Lawrence*, the claimant was an educational administrator that led prayers, but conducted no sacraments, and so was barred from an exemption. 50 T.C. at 495-96. Here, Petitioner's after-school club has prayerful elements, but he is not contracted to accomplish those duties, and he performs no sacraments. R. at 3-5; s*ee Tanenbaum*, 58 T.C. at 8; *Lawrence*, 50 T.C. at 495-96. His volunteerism may be spiritual and appreciated by the students, but Petitioner has failed to show that these tasks are ministerial and sacerdotal in nature, so Petitioner is unsuccessful in showing that he can claim the exemption under section 107(2). *See Tanenbaum*, 58 T.C. at 8; *Lawrence*, 50 T.C. at 495-96.

B. Petitioner cannot be considered a "minister of the gospel" under the law because the school that employed Petitioner was not sufficiently integrated with its parent-church.

For its employees to be eligible as "ministers of the gospel" under 26 U.S.C.§ 107(2), a school must be sufficiently connected to a religious institution. *Flowers v. United States*, No. CA 4-79-376-E, 1981 U.S. Dist. LEXIS 16758, at *14-15 (N.D. Tex. Nov. 25, 1981); *Toavs*, 67 T.C. at 904-05; *Boyer*, 69 T.C. at 523. Courts may consider a number of factors to establish a

connection, but Petitioner has failed to show a sufficient relationship. *See Flowers*, 1981 U.S. Dist. LEXIS 16758, at *14-15; *Toavs*, 67 T.C. at 904-05; *Boyer*, 69 T.C. at 523.

The District and Appellate Courts in this case looked to *Flowers v. United States,* which relied on Revenue Ruling 72-606. R. at 20; *Flowers*, 1981 U.S. Dist. LEXIS 16758, at *14-15. Revenue Ruling 72-606 outlined eight factors for courts to consider regarding the relationship between an institution and a church, generally including shared name and incorporation, church control of leadership and general management, and financial control and oversight by the church. Rev. Rul. 72-606, 1972-2 C.B. 78. By looking to these factors, the *Flowers* court determined that the university in question was not sufficiently integrated with the affiliated church. *See* 1981 U.S. Dist. LEXIS 16758, at *14-15. Ultimately the *Flowers* court determined that the claimant's duties were non-sacerdotal, and his employer-school was not sufficiently integrated with its affiliated church, like Petitioner's employer-school in this case. *See id.*

Similarly, the *Toavs* court explained that when duties are performed for an agency, that agency must be under the authority of a church denomination. 67 T.C. at 904-05. To review if the organization in question is under the authority of a denomination, the *Toavs* court reviewed (1) church requirements for the agency, (2) whether losing the connection would impair the agency's ability to fulfill its mission, (3) any requirements for agency members to be church members, (4) the legal relationship, and (5) the church's oversight and control of the agency and its members. *Id.* at 905. Lacking these factors, a claimant working for the agency was barred from claiming the exemption under section 107(2). *Id.*

Further, in *Boyer,* the court examined the duties as well as group affiliation. 69 T.C. at 523. There, claimant worked for the Anti-Communism Crusade for religious reasons. *Id*. This group worked with individual Baptist churches, though it was not affiliated with any singular

church or officially under the denomination. *Id.* While this court did not review the factors outlined in *Toavs* or *Flowers,* the lack of any official connection shows most would have been met were an analysis to take place. *Flowers*, 1981 U.S. Dist. LEXIS 16758, at *14-15; *Toavs*, 67 T.C. at 905; *Boyer*, 69 T.C. at 523. This lack of affiliation meant that claimant was not employed by a qualifying religious organization and could not claim the section 107(2) exemption. *Boyer*, 69 T.C. at 523.

Here, the record does not establish that the school had the requisite connections to the church. The Appellate Court rightly noted that the District Court relied on assumptions based on gaps in the record. R. at 20. Petitioner's claim fails because he did now show sufficient connection between the church and school. *See Flowers*, 1981 U.S. Dist. LEXIS 16758, at *14-15; *Toavs*, 67 T.C. at 904-05*; Boyer*, 69 T.C. at 523. Under the factors in Rev. Rul. 72-606, 1972-2 C.B. 78, the only factor Petitioner affirmatively demonstrated was the shared name between the church and the school. *See Flowers*, 1981 U.S. Dist. LEXIS 16758, at *14-15. While a school and a religious institution may share a name and location, actual connections are required for a school to employ ministers in their ministerial status, including legal status, church control, and financial aspects. *Toavs*, 67 T.C. at 905; *see also Flowers*, 1981 U.S. Dist. LEXIS 16758, at *14-15. Here, the school could seemingly operate without pause if the connection to the church severed; the record supports only general Christian teachings and services to students, for which an official connection is not required. R. at 3; *see Toavs*, 67 T.C. at 905. While the school employs at least one pastor from the church, the record is silent as to any requirement that the two share employees, if the church must approve of all employees, or if the church can wholly terminate an employee. R. at 4; *see Toavs*, 67 T.C. at 905. Finally, the record is silent as to denominational oversight and control of the school's management or finances. *See Toavs*, 67

T.C. at 905. Petitioner only cites his occasional use of general teachings when providing guidance to students, which cannot establish a sufficient connection between this church and school. R. at 3; *see Flowers*, 1981 U.S. Dist. LEXIS 16758, at *14-15; *Toavs*, 67 T.C. at 905.

Petitioner's failure to show sufficient title and status within a religious community, duties of a sacerdotal nature, and connection between his employer-school and parent church indicates that he cannot be found as a minister under section 107(2). *See Flowers*, 1981 U.S. Dist. LEXIS 16758, at *14-15; *Toavs*, 67 T.C. at 904-05; *Boyer*, 69 T.C. at 523; *Colbert*, 61 T.C. at 452, 455; *Tanenbaum*, 58 T.C. at 8; *Kirk*, 425 F.2d at 494-95; *Lawrence*, 50 T.C. at 499-500.

II. 26 U.S.C. § 107(2) IS A VALID EXERCISE OF GOVERNMENT AUTHORITY UNDER THE ESTABLISHMENT CLAUSE.

Section 107(2) satisfies the Establishment Clause. *See* U.S. CONST. amend. I. Accordingly, this Court relies on two different tests to determine whether a challenged law violates the Establishment Clause. *See generally Lemon v. Kurtzman*, 403 U.S. 602 (1971)*; Town of Greece, N.Y., v. Galloway*, 572 U.S. 565, 577 (2014). The *Lemon* test is the predominant jurisprudential approach, requiring a statute: (1) "have a secular legislative purpose," (2) have "a principal or primary effect that neither advances nor inhibits religion", and (3) "not foster *excessive* government entanglement with religion." *Lemon*, 403 U.S. at 612-13 (emphasis added). More recently, this Court has applied a "historical significance" test where it upholds a statute if the law fits "within the tradition long followed in Congress and the state legislatures." *Town of Greece, N.Y.*, 572 U.S. at 577; *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2087 (2019) (noting that the Court diverted from the *Lemon* test and opted for an approach that considers the historical foundations underlying the government action).

Section 107(2) satisfies both Establishment Clause tests. Under the traditional *Lemon* test, legislative history demonstrates that Congress enacted the parsonage exemption not to

advantage ministers, but to eliminate discrimination against and between ministers as part of a larger tax scheme. *Gaylor*, 919 F.3d at 428-30. When viewed in the broader context of the U.S. Tax Code, 26 U.S.C. § 107(2) is not a government subsidy, but merely one of several tax provisions exempting certain employer-based housing from the normative tax base. *Id.* at 429; *see Walz v. Tax Comm'n of New York*, 397 U.S. 664, 675 (1970). Finally, by categorically exempting parsonages from tax liability, section 107(2) avoids invasive government entanglement with a church's internal affairs. *See id.* at 674. Under this Court's "historical significance" test, section 107(2) reflects a long-standing history of exempting religious property from taxation. *See Gibbons v. District of Columbia*, 116 U.S. 404, 406 (1886). In codifying a tax exemption for ministers' rental allowances, Congress sought to maintain the lengthy, historical practice of religious property tax exemptions, which date back to the founding of the American republic. *See Gaylor*, 919 F.3d at 436.

A. 26 U.S.C. § 107(2) survives the *Lemon* Test because it is merely one of several provisions exempting both secular and non-secular groups from income tax liability and is applied categorically to avoid government entanglement.

1. 26 U.S.C. § 107(2) advances three secular legislative purposes.

Section 107(2) satisfies the first prong of the *Lemon* test because it is one of several tax provisions serving the overarching, secular purpose of exempting certain employer-provided housing from income taxation. Under the Establishment Clause, Congress is precluded from enacting statutes with the primary objective of advancing religion. *McCreary County v. Am. Civ. Liberties Union of Ky.*, 545 U.S. 844, 859 (2005). Still, Congress is permitted—and at times required—to craft legislation referencing religion in order to accommodate religious groups in legislative schemes. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338 (1987); *see also Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 10 (1989) (plurality opinion). Therefore, courts will only strike down a statute if it was motivated "wholly

by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984). In determining legislative intent, the plaintiff bears the burden to demonstrate that the government's stated secular purpose is insincere, or entirely religiously motivated. *Gaylor*, 919 F.3d at 427-28.

The Seventh Circuit directly addressed whether section 107(2) satisfies the first prong of the *Lemon* test in *Gaylor v. Mnuchin*. *Id.* at 427-32. There, the Treasury Department articulated three secular purposes for the parsonage exemption: (1) "to eliminate discrimination *against* ministers," (2) "to eliminate discrimination *between* ministers," and (3) "to avoid excessive entanglement with religion." *Id.* at 427 (emphasis added). Looking to legislative history as evidence of Congressional intent, the court unanimously concluded that the plaintiff failed to show that these three purposes were illegitimate. *Id.* at 432. Thus, because section 107(2) was not motivated "wholly by religious considerations," the court held that the provision satisfies the first prong of the *Lemon* test. *Id.*

Examining these three secular purposes in turn, the legislative history of 26 U.S.C. § 107(2) illustrates that Congress enacted the provision in part to avoid discrimination *against* ministers. Upon the ratification of the Sixteenth Amendment in 1913, the IRS addressed defining "gross income." *See* U.S. CONST. amend. XVI; *Gaylor*, 919 F.3d at 423. Over the next decade, the IRS issued several rulings exempting certain housing costs from tax liability under the "convenience of the employer" doctrine, reasoning that a taxpayer should not be taxed for housing costs that primarily benefit the employer. *Gaylor*, 919 F.3d at 423-24 (listing several exemptions from the IRS rulings including seamen, hospital employees, and workers living in camps). In 1921, the IRS declined to extend these same protections to ministers, forcing Congress to pass a statute to effectuate this extension. *Id.* at 424. Finally, in 1954, Congress codified the convenience of the employer doctrine generally in 26 U.S.C. § 119(a)(2), along with

a number of categorical tax exemptions including § 107(2). *Id.* These *per se* exemptions reduced the administrative costs of implementing this doctrine, while acknowledging that some positions–including ministers–generally have housing for the employer's benefit. *Id.* at 429.

Therefore, section 107(2)'s history demonstrates that Congress did not enact the law to advantage ministers, but instead sought to provide them the same categorical exemptions afforded to certain classes of secular employees. *See, e.g.*, 26 U.S.C. §§ 132 (any employee away for temporary business trip), 134 (any member of uniformed services), 162 (any employee away for temporary business trip), 911 (any citizen living abroad), 912 (any overseas government employees). As long as Congress exempted ministers for similar reasons as these secular classes, section 107(2) is part of a greater, secular tax scheme. *Compare Walz*, 397 U.S. at 672-73 (reasoning that a property tax exemption for churches fell within a greater tax scheme exempting private, nonprofit organizations), *with Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 n.4 (plurality opinion) (rejecting a sales tax exemption for religious periodicals because other sales tax exemptions were for unrelated purposes). In *Jones v. United States*, the United States Court of Claims explained that one of these secular classes--military officials--are exempt because their positions required their physical presence, continuous daily service, use of housing to accomplish their duties, and frequent movement and limited choice. 60 Ct. Cl. 552, 569 (1925). Ministers traditionally hold these same job-related duties within similar employment relationships, and therefore, they are entitled to a similar categorical tax exemption. *See* Hannah C. Smith & Daniel Benson, *When a Pastor's House is a Church Home: Why the Parsonage Allowance is Desirable Under the Establishment Clause*, 18 FEDERALIST SOC'Y REV. 100, 107 (2017).

Conversely, CARC has failed to show that their employees, by virtue of their positions, naturally obtain housing for their employer's benefit. They are still eligible for a similar income

tax exemption if they meet the conditions set forth in section 119(a)(2), and they are only required to do so because their positions do not naturally fall within the convenience of the employer doctrine like ministers and other secular employees. Though section 107(2) may appear to favor ministers over CARC employees, in reality, section 107(2) is merely one of several tax provisions categorically exempting certain positions that traditionally have housing for the employer's benefit. *Gaylor v. Mnuchin*, 919 F.3d at 429. That CARC employees fail to meet a categorical exemption does not indicate that the parsonage exemption is unconstitutional.

Additionally, the legislative history of section 107(2) indicates that Congress intended provision to eliminate discrimination *between* ministers. In 1954, Congress amended the parsonage exemption to exempt rental cash allowances in addition to the value of in-kind housing. *Gaylor*, 919 F.3d at 424. As shown in the House and Senate reports, legislators did not intend these amendments to advantage ministers, but wanted them to "remove[] the discrimination in existing law" between denominations. H.R. Rep. No. 99-253, at 4040 (1954); S. Rep. No. 83-1622 at 4646 (1954). Certain religious denominations—whether for financial or theological reasons—were more likely to purchase parsonage than others, leading to a disparity in their respective tax liabilities. Smith & Benson, *supra*, at 110-11. Therefore, the 1954 amendments served to remedy this discrimination, following several court decisions in the 1950s exempting ministers' cash allowances from "gross income." *Gaylor*, 919 F.3d at 424 n.2 (citing *Williamson v. Comm'r*, 224 F.2d 377 (8th Cir. 1955); *Conning v. Busey*, 127 F. Supp. 958 (S.D. Ohio 1954); *MacColl v. United States*, 91 F. Supp. 721 (N.D. Ill. 1950)).

Lastly, rather than creating excessive entanglement, section 107(2) avoids the excessive government entanglement that would arise from either imposing tax liability on ministers or subjecting them to fact-intensive analyses under section 119(a)(2). As discussed further under

Respondent's analysis of the third prong of the *Lemon* test, section 107(2) only asks the IRS to conduct a facial inquiry as to whether an individual claiming the parsonage exemption is a "minister of the gospel"—a less intrusive analysis than the multifactor approach under section 119(a)(2). *Id.* at 432 (listing out the five factors); *see infra* pp. 18-19. This Court has already explicitly held that avoiding excessive government entanglement is a secular purpose under the first prong of the *Lemon* test. *Amos*, 483 U.S. at 335. Therefore, because section 107(2) serves a number of articulable, secular purposes and is not motivated "wholly by religious considerations", the provision satisfies the first prong of the *Lemon* test. *See Lynch*, 465 U.S. at 680.

2. 26 U.S.C. § 107(2) neither advances nor inhibits religion.

26 U.S.C. § 107(2)'s property tax exemption satisfies the second prong of the *Lemon* test because it neither advances nor inhibits religion. The second prong requires that a statute have a "principal or primary effect . . . that neither advances nor inhibits religion." *Lemon*, 403 U.S. at 612. For a law to have an "effect" that advances religion, the government must advance religion through its own actions and impacts. *Amos* 483 U.S. at 337. This advancement entails "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz*, 397 U.S. at 668 (1970).

In *Walz*, the Court upheld the New York City Tax Commission's grant of a tax exemption to church property against an Establishment Clause challenge. *Id.* at 672. The Court held that "the grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Id.* at 675. In its decision, the Court further noted that religious property tax exemptions actually support the separation of church and state and insulate the two from each other. *Id.* at 676. Similarly, in *Amos*, the Court upheld section 702 of the Civil Rights Act of 1964, which

exempted religious organizations from a prohibition on religious discrimination in employment, against an Establishment Clause challenge. 483 U.S. at 339; *see also Hosanna-Tabor*, 565 U.S. at 188-90 (upholding a ministerial exception for employment discrimination against an Establishment clause challenge). In its analysis the *Amos* Court noted that "[a] law is not unconstitutional simply because it *allows* churches to advance religion." 483 U.S. at 337. Instead, in order to violate the Establishment Clause, the government must directly advance religion through its own actions. *Id.*

In *Texas Monthly*, the Court, in a plurality opinion, narrowed its rule and held that a Texas statute that exclusively exempted religious periodicals from sales taxes violated the Establishment Clause. 489 U.S. at 25. The Court noted that there were no other tax exemptions for other non-religious periodicals. *Id.* at 15. Thus, the state seemed to be endorsing and advancing religious periodicals in particular. *Id.* While the Court concluded that every tax exemption constitutes a subsidy, it importantly noted that as long as the subsidy is given to many nonsectarian organizations as well as religious organizations, "the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause." *Id.* at 14-15. Most importantly, the Court took issue with the tax exemption because the government granted it only to religious publications and the exemption burdened nonreligious publications. *Id.* at 15.

Like the religious exemption in *Amos*, the religious tax exemption here is not a government sponsorship of religion, but simply allows religious organizations and religious individuals to advance their own religion by providing their employees with benefits. *See Amos*, U.S. at 337. Moreover, the tax exemption in section 107(2) does not constitute any direct payment of taxpayer money to a religious institution or even an institution's employee. R. at 1.

Notably, section 107(2) is not a singular, narrow religious publication exemption like the one in *Texas Monthly*. 489 U.S. at 14. Rather, the parsonage exemption is part of a broader federal scheme like the regulation this Court upheld in *Amos*. *See Amos*, 483 U.S. at 339.

Furthermore, section 107(2) is not a government subsidy. While some argue that a tax exemption and a subsidy have a similar practical impact, *see* Adam Chodorow, *The Parsonage Allowance*, 51 U.C. DAVIS L. REV. 849, 854 (2018), this Court has held that a religious tax exemption is not government sponsorship of religion because rather than transferring its own money to the minister, the government is refusing to accept the minister's money. *See Walz*, 397 U.S. at 675. Like the religious tax exemption the Court upheld in *Walz*, the parsonage tax exemption here does not qualify as a government subsidy regardless of the incidental "economic benefits" it offers the individuals. *Walz*, 397 U.S. at 674-75.

Even if the Court concludes the exemption is a subsidy, the exemption here is markedly different than the one the Court struck down in *Texas Monthly*. 489 U.S. at 14-15. Here, the tax exemption is not "exclusively" granted to religious organizations and does not burden nonbeneficiaries, because there are similar, secular tax exemptions in the U.S. Tax Code. *Gaylor*, 919 F.3d at 429; *see also Texas Monthly*, 489 U.S. at 15. Thus, 26 U.S.C. § 107(2) satisfies the second prong of the *Lemon* test because the government itself has not advanced religion through its direct actions. *Lemon*, 403 U.S. at 612.

3. 26 U.S.C. § 107(2) does not foster excessive government entanglement, but rather avoids it.

Section 107(2) satisfies the third and final prong of the *Lemon* test because it avoids excessive government entanglement, rather than impermissibly fostering it. The Establishment Clause prohibits the government from intrusive "participation in, supervision of, or inquiry into religious affairs." *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 995 (quoting *United*

States v. Indianapolis Baptist Temple, 224 F.3d 627, 631 (7th Cir. 2000)). However, because some interactions between church and state are inevitable, this Court has emphasized that such entanglement must be *excessive* before triggering Establishment Clause scrutiny. *Agostini v. Felton*, 521 U.S. 203, 233 (1997). In addition, the legislature is entitled to deference in both determinations regarding the Establishment Clause and tax classifications. *Gaylor*, 919 F.3d at 434.

As with the first two prongs of *Lemon*, *Gaylor* guides the application of the third prong to the parsonage exemption. In that case, the Seventh Circuit reasoned that section 107(2) provides a bright line rule, categorically exempting ministers of the gospel in order to avoid the impermissible fact-intensive analyses entailed in section 119(a)(2)—the general convenience of the employer exemption. *Id.* at 432. Thus, absent this *per se* rule, the IRS would be forced to engage in intrusive, case-by-case determinations that would run afoul of the Establishment Clause. *Id.* Noting that this Court has rejected invasive inquiries into a church's internal affairs in order to determine tax liability, the Seventh Circuit concluded that section 107(2) does just the opposite of fostering excessive entanglement. *Id.* (citing *Serbian E. Orthodox Diocese for U.S. of Am. & Can. v. Milivojevich*, 426 U.S. 696, 708-20 (1976)).

Eliminating section 107(2) would invariably lead to greater government entanglement. As this Court noted in *Walz*, imposing taxes on religious groups would "expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." 397 U.S. at 674. In addition, absent section 107(2), ministers would have to file for exemption under section 119(a)(2), a multifactor test demanding a fact-specific inquiry into the relationship between the minister and his or her employer. *See Gaylor*, 919 F.3d at 428 (laying out all five

factors); 26 U.S.C. § 119(a)(2). With each case, the IRS would have to determine whether a denomination's minister is an employee—a determination that would require an inquiry into the requirements, structure, and internal matters of the religious group and their specific employment requirements. Smith & Benson, *supra*, at 109-10. Additionally, even if a court determined that the minister is an employee, the government would have to further inquire into whether the lodging is truly for the convenience of the employer as a condition of employment. *Id.* at 110. This Court rejected a similar analysis of a church's internal affairs in *Walz*, reversing the lower court's decision for creating a "continuing day-to-day relationship" between the church and state. 397 U.S. at 674. Instead, this Court has preferred categorical exemptions like the one seen in Title VII for religious employers. *Amos*, 483 U.S. at 335-38 (holding section 702 of the Civil Rights Act of 1964 passes the *Lemon* test in categorically exempting religious employers from religious discrimination in their nonprofit activities).

Facial inquiries into whether an individual is a minister of the gospel under section 107(2) do not constitute excessive government entanglement under the Establishment Clause. Such an inquiry is far less intrusive than the alternatives above, and this Court recently engaged in a similar analysis in *Hosanna-Tabor*. 565 U.S. at 190-94 (concluding a teacher titled "Minister of Religion, Commissioned" was a minister for the purposes of a retaliation claim based on her title and job duties). This level of inquiry can be distinguished from the sales tax exemption in *Texas Monthly*, which involved examining the content of periodicals for sufficiently religious messaging. 489 U.S. at 20-21. Instead, this exemption is more akin to the property tax exemption in *Walz*. Like in *Walz*, the exemption here makes no reference to religious messaging or content, avoiding an invasive relationship between church and state. *See* 397 U.S. at 674-75. Thus,

section 107(2) meets the third prong of the *Lemon* test because its facial inquiries avoid what would otherwise constitute excessive government entanglement.

B. Religious property tax exemptions like 26 U.S.C. § 107(2) satisfy the historical significance test and are permissible under the Establishment Clause.

26 U.S.C. § 107(2)'s religious tax exemption is permissible under the Establishment Clause because it reflects a historically significant and well-established practice. In evaluating Establish Clause violations, the Supreme Court has articulated an alternative to the *Lemon* test that evaluates whether the practice "fits within the tradition long followed in Congress and the state legislatures." *Town of Greece*, 572 U.S. at 577; *see also Van Orden v. Perry*, 545 U.S. 677, 686 (2005) ("Many of our recent cases simply have not applied the *Lemon* test."). This fact-based analysis requires that any Establishment Clause inquiry evaluate the history and "must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Town of Greece*, 572 U.S. at 566.

As the Eighteenth Circuit noted below, granting tax exemptions to church-sponsored housing "is a tradition that is deeply embedded in our nation's history." R. at 21. State legislatures created religious property tax exemptions in their tax codes, which have been permanent fixtures in this country from the early years of the American republic to the present day. *See* John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 S. CAL. L. REV. 363, 380, 386-90 (1991). While Congress enacted section 107(2) in 1921, federal tax exemptions for religious property date back to 1802, when Congress granted such an exemption in the then federally controlled County of Alexandria. *Gaylor*, 919 F.3d at 436 (7th Cir. 2019).

Notably, courts have upheld these exemptions for as long as they have been in existence. In *Gibbons v. District of Columbia*, the Supreme Court addressed whether federal tax statutes

that exempted church buildings, church grounds, and land appurtenant to any church buildings were constitutional. 116 U.S. at 406. The Court concluded that Congress has the discretion to exempt certain classes of property from taxation or simply tax them at a lower rate than other property. *Id.* at 408. In its ruling upholding the religious property tax exemption, the *Walz* Court reasoned that while one does not gain the right to violate the Constitution simply because of its prolific history, "an unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside." *Walz*, 397 U.S. at 678; *see also Am. Legion*, 139 S. Ct. at 2085 ("The passage of time gives rise to a strong presumption of constitutionality."). Almost a century after deciding *Gibbons*, the Supreme Court noted that the decision to uphold the religious tax exemption reflected a long-standing "history and uninterrupted practice" that "federal or state grants of tax exemption to churches were not a violation of the Religion Clauses of the First Amendment." *Walz*, 397 U.S. at 680.

While it is true that section 107(2) is an income tax exemption, rather than a property tax exemption, the lengthy history of exempting religious property from taxes still demonstrates that the concept of exempting religious property from taxation "withstood the critical scrutiny of time and political change." *Town of Greece*, 572 U.S. at 566. The language of the statute clearly reflects this similar religious-property-based meaning. *See* 26 U.S.C. § 107(2). Section 107(2) only permits a minister of the gospel to exempt from his income a rental allowance he receives "to the extent used by him to rent or provide a home." *Id.* By focusing on the rental allowance of a minister of the gospel, the statute serves to effectuate the same idea behind the property tax exemptions: ensuring that tax exemptions apply to religious properties. *See Gibbons*, U.S. at 406.

Furthermore, because Congress could not validly collect income taxes until the passage of the Sixteenth Amendment in 1913, an earlier codified parsonage tax exemption was not possible. *See Gaylor*, 919 F.3d at 436. Thus, shortly after Congress obtained the power to tax income, it sought to (1) avoid the impermissible analysis of the general convenience of the employer exemption, and (2) continue its practice of exempting religious property from taxation—a "tradition long followed in Congress and the state legislatures." *Town of Greece*, 572 U.S. at 577; *see Gibbons*, 116 U.S. at 406-07. In the present iteration, the only aspect Congress changed was that it extended this well recognized religious property exemption to income tax as well. *See* § 107(2). As such, 26 U.S.C. § 107(2) reflects the culmination of a substantial and long-standing history of exempting religious properties from taxation and thus is constitutional. *See Town of Greece*, 572 U.S. at 576.

CONCLUSION

Religious tax exemptions are embedded in this nation's history, dating back to 1802. Following the passage of the federal income tax, Congress maintained this long-standing practice, statutorily exempting ministers from tax liability precisely one hundred years ago. Now codified in section 107(2), the parsonage exemption is one of several narrow, categorical income tax exemptions granted only to particular employment positions in which an employee's housing is naturally for the employer's benefit. This legislative history demonstrates that Congress did not intend section 107(2) to advantage ministers, but to provide them the same tax exemptions as similarly situated, secular employees. Petitioner John Burns, employed as a teacher of literature and language arts and as a guidance counselor at an unintegrated church-school, fails to meet this narrow exemption. Thus, this Court should affirm the Eighteenth Circuit's decision because Petitioner does not qualify for the parsonage exemption—an exemption that satisfies the Establishment Clause through both the *Lemon* test and the historical significance test.

Respectfully Submitted,
/s/ Team No. 18
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