No. 20-199

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

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 PETITIONERS

Team # 9
Counsel for the Petitioner
Counsel for the Petitioner-Intervenor

QUESTIONS PRESENTED

I. Whether a teacher qualifies as a "minister of the gospel" under 26 U.S.C. § 107(2) when he teaches at a religious boarding school, counsels students using the tenets of the church, and hosts religious gatherings both at the school and in his home.

II. Whether 26 U.S.C. § 107(2)—a tax exemption available only to "ministers of the gospel"—violates the Establishment Clause of the First Amendment because it favors religion.

PARTIES TO THE PROCEEDING

Petitioner John Burns was plaintiff in the district court and appellee in the court of appeals. Citizens Against Religious Convictions, Inc., was the plaintiff-intervenor in the district court and appellee-intervenor in the court of appeals. Respondents Internal Revenue Service and Commissioner of Taxation were defendants in the district court and appellants in the court of appeals.

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Touroville is reported at *Burns v. Internal Revenue Service*, No. 19-111 (S. Dist. Touroville Dec. 18, 2019). The opinion of the United States Court of Appeals for the Eighteenth Circuit is reported at *Internal Revenue Service v. Burns*, Civ. No. 20-231 (18th Cir. June 9, 2020). This Court granted certiorari.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighteenth Circuit was entered on June 9, 2020. The petition for the writ of certiorari was filed, and this Court granted the petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the First Amendment of the United States Constitution. The First Amendment states, in part, "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. The Establishment Clause requires the government to take a neutral stance towards religion.

STANDARD OF REVIEW

Courts of appeals should review claims of denial of a constitutional right de novo. *E.g.*, *Bose Corp. v. Consumer Union of U.S., Inc.*, 466 U.S. 485, 499 (1983).

STATEMENT OF THE CASE

Factual Summary

A. John Burns Incorporated His Faith Into His Teaching At A Religious Boarding School Located Near And Operated By Whispering Hills Unitarian Church.

Whispering Hills Academy is a religious boarding school overseen by the Whispering Hills Unitarian Church. (R. at 1.) The two buildings are steps apart in downtown Touroville. (R. at 3.) Petitioner John Burns was hired by Whispering Hills school in 2016. (R. at 3.) He teaches eleventh

and twelfth grade English, Renaissance Literature, along with French, Italian, and Latin. (R. at 3.) Along with teaching those subjects, Burns is also a guidance counselor. (R. at 3.) In this role, Burns counsels his students on both education and personal matters using the tenants of the faith as prescribed by the Whispering Hills church. (R. at 3.)

Burns also engages with his students through his extracurricular club—Prayer After Hours. (R. at 3.) According to Pastor Nick—the Pastor at Whispering Hills and Burns's co-worker—Burns holds daily prayer sessions with the students in the club and spiritually counsels them. (R. at 4.) Additionally, after Sunday services at the Whispering Hills church, Burns hosts students at his home. (R. at 3.) At these gatherings, Burns and his students discuss the teachings of the church, among other things. (R. at 3.) The students themselves call these Sunday gatherings Burns's "youth ministry." (R. at 3.)

When Burns first accepted his job at Whispering Hills back in 2016, he relocated from outside of upstate Touroville. His new home is five minutes away from the Whispering Hills campus. (R. at 3.) Because of this relocation, Whispering Hills school provided Burns with a $2,500 moving allowance to cover the costs of moving and related travel. (R. at 3–4). In addition to that one-time allowance, Burns is regularly compensated with a monthly housing allowance of $2,100. (R. at 4.) The school itself categorizes this income as a rental allowance. (R. at 4.) This rental allowance is specifically tailored to the fair rental value of Burns's home. (R. at 4.)

B. Burns Learned About The Parsonage Exemption From His Pastor And Applied For The Exemption In 2017.

After Burns was hired at Whispering Hills and started working, Pastor Nick suggested that Burns apply for an exemption under § 107(2) of the tax code—also called the "parsonage exemption." (R. at 4.) Section 107(2) of the tax code allows a "minister of the gospel" to exempt from his gross income "the rental allowance paid to him as part of his compensation" so long as

he uses the allowance "to rent or provide a home" and the "allowance does not exceed the fair rental value of the home." 26 U.S.C. § 107(2) [hereinafter I.R.C. § 107(2)]. In 2017, Burns attempted to utilize this section and exempt his housing allowance from his gross income. (R. at 4.)

The Internal Revenue Service ("IRS") denied Burns the parsonage exemption, reasoning that Burns was not a minister of the gospel. (R. at 4.) That summer, the IRS sent Burns a letter notifying him of its decision and demanding the additional money that he owed as a result of the denial. (R. at 4.)

Procedural History

A. Burns And CARC Brought Suit In The District Court And Won.

As a result of the IRS denying Burns the parsonage exemption, Burns filed suit in the District Court for the Southern District of Touroville. (R. at 4.) Burns argued that he was, in fact, entitled to the exemption because he does qualify as a minister of the gospel. (R. at 4.) Citizens Against Religious Convictions, Inc., ("CARC") intervened in the action and argued that § 107(2) violated the First Amendment's Establishment Clause because it favors religion. (R. at 2.)

The IRS filed a motion for summary judgment and argued that § 107(2) is constitutional but does not apply to Burns because he is not a minister of the gospel. (R. at 2.) The district court denied the IRS's motion. It held that it had the ability to determine if Burns qualified as a minister of the gospel, leading to the decision that Burns was indeed a minister of the gospel. (R. at 6, 9.) Notwithstanding the court's holding that Burns was a minister of the gospel, the district court determined that § 107(2) is unconstitutional because it failed the *Lemon* Test. (R. at 2.)

B. The Defendants Appealed To The United States Court Of Appeals For The Eighteenth Circuit.

The court of appeals reversed, holding that Burns is not a minister of the gospel. (R. at 16.) It also reversed the district court and held that § 107(2) is constitutional. (R. at 21.) Burns and CARC filed a petition for certiorari in the Supreme Court of the United States. This Court granted the petition.

SUMMARY OF THE ARGUMENT

This is a case about the applicability and constitutionality of § 107(2) of the tax code. Petitioner Burns argues that he was wrongly denied the parsonage exemption. Petitioner-Intervenor CARC argues that § 107(2) is unconstitutional.

Burns is entitled to the parsonage exemption because he is a minister of the gospel. Whispering Hills school is an integral agent of Whispering Hills church. Burns conducts religious worship by hosting youth ministry in his home for his students, incorporating the teaching of the church into his classroom and counsels students through their spiritual walks. Therefore, under § 107(2), Burns is entitled to exempt his rental allowance from his gross income.

However, because the court engages in excessive entanglement in order to determine if Burns is a minister of the gospel, § 107(2) is unconstitutional. The parsonage exemption violates the Establishment Clause of the First Amendment under both the *Lemon* test and the historical significance test. It provides a tax benefit to ministers that is unavailable to similarly situated secular employees. Section 107(2) violates the second prong of the *Lemon* test because it has a primary effect of advancing religion. It violates the third prong because it results in excessive government entanglement of religion. The parsonage exemption also fails the historical significance test because the founders would not have permitted a government sponsored taxpayer funded religious subsidy.

ARGUMENT

Under the authority of the United States Constitution and the Internal Revenue Code of 1986, as amended, Congress has the power to tax income. U.S. Const amend. XVI; I.R.C. § 61(a). "Gross income," a term of art used throughout the tax code, is taxable unless it fits within an enumerated exclusion or exemption. I.R.C. § 61(a). When crafting these exclusions and exemptions, the government must not favor religion over non-religion nor favor one religion over another religion. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989).

Petitioner in this case is entitled to exempt his rental allowance from his gross income through the parsonage exemption. However, that exemption is unconstitutional. This does not affect Burns's exemption for the year 2017 because the parsonage exemption was still in effect for tax year 2017 when Burns applied for the exemption.

I. Burns Is A Minister Of The Gospel Under § 107(2) Because He Teaches At A Religious Boarding School That Is An Integral Agent Of The Whispering Hills Unitarian Church.

For the general population of taxpayers, section 119 of the tax code provides an exemption from gross income for the "value of any . . . lodging furnished" to the taxpayer that is provided by the employer for the convenience of the employer. I.R.C. § 119. However, this requires an in-depth analysis of the taxpayer's employment and lodging requirements. To avoid excessive government entanglement with religion, "ministers" are accorded some unique tax benefits. MINISTERS AUDIT TECHNIQUES GUIDE, IRS, April 2009, available at https://www.irs.gov/pub/irs-utl/ministers.pdf. Specifically, § 107 of the tax code provides a specific code section for ministers of the gospel. This section states the following:

> In the case of a minister of the gospel, gross income does not include—
>
> (1) the rental value of a home furnished to him as part of his compensation; or
>
> (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home

> and to the extent such allowance does not exceed the fair rental value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities.

I.R.C. § 107. "The taxpayer has the burden to show that [his conduct] is within the provision allowing the deduction." *United States v. Olympic Radio & Television, Inc.*, 349 U.S. 232, 235 (1955).

The Tax Court interprets and applies § 107 using the following three requirements: "(1) [t]he minister must provide services which are ordinarily the duties of a 'minister of the gospel'; (2) the excluded amounts must actually be used to rent or otherwise provide a home; (3) and the rental allowance must be properly designated." *Haimowitz v. Comm'r*, 1997 T.C. 42, at *7 (Jan. 23, 1997) (memorandum opinion).

In general, the government must refrain from excessive entanglement with religion. However, this Court has the power to determine whether or not a taxpayer qualifies as a minister of the gospel. This determination can be made because the Court need not prescribe *who* fits the rule, instead the court need only apply already established law. Here, Burns satisfies the requirements Whispering Hills school is sufficiently integrated with Whispering Hills church.

A. This Court Has The Power To Determine Who Qualifies As A Minister Of The Gospel For Purposes Of § 107(2).

This is not the first time this Court has been asked to evaluate the tasks of an employee for the purposes of determining the status of a potentially religious employee under the law. *See Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 192 (2012) (determining if an employee satisfied the legal requirements of the "ministerial exception" in employment law). This Court in *Hosanna-Tabor* determined that its First Amendment jurisprudence "confirm[s] that it is impermissible for the government to contradict a church's determination of who can act as its ministers." *Id.* at 185. The Court declined to "adopt a rigid

formula for when an employee qualifies as a minister" for the purposes of employment law, but the Court did look into "all the circumstances" of the petitioner's employment in that case. *Id.* at 191.

Both the district court and the appellate court in this case agreed that courts have the power to review a religious employee's status as a minister. R. at 6, 16. This Court holds the same power and can review Burns's job functions and his affiliation with Whispering Hills to determine if he qualifies for the applicable tax exemption.

B. Burns Is A Minister Of The Gospel Because He Not Only Teaches Secular Subjects, But He Teaches Those Subjects *In Accordance* With The Faith And Daily Practices Prescribed By The Church.

A taxpayer need not be "duly ordained, commissioned, or licensed to minister . . . a church" in order to enjoy the tax benefits of being a minister. *Salkov v. Comm'r*, 46 T.C. 190, 197 (1966). To determine if a taxpayer qualifies as a minister, the reviewing body must look to "the tenets and practices of the particular religious body constituting his church or church denomination." Treas. Reg. § 1.1402(c)-5(b)(2)(i). Section 107 provides a non-exhaustive list of ministerial duties: "[1] Performance of sacerdotal functions; [2] Conduct of religious worship; [3] Administration and maintenance of religious organizations and their integral agencies; [4] Performance of teaching and administrative duties at theological seminaries." Treas. Reg. § 1.107-1(a). The intent of the religious institution is also a factor to consider in deciding if a taxpayer is a minister of the gospel. *Haimowitz*, 1997 T.C. at *7 ("Finally, we consider whether the temple considered petitioner its religious leader.").

In general, a "minister" must perform services "in the exercise of his ministry." *Id.* (citing Treas. Reg. § 1.107-1(a)); *see also* Treas. Reg. § 1.1402(c)-5(b)(ii)(2). Specifically, a taxpayer is in the exercise of his ministry in the following circumstance, among others:

> If a minister is performing service for an organization which is operated as an integral agency of a religious organization under the authority of a religious body . . . [then] *all service* performed by the minister in the conduct of religious worship, in the ministration of sacerdotal functions, or in the control, conduct, and maintenance of such organization [is in the exercise of his ministry].

Treas. Reg. § 1.1402(c)-5(b)(2)(ii) (emphasis added).

Burns is a minister under Treas. Reg. § 1.1402(c)-5(b)(2)(ii) because he performs services for Whispering Hills school—which is an integral agency of and under the authority of Whispering Hills church. Therefore, *all* religious worship and sacerdotal functions he performs at Whispering Hills is the exercise of his ministry.

1. Burns And Whispering Hills Have A Sufficiently Close Relationship So As To Satisfy The Requirements Established By Law.

Courts have interpreted § 107(2) and its accompanying regulations in a case-by-case manner. Satisfaction of the requirements relies heavily on the facts of each case. Two cases are particularly important in understanding how courts interpret the minister of the gospel requirement.

First, the D.C. Circuit in *Kirk v. Commissioner*, 425 F.2d 492 (D.C. Cir. 1970), has addressed the issue of whether a taxpayer serving as a director of the Department of Public Affairs for the General Board of Christian Social Concerns of the Methodist Church in the Division of Human Relations and Economic Affairs was a minister. *Id.* It determined that he was not a minister of the gospel because his services "were not sacerdotal in character, nor did they involve the conduct of religious worship." *Id.* at 493. Notably, the Court in *Kirk* recognized that the taxpayer seeking the deduction was not entrusted with "[t]he duty of spreading the gospel, either by sermon or teaching." *Id.* at 495. Instead, the taxpayer in that case was "merely a non-ordained church employee" whose duties were all "of [a] secular nature." *Id.*

Second, and perhaps the most factually analogous case, is a memorandum opinion coming from the United States District Court for the Northern District of Texas. *See Flower v. United*

States, No. CA 4-79-376-E, 1981 U.S. Dist. LEXIS 16758 (N.D. Tex. Nov. 25, 1981). The taxpayer in *Flowers* was a college professor of an undergraduate class on religion at Texas Christian University ("TCU"). *Id.* at *3. The court determined that his duties as a professor did not in any way "differ materially from any other non-religion professor who is not an ordained minister." *Id.* The key issue in *Flowers* was whether TCU was "an integral agency" of the affiliated church, and if so, then the taxpayer was entitled to the parsonage exemption. *Id.* at *9. The Court analyzed Revenue Ruling 70-549 and ultimately held that TCU was *not* an integral agency of the church. The court found it important that the church associated with the school "d[id] not control or manage TCU directly or indirectly." *Id.* at *8 ("In other words, [the church] cannot legally force or dictate that TCU take a particular course of action. The influence of [the church] is limited to suggesting and moral persuasion."). Therefore, the taxpayer in *Flowers* was not entitled to claim the exemption. *Id.* at *16.

But the *Flowers* case and the present case are not without their differences. In *Flowers*, the school, church, and taxpayer were *not* all sufficiently connected, whereas here, Whispering Hills church, school, and Petitioner Burns are much more connected. As a teacher, Burns incorporates the tenets of the faith into his teaching and counseling. Burns is a member of Whispering Hills church, he attends regular worship services with his students, and he hosts a youth ministry for his students which incorporates religious discussions each week. R. at 8. Unlike the taxpayer in *Flowers* whose guidance was no different than that of a secular guidance counselor, Burns *bases* his counseling on the teachings of the Whispering Hills church. R. at 8.

Burns's role at Whispering Hills is not only to teach secular subjects, but to teach those subjects in light of the tenets of the Whispering Hills church. By teaching and counseling students in this manner, Burns performs sacerdotal functions. If Burns merely taught secular subjects from

a secular point of view, he would not have been hired at Whispering Hills. Further, Burns is an integral member of Whispering Hills school, which is an integral agent of Whispering Hills church. Therefore, Burns performs these sacerdotal functions under the control of the Whispering Hills church and for the purpose of promoting the activities of the church. The district court was correct in determining that "[t]here existed a direct link between the goal of Whispering Hills to educate its members and students in the ways of its faith and Burns's daily practices." R. at 9.

2. Under The Relevant Revenue Rulings Issued By The Defendants Themselves, Burns Qualifies As A Minister Of The Gospel.

Though a Revenue Ruling is not the law, it is an opinion by the IRS, and courts must give "some weight" to revenue rulings that are reasonable. *Shell Oil v. United States*, 607 F.2d 924, 929 (5th Cir. 1979). In Revenue Ruling 71-7, the IRS stated that to determine whether or not a faculty member of a college was performing ministerial duties, the reviewing body must determine "(a) whether the college employing him is itself a religious organization under the authority of a religious body constituting a church or church denomination or, (b) if the college is not such a religious organization, whether the college is operated as an integral agency of such a religious organization." Rev. Rul. 71-7.

In general, if a church and an affiliated organization are sufficiently integrated, then the organization's employees can be entitled to the parsonage exemption. Rev. Rul. 70-549 ("The rental allowance of an ordained minister serving on the faculty as a teacher or administrator at a college which is, in practice, operated as an integral agency of the church is excludable from gross income.").

In considering whether a particular school was an "integral agency" of a church, the IRS has considered the following factors:

> (1) whether the religious organization incorporated the institution;
> (2) whether the corporate name of the institution indicates a church

> relationship; (3) whether the religious organization continuously controls, manages, and maintains the institution; (4) whether the trustees or directors of the institution are approved by or must be approved by the religious organization or church; (5) whether trustees or directors may be removed by the religious organization or church; (6) whether annual reports of finances and general operations are required to be made to the religious organization or church; (7) whether the religious organization or church contributes to the support of the institution; and (8) whether, in the event of the dissolution of the institution, its assets would be turned over to the religious organization or church.

Rev. Rul. 72-606. Notably, "[t]he absence of one or more of these characteristics will not necessarily be determinative in a particular case." *Id.*

Even though Whispering Hills school is itself not a religious organization, the school *is* an integral agency of such a religious organization—namely Whispering Hills church. Factors one, two, three, and seven all favor the integration of the church and school. For factor one, the district court inferred that a corporate relationship existed between the two. R. at 8. The school and church indeed share the same name—satisfying factor two. The church exercises sufficient control under factor three by requiring students to attend religious services and by requiring the incorporation of the tenets of the church into the academic curriculum. R. at 8. The seventh factor is also satisfied because the school sits on church property, and the church supports the reputation of its school within its congregation. R. at 8.

The remaining factors are not determinative. The district court correctly recognized that the remaining factors are difficult to analyze without a deeper dive into the relationship between Whispering Hills church and school. R. at. 8 ("For example, we do not know whether the church exercises any control over the operations of the school board or, if it does, to what extent. We also do not know whether any trustees, directors, or board members may be removed by the church.").

Even if this Court goes on to determine that § 107(2) is unconstitutional, Burns is still entitled to deduct his rental allowance from his gross income for tax year 2017. Therefore, a ruling

that § 107(2) is unconstitutional should not affect the tax liability in *this* case because Burns was not sufficiently notified of the code section's unconstitutionality. This decision should not be retroactive. Thus, the interests of Burns and CARC should not be considered mutually exclusive.

II. The Parsonage Exemption Violates the Establishment Clause of the First Amendment Because It Promotes a Tax Benefit Available Only to Religious Ministers of the Gospel.

The parsonage exemption is unconstitutional because allowing ministers of the gospel to deduct a housing allowance from their gross income favors religious taxpayers. The Establishment Clause of the First Amendment provides "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. Therefore, constitutional challenges with a religious nexus typically trigger strict scrutiny; however, Establishment Clause cases, because of their malleability, require "careful judicial scrutiny." *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984). Such flexibility is representative of the two different—and at times conflicting—approaches routinely applied in Establishment Clause cases. *Compare Am. Legion v. Humanist Ass'n*, 139 S. Ct. 2067 (2019) (holding a cross displayed on a state's capitol grounds did not violate the Establishment Clause), *and McGowan v. Maryland*, 366 U.S. 420 (1961) (holding Maryland's law prohibiting the sale of certain goods on Sunday did not violate the Establishment Clause), *with Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (holding a state sale and use tax exemption for religious books and periodicals violated the Establishment Clause), *and Engel v. Vitale*, 370 U.S. 421 (1962) (holding a school-sponsored nondenominational prayer violated the Establishment Clause).

The first of these two approaches, developed in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is a three-prong test that distinguishes between permissible and impermissible government interaction with religion. The second approach is more of a historical analysis that gauges the degree of government interaction with religion. No matter the approach applied by this Court in this case, § 107(2) violates the Establishment Clause of the First Amendment.

A. The Parsonage Exemption Is Unconstitutional Because It Fails The *Lemon* Test.

"[G]overnment is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government." *Lemon*, 403 U.S. at 625. In *Lemon*, this Court struck down similar Pennsylvania and Rhode Island laws that provided state aid to religious educational institutions. *Id.* at 602. This Court reasoned that "religion must be a private matter for the individual, the family, and the institutions of private choice" and while some government entanglement with religion is *at times* inevitable, "lines must be drawn." *Id.* at 625. To pass constitutional muster under the *Lemon* test, a law must (1) have a secular legislative purpose, (2) not have the primary effect of advancing or inhibiting religion, and (3) not result in excessive government entanglement with religion. *Id.* Here, the parsonage exemption fails both the second and third prongs of the *Lemon* test.

1. Even Though § 107(2) May Have A Secular Legislative Purpose Under The First Prong, That Alone Is Not Determinative.

According to the Eighteenth Circuit, § 107(2) furthers this country's long and storied history of the separation of church and state. R. at 23. The parsonage exemption has been through many congressional amendments, and its categorical approach to defining ministers of the gospel has remained intact. *See* I.R.C. § 107(2). However, there is legislative history to suggest the purpose behind the exemption was the advancement of religion. Adam Chodorow, *The Parsonage Exemption*, 51 U.C. DAVIS L. REV. 849 (2018) (outlining four motivations behind § 107(2)'s enactment: (1) to support ministers in the fight against communism, (2) to subsidize ministers' low salaries, (3) to address perceived discrimination against denominations that did not build parsonages, and (4) to encourage equity between rich and poor churches).

With discrepancies in both court opinions and in legislative history, this Court need not engage in a guessing game about the true purpose behind § 107(2)—much less decide this case

based upon those assumptions. Such speculation is unnecessary because the Establishment Clause also requires the consideration of the practical consequences of legislation. *Lemon*, 403 U.S. at 625.

2. Section 107(2) Fails The Second Prong Of The *Lemon* Test Because Its Primary Effect Is The Advancement Of Religion.

The parsonage exemption provides a more flexible tax deduction for ministers than other provisions provide to similarly situated secular employees. But the Establishment Clause requires the government to take a neutral stance towards religion when passing laws or effectuating policy. *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 394 (1990). Therefore, it follows that "tax schemes with exemptions may be discriminatory." *CSX Transp., Inc. v. Ala. Dept. of Revenue*, 562 U.S. 277, 287–89 (2011). The "government may not be overtly hostile to religion *but also* it may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general." *Texas Monthly, Inc.*, 489 at 9 (emphasis added).

In *Texas Monthly*, the secular publication for which the case is named challenged the constitutionality of a Texas sales tax exemption that was available only to religious publications. *Id.* at 5. This Court held the Texas tax code provision unconstitutional under the Establishment Clause because it was a government "subsidy that affects nonqualifying taxpayers, forcing them to become 'indirect and vicarious donors.'" *Id.* at 14 (quoting *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983)). *But see Walz v. Tax Comm'n. of New York*, 397 U.S. 664 (1970) (holding that a property tax exemption for religious organizations did not violate the Establishment Clause). However, when the government provides a benefit only to religious organizations—without a secular justification or alternative—that can only be seen as an endorsement of the religious organization. *Id.* For example:

> [I]f Texas sought to promote reflection and discussion about questions of ultimate value and the contours of a good or meaningful

> life, then a tax exemption would have been available to an extended range of associations whose publications were substantially devoted to such matters; the exemption could not have been reserved for publications dealing solely with religious issues, let alone restricted to publications advocating rather than criticizing religious belief or activity, without signaling an endorsement of religion that is offensive to the principles informing the Establishment Clause.

Id. at 16. But Texas chose otherwise, and when the state restricted the tax exemption to religious publications, it crossed the line that *must* be drawn between the government and religion. *Id.* The Establishment Clause, in that case, required a secular justification or an alternative and equal exemption to secular taxpayers. *Id.* at 17. Texas provided neither. *Id.* Accordingly, the provision violated the Establishment Clause. *Id.*

Those same constitutional principles were applied to uphold a city's special use designation that prohibited a church from building in their desired location. *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 976 (7th Cir. 2006). In *Vision Church*, the second prong of the *Lemon* test was applied by asking "whether, irrespective of the government's actual *purpose*, the practice under review *in fact* conveys a message of endorsement or disapproval." *Id.* at 993 (quoting *Books v. City of Elkhart*, 235 F.3d 292, 302 (7th Cir.2000)) (emphasis added). The court rested its decision on that fact that the zoning ordinance in question applied to all applicants for annexation, not just churches specifically. *Id.* Thus, it did not violate the Establishment Clause. *Id.*

So, whether or not this Court finds the parsonage exemption has a secular legislative purpose under the first prong, the result remains the same. Here, the parsonage exemption cannot get past the second prong of the *Lemon* test because it promotes religion by singling out ministers of the gospel for a tax exemption. Like in *Texas Monthly*, where this Court found a tax exemption promoted religion, § 107(2) is a government sponsored, taxpayer funded subsidy for religious institutions and ministers of the gospel. The nearest secular alternative in the tax code is § 119. But that housing allowance exemption comes with burdensome conditions. It requires secular

employees to prove that the housing is (1) in-kind, (2) on-site, (3) required, and (4) for the benefit of the employer. I.R.C. § 119. In contrast, the parsonage exemption only requires the housing allowance to be reasonable in terms of expenses, resulting in a more accessible exemption for religious ministers. I.R.C. § 107(2). In fact—the difference in the two tax code provisions is so significant that if current ministers of the gospel were subject to § 119, eighty-seven percent would not qualify. Chodorow, *supra*, at 855.

As demonstrated in *Vision Church*, the government's intent in enacting a law is not alone determinative. *Vision Church*, 235 F.3d at 995. What matters is whether in practice the law promotes or discriminates against religion. *Id.* The government is equally prohibited from endorsing one religion or denomination over another as it is from endorsing religion over nonreligion. *Texas Monthly*, 489 at 9. It is unavoidable to conclude that a more generous tax deduction that is available to ministers of the gospel, but not secular employees with the same job requirements, does not favor religion. The Eighteenth Circuit erred when it reversed the Touroville District Court's holding that found the parsonage exemption favored, promoted, and endorsed religion. R. at 13. Further, the exemption favors some religions over others. Specifically, the exemption favors religions with a history of building parsonages and using the ministers' homes for religious purposes. Chodorow, *supra*, at 852. Thus, the parsonage exemption fails the second prong because it favors, promotes, and endorses religious taxpayers.

A law needs to fail only one prong to be struck down, but § 107(2) also fails the third prong of the *Lemon* test. *Texas Monthly, Inc.*, 489 at 14. So, this Court has its choice of how it wants to invalidate § 107(2).

3. Section 107(2) Fails The Third Prong Because It Results In Excessive Government Entanglement With Religion.

Excessive entanglement occurs when the government intrusively participates in church administration. *Vision Church*, 235 F.3d at 995. When determining whether excessive entanglement occurred, this Court must "examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Lemon*, 403 U.S. at 615. The parsonage exemption treads too heavily on the administration of churches because the government pays for the churches' compensation of ministers. The subsidization of church payroll and the substantial alleviation of a minister of the gospel's tax burden is the precise excessive government entanglement prohibited by the Establishment Clause.

Here, the parsonage exemption cloaks itself in broad language but cannot escape the significant role it plays in church administration. How churches attract, keep, and pay their ministers as well as how churches operate and use property is at least somewhat dependent upon the parsonage exemption. The *only* institutions that benefit from § 107(2) are religious churches and schools. The aid provided by the state favors religious taxpayers by placing more burdensome restrictions on similarly situated secular employees. The resulting relationship between the government and religious taxpayers can only be viewed as preference. The accommodation is provided to one taxpayer but not the other, and it depicts an impermissibly close integration of church and state.

The categorical language of §107(2) is reined in only by a reasonableness requirement. *See* I.R.C. § 107(2). When courts are tasked with determining whether a minister of the gospel's housing allowance is reasonable, that is a fact-intensive inquiry. Yes, there are neutral benchmarks that can be applied, like cost of living and cost per square foot, but there are also necessary

individualistic metrics, like the purpose and use of the property and the job duties of that specific minister. The court will then make factual determinations about the minister's qualification based on the role the minister plays in the church and the use of the minister's property. The Establishment Clause clearly prevents courts from engaging in that type of excessive entanglement with religion. Thus, the parsonage exemption also violates the third prong of the *Lemon* test.

If this Court chooses to conclusively abandon and overrule *Lemon*, the historical analysis approach also invalidates § 107(2).

B. The Parsonage Exemption Is Unconstitutional Because It Fails The Historical Significance Test.

A successful Establishment Clause challenge must show that the law in question "shares the characteristics of an establishment as understood at the founding." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2072 (2019). In *American Legion*, a plurality of this Court rejected the *Lemon* test; it instead asked whether the government had impermissibly established religion. *Id.* (holding a cross on state capitol grounds memorializing World War I veterans did not violate the Establishment Clause because the government should not regulate religious or partially religious speech). It is inconsistent with the nation's "history and traditions" for courts "to act as supervisors and censors of religious speech." *Id.*

American Legion is an example of this Court's trend to continue applying the historical significance test developed in *Town of Greece v. Galloway*, 572 U.S. 565 (2014). In that case, this Court held that opening a legislative session with a prayer did not violate the Establishment Clause. *Id.* at 591 (relying on *Marsh v. Chambers*, 463 U.S. 783 (1983), and the long tradition of using a prayer as opening remarks to justify the practice); *see also Hosanna-Tabor*, 565 U.S. 171 (holding discrimination laws do not apply to religious organizations' selection of religious leaders). Along those lines, the Seventh Circuit recently held the parsonage exemption passed the historical

significance test. *Gaylor v. Mnuchin*, 919 F. 3d 420, 436 (7th Cir. 2019). However, certiorari was not sought in that case, preventing a definitive and controlling rule.

Here, this case reflects the opposite side of the line that must be drawn by the historical significance test. Unlike *American Legion*, where the government had an interest in not regulating religious symbolism, here, the parsonage exemption actively favors and benefits some religious taxpayers. Further, in *Gaylor*, the Seventh Circuit's justification relied *solely* on the tradition of providing the ministers of the gospel a housing allowance exemption. But the discussion is void of any mention of the need for the separation of church and state. *See Gaylor*, 919 F. 3d 420. It also fails to mention the legislative history that reasonably suggests religious motivations played a role in the enactment of the parsonage exemption. Chodorow, *supra*, at 858–59.

The historical significance test requires consideration of a holistic perspective and analysis. *Town of Greece*, 572 U.S. at 609–10. Section 107(2) might have been around for a long time, but so has the valued tradition of the separation of church and state. When all competing interests are balanced, the parsonage exemption cannot survive because it provides too great of a benefit to religious taxpayers. Its broad language does nothing to resurrect it. Such language does not preclude a fact-intensive inquiry, nor does it discount the *effect* and *perception* of the government endorsement of religion that is attached to § 107(2). The parsonage exemption crosses a line that our Constitution drew 245 years ago. Thus, § 107(2) also fails the historical significance test.

CONCLUSION

This Court should REVERSE the decision of the court of appeals. Because Burns performs sacerdotal duties, he is a minister of the gospel and therefore entitled to exclude his rental allowance from his gross income through § 107(2). Further, the parsonage exemption violates the Establishment Clause because it unconstitutionally favors religion.

Respectfully submitted,

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March 12, 2021

CERTIFICATE OF SERVICE

Counsel certifies the delivery of a copy of this document to the Touro Moot Court Competition for the Respondents, the Internal Revenue Service and Commissioner of Taxation. The copy was delivered via email March 12, 2021.

_/s/ Team #9_____

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