No. 20-199

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN BURNS,
Petitioner,

and

CITIZENS AGAINST RELIGIOUS CONVICTIONS, INC.,
Petitioner-Intervenor,

v.

INTERNAL REVENUE SERVICE AND COMMISSIONER OF TAXATION,
Respondents.

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

BRIEF FOR THE RESPONDENTS

Team #6 – Respondents
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QUESTIONS PRESENTED

I. Whether Burns qualifies for the parsonage exemption when he is not ordained, commissioned, or licensed and teaches secular courses as his primary duty at the School?

II. Whether the parsonage exemption, which minimizes government entanglement with a religious institution, is constitutional under the Establishment Clause?

STATEMENT OF THE CASE

I. Statement of Facts

Petitioner John Burns ("Burns") is a non-ordained schoolteacher who was hired to teach English, Renaissance Literature, and foreign languages at Whispering Hills Academy ("the School"). R.3; R.5. After accepting his position in 2016, Burns moved to a house five minutes from the School because his previous home was over an hour away. R.3. Associated with the Whispering Hills Unitarian Church ("the Church"), the School sits in upstate Touroville on property near the Church. R.3. The School provided Burns $2,500 to cover his move and has paid him a housing allowance each month. R.4.

Burns hosts weekend social gatherings at the Church for students who cannot go home on weekends. R.3. There, Burns provides social interaction, lunch, and snacks. R.3. While students have suggested that these gatherings somewhat resemble a "youth ministry" where they discuss the church service, the students talk about anything on their minds at these gatherings. R.3.

Burns also decided to create an after-school club called "Prayer After Hours." R.3. While this club has received awards from the School, as its name suggests, the club occurs after school hours. R.3. Additionally, Burns is one of the School's many guidance counselors and advises students on educational and personal matters. R.3. While Burns integrates religious teachings into his counseling, his counseling consists of mental and behavioral health techniques. R.3.

In 2017, Burns wanted to pay lower taxes and started researching tax exemptions. R.4. When talking with a co-worker, Burns learned about a tax exemption under 26 U.S.C. § 107(2) ("the parsonage exemption"). The parsonage exemption allows particular taxpayers to exempt the housing allowance their employers pay them, but they must be "ministers of the gospel." 26 U.S.C. § 107(2). While his co-worker mentioned that he claimed the exemption each year, he is a pastor. R.4.

Wanting to pay lower taxes too, Burns attempted to claim his housing allowance on his 2017 tax return. But Burns could not prove that he was a "minister of the gospel" and received a denial letter from the Internal Revenue Service ("IRS") in the summer of 2018. R.4. Accordingly, Burns was requested to pay the money that he withheld on his 2017 tax return. R.4. Not wanting to pay, Burns sued the IRS and Commissioner, claiming that he was a "minister of the gospel." R.4. At that time, Petitioner-Intervenor Citizens Against Religious Convictions ("CARC") heard about the lawsuit. It asserted that it had a right to intervene, claiming that the parsonage exemption violated the First Amendment's Establishment Clause. R.4.

II. Procedural History

In 2018, the IRS denied Burns for the parsonage exemption reserved for "ministers of the gospel" under 26 U.S.C. § 107(2). R.4. In response, Burns filed a claim in the U.S. District Court for the Southern District of Touroville seeking relief that the exemption should be applied to his circumstances. R.4. CARC was granted entry into the suit as a plaintiff-intervenor with an alternative claim that § 107(2) is unconstitutional. R.2.

The IRS filed a motion for summary judgment against both parties' claims. R.2. On December 18, 2019, the district court denied the motion for summary judgment and ruled in favor of both Burns and CARC. R.2–3.

The IRS appealed the district court's final judgment to the U.S. Court of Appeals for the Eighteenth Circuit. R.15. The circuit court reversed the district court on both claims and granted the IRS's motion for summary judgment. R.16. The circuit court held that Burns was not eligible for the parsonage exemption because he could not prove he was hired or considered to be a "minister" by his employer. R.18. The Court held this exemption passed the *Lemon* test because it limits government's interference with religious institutions. R.22. Burns and CARC have submitted a timely petition for writ of certiorari. The Supreme Court granted certiorari and invited briefs from the petitioners and the IRS on February 12, 2021.

SUMMARY OF THE ARGUMENT

The Establishment Clause does not prohibit Congress from passing broad tax policy—even statutes that pertain to religious institutions—in order to more evenly distribute the country's tax burden. The parsonage exemption was Congress's way to include religious institutions in the federal tax code without endorsing or disfavoring any organization because of its ecclesiastical tenets. Determining whether an applicant qualifies for the parsonage exemption does not cross over line into excessive government entanglement.

Burns does not qualify for the parsonage exemption because he is not a minister of the gospel and did not receive his housing allowance in return for services that are ordinarily a minister's duties. While the parsonage exemption permits a taxpayer to exclude one's housing allowance from his gross income, he must be a "minister of the gospel." A "minister of the gospel" must be ordained, commissioned, or licensed. But that alone is not enough. If this threshold requirement is met, the applicant must show he received his housing allowance for services that are ordinarily a minister's duties. To make this determination, courts use a balancing test and consider whether, as part of his employment, the applicant (1) administers sacraments, (2) conducts religious worship, (3) controls a religious organization, and (4) is considered a religious leader.

Burns is not ordained, commissioned, or licensed because the Unitarian Church has not authorized him to perform any ecclesiastical duties. On these grounds alone, he is not a minister of the gospel. Even assuming Burns was ordained, commissioned, or licensed, he does not satisfy any of the balancing test's four factors. Burns cannot show he performed sacerdotal functions or conducted religious worship within the tenets and practices of the Unitarian Church as part of his employment at the School. None of Burns's school duties constitute the control, conduct, or

maintenance of a church's integral agency. There is no evidence that the School considered Burns to be a "religious leader." Therefore, Burns does not qualify for the parsonage exemption.

The parsonage exemption is constitutional under the Establishment Clause regardless of which test this Court applies to it. Under both the three-prong *Lemon* test and the historical significance test, the parsonage exemption will withstand the Court's scrutiny. The three-part test established in *Lemon v. Kurtzman* has traditionally been used by this Court to evaluate Establishment Clause inquiries. A government statute will satisfy the *Lemon* test whenever it does not have any of the following: (1) a wholly religious purpose, (2) the effect of endorsing religion, and (3) excessive entanglement with religious institutions. The parsonage exemption avoids all three of these issues.

The "purpose prong" of *Lemon* is satisfied whenever a secular purpose for the legislation can be established. The parsonage exemption was established with three secular purposes in mind. First, to eliminate discrimination by the tax code against religious institutions. Second, to prevent discrimination between different religious institutions. And most importantly, to limit the government's own interactions with religious institutions. The exemption also satisfies *Lemon*'s "effect prong." This prong is satisfied when an objective observer looking at the statute's history, and circumstances would not find a government endorsement of religion. The government abstaining from taxing religious institutions via the parsonage exemption is an indirect benefit. Neither this Court in the past nor an objective observer would recognize this tax exemption as an endorsement. Lastly, the parsonage exemption satisfies the excessive entanglement prong. This prong does not require a walled, absolute separation between church and state, but instead draws the line when the government interferes with the internal affairs of the church. The parsonage

exemption was written broadly to avoid such government inquiry in approving an application. Instead, this exemption only needs a simple checklist to determine its applicability.

The parsonage exemption also satisfies the historical significance test, which focuses on the historical context of the statute and whether it has withstood the test of time. Religious tax exemptions have existed for over two hundred years and have always been considered to be within a legislative branch's power to set tax policy. Given the secular roles religious institutions have and continue to hold in our society, the government's decision to abstain from taxing them through religious exemptions has withstood the test of time.

Eliminating this exemption would force ministers to apply for tax relief under one of the other employee housing sections. It would trigger excessive government involvement in the exact way this statute aims to avoid and further, call into question more than 2,600 other state and federal tax provisions involving religious institutions.

This Court should affirm the court of appeals.

ARGUMENT

I. Burns does not qualify for the parsonage exemption because he is not a minister of the gospel and did not receive his housing allowance for services that are ordinarily a minister's duties.

When reviewing a court's grant of summary judgment, this Court applies de novo review. *Gaylor v. Mnuchin*, 919 F.3d 420, 426 (7th Cir. 2019).

Tax exemptions are matters of legislative grace and taxpayers bear the burden of proving they qualify for an exemption. *INDOPCO, Inc. v. Comm'r of Internal Revenue*, 503 U.S. 79, 84 (1992). While the parsonage exemption permits an applicant to exclude one's housing allowance from his gross income, he must be a minister of the gospel. 26 U.S.C. § 107(2). To make this

determination, the rules in section 1.1402(c)–5 of the treasury regulations apply. Treas. Reg. § 1.107-1(a).

Under those rules and existing case law, a minister of the gospel must be ordained, commissioned, or licensed. Treas. Reg. § 1.1402(c)-5(a)(2); *Kirk v. Comm'r of Internal Revenue*, 425 F.2d 492, 495 (D.C. Cir. 1970); *Knight v. Comm'r of Internal Revenue*, 92 T.C. 199, 205 (1989). But that alone is not enough. If this threshold requirement is met, the applicant must show he received his housing allowance for services that are ordinarily a minister's duties. Treas. Reg. § 1.107-1(a). To make this determination, courts use a balancing test and consider whether, as part of his employment, the applicant (1) administers sacraments, (2) conducts religious worship, (3) controls a religious organization, and (4) is considered a religious leader. *Knight*, 92 T.C. at 205; *cf.* Treas. Reg. § 1402(c)-5(b)(2).

Burns is not ordained, commissioned, or licensed because the Unitarian Church has not authorized him to perform ecclesiastical duties. On these grounds alone, he is not a minister of the gospel. Even assuming Burns was ordained, commissioned, or licensed, he does not satisfy any of the balancing test's four factors. Thus, he has failed to show he received his housing allowance for services that are ordinarily a minister's duties.

A. Burns is not ordained, commissioned, or licensed because the Church has not invested him with authority to perform ecclesiastical duties. On these grounds alone, he is not a minister of the gospel.

One is ordained, commissioned, or licensed when one's church invests that person with authority to perform ecclesiastical duties such as administering sacraments, conducting religious worship, or controlling a religious organization. *See Knight*, 92 T.C. at 202; *see also* Treas. Reg. § 1402(c)-5(b)(2). Some religions call this investiture "ordination," some "commissioning," and others "licensing." *Knight*, 92 T.C. at 202. Here, Burns cannot show he is ordained,

commissioned, or licensed generally, or more importantly, within the Church's tenets and practices. On these grounds alone, Burns is not a minister of the gospel.

1. *Burns is not ordained, commissioned or licensed within the general meaning of the terms.*

Ordination can mean being authorized to perform all ecclesiastical duties, while commissioning or licensing may refer to being authorized to perform only some of them. *See Knight*, 92 T.C. at 203; *see also Salkov v. Comm'r of Internal Revenue*, 46 T.C. 190, 197 (1966). Thus, the phrase "ordained, commissioned, or licensed" applies to various classes of authority within a particular religion. *Knight*, 92 T.C. at 203.

In *Salkov*, the court held that a Jewish cantor was commissioned. 46 T.C. at 197. There, the cantor was spiritually trained and received a certificate of commission by the official cantorial body of the Jewish religion's conservative branch. *Id*. A Jewish temple then chose and installed him as their cantor in a public and formal ceremony. *Id.* While not authorized to perform one of the duties reserved for ordained rabbis, he could perform every other religious duty. *Id.* Similarly, in *Knight*, the court held that a pastor at the Cumberland Presbyterian Church was licensed. 92 T.C. at 203–05. Because he was not ordained, he was not authorized to administer sacraments or solemnize marriages. *Id.* at 204. The court, however, noted that the Cumberland Presbyterian Church had, in writing, officially licensed him to preach the gospel and perform worship services, visit the sick, and perform funerals. *Id.* at 201, 203.

Contrarily, In *Kirk*, the D.C. Circuit held that a church employee was not ordained, commissioned, or licensed. 425 F.2d at 495. There, the church employee served as director on the General Board of Christian Social Concerns of the Methodist Church. *Id.* at 493. But he was not ordained by the Methodist Church. *Id.* at 495. He was not licensed because he had not received any official document formally authorizing him to perform religious functions. *Id.* And

he was not commissioned because he was not conferred with formal ecclesiastical duties over any church committed to his care. *Id.*

Here, like *Kirk*, Burns is not ordained, commissioned or licensed. Burns has presented no evidence that he is ordained. R.16; R.5; R.8. Unlike *Salkov,* he was not given a certificate of commission by any official body as a trained and qualified leader in his religion. Unlike *Knight*, Burns has presented no evidence that he was formally licensed by the Unitarian Church to preach the tenets of his religion. Thus, Burns is not ordained, commissioned, or licensed within the general meaning of the terms.

2. *Even if Burns was ordained, commissioned, or licensed within the general meaning of the terms, Burns cannot show he was ordained, commissioned, or licensed within the tenets and practices of the Unitarian Church.*

Whether an individual is ordained, commissioned, or licensed depends on how a particular religion structures its hierarchy of authority. *See Salkov*, 46 T.C. at 197. Courts look to the principles and tenets of the taxpayer's religion to determine if he has been invested with authority in accordance with those principles and tenets. *See id.* The purpose behind this requirement is to exclude self-appointed ministers and prevent churches from taking advantage of tax laws by giving its members artificial titles. *Lawrence v. Comm'r of Internal Revenue*, 50 T.C. 494, 498 (1968); *Salkov* 46 T.C. at 196.

Here, the record is silent regarding the Unitarian Church's principles and tenets. Thus, Burns cannot show he was ordained, commissioned, or licensed within the practices of his religion. While in some cases individuals may not have to be formally ordained, commissioned, or licensed to satisfy the investiture requirement, this is only the case when that person's religion does not formally ordain, commission, or license its ministers. *Ballinger v. Comm'r of Internal Revenue*, 728 F.2d 1287, 1290 (10th Cir. 1984). Here, the record suggests that the Unitarian

Church does formally ordain, commission, or license its ministers. R.5. Without evidence to the contrary, Burns cannot show he was ordained, commissioned or licensed within the practices of the Unitarian Church.

B. Even assuming Burns was ordained, commissioned, or licensed, he does not satisfy any of the balancing test's four factors.

Even if Burns were ordained, commissioned, or licensed, he would only qualify for the parsonage exemption if he received his housing allowance for services that are ordinarily a minister's duties. Treas. Reg. § 1.107-1(a). To make that determination, courts consider whether, as party of his employment, the applicant (1) administers sacraments, (2) conducts religious worship, (3) controls a religious organization or its integral agency, and (4) is considered a "religious leader." *Knight*, 92 T.C. at 205; *cf.* Treas. Reg. § 1402(c)-5(b)(2).

Regarding the first two factors, Burns cannot show the duties he performed constitute sacerdotal functions or religious worship generally, or more importantly, within the tenets and practices of the Unitarian Church. Regarding the third factor, Burns's services do not constitute the control, conduct, and maintenance of a church's integral agency because the school is not an integral agency of the Unitarian Church. Regarding the fourth factor, there is no evidence that the school considered Burns to be its religious leader.

1. *Burns cannot show he performed sacerdotal functions or conducted religious worship within the tenets and practices of the Unitarian Church as part of his employment at the School.*

What constitutes sacerdotal functions and religious worship depends on the tenets and practices of the taxpayer's religion. Treas. Reg. § 1.1402(c)-5(b)(2)(i). Examples of sacerdotal functions include administering sacraments such as baptisms and communions and officiating weddings and funerals. *Knight*, 92 T.C. at 201–04; *Wingo v. Comm'r of Internal Revenue*, 89 T.C. 922, 934 (1987); *Salkov*, 46 T.C. at 196. Examples of conducting religious worship include

conducing worship services, preaching, and visiting the sick. *Knight*, 92 T.C. at 201–04; *Wingo*, 89 T.C. at 934; *Salkov*, 46 T.C. at 196.

Burns does not contend that he administered sacraments or officiated weddings or funerals. He does not contend that he performed worship services, preached, or visited the sick. As part of his employment, he taught secular courses and counseled students. R.3. By his own personal desire, he held an after-school group and hosted social gatherings on weekends. R.3. Burns cannot show that these activities constitute sacerdotal functions or religious worship generally, or more importantly, within the tenets and practices of the Unitarian Church

a. Teaching secular courses and counseling students—the two duties within the scope of Burns's employment—do not constitute performing sacerdotal functions or conducting religious worship.

This Court "has long recognized that religious schools pursue two goals, religious instruction and secular education." *Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 245 (1968). In *Flowers v. United States*, the court held that a taxpayer who was both a religion professor and guidance counselor at Texas Christian University did not perform sacerdotal functions or conduct religious worship. No. CA 4-79-376-E, 1981 WL 1928, *1, *6 (N.D. Tex. Nov. 25, 1981). There, the court noted that the professor, who was ordained, did not teach his courses substantially differently than the non-religion professors. *Id.* at *1, *6. Thus, it concluded that teaching a secular course at the Christian University was not a sacerdotal function. *Id.* at *6. Additionally, because the professor also counselled students as a non-minister would, the court concluded that service was not a sacerdotal function either. *Id.* at *3, *6.

Here, like *Flowers*, teaching secular courses such as English, Renaissance Literature, and foreign languages does not constitute performing sacerdotal functions or conducting religious worship. R.3. While the district court in this case assumed Burns integrated religious principles

in his teaching, the facts in the record do not state that. R.8; R.3. And even if Burns integrated some religious principles, that does not indicate Burns taught his secular courses *substantially* differently than non-religion professors. *Flowers*, 1981 WL 1928, at *1, *6; R.18. Further, like *Flowers*, while Burns integrated some religious principles into his counseling, that does not mean he counseled the way an ordained minister would. *Flowers*, 1981 WL 1928, at *1, *6; R.18. Laymen in the Unitarian faith can easily add in some religious concepts to their counseling. Thus, this service does not constitute sacerdotal functions or religious worship.

b. Even assuming Burns counseled the way an ordained minister would, that action by itself would not constitute sacerdotal functions or religious worship.

The parsonage exemption requires that the applicant receive his housing allowance for services that are *ordinarily* a minister's duties. Treas. Reg. § 1.107-1(a). In a private letter ruling in 1991, the IRS found that an ordained minister who provided spiritual counseling as part of his employment did not qualify for the parsonage exemption. I.R.S. Priv. Ltr. Rul. 9124059 (June 14, 1991). While the minister spent 50 percent of his time providing spiritual counseling based on Biblical principles, he only spent 5 percent preaching, conducting worship services, officiating marriages, and administering sacraments. *Id.* Thus, the IRS reasoned that he did not spend enough time performing sacerdotal functions or conducting religious worship. *Id.*

Here, Burns likely does not spend 50 percent of his working hours as a guidance counselor because he was hired primarily to teach. R.3. Even assuming he did spend 50 percent of his time counseling, he does not spend any working hours preaching, conducting worship services, officiating marriages, or administering sacraments. Thus, even if Burns counseled the way an ordained minister would, that action would not constitute performing sacerdotal functions or conducting religious worship to the degree required under the parsonage exemption.

c. Holding after-school groups and hosting social gatherings do not qualify as sacerdotal functions or religious worship.

In *Haimowitz v. Comm'r of Internal Revenue*, 73 T.C.M. (CCH) 1812, *1, *3 (T.C. 1997), the court held that a Jewish director's responsibilities at a temple did not constitute performing sacerdotal functions or conducting religious worship. His responsibilities included helping prepare students for their Bar and Bat Mitzvah by assisting them memorize blessings and read the Torah. *Id. at *3.* But the rabbi and cantor had the main responsibilities for the students' spiritual training. *Id.* Thus, the court reasoned that while most of the director's responsibilities related to the Jewish religion, his duties were more organizational than religious and did not require ministerial authority. *Id.*

Here, like *Haimowitz*, hosting an after-school club or youth gatherings on weekends outside of school hours does not constitute sacerdotal functions or religious worship. R.3. Burns does not have the main responsibilities for the students' spiritual training. This is left up to the ministers of the Unitarian Church who preach on Sunday. R.3. And while his program and youth gathering may be somewhat religious, they do not require him to have ministerial authority. R.3. Thus, these actions do not qualify as sacerdotal functions or religious worship.

d. Even if Burns's after school-club or youth gatherings qualified as administering sacraments or conducting religious worship, Burns was not required to perform them as part of his employment.

In *Tanenbaum v. Comm'r of Internal Revenue*, 58 T.C. 1, 8 (1972), the court held that an ordained Jewish rabbi was not a minister of the gospel, partly because he was not hired or required to perform sacerdotal functions as part of his employment. There, the rabbi's primary duties were to explain the basic trends of Judaism and discuss how Christianity relates to Judaism. *Id.* at 4. He also performed sacerdotal functions—such as officiating weddings, funerals, and ceremonies—for members of the American Jewish Committee. *Id.* But the court

noted that his employer did not require him to perform those services as part of his employment, and therefore, he was not hired to perform sacerdotal functions. *Id.* at 8. Rather, he performed those services because of his own personal desires. *Id.*

Here, like *Tanenbaum*, Burns may have been recognized for his after-school program. R.3. He may have hosted youth gatherings on Sundays outside of school hours. R.3. But there is no evidence that he was required to perform those services as part of his employment or that he would be paid any differently if he did not perform them. R.19. Rather, he performed those services because of his own personal desires. R.19.

e. Even if any of Burns's duties constituted sacerdotal functions or the conduct of religious worship generally, there is no evidence they do so within the tenets and practices of the Unitarian Church.

What constitutes sacerdotal functions and religious worship depends on the tenets and practices of one's particular religion. Treas. Reg. § 1.1402(c)-5(b)(2)(i). Here, Burns has not presented evidence that any of the duties he performed constitute sacerdotal functions or religious worship within the particular tenets and practices of the Unitarian Church. Thus, none of Burns's duties satisfy the balancing test's first two factors.

2. None of Burns's school duties constitute the control, conduct, or maintenance of a church's integral agency.

Controlling, conducting, or maintaining a religious organization or its integral agency means directing, managing, or promoting its activities. Treas. Reg. § 1.1402(c)-5(b)(2)(ii). A religious organization or its integral agency is one that operates under the authority of a church. *Toavs v. Comm'r of Internal Revenue*, 67 T.C. 897, 904 (1977). The IRS had provided eight criteria to make this determination. Rev. Rul. 72-606, 1972-2 C.B. 78 (1972).

In *Flowers*, the court held that Texas Christian University was not an integral agency of the Christian Church. 1981 WL 1928, at *4. In its determination, the court adopted the criteria

presented in Rev. Rul. 72-606: (1) whether the church incorporated the school; (2) whether the school's name indicated a church relationship; (3) whether the church continuously controlled, managed, and maintained the school; (4) whether the trustees or directors of the school were or must be approved by the church; (5) whether the trustees or directors may be removed by the church; (6) whether annual finances and general operations reports were required to be made to the church; (7) whether the church supports the institution; and (8) whether the school's assets would be turned over to the church if the school dissolved. *Id.* The university only met the second and seventh criteria and therefore, was not an integral agency of the Christian Church. *Id.*

Here, there is no direct evidence that the Church incorporated the School. There is no evidence that the trustees or directors of the School must be approved by the Church. There is no evidence that they may be removed by the Church. There is no evidence that annual finance reports must be made to the Church. And there is no evidence that the School's assets would be turned over to the Church if the School dissolved. While the School requires its students to attend religious services and learn the basic tenets of the faith as part of the school curriculum, that does not mean that it *continuously* controls the school. Rev. Rul. 72-606, 1972-2 C.B. 78; R.8. The School's name may indicate it is related to the Church, and the Church may support the school because the School is located on Church property. R.8. However, the School still fails five of the eight criteria.

Further, when applying the facts to the criteria does not clearly support an answer, the appropriate authorities should give a statement regarding whether the institution is an integral agency based on the eight criteria. Rev. Rul. 72-606, 1972-2 C.B. 78. Here, at the very least, the facts do not clearly support an answer. And the record does not indicate that any authority at the Church gave a statement regarding its relationship the School. Thus, it is not an integral agency.

Even assuming the School was the Church's integral agency, none of the functions Burns performed there would qualify as controlling, conducting, or maintaining the School. While ordained ministers who have teaching, administrative, or managerial positions in integral agencies satisfy this third factor of the balancing test, that does not imply that *non-ordained* laypersons do. Rev. Rul. 70-549, 1970-2 C.B. 16 (1970). Thus, even if the School was the Church's integral agency, Burns would not qualify under this factor because he is not ordained.

3. There is no evidence that the School considered Burns to be its religious leader.

In *Salkov*, *Wingo*, and *Knight*, the courts found that the ministers' congregations considered them to be spiritual leaders. *Knight*, 92 T.C. at 205; *Wingo*, 89 at 936; *Salkov*, 46 T.C. at 197. In *Salkov*, the congregation chose the cantor to be its spiritual leader at a public ceremony, and the court noted that the congregation employed every possible procedure consistent with the Jewish religion to formally express that he was their spiritual leader. 46 T.C. at 197. In *Wingo*, the ordained deacon's church officially designated him, in writing, as a minister. 89 T.C. at 936. And in *Knight*, the pastor was licensed in writing by his church to preach the gospel to them. 92 T.C. at 205.

Here, while the School awarded Burns for his after-school club, that does not rise to the level of him being the School's spiritual leader. R.3. Unlike *Salkov*, the School did not publicly and formally choose him to be the School's spiritual leader by employing every possible procedure consistent with the Unitarian Church's faith. Unlike *Wingo* and *Knight*, Burns is not an ordained minister or licensed pastor who has been recognized in writing as one of the School's religious leaders. Further, even if Burns was considered a spiritual leader, that fact would not be enough for him to qualify for the parsonage exemption. *Wingo*, 89 T.C. at 937.

In sum, Burns is not ordained, commissioned, or licensed because the Unitarian Church has not authorized him to perform ecclesiastical duties. Even assuming Burns was ordained, commissioned, or licensed, he does not satisfy any of the balancing test's four factors. If this Court were to grant Burns the parsonage exemption, nothing would stop self-appointed ministers and parochial schools from taking advantage of the tax code in the future.

II. The parsonage exemption is constitutional because it satisfies both the three-prong *Lemon* test and the historical significance test.

This Court has long recognized that the federal government can accommodate religious institutions without violating the Establishment Clause. *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144–45 (1987). Because of the unique role churches and religious organizations play in American society, Congress and the IRS have granted tax exemptions and special tax statuses specifically for religious institutions. *See Walz v. Tax Commission*, 397 U.S. 664, 673, 677 (1970); *see also Tax Information for Churches and Religious Organizations*, IRS, https://www.irs.gov/charities-non-profits/churches-religious-organizations (last accessed Mar. 5, 2021). This has been done as a way to balance the constitutional requirements of the Religious Clauses with the societal role churches already play. *Bowen v. Kendrick*, 487 U.S. 589, 607 (1988). As a result, tax exemptions for religious organizations have generally been upheld under the Establishment Clause. *Gaylor*, 919 F.3d at 436.

The Establishment Clause was meant to protect the state from religious influences as much as it was intended to protect our churches, mosques, and synagogues from state overreach and sponsorship. *See Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 15–16 (1947). This Court no longer understands the Establishment Clause to have created an impenetrable wall between church and state, but rather a "line of separation." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971); *Walz*, 397 U.S. at 669. Constitutionality is measured as a matter of degree. *Id.* at 674.

To determine whether a tax exemption toes the line of constitutionality, traditionally, this Court has applied the *Lemon* test. A statute satisfies the three-pronged *Lemon* test when: (1) the statute's purpose does not endorse religion, (2) the statute's effect does not convey a message of endorsement, and (3) the statute does not excessive entangle with religion. *Lemon*, 403 U.S. at 612–13; *Lynch v. Donnelly*, 465 U.S. 668, 690–92 (1984) (O'Connor, J., concurring). No fixed, per se line can be drawn for an Establishment Clause claim. *Lynch*, 465 U.S. at 678. Instead, a fact-specific inquiry is required. *Id.* In the alternative, the "historical significance" test, which grants a presumption of constitutionality, has also been applied. *See Am. Legion v. Am. Humanist Ass'n*, 139 S.Ct. 2067 (2019); *Town of Greece v. Galloway*, 572 U.S. 565, 575 (2014). The historical significance test will find that religious tax exemptions, including the parsonage exemption, have been historically viewed favorably and have stood the test of time. *See Gaylor*, 919 F.3d at 436 (quoting *Town of Greece*, 572 U.S. at 577).

A. The parsonage exemption is constitutional because it satisfies each of the *Lemon* test's three prongs.

1. With several secular purposes, including to limit government interference, this exemption satisfies Lemon's purpose prong.

A religious tax exemption passes the *Lemon* test's purpose prong whenever it is passed with a purpose other than to endorse religious activities. *See Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). This prong does not mean the statute's purpose must be totally unrelated to religion. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987). In fact, this Court has held it is constitutionally permissible for a statute to be motivated partially by a religious reason. *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). Legislation has only rarely been invalidated for failing this prong—when there was no question that the statute was wholly motivated by religious considerations. *Lynch,* 465 U.S. at 680;

McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 859 (1987). This Court has held that the court should defer to a government's stated secular purpose without questioning its sincerity. *Edwards v. Aguillard*, 482 U.S. 578, 586–87 (1987).

The parsonage exemption has three secular purposes: eliminating discrimination against ministers, eliminating discrimination between denominations, as well as limiting government interference with the internal affairs of the church. *Gaylor*, 919 F.3d at 427, 432.

The parsonage exemption works in tandem with the rest of the tax code's housing benefits sections. *Id.* at 428. The first secular purpose is that Congress created the parsonage exemption to level the playing field between clergy and secular employees—who already receive housing benefits—by simply integrating the clergy into the existing tax code. *Id.* The parsonage exemption is an administrative application of the convenience-of-the-employer doctrine to the church. *Id.* at 429. Prior to the adoption of the parsonage exemption only secular companies were able to keep their employees. *See generally id.* Because of this exemption, churches have the ability to offer their ministers housing allowances as a convenience to the church to keep their spiritual leaders nearby so they can better tend to their flocks. *See Williamson v. Comm'r of Internal Revenue*, 224 F.2d 377, 380 (8th Cir. 1955); *Hynes v. Comm'r of Internal Revenue*, 74 T.C. 1266, 1294 (1980).

The parsonage exemption also was aimed at stopping discrimination between denominations. *Gaylor*, 919 F.3d at 427. The goal was to give smaller and upstart churches a way to attract new ministers to their newly planted parishes with otherwise, little available compensation. *See Hearings Before the Committee on Ways and Means: Statement of Hon. Peter F. Mack, Jr.,* on H.R. 4275, Concerning the Taxability of a Cash Allowance Paid to Clergymen in Lieu of Furnishing Them a Dwelling, 83d. Cong. 1, at 1576 (June 9, 1953). Congress created

this exemption to prevent the stratification of the church. *See id.* at 1574. Congress did not want to deprive underserved communities of their freedom of religion right simply because they literally could not afford to pay the pastor. *See id.* Eliminating this exemption would only exacerbate the decline of small-town churches that are already struggling to keep their flocks amidst the pandemic and shrinking town populations. *See* Michelle Boorstein, *Church donations have plunged because of the coronavirus. Some churches won't survive,* WASHINGTON POST (Apr. 24, 2020, 5:00 AM), https://www.washingtonpost.com/religion/2020/04/24/church-budgets-coronavirus-debt/. If this Court outlaws this housing benefit, it will, in effect, greenlight the government to selectively discriminate between denominations and choose which churches shutter their doors when their current pastors move away, unable to afford to keep their homes.

Finally, the parsonage exemption is an intentionally broad, bright-line rule in order to limit government interference with churches' internal affairs. *Gaylor*, 919 F.3d, at 429, 431–32. Because it does not possess the same restrictions as other sections of the tax code, this categorical exemption is able to let the church best decide who they want to offer housing benefits to without strict government oversight or an invasive approval process that might impact a church's ministerial hierarchy. *Id.* at 431–32; *see Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 189 (2012). Applying more restrictions to religious institutions in the manner required of § 119 would be akin to the government delving into a church's affairs and endorsing by edict which religious leaders receive benefits and which do not. *See Walz*, 397 U.S. at 669. It would abandon the government's constitutional neutrality mandate. *See id.*

2. Because the parsonage exemption does not have the effect of endorsing religion over non-religion, it passes the second prong of the Lemon test.

A religious institution's receipt of an indirect tax benefit does not violate the Establishment Clause. *See Walz*, 397 U.S. at 674–75; *Mueller v. Allen*, 463 U.S. 388, 396 n.5 (1983). The second prong of the *Lemon* test requires that a statute does not convey a message of endorsement of religious practice. *Lemon*, 403 U.S. at 612; *Lynch*, 465 U.S. at 691–92 (O'Connor, J., concurring). If this endorsing effect is indirect, incidental, or remote, it is constitutionally valid. *See Comm. For Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973). This prong focuses on whether an objective observer looking at the law, its history, and "social facts," would see the religious group as having the government's seal of approval. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (quoting *Wallace*, 472 U.S. at 73, 76 (O'Connor, J., concurring)); *Lynch*, 465 U.S. at 693–94 (O'Connor, J., concurring).

Simply put, the parsonage exemption does not convey such an endorsing effect. This Court has not considered religious tax exemptions to be the type of "benefit" that counts as religious preferential treatment. *See Walz*, 397 U.S. at 674–75. In *Walz*, this Court determined that tax exemptions were not subsidies because no money was given to the religious institution. *Id.* At best, tax exemptions were "indirect economic benefit[s]." *Id.* at 674. There is no "genuine nexus" between religious tax exemptions and the establishment of religion. *Id.* at 675.

This Court has consistently rejected the notion that any program that "aids" a religious institution must be rejected under the First Amendment. *Hunt v. McNair*, 413 U.S. 734, 742 (1973). In fact, *Walz* stated that this type of "aid" to religious organizations restricts and reinforces the separation between church and state. *Walz*, 397 U.S. at 676. The *Walz* Court held that religious exemptions were neither subsidies nor sponsorships because the government had simply abstained from demanding the church support the state. *Id.* Most of our founding Thirteen

States used to establish official state religions and would tax their residents to fund the ministers' salaries. *See Everson*, 330 U.S. at 11. The Founders adopted the Establishment Clause as a direct result, wanting to prevent the nation from going down the same path. *See id.* at 11–12.

The effect of this statute is that more ministers are able to afford to live in the same community as their ministry. *See Hynes*, 74 T.C. at 1293. Before this religious exemption, state governments would overreach and tax the public to raise ministers' salaries. *Everson*, 330 U.S. at 11. An objective observer understanding this history, would see the parsonage exemption as the government doing the opposite of history: in simply getting out of the way. *See Walz*, 397 U.S. at 676. This exemption allows religious institutions to address their own needs in a comparable way to how secular entities already receive housing benefits from elsewhere in the tax code. *See id.*

The federal government and the general public have long recognized the important part religious institutions play in resolving secular problems, from education to various charitable causes. *See Bowen*, 487 U.S. at 607. The parsonage exemption as an incidental and remote benefit does not implicitly endorse or promote religious institutions. *See id.* It merely enables the church to advance their own religion beliefs themselves. *See Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1260–61 (10th Cir. 2005).

3. Removing the parsonage exemption would only increase the government's level of entanglement in the ecclesiastical affairs of religious institutions.

The government has not excessively entangled itself with a religious institution if the institution has only received an indirect benefit, the nature of the aid is indirect, and there is a minimal relationship between the two. *See Lemon*, 403 U.S. at 615; *Walz*, 397 U.S. 674. Here, religious institutions have received a tax exemption—a remote, economic benefit—which, as previously noted in prong two, has been considered constitutionally permissible. *Id.* at 674–75. The nature of the aid is not an issue here. Without any direct aid or funding to a religious

institution, the parsonage exemption will not qualify as a subsidy. *Id.* Tax exemptions are passive and indirect and therefore, inherently different from subsidies. *Id.* at 690–91 (Brennan, J., concurring); *Steele v. Indus. Dev. Bd. Of Metro. Gov't Nashville*, 301 F.3d 401, 410 (6th Cir. 2002). Tax exemptions represent a much lower level of entanglement because they do not have the same expectations as subsidies. *See Walz*, 397 U.S. 690–91 (Brennan, J., concurring).

Additionally, the resulting relationship between the government and any applicant seeking this exemption is not excessive because of the limited government involvement built into this tax exemption. The parsonage exemption does not commit "religious gerrymandering" by selecting which "ministers of the gospel" count or qualify based on ideology. *See* 26 U.S.C. § 107(2); *Gillette v. United States*, 401 U.S. 437, 452 (1971). It does not require certain income level or congregation size. *See* 26 U.S.C. § 107(2); *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 681 (1989). The absence of these facts reduces the likelihood of excessive entanglement. *Compare Tilton v. Richardson*, 403 U.S. 672, 687–88 (1971), *with Larson v. Valente*, 456 U.S. 228, 255 (1982). Unlike the restrictions in 26 U.S.C. § 119, the parsonage exemption only requires a routine regulatory interaction this Court previously has found to be a permissible level of entanglement. *Compare Hernandez*, 490 U.S. at 681, *with* 26 U.S.C. § 119.

As long as the "minister of the gospel" is ordained, commissioned, or licensed and performs the ecclesiastical duties stated in the U.S. Treasury regulations as an expected duty of their employment, he or she is eligible under § 107. Treas. Reg. § 1402(c)-5(b)(2). Once the IRS's short checklist is met, the exemption is granted; without further inquiry or approval of the government evaluating a church's doctrine or doxology. *Compare Gaylor*, 919 F.3d at 429, *with* 26 U.S.C. § 119. This simple factual inquiry is not the type of government surveillance, detailed monitoring, or close contact, this Court has previously ruled fails this third prong. *Jimmy*

Swaggart Ministries v. Bd. of Equalization of California, 493 U.S. 378, 395 (1990) (quoting *Tony & Susan Alamo Found. v. Sec'y of Lab.*, 471 U.S. 290, 308 n.31 (1985)).

The Establishment Clause does not mean that the government can have no entanglement with religion, just that it cannot have an excessive entanglement with religion where the state could influence the intricacies of the institution. *Compare Lemon*, 403 U.S. at 613; *Walz*, 397 U.S. at 674, *with Hosanna-Tabor*, 565 U.S. at 189. It is inevitable that there is some contact between the church and state. From enforcing fire, building, and zoning codes, mandating school attendance and core curriculum requirements, to dispatching first responders in emergencies, the government interacts with religious bodies regularly as they comingle in American society. *Lemon*, 403 U.S. at 614; *Bd. of Ed. of Cent. Sch. Dist. No. 1*, 392 U.S. at 245–46 n.7; *Everson*, 330 U.S. at 17–18. To construe the Establishment Clause with such an absolutist, literal meaning would undermine the very objectives of the First Amendment. *Walz*, 397 U.S. at 671.

The parsonage exemption should not be read in isolation, but rather in concert with the other work-related housing benefits. *Gaylor*, 919 F.3d at 429 (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 252 (2012)). From excluding housing provided to members of the military to exemptions for employees working abroad, the tax code has plenty of other examples of per se exemptions that do not include limiting restrictions. *Compare* 26 U.S.C. §§ 107, 134, 162, 911, *with* 26 U.S.C. § 119. This Court has long recognized that Congress has broad power to set sound tax policy to address different circumstances with different solutions. *See Regan v. Taxation with Representation*, 461 U.S. 540, 547 (1983); *see also Madden v. Kentucky*, 309 U.S. 83, 88 (1940). This is because legislators have requisite familiarity to best equitably distribute tax burdens. *Id.* Part of the reason the tax code is so intricate is because the federal government has determined just how many different circumstances our 300 million

Americans find themselves in. *See generally id.* A minister or religious institution receiving such an indirect benefit through a tax exemption does not violate the Establishment Clause.

The Establishment Clause does not require that in each and every respect there should be a separation of church and state. *Zorach v. Clauson*, 343 U.S. 306, 312 (1952). Eliminating this exemption would require this Court to settle more cases on this topic because it would inevitably lead to more government entanglement with religious institutions. *See Walz*, 397 U.S. at 674. Instead of the government minimizing its involvement to the current level, federal and state courts will have to adjudicate more disputes involving various government agencies and state authorities that are now assessing a church's property taxes, liens, and other property evaluations to maximize the value of the land. *See id.* America's religious institutions improve the moral fabric of our democracy. *See Bowen*, 487 U.S. at 607. Exposing them to the rigors of the tax system will only dethrone government neutrality with religious hinderance and replace minimal entanglement with excessive tax assessments. *See Walz*, 397 U.S. at 673.

The parsonage exemption passes each of the three prongs of the *Lemon* test. With three secular purposes and an effect this Court has held to be opposite of a direct subsidy or aid, this exemption neither has the purpose nor the effect of endorsing religious institutions. *See Walz*, 397 U.S. at 674. Finally, because of the government's efforts to minimize the intensity of its factual inquiry in order to regulate the statute, the parsonage exemption does not excessively entangle itself with the church.

B. The parsonage exemption is constitutional under the historical significance test because it excludes religious groups in a way that would be historically accepted.

As an alternative to the *Lemon* test, this Court has determined an Establishment Clause inquiry will be upheld whenever a government practice has been historically accepted and has stood the test of time. *See Town of Greece*, 572 U.S. at 575, 577. As Justice Holmes said one

century ago, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). This fact-specific inquiry provides context for how our Founders and predecessors saw the interactions between the church and the state. *See Gaylor*, 919 F.3d at 435.

Most recently, this Court applied this test in upholding a public World War I memorial cross which honored fallen soldiers. *See Am. Legion*, 139 S.Ct. at 2074. In *Am. Legion*, this Court upheld the cross because of the historic and permissible nature of religious symbols in memorializing the dead. *Id.* at 2086, 2089–90. This Court used this rationale to uphold legislative prayer. *Town of Greece*, 572 U.S. at 587; *Marsh v. Chambers*, 463 U.S. 783, 787 (1983). Federal courts have used this reasoning to uphold other long-standing governmental religious practices. *See, e.g., Woodring v. Jackson Cty., Indiana*, 986 F.3d 979 (7th Cir. 2021); *Perrier-Bilbo v. United States*, 954 F.3d 413, 425 (1st Cir. 2020); *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010). Even though this Court has not applied the historical significance test to religious tax exemptions before, it has regularly discussed the history of a statute when upholding its constitutionality. *See, e.g., Walz*, 397 U.S. 675–76; *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002). Additionally, this Court has not outlined a limit to this test's application in Establishment Clause cases. *See Town of Greece*, 572 U.S. at 576. While the age of a practice or its historical context is not sufficient by itself, longstanding, government-supported religious practices that do not deviate from their historical context are constitutional. *Marsh*, 463 U.S. at 790–91; *Am. Legion*, 139 S.Ct. at 2102 (Gorsuch, J., concurring). As stated under the analysis of the *Lemon* test, tax exemptions for religious institutions have been used historically to end discrimination against the church, prevent a "free exercise" issue resulting from the stratification of the church, and prevent the government from picking and choosing which religious groups qualified. *Gaylor*, 919 F.3d at 427. This historical context behind granting tax exemptions to

religious institutions complies with the ageless principles behind their original enactment and will pass this test if applied.

Under this test, long-standing government practices have a presumption of constitutionality. *Am. Legion*, 139 S.Ct. at 2081–82. Federal and state governments have a two-hundred-year history of granting tax exemptions to religious organizations as a matter of public policy. *See* 7 Cong. Ch. 53, May 3, 1802, 2 Stat. 194; *Gibbons v. District of Columbia*, 116 U.S. 404 (1886). Today, all 50 states provide religious tax exemptions, making up more than 2,600 federal and state tax laws in total. *Walz*, 397 U.S. at 676; *Gaylor*, 919 F.3d at 436. The parsonage exemption itself has existed in one form or another since 1921. *See Revenue Act of 1921*, Pub. L. No. 67-98, § 213(b)(11), 42 Stat. 227, 239 (1921). The parsonage exception came about only a few years after the federal income tax was instituted in the Sixteenth Amendment. *Gaylor*, 919 F.3d at 436. Before the Sixteenth Amendment, Congress was not able to tax church-provided housing to clergy members. *Id.* Congress's decision to provide this exception within just a few years of the Sixteenth Amendment's ratification demonstrates that Congress wanted to continue the practice of shielding religious organizations from certain tax liabilities after expanding the federal revenue sources. *See id.*

This historical practice has stood the test of time and political change. Pastors are not recognized as merely religious officials, but for their secular ministries. From helping the homeless to advocating for civil rights and new crime laws, we recognize their role in everyday society. *See, e.g., Study: 60% of Homeless Shelter Beds Are Provided Through Faith-Based Organizations*, RELEVANT MAG. (Feb. 2, 2017), https://www.relevantmagazine.com/current/study-60-homeless-shelter-beds-are-provided-through-faith-based-organizations/; John Eligon, *Where Today's Black Church Leaders Stand on*

Activism, N.Y. TIMES (Apr. 3, 2018); https://www.nytimes.com/2018/04/03/us/mlk-church-civil-rights.html. This exemption allows these ministers to continue to support not just their church community, but their entire city, state, and this country. Even as the statute has been slightly modified, the government maintains its practice of not demanding church support. *See Walz*, 397 U.S. at 675. Finally, because of the presumption of constitutionality that accompanies this test, the Petitioner-Intervenor has the burden to demonstrate § 107 had a discriminatory intent against non-religious groups, which they have not done. *See Am. Legion*, 139 S.Ct. at 2081–82.

This Court has previously struck down tax provisions only on rare occasion. The *Everson* Court noted that its power in this area should be exercised with the utmost care because a government's power to legislate for the public interest might be seriously curtailed as a result. 330 U.S. at 6. This one-hundred-year government practice of granting the parsonage exemption should not be cast aside lightly. *See Walz*, 397 U.S. at 678.

To rule the parsonage exemption unconstitutional, this Court would, in effect, mandate the IRS should show a "callous indifference to religious groups." *See Zorach*, 343 U.S. at 313–14. All 2,600 state and federal religious tax exemptions would be challenged left and right as additional examples of government granting unconstitutional preferential treatment. *See Gaylor*, 919 F.3d at 436. As a result, state and federal tax codes would resemble swiss cheese instead of sound tax policy. This Court would inevitably be responsible for significantly rewriting the tax code. But perhaps even more important would be the constitutional consequence. This Court's worst fears in *Van Orden v. Perry*, 545 U.S. 677 (2005) would be realized. A reversal in this case would result in a "pervasive bias" against religion and would redefine the Establishment Clause, undermining its quintessential neutrality requirement. *Perry*, 545 U.S. at 684 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 845–46 (1995)).

CONCLUSION

This Court should affirm the appellate court's decision.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 20-199

JOHN BURNS,
Petitioner,
and
CITIZENS AGAINST RELIGIOUS CONVICTIONS, INC.,
Petitioner-Intervenor,
v.
INTERNAL REVENUE SERVICE AND COMMISSIONER OF TAXATION,
Respondents.

_____

CERTIFICATE OF SERVICE

_____

We, Team #6, counsel for the Internal Revenue Service and the Commissioner of Taxation, hereby certify that on this 12th day of March 2021, we caused forty copies of the Brief of the Internal Revenue Service and the Commissioner of Taxation as the Respondent Brief to be served by electronic delivery service on the following counsel:

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We further certify that all parties required to be served have been served.

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