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 AND
COMMISSIONER OF TAXATION,

Respondents.

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

BRIEF FOR THE PETITIONER AND PETITIONER-INTERVENOR

Team Number 3

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Petitioner-Intervenor

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QUESTIONS PRESENTED

I. Whether a teacher at a religious boarding school, who teaches a faith-based curriculum, conducts weekly youth ministry gatherings, and provides after-school spiritual guidance, qualifies as a minister of the gospel under I.R.C. § 107(2).

II. Does a housing income tax exemption that provides exclusive benefits solely to religious ministers violate the Establishment Clause of the First Amendment?

STATEMENT OF THE CASE

John Burns ("Petitioner" or "Mr. Burns") is an educator and religious counselor at Whispering Hills Academy ("School"), a religious boarding school governed under the auspices of Whispering Hills Unitarian Church ("Church"). R. at 1, 3. The School is located just steps away from the Church and incorporates Unitarian values and practices throughout its curricula. Id. at 3. Although Mr. Burns was hired to teach eleventh and twelfth grade English, Renaissance Literature, and several foreign languages, his role as a faith-based educator extended far beyond those academic subjects. Id.

Mr. Burns hosted weekly gatherings for his students which took place after Sunday services at the Church. Id. Described by his students as a youth ministry, Mr. Burns encouraged discussion and guidance on the church service's topics. Id. Additionally, Mr. Burns held daily counseling sessions for students through his after-school program, Prayer After Hours. Id. Because of Mr. Burns's effective integration of both academic and religious principles into his counseling, Prayer After Hours has been the subject of numerous school awards. Id.

In 2016, Mr. Burns lived over an hour away from campus, but soon thereafter, he elected to move to a residence five minutes away from the School for the purpose of being closer to the School and his ministry. Id. In addition to a one-time moving credit, the School provided $2,100 a month to be included as part of his monthly salary for rental allowance. Id. at 4. A co-worker, who recognized Mr. Burns's integral role to the School's academic and religious mission, alerted Mr. Burns that he was potentially eligible for the parsonage exemption, which would provide him a tax benefit for his work as a "minister of the gospel." Id. This colleague, Pastor Nick, suggested that Mr. Burns look into claiming an exemption under § 107(2) because he was employed by a religious institution, held daily prayer sessions with his afterschool club, and provided spiritual counseling to the students. Id.

Taking his colleague's advice, Mr. Burns claimed the tax exemption under § 107(2) on his 2017 tax return in the amount of the housing allowance the School provided. Id. Despite Mr. Burns's commitment to the spiritual development of his students and his role as a religious leader within his Unitarian congregation, the Internal Revenue Service and Commissioner of Taxation (collectively "Respondents") disqualified him from the exemption, claiming that he could not prove he was a "minister of the gospel." Id.

Subsequently, Mr. Burns brought suit in the United States District Court for the Southern District of Touroville. Id. at 2. Citizens Against Religious Convictions, Inc., ("Petitioner-Intervenor" or "CARC"), a group comprised of individuals who did not qualify for the exemption under § 107(2), filed a motion to intervene claiming § 107(2) violated the Establishment Clause. Id. The District Court granted CARC's motion which provided them standing to pursue their claim. Id. The District Court then granted both Mr. Burns's and CARC's motions for summary judgment and held (1) that Mr. Burns did qualify as a minister of the gospel under § 107(2), and (2) that § 107(2) violated the Establishment Clause. Id. at 3. Respondents then appealed that decision to the United States Court of Appeals for the Eighteenth Circuit. Id. at 15. The Court of Appeals reversed the District Court's decision and instead granted Respondents' motion for summary judgment by holding (1) that Mr. Burns did not qualify as a minister of the gospel under § 107(2), and (2) that § 107(2) is constitutional. Id. at 24.

Petitioner and Petitioner-Intervenor appealed the Eighteenth Circuit Court's ruling that Mr. Burns did not qualify as a minister and that § 107(2) is constitutional, and the United States Supreme Court granted their petition for writ of certiorari. Id. at 25. Petitioner joins only in Issue I of this brief and respectfully requests this Court reverse the decision of the United States Court of Appeals for the Eighteenth Circuit and instead find he qualifies as a "minister of the gospel"

under § 107(2). Petitioner-Intervenor joins only in Issue II of this brief and respectfully requests this Court reverse the decision of the United States Court of Appeals for the Eighteenth Circuit and instead find that § 107(2) is unconstitutional.

SUMMARY OF THE ARGUMENT

Mr. Burns qualifies for the parsonage exemption under Internal Revenue Code § 107(2) because the services he provides to a religious institution are in the nature of a Unitarian minister. Through teaching a faith-based curriculum, administering daily spiritual counseling through his award-winning program Prayer After Hours, and providing weekly youth ministry gatherings, Mr. Burns plays a crucial role in the religious development of his students. Further, he has been commissioned by his religious community to perform these ministerial duties. Lastly, Mr. Burns exercises substantial control over the School, which operates fully under the auspices of the Church. Therefore, Mr. Burns is a minister of the gospel within the meaning of § 107(2). Petitioner requests this court reverse and remand only as it pertains to Issue I.

Additionally, Petitioner-Intervenor claims § 107(2) violates the Establishment Clause because it fails both the Lemon and historical significance tests. Regarding the Lemon test, § 107(2): (1) does not have a secular purpose because it was wholly motivated by religious reasons to provide solely ministers with a housing exemption, (2) it has the principal effect of advancing religion because it provides roughly $900 million a year in foregone taxes exclusively to ministers, which is unjustifiable government aid because there is no countervailing Free Exercise claim, and (3) it excessively entangles government with religious internal affairs because it requires courts to determine what constitutes "sacerdotal functions" and religious worship. Moreover, § 107(2) fails the historical significance test because it was only passed recently, in 1954, which necessarily means it lacks an unbroken and unambiguous history that was contemplated by the Framers. Therefore, § 107(2) is unconstitutional and Petitioner-Intervenor requests this court reverse and remand the decision of the United States Court of Appeals for the Eighteenth Circuit only as it pertains to Issue II.

ARGUMENT

I. Mr. Burns qualifies for the parsonage exemption of § 107(2) because he performs the duties of a minister, he is recognized by his Unitarian community as a religious leader, and he maintains and controls the mission of the Church through his spiritual leadership at the Church-integrated School.

Section 107 of the Internal Revenue Code ("I.R.C.") allows "ministers of the gospel" to exclude the value of their housing benefits from their taxable income, including benefits in the form of a housing allowance. I.R.C. § 107(2). Despite the Christian connotations of the designation "minister of the gospel," courts have interpreted this exception to apply to leaders of diverse faiths. See Adam Chodorow, The Parsonage Exemption, 51 U.C. DAVIS L. REV. 849 (2018) (explaining that the IRS has construed the term to include rabbis, imams, and others). The United States Tax Court has held that a minister is someone "authorized to administer the sacraments, preach and conduct services of worship." See, e.g., Salkov v. Comm'r, 46 T.C. 190, 194 (1966). This broad language has caused courts and scholars to grapple with the gray areas of § 107(2), noting that "because religions vary as to whether such activities can be conducted by lay individuals in addition to ordained people, and further vary as to the process for ordination, there is no bright-line rule for who qualifies as a minister for purposes of [§ 107]."[1]

However, the Treasury regulations accompanying § 107(2) provide some guidance. See Treas. Reg. § 1.1402(c)-5 (1963) (services that are "ordinarily the duties of the minister of the gospel" include "the conduct of religious worship *or* the ministration of sacerdotal functions" as well as "directing, managing, or promoting the activities of such organization" (emphasis added)). Further, courts look to the connection between a church and its integral agencies to determine whether the individual exercises sufficient control of the church's mission and

[1] Bridget J. Crawford et al., Ministerial Magic: Tax-Free Housing and Religious Employers, 22 U. PA. J. CONST. L. ONLINE 101 (2019) (compiling cases).

organizations. See Flowers v. United States, 1981 U.S. Dist. LEXIS 16758 (N.D. Tex. November 25, 1981). The Supreme Court defers to the discretion of legislative bodies to "shape definitions and classifications to form sound policies." Madden v. Kentucky, 309 U.S. 83, 88 (1940). However, this Court has the authority to make factual determinations about the status of a religious employee based on the job functions they perform. See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 545 U.S. 171, 189 (2012) (creating a "ministerial exception" within the narrow scope of employment discrimination claims).

Here, the nature of Mr. Burns's services to the religious boarding School are that of a minister of the gospel within the meaning of § 107(2) because he imparts Unitarian values to students through education, provides daily spiritual counseling, and hosts weekly ministry gatherings. His religious community has recognized his efforts as a religious leader, demonstrated by his student following, his numerous accolades given by the School for his spiritual counseling programs, and suggestions by a colleague that he apply for the parsonage exemption. Whispering Hills Academy is fully integrated with Whispering Hills Unitarian Church because the School operates under the authority and control of the Church, and the Church's values dictate the School's curriculum and religious training. Mr. Burns exercises control over key aspects of the School's operations as a uniquely faith-based educator, and by providing religious and spiritual guidance to his students in accordance with the Church's values. Therefore, Mr. Burns qualifies for the parsonage exemption under § 107(2).

A. Mr. Burns assumes the duties of a Minister of the Gospel by conducting spiritual worship and providing religious counseling, roles that his community has recognized and commissioned him to perform.

Because performing ministerial duties triggers § 107(2), and because titles are not dispositive, Mr. Burns qualifies for this tax exemption. By regularly counseling students on

religious values and teaching school subjects entrenched in Unitarian tenets, Mr. Burns performs key services of a Unitarian religious leader. Unitarianism allows for congregations and religious communities to ordain or commission their ministers, which Mr. Burns's community has done by publicly recognizing his spiritual counseling of the Church's student congregation.

1. The nature of Mr. Burns's services to the School qualify him as a Minister of the Gospel under § 107(2) because he imparts regular spiritual counseling and teaches a curriculum that is inextricably intertwined with Unitarianism.

Explaining the distinction between title and duties, courts hold that "whether an individual performs services as an ordained, commissioned, or licensed minister depends on the type of services performed, not just the official title of the person performing those services." Brannon v. Comm'r, 78 T.C.M. (CCH) 765 (T.C. 1999) (affirming Commissioner's denial of exemption because the application was not timely filed, while recognizing that Appellant's services *were* in the nature of a minister). Echoing this reasoning, the Tenth Circuit interprets the exemption for "any individual who is 'a duly ordained, commissioned or licensed minister of a church' to mean that the triggering event is the assumption of the duties and functions of a minister." Ballinger v. Comm'r, 728 F.2d 1287, 1290 (10th Cir. 1984) (affirming Tax Court decision that although appellant assumed the duties of a Baptist minister, he could not receive § 1402 parsonage exemption because he did not timely file when he was performing those duties). See also Knight v. Comm'r, 92 T.C. 199, 203 (1989) (explaining that "case law construing who is a 'minister of the gospel' for the purposes of § 107 has equal force in construing who is a 'duly ordained, commissioned, or licensed' minister for purposes of § 1402").

Importantly, these ministerial duties need not be all-inclusive. See Reeder v. Comm'r, 66 T.C.M. (CCH) 1 (T.C. 1993) (holding that there is no requirement that to qualify for a parsonage exemption the individual actually perform *every* sacrament of the religion (emphasis added)).

However, the frequency in performance of a minister's duties must be more than sporadic. See Lawrence v. Commissioner, 50 T.C. 494 (1968) (holding that an employee at a Baptist Church whose duties included the administration of educational and service organizations within the church and who "occasionally" filled in for the Church's pastor in emergencies was not a minister of the gospel within the meaning of § 107(2)).

Unitarianism is a uniquely formatted religion in that there are "no prescribed rituals."[2] Most Unitarian churches have rejected sacraments, as the religion rejects the necessity of an intercessor between God and humans.[3] The lack of formal sacraments within Unitarianism religion must not render a minister within the religion's meaning ineligible for a parsonage exemption when they conduct religious worship and are responsible for the religious development of a Unitarian youth congregation. See Treas. Reg. § 1.1402(c)-5(b)(2) ("whether service performed by a minister is the conduct of religious worship or the ministration of sacerdotal functions depends on the tenets and practices of the particular church or church denomination.").

Mr. Burns has assumed the duties of a minister of the gospel for the purposes of § 107(2) within a religion that rejects sacraments and prescribed rituals. As a religious leader within the Unitarian school, Mr. Burns teaches secular subjects in harmony with the Unitarianism religion, hosts religious discussions with his students after church services, and holds daily spiritual guidance through his Prayer After Hours program. R. at 3. These ministry activities are anything but sporadic, in sharp contrast to the rare conduct of religious worship performed by the claimant

[2] Rzepka, Jane Ranney, How We Break the Rules, (Mar. 10, 2021, 11:15:02 AM), https://www.uuworld.org/articles/uus-break-rules.
[3] LaMar, Susan G., Unitarian Universalist Ordination – A Search for Meaning, (Mar. 10, 2021, 11:20:02 AM), https://cdn.ymaws.com/www.uuma.org/resource/collection/667B37B7-F1F4-433B-BF1F-928B6073BF12/A_Unitarian_Universalist_Ordination_-_-_A_Search_for_Meaning.pdf.

in Lawrence. Rather, Mr. Burns's faith-based counseling program and youth ministry meetings are frequent and consistent. Mr. Burns's steady spiritual influence over his students establishes his eligibility under § 107(2) because the parsonage exemption is triggered by the performance of ministerial duties regardless of formal title.

2. Mr. Burns's congregation and religious community has commissioned him as a Minister of the Gospel, as demonstrated by their public recognition of his role as a religious leader.

The United States Tax Court and civil courts alike consider "whether the particular church or denomination recognizes the person as a minister or religious leader." Wingo v. Comm'r of Internal Revenue, 89 T.C. 922, 933 (1987) (citing Silverman v. Comm'r, No. 72-1336, 1973 WL 2493 (8th Cir. July 11, 1973) and Salkov, 46 T.C. at 197-198). In Wingo, although the Commission argued that respondent was an employee of the local church rather than a minister since he was not a member in full connection with the Methodist Annual Conference and had not yet been ordained as an elder, the court determined that, *inter alia*, the United Methodist Church regarded him as a member of the ministry. Id. This recognition granted respondent an exemption under § 1402. Id. at 937.

Notably, § 107(2)'s accompanying tax regulations are bereft of a requirement that the commissioning must come from an ecclesiastical authority. See Salkov, 46 T.C. (holding that a cantor of the Jewish faith was a "sui generis" minister within the meaning of § 107 even though he did not perform a key function of Jewish rabbis, the only ordained minister of the Jewish religion). In concluding that a congregation may commission a religious leader sufficient to meet § 107's requirements, the Tax Court opined that "if the statute . . . was so severely restrictive as to exclude ministers elected, designated, or appointed by a religious congregation, there would

be a serious question in our minds as to the propriety of such an exclusion under the Constitution of the United States." Id. at 196.

Here, a central tenet of Unitarianism is that there is no hierarchy within the religion, in sharp contrast to religions with a chain of commands like Catholicism.[4] Notably, "congregations ordain" within Unitarianism—a designation that is born and maintained through the religious community.[5] In this case, Mr. Burns is recognized both by a congregation (his student following) and his colleagues: his students have labelled Mr. Burns's post-church service gatherings as a "youth ministry" wherein they discuss topics covered in church, and his after-school spiritual counseling program, Prayer After Hours, is a program Whispering Hills Academy awarded Mr. Buns for implementing. This honor serves as public recognition by the School that Mr. Burns holds a position of religious leadership and influence over his students.

In addition to the congregation's act of recognizing ministers for the purposes of commissioning, courts have noted that whether a religious organization "holds an employee out" as a minister is relevant to this analysis. See Kirk v. Comm'r, 425 F.2d 492 (D.C. Cir. 1970) (holding that a professional employee of a Methodist church who was relegated to solely secular duties was not held out by his employer as a minister because the nature of his employment did not approach the realm of conducting religious worship). Likewise, courts have looked to whether the performance of sacerdotal duties was tied to the purpose of employment at all. Two years after Kirk, an ordained minister who was not employed for the purposes of performing ministerial duties was denied a parsonage exemption, despite the fact that he "sometimes"

[4] Rzepka, Jane Ranney, How We Break the Rules, (Mar. 10, 2021, 11:15:02 AM), https://www.uuworld.org/articles/uus-break-rules.
[5] LaMar, Susan G., Unitarian Universalist Ordination – A Search for Meaning, (Mar. 10, 2021, 11:20:02 AM), https://cdn.ymaws.com/www.uuma.org/resource/collection/667B37B7-F1F4-433B-BF1F-928B6073BF12/A_Unitarian_Universalist_Ordination_-_-_A_Search_for_Meaning.pdf.

performed religious functions. Tanenbaum v. Comm'r of Internal Revenue, 58 T.C. 1, 1972. The Tanenbaum court explained that while it could be telling that petitioner performed sacerdotal duties only of his own volition, the crux of the decision rested on the fact that his employer was merely an educational organization, and that petitioner was not assigned to this organization by any religious body that could be considered a church. Id. at 8.

In contrast to Tanenbaum, Whispering Hills Academy is a religious educational institution governed under the auspices of the Whispering Hills Unitarian Church, and the School's faith-based ideals are integral to the school's curriculum. While it is unclear from the Record if the School hired Mr. Burns for the purpose of teaching academic subjects in addition to spiritually counseling students daily and hosting weekly youth ministries, these actions were certainly ratified by his employers after he assumed those duties. R. at 4. The numerous awards bestowed upon Mr. Burns by the School's administration for his ministerial duties demonstrate that the School not only benefitted from Mr. Burns's dedication to his student's spiritual development, but it publicly approved and encouraged his actions. Unlike the solely secular duties at issue in Kirk, Mr. Burns was considered a religious leader by the School and his colleagues. See R. at 4 (co-worker Pastor Nick suggested that Mr. Burns apply for the § 107(2) exemption because he "was employed by a religious institution, held daily prayer sessions with his afterschool club, and provided spiritual counseling to the students"). Therefore, because Unitarianism allows for community recognition of its religious leaders, Mr. Burns has been commissioned by his peers and youth congregation as a minister for the purposes of § 107(2).

B. Mr. Burns exercises religious control over Whispering Hills Academy, which is integrated with and governed by Whispering Hills Unitarian Church.

Further tests to determine whether an individual is eligible for the parsonage exemption include whether the individual provides service in furtherance of an organization which is under

the control or authority of a religious body.[6] Where a school is operated by a parent church, and that church exercises control (either directly or indirectly) over the school, "the two entities are integrated and any teacher or board member who exercise control over some aspect of the school is entitled to the parsonage exemption." Rev. Rul. 70-549, 1970-2 C.B. 16.

Here, Whispering Hills Academy operates under the authority of Whispering Hills Unitarian Church: the School is under direct supervision and influence of the Church, the Church's tenets are incorporated into the School's curriculum, and the School's students are required to attend service at the Church. R. at 2, 8. Mr. Burns exercises control over the School's curriculum by playing a crucial rule in students' spiritual and faith-based academic development. He is dedicated to imparting Unitarianism's tenets by counseling students daily on spiritual matters and hosting weekly ministry gatherings at the on-campus Church. R. at 3. Therefore, the functions and activities performed by Mr. Burns are integral to the curriculum of the School which is integral to the Church's operation.

1. Whispering Hills Academy is an integral agency of Whispering Hills Unitarian Church because the School operates under the authority of the Church and dutifully carries out its Unitarian tenets and principles.

Courts have used the tests provided in Treasury Regulation 1.1402(c)-5(b)(2) to determine whether a church exercises control over an affiliated institution. See Colbert v. Comm'r, 61 T.C. 449 (1974); Tanenbaum, 58 T.C. *supra*; Toavs v. Comm'r of Internal Revenue, 67 T.C. 897, 903 (1977) (explaining that Treasury Regulations §§ 1.107-1(a) and 1.1402(c)-5 provide "reasonable interpretations of § 107."):

> Service performed by a minister in the control, conduct, and maintenance of a religious organization relates to directing, managing, or promoting the activities of such organization. Any religious organization is deemed to be under the authority of a

[6] Ellen Osni Bonito et al., Who Qualifies, and When, For the Parsonage Allowance for 'Ministers?', 14 TAX'N EXEMPTS 227, 229 (2003) (explaining that additional tests to determine § 107 eligibility include the "integral agency" test).

> religious body constituting a church or church denomination if it is organized and dedicated to carrying out the tenets and principles of a faith in accordance with either the requirements or sanctions governing the creation of institutions of the faith.

Treas. Reg. § 1.1402(c)-5(b)(2)(ii). The Toavs court applied this test to decide whether there was objective manifestation of control over the administrators of nursing homes by a church which would entitle the applicants to the parsonage exemption of § 107(2). Toavs, 67 T.C. The court concluded that the nursing home organization was not operating under the authority of the church in question because the record was devoid of any evidence that the church even made suggestions about the operation of the nursing home organization. Id. at 906.

Four years after Toavs, the Northern District of Texas relied on Revenue Ruling 72-606, 1972-2 C.B. 78, interpreting the same tax regulation to conclude that a professor of undergraduate religion at a Christian university was not entitled to an exemption under § 107 because the university and church were not sufficiently integrated. Flowers v. United States, 1981 U.S. Dist. LEXIS 16758 (N.D. Tex. November 25, 1981). The Flowers court asserted that "if [the university] is an integral agency of the Christian Church . . . then plaintiffs would be entitled to the exemption under Section 107." Id. at *13. As the Eighteenth Circuit Court of Appeals explained, the factors to be weighed in considering the entities' relationship include "incorporation, the school's relationship with the church, the church's level of control over the school, the church's approval/removal of school administration, reporting of annual finances, and the church's financial contributions to the school." R. at 20 (referencing Rev. Rul. 72-606, 1972-2 C.B. 78). Weighing these factors, the court in Flowers concluded that the church in question did not control the college either directly or indirectly, and that there was no evidence of management beyond a broad "moral persuasion" which connected both entities by the word "Christian" in both names. Flowers at *13.

Unlike the entities in Toavs, wherein the organization was merely one of many organizations loosely affiliated with a church, here, Whispering Hills Academy and Whispering Hills Unitarian Church are inextricably interconnected. Not only are the two parties located on the same property steps away from each other, but the Church influences the School's academic and religious curriculum, requiring attendance and participation by the students at the Church. R. at 2. Further, in contrast to the church and school at issue in Flowers, here there is substantially more integration between the School and Church than mere "moral persuasion." Even in the absence of information such as the process of removing school administration, the Revenue Ruling's factors weigh in favor of Mr. Burns's status as a minister of the gospel: the Church and School being located on the same property and operating with the same name signals that the church exercises control over the school and implies a corporate relationship. Further, the Church contributes to the School's teachings, curricula, and purpose by influencing the School's religious ideals and requiring students to attend services at the Church. R. at 8.

Therefore, Whispering Hills Unitarian Church has demonstrated an objective manifestation of control over the Whispering Hills Academy because the School is dependent on and substantially integrated with the Church.

2. Mr. Burns maintains and controls crucial aspects of the church-integrated School by promoting the Unitarian faith, providing daily spiritual guidance to its students, and delivering an education based on religious principles.

To establish that an individual performs services in the control, conduct, and maintenance of the church or organizations within the church, "the minister need only have *some* participation in the conduct, control, and maintenance of the local church or denomination. Brannon, 78 T.C.M. at 765 (emphasis supplied) (ruling against claimant's parsonage exception on other grounds, but concluding that claimant Pastor served in the control, conduct, and maintenance of

his local chapter even though his ministerial functions were limited to his locality). Indeed, over ten years before Brannon, the Tax Court held that "a minister can conduct, control and maintain the church or church organizations if he is in control of a single congregation, even if the congregation is not the only or highest government body of the church." Wingo, 87 T.C. at 935. The Wingo court held that a Methodist deacon was in the control, conduct, and maintenance of his local charge by overseeing organizational concerns and supervising the working program of the church even though he could not perform *all* the duties of full members of the Methodist Annual Conference. Id. at 934. These two decisions similarly rest on Treasury Regulation 1.1402(c)-5(b)(2) and illustrate that religious leaders who have *some* degree of control over a church organization satisfy the charge of § 1.1402(c)-5(b)(2)(ii).

Mr. Burns exercises control over Whispering Hills Academy curriculum—in both the academic and spiritual development of the School's students. Mr. Burns is a faith-based educator who incorporates Unitarian values while teaching multiple subjects. Further, his after-school program, Prayer After Hours, provides students with invaluable spiritual counseling. Finally, he discusses the messages of the Church's weekly religious services with students during his weekly youth ministry gatherings at the Church. These responsibilities illustrate Mr. Burns's substantial influence over the Church's youth congregation. Mr. Burns's position is integral to the furtherance of the School's mission to provide an education to students while furthering the Whispering Hills Unitarian Church's tenets and values. Therefore, Mr. Burns exercises considerable control over the curriculum of the School, an agency of the Church.

II. I.R.C. § 107(2) violates the Establishment Clause under both the Lemon and historical significance tests because (1) it impermissibly confers an exclusive and significant tax benefit on religion which is not available to anti-religious or secular counterparts, and (2) it was adopted recently.

The First Amendment to the United States Constitution declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. Those Religion Clauses prohibit "either governmentally established religion or governmental interference with religion." Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 669 (1970). Although the Religion Clauses connote a complete separation of church and state, the "line of separation . . . is a blurred, indistinct, and variable barrier . . . ." Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). To find constitutional merit under the Lemon test, a statute must (1) "have a secular legislative purpose . . . ," (2) have a "principal or primary effect . . . that neither advances nor inhibits religion . . . ," and (3) not foster excessive "government entanglement" with religion. Id. at 612-13.

Alternatively, to survive the narrow historical significance test, a practice must have an "unambiguous and unbroken history," and the court must undergo a "fact-sensitive" inquiry in which "history shows that the *specific practice* is permitted." Marsh v. Chambers, 463 U.S. 783, 792 (1983) (emphasis added); Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 577, 587 (2014). In this case, § 107 grants a tax exemption exclusively to "minister[s]" for (1) in-kind housing "furnished to [them] as part of [their] compensation," and (2) a housing cash allowance "paid to [them] as part of [their] compensation." I.R.C. § 107(1)-(2) (West 2020). Section 107(2) is unconstitutional because it confers a housing tax exemption exclusively on ministers that secular individuals like members of Citizens Against Religious Convictions, Inc., ("Petitioner-Intervenor" or "CARC") can only benefit from under a separate, more stringent section of the tax

code. Additionally, § 107(2) and its predecessor originated recently, in 1954 and 1921 respectively.[7] Therefore, § 107(2) violates the Establishment Clause.

A. A statute violates the Establishment Clause if it fails even one prong of the Lemon test: § 107(2) fails all three prongs of the Lemon test and is therefore overtly unconstitutional.

Section 107(2) fails all three prongs of the Lemon test. The Lemon test permits a statute to pass constitutional scrutiny only if it (1) has a "secular" purpose, (2) does not have the "principal" effect of advancing or inhibiting religion, and (3) does not "foster excessive" entanglement between government and religion. Lemon, 403 U.S. at 612-13. Here, § 107(2) fails the first prong because its purpose is to provide a benefit exclusively to religious ministers. Section 107(2) fails the second prong because it impermissibly advances religion over nonreligion by providing religious individuals with $10 billion in foregone taxes over a decade.[8] Lastly, § 107(2) fails the third prong because it requires courts to determine what constitutes "sacerdotal functions" and "religious worship," whereas having ministers apply for the housing exemption under § 119, like all other non-ministerial individuals, does not rise to excessive entanglement because § 119 focuses on the employment relationship of ministers and churches, not the internal religious functions. Therefore, § 107(2) violates the Establishment Clause.

1. Section 107(2) fails Lemon's secular purpose prong because Congress passed §§ 107 and 119 on the same date to achieve the same ends—a housing exemption—but § 119 confers a rigid test only upon secular individuals while § 107(2) provides a loose test exclusively to ministers for the same benefit.

If a statute is "motivated wholly by religious considerations" it does not have a secular purpose. Lynch v. Donnelly, 465 U.S. 668, 680 (1984). Furthermore, a secular purpose is most

[7] I.R.C. § 107(2) (West 2020); Revenue Act of 1921, Pub. L. No. 67-98, § 213, 42 Stat. 227, 239 (1921) (West 2020) (hereinafter "Revenue Act").
[8] Office of Tax Analysis U.S. Dep't of the Treasury Tax Expenditures: Fiscal Year 2018 (Mar. 11, 2021, 1:54PM) (hereinafter "Tax Expenditures"), https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2020.pdf.

evident when religious organizations are not exclusive beneficiaries. Walz, 397 U.S. at 673. In Walz, this Court upheld a state statute that provided a property tax exemption to religious organizations as well as to a "broad class of property owned by nonprofit, quasi-public corporations" such as "hospitals, libraries, [and] playgrounds . . . ." Id. The Court reasoned the property tax exemption benefited organizations that had "religious, educational, or charitable purposes" but satisfied the secular purpose prong because the broad class of exempted organizations all existed to benefit the "community at large." Id. at 666-67, 672.

Similarly, a secular purpose can include a governmental benefit to religion but only if the benefit is incidental. Lynch, 465 U.S. at 683, 686. In Lynch, this Court held a Christmas nativity crèche displayed by a local government had a secular purpose despite religious overtones because the crèche was a "passive symbol" among other secular Christmas displays and the $200 "de minimis" benefit to religion was "indirect, remote, and incidental." Id. at 684, 686.

Here, § 107(2)'s secular equivalent, § 119 "Meals and Lodging for the Convenience of the Employer," lists the requirements that all individuals, except ministers, must meet to benefit from a housing exemption. I.R.C. § 119(a), (a)(2) (West 2020). In order to qualify for the exemption, the applicant's housing must be: (1) in-kind, (2) on site of the employer, (3) required by the employer, and (4) for the benefit of the employer. Id. Unlike the passive symbolism of the crèche in Lynch which only indirectly benefited religion and had the *de minimis* effect of costing taxpayers $200, § 107 costs taxpayers $900 million per year in foregone taxes, which is anything but *de minimis*, and directly benefits only religious ministers.[9] Because "87%" of pastors "receive a housing allowance, while only 11% receive in-kind housing," if ministers were subject to the same § 119 housing exemption criteria as secular individuals, it is likely only 11%

[9] Tax Expenditures.

would qualify under § 119, saving taxpayers millions of dollars of foregone taxes per year.[10] In this case, §§ 107 and 119 espouse different qualification standards for the same tax benefit based solely upon an individual's religious affiliation; this differs markedly from the property tax exemption in Walz that provided the exact same tax exemption which applied evenly to a broad range of both religious and nonreligious nonprofit organizations.

Additionally, the legislative history shows Congress passed § 107 for wholly religious reasons. Congress passed § 107 in 1954, at the beginning of the Cold War conflict and fear of Communist ideology.[11] It was in that context that Peter Mack, the sponsor of § 107, stated "we are being threatened by a godless and antireligious world movement [and] we should correct this discrimination against certain ministers of the gospel who are carrying on such a courageous fight against this foe."[12] The discrimination against ministers Mack referenced is embodied in an Eighth Circuit case addressing § 107's predecessor, I.R.C. § 22(b)(6). Williamson v. Comm'r, 224 F.2d 377, 378-89 (8th Cir. 1955). Section 22(b)(c) only permitted ministers to exempt in-kind housing from their gross income, not cash allowances. Id. The court held that because the employer furnished the minister a cash allowance for housing that "was manifestly for the *convenience of the employer* . . ." the minister could exempt the cash allowance even though § 22(b)(c) did not expressly permit the exemption. Id. at 380-81 (emphasis added).

Moreover, the Williamson case originated June 15, 1954; Congress passed both §§ 107 and 119 into law on August 16, 1954.[13] In what can only be understood as a direct response to the issues raised in Williamson, Congress expressly codified the Williamson convenience of the

[10] *Supra* note 1 at 102 (citing Sarah Eekhoff Zylstra, *Are Pastors' Homes That Different?*, https://www.christianitytoday.com/ct/2014/june/are-pastors-homes-that-different.html).
[11] Adam Chodorow, The Parsonage Exemption, 51 U.C. Davis L. Rev. 849, 858 (2018).
[12] Id. at n.39.
[13] I.R.C. § 119(a), (a)(2) (West 2020); I.R.C. § 107 (West 2020).

employer doctrine for secular individuals in § 119, and expressly refuted the doctrine for ministers in § 107—a decision wholly motivated by religion. Respondents claim that § 107 has a secular purpose because Congress sought to even the playing field between religions that provide physical parsonages (in-kind) and those that do not (cash allowances) because "[t]he clearest command of the Establishment Clause is that one religious denomination" cannot be preferred over another. Larson v. Valente, 456 U.S. 228, 244 (1982). While noble, that claim fails to uphold the equally important Establishment Clause command that there must be government neutrality between "religion and nonreligion." McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 860 (2005). Seeking to not prefer one religion over another does not satisfy a secular purpose when that practice places all religions over irreligion generally. Therefore, § 107(2) does not have a secular purpose and is unconstitutional.

2. **Section 107(2) fails Lemon's effects prong because (1) it is not neutral but rather advances religion by conferring a significant economic benefit to religious individuals over nonreligious individuals, and (2) Petitioner asserts no corresponding Free Exercise claim that warrants accommodation.**

The Establishment Clause requires neutrality between religions generally and between religion and nonreligion. McCreary, 545 U.S. at 860. Additionally, where Free Exercise of religion rights are not implicated, the Establishment Clause commands secular counterparts be given the same benefits as religious counterparts. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987). In this case, there is no reason, aside from advancing religion, to provide ministers with an exclusive housing exemption because § 119 already provides a neutral housing exemption to all individuals, religious and nonreligious alike. Because Petitioner claims no Free Exercise right, and § 107(2)'s housing

exemption amounts to $10.8 billion in foregone taxes over a decade, the exemption is the economic equivalent of a direct subsidy to religion and violates the Establishment Clause.[14]

a. Section 107(2) is not part of a constitutionally neutral housing policy because it provides ministers a categorical housing exemption while subjecting secular counterparts like CARC to a stringent set of rules in order to experience the same benefit, acting as a subsidy to religious individuals.

"The touchstone for our analysis is the principle that the 'First Amendment mandates governmental *neutrality* between religion and religion, and between religion and nonreligion.'" McCreary, 545 U.S. at 860 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)) (emphasis added). The government cannot "close[] its eyes to the manner in which" funds "are actually used" or it will "allow[] public funds to promote sectarian" ends. Lemon, 403 U.S. at 640 (Douglas, J., concurring). In addition to §§ 107(2) and 119, the tax code provides housing exemptions in three other sections, §§ 911, 134, and 912, which each provide a housing exemption for individuals owning property abroad, living abroad, or to military.[15] Purporting that § 107(2) is part of a neutral housing policy because sections like § 134 provide an exemption to military distorts constitutional neutrality analysis; the Constitution does not forbid Congress from giving certain categories of people different tax treatments—the Constitution forbids that treatment only when religion is expressly advanced above similarly situated secular counterparts, which is precisely what § 107(2) does.

The Establishment Clause commands that religious individuals cannot be advanced over nonreligious individuals. Est. of Thornton v. Caldor, 472 U.S. 703, 710 (1985). In Thornton, the Court held that a state law requiring businesses to give their employees time off on the employee's sabbath, "no matter what burden or inconvenience this imposes on the employer,"

[14] Tax Expenditures.
[15] I.R.C. § 911 (West 2020) (housing exemption for people who own a tax home abroad); I.R.C. §§ 119, 134 (West 2020) (housing exemptions for military, and for federal employees overseas).

violated the effects prong of Lemon because it had the "primary effect" of "impermissibly advanc[ing] a particular religious practice [sabbath observers]." Id. at 710.

Similarly, tax exemptions that provide exclusive benefits to religious individuals fail the effects prong. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 5 (1989). In Texas Monthly, a majority of judges struck down a Texas statute that exclusively exempted religious publications from sales tax because the statute denied that exemption to secular publications. Id.[16] The Court pointed to other Supreme Court decisions where deductions and subsidies permissibly benefitted religious organizations but clarified that "were those benefits *confined* to religious organizations, they could not have appeared other than as state sponsorship of religion" and the Court "would not have hesitated to strike them down for lacking a secular purpose and effect" due to the "burdens [placed upon] nonbeneficiaries." Id. at 11, 15 (emphasis added).

Conversely, laws providing the *same* tax exemption for both religious and secular groups do not violate the Establishment Clause. Walz, 397 U.S. at 673. In Walz, this Court upheld a state property tax exemption to properties used for "religious, educational, or charitable purposes." Id. at 666-67. The Court held that because the state law did not "single[] out . . . churches" but "granted exemption to all houses of religious worship within a broad class of property," including libraries and playgrounds, the law was not "attempting to establish" or advance religion but rather functioned to exempt non-profit institutions, religious or otherwise, from tax. Id. at 673. In that light, the Court held there was "no genuine nexus between tax exemption and establishment of religion." Id. at 675. However, outside of that limited context where religions are among a vast group of nonprofits which benefit from an exemption, tax

[16] Id. at 26 (Justice Blackman, joined by Justice O'Connor, concurring with the plurality opinion because the Establishment Clause "suggests that a State may not give a tax break to those who spread the gospel that it does not also give to others who actively might advocate disbelief in religion").

exemptions can function as a direct subsidy to religion. Bob Jones v. United States, 461 U.S. 574, 580-81, 91 (1983) ("When the Government *grants exemptions* or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors.'") (emphasis added); Regan v. Taxation with Representation, 461 U.S. 540, 544, 551 (1983) ("Both *tax exemptions* and tax-deductibility are a *form of subsidy* that is administered through the tax system. A tax exemption has much the *same effect* as a cash grant to the organization of the amount of tax it would have to pay on its income.") (emphasis added).

Here, like placing sabbath observers exclusively above secular counterparts in Thornton, § 107(2) advances religion by conferring foregone tax benefits on ministers exclusively, making all non-ministers vicarious tax donors, similar to the taxpayers in Bob Jones. Section 107(2) is remarkably similar to the exclusive sales tax exemption struck down as unconstitutional in Texas Monthly because §107(2) lacks the constitutionally required breadth and is similarly confined to benefit religious individuals only, unlike the exemption in Walz which benefitted nonprofits generally and religious organizations only passively. This Court cannot close its eyes to the way this tax exemption functions; § 107(2) confers an exclusive benefit to ministers totaling $10.8 billion in foregone taxes. Tax Expenditures. Expressly supported by Regan, the § 107(2) exemption functions as a form of subsidy by significantly decreasing the amount of tax ministers pay; secular individuals like those represented by CARC cannot experience that subsidy because they do not qualify under § 107. Therefore, § 107 violates the effects prong of Lemon.

b. **Section 107(2) does not represent a mere accommodation of religion because Petitioner has not claimed a Free Exercise right to a housing exemption**.

In general, "[r]eligious beliefs can be accommodated . . . " but the Free Exercise of religion is not absolute. United States v. Lee, 455 U.S. 252, 259 (1982). *If* a Free Exercise right

is implicated, then secular individuals do not have to be given similar benefits under the Establishment Clause. Amos, 483 U.S. at 338. Absent a Free Exercise right, the Establishment Clause requires secular and religious individuals to be given the same benefits. Id. In Amos, an engineer employed by a church was fired for failing to obtain a certificate that he was a member of the church. Id. at 330. The Court held the church was exempt from Title VII religious discrimination claims, even though secular organizations were not, because the church's Free Exercise rights were implicated. Id. at 330, 338. By default, "a government action lifting from religious organizations a generally applicable regulatory burden" advances religion. Id. at 348 (O'Connor, J., concurring). From there, courts should "separate those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of assistance to religious organizations." Id. Because the church had Free Exercise rights to hire employees in line with the tenets of their faith, the Title VII exemption was permissible. Id. The exemption also passed the objective observer test because an objective observer "acquainted with the text, legislative history, and implementation of the statute" did not find the exemption conveyed a "message of endorsement" for religion. Id.

In this case, Petitioner makes no claim that paying tax on his housing allowance violates his religious beliefs. Unlike the Title VII exemption in Amos that constitutionally accommodated the church's Free Exercise rights, the § 107(2) housing exemption implicates no Free Exercise right for Petitioner and therefore applies unjustifiable awards to religion. Further, an objective observer familiar with the text and history of both §§ 107 and 119 would find that § 107 communicates a message of endorsement for religion because nonreligious individuals cannot qualify under § 107(2). Therefore, § 107(2) violates the effects prong of Lemon, and, on that failure alone, is unconstitutional.

3. Because § 107(2) creates excessive entanglement between government and religious internal affairs, the Establishment Clause commands that ministers, like all other individuals, apply for the housing exemption under the neutral § 119 housing exemption.

Because the "line of separation" between church and state is inevitably "blurred," the test is not whether there is entanglement, but whether there is "*excessive*" entanglement between government and religion. Lemon, 403 U.S. at 614 (emphasis added). To determine excessive entanglement, courts must examine the "character and purpose" of those benefitted, the "nature of the aid" the government provides, and the "resulting relationship" between government and religious institutions. Id. at 615. Moreover, routine administrative and record keeping requirements placed on religious individuals for tax purposes do not rise to unconstitutional excessive entanglement. Hernandez v. C.I.R., 490 U.S. 680, 695–98 (1989) (federal income tax). Further, the term "internal affairs" doctrine aids the quest for determining excessive entanglement, which involves ecclesiastical oversight in religious matters, not mere routine or regulatory oversight. Schleicher v. Salvation Army, 518 F.3d 472, 475 (7th Cir. 2008).

When removing an unconstitutional exemption subjects religious organizations to routine tax regulation, there is no excessive entanglement. Texas Monthly, 489 U.S. at 20. In Texas Monthly, the Court struck down a statute requiring "public officials [to] determine whether some message or activity is consistent" with a particular religion because that constituted excessive entanglement. Id. Absent the statute, the Court conceded that religious publications would be required to adhere to "government regulations" and compliance, rising to the level of entanglement. Id. The Court held, however, that the government monitoring did not rise to *excessive* entanglement because it did "not impede the evangelical activities of religious groups" and because that type of routinized factual inquiry was "commonly associated with the enforcement of tax laws." Id. at 20, 21.

Similarly, "routine and factual inquiries" such as "fire inspections and building and zoning regulations" is not "the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement with religion . . . ." Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 305 (1963); accord Vision Church v. Vill. of Long Grove, 468 F.3d 975, 991, 994-95 (7th Cir. 2006) (holding zoning decisions factoring in church size, hours of operation, and a number of "religious activities," did not constitute excessive entanglement).

In this case, § 107(2) excessively entangles government with religious internal affairs by requiring courts to parse through internal religious doctrines to determine who qualifies as a "minister."[17] To aid this intrusive endeavor, the Treasury promulgated regulations that purport a "minister" for tax purposes is one whom performs "ministration of sacerdotal functions and the conduct of religious worship . . . " which "depends on the tenets and practices of the particular religious body constituting his church . . . ." Treas. Reg. § 1.1402(c)-5(b)(2)—(b)(2)(i).[18]

Conversely, the § 119 four factor test sets out routine and fact specific questions that avoid excessive entanglement with religious internal affairs by relying on the nature of the employment relationship, not the religious nature of the work. This is similar to the home office provision, which permits a deduction to individuals using their homes for business; ministers and secular individuals both currently apply for the same exemption—there is no separate category for ministers. I.R.C. § 280A (West 2020). Additionally, in order to qualify for § 107, ministers must already prove their ministerial allowance through "an employment contract, in minutes of

[17] The § 107(2) inquiry is even more intrusive to new or lesser-known religions; as Petitioner noted on page four of this brief, the Unitarian religion does not even have prescribed rituals to aid the court in determining who qualifies as minister.

[18] Treasury regulations are binding, "have the force and effect of law," and are analyzed under Chevron deference. Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 55 (2011); see Regulatory Guidance Processes, (Mar. 11, 2021, 9:26:16 PM), https://www.gao.gov/assets/gao-16-720.pdf (listing on page 8 that Treasury regulations are "binding on taxpayers").

or in a resolution by a church . . . or in its budget . . . .” Treas. Reg. § 1.107. Because ministers are already required to produce proof of their employment relationship in order to qualify for § 107(2), the government can avoid excessive entanglement by collecting that same information under § 119, but without an inquiry into sacerdotal functions. Determining sacerdotal functions and religious conduct, required under § 107(2), are not routine factual inquiries like the zoning codes in Vision Church and Tony. Requiring ministers to comply with § 119 and be subject to routine tax law enforcement is not excessive entanglement; instead, it is strikingly similar to requiring religious publications to comply with a common sales tax law in Texas Monthly. Section 107(2) infringes upon evangelical activities and therefore rises to the level of excessive entanglement; § 119 does not. Therefore, § 107(2) violates the Establishment Clause.

B. Even under the historical significance test, § 107(2) is unconstitutional because it did not exist until 1954, and the predecessor statute permitting only in-kind housing exemptions for ministers did not originate until 1921, eight years after Congress was given income taxing power by the Sixteenth Amendment.

The historical significance test involves a “fact-sensitive” inquiry about whether the “specific” practice falls within a historical tradition. Town of Greece, 572 U.S. at 577, 587. The test is difficult to satisfy because “[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees.” Marsh, 463 U.S. at 790. In Marsh, the Court held that legislative prayer had an “unambiguous and unbroken history” of “two centuries of national practice” and, because of that “unique history,” the Nebraska legislature’s prayer practice did not violate the Establishment Clause. Id. at 791, 792, 795. The Court clarified that legislative prayers could violate the Establishment Clause despite their history if the content of the religious prayers was “exploited” to “advance any one . . . faith or belief.” Id. at 794-95.

In order to survive the historical significance test, the contested religious practice must be similar to a specific practice deeply rooted in history and have only an incidental impact on the

public. Town of Greece, 572 U.S. at 577, 588. In Town of Greece, this Court held that beginning town hall meetings with prayer was constitutional, even though the prayers were primarily Christian. Id. at 585. The Court reasoned that the legislative prayers found constitutional in Marsh extended to the town hall meeting prayers because the "specific practice" of prayer aimed at "lawmakers" was permitted "by Congress" in a "tradition dating to the time of the Framers" that was part of the Nation's "heritage." Id. at 577, 587-88. The court readily acknowledged the analysis would be different if the prayers were aimed at the public. Id. at 588.

In this case, the recent vintage of § 107(2)'s 1954 cash housing allowance *income* tax exemption bars it from meeting the historical significance test. Section 107(2) cannot "ride on the constitutional coattails" of centuries old *property* tax exemptions, a categorically different tax exemption. Town of Greece, 572 U.S. at 629 (Kagan, J., dissenting).[19] While Congress could not tax income until the Sixteenth Amendment was passed in 1913, the first parsonage housing exemption was not passed until 1921—an eight-year delay does not connote unbroken congressional support for such an exemption.[20] Section 107(2) does not fall among the heritage hallmark elite like the two centuries of unbroken legislative prayer aimed at lawmakers in Town of Greece and Marsh because § 107(2) was passed in 1954, lacks the breadth of history, and was not a practice contemplated by the framers. Additionally, the public is not incidentally impacted like those present at the town hall meetings in Town of Greece because non-ministerial taxpayers essentially subsidize the $900 million a year that ministers do not pay as a result of qualifying for § 107. Tax Expenditures. Because income taxing power did not even exist until 1913, § 107(2)'s income tax exemption fails the historical significance test and violates the Establishment Clause.

[19] While religious organizations have benefitted from property tax exemptions dating back to 1802, those property tax exemptions applied equally to "public charit[ies] [and] libraries" and not exclusively to religions. Walz, 397 U.S. at 677-79.

[20] U.S. Const. amend. XVI; Revenue Act.

CONCLUSION

For the foregoing reasons, Petitioner requests this Court reverse and remand the decision of the United States Court of Appeals for the Eighteenth Circuit only as it pertains to Issue I. Petitioner-Intervenor requests this Court reverse and remand the decision of the United States Court of Appeals for the Eighteenth Circuit only as it pertains to Issue II.

Respectfully Submitted,

Team Number 3

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