Docket No. 20-199

IN THE

Supreme Court of the United States

OCTOBER TERM 2020

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

CIV. NO. 20-231

BRIEF FOR PETITIONER & PETITIONER-INTERVENOR

Team 19
Counsel for the Petitioner and Petitioner-Intervenor
Dated: March 12, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Supreme Court Cases

U.S. Circuit Court of Appeal Cases

U.S. District Court Cases

U.S. Tax Court Cases

State Court Cases

Revenue Rulings

Constitutional Provisions

Statutes

Regulations

Rules

Other Authorities

QUESTIONS PRESENTED

(1) Whether a teacher at a religious boarding school, who is required to integrate religious teachings into his lessons, provides spiritual guidance counseling to students, spearheads an after-school prayer group, and runs a weekly youth ministry, qualifies as a "minister of the gospel" and is therefore entitled to the parsonage tax exemption.

(2) Whether the parsonage tax exemption, which was enacted to provide preferential tax treatment only to religious ministers and requires courts to undertake an intensive factual investigation into a religious organization's internal structure to determine if particular employees qualify, conveys an endorsement of and excessive government entanglement with religion in violation of the Establishment Clause.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eighteenth Circuit in *IRS v. Burns* is assigned case number 20-231 and is reproduced in the Appendix to the Petition at pages 15 to 24 of the record. The opinion of the U.S. District Court for the Southern District of Touroville in *Burns v. IRS* is assigned case number 19-111 and is reproduced in the Appendix to the Petition at pages 1 to 14 of the record.

STATEMENT OF JURISDICTION

The Eighteenth Circuit entered its judgment on June 9, 2009. R. at 15. Petitioner John Burns and Petitioner-Intervenor Citizens Against Religious Convictions, Inc. timely filed a petition for a writ of certiorari from this Court to appeal that decision. *See* R. at 25-26. This Court granted certiorari. R. at 25-26. The Court has jurisdiction under 28 U.S.C. § 1254(1), which permits the Court to review civil and criminal cases appealed from the federal circuit courts of appeal by writ of certiorari when petitioned by any party.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

I.R.C. § 107. Rental value of parsonages.

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.

Treasury regulation § 1.1402(c)-5 is included in the Appendix.

INTRODUCTION

The parsonage exemption under I.R.C. § 107(2) is a matter of monumental constitutional and financial importance. Under this provision, ministers of the gospel may exclude the rental value of a home and rental allowances paid to them as part of their compensation. Petitioner John Burns ("Burns") respectfully requests that the Court reverse the decision of the Eighteenth Circuit regarding whether he qualifies for the exemption and hold that he is entitled to the exemption. Burns teaches at a parochial boarding school operated by a Unitarian church and seeks to exclude his housing allowance from his taxable income. He asks this Court to respect his and his employer's sincere assertion that he is a minister of the gospel and abstain from intruding on matters of internal church governance, as it has done for over 100 years. Burns deserves equal treatment to any other minister: in addition to teaching, he conducts worship, is recognized as a religious leader, provides spiritual counseling, and cultivates his students' development as members of their faith. The parsonage exemption was designed for individuals like him. Denying Burns the exemption would send a chilling message to religious organizations that their internal structures are no longer insulated from judicial interference.

Petitioner-Intervenor Citizens Against Religious Convictions, Inc. ("CARC")—a non-religious organization that is a separate party from Burns—requests that this Court reverse the Eighteenth Circuit's decision as to the issue of the exemption's validity under the Establishment Clause and hold that the parsonage exemption is unconstitutional. The cornerstone of the Establishment Clause is state neutrality between religion and non-religion and between different religions. The parsonage exemption contravenes this principle. The exemption lacks a secular purpose, endorses and advances religion, and excessively entangles church and state. Moreover, it favors religions with centralized ecclesiastical structures, which can more easily claim that their

religious leaders are ministers, and disfavors religions that do not formally ordain their clergy. This sweeping exemption directly subsidizes religion and is unavailable to secular employees and organizations, rendering it unconstitutional.

STATEMENT OF THE CASE

A. Statement of Facts

In 2016, Burns accepted a teaching and counseling position with a religious boarding school, the Whispering Hills Academy ("the school"). R. at 3. The school is operated by the Whispering Hills Unitarian Church ("the church"). R. at 3. The church and school share an expansive property in upstate Touroville. R. at 3. Students at the school are required to attend religious services of the Unitarian faith at the church, and the school incorporates basic tenets of Unitarianism into the academic curriculum. R. at. 8.

In his position, Burns teaches English, Renaissance Literature, and multiple foreign languages to eleventh- and twelfth-grade students and serves as a school guidance counselor for students needing educational and personal support. R. at 3. Although he teaches secular subjects, Burns follows the school's faith-based curriculum and integrates Unitarian beliefs and values into his lessons. R. at 5. Further, his guidance counseling techniques focus on mental and behavioral practices, combined with instruction and cultivation of the school's religious teachings. R. at 3. Additionally, Burns established and now leads a daily after-school prayer group, Prayer After Hours. R. at 3. He has received several school awards for this club. R. at 3. He also hosts large gatherings of students after Sunday services at the on-campus church, where he provides food and facilitates discussions about the week's service and other topics. R. at 3.

Upon accepting the job, Burns, who originally lived over an hour away from the church and school, decided to move to a house five minutes away from the campus to reduce his travel

time. R. at 3-4. To help offset moving and living expenses, the school provided him $2,500 to cover the cost of moving, as well as $2,100 per month, included in his monthly salary, to cover the fair rental value and expected utility costs of his new home. R. at 3-4.

In 2017, Burns began looking into possible tax exemptions on his gross income. R. at 4. His co-worker, Pastor Nick, suggested Burns consider the parsonage exemption under I.R.C. § 107(2), which permits a minister of the gospel to exclude from his taxable income all housing allowances paid to him by his employer, because Burns was employed by a religious organization, led a daily prayer group, and provided spiritual counseling. R. at 1, 4. Burns claimed this exemption on his 2017 tax return. R. at 4. He received a letter of denial from the Internal Revenue Service ("IRS") in the summer of 2018, in which the IRS claimed that he did not qualify as a minister of the gospel. R. at 4. Consequently, he could not claim the parsonage exemption and owed additional money to the IRS. R. at 4.

B. Procedural History

Due to the denial of his tax exemption claim, Burns brought suit in the District Court for the Southern District of Touroville against the IRS and the Commissioner of Taxation ("the Commissioner"), asserting that he was entitled to the parsonage exemption as a minister of the gospel. R. at 4. Soon after Burns filed his suit, CARC, a local non-religious organization, filed a motion to intervene under Rule 24(a)(2) of the Federal Rules of Civil Procedure. R. at 2, 10. CARC argued that § 107(2) is unconstitutional under the Establishment Clause of the First Amendment because it impermissibly and excessively entangles the government with religion. R. at 2, 4.[1] The IRS and the Commissioner subsequently moved for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. R. at 2.

[1] Burns and CARC are two separate parties represented by different lawyers. Rule 24 does not require the interests of a plaintiff and plaintiff-intervenor in the same case to be consistent. *See* R. 24(a)(2).

The district court rendered its decision on December 18, 2019, in favor of Burns and CARC. R. at 1, 14. The court first granted CARC's motion to intervene under Rule 24(a)(2) because CARC's employees were not entitled to the exemption, which qualified as a significant interest in the outcome of the case. R. at 2.[2] The court then denied the IRS's motion for summary judgment. R. at 2. The court found that Burns qualified as a minister of the gospel under the parsonage exemption because he performed and was granted responsibility over religious duties, incorporated religious teachings into his secular courses, and provided spiritual counseling and guidance to students. R. at 2-3. However, the court also found that § 107(2) was unconstitutional under the Establishment Clause because it provides preferential tax benefits only to religious ministers and excessively entangles government with religion. R. at 9-13.

The IRS and the Commissioner appealed this decision to the United States Court of Appeals for the Eighteenth Circuit. R. at 15. On June 9, 2020, the Eighteenth Circuit reversed the district court, granting summary judgment to the IRS. R. at 15. The court found that Burns was not a minister of the gospel because his employer did not hold him out as such, and the evidence could not adequately demonstrate that the church and school were integrated. R. at 15, 19-20. The court also found that § 107(2) was constitutional because it has a secular purpose, does not advance or inhibit religion, and does not impermissibly entangle the government with religion. R. at 23.

CARC and Burns timely petitioned this Court for a writ of certiorari, which the Court granted. *See* R. at 25-26.

[2] This finding is not challenged on appeal. R. at 15-16.

SUMMARY OF THE ARGUMENT

Burns qualifies for the parsonage exemption because he is a minister of the gospel in the Unitarian faith under § 107(2). The Whispering Hills Unitarian community has recognized Burns as a spiritual leader at the school. The ecclesiastical abstention doctrine dictates that the judiciary should not encroach upon churches' decisions about their religious beliefs and values, especially on matters concerning the structure of religious hierarchies. Under this doctrine, the question of whether an employee is a minister of the gospel for tax purposes is squarely within the church's domain. Consequently, the Treasury Regulations that interpret § 107, which require the IRS and the courts to make fact-intensive analyses regarding an organization's theological tenets, contravene the ecclesiastical abstention doctrine. In this case, the Court should not question the sincere assertion that Burns is a minister.

Even if the Court evaluates Burns's functions in the context of the Unitarian faith, it should still hold that he is a minister. First, Burns provides religious counseling, which is a sacerdotal function. Second, he serves as a spiritual leader and conducts worship services because he leads daily prayer sessions, runs a youth ministry, and integrates faith-based teachings into the secular curriculum. He has won multiple awards for his daily prayer group, indicating that the Whispering Hills community regards him as a spiritual leader. Finally, he helps to conduct, control, and maintain the school. The school is an integral agency of the church because the church sets the school's faith-based curriculum and manages its operations. As a highly involved teacher, Burns is intimately involved in the school's business. For these reasons, he is a minister of the gospel.

Additionally, § 107(2) is unconstitutional under the Establishment Clause. The exemption fails all three prongs of the most commonly used Establishment Clause test created by this Court in *Lemon v. Kurtzman.* First, the exemption does not have a secular purpose because it is available

exclusively to ministers of the gospel and not to other similarly situated non-religious organizations, and its legislative history demonstrates that its purpose is to benefit religious organizations. Second, the exemption's primary effect is to impermissibly advance religion by providing a substantial financial benefit to ministers. The direct subsidy in the form of a tax benefit gives the impression that the government is impermissibly endorsing religion in violation of the Establishment Clause. Third, the exemption leads to excessive entanglement between the government and religious organizations. The character of the institutions benefited are solely religious, and the nature of the aid is the equivalent of a direct subsidy. This leads to a continuing, consistent relationship between the church and state, where the government decides religious questions to determine qualification under the exemption. Because the exemption fails all three prongs of the *Lemon* test, it is unconstitutional under the Establishment Clause.

Furthermore, the exemption does not pass constitutional muster under lesser-used Establishment Clause tests, notably the historical significance test and the neutrality test. The exemption fails the historical significance test because it cannot be traced back to the Founding Era and was only relatively recently adopted by Congress. The exemption does not pass the neutrality test because it favors religion over non-religion and applies more easily to religions with centralized ecclesiastical structures and formal ordination processes than decentralized and non-traditional religions. Therefore, the exemption violates the Establishment Clause.

ARGUMENT

Burns and CARC respectfully request that this Court reverse the Eighteenth Circuit's decision for two reasons. First, Burns asks this Court to find that he qualifies for the parsonage exemption because he is a minister of the gospel. This Court should accept the sincere assertion that Burns is a minister and respect the church's autonomy in determining its religious leadership.

However, even if the Court engages in an independent analysis of the question, Burns qualifies as a minister due to his sacerdotal and religious functions. Second, CARC asserts that the parsonage exemption is unconstitutional under the *Lemon* test because the exemption does not have a secular purpose; it impermissibly endorses and advances religion on behalf of the government; and it excessively entangles church and state. The exemption is also unconstitutional under other tests and considerations because it is neither long-standing nor neutral toward religion. Therefore, the decision of the Eighteenth Circuit should be reversed.

I. BURNS QUALIFIES FOR THE PARSONAGE EXEMPTION BECAUSE HE IS A MINISTER OF THE GOSPEL.

Burns qualifies as a minister of the gospel and can therefore claim the parsonage tax exemption. Section 107(2) provides that "[i]n the case of a minister of the gospel, gross income does not include . . . the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home." § 107(2). To qualify for the parsonage exemption, an individual must be a "duly ordained, commissioned, or licensed minister of a church." Treas. Reg. § 1.1402(c)-5(a)(2).[3] This phrase is disjunctive, meaning that the benefit applies to ministers who have not been formally ordained. *Salkov v. Comm'r*, 46 T.C. 190, 197 (1966). A minister is "one who is authorized to administer the sacraments, preach, and conduct services of worship." *Id.* at 194. Further, the "'gospel' means glad tidings or a message, teaching, doctrine, or course of action having certain efficacy or validity." *Id.* There is no per se test for who constitutes a minister of the gospel for the purposes of the parsonage exemption. *Id.* Instead, this determination necessitates a fact-bound analysis of an employee's responsibilities. *See Knight v. Comm'r*, 92 T.C. 199, 204-05 (1989).

[3] Treasury regulation § 1.107-1 states that section 1.1402(c)-5 should be used to determine who constitutes a minister of the gospel and can claim the parsonage exemption. *See* Treas. Reg. § 1.107-1(a).

As Burns's employer, the school should decide whether he is a minister. The judiciary should not encroach on the Unitarian religion's ecclesiastical structure by making this decision in its stead. Nevertheless, even if this Court chooses to analyze Burns's responsibilities and functions at the school, it should still hold that he is a minister of the gospel. This Court considers grants of summary judgment *de novo*. *Eastman Kodak Co. v. Image Tech. Servs. Inc.*, 504 U.S. 451, 465 n.10 (1992) (citing *United States v. Diebold*, 369 U.S. 645, 655 (1962)). Because Burns is the non-movant, R. at 2, the Court must consider all evidence and make inferences in the light most favorable to him. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). Under this standard, Burns is a minister: He executes sacerdotal duties, leads worship, is recognized as a spiritual leader, and participates in the conduct of the school, which is an integral agency of the church. *See* R. at 3, 5, 8.

A. As a Threshold Matter, Burns's Employer, Not the Government, Should Determine Whether He Qualifies as a Minister of the Gospel.

The First Amendment right to free religious exercise insulates churches from state interference with their selection of clergy. *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). Under the ecclesiastical abstention doctrine, courts have consistently accepted, without second-guessing, decisions regarding "questions of discipline, or of faith, or ecclesiastical rule, custom, or law." *Watson v. Jones*, 80 U.S. 679, 727 (1871). The judiciary has regularly sought to avoid encroaching on matters requiring a judgment of religious beliefs and values, particularly when a case concerns the structure of religious hierarchies. *See*, *e.g.*, *Corp. of the Presiding Bishop of the Church of Jesus Christ and Latter-day Saints v. Amos*, 483 U.S. 327, 329-30 (1987) (exempting religious employers from the prohibition on employment discrimination on the basis of religion under Title VII of the Civil Rights Act);

Serbian E. Orthodox Diocese for U.S. of Am. & Can. v. Milivojevich, 426 U.S. 696, 721 (1976) (refusing to intervene in church property dispute when the dispute concerned matters of "internal church government"); *Dausch v. Rykse*, 52 F.3d 1425, 1432 (5th Cir. 1994) (Ripple, J., concurring) (noting that state courts have uniformly rejected claims for clergy malpractice because such claims would "entangl[e] the civil courts in extensive investigation and evaluation of religious tenets").

The courts below cite *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), for the proposition that the judiciary—not religious employers—should determine who constitutes a minister. R. at 5-6, 17. In *Hosanna-Tabor*, the Court reiterated that the matter of who counts as a minister is a purely ecclesiastical concern. 565 U.S. at 196. Nonetheless, in a deviation from the ecclesiastical abstention doctrine, the *Hosanna-Tabor* Court undertook an extensive factual analysis of the plaintiff-minister's duties and activities to determine whether she was a minister. *See id.* at 191-94. Notably, the majority explicitly confined its decision to the narrow context of the ministerial exception to federal employment discrimination claims. *See id.* at 196. By contrast, this case involves a different issue: the question of who may claim the parsonage tax exemption. R. at 26. In this case, the Court has the opportunity to reaffirm the ecclesiastical abstention doctrine and ensure that decisions regarding the application of theological tenets are protected from civil intrusion.

Section 107(2) aims in part to accomplish this goal by categorically permitting ministers to deduct housing allowances from their taxable income—even if they do not use their home for religious purposes—thereby minimizing government entanglement with religion. *See Gaylor v. Mnuchin*, 919 F.3d 420, 430 (7th Cir. 2019); Justin Butterfield et al., *The Parsonage Exemption Deserves Broad Protection*, 16 Tex. Rev. L. & Pol. 251, 264-68 (2011). However, the Treasury regulations interpreting this statute unconstitutionally require courts to engage in a fact-intensive

inquiry into a minister's functions and duties. Butterfield et al., *supra*, at 264-68. In this case, the regulations force the Court to decide who is a minister under Unitarian beliefs and practices, thereby infringing on the religion's ability to determine its own ecclesiastical hierarchy.

Deciding who leads a church is an inherently religious decision. "[P]erpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and the world at large." *Rayburn v. Gen. Conf. of Seventh-day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985). The creation of per se and multi-factor tests to evaluate who is a minister "risk[s] disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some." *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). Such tests also encourage groups to restructure their unique beliefs and practices to conform with the judicial definition of "minister." *Id.* The question of who is a minister for tax purposes is thus best left to religious congregations and authorities. *See, e.g.*, *Kedroff*, 344 U.S. at 116.

Of course, the ecclesiastical abstention doctrine is not without limits, as churches are not "above the law." *Rayburn*, 772 F.2d at 1171. Courts may intervene when ecclesiastical decisions stem from fraud or collusion. *Milivojevich*, 426 U.S. at 712-13. In this vein, the Treasury regulations aim to prevent those who fraudulently appoint themselves as ministers to escape tax liability. *See Lawrence v. Comm'r*, 50 T.C. 494, 498 (1968) (finding parsonage exemption did not apply when taxpayer was commissioned as a minister solely as a means to receive the exemption, and the commission did not change his duties within his church). There is no evidence of fraud in this case–Burns simply discovered, researched, and applied for the parsonage exemption based on the sincere belief that he is a Unitarian minister. *See* R. at 4. The Court should not second-guess Burns's assertion that he is a minister in the Unitarian faith.

B. Burns Qualifies for the Parsonage Exemption Because He Is a Minister, Despite Not Being Ordained.

Even if this Court conducts a functional analysis of Burns's role at the school under section 1.1402(c)-5 of the Treasury regulations, it should still find that Burns is entitled to the parsonage exemption. Courts have long interpreted the term "minister of the gospel" in a "reasonably expansive [and] pragmatic" way. *Lawrence*, 50 T.C. at 501 (Dawson, J., dissenting). Not every church ordains, licenses, or commissions ministers "in a traditional or legally formal manner." *Ballinger v. Comm'r*, 728 F.2d 1287, 1290 (10th Cir. 1984). Consequently, whether an individual qualifies as a minister never depends on formal ordination alone. *Id.* Rather, "the triggering event is the assumption of the duties and functions of a minister." *Id.* Tax exemptions are indeed a "matter[] of legislative grace." *Id.* (citing *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440 (1934)). However, courts cannot "determine the merits of various churches" by excluding spiritual leaders in decentralized or non-traditional religions. *Id.*

Determining whether an individual is a minister requires a fact-intensive, case-specific analysis of an individual's responsibilities in their organization. *See Wingo v. Comm'r*, 89 T.C. 922, 934-39 (1987); *Knight*, 92 T.C. at 204-05 ("This is not an arithmetical test but a balancing test."). The Treasury regulations lay out three services that indicate an individual qualifies as a minister of the gospel: "the ministration of sacerdotal functions[,] 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." Treas. Reg. § 1.1402(c)-5(b)(ii)(2).

However, the courts' understanding of who qualifies as a minister has broadened over time beyond this three-factor test. When interpreting this regulation, the Tax Court clarified that the

"absence of ordination or incapacity to perform all sacerdotal functions is only one element in analyzing a taxpayer's ministerial status for purposes of section 107." *Knight*, 92 T.C. at 204. It expanded the considerations that the IRS and the courts are permitted to balance beyond the three originally listed in the Treasury regulations to include (1) ministration of sacraments; (2) conduct of worship services; (3) performance of services in the control, conduct, and maintenance of a religious organization; (4) ordination, commission, or licensing as a minister; and (5) status as a spiritual leader by his religious body. *Id.* An individual need not satisfy all of these factors to be considered a minister. *Id.* In this case, Burns has assumed the duties and functions of a minister of the gospel and is consequently entitled to the parsonage exemption.

1. Burns Performs Sacerdotal Functions.

The district court correctly held that Burns performs sacerdotal duties in his teaching and counseling position at the school. Sacerdotal functions are the ministration of religious ceremonies, such as communion, marriages, and funerals. Lisa A. Runquist & David T. Ball, *Whither the Parsonage Allowance: Will It Survive the Most Recent Attack*, Bus. L. Today, June 2014, at 1, 2. "Whether service performed by a minister constitutes . . . the ministration of sacerdotal functions depends on the tenets and practices of [his church]." Treas. Reg. § 1.1402(c)-5(b)(2)(i).

Because each religion possesses its own unique traditions, courts have been reluctant to bar unordained religious leaders from receiving ministerial privileges, even if they do not perform all possible sacerdotal duties. For instance, multiple courts have held that Jewish cantors are ministers of the gospel even though they cannot interpret religious law, which is "the one function reserved to the rabbi, the only ordained minister of the Jewish religion." *Salkov*, 46 T.C. at 196; *see also Silverman v. Comm'r*, No. 72-1336, 1973 WL 2493, at *5 (8th Cir. July 11, 1973). Although cantors lack ordination, they still execute "the same sacerdotal functions that are

performed by their equivalents in non-Jewish religions" and therefore are ministers under § 107. *Salkov*, 46 T.C. at 196.

Further, the District Court was correct to distinguish this case from *Flowers v. United States*, Civil Action No. CA 4-79-376-E, 1981 WL 1928 (N.D. Tex. Nov. 25, 1981), and *Kirk v. Commissioner*, 425 F.2d 492 (D.C. Cir. 1970). *See* R. at 6-7. In *Flowers*, the plaintiff was a professor at Texas Christian University ("TCU"). 1981 WL 1928, at *1. He was an ordained minister but did not perform sacerdotal functions as part of his employment. *Id.* at *3. The plaintiff taught only secular courses and provided non-religious counseling for students in his department—functions that a "nonminister professor would perform." *Id.* at *6. Similarly, the *Kirk* plaintiff directed the Department of Public Affairs of the Methodist Church's General Board of Christian Social Concerns, an organization involved in religious education and research. 425 F.2d at 493. In that position, the plaintiff performed no sacerdotal duties, and he "expressly stipulated" that he was not a minister. *Id.* at 495.

By contrast, Burns provided religious services to students as part of his job responsibilities. In particular, he provided religious counseling, R. at 3, which the Tax Court has characterized as sacerdotal, *see McEneany v. Comm'r*, 52 T.C.M. (CCH) 336, 368 (1986). Moreover, the record does not reflect whether Unitarianism is a Christian denomination or detail the traditions or sacraments the Unitarian religion espouses, if any exist. This Court should not demand that Unitarianism mimic the same structure of more mainstream religions for Burns to receive the parsonage exemption. *See Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). Burns performs at least one traditional sacerdotal function and should receive the parsonage exemption as a result. *See also Silverman*, 1973 WL 2493, at *5; *Salkov*, 46 T.C. at 196-97.

2. Burns Conducts Religious Worship and Is Recognized as a Spiritual Leader in His Religious Community.

Even if this Court does not find that he performs sacerdotal duties, it should still hold that Burns is a minister because he conducts religious worship and is regarded as a spiritual leader. *See Knight*, 92 T.C. at 204-05 (finding that taxpayer was a minister despite being unable to perform the sacraments of his religion). What constitutes religious worship depends on a church's particular beliefs and practices. Treas. Reg. § 1.1402(c)-5(b)(2)(i). The IRS and several courts have found that individuals who perform similar worship and leadership functions to Burns are ministers. *See* Rev. Rul. 57-107, 1957-1 C.B. 277; *Silverman*, 1973 WL 2493, at *5; *Salkov*, 46 T.C. at 199. For example, the IRS concluded that unordained parochial schoolteachers who taught a church's religious principles to the children of the congregation and led worship services were ministers. Rev. Rul. 57-107, 1957-1 C.B. 277. It also found that a college chaplain and professor of religion who provided religious counseling and organized weekly religious services was a minister. Rev. Rul. 55-243, 1955-1 C.B. 490. Likewise, courts consider Jewish cantors ministers because they assist rabbis, prepare children for life in the Jewish community, lead worship, and are well versed in Jewish law and tradition. *Silverman*, 1973 WL 2493, at *3, *5; *Salkov*, 46 T.C. at 195-96, 199.

In this case, Burns teaches his students about their faith and prepares them for life in the Unitarian community. *See* R. at 3. Because the church requires that the school's teachers follow a faith-based curriculum, Burns has no choice but to serve as a spiritual leader for his students. *See* R. at 3. He also conducts religious worship and acts as a spiritual leader by running a daily prayer group and facilitating a youth ministry after church on Sundays. *See* R. at 3. These activities are a consistent and significant part of Burns's job. *See* R. at 3; *Lawrence*, 50 T.C. at 499 (finding that parsonage exemption did not apply when employee performed ministerial functions only

occasionally). In fact, Burns's employer has explicitly recognized him as a spiritual leader, as his prayer group has received several school awards. *See* R. at 3. Similarly, a pastor recommended that Burns apply for the parsonage exemption. R. at 4. Viewing this fact in Burns's favor, the Court can infer that this pastor also believed Burns is a minister. *See* R. at 4.

Moreover, the Eighteenth Circuit was incorrect to discount the activities that Burns took on voluntarily, such as the youth ministry. *See* R. at 18. This Court recognized just last year that teachers at parochial schools are "[e]xpected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2066 (2020). This responsibility is heightened at parochial boarding schools, which expect their teachers to be spiritually and emotionally available to their students at all hours. *See* Tammy McGuire, *Spiritual Labor and Spiritual Dissonance in the Total Institution of the Parochial Boarding School* 154-55, 160 (Dec. 2006) (Ph.D. dissertation, University of Missouri-Columbia) (Google Scholar). Teachers at parochial boarding schools must integrate their religions' practices and values into their lives beyond the classroom "in a much more encompassing manner than [faculty at] other types of schools." *Id.* at 10. When Burns led daily prayer groups and weekend youth ministries, he was fulfilling the unwritten duties that teachers at parochial boarding schools typically bear.

3. Burns Participates in the Control, Conduct, and Maintenance of the School, Which Is an Integral Agency of the Church.

As a teacher at the school, which is operated by the Whispering Hills Unitarian Church, Burns participates in the control, conduct, and maintenance of an integral religious organization of a "religious body constituting a church." Treas. Reg. § 1.1402(c)-5(b)(2).

i. The School Is an Integral Agency of the Church.

Under the Treasury regulations, the school qualifies as an integral agency of a church because "it is organized and dedicated to carrying out the tenets and principles of [the church's] faith in accordance with either the requirements or sanctions governing the creation of institutions of the faith." Treas. Reg. § 1.1402(c)-5(b)(2)(i). Specifically, the IRS has found that a school is an integral agency of a church when it is "governed and controlled" directly or indirectly by the church. Rev. Rul. 70-549, 1970-2 C.B. 16 (finding that college controlled by board of directors overseen by a church's elders was an integral agency of that church). In this case, the church "operates" the school, indicating extensive control. R. at 3.

The IRS has devised a multi-factor test to determine when an organization is integral to a church:

> (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 dissolution of the institution its assets would be turned over to the religious organization or church.

Rev. Rul. 72-606, 1972-2 C.B. 78. "[T]he absence of one or more of these characteristics will not necessarily be determinative in a particular case." *Id.* Importantly, it is the quality, not quantity, of contacts between a church and school that "is the determining factor" in this analysis. *Flowers*, 1981 WL 1928, at *5.

Here, the school carries out the church's tenets and principles by setting a faith-based curriculum for all subjects and requiring students to attend religious services, thereby steeping its students in the church's religious teachings. Treas. Reg. § 1.1402(c)-5(b)(2)(ii); R. at 8. The school

and the church share the same name, demonstrating a "corporate relationship" between the two entities. R. at 8. Further, the school is on church grounds, indicating that the church contributes to the school's finances and reputation. R. at 8. The Eighteenth Circuit erred in finding that the church-school relationship here resembled the one in *Flowers*. There, the court rightly found that when the Christian church did not incorporate TCU, did not require its faculty members to be church members, and did not control the university's curriculum or teaching methods, TCU was not an integral agency of the church. *Flowers*, 1981 WL 1928, at *5. By contrast, here, the church directly supports the school and maintains tight control over its curriculum and operations. *See* R. at 8.[4]

ii. Burns Is Intimately Involved in the School's Operations.

To participate in the conduct of a religious organization and therefore qualify for the parsonage exemption, ministers must engage in activities "relate[d] to directing, managing, or promoting the activities of such organization." Treas. Reg. § 1.1402(c)-5(b)(2)(ii). Burns participates in the conduct of the school by implementing its faith-based curriculum, leading a daily prayer group, providing spiritual counseling, and running a youth ministry. *See* R. at 3. "[E]ducating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private school." *Morrissey-Berru*, 140 S. Ct. at 2064. Burns's duties are crucial to the school's mission, and consequently, to the church itself.

[4] Alternatively, even if there are not enough facts to determine whether the school is an integral agency of the church, the Court should still reverse and remand for further fact-finding on this issue. When "the facts [do] not clearly support an affirmative or negative answer [to the question of whether an entity is an integral agency], the appropriate organizational authorities are contacted for a statement [regarding] whether the particular institution is an integral agency, and their views are carefully considered." Rev. Rul. 72-606, 1972-2 C.B. 78. Several facts suggest that the school is an integral agency, and the record is silent as to some of the eight factors listed. *See id.* If the Court finds that Burns is not entitled to summary judgment at this stage, it should remand for further inquiry into the exact contours of the church-school relationship.

Notably, as long as a minister is employed by an integral agency of a religious organization, he can receive the parsonage exemption, even if he was hired to perform secular services. Treas. Reg. § 1.1402(c)-5(b)(2)(iv); *see also* Rev. Rul. 62-171, 1962-2 C.B. 39 (finding that ministers who have secular administrative and management responsibilities and religious duties at parochial schools and universities that are integral agencies of religious organizations were entitled to the parsonage exemption). Thus, that Burns was hired to teach secular courses should not bar him from receiving the parsonage exemption, especially since the church requires him to integrate faith-based teachings into his subjects' curriculum. *See* R. at 5.

Moreover, Burns's secular and religious duties are inextricable. He teaches secular subjects using a faith-based curriculum and counsels students using religious and psychological techniques. R. at 3. This Court cannot separate his services to the school into "two separate and distinct categories" without making an impermissible religious judgment regarding when Burns is carrying out the tenets of his faith. Rev. Rul. 55-243, 1955-1 C.B. 490 (finding that college chaplain was a minister despite having religious and secular duties); *see also Kedroff*, 344 U.S. at 116. As a teacher, Burns facilitates his students' development as members of the Unitarian faith. *See* R. at 3. In this way, he promotes the activities of the school, an integral agency of the church. For that and the forgoing reasons, he is a minister of the gospel and entitled to the parsonage exemption.

II. SECTION 107(2) VIOLATES THE ESTABLISHMENT CLAUSE BECAUSE IT GRANTS A BENEFICIAL TAX EXEMPTION ONLY TO MINISTERS AND CREATES EXCESSIVE ENTANGLEMENT BETWEEN THE GOVERNMENT AND RELIGION.

The parsonage exemption, which is granted solely to ministers of the gospel, violates the Establishment Clause and is thus unconstitutional. *See* § 107. The First Amendment states that

"Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. The Establishment Clause mandates government neutrality between different religions and between religion and non-religion. *See McCreary Cnty v. ACLU*, 545 U.S. 844, 860 (2005). While there is "room for play in the joints," in which Congress can accommodate religious belief, the government must carefully ensure that its actions are "without sponsorship and without interference." *Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970). When the government provides a benefit only to religion that is unavailable to a broader class of citizens, it contravenes the Establishment Clause. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

A. The Parsonage Exemption Is Unconstitutional Under the *Lemon* Test.

The parsonage exemption fails the most commonly used Establishment Clause test, the *Lemon* test. The *Lemon* test contains three requirements: (1) a law must have a secular purpose; (2) its primary effect must neither advance nor inhibit religion; and (3) it must not foster an excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). If a statute fails any part of this test, it violates the Establishment Clause. *Gaylor*, 919 F.3d at 427. Because the parsonage exemption was enacted to solely benefit religious organizations, and it requires the government to engage in fact-intensive evaluations of ecclesiastical structures, it does not pass muster under the *Lemon* test.

1. The Exemption Does Not Have a Secular Legislative Purpose.

The parsonage exemption does not have a secular legislative purpose because it applies only to religious leaders, and its legislative history demonstrates that it was enacted to benefit religion. The government violates the Establishment Clause when it "abandon[s] secular purposes in order to . . . [endorse] religion . . . or to favor the adherents of any sect or religious organization." *Gillette v. United States,* 401 U.S. 437, 450 (1971). If the government "acts with the ostensible

and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality." *McCreary Cnty.*, 545 U.S. at 860. Courts defer to the government's stated purpose only when that purpose is sincere and advances a legitimate secular goal. *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987); *see Mueller v. Allen,* 463 U.S. 388, 393 (1983). The government may implement a law that touches religion, "so long as [it does not] intrude[] unduly into [religious] affairs." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 10 (1989).

i. The Exemption Is Available Only to Religious Leaders, Demonstrating That Its Purpose Is to Benefit Religion.

The parsonage exemption states in relevant part that "[i]n the case of a *minister of the gospel*, gross income does not include . . . the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home." § 107(2) (emphasis added). Only religious leaders, therefore, can receive this exemption. As this Court has repeatedly recognized, tax exemptions are subsidies that compel "nonqualifying tax payers . . . to become 'indirect and vicarious donors.'" *See*, *e.g.*, *Texas Monthly*, 489 U.S. at 14 (quoting *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983)). Religious groups may "benefit incidentally" from a subsidy as long as the subsidy is available to secular groups and is justified by a secular purpose. *Id.* at 14-15. However, the parsonage exemption exclusively subsidizes religious organizations and impermissibly sponsors religion—particularly because the subsidy aids ministers in spreading religious messages. *See e.g.*, *id.* at 15; *Haller v. Commonwealth*, 728 A.2d 351, 355-57 (Pa. 1999).

ii. The Legislative History of The Exemption Shows It Is Meant to Benefit Religion.

Additionally, the parsonage exemption's legislative history underscores that its purpose is to advance religion. Representative Peter Mack, the statute's sponsor, urged support for the

exemption by stating that "in these times when we are being threatened by a godless and anti-religious world movement we should correct this discrimination against certain ministers of the gospel who are carrying on such a courageous fight . . . . Certainly this is not too much to do for these people who are caring for our spiritual welfare." Hearings on General Revenue Revisions before the House Committee on Ways and Means, 83d Cong., 1st Sess., pt. 3, at 1576 (1953). He framed the statute as a means to increase religious leaders' income, noting that "many of these clergymen still receive low income based on the 1940 cost of living but must pay 1953 rents for a dwelling house." *Id.* While not dispositive, Representative Mack's statements, as a key sponsor of the statute, highlight that § 107's purpose is to financially benefit religious leaders alone.

2. The Exemption's Primary Effect Is to Impermissibly Advance Religion by Providing a Beneficial Tax Exemption Solely to Ministers of the Gospel.

Under the *Lemon* test's second prong, § 107(2) advances religion by providing a beneficial tax exemption solely to religious leaders without imposing the stringent requirements found in other housing exemption provisions, thereby engendering an endorsement of religion. *See Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 493 (7th Cir. 2000). When determining that a law has the primary effect of advancing religion, this Court considers "whether, irrespective of [the] actual purpose, the practice under review in fact *conveys* a message of endorsement." *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (emphasis added). It must be shown that the "government itself" has advanced religion through its own activities. *Amos*, 483 U.S. at 337. This can be proven through government "sponsorship [or] financial support" or active involvement in religious activity. *Walz*, 397 U.S. at 668. If a reasonable person could find that a government's action conveys that religion is favored, the Establishment Clause has been violated.

See Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 778-79 (1995) (O'Connor, J., concurring).

Where this Court has addressed tax exemptions favorable to religious groups, it has allowed those that "ha[ve] not singled out one particular church or religious group or even churches as such . . . [and] include[d] hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." *Walz*, 397 U.S. at 673. Another important consideration has been whether the exemption was designed to promote religious beliefs in a "non-religious context" or help spread the religious messages of a group. *Id.* at 689 (Brennan, J., concurring). This Court has specifically struck down tax exemptions for "lack[ing] sufficient breadth." *Texas Monthly*, 489 U.S. at 14. A tax exemption given only to religious organizations goes beyond "removing a deterrent to free exercise." *Id.* Such action "provide[s] unjustifiable awards of assistance to religious organizations" and demonstrates endorsement. *Id.* at 14-15 (quoting *Amos*, 483 U.S. at 348 (O'Connor, J., concurring) (alteration in original)).

The parsonage exemption benefits religion alone, not a diverse set of institutions as the Establishment Clause requires. *See Walz*, 397 U.S. at 673. Being a minister of the gospel is the *only* requirement needed to claim this tax exemption. § 107(2). Further, the exemption benefits religious organizations as a whole "because churches and synagogues and mosques can pay their clergy much less because of the tax-free dollars." Erwin Chemerinsky, *The Parsonage Exemption Violates the Establishment Clause and Should Be Declared Unconstitutional*, 24 Whittier L. Rev. 707, 713 (2003). This financial benefit enables ministers and churches to spread their religious messages and thus advances religion.

Notably, the exemption does not fit the convenience-of-the-employer doctrine. This doctrine allows the exclusion of "certain employment-related expenses" from taxable income and

is codified most clearly in I.R.C. § 119. *Gaylor*, 919 F.3d at 430; Chemerinsky, *supra* at 712. Section 119 permits any employee to deduct from their taxable income "the value of any . . . lodging furnished to him, . . . *but only if* . . . the employee is required to accept such lodging on the business premises of his employer as a condition of his employment." § 119 (emphasis added). Unlike this statute, the parsonage exemption does not require ministers to live on church premises or take housing as a condition of employment, making the exemption extremely broad. Chemerinsky, *supra* at 724. Therefore, the parsonage exemption provides a substantial benefit to ministers unavailable to secular employees.

Secular employees can claim other housing exemptions, but these provisions are more limited than the parsonage exemption and are driven by secular purposes. Additional tax exemptions for housing include I.R.C. § 911, which allows U.S. citizens living abroad to deduct a portion of their housing expenses from their income; I.R.C. § 912, which allows certain federal employees living abroad to exclude housing expenses; and I.R.C. § 134, which allows members of the military to exclude housing allowances. Through § 911, the government aims "to eliminate double taxation for those subject to foreign taxes or . . . to encourage international trade," whereas §§ 134 and 912 "should be understood as part of the government's employment contract with its workers. Rather than tax such amounts and gross up salaries to account for the additional taxes, the government simply excludes the allowances from the income." Adam Chodorow, *The Parsonage Exemption*, 51 U.C. Davis L. Rev. 849, 854 (2018). By contrast, § 107's primary effect is clear on its face: to provide a tax exemption solely for ministers, thereby subsidizing and advancing religion.

3. The Exemption Excessively Entangles the Government with Purely Religious Determinations and Questions.

By subsidizing religious ministers alone and requiring the IRS to decide who constitutes a minister, the parsonage exemption excessively and impermissibly entangles the government with religion under the third prong of the *Lemon* test. *See, e.g.*, *Lemon*, 403 U.S. at 614-25; *Agostini v. Felton*, 521 U.S. 203, 232-35 (1997); *Lynch*, 465 U.S. at 684-85. While some interaction between religion and the government is "inevitable," excessive entanglement between the two violates the Establishment Clause. *Lemon*, 403 U.S. at 625; *Agostini*, 521 U.S. at 233. Specifically, the Court should be wary of "certain programs . . . whose very nature is apt to entangle the state in details of administration and planning." *Walz*, 397 U.S. at 695 (Brennan, J., concurring). "Entanglement is a question of kind and degree," *Lynch*, 465 U.S. at 684, based on the totality of the circumstances, such as "the character and purposes of the institutions that are benefited, 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; *see also Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 762-65 (1976). Additionally, this Court has taken into account "the divisive political potential" of the statutory scheme at issue. *Lemon*, 403 U.S. at 622.

All of the factors relevant to the parsonage exemption indicate excessive entanglement between church and state. Ministers are the sole beneficiaries of the parsonage exemption. *See* § 107 (only delineating ministers of the gospel). The legislative history of the exemption only focuses on providing benefits and subsidies for religious employers and employees and never mentions "broad, neutral . . . polic[ies] . . . or the need to put ministers on the same footing as laypeople." Chodorow, *supra*, at 858-59 (noting that one of § 107's purposes was to subsidize ministers' salaries); *see supra* Part II.A.ii.

As it applies in this case, the tax exemption benefits a parochial school, a relationship which this Court has recognized heightens "the danger of political divisiveness" because the "student constituency is not local but diverse and widely dispersed," unlike that of a religiously affiliated college or university. *Roemer*, 426 U.S. at 765 (quoting *Tilton v. Richardson*, 403 U.S. 672, 688-89 (1971)). The school here is indeed a boarding school, but many of its students rarely return home, meaning they have stronger ties to the local area than college students, which increases the potential for divisiveness in the Touroville community. *See* R. at 3. Further, the school is located very close to the main parish, spiritual teachings are embedded in school counseling sessions and secular lessons, and extracurricular activities are religiously focused. R. at 3; *Lemon*, 403 U.S. at 617. Even though Burns teaches secular lessons, R. at 3, "the potential for impermissible fostering of religion" is pervasive, *see Lemon*, 403 U.S. at 618-19.

The parsonage exemption directly subsidizes religious organizations and thus excessively entangles government with religion. *See Texas Monthly*, 489 U.S. at 14-15; *Bob Jones Univ.*, 461 U.S. at 591; *Regan v. Taxation with Representation of Wa.*, 461 U.S. 540, 544 (1997). Direct subsidies excessively entangle church and state because they involve "sustained and detailed administrative relationships." *Lemon*, 403 U.S. at 621 (quoting *Walz*, 397 U.S. at 675). Here, the parsonage exemption requires the government to scrutinize a religious organization's internal structure to determine who qualifies as a minister of the gospel. *See* § 107(2); Treas. Reg. § 1.1402(c)-5. The government must closely evaluate whether and how often a person performs ministerial functions under the tenets of their faith. *See* Treas. Reg. § 1.1402(c)-5 (describing factual determinations needed to ascertain who qualifies as a minister). This case itself illustrates how complex these factual determinations can be. *See* R. at 5-23.

When the state must make such religious determinations, excessive entanglement ensues. The *Texas Monthly* Court warned of the government deciding "whether some message or activity is consistent with 'the teaching of the faith.'" 489 U.S. at 20. Determining whether a person performs adequate ministerial functions necessitates this type of fact-intensive religious inquiry. *See Lemon*, 403 U.S. at 619; *e.g.*, *Knight*, 92 T.C. at 204-05. Furthermore, the parsonage exemption requires the IRS to annually evaluate whether an individual qualifies as a minister, resulting in prolonged entanglement. *See* § 107; *Lemon*, 403 U.S. at 618-20 (recognizing excessive entanglement occurs when teachers would have to be regularly inspected to ensure religious tenets did not permeate secular subjects).

Eliminating the parsonage exemption would reduce entanglement because ministers can claim a housing allowance under an alternate exemption, § 119, which would put religious and secular employees and organizations on equal footing. *See* § 119. Further, ministers receiving housing allowances in cash would no longer be exempted from taxation, thereby significantly reducing government and church interaction. *See* § 119(a) (only providing exemptions for in-kind housing); Chodorow, *supra*, at 855 ("The in-kind requirement would eliminate 87% of [§ 107 qualifying] ministers because they receive cash allowances."). Under § 119, the IRS would merely inquire into "whether the minister [was] an employee and whether the housing [was]: (1) on-site, (2) required by the employer, and (3) for the employer's convenience." Chodorow, *supra*, at 901; *see also* § 119. These determinations are exactly the same as those made for secular employers and employees and would not require any intrusion into religious tenets and beliefs. Chodorow, *supra*, at 899; Chemerinsky, *supra*, at 719. Because the parsonage exemption lacks a secular purpose, solely benefits religious organizations, and excessively entangles the government with religion, it fails the *Lemon* test and violates the Establishment Clause.

4. The Parsonage Exemption Is Also Unconstitutional Under Less Frequently Used Establishment Clause Tests and Considerations.

The parsonage exemption is additionally unconstitutional under the Establishment Clause following other tests and considerations, notably the historical significance consideration and the neutrality test. While courts generally follow the *Lemon* framework, the Court can also consider how long a practice has been adopted and if the practice is neutral toward religion. *See generally Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Zelman*, 536 U.S. 639. The parsonage exemption fails both of these tests because it lacks historical roots and is not religiously neutral.

i. The Exemption Does Not Pass the Historical Significance Test Under *Galloway*.

The parsonage exemption does not have long historical roots tracing back to the country's Founding, thereby failing the historical significance test. This Court has held that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Galloway*, 572 U.S. at 576 (quoting *Cnty. of Allegheny*, 492 U.S. at 670). While this consideration "must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation," it helps to contextualize the statute at issue. *Id.* at 577. Under this test, courts evaluate whether a practice "was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Id.*

Indeed, churches in this country have been able to claim real estate tax exemptions for church property for two centuries. *See Walz*, 397 U.S. at 680. However, the modern version of the parsonage exemption for individual ministers was enacted less than a century ago. *See* Chemerinsky, *supra*, at 720. The Sixteenth Amendment, which allowed Congress to impose an

income tax, was ratified in 1913. *Gaylor*, 919 F.3d at 423. At that time, the statute did not address any tax exemptions for employer-provided housing. Chodorow, *supra*, at 856. In 1921, Congress added the equivalent of § 107(1), allowing tax exemptions just for in-kind housing provided to ministers by their religious employers. *Id.* at 856-57; *Gaylor*, 919 F.3d at 424. It was not until 1954 that Congress enacted § 107(2) to exempt housing allowances in cash. Chodorow, *supra*, at 857-58. This Court has held that institutions and practices that arose even earlier than 1954 are not historically significant because they do not date back to the Founding Era. *Cf. Int'l Soc'y of Krishna Consciousness v. Lee*, 505 U.S. 672, 680 (1992) (holding airports were not considered public fora due to "the lateness with which the modern air terminal has made its appearance"); Chemerinsky, *supra*, at 720. History does not indicate that a parsonage exemption would have been accepted during the Founding Era.

In fact, there is reason to believe that a parsonage exemption *would* have been considered an establishment of religion at that time. *See* Chemerinsky, *supra*, at 720. The Framers themselves likely would have rejected such an exemption. For example, James Madison, who authored the First Amendment, fiercely opposed a bill that would have established a property tax in support of Christian teachers in Virginia. James Madison, A Memorial and Remonstrance Against Religious Assessments, *reprinted in* Selected Writings of James Madison 21, 21 (Ralph Ketcham ed., 2006) (1785). He wrote that the bill "degrade[d] from the equal rank of Citizens all those whose opinions in Religion do not bend to those of Legislative authority." *Id.* at 25. Likewise, in a subsequent bill that prohibited the establishment of a state church in Virginia, Thomas Jefferson stated that "compel[ing] a man to furnish contributions of money for the propagation of opinions which he disbelieves *and abhors* is sinful and tyrannical; that even the forcing him to support [a] teacher of his own religious persuasion" would be violative of religious freedom. Thomas Jefferson, A Bill

for Establishing Religious Freedom, *in* 2 The Writings of Thomas Jefferson 237, 238 (Paul Leicester Ford ed., 1893) (1779); *see* Chemerinsky, *supra* at 720. Against this background, the parsonage exemption, which coerces non-ministers to subsidize religion, cannot be deemed historically significant under the Establishment Clause.

ii. The Exemption Does Not Pass the Neutrality Test Under *Mitchell* and *Zelman*.

The parsonage exemption does not pass even the most permissive Establishment Clause test because it favors religion over non-religion and helps some religions more than others. *See Mitchell*, 530 U.S. at 813 (quoting *Agostini*, 521 U.S. at 231). The neutrality test requires the government to provide aid "to a broad range of groups or persons without regard to their religion." *Id.* at 809. Here, the exemption singles out ministers for benefits on its face. *See* § 107. Furthermore, this statute disfavors decentralized religions that do not formally ordain their ministers. *See* Chemerinsky, *supra*, at 733; Thomas E. O'Neill, *A Constitutional Challenge to Section 107 of the Internal Revenue Code*, 57 Notre Dame L. Rev. 853, 865-66 (1982). Therefore, the parsonage exemption fails the neutrality test.

CONCLUSION

For the foregoing reasons, this Court should REVERSE the decision of the Eighteenth Circuit. Petitioner Burns asks that this Court hold that Burns qualifies as a minister of the gospel and is entitled to the parsonage tax exemption for his housing allowance under § 107(2). Burns leads worship, teaches Unitarian principles, provides spiritual counseling, and runs a youth ministry. He is heavily involved in the operations of the school, which is an integral agency of the church. For these reasons, he is a minister.

Petitioner-Intervenor CARC, which is an entirely separate party from Burns, requests that this Court hold that § 107(2) is unconstitutional under the Establishment Clause of the United States Constitution. The parsonage exemption benefits ministers alone and favors religions with a centralized structure. It lacks a secular purpose, advances and endorses religion, and fosters excessive entanglement between church and state. Further, it is neither rooted in American history nor religiously neutral. For these reasons, it violates the Establishment Clause.

Respectfully submitted,

Team 19
Counsel for the Petitioner and Petitioner-Intervenor

CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of this Brief for Petitioner John Burns and Petitioner-Intervenor Citizens Against Religious Convictions, Inc. was served upon Respondents, the Internal Revenue Service and Commissioner of Taxation, through its counsel of record by email to the Touro Moot Court Honors Board at tlcmootcourt@student.touro.edu on this day, the 12th of March 2021.

Team 19
Counsel for the Petitioner and Petitioner-Intervenor

CERTIFICATE OF COMPLIANCE

Pursuant to Rule III(I) of the 7th Annual National Moot Court Competition in Law & Religion, we hereby certify that this Brief of Petitioner John Burns and Petitioner-Intervenor Citizens Against Religious Convictions, Inc. is the original work of our team (Team 19) and that the brief complies with the Tournament rules.

Team 19
Counsel for the Petitioner and Petitioner-Intervenor

APPENDIX

Treas. Reg. 1.1402(c)-5. Ministers of the gospel and members of religious orders.

(a) *In general*—(1) *Taxable years ending before 1968.* For taxable years ending before 1955, a duly ordained, commissioned, or licensed minister of a church or a member of a religious order is not engaged in carrying on a trade or business with respect to service performed by him in the exercise of his ministry or in the exercise of duties required by such order. However, for taxable years ending after 1954 and before 1968, any individual who is a duly ordained, commissioned, or licensed minister of a church or a member of a religious order (other than a member of a religious order who has taken a vow of poverty as a member of such order) may elect, as provided in §1.1402(e)(1)-1, to have the Federal old-age, survivors, and disability insurance system established by title II of the Social Security Act extended to service performed by him in his capacity as such a minister or member. If such a minister or a member of a religious order makes an election pursuant to §1.1402(e)(1)-1 he is, with respect to service performed by him in such capacity, engaged in carrying on a trade or business for each taxable year to which the election is effective. An election by a minister or member of a religious order has no application to service performed by such minister or member which is not in the exercise of his ministry or in the exercise of duties required by such order.

(2) *Taxable years ending after 1967.* For any taxable year ending after 1967, a duly ordained, commissioned, or licensed minister of a church or a member of a religious order (other than a member of a religious order who has taken a vow of poverty as a member of such order) is engaged in carrying on a trade or business with respect to service performed by him in the exercise of his ministry or in the exercise of duties required by such order unless an exemption under section 1402(e) (see §§1.1402(e)-1A through 1.1402(e)-4A) is effective with respect to such individual for the taxable year during which the service is performed. An exemption which is effective with respect to a minister or a member of a religious order has no application to service performed by such minister or member which is not in the exercise of his ministry or in the exercise of duties required by such order.

(b) *Service by a minister in the exercise of his ministry.* (1)(i) A certificate of election filed by a duly ordained, commissioned, or licensed minister of a church under the provisions of §1.1402(e)(1)-1 has application only to service performed by him in the exercise of his ministry.

(ii) An exemption under section 1402(e) (see §§1.1402(e)-1A through 1.1402(e)-4A) which is effective with respect to a duly ordained, commissioned, or licensed minister of a church has application only to service performed by him in the exercise of his ministry.

(2) Except as provided in paragraph (c)(3) of this section, service performed by a minister in the exercise of his ministry includes the ministration 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 following rules are applicable in determining whether services performed by a minister are performed in the exercise of his ministry:

(i) Whether service performed by a minister constitutes the conduct of religious worship or the ministration of sacerdotal functions depends on the tenets and practices of the particular religious body constituting his church or church denomination.

(ii) Service performed by a minister in the control, conduct, and maintenance of a religious organization relates to directing, managing, or promoting the activities of such organization. Any religious organization is deemed to be under the authority of a religious body constituting a church or church denomination if it is organized and dedicated to carrying out the tenets and principles of a faith in accordance with either the requirements or sanctions governing the creation of institutions of the faith. The term "religious organization" has the same meaning and application as is given to the term for income tax purposes.

(iii) If a minister is performing service in the conduct of religious worship or the ministration of sacerdotal functions, such service is in the exercise of his ministry whether or not it is performed for a religious organization. The application of this rule may be illustrated by the following example:

Example. M, a duly ordained minister, is engaged to perform service as chaplain at N University. M devotes his entire time to performing his duties as chaplain which include the conduct of religious worship, offering spiritual counsel to the university students, and teaching a class in religion. M is performing service in the exercise of his ministry.

(iv) 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 constituting a church or church denomination, 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 (see subparagraph (2)(ii) of this paragraph) is in the exercise of his ministry. The application of this rule may be illustrated by the following example:

Example. M, a duly ordained minister, is engaged by the N Religious Board to serve as director of one of its departments. He performs no other service. The N Religious Board is an integral agency of O, a religious organization operating under the authority of a religious body constituting a church denomination. M is performing service in the exercise of his ministry.

(v) If a minister, pursuant to an assignment or designation by a religious body constituting his church, performs service for an organization which is neither a religious organization nor operated as an integral agency of a religious organization, all service performed by him, even though such service may not

involve the conduct of religious worship or the ministration of sacerdotal functions, is in the exercise of his ministry. The application of this rule may be illustrated by the following example:

Example. M, a duly ordained minister, is assigned by X, the religious body constituting his church, to perform advisory service to Y Company in connection with the publication of a book dealing with the history of M's church denomination. Y is neither a religious organization nor operated as an integral agency of a religious organization. M performs no other service for X or Y. M is performing service in the exercise of his ministry.

(c) *Service by a minister not in the exercise of his ministry.* (1)(i) A certificate filed by a duly ordained, commissioned, or licensed minister of a church under the provisions of §1.1402(e)(1)-1 has no application to service performed by him which is not in the exercise of his ministry.

(ii) An exemption under section 1402(e) (see §§1.1402(e)-1A through 1.1402(e)-4A) which is effective with respect to a duly ordained, commissioned, or licensed minister of a church has no application to service performed by him which is not in the exercise of his ministry.

(2) If a minister is performing service for an organization which is neither a religious organization nor operated as an integral agency of a religious organization and the service is not performed pursuant to an assignment or designation by his ecclesiastical superiors, then only the service performed by him in the conduct of religious worship or the ministration of sacerdotal functions is in the exercise of his ministry. See, however, subparagraph (3) of this paragraph. The application of the rule in this subparagraph may be illustrated by the following example:

Example. M, a duly ordained minister, is engaged by N University to teach history and mathematics. He performs no other service for N although from time to time he performs marriages and conducts funerals for relatives and friends. N University is neither a religious organization nor operated as an integral agency of a religious organization. M is not performing the service for N pursuant to an assignment or designation by his ecclesiastical superiors. The service performed by M for N University is not in the exercise of his ministry. However, service performed by M in performing marriages and conducting funerals is in the exercise of his ministry.

(3) Service performed by a duly ordained, commissioned, or licensed minister of a church as an employee of the United States, or a State, Territory, or possession of the United States, or the District of Columbia, or a foreign government, or a political subdivision of any of the foregoing, is not considered to be in the exercise of his ministry for purposes of the tax on self-employment income, even though such service may involve the ministration of sacerdotal functions or the conduct of religious worship. Thus, for example, service performed by an individual as a chaplain in the Armed Forces of the United States is considered to be performed by a commissioned officer in his capacity as such, and not by

a minister in the exercise of his ministry. Similarly, service performed by an employee of a State as a chaplain in a State prison is considered to be performed by a civil servant of the State and not by a minister in the exercise of his ministry.

(d) *Service in the exercise of duties required by a religious order*—(1) *Certificate of election.* A certificate of election filed by a member of a religious order (other than a member of a religious order who has taken a vow of poverty as a member of such order) under the provisions of §1.1402(e)(1)-1 has application to all duties required of him by such order.

(2) *Exemption.* An exemption under section 1402(e) (see §§1.1402(e)-1A through 1.1402(e)-4A) which is effective with respect to a member of a religious order (other than a member of a religious order who has taken a vow of poverty as a member of such order) has application only to the duties required of him by such order.

(3) *Service.* For purposes of subparagraphs (1) and (2) of this paragraph, the nature or extent of the duties required of the member by the order is immaterial so long as it is a service which he is directed or required to perform by his ecclesiastical superiors.