NO. 20-199

IN THE

UNITED STATES SUPREME COURT

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 RESPONDENT

TEAM
#16

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QUESTIONS PRESENTED

I. Whether a teacher qualifies as a minister of the gospel under 26 U.S.C. § 107(2) when that teacher does not teach religion or perform sacerdotal duties.

II. Whether 26 U.S.C. § 107(2) violates the Establishment Clause of the First Amendment.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals, reversing the district court's order denying the Respondent's motion for summary judgment was entered on June 9, 2020. (R. at 15). The Petition for Writ of Certiorari was granted on July 1, 2020. (R. at 23). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. The Present Controversy and Proceedings Below

Petitioner John Burns is a teacher employed at the Whispering Hills Academy ("Whispering Hills" or the "school"), a religious boarding school operated by the Whispering Hills Unitarian Church. (R. at 3). Petitioner Respondent, Citizens Against Religious Convictions, Inc. (CARC) is a local organization dedicated to advocating against laws that favor religion over non-religion. (R. at 4).

Mr. Burns began this action against the respondents in the United States District Court for the Southern District of Touroville, claiming that he is a "minister of the gospel" for the purposes of section 107 (2) of the Internal Revenue Code and thus should not have been disqualified from exempting from his gross income the rental allowance provided to him by his employer on his 2017 tax return. Upon hearing about Burn's pending lawsuit, CARC filed a motion to intervene with the district court, asserting its right to do so and establishing standing to claim that section 107(2) is unconstitutional because the statute favors religion over non-religion. (R. at 4). The District Court denied respondent's motion for summary judgement pursuant to Rule 56 of the Federal Rules of Civil Procedure on both the petitioner and petitioner intervenor's claims. Fed. R. Civ. P. 56. (R. at 24). It held that Burns is a "minister of the gospel" because he performs "various sacerdotal duties" and is entitled to claim the parsonage exemption under § 107(2). (R. at 9). The court further held that 26 U.S.C. § 107(2) is unconstitutional because it violates the Establishment Clause of the First Amendment. (R. at 14).

The Eighteenth Circuit reversed the court's denial of the respondent's motion for summary judgment, holding that the petitioner is not a "minister of the gospel,' because "his

responsibilities were non-sacerdotal…" and "there is insufficient factual evidence in the record to support a finding that the church and school…are integrated. (R. at 20). It also that 26 U.S.C. § 107(2) satisfies the *Lemon* test and thereby is not unconstitutional. (R. at 23).The Eighteenth Circuit then granted the Respondent's motion for summary judgment pursuant to Rule 56 in its entirety. (R. at 24).

B. Statutory and Regulatory Background

Congress created the modern income tax in 1913 and, shortly thereafter, began implementing the convenience of the employer doctrine. O.D. 265, 1919-1 C.B. 71. The convenience of the employer doctrine reasons that when an employer requires an employee to live on the premises of the business or nearby for the employer's convenience – namely that the employee can report to the job quickly or take care of the premises – the value of the housing should not be included in taxable income. *See* 26 C.F.R. §1.119-1. The doctrine's public policy underpinning is that employees should not be taxed under certain situations where the employer provided them with housing including when the housing has been furnished so that the employee can do their job properly rather than for a compensatory purpose. *Commissioner of Internal Revenue v. Kowalski,* 434 U.S. 77, 84-90, (1977*)*. The convenience of the employer doctrine has been applied to seamen and hospital workers that are expected to be on call around the clock. *Id* at 84, 86.

First, Congress applied this doctrine to sailors, to those working in camps, then to hospital workers who were on 24-hour call. *Id.* at 84, 86. The exemption covers that portion of the allowance that is actually used by the taxpayer clergyperson to rent and maintain a home and such allowance must not exceed the fair market value of the home rental. *See* IRS Pub. 525, *Taxable and Nontaxable Income.* As soon as the Treasury interpreted the Tax Code to require

ministers to include the value of their housing they received in their income, Congress acted to express their intention by passing § 107. Initially, § 107 only allowed ministers to exempt from their income the value of housing provided by the religious but did not allow for the religious organization to merely give the minister an allowance meant for housing. "[L]imitting the benefit to in-kind housing meant that certain denominations with a tradition of building parsonages, such as Catholics, were able to offer tax-free housing, while others that did not build parsonages, including most protestant denominations, could not." Adam Chodorow, *The Parsonage Exception*, 51 U.C. Davis L. Rev. 849, 857 (2018). Congress created more equity in the Tax Code between religions by allowing the portion of income spent on housing to be exempted, putting all other ministers on the same footing as Catholic ministers.

When Congress overhauled the Tax Code in 1954, they altered the convenience of the employer doctrine for most employees through 26 U.S.C. § 119 which required an employee's housing, if exempt from taxable income, to be in-kind, on-site, required by the employer, and for the employer's convenience. § 119. Congress left § 107 unchanged, declining to extend these heightened requirements to ministers. *Id.* The reason for this congressional determination was, as usual, very mixed. Some legislators were motivated by fears of communism while others were concerned with inequities between different religions, such as between Catholicism and other protestant religions. The House Report, however, reflects the latter, secular purpose: "[The] committee has removed the discrimination in existing law by providing that the present exclusion[, § 107,] is to apply to rental allowances paid to ministers to the extent used by them to rent or provide a home." H.R. Rep. No. 83-1337, at 15 (1954). Once again, Congress reaffirmed its commitment to religious equity when, in 1984, the Treasury Department proposed eliminating the exemption, but Congress chose to retain it. Adam Chodorow, *supra*, at 859 (citing US Dep't

of the Treasury, 1 *Tax Reform for Fairness, Simplicity, and Economic Growth: The Treasury Dep't Report to the President* 73 (1984)).

As currently fashioned, § 107 allows for the government to avoid the pervasive surveillance of ministers and their religious organizations which are required of most secular employees. This congressional determination decreases government entanglement with religion by reducing the frequency of surveillance and tax-related conflicts. The flexibility to exempt cash allowances used for housing expenses is not exclusively offered to religious ministers; Other types of employees, too, avoid these heightened restrictions such as citizens living abroad, government employees abroad, and military members. 26 U.S.C. § 912; 26 U.S.C § 134; 26 U.S.C. § 911; *See* Adam Chodorow, *The Parsonage Exception*, 51 U.C. Davis L. Rec. 849, 854 (2018).

26 U.S.C. § 107 provides:

> "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."

C. Factual Background

Mr. Burns is employed as a teacher at Whispering Hills Academy located in upstate Tuoroville. (R. at 3). The school is operated by Whispering Hills Unitarian Church (the "church") which is adjacent to it. Mr. Burns was hired by the school to teach eleventh and twelfth grade English, Renaissance Literature, and various foreign languages including French, Italian, and Latin. *Id.* He serves as one of the school's several guidance counselors and provides

students with personal and educational counseling. He combines commonly held teachings of the Unitarian faith with secular mental and behavioral health therapy techniques. Although he has received certain accolades from the school for his personally created “Prayer After Hours" after school club, the school has not formally recognized him as a minister for this work. *Id.*

Burns is not a trained or ordained member of the clergy. (R. at 5). Whispering Hills also does not hold Burns out to be a minister and he is not assigned to a congregation. (R. at 3). Some of Burn’s activities as a teacher at the school resemble ministerial work, but he does not have any ministerial duties formally conferred on him by the church or the school beyond teaching in harmony with the precepts of the Unitarian faith. *Id.* A significant portion of the student body cannot go home on weekends. *Id.* Mr. Burns frequently organizes lunches, provides snacks and facilitates social gatherings for these students which typically take place after Sunday Services at the on-campus church. (R. at 3).

Mr. Burns began his employment at the school in 2016. *Id.* At that time, he moved to a home five minutes away from the school to save on his commute time which had been over an hour before. (R. at 4). The school provided him with a $2,500 moving credit and also agreed that an additional $2,100 a month would be included in his monthly salary as a rental allowance. *Id.* The $2,100 figure was inclusive of the fair rental value of the home plus expected utilities costs. *Id.* A co-worker, Pastor Nick, suggested that Burn’s claim exemption from his gross income for this rental allowance under § 107(2), the ‘parsonage exemption,’ because Burns “held daily prayer sessions with his after school club, and provided spiritual counseling to the students.” *Id.* Burns took the suggestion and claimed the exemption on his 2017 tax return. The IRS and Commissioner of Taxation sent a denial letter to Burns in the summer of 2018 informing him that he was disqualified from claiming the exemption under § 107(2) because he could not prove

that he was "in fact, a 'minister of the gospel' and assessed him a deficiency in income for the value of said rental allowance. *Id.*

Upon learning of the assessed deficiency, Burns filed suit against the I.R.S. and Commissioner of Taxation in the District Court for the Southern District of Touroville challenging its determination that he was not a "minister of the gospel" and thereby ineligible to claim the parsonage exemption. *Id.* CARC learned of the lawsuit and filed a petition to intervene asserting that its right to intervene and that it had standing to challenge the constitutionality of the exemption Burns had attempted to claim. *Id.* CARC argues that §107(2) violates the Establishment Clause of the First Amendment because it favors employees of religious institutions over the employees of non-religious institutions. *Id*

SUMMARY OF THE ARGUMENT

The Court of Appeals was correct in overturning the District Court's denial of summary judgment for Respondents for the following reasons:

First, Burns does not qualify as a minister of the gospel for the purposes of §107(2) because applying the plain language of the statute, Treasury Regulations, and well-established jurisprudence, demonstrates that, as a teacher that does not teach religion or perform sacerdotal duties, he is not a minister of the gospel. If the plain language is not found to be plain and unambiguous, this Court has a wealth of legislative and administrative jurisprudence upon which to rely to determine who is qualified to enjoy the parsonage exemption. First, given that the regulations promulgated pursuant to § 107*,* §1.107-1(a) and 1.1402(c)-5, are reasonable interpretations of the Code, the Court should apply these rules to Burns' case. Second, if the Court chooses to look beyond the plain text of the Code and Regulations pursuant thereto, the Court has the option of utilizing a variety of tests developed by the lower courts, Tax Court and in Treasury revenue rulings. Finally, no matter which test it chooses to apply to the facts, even viewed in a light most favorable to the petitioner, a teacher in Burn's position who does not teach religion or perform sacerdotal duties will not qualify for the exemption under § 107(2). The Court has an opportunity to endorse a plain language reading of § 107 and the rules for defining "minister of the gospel" promulgated in the Treasury regulations.

Second, § 107(2) is constitutional because it passes both the *Lemon* test and the *Town of Greece* test. The statute at interest satisfies the *Lemon* test because, first, it is a portion of a broad and neutral tax scheme with the secular purposes of implementing the convenience of the employer doctrine fairly to all employees while minimizing government entanglement with

religion. Additionally, § 107(2) does not have the primary effect of advancing religion because the statute merely allows greater flexibility to ministers of the gospel and does not involve the government itself in forwarding any particular religion. Especially given the government's greater flexibility in advancing religion, as compared to inhibiting religion, §107(2) satisfies the second prong of the *Lemon* test. The statute likewise does not violate the third prong of the *Lemon* test: § 107 is tailored to minimize government entanglement with religion. If struck down, the IRS would need to utilize pervasive and intrusive surveillance in order to confirm a religious minister's home meets all the requirements of the generally applicable convenience of the employer statute.

This statute is also consistent with the United States' historical understanding of government-religion interactions, which is the test laid out in *Town of Greece*. Since the beginning of our country, the policy of avoiding the implementation of taxes on religious property and housing has never been deemed by this Court to be in violation of the Establishment Clause.

Thus, this Court should find in favor of the Respondents and uphold the decision of the Court of Appeals.

ARGUMENT

I. Summary Judgment and Standard of Review

Summary judgment is appropriate when there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. *Bose Corp. v. Consumers Union of U.S., Inc*., 466 U.S. 485, 492 (1984). Judgments as a matter of law are reviewed de novo by this Court. In determining whether there is any genuine dispute of material fact, the court looks at all facts in

the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). When there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, a motion summary judgment is granted. Fed. Rule Civ. Proc. 56(a).

II. Burns is not a minister of the gospel for the purposes of § 107.

A. This Court should give deference to Congress's determinations regarding § 107(2).

This Court should be directed by the plain language of § 107(2) and the Treasury's regulatory definitions and decline to expand court the definition of a § 107 minister of the gospel to include a teacher in Burn's position who does not teach religion or perform sacerdotal duties. This Court should apply the well-established deference to legislative bodies in tax matters. As dictated by *Madden v. Kentucky*, this Court defers to legislative bodies definitions and classifications. *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). Legislative bodies are best equipped to fit "tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden." *Id.* This principle is supported by the findings in *Regan v. Taxation with Representation*, which also recognized the grant to legislative bodies of a broad license to create classifications and distinctions in tax legislation. *Regan v. Taxation with Representation*, 461 U.S. 540, 547 (1983). These classifications are upheld if there exists a "rational relation" to a legitimate governmental purpose. *Id*.

The government has a compelling obligation to remain far removed from the inner workings of religious institutions. (R. at 5). However, as the District and Circuit Court noted, this Court's holding in *Hosanna-Tabor Evangelical Lutheran Church & Sch. V. EEOC* confirms that courts can make factual determinations about the status of a religious employee based on the job functions they were hired to perform, 565 U.S. 171, 190 (2012). There is a difference between

filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp.* v. *Higginbotham,* 436 U.S. 618, 625 (1978).

When the statute's language is plain and unambiguous, it is well established that this Court must enforce it according to its terms. See, *e.g., Dodd* v. *United States*, 545 U.S. 353 (2005). § 107 of the Code uses the word "minister" rather than a broader term like "employees" which would cover any taxpayer associated with the operation of a religious institution. The word "minister" is defined by Webster's Dictionary as "[o]ne duly authorized or licensed to conduct Christian worship, preach the gospel, administer the sacraments, etc.; especially a pastor; a clergyman." Webster's New Dictionary (2ed. 1960.) A teacher with Burns' duties does not fit that definition because he is not duly authorized or licensed. The petitioner's interpretation of the word "minister" is overly broad and constitutes a rewriting of the rules Congress has affirmatively and specifically enacted. A plain reading of the statute forecloses the broad definition of "minister" the Petitioner requests. The Court should not "soften the import of Congress' chosen words even if [the Court] believe[s] the words lead to a harsh outcome is longstanding." *Lamie v. United States Tr.,* 540 U.S. 526, 538, (2004). The Court should enforce § 107 according to its terms and find that Burns is not a "minister of the gospel" based on the plain and unambiguous language.

B. This Court should follow the Treasury Regulations and rule that Burns is not a "minister of the gospel."

As the binding regulations that the Treasury uses to interpret and give effect to the Code, the regulations have the force of law until they are overturned. *See Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44 (2011). The Code explicitly authorizes the Treasury to promulgate rules, after notice and comment pursuant to I.R.C. § 7805(a). I.R.C § 107 did not

define “minister of the gospel” or address teachers who do not teach religion or perform sacerdotal duties. Treas. Reg. § 1.107-1(a). However, the Treasury defined minister in the regulations promulgated pursuant to § 107 of the Code after notice and comment which indicates that *Chevron* provides the appropriate framework. *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 56 (2011) (stating “our decision in Chevron apply with full force in the tax context.”). Step one of the *Chevron* framework, is to ask whether Congress has “directly addressed the precise question at issue.” C*hevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-843 (1984). Congress did not define “minister of the gospel” or address teachers who do not teach religion or perform sacerdotal duties I.R.C § 107 satisfying step one. Under step two of *Chevron*, the court may not disturb an agency rule unless it is “arbitrary or capricious in substance, or manifestly contrary to the statute." *Household Credit Services, Inc.* v. *Pfennig*, 541 U.S. 232, 242 (2004) (internal quotations omitted). According to the Regulations, “examples of specific services . . . which will be considered duties of a minister for purposes of§ 107 include the performance of sacerdotal functions, the conduct of religious worship, the administration and maintenance of religious organizations and their integral agencies, and the performance of teaching and administrative duties at theological seminaries.” Treas. Reg. §1.107-1(a). Treas. Reg. § 1.107-1(a) further provides that in general the rules in Treas. Reg. § 1.1402(c)-5 determine whether “a taxpayer received rental allowance as remuneration for services which are ordinarily the duties of a minister.” Treas. Reg. § 1.107-1(a). Treas. Reg. § 1.1402(c)-5(b)(2) provides that the services performed by a minister in the exercise of his ministry include: the administration of sacerdotal functions and the conduct of religious worship, and the control, conduct, and maintenance of religious organizations (including the religious boards, societies, and other integral agencies of such organizations), under the authority of a religious body

constituting a church or church denomination. The quintessential question is whether the claimant is attempting to claim an exemption for "services performed by a minister [that] are performed in the exercise of his ministry." 26 C.F.R. §1.1402(c)-5(b)(2). The Regulations under §1.107-1(a) and 1.1402(c)-5 are both reasonable and valid interpretations of § 107 of the Code and should be applied by the Court to answer the question at bar. Focusing on the specific duties of a minister reasonably distinguishes between general employees who work for religious institutions and ministers who direct those religious institutions and the followers of that religion. The rules promulgated by the Treasury reasonably avoid litigation and uncertainty under a case-by-case approach and that taxing teachers who are not ordained and perform no sacerdotal duties prevents a deviation from the "convenience of the employer" doctrine.

Without being an ordained minister, Burns cannot enjoy the exemption. By affirming the appellate court's ruling, this Court will demonstrate its recognition of the standard the Treasury has sought to apply through the regulations promulgated pursuant to § 107(2). Further, the holding would be commensurate with § 107(2)'s 'convenience of the employer' doctrinal underpinning. This standard would prevent abuse of the parsonage exemption by non-qualifying individuals and would create clarity for taxpayers that have an employment relationship to a religious institution and receive a rental allowance pursuant to that employment relationship.

C. The taxpayer must be an individual who is duly ordained, commissioned or licensed as a minister of a church in order to enjoy the § 107(2) exemption.

Treas. Reg. § 1.1402(c)-5 specifically applies to "a duly ordained, commissioned, or licensed minister of a church." Failing to meet the requirement of being an "ordained, commissioned, or licensed minister" has resulted in the denial of the § 107(2) exemption for many taxpayers. *See e.g. Good v. Commissioner of Internal Revenue,* T.C. Memo 2012-323, 104

T.C.M. (CCH) 595 (T.C. 2012). A significant number of courts have agreed that the test from *Knight v. Commissioner of Internal Revenue* identifies all the relevant factors sufficiently to determine whether a taxpayer is a § 107 minister of the gospel. 92 T.C. 199, 205 (1989); *See, e.g., Freedom from Religion Found., Inc. v. Lew*, 983 F. Supp. 2d 1051, 1057 (W.D. Wis. 2013); *Haimowitz v. Commissioner*, Docket No. 11985-95., 1997 Tax Ct. Memo LEXIS 42, at *13 (T.C. Jan. 23, 1997). The five-factor test developed in *Knight* to determine whether a taxpayer's duties are recognized as those of a minister examines whether the individual (1) administers sacraments; (2) conducts religious worship; (3) is responsible for management duties in a local church or religious denomination; (4) is ordained, commissioned, or licensed; and (5) is considered a religious leader by the church or denomination, *Knight v. Commissioner of Internal Revenue,* 92 T.C. 199, 205 (1989). However, only the fourth factor must be present for an individual to qualify for the exemption under § 107(2). *Id.* The requirement of the fourth factor is due to the regulations plainly stating that a minister is an individual who is duly ordained, commissioned or licensed as a minister of a church. Treas. Reg § 1.107-1(a) (making reference to Treas. Reg. §1.1402(c)-(5)(a)(2)). Burns arguably does not satisfy any of the five factors but definitely does not satisfy the fourth factor in the *Knight* and thus should not be able to claim the exemption.

D. Burns is neither ordained as a Unitarian Minister nor recognized by the Whispering Hills School or Church as a minister.

The Appellate Court correctly relied on the Tax Court's ruling in *Kirk v. Commissioner* to find that Burns was not a "minister of the gospel." (R. at 17). *Kirk v. Commissioner*, 425 F.2d 492, 495 (D.C. Cir. 1970). In that case, the appellant was not a minister of the gospel because he was 1) not an ordained minister, 2) no sacerdotal functions were "formally conferred upon him" and 3) "no congregation or other body of believers was committed to his charge." *Id.* The Tax

Court in *Kirk*'s decision that the appellant was not a minister of the gospel was founded upon the principle that defining the taxpayer's role could not be limited to whether he performed *any* ministerial duties but must be inclusive of whether he was *actually a minister* that was recognized by the religious institution that employed him. *Id.* at 493. The court in *Kirk* laid out several ways that religious institutions demonstrate recognition of an individual as a minister. They include licensing, certification of ordination or a formal commission of duty to spread the gospel. *Id.* at 495. Burns has failed to provide evidence of his employer or the Unitarian Church conveying any of these means of formal recognition upon him whether by licensing, ordination or otherwise. (R. at 3-4). Taxpayers who perform duties that bear similarities to those performed by ministers but are not ordained, commissioned or licensed and claim the § 107 exemption have been routinely denied. *Kirk v. Commissioner*, 425 F.2d 492 (D.C. Cir. 1970); *See also Lawrence v. Commissioner,* 50 T.C. 494 (1968); Rev. Rul. 59-270. Thus, Burns is not entitled to claim the § 107(2) exemption.

E. No congregation or other body of believers is committed to Burns's charge.

The only "congregation" or "body of believers" that could be said to be committed to Burns' charge are his students. Teachers at seminaries can qualify for the exemption pursuant to the regulations, but the students are not seminarians nor is the school a seminary, they are high school students receiving language education and guidance counseling services. Consistent with convenience of the employer doctrine, the regulations seek to ensure that the work being performed by the minister of the church is for the benefit of a church. Being assigned to a congregation demonstrates that the minister is performing the function of leading a group of religious believers in the practice of faith which is the essential purpose of a church. Simply put,

the students at the school within his class are not a congregation and they have not been assigned to Burns by the church.

A taxpayer's employer must be under the authority of a religious body constituting a church or church denomination to qualify for the parsonage exemption. Treas. Reg. 1.1402(c)-5. The Treasury has issued numerous revenue rulings addressing questions about who qualified as a minister of the gospel. The District Court did not err in following *Flowers* by relying on Rev. Rul. 70-549 and Rev. Rul. 72-606 in its opinion. Rather, as the appellate court opined, it erred by failing to apply all of the factors listed in these two rulings. The 1970 ruling was based on a church which operated and controlled (directly or indirectly) a school and therefore was integrated with it. The I.R.S. accepted that any teacher or board members involved with the school control would be entitled to the exemption. Rev. Rul. 70-549, 1970-2 C.B. 16. The revenue rulings' essential goal in listing these factors was to direct taxpayers to establish an agency relationship between the church and the taxpayer's employer. Rev. Rule. 1970-2 C.B. 16.

Burns was not entitled to an exemption under § 107 as interpreted by Treas. Reg. 1.1402(c)-5. The Appellate Court aptly acknowledged that the District Court made impermissible inferences related to the relationship between the school and the church. (R. at 20). These assumptions by the District Court bolstered its thin claim that a teacher situated as Burns is qualified for the parsonage exemption. *Id.* As the burden is on the Plaintiff to show that he is entitled to the exemption, his failure to provide sufficient evidence should not have been rewarded with suppositions favorable to the petitioner about the control that the church exerted over school. Even the trial court admitted that it "did not know whether the church exercises any control over the operations of the school board, or if it does to what extent...whether any trustees, directors or board members [of the school] may be removed by the church." (R. at 8).

Burns's duties being integral to the school is not dispositive for those duties being per se integral to the church. The Petitioner has not met the burden of demonstrating that the school itself is an integral agency of the church.

F. In order for the duties of the "minister of the gospel" to be integral to the school, the duties should involve the maintenance of religious organizations

The Petitioner will likely argue that the District Court was correct when it assumed Burns' work may *relate* to Whispering Hill's religious doctrine. This argument lacks merit because Burns's duties are merely a complementary, secondary aspect of his main function of teaching secular subjects, performing guidance counseling and supervising students. Further, Burns's duties which are similar to those of a minister are not required under his employment contract and, therefore, are not a part of his "official" duties. Thus, there is no direct link between Burn's official duties as a teacher at the school and the maintenance of the church.

The Tax Court has set a rigid standard for claiming the parsonage exemption that requires consideration of all of the facts and circumstances. Even ordained ministers cannot claim the exemption if they do not perform traditional sacerdotal functions. The minister in *Lawrence* had the title of 'minister' but the Tax Court found that he was not a "minister of the gospel" for the purposes of § 107 (2) even though he occasionally filled in for the regular pastor in emergencies and occasionally led the congregation in prayers. *Lawrence v. Commissioner*, 50 T.C. 494 (T.C. June 13, 1968). Compared to the case at hand, the minister in *Lawrence* was significantly more involved in the maintenance of the religious organization and congregation. Even if the argument can be made that Burns' activities on the weekends resemble ministerial duties because he discusses religious topics with students, these weekend activities are not

Burns' primary duties as an employee at the school. Burns was not hired to be a minister by the school. (R. at 19).

G. Burns's duties do not involve the administration of sacerdotal functions and the conduct of religious worship.

The Petitioner's services as a teacher and guidance counselor do not constitute sacerdotal duties because 1) he teaches secular subjects, 2) his after school program is of his own design and only by his own volition, 3) his weekend programming primarily serves the purpose of supervising children who cannot go home on weekends. A teacher who satisfies so few of the factors listed in the jurisprudence applying § 107(2) cannot possibly qualify for the exemption.

Burns's duty of educating students on secular matters is non-sacerdotal. First, there is nothing in the stipulated facts which suggests that Burns' actions are not purely arising out of his own volition to interweave faith into his after-school and weekend activities. The District Court for the Northern District of Texas in *Flowers v. United States* held that a university professor who performed counseling services and was an ordained minister was not qualified to claim the parsonage exemption because his "responsibilities were non-sacerdotal and the university was… not sufficiently integrated with its parent-church." *Flowers,* 1981 U.S. Dist. LEXIS 16758, at *15. Second, the Court should recognize, as the appellate court did, that *Flowers* is analogous. Like the taxpayer in *Flowers,* Burns does not perform sacerdotal functions as a requirement of his employment as a teacher, and he did not receive the rental allowance for the functions he performed that are sacerdotal-like. As the court pointed to in *Kirk*, sacerdotal duties must be "formally conferred upon [the would-be minister]."

Counseling students on both personal and religious matters does not constitute "the administration and maintenance of religious organizations and their integral agencies." 26 CFR

1.107-1. Even in a light most favorable to the Petitioner, it is clear that Burns's activities which are required for his employment do not come close to qualifying as significant control. The fact that the school has awarded him for the after-school club that he created, "Prayer After Hours," reveals that neither the school nor the church directed his actions. Burns is similarly situated to the rabbi in *Tennenbaum*, both performed some religious activities but did so of their own volition. In *Tennenbaum v. Commissioner*, the Tax Court held that a rabbi who worked at an educational institution and performed no ministerial functions was not a minister for § 107 purposes although he was ordained. *Tanenbaum v. Commissioner*, 58 T.C. 1 (1972). Like Rabbi Tennenbaum, Burns is not required to lead religious worship or any other sacerdotal function beyond teaching secular subject. His creation of after school programming and supervision of students who do not go home on the weekends cannot be said to be an integral agency of the church itself. Burns, like the taxpayer in *Lawrence*, has not been recognized as a minister of the gospel by either the school or the church.

The evidence the Petitioner presented at the trial level fell far short of showing that his duties as a teacher at Whispering Hills were equivalent to the services performed by a minister. Merely attending "required worship services on weekends" cannot be equated to leading a congregation or having a congregation at one's disposal. (R. at 8). Burns qualifying for the exemption when he was not an ordained, licensed minister is contrary to the Tax Court's expansive precedence. (R. at 16). Petitioner's contrary interpretation of § 107(2) misconstrues the plain statutory text and significant jurisprudence of the definition of minister for the purposes of § 107(2) developed in the lower courts.

Therefore, the Appellate Court was correct in finding that Burns was not a minister of the gospel for the purposes of the parsonage exemption under § 107(2).

III. The Eighteenth Circuit correctly granted summary judgment to the IRS because 26 U.S.C. § 107(2) does not violate the Establishment Clause due to the statute satisfying the *Lemon* test and not being contrary to our Nation's history and tradition of government interaction with religion.

The First Amendment allows for interaction between government and religion as long as the government does not pass laws "respecting an establishment of religion." U.S. Const. amend 1; *See Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970) ("[W]e will not tolerate . . . governmentally established religion."). A statute only violates the Establishment Clause if it fails to satisfy either the *Lemon* test or the test from *Galloway*; In order to satisfy *Lemon*, the statute must: (1) have a legitimate secular purpose; (2) ensure the primary effect of the statute does not advance nor inhibit religion; and (3) not cause excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). However, in *Town of Greece v. Galloway,* 572 U.S. 565, 566 (2014) where Court did not use the *Lemon* Test and, instead, used a test from *Marsh v. Chambers,* 463 U.S. 783 (1983), which required the statute to be consistent with the historical practices and understandings of government interaction with religion. *Galloway*, 403 U.S. at 612-13. Although the Court did not follow *Lemon* in its decision in *Town of Greece*, it did not explicitly overrule the *Lemon* test. *Id.*

A. § 107(2) satisfies the *Lemon* test because the statute is part of a broad and neutral tax scheme to exempt housing expenses for both secular employees and ministers and is tailored to minimize government entanglement with religion.

The *Lemon* test is satisfied when the law in question has a legitimate secular purpose, does not establish or inhibit religion, and does not cause excessive entanglement between government and religion. *Lemon*, 403 U.S. at 612-13.

1. § 107(2) has the legitimate secular purposes of avoiding conflict between the government and religion, avoiding unequal treatment between the ministers of different religions, and puts ministers on equal footing with secular employees.

The Court defers to the government's stated purpose unless the plaintiff can show that the stated purpose is not sincere and is, instead, "a sham." *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987); *See Gaylor v. Munchin*, 919 F.3d 420, 427 (7th Cir. 2019). Importantly, though, the law under scrutiny's purpose can be related to religion. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987) ("This does not mean that the law's purpose must be unrelated to religion."). Only when the implementation of a law is "motivated by wholly religious reasons" is the first prong of the *Lemon* test violated. *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984); *Amos*, 483 U.S. at 335. Finally, in Establishment Clause cases, deference to Congress is especially strong in relation to tax legislation. *Regan v. Tax'n with Representation Washington*, 461 U.S. 540, 547 (1983).

When any legitimate secular purpose exists, the challenged law satisfies the secular purpose prong of the *Lemon* test. *See, e.g., Edwards,* 482 U.S. at 586-87 (striking down a state law requiring the teaching of a Christian-version of evolution because there was no question that requiring a certain curriculum is in opposition to the stated purpose of academic freedom); *Lynch*, 465 U.S. at 680 (upholding a nativity display by a local government because there were a variety of motives, including both religious and secular, for the display). Hence, the Court has ruled that a legislature's intent to reduce entanglement between the government and religion is a permissible, legitimate secular purpose and, therefore, does not violate the Establishment Clause. *Amos*, 483 U.S. at 335-36. In *Amos*, the Court held that it was constitutional for a religious non-profit to terminate employees who were not church members, where the termination would have been illegal if the organization was not religious, and that a religious exemption to an employment discrimination law did not violate the Establishment Clause. *Amos*, 483 U.S. at 330.

Turning to § 107(2), the government asserts that the purpose of the statute is to allow religious ministers to have access to the same housing exemption that is available to secular employees under § 119 while, simultaneously, attempting to avoid continuous surveillance of the inner-workings of religious organizations that would occur if not for § 107. H.R. Rep. No. 83-1337, at 15 (1954) ("[The] committee has removed the discrimination in existing law by providing that [§ 107] is to apply to rental allowances paid to ministers to the extent used by them to rent or provide a home. Further, [§ 107(2)'s] purpose is to avoid inequities between one religion's ministers and another's as well as avoiding disadvantaging less affluent religions.").

In order to fully evaluate the purpose behind § 107(2), other sections of the tax code must be analyzed. Three statutes are of particular relevance: 26 U.S.C. §§ 119, 280A(c)(1), and 911. Sections 119 and 280A(c)(1) lay out the requirements for secular employees to exempt their housing expenses pursuant to the convenience of the employer doctrine. § 119 requires that employees "accept such lodging on the business premises of his employer as a condition of his employment" and that the housing is provided to them by the employer. 26 U.S.C. § 119(a)(2). § 280A(c)(1) further requires that the dwelling unit: (1) be exclusively used on a regular basis as a principal place of business, (2) a place of business which is used by clients or customers, or (3) if a separate building, in connection with the taxpayer's business. 26 U.S.C. § 280A(c)(1). If the dwelling unit is used in connection with the taxpayer's business and is separate from the business's property, the employee must be living there for the employer's convenience. *Id.*

Although the sections that refer to secular employees generally and § 107 may be slightly inconsistent, they are consistent with the general convenience of the employer tax scheme. This slight difference is that the sections referring to many secular employees and § 107 is that § 107 allows for the exemption of cash rental allowances whereas § 119 only allows the value of the

housing to be exempted from taxable income if the dwelling unit is provided by the employer. Although § 107(2) is more flexible than sections applying to some secular employees, this flexibility is not exclusive to religious ministers. 26 U.S.C. § 911 provides similar flexibility to citizens living abroad. United States government employees abroad can also exempt cash payments used to pay for housing via 26 U.S.C. § 912. § 134 of the Code provides the same cash housing exemptions but to military members living abroad. 26 U.S.C. § 134; Adam Chodorow, *The Parsonage Exception*, 51 U.C. Davis L. Rec. 849, 854 (2018). In sum, secular employees *generally* cannot exempt cash allowances that were subsequently spent on housing from their income while ministers, government employees living abroad, and military personnel can exempt cash allowances spent on housing. However, it is the nature of the employment which is the important distinction.

All of the aforementioned statutes should be considered together to analyze Congress's convenience of the employer tax scheme. *See* Antonin Scalia & Bryan A. Garner, *Reading Law* 252 (2012). It is clear that Congress has enacted a generally applicable statute regarding convenience of the employer housing exemptions which took the form of § 119. However, Congress has also determined that certain types of employees need not be required to meet the same stringent requirements as employees generally. This congressional determination explains why the government is more flexible with religious ministers, government officials, and military personnel. Congress reasoned that it is so clear that government employees and military personnel living abroad fall under the convenience of the employer doctrine that there is no need for these employees to prove every element required under § 119. Similarly, Congress could have reasonably determined that ministers' houses innately fall under the convenience of the employer doctrine. Ministers very often utilize their home for religious ceremonies and official

acts. As a result, it is the nature of the ministers' employment that allows Congress to give more flexibility to ministers without violating the Establishment Clause while simultaneously avoiding excessive government entanglement with religion.

Requiring all ministers to prove that they meet all requirements under § 119 would require excessive government entanglement with religion. Whether the dwelling place is the "principal place of business" or if the dwelling unit is "a place of business which is used by . . . clients . . . in the normal course of . . . business" would require direct supervision of religious organization's activities and the content of any meetings held at the minister's home. § 280A(c)(1). It would require a determination of whether the meetings at the minister's house were sufficiently connected to the church to be "in the normal course of business." *Id.* Confirming this requirement would likely require the government to analyze what occurs in the meetings at the minister's house and how the content of those meetings is related to the overarching religion's mission. This type of government oversight of religious activity is precisely what the Court in *Walz* emphasized as being unconstitutional and, later, became the basis of the third prong of the *Lemon* test. Further discussion of excessive government entanglement with religion can be found in section II(A)(3) of this brief.

Additionally, Congress realized that requiring religious ministers to have their residence on-site, as is required of secular employees, would disproportionately benefit some religions over others. More specifically, it is more common for Catholic churches to have parsonages – or clergy houses – on the Church's property than other religions. Chodorow, *The Parsonage Exception*, 51 U.C. Davis L. Rec. 849, 857 (2018). Other newer religions could not afford the overhead costs of purchasing more property than the church itself. *Id.* Notably, without § 107(2), many religious ministers who do not live on-site but who hold official church gatherings at their

home would be forced to pay taxes on the religious housing expenses. If subjected to the same requirements as secular employees, only those ministers whose religious organization can afford to own a building to house them could exclude their rental allowance and housing expenses furnished by their employer from their taxable income, despite having very similar job duties and expectations. This is the exact concern which resulted in Congress adding the second paragraph of § 107. If this statute is struck down, the drastic change in tax policy would give preference to larger, more affluent religions over smaller, poorer religions by requiring the minister to live on-site.

It is even more clear that § 107(2) satisfies the secular purpose prong of the *Lemon* test when noting that the burden is on the plaintiff to show that the government's stated purpose for the law is disingenuous and a sham. Here, there is extremely limited evidence to suggest that the government's stated purpose is insincere. There simply is not sufficient evidence to overcome the deference given to the government's stated purpose nor is there sufficient evidence to show that the law's purpose was *wholly motivated* by religion, as required under this Court's jurisprudence.

2. § 107(2) does not have the primary effect of advancing religion nor establishing a national religion and striking down § 107(2) would inhibit religion.

A statute evaluated pursuant to the Establishment Clause is only unconstitutional if the effect of the law is "either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints . . . ." *Walz*, 397 U.S. at 669. Additionally, the government is more restricted in interfering with religion than in advancing religion. *Amos,* 483 U.S. at 334 ("It is well established that the

limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause." (internal quotation omitted)). Pure separation of church and state is not possible nor supported by the Constitution. *See Walz*, 397 U.S. at 670. "[W]e see no reason to require that the exemption comes packages with benefits to secular entities." *Amos*, 483 U.S at 338.

It is constitutionally permissible for a law to give benefits to religious organizations, even when those same benefits are not available to secular organizations. *Walz* at 647-75 (holding that complete tax exemption of church property is permissible); *Amos* at 338 ("Where . . . the government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packages with benefits to secular entities.") In *Walz*[1], the Court held that a statute exempting church property from taxation did not have the primary effect of advancing religion, despite the fact that the law gave large financial benefits to religious organizations which were not available to most secular organizations. Fundamentally, the tax policy at issue did not have the "legislative purpose of . . . sponsorship nor hostility [towards religion]." *Id.* at 672. The Court reasoned that New York's legislature determined that some entities that promoted moral improvement should not be inhibited by property taxes. *Id.* It was especially important to the legislature to avoid tax confrontations between the government and religious organizations, which is permissible. *Id.* at 673. The Court further reasoned that the choice not to tax religious organizations reflects a cautiousness regarding the "latent dangers of imposition of . . . taxes [on religious organizations]." *Id.*

[1] Although *Walz* was decided before *Lemon*, *Walz* utilized a purpose and effect test which is essentially the same as the first two prongs of the *Lemon* test. *Amos*, 483 U.S. at 335 ("The first two of the three *Lemon* factors, however, were directly taken from pre-Walz decisions and Walz did not purport to depart from prior Establishment Clause cases. . . .").

Statutes, like the one at issue in *Texas Monthly,* which clearly express an endorsement of religion violate the Establishment Clause. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 25 (1989). In *Texas Monthly, Inc. v. Bullock*, the Court struck down a law which exempted religious magazines from state sales taxes. *Id.* The statute only applied to magazines distributed by religious organizations and "consist wholly of writings promulgating the teaching of the faith." *Id.* at 5. There was no scheme which exempted other non-religious magazines from sales taxes. *Id*. at 21. The Court reasoned that because *only* religious writings which were exempted, the law had the primary effect of endorsing religion. *Id.*

Further, *Texas Monthly* was decided by a plurality and, pursuant to the *Marks* rule, the controlling holding should be the narrowest shared holding of a majority of Justices. *Marks v. United States*, 430 U.S. 188, 193 (1977). "Because Justice Blackmun decided the case on Establishment Clause grounds, and on a narrower basis that Justice Brennan's opinion, under the *Marks* rule Justice Blackmun's concurrence sets the rule of [the] decision. His concurrence did not comment on what constitutes a forbidden effect under *Lemon* . . . ." *Gaylor v. Munchin*, 919 F.3d 420, 433 (7th Cir. 2019) (citing *Marks*, 430 U.S. at 193). Therefore, *Texas Monthly* is not controlling in relation to the second prong of the *Lemon* test. *Id.*

Turning to the case at hand, it is clear that § 107(2) does not have the primary effect of advancing religion because it only allows religious organizations to advance religion, not the government itself. § 107(2) merely gives ministers the same ability to exempt certain housing expenses as employees of secular organizations while also minimizing excessive government surveillance of religious organizations. All religious ministers may exclude housing expenses, not just those of a particular religion. Consequently, § 107(2) does not establish a national

religion as proscribed by *Walz* and, instead, clearly constitutes "play in the joints" between some government interaction with religion and fully establishing a national religion. 397 U.S. at 669.

Additionally, §107(2) can be easily distinguished from *Texas Monthly* because § 107(2) is a part of a broad and neutral tax scheme attempting to implement the convenience of the employer doctrine while reducing entanglement. The statute at issue in *Texas Monthly* was not a part of a broad ranging tax scheme to exempt certain secular and religious magazines from sales taxes, instead it exclusively applied to religion and there were not similar statutes exempting secular material – unlike § 107(2). The statute at issue is merely a slight variation from the generally applicable convenience of the employer doctrine found in § 119. When read in isolation, § 107(2) could suggest that the only class of people who can exclude their rental allowance and housing expenses from their gross income are religious ministers, however this is not the case. As previously mentioned, there are many other sections of the Code which allow for secular employees to exempt their housing expenses. The flexibility offered to religious ministers is also available to some secular employees. There are some classifications of secular employees who may exclude from their gross income cash housing expenses, such as sections 911 and 134, – which is the exact same flexibility as § 107(2) allows religious ministers to enjoy.

As was described in section II(A)(2), requiring ministers to meet the same requirements of secular employees would give preference to some religions' ministers over others. Taxing the housing allowances of religious ministers would not only fail to have the primary effect of advancing religion, it would also have the effect of inhibiting religion. The government has more freedom to create benefits for religion than it has to create obstacles. *Amos,* 483 U.S. at 334. Clearly, § 107(2) avoids inhibiting religion and merely causes *some* incidental benefits to all religions, neutrally, which is permissible under this Court's jurisprudence.

3. § 107(2) minimizes government entanglement with religion by avoiding intrusive government review of the inner workings of religious organizations.

"Not all entanglements . . . have the effect of advancing or inhibiting religion." *Agostini v. Felton*, 521 U.S. 203, 233 (1997); *Lynch*, 465 U.S. at 668 ("Entanglement is a question of kind and degree."). Excessive entanglement with religion occurs when the statutory scheme requires "continuing [official] surveillance leading to an impermissible degree of entanglement." *Walz*, 397 U.S. at 675. "Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, *but a lesser*, involvement than taxing them." *Id.* at 674-75 (emphasis added). Notably, the *Lemon* test's third prong originates from *Walz* where the alleged entanglement which ran contrary to the Establishment Clause was the continuing surveillance necessary to ensure tax compliance. *Walz*, 397 U.S. at 675; *Amos*, 483 U.S. at 335 (describing the holding in *Walz* as "adding a consideration that became the third element of the *Lemon* test).

In order to confirm that a religious organization is in compliance with a particular statute, the government can make simple factual findings regarding the religious organization. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589, 615-17 (1988) (holding that there is no excessive entanglement when the government reviews a children's counselling program instituted by a religious organization by making periodic visits); *Roemer v. Board of Public Works of Md.*, 426 U.S. 736, 764-65 (holding that there is no excessive entanglement when the government conducts annual audits to confirm that government funds are not being used for religious instruction). On the other hand, pervasive and intrusive supervision is excessive entanglement. *See Agostini*, 521 U.S. at 233-34. For example, in *Lemon* the Court held that state aid to religious schools was unconstitutional because it would require state surveillance to make sure the

restrictions were being followed. *Lemon,* 403 U.S. at 619. In order to ensure public funds were not used for religious instruction, the government would have to make regular checks on the school and analyze the content for any religious proselytization. *Id.* The Court reasoned that "a comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed. . . . These prophylactic contacts will involve excessive and enduring entanglement between state and church." *Id.*

Section 107(2) of the Code does not require excessive prophylactic contacts in order to assure compliance. § 107(2) merely requires the government to make a simple factual finding as to whether the individual claiming the exemption is a minister of the gospel. The statutes in *Bowen* and *Roemer* required far greater entanglement than a simple determination of whether the individual is a minister and, yet, were approved by this Court. Further, § 107(2) does not require continuing pervasive surveillance of the religious organization as the statute only requires determining whether the employee is a minister but does not require the government to evaluate what specifically occurs in the minister's dwelling unit. More specifically, the government would have to determine whether the activities within the minister's home were sufficiently related to the religious organization's mission in order to qualify for the exemption . Additionally, § 107(2) does not result in *excessive* entanglement because the government has a greater ability to support religion than inhibit it. *Amos,* 483 U.S. at 334.

As has been described in the analysis of *Lemon's* first prong, not only does § 107(2) not result in excessive entanglement but deeming this section unconstitutional *would* result in excessive entanglement. Without § 107(2), the government would need to determine the details of what occurs inside a minister's house and how it connects to the religious organization. Further, the government would need to confirm annually whether all aspects of § 119 are met

whereas, currently, they need only determine that the person is an ordained minister and completes some sacerdotal activities whi.[JCD5] If § 107(2) is struck down, regular pervasive surveillance would be required to ensure compliance with the tax law -- precisely the type of entanglement deemed excessive and impermissible in *Walz.*

B. § 107(2) is consistent with our Nation's historical understanding and traditions surrounding the Establishment Clause.

"[T]he establishment clause must be interpreted 'by reference to historical practices and understandings.'" *Town of Greece*, 572 U.S. at 576 (quoting *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989)). "Any test must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Id.*

When certain conduct has occurred for an extended portion of our history and has not been struck down or otherwise ended, the conduct is likely constitutional. *See, Galloway*, 572 U.S. at 591-92 (holding that a procedure of praying before town board meetings did not violate the Establishment Clause because the Founders also prayed before legislative session and it has been a tradition ever since.); *Marsh*, 463 U.S. at 795 (holding that the procedure of opening each legislative session with a prayer is constitutional because it was a common practice shortly after the Constitution was signed and has continued uninterrupted); *Van Orden v. Perry*, 545 U.S. 677, 686-87 (2005) (holding that displaying a monument inscribed with the Ten Commandments in the state capital is constitutional because it is consistent with our "unbroken history").

The government has a consistent, uninterrupted tradition of exempting religious organizations and property from taxes in order to avoid inhibiting religion. *Gaylor*, 919 F.3d at 436. Further, exempting from taxes religious buildings and property has never been viewed as

running afoul of the Establishment Clause. *Id.* Religious property tax exemptions have been a part of our history for more than a century and their uninterrupted practice clearly shows that § 107(2) does not violate our historical understanding of the Establishment Clause. It would be inconsistent to hold that a *per se* rule exempting all religious property from taxes is constitutional but allowing ministers to exempt their rental allowance and housing expenses, in only a slightly different manner than most secular employees, is somehow unconstitutional.

It is clear that our historical practice has favored religion generally which is entirely consistent with the Founders' understanding of the First Amendment because the government has not established a national religion nor endorsed a particular religion. Finally, the secular nature of the convenience of the employer doctrine makes it even clearer that § 107(2) violates no portion of our historical understanding of government-religion interactions.

CONCLUSION

The judgement of the Court of Appeals for the Eighteenth Circuit should be affirmed.

Respectfully submitted.