Case No. 20-199

IN THE
Supreme Court of the United States

JOHN BURNS AND CITIZENS AGAINST RELIGIOUS CONVICTIONS, INC.,

Petitioners,

v.

INTERNAL REVENUE SERVICE AND COMMISSIONER OF TAXATION,

Respondent.

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

BRIEF FOR PETITIONER

March 14, 2020

Team #7

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Constitution, Statutes & Regulations

Other Authorities

QUESTIONS PRESENTED

1. Whether a teacher qualifies as a "minister of the gospel" under 26 U.S.C. § 107(2) when he hosts students for youth ministry meetings and incorporates religious tenets into his counseling but does not teach religion or perform sacerdotal duties?
2. Whether 26 U.S.C. § 107(2) violates the Establishment Clause of the First Amendment when it provides tax benefits to "ministers of the gospel" that are unavailable to secular employees?

STATEMENT OF JURISDICTION

The judgement of the United States Court of Appeals for the Eighteenth Circuit was entered on June 9, 2020. J.A. 15. This Court granted certiorari. J.A. 25. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Petitioner Mr. John Burns is a teacher at Whispering Hills Academy, a religious boarding school operated by the Whispering Hills Unitarian Church. J.A. 3. The School, located in upstate Touroville, is situated just steps away from the Church. J.A. 3. At the School, Mr. Burns teaches a variety of secular subjects, but he also serves as a school counselor. J.A. 3. As school counselor, Mr. Burns imbues common behavioral and mental health counseling techniques with the religious teachings held by the Church and School. J.A. 3.

In addition to his teaching and counseling duties, Mr. Burns contributes to the School's religious life in a variety of ways. J.A. 3. Mr. Burns has received several school awards for his after-school club called "Prayer After Hours." J.A. 3. Mr. Burns also hosts a youth ministry at

his home after the Sunday services at the on-campus Church where he leads the students is discussions about the week's church services. J.A. 3.

When Mr. Burns began teaching at the School, he relocated to a home that was closer to work. J.A. 3. The School provided Mr. Burns with a $2,500 moving stipend and agreed to pay Mr. Burns a $2,100 per month rental allowance as part of Mr. Burn's salary. J.A. 4. In 2017, Mr. Burns applied to exempt the monthly rental allowance from his gross income using the Parsonage Exemption provided for under section 107(2) of title 26 of the U.S. Code. J.A. 4. Mr. Burns applied for the exemption because as a teacher at a religious school who counseled students in the teachings of the faith, prayed daily with students in his after-school club, and hosted a youth ministry in his home after Sunday services, he was a "minister of the gospel" under the statute. J.A. 4. The Internal Revenue Service denied Mr. Burns the exemption in 2018. J.A. 4.

II. PROCEDURAL HISTORY

Mr. Burns brought suit in the District Court for the Southern District of Touroville challenging the IRS's decision to deny him the Parsonage Exemption. J.A. 4. Subsequently, Petitioner Citizens Against Religious Convictions, Inc. (CARC), a local organization dedicated to working against violations of the separation of church and state, filed a motion to intervene in Mr. Burn's lawsuit claiming that the Parsonage Exemption violated the Establishment Clause of the First Amendment. J.A. 4. The District Court granted CARC's motion to intervene. J.A. 2. The District Court denied the Commissioner of Taxation's motion for summary judgment and instead held (i) that Mr. Burns is a "minister of the gospel" under § 107(2) and (ii) that the Parsonage Exemption is an unconstitutional violation of the Establishment Clause. J.A. 14.

The Commissioner appealed to the United States Court of Appeal to the Eighteenth Circuit. J.A. 15. There, the Court reversed the ruling of the District Court and granted the

Commissioner's motion for summary judgment in its entirety, holding that (i) Mr. Burns is not a "minister of the gospel" under § 107(2) and (ii) the Parsonage Exemption is not unconstitutional. J.A. 24. Mr. Burns and CARC now appeal. J.A. 25.

SUMMARY OF THE ARGUMENT

I. Burns Is A Minister Of The Gospel Under Tax Court Precedent And Federal Law And Thereby Qualifies For The §107(2) Parsonage Exemption.

The purpose of the pertinent Treasury Regulations that interpret §107(2) is to exclude "self-appointed ministers" from qualifying for the parsonage exemption. *Salkov v. Comm'r*, 46 T.C. 190, 196 (1966). The Tax Court analyzes whether the claimant (1) performs sacerdotal functions; (2) conducts worship services; (3) performs services in the control, conduct, and maintenance of a religious organization that operates under the authority of a church or church denomination; (4) is ordained, commissioned, or licensed; and (5) is considered to be a spiritual leader by his religious body to determine ministerial status. *See Knight v. Comm'r,* 92 T.C. 199, 204 (1989). While Burns does not administer sacraments, he satisfies the remaining four factors via teaching his classes in accordance with the Unitarian faith, engaging in his "Prayer After Hours Club," and youth ministry groups on Sundays with his students at the on-campus church. Further, the Court's recent jurisprudence on the ministerial exception in employment law furnishes another strong reason why the balancing test employed by the Tax Court should weight in Burns' favor as it focuses on employee duties to determine ministerial status.

II. The Parsonage Exemption Is Facially Unconstitutional Under the First Amendment's Establishment Clause.

The First Amendment to the United States Constitution states that, "Congress shall make no law respecting an establishment of religion…" U.S. Const. amend. I. To decide whether governmental action violates the Establishment Clause, the Court has established three main

standards. First, for administrative provisions, the test announced in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), should apply. Second, unbroken traditions of religiously motivated cultural practices do not always violate the Establishment Clause. *See Marsh v. Chambers*, 463 U.S. 783, 790-91 (1983). Third, longstanding monuments, symbols and practices with religious associations enjoy a presumption of constitutionality. *See Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2085 (2019).

Because the Parsonage Exemption is an administrative provision that instructs the Internal Revenue Service not to include the value of a parsonage in a minister of the gospel's gross income, the *Lemon* test should apply. *See* 26 U.S.C. § 107(2). Section 107(2) fails the *Lemon* test because (i) it was adopted for no secular purpose, (ii) it has the principal effect of advancing religion over irreligion, and (iii) it requires a relationship between government and religion that is excessively entangled. *See Lemon*, 403 U.S. at 612-13. Thus, section 107(2) is an unconstitutional violation of the Establishment Clause.

ARGUMENT

I. Burns Is A Minister Of The Gospel As Defined Under Relevant Tax Court Case Law And Federal Law And Thereby Qualifies For The §107(2) Parsonage Exemption.

A. Burns' Roles And Duties At The School Confer Ministerial Status Onto Him.

26 U.S.C. §107(2) provides no definition of the phrase "minister of the gospel" nor does the statute's legislative history provide guidance. *See Lawrence v. Comm'r*, 50 T.C. 494, 497 (1968); *Salkov,* 46 T.C. at 194. Therefore, because this Court has not ruled on how to interpret the statutory language, Article III and tax courts define the contours of who qualifies as a "minister of the gospel." Unfortunately, the tax courts have failed to uniformly employ a test to determine what qualities a taxpayer must possess to qualify for the parsonage exemption. *See*

Freedom from Religion Found., Inc. v. Lew, 983 F. Supp. 2d 1051, 1057 (W.D. Wis. 2013) *(*vacated and remanded on other grounds). Nevertheless, upon compiling the case law and analyzing the pertinent treasury regulations, the tax courts largely determine whether "services performed by a minister are performed in the exercise of his ministry," Treas. Reg. § 1.1402(c)–5(b)(2),[1] via a five-factor balancing. *See Knight*, 92 T.C. 199 at 205; *see also Salkov,* 46 T.C. at 195 ("[t]he [treasury] regulations do not attempt to say what a 'minister' is, but only what a 'minister' does."). Courts look to whether the claimant: (1) performs sacerdotal functions; (2) conducts worship services; (3) performs services in the control, conduct, and maintenance of a religious organization that operates under the authority of a church or church denomination; (4) is ordained, commissioned, or licensed; and (5) is considered to be a spiritual leader by his religious body. *See Knight*, 92 T.C. at 204. The statute solely requires that the claimant is "ordained, commissioned, or licensed",[2] but the other factors are based on the facts and circumstances of the individual claimant. *See id.* at 204–05. Failure to meet one or more of the four remaining factors is not dispositive in determining ministerial status. *Id.*

While it is true that Burns does not perform sacerdotal duties or administer sacraments, he satisfies four of the five factors for determining ministerial status, thereby carrying his burden[3]

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[1] Tax Courts have ruled that the Treasury Regulations on Income Tax § 1.1402(c)-5 are reasonable and valid interpretation of 26 U.S.C § 107, therefore, the courts rely on the regulations to determine who is a "minister of the gospel" for §107(2). *See Toavs v. Comm'r*, 67 T.C. 897 (1977); *Colbert v. Comm'r* , 61 T.C. 449 (1974).

[2] The Treasury Regulations require that only a "'a duly ordained, commissioned, or licensed minister of a church or a member of a religious order' can qualify for the statutory exclusion of section 107." *Salkov*, 46 T.C. at 196; Cf. *Ballinger v. Comm'r*, 728 F.2d 1287, 1290 (10th Cir. 1984) ("We interpret Congress' language providing an 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.") (emphasis added).While the *Ballinger* Court analyzed the definition of a minister for purposes of 26 U.S.C. § 1402(e), courts apply the same principles in construing who constitutes a "minister of the gospel" for purposes of 26 U.S.C. § 107. *See Knight*, 92 T.C at 203.

[3] Burns has the burden to show that he is within the statutory exemption as taxation exemptions are to be narrowly construed. *See Bingler v. Johnson,* 394 U.S. 741, 752 (1969); *see also New Colonial Ice Co. v. Helvering,* 292 U.S. 435, 440 (1934) (exemptions are matters of legislative grace).

and qualifying for the 107(2) exemption. Because the statute only requires that Burns be ordained, licensed, or commissioned, that will be analyzed first followed by the other factors in numerical order.

i. Although Burns Is Not Formally Ordained Or Licensed, He Is Commissioned By The Whispering Hills Unitarian Church Because He Is Entrusted To Further The Church's Charge Through His Religious Endeavors At Whispering Hills Academy.

A taxpayer seeking the parsonage exemption need not be formally ordained if he is commissioned *or* licensed by a church. *See Salkov*, 46 T.C. at 197 ("'duly ordained, commissioned or licensed' is … in the disjunctive."); *see also Wingo v. Comm'r,* 89 T.C. 922, 933 (1987) (same). Importantly, there is no test in the regulations "or even a suggestion … that the ordination, commissioning, or licensing must come from some higher ecclesiastical authority." *Salkov,* 46 T.C. at 196. To be commissioned simply means "the act of committing to the charge of another or an entrusting." *Id.* at 197; *see also Kirk v. Comm'r,* 425 F.2d 492, 495 (D.C. Cir. 1970).

Burns fulfills the commission requirement. In *Salkov*, the court reasoned that the synagogue's formal selection[4] of the taxpayer as their cantor constituted the commissioning him as their minister. *Id.* Although the cantor in *Salkov* was selected through a process of appointment via representatives of the congregation and approval by the Board of Trustees, such formal selection is not required by law. *Salkov,* 46 T.C. at 196. While Whispering Hills Academy hired Burns as a teacher and guidance counselor, the school invariably ratified his religious endeavors by awarding him on several occasions for creating the after-school religious club "Prayer After Hours." J.A. 3. Therefore, while the school may not have formally selected him for

[4] When the synagogue needed another cantor, the members of the congregation "acting through their representatives on [a committee] and the board of trustees, singled out the petitioner as their choice for the cantorate of the congregation and formally installed him in that position." *Salkov,* 46 T.C. at 197.

a position of religious leadership, their awarding him for "Prayer After Hours," signaled that they entrusted him in such role to continue guiding students in harmony with the Church. Beyond Burns' club, because the School operates in tandem the Whispering Hills Unitarian Church, Burns teaches his secular subjects of foreign language and literature in accordance with the church's tenets and guides his students spiritually every week on Sundays after service at the on-campus church. Therefore, the very nature of him teaching classes in accordance with the Church's faith, the School awarding him on several occasions for his club, and allowing him to be a religious counselor for students after Sunday service constituted the school's commissioning him as a minister.

ii. Burns Also Conducts Worship Services In His Capacity As A Teacher At Whispering Hills.

Burns conducts worship services within the meaning of the Treasury Regulations. The Treasury Regulations list three types of ministerial services: (1) The ministration of sacerdotal functions; (2) the conduct of religious worship; and (3) the direction of organizations within the church. Treas. Reg § 1.1402(c)-5(b)(2)(ii)*; see also Wingo,* 89 T.C. at 931. Claimants need only satisfy one of these ecclesiastical functions to qualify as a minister. *See Knight*, 92 T.C. at 204; *see also Silverman v. Comm'r*, 57 T.C. 727, 732 (1972) ("We do not agree … that the [claimant] must perform all ecclesiastical duties in order to obtain the exclusion."). Further, the fact that a claimant cannot authoritatively teach or interpret the faith does not preclude them from conducting worship. *See Salkov*, 46 T.C. at 196.

While Burns does not administer sacraments nor act as a director of the Whispering Hills Unitarian Church, Burns undoubtedly performs one of the significant ecclesiastical functions – religious worship – through his classes, his youth ministry groups, and "Prayer After Hours" club. Burns' duties are twofold. First, although he teaches secular subjects, he teaches in

accordance with the precepts of the school's faith. As the Court in *Lemon v. Kurtzman*, 403 U.S. 602, 618–19 (1971), emphatically declared, "[w]ith the best of intentions such a teacher [at a religious school] would find it hard to make a total separation between secular teaching and religious doctrine." Further, because Whispering Hills hired Burns to teach language and literature in harmony with their faith, Burns cannot (via his agreement with the school) and does not metaphorically close the door to his classroom to religious worship. J.A. 8. Outside of the classroom as a counselor for students, Burns surely clarifies the precepts of the Unitarian Faith during discussions with them. Second, in his capacity as a counselor, Burns combines mental and behavioral techniques with the church's religious teachings, thereby blurring the lines even more between secular and religious duties. Moreover, the two legislatures "have also recognized that church-related elementary and secondary schools have a significant religious mission and that a substantial portion of their activities is religiously oriented." *Lemon*, 403 U.S. at 613. It is of no consequence that Burns was not formally hired as a religious counselor because his approach to counselling students runs parallel, and furthers, the precepts of the Unitarian faith. Lastly, guiding young followers of the faith and speaking to them in less formal settings than Sunday service presumably constitutes one of the many tasks of ordained leaders in the faith.

Moreover, it is not within the duty of this Court to be "arbiters of scriptural interpretation." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.,* 450 U.S. 707, 716 (1981). That is, in accordance with this Court's longstanding First Amendment jurisprudence on maintaining religious institution's autonomy by not questioning the centrality of petitioners' beliefs, this Court must not question how central prayer and spiritual guidance are to the Unitarian Faith. *See Thomas*, 450 U.S. at 716; *cf. Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 696 (2014) (quoting 42 U.S.C. § 2000cc-5(7)(A) ("The term 'religious exercise' includes any exercise of religion, whether or not

compelled by, or central to, a system of religious belief.")). It is simply not within the function or province of the Court to question whether the "Prayer After Hours" and weekly youth ministry sessions at the on-campus church constitute worship. Therefore, the Treasury regulations, read in the spirit of the Court's religious freedom jurisprudence furnish sufficient reason to find that Burns performs the type of services which give rise to the parsonage exemption. Hills.

iii. Burns Performs Services In The Control, Conduct And Maintenance Of A Religious Organization That Operates Under The Authority Of A Church Or Church Denomination.

Whispering Hills Academy operates under the Unitarian Church and Burns' duties directly sustain the school and further its goal of teaching in the spirit of the faith. A religious organization is "under the authority" of a religious body constituting a church or church denomination if it is organized and dedicated to carrying out the tenets and principles of a faith with either the requirements or sanctions governing the creation of institutions of the faith. Treas. Reg. § 1.1402(c)-5(b)(2)(ii); *Mosley v. Comm'r*, Nos. 20269–92, 20270–92, 1994 WL 500947, at *7 (Sept. 14, 1994). Such determination is made after analyzing the facts and circumstances surrounding the relationship between the church and the organization.[5] *Toavs v. Comm'r,* 67 T.C 897, 904–05 (1977). Some legal or actual, objective manifestation of control by the church must exist over the organization to qualify as "under the authority." *See id.* at 906; *Mosley,* 1994 WL 500947, at *7.

As a threshold matter, the school is a religious organization as defined by tax court precedent. The *Whittington v. Comm'r* Court reiterated that under the Internal Revenue Code, the Tac Court look to an organization's religious purpose and means to accomplish the purpose to determine its religious status. No. 5208–96, 11955–96, 2000 WL 1358652, at *3 (T.C. Sept. 21,

[5] Only one district court has used the eight factors outlined in Rev. Rul. 72-606, 1972-2 C.B. 78 (1972) to determine authority. *See Flowers v. United States*, No. CA 4–79–376–E, 1981 WL 1928, *6 (N.D.Tex. 1981). But no tax courts have used the factors because they do not "have the force and effect of law," therefore, this court should not use them as authorititaive. *Id.* at 4.

2000). The School educates its student about Unitarianism and its teachers teach otherwise secular subjects in accordance with the faith, thereby furthering the Church's goal to evangelize. The School also holds themselves out to be a religious boarding school and no evidence suggests any desire of the school to dissociate from their religious underpinnings, thereby they qualify under the regulations as a religious organization.

As the District Court stated, the record is devoid of specific factual information regarding the legal relationship between the church and the academy; nevertheless, a substantial relationship between the two institutions can still be inferred from the record. J.A. 7–8. First, the religious boarding school is named after the church, likely denoting a legal relationship under state corporate law between the two entities. Second, the physical proximity between the two institutions as the campus is merely steps away from the church solidifies such (presumably) corporate relationship and indicates the school is sufficiently assimilated with the church in its day-to-day activities as well as long term goals. Third, Burns, and presumably other School employees, are hired to teach in accordance with the precepts of the Unitarian faith. Finally, students are required to attend religious services and learn the basic tenets of Unitarianism. On such facts taken together, this Court can sufficiently infer that the objective manifestation of control by the church exists over the school and likely legal control as well via their shared name and geographical location.

iv. Burns Is Considered A Spiritual Leader By His Students And Whispering Hills Academy.

Finally, the School and students consider Burns to be a spiritual leader in the community. Courts find whether a religious body perceives the claimant as spiritual leader or teacher persuasive in deeming the taxpayer a "minister" for §107(2). *See Salkov* 46 T.C. at 197–198. Further, the purpose of the Treasury Regulations that interpret 107(2) is to exclude "self-

appointed ministers" from qualifying for the exemption, which is why the religious body's views of the claimant is important in determining ministerial status. *See id.* at 196.

The record supports that the community undeniably considers Burns a spiritual leader. In *Haimowitz v. Comm'r*, the claimants relied entirely on his self-perception that he was a temple leader for his ministerial status and failed to present testimony or admissible evidence establishing that anyone else in the temple viewed him as a leader to. No. 11985–95., 1997 WL 27077, at *4 (Jan. 23, 1997). Thus, in accordance with the purpose of the Treasury Regulations, the court found that he did not satisfy this important factor. Burns is unlike petitioner in *Haimowitz* because he was formally recognized by the School for his religious endeavors via their praise of his after-school prayer program in the form of numerous awards. It is reasonable to also infer that given the School considered his after-school club a success, his students supported his charge as well as his club could not exist without students attending. This fact alone is evidence that Burns is not a self-appointment minister in contravention of §107(2)'s purpose. Therefore, he is within the spirit of the statute and eligible for the parsonage exemption.

B. In Accordance With This Court's Recent Functional Approach To The Ministerial Exception In The Context Of Employment Law, The Court Should Find That The Aforementioned Balancing Test Weighs Strongly In Favor Of Burns.

The Court's holding in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), which emphasizes the importance of the employee's duties for the purposes of the ministerial exception in employment law, presents another reason why the Court should find that Burns qualifies as a minister for tax purposes. The ministerial exception functions to protect religious institutions' autonomy, shielding them from employment discrimination claims by not questioning the "selection of the individuals who play certain key roles." *Id.* at 2060; *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 188 (2012) (Religion Clauses foreclose certain employment discrimination claims against religious

organizations). Because finding the employee as a "minister" precedes a finding that the ministerial exception applies to the religious organization, the approach the Court uses in such cases should inform the Court's decision for determining a "minister" under the tax code.

The *Hosanna-Tabor* Court focused on four factors to determine whether an elementary school teacher at a Lutheran school was a "minister": (1) "the formal title given [her] by the Church," (2) "the substance reflected in that title," (3) "her own use of that title," and (4) "the important religious functions she performed for the Church." 565 U.S. at 190–92. Two Justices found the ministerial exception "should apply to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, *or serves as a messenger or teacher of its faith.*" *id.* 199 (Alito, J., concurring) (emphasis added). The *Our Lady of Guadalupe* Court in June 2020 solidified the post *Hosanna-Tabor* precedent in the Circuits that emphasized that employees' duties are the most important factor in the calculus.[6] It was sufficient that one of the petitioner teachers in *Our Lady of Guadalupe* "taught 'religion from a book required by the school'" and "'joined' students in prayer, and accompanied students to Mass in order to keep them 'quiet and in their seats'" for the purposes of the exception. 140 S. Ct. at 2068. Further, teacher petitioners' agreements with their religious schools were nearly identical in that both were expected to serve the religious mission through their work even in teaching secular subject areas. *Id.* at 2058.

Under the balancing test laid out by the Tax Court to determine ministerial status for the parsonage exemption, this Court should find Burns' duties as especially persuasive considering

[6] *See e.g.*, Puri v. Khalsa, 844 F.3d 1152, 1160 (9th Cir. 2017) ("[A]n employee whose 'job duties reflect a role in conveying the Church's message and carrying out its mission' is likely to be covered by the exception, even if the employee devotes only a small portion of the workday to strictly religious duties and spends the balance of her time performing secular functions.") (internal citations omitted); Cannata v. Catholic Diocese of Austin, 700 F.3d 169, 177 (5th Cir. 2012) (applying the exception because employee performed important "function" that "furthered the mission of the church and helped convey its message").

its *Our Lady of Guadalupe* precedent. Burns performs significant religious duties at the School in teaching his students secular subjects in accordance with the Unitarian faith, discussing Sunday service with them at his ministry groups, and engaging in more religious discussions (and likely prayer with them) at "Prayer After Hours." Therefore, given such significant religious duties and that the School has praised his spearheading of "Prayer-After-Hours," Burns is a minister within the parsonage exemption as analyzed by the Tax Courts along with this Court's recent ministerial exception jurisprudence.

II. The Parsonage Exemption Is Facially Unconstitutional Under the First Amendment's Establishment Clause.

The First Amendment to the Constitution declares that, "Congress shall make no law respecting an establishment of religion…" U.S. Const. amend. I. What exactly Congress meant when it proposed the Establishment Clause, however, is not evident by the text alone. At base, the Establishment Clause means: (i) neither the Federal Government nor a state government can "set up a church," (ii) neither "can pass laws that aid one religion, aid all religions, or prefer one religion over another," (iii) neither "can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion" (iv) "no person can be punished" for his or her belief or disbelief or for church attendance or non-attendance, (v) no "tax in any amount, large or small, can be levied" to support any religion and (vi) neither "a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa." *See Everson v. Bd. of Educ. of. Ewing Twp.*, 330 U.S. 1, 15-16 (1947).

When governmental action is neither clearly within nor outside the bounds set by the Establishment Clause, this Court has devised several Constitutional lenses through which to view certain governmental conduct in light of the Establishment Clause. In *Lemon*, the Court

announced a tri-partite test for determining when government action remains within the restrictions set by the Establishment Clause: (i) it must have a secular legislative purpose; (ii) its principal or primary effect must be one that neither advances nor inhibits religion; and (iii) it must not foster an excessive government entanglement with religion. 403 U.S. at 612-13. In *Marsh v. Chambers*, the Court recognized that unbroken historical patterns of government supported, but religiously motivated, cultural practices do not always violate the Establishment Clause. 463 U.S. at 783. Finally, in *American Legion*, the Court decided that the passage of time grants religiously expressive monuments, symbols and practices a strong presumption of constitutionality. 139 S. Ct. at 2067.

First, because the Parsonage Exemption is an administrative provision instructing the Internal Revenue Service on how to collect income taxes and not a religiously motivated cultural practice or longstanding expressive monument or display, the three-part test announced in *Lemon* should apply. 403 U.S. at 612-13. Second, the Parsonage Exemption violates the Establishment Clause under the *Lemon* test because (i) it was enacted with the purpose of preferring religion over irreligion; (ii) it grants religious people tax benefits that it does not grant irreligious people; and (iii) it requires the Internal Revenue Service and the courts to become excessively entangled with religion when they are tasked with deciding which taxpayers are "ministers of the gospel." *See* § 107; *Lemon*, 403 U.S. at 612-13.

A. The Lemon Test Should Apply In This Case Because It Concerns An Administrative Governmental Provision Rather Than A Religiously Motivated Cultural Practice Or A Longstanding Public Monument or Display.

In 1971, the *Lemon* court announced a tri-partite test for Establishment Clause cases that it "thought would provide a framework for all future Establishment Clause decisions…" *See American Legion*, 139 S. Ct. at 2080. "That expectation has not been met," this Court stated,

because of the unwillingness to apply the *Lemon* test in cases that involve the, "use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations." *Id.* at 2081. While precedent supports the *American Legion* court's characterization of certain parts of Establishment Clause jurisprudence, this case does not concern "words or symbols with religious associations" used for "ceremonial, celebratory or commemorative purposes." *Id.* Instead, it concerns Congress's instructions to the Internal Revenue Service as to how it is to collect personal income taxes from religious ministers. *See* § 107. Such a statute, implicating the religion clauses of the First Amendment, is properly reviewed under *Lemon.*

In *Lemon*, two state statutes granting aid to nonpublic, sectarian schools and school teachers were challenged as violations of the Establishment Clause. 403 U.S. at 606-07. The Rhode Island statute paid directly to teachers at nonpublic, sectarian schools a 15% supplement of the teacher's current salary to incentivize teachers to consider lower paying private school teaching jobs. *Id.* In other words, the Rhode Island statute was an administrative provision instructing the State Commissioner of Education to pay supplemental income to eligible private school educators. *See id.* at 607-08. The Rhode Island statute evaluated in *Lemon* is like section 107 of title 26 of the U.S. Code. Like the Rhode Island statute, which instructed the Commissioner of Education to make supplemental payments to eligible teachers, section 107 instructs the Internal Revenue Service not to include the value of a parsonage in a minister of the gospel's gross income for purposes of charging personal income tax. *See* § 107; *Lemon*, 403 U.S. at 607-08. Both statutes are administrative in nature, providing guidelines for how government is to carry out certain functions and do not implicate "words or symbols with religious

associations" used for "ceremonial, celebratory or commemorative purposes." *See* § 107; *Lemon*, 403 U.S. at 607-08; *American Legion*, 139 S. Ct. at 2081.

In contrast, the Court signaled the limits of the *Lemon* test just over a decade later in *Marsh v. Chambers* in an opinion authored by Chief Justice Burger, also the author of *Lemon*. *Marsh*, 463 U.S. at 783. In *Marsh*, the Court considered whether the Nebraska State Legislature's practice of opening its legislative sessions with a prayer violated the Establishment Clause. *Id.* at 784-85. There, the "unique history" that revealed a widespread and unbroken practice of legislative prayer in Congress and in the state legislatures dating to the time Congress first proposed the First Amendment led the Court to "accept the interpretation of First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer…" *Id.* at 791. Prayer at the opening of legislative sessions is a religiously motivated cultural practice and thus does not fall neatly into the type of analysis afforded administrative provisions under *Lemon*. Instead, legislative prayer is more like the "words or symbols with religious associations" that the *American Legion* court recognized may fall outside the reach of the *Lemon* test. *American Legion*, 139 S. Ct. at 2081.

Finally, in *American Legion*, the Court considered whether the display of a large, Christian cross on state-owned land in Bladensburg, Maryland, erected in 1925 as a WWI memorial violated the Establishment Clause. *Id.* at 2074. The Court incorporated the concern of Justice Breyer in *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in the judgment), that removing longstanding, religiously themed public monuments and displays may engender the "hostility toward religion that has no place in our Establishment Clause traditions." Allowing the cross to remain standing, the Court announced that given the limits of the *Lemon* test when governmental conduct concerns "words or symbols with religious associations," the

Court would apply a presumption of constitutionality for longstanding monuments, symbols, and practices. *See American Legion*, 139 S. Ct. at 2081-82. Because a large monument in the shape of a cross is nothing like a tax code provision governing the taxation of parsonages, the rule of *American Legion* should not apply in this case.

In sum, section 107 of title 26 of the U.S. code is an administrative provision that governs the calculation of gross income for ministers of the gospel earning parsonage allowances. Section 107 does not concern a religiously motivated cultural practice like legislative prayer and does not address a longstanding use of words or symbols with religious associations. As such, the *Lemon* test should decide whether section 107 is unconstitutional.

B. The Parsonage Exemption Fails The Lemon Test.

To remain within the bounds set by the Establishment Clause, government conduct that implicates the Religion Clauses of the First Amendment must (i) have a secular legislative purpose, (ii) not have the principal or primary effect of advancing or inhibiting religion, and (iii) must not foster an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13. First, the Parsonage Exemption does not have a secular legislative purpose because it was adopted and subsequently amended to benefit religious ministers. Second, the Exemption's primary effect is to advance religion over irreligion when it imposes fewer requirements for ministers to claim housing exemptions than it does on secular employees. Finally, the Exemption requires excessive government entanglement with religion when it tasks the Internal Revenue Service and the courts with deciding which taxpayers qualify as "ministers of the gospel."

i. The Exemption Serves No Secular Purpose.

To determine whether a statute was adopted with a secular legislative purpose, the courts determine legislative intent. *Lemon*, 403 U.S. at 613. To determine such intent, the courts

examine the text, legislative history and implementation of the statute. *McCreary Cty. v. American Civil Liberties Union*, 545 U.S. 844, 862 (2005); *Edwards v. Aguillard*, 482 U.S. 578, 587-94 (1987) (determining purpose of statute from statements of the statute's sponsor). The Government violates the purpose prong of the *Lemon* test when the statute manifests the purpose to favor adherence to religion generally. *McCreary*, 545 U.S. at 860; *Edwards*, 482 U.S. at 585.

The Parsonage Exemption was adopted to favor adherence to religion by rewarding "ministers of the gospel" with preferential tax treatment. It prefers religious ministers who receive parsonages over regular employees who receive housing benefits.

In 1921, Congress overturned a decision of the Treasury Department that ministers should include the value of their parsonages in their gross income by adopting the first version of the Parsonage Exemption to the Tax Code. *See* Adam Chodorow, *The Parsonage Exemption*, 51 U.C. Davis L. Rev. 849, 556-7 (2018). In 1954, Congress adopted section 119 of title 26 of the U.S. Code. *Id.* In that provision, employer-provided housing could be deducted from non-minister employees' income if the housing was (i) in kind, (ii) on-site, (iii) required by the employer and (iv) for the employer's convenience. *Id.* The strict requirements for non-minister employees were not enacted as part of section 107, which allows ministers of the gospel to exempt the rental value of their parsonages whether it be in-kind or cash, on-site or off-site, required by the Church or not, and without regard to the Church's convenience. *Id.* at 857-8.

The legislative intent of the 1954 Tax Code amendments that added section 119 and augmented section 107 reveal Congress' religious purpose in adopting the Parsonage Exemption. One sponsor of the bill noted that the Exemption was important during, "these times when we are being threatened by a godless and antireligious world movement" against which ministers of the gospel were, "carrying on such a courageous fight against this foe." Chodorow, *supra*, at 858

n.39. Another noted that ministers of the gospel earned on average $256 less than the average median income of the American worker and reminded Congress that many ministers also have families of their own to support. *Id.* at 858 n.40. The more stringent requirements of section 119 for secular employees as compared to section 107 for ministers of the gospel, as well as the statements of members of Congress who sponsored the bill demonstrate that the purpose of the Parsonage Exemption was to favor adherence to religion generally by granting tax benefits to ministers who received parsonages more liberally than secular employees who received housing from their employers. *McCreary*, 545 U.S. at 860.

Because the Parsonage Exemption favors adherence to religion generally, it lacks a secular purpose and thus fails the first prong of the *Lemon* test.

ii. The Exemption Advances Religion over Irreligion.

When government action has the principal or primary effect of advancing or inhibiting religion, it violates the Establishment Clause. *Lemon*, 403 U.S. at 612. The foundational goal of the Establishment Clause is to preserve government neutrality between religion and religion and between religion and irreligion. *See McCreary*, 545 U.S. at 860. To that end, government action advances or inhibits religion when it sends a message of endorsement or disapproval of religion. *See Lynch v. Donnelly*, 465 U.S. 668, 688-89 (1984) (O'Connor, J., concurring); *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 993 (7th Cir. 2006) (adopting Justice O'Connor's concept of endorsement and disapproval from her concurrence in *Lynch* as the rule for the second prong of the *Lemon* test), *cert. denied*, 552 U.S. 940 (2007).

Here, the difference in tax treatment between parsonages for ministers of the gospel and housing allowances for secular employees signals the government's endorsement of religious vocations. Ministers of the gospel are permitted to deduct the rental value of a home given to

them as part of their compensation or the amount of a rental allowance paid to them as part of compensation. § 107. On the other hand, secular employees may only deduct the value of in-kind lodging provided to them and that lodging must be located on-site where the employee works, be required by the employer as a condition of employment, and be for the convenience of the employer. 26 U.S.C. § 119. The sweeping tax benefits afforded ministers of the gospel under the Parsonage Exemption as compared to the limited exemption for secular employees sends a message of government endorsement of the ministerial profession over that of any other employee who receives housing from his or her employer. Such an endorsement does not preserve government neutrality between religion and irreligion and advances religion while inhibiting irreligion. *See McCreary*, 545 U.S. at 860; *Lemon*, 403 U.S. at 612. Thus, section 107 fails the second prong of the *Lemon* test.

iii. Granting Of The Exemption Requires An Excessive Governmental Entanglement With Religion.

If government action fosters an excessive government entanglement with religion, it violates the Establishment Clause. *Lemon*, 403 U.S. at 613. In determining whether the government entanglement is excessive, three factors are relevant: (a) the character and the purposes of the institutions that are benefited, (b) the nature of the aid that the State provides and (c) the resulting relationship between the government and the religious authority. *Id.* at 615.

a. The Character And Purpose Of The Institution Benefitted.

The Parsonage Exemption benefits two institutions: (i) the profession of ministers of the gospel and (ii) the religious organizations that employ ministers of the gospel. In *Lemon*, Catholic schools constituted an "'integral part of the religious mission of the Catholic Church.'" 403 U.S. at 616. That finding was based the schools' close proximities to parish churches, the display of religious symbols in the school buildings, the dedication of time during the school day

to religious instruction, and the employment of nuns as teachers in the school. *Id.* The "substantial religious character" of the schools gave rise to the danger of entanglement between church and state. *Id.*

Just as the Catholic schools in *Lemon* were an "'integral part of the religious mission of the Catholic Church'" and as such were of "substantial religious character," ministers of the gospel and those organizations who employ them seek to advance their own religious missions, whatever sect or creed. *See id.* Those ministers who guide adherents to religious sects and who work for religious organizations are undoubtedly of a "substantial religious character." *See id.* Thus, the character and purpose of ministers of the gospel and their religious employers pose a danger of entanglement between religion and government and violate the Establishment Clause.

b. The Nature Of The Aid The State Provides.

The Parsonage Exemption grants ministers of the gospel tax free income by allowing them to deduct the value of their in-kind housing or cash housing allowance from their gross income. § 107. This exemption amounts to state aid to ministers in the form of a lower tax liability. In a similar way, religious organizations who employ ministers of the gospel receive state aid from the exemption because they can compensate their ministers of the gospel in part with tax-free in-kind housing or a cash housing allowance.

In *Lemon*, the direct payment of supplemental income to Rhode Island Catholic school teachers was particularly offensive to the Establishment Clause because the state had no way of ensuring that the teachers who received government aid would confine their teaching to secular subjects. *See Lemon*, 403 U.S. at 617. Here, recipients of the Parsonage Exemption are completely out of the control of the federal government. The federal government grants ministers of the gospel and those who employ them aid to facilitate religious ministry and then lacks any

control, as Rhode Island did in *Lemon*, to ensure that the aid is used for a secular purpose. If Rhode Island's lack of control over its aid in *Lemon* violated the Establishment Clause, the government's complete lack of control over the aid it grants in the Parsonage Exemption, and in fact, the explicit religious nature of the aid provided for in the Exemption, also violate the Establishment Clause.

c. The Resulting Relationship Between The Government And The Religious Authority. The Parsonage Exemption creates a relationship between taxpayers who claim to be ministers of the gospel and the government that requires the Internal Revenue Service and the courts to reach into the specific religious character and functions of ministers to determine whether they are eligible for the Exemption. In *Lemon*, ensuring that nonpublic, sectarian school teachers in receipt of state supplemental payments did not inject religious content into their teaching of secular subjects would require a "comprehensive, discriminating and continuing state surveillance." 403 U.S. at 619. These "prophylactic contacts," the Court reasoned, would "involve excessive and enduring entanglement between state and church." *Id.*

Here, the Parsonage Exemption requires not only "continuing state surveillance" of which ministers of the gospel claim the Exemption but also searching inquiries as to which taxpayers are eligible. These inquiries and subsequent adjudications often end up in the courts. *See, e.g.*, *Hosanna-Tabor*, 565 U.S. at 190-91 (employing intense, fact-based inquiry of the personal history, religious training, and duties and responsibilities of a minister to determine coverage by the ministerial exception); *Gaylor v. Mnuchin*, 919 F.3d 420, 434 (7th Cir. 2019); *Lawrence*, 50 T.C. at 500. Requiring the Internal Revenue Service and the courts to continue examining the religious character, duties and functions of taxpayers who claim the Parsonage Exemption sets up a "relationship pregnant with dangers of excessive government direction." *See Lemon*, 403 U.S. at 620. The relationship between government and religion required to

administer the Parsonage Exemption constitutes excessive government entanglement with religion and thus violates the Establishment Clause.

Therefore, because the Parsonage Exemption was adopted for no secular purpose, it has the principal effect of advancing religion over irreligion, and it requires a relationship between government and religion that is excessively entangled, the Parsonage Exemption fails the *Lemon* test and thus is an unconstitutional violation of the Establishment Clause of the First Amendment.

CONCLUSION

For the foregoing reasons, the Court of Appeals decision court reversing the District Court and granting Respondent's motion for summary judgment should be reversed.