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

BRIEF FOR RESPONDENT

Team 2
ATTORNEYS FOR RESPONDENT

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I. Whether a teacher is a "minister of the gospel" under 26 U.S.C. 107(2) when he was hired to teach secular subjects and does not perform sacerdotal duties.

II. Whether 26 U.S.C. 107(2) is constitutional under the Establishment Clause when it accommodates religion by providing a historically permitted housing allowance exemption to ministers that secular employees can claim under a different section.

STATEMENT OF THE CASE

I. Statement of Facts

In 2016, Whispering Hills Academy ("WHA"), a religious boarding school operated by the Whispering Hills Unitarian Church ("WHUC") hired John Burns ("Petitioner") to teach secular subjects including English, Renaissance Literature, French, Italian, and Latin to high school students. R. at 3. Petitioner also serves as a school guidance counselor, advising students on educational and personal matters. R. at 3.

Outside of his roles as teacher and guidance counselor, Petitioner often hosts gatherings for the students who are unable to return home on the weekends. R. at 3. These informal events involve lunch, snacks, and socialization, wherein the students discuss, among a wide range of other topics, the week's church services. R. at 3.

Petitioner moved closer to WHA when he accepted the position because his previous residence was over an hour away. R. at 3. To offset the associated costs of the move, WHA provided Petitioner with $2,500. R. at 4. WHA also agreed to include a rental allowance of $2,100 per month as a part of Petitioner' monthly salary. R. at 4. This monthly amount reflects the fair rental value of the home and expected utility costs. R. at 4.

In 2017, a co-worker suggested that Petitioner consider claiming the parsonage exemption under 26 U.S.C. 107(2), which provides a "minister of the gospel" with a tax exemption on the total housing allowance paid by an employer. R. at 1, 4. Petitioner followed this advice and claimed the housing allowance on his 2017 tax return. In the summer of 2018, the IRS and the Commissioner of Taxation notified Petitioner that he did not qualify for the exemption because he could not prove that he was a "minister of the gospel." R. at 4.

II. Nature of the Proceedings

The District Court. Petitioner filed suit against the Internal Revenue Service and the Commissioner of Taxation (collectively "the IRS" or "the Government") in the District Court for the Southern District of Touroville arguing that he is eligible for the parsonage exemption under 26 U.S.C. 107(2) because he is a "minister of the gospel." R. at 4. Upon learning of Petitioner' pending lawsuit, a local organization called Citizens Against Religious Convictions, Inc. ("CARC") filed a motion to intervene under Rule 24(a)(2) of the Federal Rules of Civil Procedure. R. at 1, 4. CARC contends that the parsonage exemption is unconstitutional because it violates the Establishment Clause of the First Amendment by preferring religion over irreligion. R. at 4. The District Court found that CARC has standing due to its significant interest in the outcome of the case because the statute excludes its members from the exemption. R. at 1. The District Court granted CARC's motion and added CARC as a plaintiff-intervenor party. R. at 2. The District Court denied the IRS's motion for summary judgment, holding that Petitioner is a "minister of the gospel" because he performs sacerdotal functions and counsels students on religious matters. R. at 2, 3. The District Court also found that the parsonage exemption fails the *Lemon* test and is thus unconstitutional. R. at 3.

The Circuit Court. The Eighteenth Circuit addressed two issues on appeal. R. at 16. First, whether Petitioner qualifies for the parsonage exemption even though he is not an ordained, licensed minister; and second, whether the IRS is entitled to judgment as a matter of law because the parsonage exemption is constitutional. R. at 16. The Eighteenth Circuit reversed the District Court's decision and granted summary judgment in favor of the IRS on both claims, holding that Petitioner failed to prove his employer considered him to be a minister and that the parsonage exemption properly mitigates the threat of government entanglement in church affairs. R. at 16.

SUMMARY OF THE ARGUMENT

This is a case about the Government's ability to utilize tax exemptions for qualifying ministers, in an effort to accommodate religion while maintaining the separation of church and state. A robust body of IRS rulings, regulations, and United States Tax Court caselaw has long guided courts in making determinations about ministerial status under 26 U.S.C. 107(2). Decades' worth of Tax Court precedent has culminated in a five-factor test which properly weighs the relevant IRS rules and regulations to create a sufficiently broad, yet deliberately narrow, approach to the application of the parsonage exemption. Under this balancing test, no one factor is weighed more than another. Petitioner has not satisfied any of the five criteria. By merely leading an after-school prayer club and hosting informal Sunday gatherings, Petitioner does not administer sacraments or conduct worship services. Whispering Hills Academy is not sufficiently integrated with Whispering Hills Unitarian Church because the relationship between the two entities does not satisfy the eight-criteria established in the applicable IRS ruling. Petitioner is not ordained, licensed, or commissioned, as no religious ministry was conferred on him by Whispering Hills Academy or Whispering Hills Church. Petitioner is not considered a spiritual leader because he was hired to teach secular subjects and act as a guidance counselor, not to perform sacerdotal functions. Petitioner does not qualify for the parsonage exemption because he fails to satisfy all five factors in the balancing test.

The parsonage exemption found in 26 U.S.C. 107(2) is constitutional under the Establishment Clause because it functions as an accommodation that reflects historical practices and because it passes muster under *Lemon*. Courts need not apply a specific test to determine the boundaries of the Establishment Clause where unbroken historical practices exist. This Court has long upheld tax exemptions for churches and income exemptions for employees. Alternatively,

the parsonage exemption passes constitutional muster under *Lemon* because the exemption has secular legislative purposes, does not advance religion, and does not excessively entangle church and state. The Government identified two secular legislative purposes for the parsonage exemption: maintaining a separation of church and state and limiting government's interference with internal church matters. Because the parsonage exemption accommodates religion by allowing churches to advance religion, the Government itself avoids impermissibly advancing religion. The Government avoids excessive government entanglement with religion because the parsonage exemption requires far less government involvement than the housing exemption for secular employees. Therefore, this Court should affirm the Eighteenth Circuit's decision and hold that Petitioner does not qualify as a minister under the parsonage exemption, but the exemption is constitutional under the Establishment Clause.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE EIGHTEENTH CIRCUIT'S DECISION BECAUSE PETITIONER IS NOT A "MINISTER OF THE GOSPEL" UNDER 26 U.S.C. 107(2).

Petitioner failed to establish that he is a "minister of the gospel" for purposes of the parsonage exemption under 26 U.S.C. § 107(2); therefore, this Court should affirm the decision of the Eighteenth Circuit. The parsonage exemption provides that a "minister of the gospel" may exclude from gross income the "rental allowance paid to him as part of his compensation" provided as "remuneration for services which are ordinarily the duties of a minister of the gospel." 26 U.S.C. § 107(2); Treas. Reg. § 1.107–1(a). To determine ministerial status under § 107(2), a five-factor balancing test drawn from Treas. Reg § 1.1402(c)–5(b) and prior caselaw is applied. *Knight v. Comm'r*, 92 T.C. 199, 204 (1989). The factors assess whether an individual "(1) administers sacraments, (2) conducts worship services, (3) performs services in the control,

conduct, and maintenance of a religious organization, (4) is ordained, commissioned, or licensed, and (5) is considered to be a spiritual leader by his religious body." *Knight*, 92 T.C. at 204. The presence or absence of no single factor is dispositive of ministerial status, but "[f]ailure to meet one or more of these factors must be weighed by the court in each case." *Knight*, 92 T.C. at 204 - 205. Notably, lower courts have not applied the rationale developed by this Court in *Hosanna-Tabor* and its progeny, because that line of cases exclusively considered employment discrimination claims and not tax exemptions. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 656 U.S. 171, 196 (2012).

In *Our Lady of Guadalupe*, this Court reiterated that the purpose of the "ministerial exception" developed in *Hosanna-Tabor* is to ensure the judiciary does not infringe on a religious school's "selection and supervision of teachers." *Our Lady of Guadalupe Sch. v. Morrissey Berru*, 140 S.Ct. 2049, 2055 (2020). At bar before this Court is not an employment discrimination claim, but a tax exemption issue governed by a robust body of IRS rulings, regulations, and on-point Tax Court caselaw. We urge this Court to follow the principle it established in *Bingler* that "exemptions from taxation are to be construed narrowly," and refrain from applying the broad considerations of *Hosanna-Tabor* and its progeny to this tax exemption case. *Bingler v. Johnson*, 394 U.S. 741, 752 (1969).

Here, Petitioner fails to establish that he is a "minister of the gospel" for four reasons. First, Petitioner does not administer sacraments or conduct worship services during his after-school and weekend religious activities. Second, Whispering Hills Academy ("WHA") is not sufficiently integrated with Whispering Hills Unitarian Church ("WHUC"). Third, Petitioner is not ordained, commissioned, or licensed by WHUC. Fourth, as a teacher of secular subject matter and a guidance counselor, Petitioner is not

considered to be a spiritual leader by WHA. For these reasons, this Court should affirm the decision of the Eighteenth Circuit.

A. Petitioner does not administer sacraments or conduct worship services because his religious functions are limited to an after-school club and informal weekend gatherings.

Though Petitioner conducts limited quasi-religious functions, he does not "administer sacraments" or "conduct worship services." The definitions of "sacraments" and "worship" vary significantly across religious traditions. Determinations about these two factors "depend on the tenets and practices of the particular religious body" to which the subject is attached. Treas. Reg. § 1.1402(c)–5 (b)(2)(i). Accordingly, courts have considered the common practices of the religious denomination of the individual in question to assess ministerial status. *See Lawrence v. Comm'r*, 50 T.C. 494 (1968).

Most of the caselaw regarding this issue examines "sacraments" and "worship" in the Christian tradition. Under such circumstances, the majority of courts have emphasized the importance of the rites of baptism and the Lord's Supper. *Id*. For example, in *Lawrence*, the Tax Court held that a Baptist "minister of education" who regularly offered the opening prayer at Sunday worship was not a "minister of the gospel" because he "never administered the ordinances of baptism or the Lord's Supper." *Lawrence v. Comm'r*, 50 T.C. at 499; *see also Colbert v. Comm'r*, 61 T.C. 449, 452 (1974) (holding that an ordained Baptist minister did not perform the "duties of a minister of the gospel" because he did not administer "the rites of baptism and the Lord's Supper."). Contrarily, in *Wingo*, a deacon "administered the sacraments" and "conducted worship services" where he not only "administer[ed] the Sacraments of Baptism and the Lord's Supper," but also as "conducted divine worship, preached the Word, and

performed the services of marriage, burial, confirmation, and membership reception." *Wingo v. Comm'r*, 89 T.C. 922, 926 (1987).

There is one exception to this analysis. In *Knight*, the Tax Court found that the "incapacity to perform the Lord's Supper [and] baptism . . . did not diminish the ministry that petitioner did perform." *Knight*, 92 T.C. at 204. These "ministries" included "preaching, conducting worship, visiting the sick, performing funerals, and ministering to the needy." *Id.* Notably, even under the expansive holding of *Knight*, an individual must still perform significant religious functions to "administer sacraments" and "conduct worship."

Several cases have applied these factors to practitioners of Judaism, a lay and non-sacramental religion. Mindful that the term "sacrament" is commonly associated with Christianity, in *Silverman*, the Tax Court observed that "we must be mindful of the mores and customs of [the] religion as proven in the record." *Silverman v. Comm'r*, 52 T.C. 727, 731 (1972). There, the Tax Court held that a Jewish cantor "performed the ministerial duties required of him in his official position" because "he conducted religious worship; he administered sacerdotal functions; he performed marriages and officiated at funerals and services at houses of mourning, and he directed organizations within the congregation." *Id.*; *see also Salkov v. Comm'r*, 46. T.C. 190, 195 (1966) (holding that a Jewish cantor "administered sacraments" and "conducted worship" where his responsibilities included "officiating at weddings, funerals, and at houses of mourning.").

Here, there is no indication that Petitioner administered sacraments or conducted religious worship. The extent of Petitioner's religious activity is operating an after-school prayer club and hosting Sunday gatherings at WHUC. R. at 3. The record indicates that WHUC has Sunday services and that one of Petitioner's co-workers is a pastor. R. at 3,4. These two facts

suggest that the WHUC adheres to at least some of the formal traditions of sacramental denominations. There is no indication that the Petitioner performs any of the tenets or practices unique to the WHUC. Moreover, even if the WHUC is not sacramental, Petitioner still lacks a showing that he engaged in any substantial religious functions. Petitioner does not "administer sacraments" or "conduct religious worship. This Court should affirm.

B. Whispering Hills Academy is not sufficiently integrated with Whispering Hills Unitarian Church.

Petitioner does not "participate in the control, conduct, or maintenance of a religious organization" because WHA is not sufficiently integrated with WHUC. *Knight*, 92 T.C. at 204. To assess this factor, courts consider whether an individual's place of employment is an "integral agency of a church." *Toavs v. Comm'r*, 67 T.C. 897, 905 (1977). This determination requires a review of "all the facts and circumstances surrounding the relationship between the church denomination and the organization." *Id.* Accordingly, eight factors are weighed:

> (1) whether the religious organization incorporated the institution; (2) whether the corporate name of the institution indicates a church relationship; (3) whether the religious organization continuously controls, manages, and maintains the institution; (4) whether the trustees or directors by the institution are approved by or must be approved by the religious organization or church; (5) whether trustees or directors may be removed by the religious organization or church; (6) whether annual reports of finances and general operations are required to be made to the religious organization or church; (7) whether the religious organization or 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, 1972-2 C.B. 78.

In *Toavs*, the Tax Court determined that Challenge Homes, Inc. ("Challenge), a nursing home facility, was not an "integral agency" of the Assemblies of God Church ("Assemblies Church"). *Toavs*, 67 T.C. at 906. The Tax Court found no indication that

"loss of recognition by [the Assemblies Church] would impair Challenge's ability to carry out its primary purpose." *Id.* at 905. The Tax Court also emphasized the lack of a legal relationship between the two entities, observing that "the [Assemblies Church] does not have right of approval or the right to remove directors of Challenge, does not support Challenge financially, and cannot legally require Challenge to report on its operations." *Id.* Importantly, the Tax Court was not swayed by Challenge's assertion that it was "operating under the unwritten moral discipline and guidance of the [Assemblies Church]." *Id.* at 906.

Likewise, in *Flowers* the District Court determined that Texas Christian University ("TCU") was not an "integral agency" of the Disciples of Christ Christian Church ("Disciples of Christ"). *Flowers v. United States*, 1981 WL 1928, *5 (N.D. Tex. Nov. 25, 1981). As in *Toavs*, the District Court in *Flowers* found that although "the close relationship between TCU and the [Disciples of Christ] did result in moral persuasion by the church over the university, moral persuasion does not make an institution an integral agency within the meaning of the regulations or law." *Id.* The District Court did not find "integral agency" for numerous reasons including that TCU did not require faculty members to be members of the Disciples of Christ; that only a small percentage of TCU's student body were members of the Disciples of Christ; and that the TCU Board of Trustees was not controlled by a majority of members of the Disciples of Christ. *Id*. Notably, the District Court reached this conclusion even though a divinity school operated by the Disciples of Christ was located on the campus of TCU. *Id.* at 3. Though *Flowers* is an unreported case with no precedential value, the District Court's reasoning

is instructive, as it is one of only two cases which considers the factors outlined in Rev. Rul. 72-606, 1972-2 C.B. 78.

Here, at best, only two of the six factors are potentially satisfied. First, WHA and WHUC share a name. However, even if the shared name reflects WHUC's "moral persuasion" over WHA, which the record does not indicate, this would be insufficient to establish an "integral agency." Second, even though WHUC is on the campus of WHA, like the divinity school in *Flowers*, this is insufficient to establish "integral agency." R. at 3. Because only two of the eight factors may be sufficiently analyzed, and even those do not pass muster, we urge this Court to follow the reasoning of the Eighteenth Circuit and conclude that there "is insufficient factual evidence in the record to support a finding that the church and school . . . are integrated." R. at 20. This Court should affirm.

C. Petitioner is not ordained, commissioned, or licensed as a minister by the Whispering Hills Unitarian Church.

Petitioner is not "ordained, commissioned, or licensed" as a minister. *Knight,* 92 T.C. at 204. To assess this factor, courts consider: (1) whether the religious organization provides for the ordination of ministers; (2) whether any document or indicia of permission to perform sacerdotal functions has been conferred; and (3) whether an individual has been charged with the care of a congregation or other body of believers. *Kirk v. Comm'r*, 452 F.2d 492, 495 (D.C. Cir. 1970).

In *Kirk*, the D.C. Circuit Court held that a board member of the Methodist Church was not ordained, commissioned, or licensed. *Kirk*, 452 F.2d at 493. First, the Circuit Court found that the board member "is a member of a church which provides for the ordination of ministers," yet, "[h]e does not claim to be ordained." *Id*. at 495. Next, he was not "licensed" because he had no "official document or other indicia of permission, formally conferred upon him, to perform

sacerdotal functions." *Id.* Finally, he was not "commissioned" because "[n]o congregation or other body of believers was committed to his charge" and "[t]he duty of spreading the gospel, either by sermon or teaching, was not formally entrusted to his care." *Id.* Consequently, the Circuit Court concluded that the board member was "merely a non-ordained church employee." *Id.*

The motive for the ordination, licensing, or commissioning should also be considered. For example, in *Lawrence,* the Tax Court held that an employee did not qualify for the parsonage exemption even where he was "commissioned" by his employer because his commission had been granted solely so that he could "receive benefits of laws relative to the . . . Internal Revenue Services." *Id.* The Tax Court concluded that the commission was "nothing more than paperwork procedure designed to help [the petitioner] get a tax benefit . . ." *Id.*

Courts have also applied this factor to "lay religions" which do not practice ordination. In such instances "ministerial authority can be conferred by the church or congregation itself" without the need of an ecclesiastical hierarchy. *Silverman v. Comm'r*, 57 T.C. 727, 731 (1972). In *Salkov*, a cantor of the Jewish faith was granted a formal commission by his congregation. *Salkov*, 46 T.C. 190 at 191. The commissioning process observed "every possible procedure consonant with the sacred traditions of Judaism" to "express in a formal and liturgical manner that petitioner had been chosen by the congregation. . . as a cantor." The Tax Court concluded that the cantor was "ordained, licensed, or commissioned" for purposes of the parsonage exemption. *Id.*

Here, Petitioner is neither ordained, licensed, or commissioned as a "minister of the gospel." First, Petitioner is not ordained. The record implies that WHUC practices ordination because one of Petitioner's co-workers is a pastor. R. at 4. The title "pastor" is commonly

associated with the practice ordination. There is no indication in the record that Petitioner is an ordained minister. Second, Petitioner is not licensed. Though Petitioner carries out some quasi-religious functions on weekends and after school hours, there is no evidence that any document or indicia of permission to perform sacerdotal functions has been conferred upon him. R at 3. Third, Petitioner has not been commissioned. Though Petitioner incorporates some of the "commonly held religious teachings" of the school's faith in his guidance counseling and hosts religious-themed gatherings where "a large number of students" assemble, there is no indication that he does so with a formal commission from WHA or WHUC. *Id.* Moreover, the record suggests that students attend Petitioner's weekend gatherings because they "cannot go home on the weekends," indicating that Petitioner has no formal congregation, but rather a group of students who have nowhere else to go. *Id.* For these reasons, Petitioner is not ordained, commissioned, or licensed. This Court should affirm.

D. As a teacher of secular subjects and a guidance counselor, Petitioner is not considered a spiritual leader by the Whispering Hills Unitarian Church.

Petitioner is not "considered to be a spiritual leader by his religious body." *Knight,* 92 T.C. at 204. To assess this factor, courts consider whether an individual was "hired to perform sacerdotal functions or to conduct religious worship" or whether these functions were performed "by virtue of his own personal desires." *Tanenbaum v. Comm'r*, 58 T.C. 1, 8 (1972).

In *Tanenbaum*, the Tax Court determined that a rabbi employed by the American Jewish Committee was not entitled to the parsonage exemption because he was hired "to encourage and promote understanding of the history, ideals, and problems of Jews by other religious groups." *Id.* at 8. In addition to the work for which he was hired, the rabbi sometimes performed a variety of "religious functions for the individual employees and members of the American Jewish Committee," including "counseling individuals with particular religious problems . . . and

conducting prayer services." *Id.* at 4. However, the Tax Court noted that such functions were "not and have never been required by him in the performance of his duties" at the American Jewish Committee. *Id.* Consequently, because the religious acts were performed "by virtue of his own personal desires," the Tax Court held that the rabbi was not considered a spiritual leader by his religious body. *Id.* at 9.

Similarly, in *Lawrence*, even though a "minister of education" regularly offered the opening prayer at Sunday worship, officiated services when the pastor was ill, and even led the congregation in worship services for one year, the Tax Court noted that he "was hired as minister of education" and that "no other statement. . . even remotely indicate[d] there was any recognition on the part of the Baptist Church that he was a minister of the gospel." *Lawrence*, 50 T.C. at 496. The Tax Court concluded that "the evidence of services performed" was "insufficient to warrant a finding that petitioner had attained the status of a minister of the gospel." *Id.* at 499-500.

The same outcome was reached in in *Colbert*. There, an ordained Baptist minister was employed as the director of missions by the Christian Anti-Communist Crusade (the "Crusade"). *Colbert*, 61 T.C. at 450. Occasionally, he substituted for ministers or aided in administering communion, but "these services were not duties required by or resulting from his employment by the Crusade." *Id.* at 452. The Tax Court held that the religious services he performed "were not pursuant to an assignment by the Baptist Church," noting that "the Crusade did not employ the petitioner for the ministration of sacerdotal functions." *Id.* at 454-55.

Here, WHA does not recognize Petitioner to be a spiritual leader because he was not hired to perform sacerdotal functions or conduct religious worship. The record states that Petitioner "was hired to teach eleventh and twelfth grade English, Renaissance Literature, and

several foreign languages, including French, Italian, and Latin." R. at 3. He also acts as "one of several school guidance counselors." *Id.* Though he incorporates the "commonly held religious teachings of the school's faith" into his guidance counseling," and holds "daily prayer sessions with his afterschool club," he performs these functions by virtue of his own personal desires because he was hired as a teacher of secular subjects. *Id.* at 3, 4. The instant facts are analogous to *Tanenbaum* and *Lawrence.* Petitioner was hired to be a teacher of various secular subjects and a guidance counselor, not a religious minister. *Id.* There is no indication in the record that any of the religious functions performed by Petitioner were required by his work duties. For the foregoing reasons, Petitioner was not recognized as a spiritual leader by WHA. This Court should affirm.

II. THIS COURT SHOULD AFFIRM THE EIGHTEENTH CIRCUIT'S DECISION BECAUSE THE PARSONAGE EXEMPTION IS CONSTITUTIONAL UNDER THE ESTABLISHMENT CLAUSE.

This Court should affirm the Eighteenth Circuit's decision because the parsonage exemption passes constitutional muster under both the historical practice and *Lemon* tests. This Court has used numerous tests to evaluate the contours of the Establishment Clause. Recently, the Court has affirmed that where a historical practice is clear and unbroken, the Court need not apply a specific Establishment Clause test. *Town of Greece v. Galloway*, 572 U.S. 565, 575 (2014), *affirming Marsh v. Chambers*, 463 U.S. 783, 790 (1983). Tax exemptions for churches have existed since the Founding. *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 677 (1970). Further, Circuit Courts have long recognized income tax exemptions for employees. *Gaylor v. Mnuchin*, 919 F.3d 420, 423 (7th Cir. 2019). This Court has also confirmed that the government can accommodate religion without fear of infringing on the Establishment Clause. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483

U.S. 327, 334 (1987). Alternatively, a law withstands constitutional scrutiny under *Lemon* if it was created with a secular legislative purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not excessively entangle government with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

Here, the parsonage exemption follows years of tradition of exempting parsonages from taxable income. R. at 21. Parsonages also reflect the practice of allowing employers to provide housing to employees for the employer's own convenience. R. at 21. The Government also articulates two secular legislative purposes for the parsonage exemption: maintaining a separation of church and state and reducing the amount of government interference with internal church matters. R. at 21-22. The parsonage exemption functions as a tax exemption, not a direct subsidy, which allows the Government to avoid advancing religion. R. at 22-23. The exemption provides ministers the same benefits as secular employees, without forcing the Government to excessively entangle itself in the church. R. at 23. Thus, this Court should affirm the Eighteenth Circuit's decision because the parsonage exemption passes constitutional muster under both the historical practice and *Lemon* tests and consequently does not violate the Establishment Clause.

A. The parsonage exemption respects the Establishment Clause by reflecting the historical practices of tax exemptions for churches and income exemptions for employees.

The parsonage exemption does not violate the Establishment Clause because it follows long held historical practices. This Court interprets the Establishment Clause as affording deference to historical practices. The First Amendment states, in pertinent part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I, cl. 1.

Tax exemptions for churches and income exemptions for employees both constitute historical practices that do not run afoul of the Establishment Clause. When history supports the contention that a practice does not violate the Establishment Clause, this Court need not apply a test defining the Clause's exact contours. *Town of Greece*, 572 U.S. at 575.

This Court's inquiry focuses on whether the tax exemption for a minister's employer provided housing "fits within the tradition long followed." *Id.* at 577. In considering the constitutionality of prayer at the beginning of the Nebraska Legislature's session, the *Marsh* Court noted that prayer in general is "deeply embedded in the history and tradition of this country." *Marsh*, 463 U.S. at 786. Further, legislative prayer specifically "has coexisted with the principles of disestablishment and religious freedom." *Id.* at 787. The Court reasoned that while history cannot allow present day constitutional violations, historical evidence shows the intent of the Founding Fathers in drafting the Establishment Clause. *Id.* at 790. The Court held that the clear history dating back over 200 years leads to the conclusion that "there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society." *Id.* at 792. In *Town of Greece,* this Court upheld the principles decided in *Marsh v. Chambers*; specifically, that where history is clear, no specific defining of the Establishment Clause's boundaries is necessary. *Town of Greece*, 572 U.S. at 577. The Court reasoned that "a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Id.*

Courts have also consistently allowed the practice of religious based tax exemptions. *See Walz*, 397 U.S. at 677. Congress has authorized tax exemptions for churches since soon after the Founding. *Id.* At the time of the First Amendment's ratification, four state constitutions either permitted or mandated tax exemptions for religious property. Justin Butterfield, *The Parsonage*

Exemption Deserves Broad Protection, 16 Tex. Rev. Law & Pol. 251, 255 (2012). The remaining states recognized these exemptions in practice. *Id.* The Seventh Congress passed a law in 1802 which provided tax exemptions for churches for the Virginia County of Alexandria. *Walz*, 397 U.S. at 677. This same year, the City Council of Washington, D.C. utilized the authority of Congress to enact property assessments that exempted church property. *Id.* By 1870, Congress exempted all churches in Washington, D.C. from any property tax. *Id.* This tradition has continued unbroken, and has "exempted all church property from taxation, including parsonages." Butterfield, 16 Tex. Rev. Law & Pol. at 252. Parsonages refer to housing provided by a church for a minister. *Id.*

The parsonage exemption also reflects the long held "convenience-of-the-employer" doctrine. *Gaylor*, 919 F.3d at 423. This doctrine allows employees to take an exemption from taxable income for housing that their employer provides, for said employer's own convenience. *Id.* Originally, the doctrine allowed exclusions for housing for "to sailors living aboard ships, workers living in camps, and hospital employees," but not for ministers. *Id.* at 424. In 1913, the ratification of the Sixteenth Amendment gave Congress the authority to levy an income tax. *Id.* at 423. In 1921, the Treasury Department decided ministers would be taxed on parsonages used for living. *Id*. at 424. Congress immediately passed a statute that would exclude church parsonages from ministers' taxable income, alluding to its intent to keep ministers from being taxed on parsonages. *See id*. at 424. A few decades later, the parsonage exemption broadened the exemption to include cash allowances, not just in-kind housing. *Id*. Allowing for cash allowances acknowledged that providing housing allowances instead of housing may often be easier for the employer. *Williamson v. Comm'r*, 224 F.2d 377, 380 (8th Cir. 1955) (holding that the housing allowance was not part of the taxpayer's gross income because "[t]he employer in the instant

case instead of furnishing the taxpayer a home paid him a house allowance. This was manifestly for the convenience of the employer.")

Courts historically show deference to the employee/employer relationship, namely here, religious institutions dealing with its ministers. In *Hosanna-Tabor*, this Court affirmed the existence of a ministerial exception, which precludes employment discrimination laws from being applied to claims regarding the employment relationship between a religious institution and its ministers. *Hosanna-Tabor,* 565 U.S. at 188. The Court reasoned that interfering with a church's ability to hire or fire a minister infringes on more than just the employment decision itself. *Id.* Because of the importance of ministers in the church, this interference obstructs the "internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Id*. The *Hosanna-Tabor* Court held that allowing the government to interfere thus runs afoul of the Free Exercise Clause. *Id*. The Seventh Circuit further explained the purpose behind the ministerial exception, writing in *Schleicher* that the doctrine serves to "avoid judicial involvement in religious matters." *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008). Unlike with school systems and prisons, the Legislature does not want the judiciary getting involved with the internal management of churches. *Id*. This allows religion to flourish, without running into an Establishment Clause problem. *Id*.

Housing exemptions for ministers also subscribe to the view that minister housing acts as an extension of the church. In *Eveland*, the court considered a tract of land that held a parsonage was property "used exclusively for religious purposes." *Eveland v. Erickson*, 182 N.W. 315, 316 (S.D. 1921). The court reasoned that just as a church building is essential to conducting the church's work, a minister is essential to carry out the work. *Id*. at 318. Promoting the church's religion necessitates the dedicated service of the minister. *Id*. The court concluded that "[t]he

idea before the mind in furnishing the pastor a house is to make efficient the religious work and purpose of the church." *Id*. at 319. Similarly, in *Immanuel Baptist Church,* the Oklahoma Supreme Court considered whether a parsonage was used exclusively for religious purposes. *Immanuel Baptist Church v. Glass*, 497 P.2d 757, 758 (Okla. 1972). The court reasoned that the statute's use of "exclusive purpose" referred to property "dedicated and devoted to religious purposes." *Id*. at 760. A minister's housing constituted "an extension of the church itself" because it served a religious purpose in providing as a "meeting place for various church groups [or]…[to] provid[e] religious services." *Id*.

The parsonage exemption exemplifies Congress' policy in the Internal Revenue Code of exempting from taxation certain employer housing, under a convenience of the employer rationale. In enacting the parsonage exemption, Congress gave ministers the same tax benefit that secular employees claimed via the convenience-of-the-employer doctrine. Section 119(a)(2) codifies this doctrine and provides an exclusion from gross income, available to all employees, for the value of "lodging furnished to him" by his "employer for the convenience of the employer." 26 U.S.C. § 119(a)(2). The statute also requires the housing to be located on the employer's business premises, and living there must be a requirement. In lifting these requirements for ministers, the parsonage exemption allows courts to refrain from interfering with a church's internal matters. Thus, history has allowed for tax exemptions for churches and income exemptions for employees under the Establishment Clause.

B. The parsonage exemption passes constitutional muster under *Lemon* because the exemption has secular legislative purposes, does not advance religion, and does not excessively entangle church and state.

The parsonage exemption passes constitutional muster under *Lemon*. Courts usually apply *Lemon* to see if accommodation is reasonable. In addition to aligning with the historic

traditions of this nation, the parsonage exemption satisfies the *Lemon* test and thus, passes muster under the Establishment Clause. Under the *Lemon* test, "the statute must have a secular legislative purpose; its principal or primary effect must be one that neither advances nor inhibits religion; [and] the statute must not foster an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

Here, the Government has identified two secular legislative purposes: maintaining the separation between church and state, and curtailing government intrusion into a church's internal affairs. The parsonage exemption does not advance or inhibit religion, but instead accommodates it by giving churches the ability to advance religion. The parsonage exemption gives ministers the ability to claim an employer-provided housing exemption similar to the exemption claimed by secular employees, but with far fewer intrusive requirements so as to guard against excessive entanglement. Thus, the parsonage exemption does not violate the Establishment Clause under *Lemon.*

1. The Government created the parsonage exemption with the secular legislative purposes of maintaining a separation of church and state and limiting government's interference with internal church matters.

The parsonage exemption passes the first prong of *Lemon* because the statute identifies two secular purposes. A statute fails this prong "only when . . . there [is] no question that the statute . . . was motivated wholly by religious considerations." *Gaylor*, 919 F.3d at 427 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984)).

The first secular purpose behind the parsonage exemption is to maintain the separation between church and state. In *Gaylor*, the Seventh Circuit considered whether the parsonage exemption violates the Establishment Clause. *Id.* at 423. The government stated that the parsonage exemption obviates the need for the IRS to inquire into the precise usage of religious

organizations' facilities. *Id.* at 431. The Court reasoned that "[a]ny financial interaction between religion and government—like taxing a church or exempting it from tax—entails some degree of entanglement. But only *excessive* entanglement violates the Establishment Clause." *Id.* There, Congress's decision to apply the convenience-of-the employer doctrine more equally to ministers served as a secular purpose because it was based on administrative ease, not religion. *Id.* at 429. Further, the Court contrasted the amount of entanglement that applying § 119(a)(2) would result in, as compared to the parsonage exemption. *Id.* at 432. Section 119(a)(2) would necessitate the IRS analyzing the "business" of the church as well as the "premises." *Id.* Under the parsonage exemption, the IRS need only determine if the taxpayer is a minister. *Id.* The Court previously allowed this inquiry in *Hosanna-Tabor*. *Id.* at 434. *See Schleicher v. Salvation Army*, 518 F.3d 472, 474-75 (7th Cir. 2008) (stating, "[i]n a religious nation that wants to maintain some degree of separation between church and state, legislators do not want the courts to tell a church whom to ordain . . . .").

Another identified secular legislative purpose is "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos* 483 U.S. at 335. In *Amos*, the court applied the *Lemon* test to determine whether the parsonage exemption could apply to secular nonprofit activities of religious organizations without violating the Establishment Clause. *Id.* at 330. The Court reasoned that this prong emphasizes the need for Congress to remain neutral and not intentionally promote a specific point of a religious view. *Id.* at 335. The court found alleviating significant governmental interference to be a permissible secular legislative purpose because of the burden on religious organizations if required to "predict which of its activities a secular court will consider religious." *Id.* at 336. The history of the statute at issue revealed that Congress did have

the purpose of limiting government interference with the decisions made within religious institutions. *Id.* Further, this Court presumes the government's stated secular purposes are sincere, unless Petitioner proves otherwise. *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987).

Here, just as in *Gaylor* and *Amos,* Congress enacted the parsonage exemption to allow ministers to claim a tax exemption, also claimed by other secular employees, while ensuring that the government stayed out of religious matters as much as possible. The parsonage exemption only requires the Government to determine whether a taxpayer qualifies as a minister, as opposed to the more invasive inquiry that exemptions like § 119(a)(2) call for. The exemption here keeps the Government from having to interfere with religious institutions. Churches, not the Government, have the discretion to decide if a parsonage will be provided, and whether it will be in kind or in cash. Therefore, the parsonage exemption passes *Lemon*'s first prong because the Government enacted the exemption with a secular legislative purpose.

2. The parsonage exemption does not have the principal or primary effect of advancing or inhibiting religion, but merely accommodates religion.

The parsonage exemption passes *Lemon'*s second prong because its primary effect is not one that advances or inhibits religion. To determine if a statute adheres to *Lemon*'s second prong, the Court determines whether "'irrespective of government's actual purpose,'" the "'practice under review in fact conveys a message of endorsement or disapproval.'" *Sherman v. Koch*, 623 F.3d 501, 517 (7th Cir. 2010) (citation omitted).

The primary effect of an act by government must be considered in light of what a reasonable observer would see. *Fields v. City of Tulsa*, 753 F.3d 1000, 1010 (10th Cir. 2014). A reasonable observer is "aware of the history, purpose, and context of the act in question." *Id.* In *Fields*, a captain brought suit after his superior at the Tulsa Police Department (TPD) punished him for defying an order instructing him to attend or send coworkers on his shift to a law-

enforcement appreciation event. *Id.* at 1004. This event was put on by the Islamic Society of Tulsa to thank law enforcement for its help in dealing with a recent threat against the Islamic Society. *Id.* at 1005. The Tenth Circuit reasoned that "given the history, purpose, and context of the order, it would be unreasonable to conclude that the order or TPD's attendance at the event was such an endorsement." *Id.* at 1010. TPD practiced the policy of "community policing," whereby law enforcement actively engaged in the different communities of Tulsa. *Id*. Between 2004 and 2011, officers participated in 3,500 community events, 350 of which took place at a religious site, or were hosted by a religious group. *Id.* Furthermore, the order in question asked officers to attend a meet and greet type event, which would not include any religious services, the reading of religious texts, or any discussion of Islam. *Id.* at 1011. Therefore, the Tenth Circuit held that no Establishment Clause violation occurred. *Id.*at 1004.

When the government acts to avoid potentially violating the Establishment Clause, it does not advance or inhibit religion. *Santa Monica Nativity Scenes Comm. v. City of Santa Monica,* 784 F.3d 1286, 1288 (9th Cir. 2015). In *Santa Monica*, the City eliminated a Winter Display policy after atheists continued to flood the lottery system in order to keep religious groups from setting up religious displays. *Id.* An affected religious group, Nativity Scenes Committee, argued that getting rid of the Winter Display policy constituted the government disapproving of Christianity. *Id.* at 1288-9. The Ninth Circuit considered the history behind the Winter Display, including the fact that the system accommodated religious displays for over fifty years, and only ended when the controversy made it so no other course of action was plausible. *Id.* at 1300.

For a second prong issue to arise under *Lemon*, the "*government itself*" must advance "religion through its own activities and influence." *Amos*, *4*83 U.S. at 337. The Court reasoned

that many constitutional laws make it easier for religious groups to advance their religion. *Id.* at 336. *See Board of Education v. Allen*, 392 U.S. 236, 238 (1968) (held constitutional a law that permitted loans of schoolbooks to schoolchildren, including parochial school students). "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose." *Amos*, *4*83 U.S. at 337. The Court concluded the government's purpose was to do away with a regulation that burdened the exercise of religion. *Id.* at 339. As such, this exemption did not need to also specifically benefit secular organizations. *Id.* at 338.

This Court has long held that accommodation of religion is permitted under the Establishment Clause. At the Founding, the Establishment Clause referred to "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz*, 397 U.S. at 668. For example, the British Monarchy has historically both sponsored and supported the Church of England. *Id*. Further, despite the tension between the prohibitions on establishing religion and government interference with religion, "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* at 669. This Court has confirmed that the government may accommodate religion without defying the Establishment Clause. *Amos*, 483 U.S. at 334. Accommodation "respects the religious nature of our people and accommodates the public service to their spiritual needs." *Zorach v. Clauson,* 343 U.S. 306, 314 (1952). The government need not be hostile to religion, as this would serve to prefer irreligion over religion. *Id.* The Establishment Clause allows for religion to be accommodated so long as the accommodation is reasonable under *Lemon.*

Tax exemptions do not improperly advance religion by way of "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz*, 397 U.S. at 668. In

Walz, this Court noted the difference between a direct subsidy and a tax exemption. *Id.* at 675. With direct subsidies, the government transfers money to a church. *Id.* at 690. Conversely, tax exemptions function as a way for the government to decline to force the church to pay the state. *Id.* While the former is active assistance, the later is passive. *Id.* This qualitative difference led to the Court's conclusion that tax exemptions do not constitute sponsorship because "[t]here is no genuine nexus between tax exemption and establishment of religion." *Id.* at 675.

The *Texas* plurality does not affect the analysis laid out in *Amos* and *Walz*. *Gaylor*, 919 F.3d at 433. In *Texas*, the plurality opinion held unconstitutional a state sales tax exemption for religious publications. *Texas Monthly v. Bullock*, 489 U.S. 1, 5 (1989). The Court distinguished the statute at issue from the statute in *Walz*, based on breadth of the latter statute. *Id.* at 12. The *Texas* plurality stated that a direct subsidy to religious organizations not required by the Free Exercise Clause constitutes an endorsement of religion. *Id.* at 15. The Court specifically took issue with the statute at hand because the subsidy applied to "writings that *promulgate* the teachings of religious faiths." *Id.* at 14. However, only Justices Marshall and Stevens joined the *Texas* plurality authored by Justice Brennan. Justice White concurred, Justice Blackman concurred and was joined by Justice O'Connor, and Justice Scalia dissented and was joined by Chief Justice Rehnquist and Justice Kennedy. *Gaylor*, 919 F.3d at 433. Although Justice Brennan decided "every tax exemption constitutes a subsidy that affects nonqualifying taxpayers," the concurrences and dissent reached a more narrow holding. *Texas Monthly*, 489 U.S. at 14. Justice White's concurrence rested on the Press Clause and Justice Blackmun's concurrence held that only the tax exemption at hand, as specifically limited to the sale of religious literature by religious organizations, violated the Establishment Clause. *Id.* at 26, 28. In *Marks*, this Court ruled that in a plurality opinion where five Justices do not employ the same

rationale, the narrowest opinion prevails. *Gaylor*, 919 F.3d at 433 (citing *Marks v. United States,* 430 U.S. 188, 193 (1977)). Under this rule, Justice Blackmun's concurrence sets the rule. *Gaylor*, 919 F.3d at 433. Therefore, the *Amos*/*Walz* analysis does not change.

Here, given the purpose, context, and history of parsonages and tax exemptions, it would be unreasonable for an observer to see the parsonage exemption as advancing religion. Congress enacted the parsonage exemption in an effort to accommodate religious organizations in a way that this Court has long upheld. As previously delved into, Congress has historically provided for tax exemptions for churches. Further, the parsonage exemption reflects the commonly held convenience-of-the-employer doctrine. A reasonable observer would reach the conclusion that the exemption puts ministers on equal footing as other employees, without forcing an impermissibly excessive entanglement between government and church. Since the government acted to avoid such a violation, it cannot be said to have acted with the purpose not to advance or inhibit religion. The exemption here allows churches to advance their religions by way of providing housing for its ministers. The Government is not advancing religion, the church is. Lastly, since the parsonage exemption is a tax exemption and not a direct subsidy, the Government does not advance religion. Because of the passive nature of this exemption, there is no connection between the assistance and establishing a religion. Therefore, the parsonage exemption satisfies *Lemon'*s second prong because its primary purpose is not to advance or inhibit religion.

3. The parsonage exemption avoids excessive government entanglement with religion because the Government's involvement is far more limited than under the housing exemption for secular employees.

The parsonage exemption does not result in an excessive government entanglement with religion. In determining whether the entanglement is excessive, "[t]he test is inescapably one of

degree." *Walz*, 397 U.S. at 674. "[Tax] exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches." *Id.* at 676. The *Walz* Court noted that both taxation and exemption lead to government entanglement with religion in some form. *Id.* However, the Court found that abolishing the exemption would have the effect of further entangling the government with the church to an excessive degree, with issues arising under the legal processes of valuation of property, liens, and foreclosure. *Id.* at 674. *See Amos*, 483 U.S. at 339 (stating that, "the statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief.")

Eliminating the parsonage exemption would cause more severe entanglement by pressuring ministers into complying with the more specific requirements of § 119(a)(2). *Gaylor*, 919 F.3d at 435. In *Gaylor* the Seventh Circuit noted that "some level of church-state interaction is unavoidable." *Id*. at 434. Under the parsonage exemption, the IRS must determine whether the taxpayer qualifies for the exemption as a minister. *Id.* This Court allowed this type of entanglement in *Hosanna-Tabor*. *Id*. If the government forced ministers to instead utilize § 119, the government would become far more entangled with religious affairs, determining whether the minister's house was for the purpose of the employer's convenience. *Id.* Further, the Legislature's decisions should be shown deference, particularly with regards to tax. *Id.*

Here, like in *Walz,* abolishing the parsonage exemption would result in a far more severe entanglement between church and government than currently exists. If ministers could not claim a tax exemption for housing allowances, they would likely turn to the general exemption for employer provided housing, § 119(a)(2). Section 119 would then require the Government to determine whether the housing was furnished for the employer's convenience. Thus the parsonage exemption does not necessitate an excessive government entanglement with religion.

CONCLUSION

The Supreme Court should affirm the Eighteenth Circuit's decision because Petitioner is not a "minister of the gospel," and the parsonage exemption is constitutional under the Establishment Clause. Petitioner fails to satisfy any of the criteria established by the IRS and Tax Court precedent to qualify for the parsonage exemption. The parsonage exemption has long been upheld by courts because it reflects historical practices and serves as an accommodation of religion. Accordingly, Respondent respectfully requests that this Honorable Court affirm the judgment of the Eighteenth Circuit.

Respectfully Submitted,

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ATTORNEYS FOR RESPONDENT