No. 20-199

IN THE SUPREME COURT OF THE UNITED STATES

John BURNS,

Petitioner,

&

CITIZENS AGAINST RELIGIOUS CONVICTIONS, INC.,

Petitioner-Intervenor,

v.

INTERNAL REVENUE SERVICE & COMMISSIONER OF TAXATION,

Respondent.

On Petition for *Writ of Certiorari* from the
United States Court of Appeals for the Eighteenth Circuit.

BRIEF FOR THE *RESPONDENT*

Team #20
Counsel for the Respondent

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The opinion of the district court is reported at No. 19-111, at *1 (S.D. Tour. Dec. 18, 2019). Similarly, the opinion of the court of appeals is reported at No. 20-231, at *1 (18th Cir. Jun. 9, 2020).

JURISDICTIONAL STATEMENT

The judgment of the district court denying Respondent's Motions for Summary Judgment was entered on December 18, 2019. The court of appeals opinion reversing the district court's order was entered on June 9, 2020. The petition for a *writ of certiorari* was granted on October 1, 2020. Jurisdiction therefore vests in this Honorable Court pursuant to 28 U.S.C. § 1254(l).

STANDARD OF REVIEW

The district court's findings of fact may not be set aside unless they are shown to be "clearly erroneous." *See* Fed. R. Civ. P. 52(a); *see also Pullman-Standard v. Swint*, 456 U.S. 273, 285-90 (1982) ("A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948))). With respect to challenges brought under the Establishment Clause of the First Amendment of the United States Constitution:

> no fixed, *per se* rule can be framed. The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause "was to state an objective, not to write a statute." The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."

Lynch v. Donnelly, 465 U.S. 668, 678 (1984) (citations omitted).

QUESTIONS PRESENTED

1. Whether a secular employee, who is neither "ordained, commissioned, or licensed" by a religious body, nor administers sacerdotal functions or conducts religious worship, qualifies as a "minister of the gospel" under 26 U.S.C. § 107 ("Parsonage Exemption").

2. Whether a tax exemption furthering a secular interest in neutral tax treatment offends the Establishment Clause where the exemption is historically accepted and effects, without excessive government interference, impartial treatment of secular and religious employees.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

In June of 2016, Petitioner, John Burns, accepted his current job as a lay teacher and guidance counselor at Whispering Hills Academy, a religious boarding school. (R. at 3). Petitioner, who lived a distance from Whispering Hills, received a $2,500 moving credit "to help cover the costs of the moving company and travel." (R. at 3). Petitioner also receives a $2,100 rental allowance, provided monthly as part of his compensation as a secular teacher and guidance counselor. (R. at 4).

At Whispering Hills Academy Petitioner teaches "eleventh and twelfth grade English, Renaissance Literature, and several foreign languages[.]" (R. at 3). In addition, Petitioner is one of several school guidance counselors. *Id.* Petitioner adapts his counseling practice to suit the needs of some religious students. *Id.* Evidence of Petitioner's commitment to the student body is found in his establishment of an award winning, after-school club, "Prayer After Hours." *Id.* Petitioner also hosts periodic gatherings, sometimes on Sunday afternoon, where he provides "lunch, snacks, and social interaction" for students who remain on campus during the weekends. *Id*. Some students describe the club as a "sort of youth ministry," where students meet at the on-campus Unitarian Church to discuss general topics, which may sometimes include the weekly church sermon. *Id.*

In 2017, Petitioner became interested in lowering his tax liability. The Pastor from Whispering Hills disclosed during a casual conversation that he regularly claims the Parsonage Exemption and was able to pay lower taxes as a result. (R. at 4). He explained the exemption allows "ministers of the gospel" to exclude from their gross income employment-related housing expenses. (R. at 1). Petitioner then "investigated this exemption[,]" and believed he qualified as a "minister of the gospel" since he was employed by Whispering Hills Academy, initiated prayer

sessions during the after-school club, and sometimes combined religiosity with his general counseling services. (R. at 4).

In early 2018, Petitioner claimed the Parsonage Exemption for the previous year's earnings. That summer, Petitioner received a letter denying his claim, explaining that he "could not prove that he was, in fact, a 'minister of the gospel.'" (R. at 4).

B. PROCEDURAL HISTORY

Petitioner filed suit in the United States District Court for the Southern District of Touroville, the Honorable Evanora Cruz presiding, seeking to exempt his rental allowance under the Parsonage Exemption. (R. at 1, 14). Citizens Against Religious Convictions, Inc., (CARC) successfully moved to intervene on behalf of Petitioner. (R. at 2). On December 18, 2019, the district court denied Respondent's Motion for Summary Judgment, (r. at 14), finding Petitioner qualified as a "'minister of the gospel[,]'" (r. at 5-9), and the Parsonage Exemption violated the Establishment Clause of the First Amendment. (R. at 9-13).

Respondents appealed. (R. at 15). On June 9, 2020, the United States Court of Appeals for the Eighteenth Circuit reversed, (r. at 24), concluding the record did not demonstrate Petitioner was a "minister of the gospel." (R. at 20). The court also concluded, given the Parsonage Exemption's "well-established secular purpose, its non-advancement or inhibition of religion, and its lack of excessive entanglement between the government and the religious institution, [the Parsonage Exemption] satisfies *Lemon* [*v. Kurtzman*, 403 U.S. 602 (1971)] and therefore, is constitutional." (R. at 23). Petitioner and CARC then sought review from this Honorable Court. *See* Order Granting Certiorari, No. 20-199.

SUMMARY OF THE ARGUMENT

Petitioner does not qualify for the Parsonage Exemption because he has failed to show he is a "minister" performing services "in the exercise of his ministry." Petitioner does not qualify as a "minister of the gospel" since the record does not prove he is a "duly ordained, commissioned, or licensed minister of a church," or that he was "invested with the status and authority of an ordained minister." Petitioner also does not qualify as a "minister" under this Court's precedent. He did not perform "vital religious duties," or "educate and form students in the Unitarian faith." Critically, the record does not support the conclusion that Whispering Hills regarded Petitioner as a teacher of the principles of the Unitarian religion, nor did it expressly see him as "playing a vital part in carrying out the mission of the church." Likewise, Petitioner's secular services were not performed "in the exercise of his ministry." Petitioner neither administered sacerdotal functions nor conducted religious worship. The record also does not show his secular conduct was controlled by the Unitarian Church. As laudable as Petitioner's actions are, voluntarily incorporating religious teachings into counseling services, and creating an after-school club, are actions taken "by virtue of [Petitioner's] own personal desires," and are not the cause of his compensation by Whispering Hills Academy. Petitioner therefore does not qualify as a "minister of the gospel."

Moreover, the Parsonage Exemption is constitutional. First, the exemption is constitutional under this Court's guiding Establishment Clause Principles. We acknowledge this Court's Establishment Clause jurisprudence is fractured, but our review of Establishment Clause decisions reveals the presence of four guiding principles. The Parsonage Exemption enjoys the benefit of historical acceptance and therefore honors the *Historical Significance Principle*. Two centuries of unbroken history confirm that religious tax exemptions are fully consistent with the historical meaning of the Establishment Clause. The *Purpose Principle* guides the Parsonage Exemption's

secular goal of easing administration of the Convenience of the Employer Doctrine. This "genuine" purpose is evident when considering that all employees with employment-related housing expenses are eligible for a tax exemption, and no less than six other categories of employees are entitled to the exemption *per se*. Similarly, the Parsonage Exemption respects the *Primary Effects Principle* by effecting neutral application of the Convenience of the Employer Doctrine. It is also important to note, singling out "ministers of the gospel" and subjecting them to a more stringent analysis under a different tax provision, while affording other classes of employees a *per se* exemption, is the type of secular preference prohibited by the Establishment Clause. Finally, the Parsonage Exemption reduces government's involvement with religion, thereby furthering the *Entanglement Principle*. The level of inquiry required under the Parsonage Exemption is far less excessive than what has already been deemed constitutional.

Finally, the Parsonage Exemption is also constitutional under *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). Assuming the Parsonage Exemption is a subsidy and the *Texas Monthly* plurality applies, the overarching secular purpose underlying the Parsonage Exemption is efficient administration of the Convenience of the Employer Doctrine. Moreover, it can be fairly concluded the Parsonage Exemption falls within the "natural parameter" of the Convenience of the Employer Doctrine. Justice Blackmun's concurrence in *Texas Monthly* is "the judgment on the narrowest ground[,]" and therefore the controlling opinion. Under that test, the Parsonage Exemption is one of many categorical tax exemptions for employment-related housing expenses and does not demonstrate a "statutory preference" for ministers of the gospel. Furthermore, the exemption does not apply to "religious publications," but to employment-related housing expenses. For these reasons, this Court should *affirm*.

ARGUMENT

I. PETITIONER DOES NOT QUALIFY FOR THE PARSONAGE EXEMPTION.

Petitioner has failed to show he is a "minister" performing services "in the exercise of his ministry" and is therefore not entitled to a tax exemption under 26 U.S.C. § 107. The relevant code provides, "a *minister of the gospel* . . ." may exclude from his gross income "the *rental value* of a home furnished to him as part of his compensation[,]" or "the *rental allowance* paid to him as part of his compensation[.]" 26 U.S.C. § 107 (emphasis added) ("Parsonage Exemption"). A "minister of the gospel," must be:

> a duly ordained, commissioned, or licensed minister of a church or a member of a religious order . . . engaged in carrying on a trade or business with respect to service performed by him in the exercise of his ministry or in the exercise of duties required by such order[.]

26 C.F.R. 1.1402(c)-5(a)(2). Petitioner asserts he is entitled to the Parsonage Exemption because he qualifies as a minister and performs services in the exercise of his ministry. We disagree.

A. Petitioner is not a "minister" under the Code or this Court's precedents.

Petitioner does not qualify as a "minister of the gospel" for the purposes of the Parsonage Exemption. To qualify as a "minister of the gospel," a taxpayer must be either "a duly ordained, commissioned, or licensed minister of a church[.]" 26 C.F.R. 1.1402(c)-5(a)(2). "All persons who are not ministers are denied . . ." the exemption. *Kirk v. Comm'r,* 425 F.2d 492, 495 (D.C. Cir. 1970). Petitioner asserts that although the record is silent as to whether he is formally ordained, "given all the circumstances of [his] employment[,]" his position is sufficiently religious to be categorized as a minister under this Court's decision in *Our Lady of Guadalupe Sch. v. Morrissey-Berru,* 140 S. Ct. 2049, 2062 (2020) (citation omitted).

1. Petitioner failed to show he is "a duly ordained, commissioned, or licensed minister of a church."

Petitioner has failed to carry his burden of showing he is a "duly ordained, commissioned, or licensed minister of a church[.]" *See* 26 C.F.R. 1.1402(c)-5(a)(2). One who is "duly ordained, commissioned, or licensed . . ." as a minister of a church can qualify as a "minister of the gospel." 26 C.F.R. 1.1402(c)-5(a)(2); *see Knight v. Comm'r*, 92 T.C. 199, 204 (1989) (statute requires ordination, commissioning, or licensure "a[t] a minimum[.]"). However, formal ordination is not required, as all religions do not follow such practices. *See Silverman v. Comm'r*, 57 T.C. 727, 731-32 (1972). Instead, "the licensing or commissioning of an individual as a minister of the gospel must establish a status that is equivalent of ordination and is so recognized by the church." Rev. Rul. 66-90, 1966-1 C.B. 27 (1966). The individual, "must be invested with the status and authority of an ordained minister, fully qualified to exercise all of the ecclesiastical duties of such a minister[.]" Rev. Rul. 65-124, 1965-1 C.B. 60 (1965). The lack of "official document[ation] or other indicia of permission . . . to perform sacerdotal functions," is evidence of a lack of licensure. *Kirk*, 425 F.2d at 495. Furthermore, the showing of a commission requires the existence of a "congregation or other body of believers . . . committed to *his* charge," and that the "duty of spreading the gospel . . . [was] formally entrusted to his care." *Id.* (emphasis added); *see also Lawrence v. Comm'r*, 50 T.C. 494, 498 (1968).

Here, the record is silent as to whether Petitioner is a "duly ordained, commissioned, or licensed minister of a church[.]" *See* 26 C.F.R. 1.1402(c)-5(a)(2). Although formal ordination is not required, *see Silverman*, 57 T.C. at 731-32, Petitioner has failed to establish he maintains a "status that is equivalent of ordination and is so recognized by the church." *See* Rev. Rul. 66-90, 1966-1 C.B. 27. Furthermore, the record does not provide sufficient evidence showing Petitioner was "invested with the status and authority of an ordained minister[.]" Rev. Rul. 65-124, 1965-1

C.B. 60. Although Petitioner received awards for his involvement with the after-school club, (r. at 3), this "involvement" is hardly sufficient to prove he was "invested with the status and authority of an ordained minister[.]" *See* Rev. Rul. 65-124, 1965-1 C.B. 60. Moreover, the record is silent with respect to whether the activities directed by Petitioner during the after-school club were "sacerdotal functions[,]" conducted with "permission, formally conferred upon him[.]" *See Kirk*, 425 F.2d at 495. Petitioner simply provided lunch, initiated prayer sessions, and moderated general discussions that sometimes involved the weekly sermon. (R. at 3, 4). Additionally, the after-school club is hardly a "congregation or other body of believers . . . committed to [Petitioner's] charge." *See Kirk*, 425 F.2d at 495. The record does not show Petitioner was "formally" entrusted with the "duty of spreading the gospel, either by sermon or teaching[.]" *Id.* In this respect, Petitioner has failed to demonstrate he is a "duly ordained, commissioned, or licensed minister of a church[.]" *See* 26 C.F.R. 1.1402(c)-5(a)(2).

2. Petitioner does not qualify as a "minister" under *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

Petitioner's role at Whispering Hills Academy is not sufficiently religious to qualify him as a minister under this Court's precedents. Petitioner argues his role at Whispering Hills was sufficiently religious under this Court's decision in *Our Lady of Guadalupe Sch.*, 140 S. Ct. 2049. There, this Court expanded the analysis for determining when an employee qualifies as a "minister" for purposes of the "ministerial exception."[1] *Id.* Refusing "to adopt a rigid formula for deciding when an employee qualifies as a minister[,]" *id.* at 2062, citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190-91 (2012), this Court permitted

[1] "Under this rule, courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions. The rule appears to have acquired the label 'ministerial exception' because the individuals involved in pioneering cases were described as 'ministers.'" *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060 (citation omitted).

the consideration of "a variety of factors" in addition to whether the employee is: titled "minister, with a role distinct from that of most of its members[;]" whether the position "reflect[s] a significant degree of religious training followed by a formal process of commissioning[;]" whether the employee holds himself "out as a minister of the Church by accepting the formal call to religious service[;]" and whether the "job duties reflect[ ] a role in conveying the Church's message and carrying out its mission." *Id.* at 2062-63 (citation omitted). However, "[w]hat matters, at bottom, is what an employee does." *Id.* at 2064.

In *Our Lady Guadalupe Sch.*, two elementary school teachers were barred from pursuing lawsuits against their religious employers because their positions implicated "matters of faith and doctrine" and were sufficiently religious to warrant application of the "ministerial exception." 140 S. Ct. at 2066-67. The school's mission developed and promoted a Catholic faith community; it imposed commitments regarding religious instruction, worship, and personal modeling of the faith; and explained that teachers' performance would be reviewed on those bases. *Id.* at 2058-60. Each taught religion in the classroom, worshipped and prayed with their students, and had their performance measured on religious bases. *Id.* This Court concluded that "although neither teacher held the title of minister, both performed vital religious duties, including educating and forming students in the Catholic faith, praying with and attending Mass with their students, and preparing students for their participation in other religious activities." *Id.* at 2065. Critically, both schools regarded the employees as teachers of the principles of the Catholic religion and "expressly saw them as playing a vital part in carrying out the mission of the church." *Id.* at 2066.

Applying these principles, Petitioner's duties as a secular teacher and guidance counselor were not sufficiently religious to qualify him as a minister. *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2062-63. First, the record does not show Petitioner was given a title of "minister," nor

does it show his roles were "distinct" from others. *See id.* (citation omitted); *see also* (R. at 3) (Petitioner taught secular subjects and was one of several guidance counselors). Second, the record does not indicate Petitioner received a "significant degree of religious training . . ." or "formal process of commissioning[.]" *See id.* (citation omitted). Instead, Petitioner was hired for purely secular positions. (R. at 3). Third, Petitioner's voluntary incorporation of religious teachings into counseling services does not amount to "accepting the formal call to religious service . . ." as required by this Court's precedent. *See Our Lady of Guadalupe Sch.,* 140 S. Ct. at 2062-63; *see also* (R. at 3). Although Petitioner's actions may "reflect[ ] a role in conveying the Church's message and carrying out its mission[,]" the satisfaction of one factor, alone, cannot be sufficient evidence of Petitioner's ministerial status. Every religious adherent lives his life "reflecting a role in conveying the Church's message and carrying out its mission[.]" *See id.* It cannot be that every adherent is also a minister.

Finally, unlike the teachers in *Our Lady of Guadalupe Sch.,* Petitioner did not perform "vital religious duties," or "educate and form[ ] students in the [Unitarian] faith." *See* 140 S. Ct. at 2058-60, 2066. His duties did not include "*preparing* students for their participation in other religious activities." *See id.* (emphasis added). Most importantly, the record does not support the conclusion Whispering Hills regarded Petitioner as a teacher of the principles of the Unitarian religion, nor does the record show Petitioner "play[ed] a vital part in carrying out the mission of the church." *See id.* Thus, Petitioner's duties as a teacher and guidance counselor were secular in nature and not sufficiently religious under *Our Lady of Guadalupe Sch.,* 140 S. Ct. 2049.

B. Petitioner did not perform services "in the exercise of his ministry[.]"

Petitioner failed to show he administered sacerdotal functions or conducted religious worship, nor did he prove his secular conduct was controlled by the Unitarian Church. *See* 26 C.F.R. § 1.1402(c)-5(b)(2). Petitioner contends he performed services "in the exercise of his ministry or in the exercise of duties required by such order[.]" 26 C.F.R. § 1.1402(c)-5(a)(2). Qualifying services include:

> the [1] *ministration of sacerdotal functions* and the *conduct of religious worship*, and [2] the *control, conduct, and maintenance of religious organizations* (including . . . *integral agencies* of such organizations), *under the authority of a religious body* constituting a church or church denomination.

26 C.F.R. § 1.1402(c)-5(b)(2). Petitioner maintains the services provided in his role as a guidance counselor and founder of the after-school club were performed "in the exercise of his ministry[,]" *see 2*6 C.F.R. § 1.1402(c)-5(a)(2)*; see also id.*, and that Whispering Hills Academy is an "integral agency" of Whispering Hills Unitarian Church. *See* 26 C.F.R. § 1.1402(c)-5(b)(2). We respectfully disagree.

1. Petitioner failed to show he administered sacerdotal functions or conducted religious worship.

Petitioner mistakenly argues that by facilitating discussions in the after-school club and by voluntarily incorporating "religious teachings" into his counseling services, he was conducting religious worship and administering sacerdotal functions. However, the record does not show Petitioner was involved in "the ministration of sacerdotal functions [or] the conduct of religious worship[.]" *See* 26 C.F.R. § 1.1402(c)-5(b)(2).

It is irrelevant whether a purported minister possesses a subjective belief he is conducting religious worship. *See Colbert v. Comm'r*, 61 T.C. 449, 455 (1974). Conducting religious worship or administering sacerdotal functions "depends on the tenants and practices of the" religious body.

26 C.F.R. § 1.1402(c)-5(b)(2)(i). The term "tenets and practices," as provided in the regulations, "include those principles which are generally accepted as beliefs and practices within the denomination." *Colbert*, 61 T.C. at 455. Nevertheless, "it is more important to note the religious rites and ceremonies which petitioner *did not perform*." *Lawrence*, 50 T.C. at 499 (emphasis added). This Court must "judge from the record before [it] whether the duties required by the petitioner's employment . . . were the functions of a minister within the meaning of the statute." *Id.*

Relevant here is *Tanenbaum v. Comm'r*, 58 T.C. 1 (1972). There, Tanenbaum, an ordained rabbi of the Jewish faith, was employed as the National Director of Interreligious Affairs for the American Jewish Committee where "he functioned as an independent contractor, separate and apart from any association with a religious group." *Id.* at 7, 8. However, "sometimes [he] perform[ed] religious functions . . . [including] officiating at various weddings, funerals, and religious ceremonies[;] counseling individuals with particular religious problems[;] and . . . the conducting of prayer services, deliverance of invocations and benedictions at appropriate occasions." *Id.* at 2, 4. Tanenbaum was denied the Parsonage Exemption after the court concluded he:

> was not hired to perform "sacerdotal functions" or to "conduct religious worship[;]" rather, his job is to encourage and promote understanding of the history, ideals, and problems of Jews by other religious groups. Any other functions he may perform are *by virtue of his own personal desires* but are not cause for remuneration by the American Jewish Committee.

Id. at 8 (emphasis added). Critically, the court found, "[t]he American Jewish Committee did not need to hire a rabbi to perform this task. Indeed, . . . a theologian learned in Judaism could have performed the same function equally as well." *Id.* at 9.

In the present case, the record does not show Petitioner performed sacerdotal functions or conducted religious worship. Although Petitioner may believe his services conformed to "generally accepted . . . beliefs and practices within the [Unitarian] denomination[,]" his beliefs have no influence on the disposition of the present case. *See Colbert*, 61 T.C. at 455. More important is the "religious rites and ceremonies which petitioner *did not perform.*" *Lawrence*, 50 T.C. at 499 (emphasis added). The record does not show Petitioner performed *any* religious rites. Instead, the record demonstrates Petitioner merely incorporated religious beliefs into his counseling services, participated in discussions on church topics, and initiated prayer sessions. (R. at 3, 4). Initiating grace over a thanksgiving meal does not make the speaker a "minister of the gospel." Like the taxpayer in *Lawrence*, an employee whose "principal duties included the administration of the educational and service organizations of the church[,]" cannot qualify for the Parsonage Exemption. *See Lawrence*, 50 T.C. at 495-96. Furthermore, Petitioner's after-school club operated "separate and apart from any association with a religious group." *See Tanenbaum*, 58 T.C. at 7, 8. Simply discussing the weekly sermon does not associate Petitioner's after-school club with the Unitarian Church. (R. at 3). Like *Tanenbaum*, Petitioner "*was not hired to perform* 'sacerdotal functions' or to conduct 'religious worship[,]'" but to teach secular subjects and to provide general counseling services. *See* 58 T.C. at 8 (emphasis added); *see also* (R. at 3). As laudable as Petitioner's actions were, voluntarily incorporating religious teachings into his counseling services and creating an after-school club, were services performed "*by virtue of his own personal desires*[.]" *See Tanenbaum*, 58 T.C. at 8. (emphasis added). Accordingly, Petitioner did not perform services "in the exercise of his ministry or in the exercise of duties required by such order[.]" *See* 26 C.F.R. § 1.1402(c)-5(a)(2).

2. Petitioner failed to show his secular conduct was controlled by the Unitarian Church.

Alternatively, Petitioner argues that although he did not perform sacerdotal functions or conduct religious worship, he still performed services "in the exercise of his ministry" because Whispering Hills Academy operates under the authority of the Unitarian Church. Certainly:

> [i]f a minister is performing service for an organization which is operated as *an integral agency* of a religious organization under the authority of a religious body constituting a church . . . , all service performed by the minister . . . is in the exercise of his ministry.

26 C.F.R. § 1.1402(c)-5(b)(2)(iv). Court's employ an eight-factor analysis when determining whether a church-related institution is an integral agency of a religious organization.[2] *See* Rev. Rul. 72-606, 1972-2 C.B. 78 (1972).

Yet, as noted by the Eighteenth Circuit below, the substandard nature of Petitioner's record does not provide this Court the ability to properly apply the integration factors. *See Burns v. Comm'r,* No. 20-231, at *1, *16-20 (18th Cir. Jun. 9, 2020). Petitioner has therefore failed to show Whispering Hills Academy is an integral agency of the Unitarian Church. *See* 26 C.F.R. § 1.1402(c)-5(b)(2)(iv). Still, *Flowers v. United States* is instructive. No. CA 4-79-376-E, 1981 WL 1928, at *1 (N.D. Tex. Nov. 25, 1981). There, the court concluded that the sharing of a name "is indicative of the relationship between the institution and . . ." a religious body constituting a church. *Id.* at 3. However, what matters, the court underscored, is the religious body's ability to "force" the institution, "directly or indirectly[,]" to take action. *Id.* at 4-5. Moreover, the court

[2] "(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.

found, "[t]he teaching of a secular . . . course at [an institution] not an integral agency of a church is not a sacerdotal function[,]" and "[t]he performing of counseling functions for students, in the same manner as [those] who are not ministers, is not by itself a sacerdotal function." *Id.* at *6.

Guided by these principles, it is true that the name "Whispering Hills" indicates a "relationship between" Whispering Hills Academy and Whispering Hills Unitarian Church. *See Flowers*, 1981 WL 1928, at *3; *see also* (R. at 3). Nevertheless, the record does not show the Unitarian Church had the authority to "force directly or indirectly [Whispering Hills Academy] to take any particular action or cease from taking any particular action[.]" *See id.* at *4-5. Thus, despite sharing the name "Whispering Hills," the record does not show Whispering Hills Academy is an integral agency of Whispering Hills Unitarian Church. *See* 26 C.F.R. § 1.1402(c)-5(b)(2)(iv). Furthermore, Petitioner's teaching of a secular course at an institution "which is not an integral agency of a church[,] is not a sacerdotal function[,]" and "[t]he performing of counseling functions for students, in the same manner as [those] who are not ministers, is not by itself a sacerdotal function." *See Flowers*, 1981 WL 1928, at *6; (R. at 3). Petitioner's actions were therefore not performed "in the exercise of his ministry." *See id.* Accordingly, we need not address Petitioner's "control, conduct, and maintenance" argument because Petitioner neither controlled, conducted, or maintained "*an integral agency* of a religious organization[.]" *See* 26 C.F.R. § 1.1402(c)-5(b)(2).

For those reasons, Petitioner is not entitled to the Parsonage Exemption. *See* 26 U.S.C. § 107. It is uncontroverted, "[t]he taxpayer has the burden to show that [he] is within the provision allowing the deduction." *United States v. Olympic Radio & Television, Inc.*, 349 U.S. 232, 235 (1955). Here, Petitioner has failed to carry his burden.

II. THE PARSONAGE EXEMPTION RESPECTS THE ESTABLISHMENT CLAUSE.

The Parsonage Exemption honors this Court's Establishment Clause jurisprudence. In addition to providing that "Congress shall make no law respecting an establishment of religion," government is also barred from "prohibiting the free exercise thereof[.]" U.S. CONST. amend. I. The Sixteenth Amendment was ratified in 1913 authorizing Congress to impose an "income" tax. Congress was then charged with defining what money qualified as "income." Thus, the "Convenience of the Employer Doctrine" was codified:

> (a) There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him . . . by or on behalf of his employer for the *convenience of the employer*, but only if--
>
> * * *
>
> (2) in the case of lodging, the employee is *required to accept* such lodging on the *business premises* of his employer as a *condition of his employment*.

26 U.S.C. § 119(a)(2) (emphasis added). Congress provides the same exemption *per se* to specific subsets of employees,[3] including "ministers of the gospel."

> In the case of a minister of the gospel, gross income does not include--
>
> (1) the rental value of a home furnished to him as part of his compensation; or
>
> (2) the rental allowance paid to him as part of his compensation[.]

26 U.S.C. § 107 ("Parsonage Exemption"). Here, Petitioner asserts the Parsonage Exemption violates the Establishment Clause of the First Amendment. He is mistaken.

[3] See 26 U.S.C. §§ 107 (ministers of the gospel); 112 (certain combat zone compensation of members of the Armed Forces); 119 (meals or lodging furnished for the convenience of the employer); 119(c) (employees living in certain camps); 119(d) (lodging furnished by certain educational institutions to employees); 134 (qualified military benefits); 911 (citizens or residents of the United States living abroad); 912 (overseas government employees).

A. The Parsonage Exemption is Constitutional under this Court's guiding Establishment Clause Principles.

Preliminarily, we acknowledge this Court's Establishment Clause jurisprudence is fractured. No single test has been consistently applied when evaluating government action with respect to the establishment of religion. *See Town of Greece, N.Y. v. Galloway*, 572 U.S. 565 (2014) ("Historical Significance Test"); *Lynch v. Donnelly*, 465 U.S. 668 (1984) ("Endorsement Test"); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) ("*Lemon* Test"). Indeed:

> [t]he three-part [*Lemon*] test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize. Even worse, the *Lemon* test has caused this Court to fracture into unworkable plurality opinions depending upon how each of the three factors applies to a certain state action.

Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) (internal citation omitted); *see also Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring). Accordingly, we respond to Petitioner's contentions guided by the "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987). Our comprehensive review of this Court's Establishment Clause decisions reveals the presence of four guiding principles: the Historical Significance Principle; the Purpose Principle; the Primary Effects Principle; and the Entanglement Principle. We address each in turn.

1. The Parsonage Exemption enjoys the benefit of historical acceptance and therefore honors the *Historical Significance Principle*.

More recently, this Court requires interpretation of the Establishment Clause with "reference to historical practices and understandings." *Town of Greece, N.Y.*, 572 U.S. at 576 (citation omitted); *see also Hosanna-Tabor*, 565 U.S. at 181-85 (discussing history of church-state relations); *Van Orden v. Perry*, 545 U.S. 677-78 (2005) (rejecting *Lemon* Test, "the analysis should

be driven by both the monument's nature and the Nation's history."). Critically, "[a]ny test the Court adopts must acknowledge a practice that was accepted by the Framers and . . . withstood the critical scrutiny of time and political change." *Town of Greece, N.Y.*, 572 U.S. at 577 (citation omitted). The Court's inquiry is to "determine whether the [practice] . . . fits within the tradition long followed in Congress and the state legislatures." *Id.* If so, the practice is permissible. *Id.* (citation omitted).

Guided by the Historical Significance Principle, two centuries of unbroken history confirm that religious tax exemptions are fully consistent with the historical meaning of the Establishment Clause. *See Town of Greece, N.Y.*, 572 U.S. at 576. In 1799, after Virginia disestablished the Anglican Church, the state enacted "a measure exempting from taxation property belonging to 'any . . . college, houses for divine worship, or seminary of learning.'" *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 683 (1970) (Brennan, J., concurring), quoting 2 Va. Statutes at Large of 1792—1806 (Shepherd) 149. Likewise, in 1799, the New York legislature also enacted similar exemptions, *id.* at 684, quoting N.Y. Laws of 1797—1800, c. 72, at 414., as did the District of Columbia. *Id.* (citation omitted). This Court's decision in *Walz* aptly concludes, "[i]t appears that at least up to 1885 this Court, reflecting more than a century of our history and uninterrupted practice, accepted without discussion the proposition that federal or state grants of tax exemption to churches were not a violation of the Religion Clauses of the First Amendment." *Id.* at 680; *see also Gibbons v. District of Columbia*, 116 U.S. 404, 429 (1886) (upholding religious property tax exemptions, holding Congress may "wholly exempt from taxation certain classes of property, or tax them at a lower rate than other property."). The Parsonage Exemption enjoys the benefit of historical acceptance and therefore honors the Historical Significance Principle. *See Town of Greece, N.Y.*, 572 U.S. at 576.

2. The *Purpose Principle* guides the Parsonage Exemption's secular goal of easing administration of the Convenience of the Employer Doctrine.

First, Petitioner claims the Parsonage Exemption serves entirely religious purposes. Specifically, that the benefits conferred to ministers of the gospel were intended to be more generous than those given to secular employees, thus enabling ministers to disseminate religious doctrine.

Petitioner's first argument strikes at the heart of the Purpose Principle. *See Lemon*, 403 U.S. at 612 ("[A] statute must have a secular legislative purpose[.]"). He correctly states, when the government acts with the "ostensible and predominant purpose of advancing religion, it violates [the] central Establishment Clause value of official religious neutrality[.]" *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (citation omitted). However, this Court has labored to emphasize that the Purpose Principle "does not mean that [a] law's purpose must be unrelated to religion . . . ." *Amos*, 483 U.S. at 335. Instead, a secular purpose is lacking, and the respective law unconstitutional, only where the law is "*entirely* motivated by a purpose to advance religion." *Wallace*, 472 U.S. at 56 (emphasis added). Moreover, this Court affords deference to the government's articulation of a legislative purpose so long as the purpose is "genuine . . . and not merely secondary to a religious objective." *McCreary*, 545 U.S. at 864 (citation omitted).

Here, the Parsonage Exemption merely eases administration of the secular Convenience of the Employer Doctrine by providing ministers a categorical tax exemption for employment-related housing expenses. *See Lemon*, 403 U.S. at 612. This "genuine" purpose is evident when considering that: *all* employees with employment-related housing expenses are eligible for a tax exemption, *see* 26 U.S.C. § 119; and *no less than six* other categories of employees are entitled to

the exemption *per se*.[4] As such, it would be proper for this Court to defer to the government's stated purpose. *See McCreary*, 545 U.S. at 864.

Furthermore, although the Parsonage Exemption applies exclusively to minsters, that fact, alone, is not determinative. *See Amos*, 483 U.S. at 335. Petitioner bears the burden of proving the Parsonage Exemption was "*entirely* motivated by a purpose to advance religion[,]" a burden he cannot carry considering the Parsonage Exemption was incorporated into a *pre-existing statutory scheme* and merely extends a secular benefit to religious employees. *See Wallace*, 472 U.S. at 56 (emphasis added). Incorporation of ministers into a secular statutory scheme, already existing, does not "advance religion[,]" *see id.*, nor is it "secondary to a religious objective." *McCreary*, 545 U.S. at 864 (citation omitted). Instead, affording ministers a categorical exemption in a pre-existing statutory scheme has a principle purpose of effecting neutral treatment of religious employees in a manner respecting the Establishment Clause. By isolating the Parsonage Exemption from its sibling provisions and emphasizing the word "minister," Petitioner's characterization of the Parsonage Exemption perverts the secular purpose for which the provision was enacted, efficient application of the Convenience of the Employer Doctrine. Petitioner's claim is therefore meritless.

3. The Parsonage Exemption respects the *Primary Effects Principle* by effecting neutral application of the Convenience of the Employer Doctrine.

Petitioner mistakenly asserts the Parsonage Exemption has the primary effect of advancing religion through both indirect and direct government aid. However, for the reasons that follow, the government does not advance religion through the Parsonage Exemption, but "allows churches to advance religion, which is their very purpose." *See Amos*, 483 U.S. at 337.

[4] *Supra*, note 3.

It is well settled that a statute's "princip[le] or primary effect must be one that neither advances or inhibits religion[.]" *Lemon*, 403 U.S. at 613 (citation omitted). The effects principle prohibits preferential treatment of one religion over another, religion over secularism, or secularism over religion. *McCreary*, 545 U.S. at 875-76. More importantly, "[f]or a law to have forbidden 'effects' . . . the government itself [must] advance[ ] religion through its own activities and influence." *Amos*, 438 U.S. 327 (emphasis removed). Religious advancement is achieved through direct "sponsorship, financial support, and active involvement of the sovereign *in religious activity*." *Walz*, 397 U.S. at 668 (emphasis added).

First, Petitioner argues the Parsonage Exemption violates the Primary Effects Principle, and thereby the Establishment Clause, because the provision has the primary effect of advancing religion through indirect government support. By granting a religious organization a tax exemption, Petitioner maintains the religious organization is free to divert the money they would have otherwise paid in taxes to other religious expenditures. However, Petitioner fails to recognize that if secular organizations are permitted to participate in the same programs as religious organizations, even if the terms of the program tend to favor the religious entities, the "indirect aid" is constitutional. *See Walz*, 397 U.S. at 666 n.1, 674-75 (upholding statute granting property tax exemptions to broad class of non-profit organizations, including properties used exclusively for "religious purposes." (citation omitted)); *see also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 10 (1989) (plurality) (declaring unconstitutional tax exemption provided only for religious periodicals, concluding, government policies with secular objectives may incidentally benefit religion).

Here, Petitioner's "indirect aid" argument fails because the government must advance religion "through its own activities," and there is no "sponsorship, financial support, and active

involvement of the sovereign . . .” in providing tax exemptions to a broad class of employees. *See Amos*, 438 U.S. 327; *see also Walz*, 397 U.S. at 668. Moreover, the Code provides the same benefit — a tax exemption for employment-related housing expenses — to both secular and religious employees. *See* 26 U.S.C. §§ 107, 119. This neutral exemption “neither advances [n]or inhibits religion[.]” *See Lemon*, 403 U.S. at 613 (citation omitted). Although the Parsonage Exemption’s terms favor ministers, the *entire statutory scheme* designed to advance the Convenience of the Employer Doctrine benefits both secular and religious organizations.[5] Thus, the Parsonage Exemption is constitutional under this Court’s decisions in *Walz*, 397 U.S. at 666 n.1, 674-75, and *Texas Monthly*, 489 U.S. 1.

Next, Petitioner argues in the alternative that the Parsonage Exemption operates as a subsidy, advancing religion through “direct government support.” Petitioner relies on the plurality opinion of three justices in *Texas Monthly* for the proposition that “[e]very tax exemption constitutes a subsidy[.]” 489 U.S. at 14 (citation omitted), *contra Walz*, 397 U.S. at 675 (“There is no genuine nexus between [a] tax exemption and establishment of religion.”). In this context, Petitioner seeks to impose a plurality opinion on the eight-justice majority in *Walz* who recognized a constitutional distinction between a tax exemption and a subsidy; “[t]he grant of a tax exemption is *not* sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state.” 397 U.S. at 675 (emphasis added).

[5] It is a well settled rule of statutory construction that statutes *in pari materia*, “which relate to the same person or thing, or to the same class of persons or things,” are to be interpreted together. *See United States v. Freeman*, 44 U.S. 556 n.1 (1845). However, where “the legislature, conferring *distinct rights* on different individuals, which never can be considered as being one statute, or *the parts of a general system*, are not to be interpreted, by a mutual reference to each other.” *Id.* (emphasis added). Here, since both section 107 and 119 are contained in the same chapter of the Code, and both relate to a tax exemption for employment-related housing expenses, the respective rights are *in*distinct and must be considered “parts of a general [tax] system[.]” *See id.; see also* 26 U.S.C. §§ 107, 119. The statutes must therefore be interpreted together. *See Freeman*, 44 U.S. 556 n.1.

Notwithstanding the majority opinion in *Walz*, 397 U.S. 664, we assume *arguendo* the Parsonage Exemption is a subsidy advancing religion.[6] The Primary Effects Principle operates only to limit the government's ability to favor religious recipients of government aid over nonreligious recipients. *See id.* (comparison of property tax exemption to school aid cases in upholding property tax exemptions to, *among other recipients*, religious organizations); *see also Texas Monthly*, 489 U.S. at 9 (declaring unconstitutional state sales tax exemption provided *only* for religious periodicals); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding school voucher program providing funds for use at public and religious schools); *Mitchell v. Helms*, 530 U.S. 793 (2000) (upholding school financing program providing materials for use at public and religious schools). Where a "government subsidy" is offered to secular and religious institutions alike, the government "makes[s] no law . . ." advancing religion. *See* U.S. CONST. amend. I; *see also Lemon*, 403 U.S. at 613. Accordingly, Petitioner's argument fails under the majority opinion in *Walz*, 397 U.S. 664, and the obvious fact that the Code grants the purported "subsidy" to: any employee who "is required to accept . . . lodging on the business premises of his employer[,]" *see* 26 U.S.C. § 119(a)(2); and *no less than six* other categories of employees entitled to the exemption *per se*.[7] Therefore, assuming the Parsonage Exemption operates as a subsidy, the provision is still constitutional as a neutral government aid program. *See Walz*, 397 U.S. 664; *Texas Monthly*, 489 U.S. at 9; *Zelman*, 536 U.S. 639; *Mitchell*, 530 U.S. 793.

We also emphasize, singling out ministers and subjecting them to the entangled analysis under section 119, while affording other classes of employees a *per se* exemption, is the type of

[6] *See Walz*, 397 U.S. 690-91 (Brennan, J., concurring) ("An exemption . . . involves no [direct transfer of public monies . . . exacted from taxpayers as a whole]. [The Government] assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes. In other words, 'in the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches,' while 'in the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions.'" (citation omitted)).

[7] *Supra*, note 3.

secular preference prohibited by the Establishment Clause. *See Lemon*, 403 U.S. at 613. Furthermore, declaring the Parsonage Exemption unconstitutional and striking it from the Code would have the operative effect of inhibiting religion. *Id.* Specifically, taxation "would bear unequally on different churches, having its most disruptive effect on those with the least ability to meet the annual levies assessed against them." *Walz*, 397 U.S. at 692 (Brennan, J., concurring). In addition, tax obligations would "influence the allocation of church . . . [funds] to the support of the Government," and "the public service activities would bear the brunt of the reallocation, as churches looked first to maintain their places and programs of worship." *Id.* at 692. Without the benefits of the Parsonage Exemption, the secular interests advanced by Petitioner would override the neutrality demands of the Establishment Clause. Indeed, this Court stresses, the Establishment Clause "will not tolerate either governmentally established religion or *governmental interference with religion.*" *Id.* at 669 (emphasis added).

4. The Parsonage Exemption reduces government's involvement with religion, thereby furthering the *Entanglement Principle*.

Petitioner also argues the Parsonage Exemption fosters excessive entanglement between church and state because the government is still required to determine whether a taxpayer qualifies as a minister. However, entanglement is inevitable; "[e]ither course, taxation of churches or exemption, occasions some degree of involvement with religion." *Walz*, 397 U.S. at 675.

The entanglement principle prohibits only "*excessive* government entanglement with religion." *Lemon*, 403 U.S. at 613 (citation omitted). "[N]o institution within [our society] can exist in a vacuum or in total or absolute isolation . . . from government." *Lynch*, 465 U.S. at 673. For that reason, "[i]t has never been thought either possible or desirable to enforce a regime of total separation" between church and state. *Id.* (citation omitted). Rather, the test "is inescapably one of degree." *Walz*, 397 U.S. at 674. The relevant inquiry is whether the test under the Parsonage

Exemption is of a "degree" permitted by this Court's precedent. *See id.*; *see also Our Lady of Guadalupe Sch.*, 140 S. Ct. 2049 (permitting fact-bound inquiry into relevant circumstances to determine whether parochial schoolteacher qualified as a "minister").

In the case *sub judice*, the level of inquiry required under the Parsonage Exemption is far less excessive than what has already been deemed constitutional. *See Our Lady of Guadalupe Sch.*, 140 S. Ct. 2049. In *Our Lady of Guadalupe Sch.*, this Court expressly permitted the broad inquiry into "a variety of factors" *beyond* whether an employee is titled "minister, with a role distinct from that of most of its members[,]" 140 S. Ct. at 2062 (citation omitted); whether the position "reflect[s] a significant degree of religious training followed by a formal process of commissioning[,]" *id.*; whether the employee holds themselves out as "a minister of the Church by accepting the formal call to religious service, according to its terms," *id.* (citation omitted); and whether their "job duties reflect[ ] a role in conveying the Church's message and carrying out its mission[.]" *Id.* at 2062-63 (citation omitted).

Conversely, the Parsonage Exemption merely requires a limited inquiry into: first, whether Petitioner is "a duly ordained, commissioned, or licensed minister of a church or a member of a religious order[,]" *see* 26 C.F.R. 1.1402(c)-5(a)(2); and second, whether he performs service "in the exercise of his ministry." *See id.* This inquiry is more constrained and far less intrusive than the broad inquiry into "a variety of factors" permitted under *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2062-63.

Additionally, the analysis under section 119 fosters a higher degree of entanglement between church and state. Section 119 requires the Courts to determine the "business" of the religious organization and whether the employee is "required to accept" housing on the "business premises" as "a condition of his employment." *See* 26 U.S.C. § 119(a)(2). The analysis requires

Courts to determine the specifics of religious doctrine in examining what is and is not the organization's "business," how far the premises of the "business" extends, and whether the acceptance of lodging is "a condition of employment." *Id.* This intrusive inquiry undoubtedly infringes on the general principle of church "independence in matters of faith and doctrine and in closely linked matters of internal government." *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2061. More concerning is the possibility that congregations might alter their religious activities to attempt to conform with section 119's requirements. *See Walz*, 397 U.S. at 669-70 ("[T]he Establishment [Clause] . . . has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice."). Therefore, the analysis required by the Parsonage Exemption is of a "degree" permitted by this Court's decision in *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2062-63, and as such, does not amount to "*excessive* government entanglement with religion." *See Lemon*, 403 U.S. at 613 (citation omitted) (emphasis added). Indeed, a tax exemption "restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other." *Walz*, 397 U.S. at 676.

B. The Parsonage Exemption is constitutional under *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989).

Texas Monthly, 489 U.S. 1, does not control. First, the plurality ignores the constitutional distinction between a tax exemption and a subsidy as discussed in *Walz*, 397 U.S. at 675 (holding a tax exemption is not a subsidy since the government does not transfer part of its revenue to churches). Second, Justice Blackmun's concurrence is the narrowest holding and therefore the controlling test under *Marks v. United States*, 430 U.S. 188, 194 (1977) (where no single *ratio decidendi* receives the assent of five Justices, the holding of the Court is the position taken "on the

narrowest grounds[.]" (citation omitted)). As discussed below, the Parsonage Exemption is constitutional under both the plurality opinion and Justice Blackmun's concurrence.

1. It can be "fairly concluded" religious institutions fall within the "natural parameter" of the secular Convenience of the Employer Doctrine.

Justice Brennan wrote for a three justice plurality invalidating a state sales tax exemption applying *only* to "periodicals published or distributed by a religious faith[.]" *Texas Monthly*, 489 U.S. at 6. The plurality concluded that the sales tax exemption violated the Establishment Clause because it constituted a "subsidy exclusively to religious organizations[,]" "burden[ed] nonbeneficiaries markedly[,]" and could not "reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion." *Id.* at 15. The plurality concluded that "[i]t certainly appears that the exemption was intended to benefit religion alone." *Id.* at 14 n.4. When a *subsidy* is provided to religious organizations it must "be warranted by some overarching secular purpose that justifies like benefits for nonreligious groups[,]" and "it can be fairly concluded that religious institutions [would] fall within the natural perimeter [of the legislation]." *Id.* at 14 n.4, 17, quoting *Waltz*, 397 U.S. at 696 (Harlan, J., concurring).

Here, assuming the Parsonage Exemption is a subsidy and the *Texas Monthly* plurality applies, the overarching secular purpose underlying the Parsonage Exemption is efficient administration of the Convenience of the Employer Doctrine. *See Walz*, 397 U.S. 664. It can be fairly concluded the Parsonage Exemption falls within the "natural parameter" of the legislation because the Convenience of the Employer Doctrine applies to *all* eligible employees with employment-related housing expenses, *see* 26 U.S.C. § 119(a)(2); and *no less than six* other categories of employees entitled to the exemption *per se*.[8] The benefits of the Convenience of the Employer Doctrine therefore "flow[ ] to a large number of nonreligious groups[,]" and cannot be

[8] *Supra*, note 3.

regarded as "intend[ing] to benefit religion alone." *Texas Monthly*, 489 U.S. at 11, 14 n.4. Accordingly, the Parsonage Exemption is constitutional under the *Texas Monthly* plurality. *Id.*

2. As part of a general statutory framework, the Parsonage Exemption is neutral treatment of religion and does not apply to "religious publications."

Justice Blackmun's concurrence in *Texas Monthly*, 489 U.S. at 905-07, is "the judgment[ ] on the narrowest grounds[,]" and therefore the controlling opinion under *Marks*, 430 U.S. at 194. Justice Blackmun acknowledged, "[w]e need decide here only whether a tax exemption limited to the sale of religious literature by religious organizations violates the Establishment Clause." *Texas Monthly*, 489 U.S. at 907 (emphasis removed). He concluded that "[a] statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about[.]" *Id.* (citation omitted). More aptly, the concurrence holds that the Establishment Clause forbids "statutory preference" in the form of tax exemptions provided only for "religious publications[.]" *Id.*

Applying the foregoing principles, the Parsonage Exemption is one of many categorical tax exemptions for employment-related housing expenses and does not demonstrate a "statutory preference" for ministers of the gospel. *See Texas Monthly,* 489 U.S. at 907. Moreover, the exemption does not apply to "religious publications," but to employment-related housing expenses. *See* 26 U.S.C. § 107. Thus, the Parsonage Exemption passes Justice Blackmun's concurring opinion in *Texas Monthly*, 489 U.S. at 905-07.

For these reasons, the Parsonage Exemption is Constitutional under this Court's guiding Establishment Clause Principles, as well as the plurality and concurring opinions in *Texas Monthly, Inc.*, 489 U.S. 1 (1989).

CONCLUSION

In sum, Petitioner's claims fall short. First, Petitioner does not qualify as a "minister of the gospel" because he has failed to prove he is "a duly ordained, commissioned, or licensed minister of a church," or that his position is sufficiently religious to warrant application of this Court's "ministerial" precedents. Moreover, Petitioner did not perform services "in the exercise of his ministry" since the record is silent regarding whether he administered sacerdotal functions, conducted religious worship, or was controlled by the Unitarian Church. Second, The Parsonage exemption is Constitutional under this Court's guiding Establishment Clause principles and *Texas Monthly, Inc. v. Bullock,* 489 U.S. 1 (1989). The exemption is historically accepted, furthers a secular purpose of impartial tax treatment of religious and secular employees, effects neutral treatment of the tax code, and avoids excessive government entanglement by providing another category of employees a *per se* exemption.

Accordingly, we respectfully request this Court *affirm.*

Respectfully Submitted,

Team #20

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