No. 20-199

In the Supreme Court of the United States

JOHN BURNS,

Petitioner,

and

CITIZENS AGAINST RELIGIOUS CONVICTIONS, INC.

Petitioner-Intervenor,

v.

INTERNAL REVENUE SERVICE AND COMISSIONER OF TAXATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTEENTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Does a teacher qualify as a minister of the gospel under 26 U.S.C. § 107(2) when he does not teach religion or perform sacerdotal duties?
2. Does 26 U.S.C. § 107(2) violate the Establishment Clause of the First Amendment even though it is one of many income exemptions provided by the Internal Revenue Service?

STATEMENT OF THE CASE

Statement of Facts

John Burns teaches secular subjects and is a guidance counselor at Whispering Hills Academy ("Whispering Hills" or "school"), a religious boarding school located near and operated by the Whispering Hills Unitarian Church. *Burns v. Internal Revenue Service and Comm'r of Taxation,* NO. 19-111 at 3-4 (S.D. Touroville 2019). When he accepted the position in 2016, Mr. Burns lived an hour away from the school. To cut down on travel time, he moved to a house five minutes from campus. The school covered $2,500 of his moving expenses. *Id.* at 4. Additionally, he was granted a monthly rental allowance of $2,100 as part of his monthly salary. This amount was calculated to include the fair rental value of the home, plus Burns' expected utility costs.

Mr. Burns teaches eleventh and twelfth grade English, Renaissance Literature, and several foreign languages, including French, Italian, and Latin. *Id.* at 3. In addition to those secular courses, he is one of the school's guidance counselors, advising students on educational and personal matters. Mr. Burns started an after-school club called Prayer After Hours. He also holds on-campus gatherings for students after Sunday service, providing lunch, snacks, and social interaction. Students have described these gatherings as a sort of "youth ministry," where they discuss topics ranging from that week's church services to any other topic on their minds. *Id.*

In 2017, Mr. Burns started to research possible tax exemptions to lower his tax liability. He thought he may qualify for an exemption because he had moved to be closer to his job and was receiving a housing allowance as part of his salary from the school. *Id.* at 4. His co-worker, Pastor Nick, suggested that Mr. Burns look into the parsonage exemption under 26 U.S.C. § 107(2). Pastor Nick told Mr. Burns he may qualify because he was employed at a religious institution, led prayers for his afterschool club, and included some spirituality into his guidance counseling. Mr. Burns took this advice and claimed his housing under the exemption in § 107(2) on his 2017 tax return. *Id.* at 4.

In the summer of 2018, Mr. Burns received a letter of denial from the IRS and Commissioner of Taxation, disqualifying him for the exemption because he could not prove that he was, in fact, a "minister of the gospel." *Id.* at 4. Subsequently, he owed the IRS additional tax money. Mr. Burns claimed he was a minister of the gospel and was entitled to the parsonage tax exemption.

Procedural History

In 2019, Mr. Burns filed a claim against the IRS and the Commissioner of Taxation in District Court after having been denied the housing exemption under § 107(2). He claimed that he was a "minister of the gospel" and thus eligible to claim the parsonage exemption. A local organization, Citizens Against Religious Convictions, Inc. ("CARC"), learned about the pending lawsuit and filed a motion to intervene. CARC claimed the parsonage exemption violated the Establishment Clause of the First Amendment because the statute favored religion over non-religion. CARC was granted entry into the lawsuit. CARC's motion with the district court established the standing needed to support the claim that § 107(2) is unconstitutional. The IRS and Commissioner of Taxation filed a motion for summary judgement on both claims. The District Court held for the plaintiffs. The court found that Mr. Burns satisfied the IRS's

definition of "minister of the gospel" and was entitled to the parsonage exemption under § 107(2) and that the tax exemption provided preferential treatment to ministers and violated the Establishment Clause. *Burns*, NO. 19-111 at 9, 13.

The District Court looked to two cases when deciding whether Mr. Burns was a "minister of the gospel:" *Kirk v. Commissioner,* 425 F.2d 492, 493 (D.C. Cir. 1970); *Flowers v. United States,* No. CA 4-79-376-E, 1981 U.S. Dist. LEXIS 16758 at *14-15 (N.D. Tex. Nov. 25, 1981). In *Kirk,* the plaintiff was a member on the board of his church and served as the director of the public affairs department. 425 F.2d at 493. The D.C. Court found that the plaintiff's responsibilities did not include "the conduct of religious worship" and were not "sacerdotal in nature." *Id.* In *Flowers,* a Texas district court held that the plaintiff-professor was not entitled to the parsonage exemption because the university at which he taught was not under control of the affiliated religious organization and his teachings were not sacerdotal in nature. No. CA 4-79-376-E at *14-15.

Here, the lower court found that Mr. Burns was a "minister of the gospel" because he incorporated faith-based ideals into his secular teachings and counseling, attended required worship services, and hosted religious discussions with his students after services. *Burns*, NO. 19-111 at 8. The court found that Mr. Burns did not need to be an ordained minister to teach his subjects "in harmony with the precepts of [the] faith" and to perform sacerdotal duties. *Id*. The court then used an eight-part test employed in *Flowers* to find that the "school was integral to the operation of the church" and, therefore, Mr. Burns's position at the school made him a "minister of the gospel." *Id.* at 9.

Next, the court examined whether § 107(2) was Constitutional under the Establishment Clause. The court looked to a three prong test established by the Supreme Court in *Lemon v.*

Kurtzman, 403 U.S. 602, 612-13 (1971). The court found that the parsonage exemption in § 107(2) favors religion over non-religion. *Id.* at 10. Further, the court explained that the First Amendment "mandates government neutrality...between religion and non-religion" and that the housing allowance serves as a "message of [religious] endorsement" by the government. *Id.* (quoting *Vision Church v. Vill. of Long Grove,* 468 F.3d 975, 991-993 (7th Cir. 2006)). The court also found § 107(2) "excessively entangled" government with religion. *Id.* at 11. It reasoned that because § 107(2) requires the courts to make a fact-specific inquiry to determine who qualifies as a "minister of the gospel," the government had to intrude into the affairs of the religion itself. *Id.* One of the last points the court made was that by implementing a tax scheme that favors religion exclusively, the government is "essentially promoting the activity that it is subsidizing." *Id.* at 12. For those reasons, the court held that even though Mr. Burns was a "minister of the gospel" under § 107(2) and entitled to the parsonage exemption, the exemption was unconstitutional and violated the Establishment Clause. *Id.* The IRS and Commissioner of Taxation appealed this decision to the 18th Circuit Court of Appeals.

The Appellate Court reversed the District Court's decision and granted summary judgement for the Defendants. *Internal Revenue Service and Comm'r of Taxation v. Burns,* NO. 20-231 at 16 (18th Cir. App. 2020). The court revisited *Kirk* and looked at two other cases in its decision. The court found that, similarly to the plaintiff in *Kirk*, Mr. Burns was not commissioned with the charge of leading a congregation, was not an ordained minister, and neither his classroom teachings nor his guidance counseling included the conduct of worship. *Id.* at 18.

Further, the court found taxpayers who are not employed specifically to conduct religious worship or sacerdotal duties are not ministers of the gospel. *Tannenbaum v. Commissioner,* 58 T.C. 1 (1972). Like the plaintiff in *Tannenbaum*, the court here found that Mr. Burns was hired

to be a guidance counselor and teacher of secular subjects, none of which was "inherently sacerdotal in nature, involving the conduct of religious worship." *Internal Revenue Service and Comm'r of Taxation,* NO. 20-231 at 18. The court reasoned that since the nature of Mr. Burns's job is secular, his employer did not hold him out to be a minister. *Id.* Further, any religious activities Mr. Burns conducted were of his own volition. *Id.* at 19.

The court then addressed the issue of whether the school and the church were integrally connected. *Id.* at 20. The court found that there was not enough information on the record to employ the eight-part test in *Flowers* that was used by the district court. *Id.* Therefore, the court held that since there was insufficient factual evidence which pointed to integration, the church and school were not integrated. *Id.*

Next, the court examined the constitutionality of § 107(2) and found that it does not violate the Establishment Clause. *Id.* at 23. It found the parsonage tax exemption satisfied the three-prong *Lemon* test. *Id.* at 21. The court viewed § 107(2) as less restrictive than other tax exemptions which applied to secular employees. *Id.* at 22. The court held that because the exemption allows religious organizations to decide when and how to furnish parsonage to its ministers, there is minimal governmental interference. *Id.* The Supreme Court held in *Lemon* that government entanglement is only unconstitutional when the entanglement becomes excessive. *Lemon,* 403 U.S. at 614. The Appellate Court here found that § 107(2) "specifically disassociates itself from the intricate tax inquiries that would be required under other possible tax exemptions" and therefore did not rise to the level of excessive entanglement. *Internal Revenue Service and Comm'r of Taxation,* NO. 20-231 at 23. For these reasons the 18th Circuit Court ruled in favor of the IRS and the Commissioner of Taxation. Mr. Burns and CARC appealed that decision to the Supreme Court.

SUMMARY OF THE ARGUMENT

I. A TEACHER DOES NOT QUALIFY AS A MINISTER OF THE GOSPEL UNDER 26 U.S.C. § 107(2) WHEN THEY DO NOT TEACH RELIGION OR PERFORM SACERDOTAL DUTIES.

"Ministers of the gospel" in their respective religions are eligible for a parsonage tax exemption under § 107 of the tax code. The code does not define "minister of the gospel" nor does the government seek to define who is a "minister of the gospel" of their respective religions. The Treasury Department, however, does give some guidance as to what duties and responsibilities a taxpayer should perform to be considered a minister of the gospel and qualify for the parsonage tax exemption. 26 C.F.R § 1.1402(c)-5 (2021).

Section 1.1402(c)-5 lays out three qualifications courts can look to when considering whether a taxpayer is a minister of the gospel. Courts may consider whether the service performed by a minister constitutes the conduct of religious worship or the ministration of sacerdotal functions as provided by the tenets and practices of their particular religion, whether the service performed by a minister in the control, conduct, and maintenance of a religious organization relates to directing, managing and promoting the activities of such organizations, and whether the organization for which the minister works is under the control of a religious body. 26 C.F.R § 1.1402(c)-5(b)(2)(i).

Further, the code gives three examples of the different situations in which a taxpayer *may* be considered minister of the gospel for tax purposes: a duly ordained minister who conducts religious worship, offers spiritual counseling, and teaches religion classes; a duly ordained minister who serves as the director of one of the departments of a religious organization; and a duly ordained minister who is assigned by their religious body to advise a secular organization in connection with their religion's history or philosophy. *Id.* at § 1.1402(c)-5(b)(2)(iii)-(v). This list

is not exhaustive; however, it does work to illustrate the government's intent on who is likely to qualify for the parsonage exemption under § 107.

Here, Mr. Burns is not "minister of the gospel" in the Unitarian Church and therefore does not qualify for the parsonage exemption. Ministers in the Unitarian Church serve many functions including religious worship and teaching. The Unitarian Church traditionally "calls up" ministers through its congregation, it typically does not hire ministers from outside of the church. Unitarian Universalist Association, *Religious Leadership*, https://www.uua.org/leadership/learning-center/governance/polity/47012.shtml. Therefore, Mr. Burns is not considered a minister of the gospel according to the "tenets and practices" of the church.

A taxpayer can be a "religious functionary" of a church and still not be considered a minister of the gospel as it relates to the parsonage exemption of § 702. *Haimowitz v. Comm'r,* 1997 Tax Court Memo LEXIS 42 at *12 at 14 (T.C.M. 1997). Mr. Burns taught secular subjects, served as a guidance counselor, and hosted after school and after worship clubs on Sundays for the students. These are not "services performed by a minister in the control, conduct, and maintenance of a religious organization that relate[] to directing, managing, or promoting the activities of such organization." § 1.1402(c)-5(b)(2)(ii). Although Mr. Burns weaved religion into his counseling, the after-school and after-worship activities he organized were not officially sanctioned by the church and did not require performance from someone with religious authority.

The third qualification laid out in § 1.1402(c)-5 examines whether the organization for which the taxpayer works is under religious authority. While there are not enough facts in the case at bar to determine if the School is under religious authority of the Church, that fact is irrelevant because Mr. Burns does not qualify as a "minister of the gospel" under the tenants and practices

of the Unitarian Faith. For these reasons, Mr. Burns is not entitled to the parsonage exemption under § 107.

II. 26 U.S.C. § 107(2) IS CONSTITUTIONAL UNDER THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

The Supreme Court has laid out a three-prong test, known as the *Lemon* test, for assessing whether a statute is constitutional under the Establishment Clause of the First Amendment. *Lemon*, 403 U.S. at 612-13. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [and] the statute must not foster 'an excessive government entanglement with religion.'" *Id.* (*citing Walz v. Tax Com. of New York,* 397 U.S. 664, 674 (1970)). If a statute fails any one prong, it violates the Establishment Clause. *Gaylor v. Mnuchin*, 919 F.3d 420, 427 (7th Cir. 2019). Here, CARC contends that the gross income exemption under § 107(2) of Title 26 of the Internal Revenue Code is unconstitutional because the exemption favors religion over non-religion and thus, violates the Establishment Clause of the First Amendment. However § 107(2) is constitutional because it satisfies all three prongs of the *Lemon* test and supports our historic notion of separation between church and state.

First, § 107(2) has three secular legislative purposes: to avoid excessive entanglement with religion; to eliminate discrimination against ministers; and to eliminate discrimination between ministers. *Gaylor,* 919 F.3d at 427. Section 107(2) was implemented to avoid the excessive entanglement of government and religion that was required by the principal housing exemption under § 119(a)(2), convenience-of-the-employer-doctrine.[1] Section 107 "prevents the IRS from

[1] 26 U.S.C. § 119(a)(2) exempts meals and lodging if: the meal or lodging is furnished (1) by an employer to an employee, (2) in kind (as opposed to in cash), (3) on the business premises of the employer, (4) for the convenience of the employer, and (5) as a condition of employment.

conducting intrusive inquiries into how religious organizations use their facilities," where and how far the church's premises extend, and other determinations about the "business of the church." Instead, § 107 only requires the IRS to determine who is a minister, avoiding excessive entanglement with religion. *Id.* at 431-32. Section 107 also sought to put ministers on an equal footing with secular employees who could receive housing benefits. Ministers could not obtain the tax exemption under § 119(a)(2) because allowing that exemption excessively entangled church and state. Further, § 107(2) seeks to alleviate discrimination between ministers, specifically those of smaller and poorer denominations that cannot offer in-kind housing. *Id.* at 430.

Second, the principal or primary effect of § 107(2) neither advances nor inhibits religion. A law or statute is not "unconstitutional simply because it allows churches to advance religion." *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987). Many laws make it easier for religions to advance their purposes and still pass constitutional muster. Rather, the government *itself* must advance religion through its activities. *Id*. Tax exemptions are not sponsorship even if they may afford religious organizations indirect economic benefits. *Walz*, 397 U.S. at 675. The tax exemption provided in § 107(2) is no different than tax exemptions provided to secular occupations; it is "simply one of many per se rules that provide a tax exemption to employees with work-related housing requirements." *Gaylor,* 919 F.3d at 428-29. Thus, § 107(2) must be taken in the greater context of all tax exemptions provided to employees with work-related housing requirements, instead of examined in isolation.

Last, § 107(2) does not foster an excessive government entanglement with religion. Because religion and government can never truly be separate, the Establishment Clause is violated only where there is *excessive* entanglement. *Lemon*, 403 U.S. at 614. While continued oversight and

state inspection excessively entangle religious organizations and the government, as discussed above, § 107(2) was specifically designed to require the smallest level of inquiry to determine who constitutes a "minister of the gospel." The Supreme Court has approved such inquiries into whether an individual is considered a minister. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190-95 (2012). Further, exemptions from taxation require less entanglement than taxation would. *Walz*, 397 U.S. at 674-75.

Further, legislative determinations about the Establishment Clause are entitled to deference, specifically for classifications in tax legislation. *Gaylor,* 919 F.3d at 434. Here, the government already made determinations about how § 107(2) affected the Establishment Clause, and while not binding, this determination should be afforded some deference. Section 107(2) was specifically designed to avoid excessive entanglement so that ministers would be afforded the same tax exemptions as others in secular employees. Because § 107(2) serves a secular legislative purpose, neither advances nor inhibits religion, and does not foster an excessive government entanglement with religion, it passes all three prongs of the *Lemon* test. Therefore, it does not violate the Establishment Clause of the First Amendment.

ARGUMENT

The Establishment Clause of the First Amendment prohibits the government from making any law "respecting an establishment of religion." U.S. Const. amend. I. While "establishment" is not self defined in the Constitution, courts have long held that the main objective of the Establishment Clause is that one religion cannot be officially preferred over another. *Skoros v. City of New York,* 437 F.3d 1, 16 (2nd Cir. App. 2004). As such, governmental institutions and agencies have specifically implemented policies and legislation to honor this separation of government and religion.

The IRS has honored this separation throughout the Code, specifically 26 U.S.C. § 107. This section allows an income tax exemption for housing provided to "ministers of the gospel." It 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 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.

26 U.S.C. § 107. The parsonage exemption was created so that ministers could be afforded the same tax exemptions secular employees received with work-related housing requirements. *Gaylor,* 919 F.3d at 427. The government provides broad latitude to religious organizations to choose who they deem to be "ministers of the gospel." The Treasury Department provides guidelines that courts may follow when deciding if a taxpayer is a "minster of the gospel." 26 C.F.R. § 1.1402(c)-5.

First this brief explains why Mr. Burns is not a "minister of the gospel" under the tenets and practices of the Unitarian Church and is not entitled to the parsonage exemption under § 107. Second, the brief argues that the parsonage exemption under § 107(2) does not excessively entangle government in religion and is therefore constitutional under the Establishment Clause. The court should review these questions of law de novo.

I. PETITIONER IS NOT A "MINISTER OF THE GOSPEL" AND THEREFORE IS NOT ENTITLED TO THE PARSONAGE TAX EXEMPTION UNDER § 107(2)

Section 107 exempts a "minister of the gospel" from paying taxes on either the rental value of a home furnished to him as part of his compensation or the rental allowance paid to him as part of his compensation that is used to rent or provide a home. 26 U.S.C. § 107 (2021) . In order

to qualify for the exemption, the rental allowance must be paid "in remuneration for services which are ordinarily the duties of a minister of the gospel." 26 C.F.R. §1.107-1(a).

Courts do not limit parsonage to ministers who are officially ordained by the church. *In re Marlow*, 269 S.C. 219, 224 (S.C. 1977). In *Marlow*, the South Carolina Supreme Court recognized that some churches do not have formal ordination. The court adopted a broader definition of the type of "minister" who may qualify for the parsonage exemption. *Id.*

Further, "minister of the gospel" is not explicitly defined in the code. Treasury regulations provide a guide for courts to determine whether a service is being performed by a minister in the exercise of his ministry. The relevant part of the code provides:

> "[1] 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;* [2] 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; [3] 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 faith in accordance with either the requirements or sanctions governing the creation of institutions of the faith..." 26 C.F.R. §1.1402(c)-5(b)(2)(i), (ii), (iii) (*emphasis added*).

First this brief explains why Petitioner does not perform sacerdotal functions based on the tenants and practices of the Unitarian Church. Second, the brief argues that because Mr. Burns is not a minister of the gospel because he does not have ministerial control of directing, managing

or promoting the activities of the Church. Third, it explains why the court does not have to reach the conclusion of whether the School is an integral part of the religious body.

A. Petitioner is not a minister of the gospel according to the tenets and practices of the Unitarian Church.

Courts are hesitant to "evaluate and judge ecclesiastical authority" when deciding who is and who is not a minister of the gospel under § 107. *Silverman v. Comm'r,* 57 T.C. 727, 730 (T.C. 1972). Instead, courts base all findings on the evidence and record of proof presented in each case. *Id.* Further, much deference is given to the particular religion as to the qualifications they consider to be "ministers of the gospel." *Haimowitz,* 1997 Tax Court Memo LEXIS 42, at *12 (T.C.M. 1997). The code does not define sacerdotal functions but says that inquiry "depends on the tenants and practices of the particular religious body constituting his church…" 26 C.F.R §1.1402(c)-5 (2)(i).

The Tax Court looks to the traditions of the particular religion when determining if the taxpayer in question is a "minister of the gospel." In *Silverman*, the court found even though a cantor in the Jewish faith was not officially ordained, he was still considered a "minister of the gospel" in Judaism. 57 T.C. 727 at 732. The cantor was "called" to his congregation, which is in line with Jewish traditions, and he performed ministerial duties. For those reasons he was subject to the parsonage exemption. *Id.*

The Michigan First District Court of Appeals found that a music teacher was a "minister of the gospel" and was entitled to the parsonage tax exemption of § 107. *St. John's Evangelical Church v. Bay City*, 114 Mich. App 616 (Mich. Ct. App. 1982). The court looked to the traditions of the Wisconsin Synod and found that teaching ministers in Wisconsin Lutheran Churches are considered by the church to be ordained ministers of the gospel. The teachers

received theological training; they were trained and certified by the synod at the church schools; they made a life-long commitment to their work, like preaching ministers in that religion; they came to church by receiving a call in the same fashion as preaching ministers; they had the same rights and duties of preaching ministers, including voting at synodical meetings; and they were theologically equipped to perform marriages. *Id.* at 621.

Unlike the petitioner in *St. John's Evangelical Church*, Mr. Burns was not an ordained minister and does not have theological training. Further, it is unclear if Mr. Burns has made a life-long commitment to the church, or if he was hired to be a teacher as a regular employee. The record does not show that he has any authority in the ecclesiastical decisions of the church or if he is permitted to perform services.

Pursuant to Treasury regulations and pertinent case law, here, the Court may look into the traditions of the Unitarian Church to decide if Mr. Burns is considered by that faith to be a "minister of the gospel." The Unitarian Church combines the typical categories of parish ministry, religious education, and community ministry into one professional ministry. *Supra* Unitarian Universalist Association, *Religious Leadership*. The Unitarian Universalist Association recommends that all ministers must meet the same criteria of training, skill, and ability and demonstrate an understanding of their area of specialization. *Id.* This ensures that all clergy have the basic skills needed to relate to congregational structure such as preaching, interpersonal communication, and knowledge of theology. *Id.* All clergy, regardless of the setting of their ministry, are "called" from the ranks of the church. *Id.* An important tenet of Unitarianism is that ministers are called from the congregation. Rev. Diane Dowgiert, *From the Minister's Study*, Unitarian Universalist Church of Greensboro (November 1, 2017) https://uugreensboro.org/ministers-study-november-2017/. All clergy should be active members

of a Unitarian Universalist Congregation. “The authenticity and credibility of ministers will only be enhanced if they are active members of the religious movement from which they minister.” *Id.* Ordination into the Unitarian Church is for life. Foothills Unitarian Love Unites Us all, *Ordaining a Minister: Our Unitarian Congregation’s Privilege and Responsibility* (May 20, 2019) https://foothillsuu.org/2019/05/ordaining-a-minister-our-unitarian-congregations-privilege-and-responsibility/.

Here, Mr. Burns was hired to be a guidance counselor and teach secular subjects to students at a Unitarian boarding school. The record does not reflect that he was specifically trained in any way that is congruent with other ministers in the church. There is also nothing in the record that suggests he was called to this position from within the congregation, which is customary for ministers, including teaching ministers, in the Unitarian faith. Further, Mr. Burns moved an hour away from his home to accept this job. A court can reasonably infer that because he lived so far away, he was not a member of this congregation before accepting the position. Therefore, he was not called from within the congregation to be a teacher or a teaching minister. This fact makes it less likely that the Unitarian Church itself would see Mr. Burns as a minister of the gospel.

Here, Petitioner could argue that because Pastor Nick told him he should look into the parsonage exemption that the Church considers him a “minister of the gospel.” However, that is not necessarily true. In the Unitarian faith, the congregation as a whole decides who serves as ministers. The opinion of one Pastor would not qualify Mr. Burns as a “minister of the gospel” in the eyes of the church.

Tax regulations set out three examples of who may be considered a “minister of the gospel.” Example one contemplates a duly ordained minister whose duties include the conduct of religious worship, offering spiritual counsel to students and teaching a class in religion. 26

C.F.R. § 1.1402(c)-5(b)(2)(iii). Example two contemplates a duly ordained minister who is asked by the board of the religious organization to serve as director of one of its departments but performs other duties. If the religious board is an integral agency of a religious organization operating under the authority of a religious body, then the minister is performing a service in the exercise of his ministry. § 1.1402(c)-5(b)(2)(iv). In the third example, a minister is performing a service in the exercise of his ministry if a duly ordained minister is assigned by his religious body to perform advisory service to a company or agency in connection with the church's history or philosophy. § 1.1402(c)-5(b)(2)(v).

The government does not contend to define "ministers" as the word relates to each religion. Further, an employee who is not officially an ordained minister may be considered a "minister of the gospel" by a particular religion based on that religion's customs. However, it is clear from the text of the code that secular teachers who taught secular subjects at a religious school were not contemplated as part of the parsonage exemption on § 107. Further, it is clear from Mr. Burns's position and responsibilities at the School, that he is not considered a "minister of the gospel" in the eyes of the Unitarian Church.

B. Although Petitioner may take part in religious activities, he is not necessarily in the control, conduct and maintenance of the religious organization.

An employee of a religious organization can have a heavy hand in the direction, management, and promotion of religious activities without being considered a "minister of the gospel." In *Haimowitz*, the Tax Court found that although Petitioner was a "religious functionary" of the synagogue, he did not qualify as a "minister of the gospel" and therefore was not subject to the parsonage exemption under § 107(2). 1997 Tax Court Memo LEXIS 42, at *14. The temple had a Rabbi and a cantor; Petitioner did not claim to fill those roles. *Id.* at 4. He

was initially hired as an executive director, performing mostly administrative functions. *Id.* Over the course of 30 years, he assisted students with their Bar and Bat Mitzvah preparation. *Id.* He also served as the synagogue wedding director and frequently participated as a witness to the Jewish marriage contract. *Id.* at 5. Further, Petitioner assisted the rabbi with various tasks during the religious ceremonies and managed the synagogue's cemetery lots and visited and conducted services for mourners. *Id.*

The court found that Petitioner's duties were more organizational than religious in nature and did not require performance from someone with ministerial authority, like a Rabbi. *Id.* at 10. In making its decision, the court pointed to the duties Petitioner did *not* perform. He did not lead the religious Bar and Bat Mitzvah training, he merely augmented it for the Rabbi and cantor who did the main parochial training. *Id.* His responsibilities at the wedding and funerals were mostly secular in nature, he did not officiate any of the services. *Id.* at 10-11. Further, the court noted that Petitioner was never ordained to perform religious functions and found Petitioner failed to produce evidence that the temple, or anyone else, viewed him as a religious leader. *Id.* at 12.

Like the petitioner in *Haimowitz*, Mr. Burns used his religious knowledge to assist students in his guidance counseling sessions and in his after-worship gatherings. The students describe the after-school gatherings as a type of "youth ministry," but this is not evidence that the church held Mr. Burns out to be a minister. These activities ran adjacent to the main ecclesiastical duties of the ministers of the church and after the Sunday worship services in which Mr. Burns did not have an official role. These after-worship meetings were done on Mr. Burns' own accord, were more organizational than religious in nature, and did not require performance from someone with religious authority.

C. If Petitioner is not a minister of the gospel under the tenets and practices of the religion, the church's authority over the school is irrelevant

The third prong of §1.1402(c)-5 sets out the guidelines for organization that is under religious authority. "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 faith in accordance with either the requirements or sanctions governing the creation of institutions of the faith…" 26 C.F.R § 1.1402(c)-5(b)(2)(ii). Both lower courts used an eight-part test used by a Texas District Court in *Flowers* to determine if the School was under the religious authority of the church. No. CA 4-79-376-E at *14-15.

In *Flowers,* the court found a teacher who taught secular classes at a Christian college was not a minister of the gospel and was not entitled to the parsonage exemption under § 107. *Id.* at 15. The court looked at several factors including the services performed by the teacher and whether or not the college was under religious authority from the Christian Church. *Id.* at 10-11. The court looked to an IRS Revenue Ruling to determine if the college was under authority of the church. *Id.* at 9. Before making its analysis, the court pointed out that "a Revenue Ruling is only an opinion of the [IRS] and does not have force of law." *Id.* Revenue Rulings have "some weight" but a court does not have to follow them. *Id.* The eight factors the court looked at were: (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. *Id.* at 11.

Here, both lower courts utilized this test to determine if the School is under religious authority of the Church. *Burns,* NO. 19-111 at 7*; Internal Revenue Service and Comm'r of Taxation,* NO. 20-231 at 19-20*.* The District Court found that "without a more detailed analysis of the relationship between the church and the school, it is difficult to address each factor in the case at bar." *Burns,* at 8. Yet the court still found that the School is an integral part of the Church. The Appellate Court agreed with the lower court that there was "[in]sufficient evidence in the facts of the case to conduct a proper weighing of the factors" and found that the Church and School were not integrated. *Internal Revenue Service and Comm'r of Taxation, NO. 20-231 at 20.*

Respondent agrees with both courts in that there is insufficient evidence on the record to determine whether the School is under the religious authority of the Church. This prong of §1.1402(c)-5, which mandates that an organization must be integrally related to the church, clearly comes into play when the taxpayer is a "minister of the gospel" and the question is whether the taxpayer is performing services "in the control, conduct and maintenance of a religious organization [which] relate[] to directing, managing, or promoting the activities of such organization[s]." 26 C.F.R § 1.1402(c)-5(b)(2)(ii). If the taxpayer does not meet the threshold inquiry of whether he is conducting religious worship in the service of ministry according to the tenets and practices of the particular religious body constituting his church or church denomination and therefore is not a "minister of the gospel," then there is no reason to ask if the organization for which the taxpayer is working is under control of a religious body. Because Mr.

Burns is not held to be a minister of the gospel according to the tenants and practices of the Unitarian Church, it does not matter if the School is under control of the Church when determining if Mr. Burns is entitled to the parsonage exemption under § 107(2).

A taxpayer is considered a "minister of the gospel" if they perform sacerdotal duties of their respective religion based on the tenants and practices of that religion. A taxpayer who is not considered a "minister of the gospel" may still perform services that are within the "control conduct and maintenance" of a religious organization which relate to directing, managing or promoting the activities of such organization and not qualify for the parsonage exemption. Further, if the taxpayer is not considered a "minister of the gospel" it does not matter if the organization for which he works is under the control of a religious organization for the purposes of determining whether he is entitled to the parsonage exemption.

Mr. Burns is not considered a "minister of the gospel" according to the tenants and practices of the Unitarian faith. Further, he teaches secular subjects and, although he includes some religion in his counseling services, that is not the main objective of his counseling services. The after-worship program he started runs adjacent to the main Sunday Service. Mr. Burns runs it on his own volition and not under command of the Church. For those reasons, Mr. Burns is not a "minister of the gospel" and is not entitled to the parsonage exemption under § 107.

II. 26 U.S.C. § 107(2) IS CONSTITUTIONAL UNDER THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

Section 107(2) respects the Establishment Clause and supports our nation's historical deference to the relationship between employer and employee in order to maintain separation of religion and the government. Historically, ministers were compensated through parsonages or housing allowances, allowing them to efficiently fulfill their religious duties and the church's

mission. *See Hosanna-Tabor*, 565 U.S. at 190-95; *Eveland v. Erickson*, 182 N.W. 315, 319 (S.D. 1921). In 1921, Congress enacted the parsonage exemption so that "ministers of the gospel" could receive the same benefits as secular employees who could exempt work-related housing from their gross income. For over a century, the U.S. government has specifically recognized this exemption. *See Gaylor*, 919 F.3d 420. While § 107(2) may provide an indirect economic benefit to religious organizations, that alone does violate the separation of church and state. *See Amos*, 483 U.S. at 337; *see* also *Walz*, 397 U.S. at 675. As of 2019, "more than 2,600 federal and state tax laws provide religious exemptions," which have passed constitutional muster. *Gaylor,* 919 F.3d at 436.

CARC contends that the gross income exemption under § 107(2) of Title 26 of the Internal Revenue Code is unconstitutional because the exemption favors religion over non-religion and thus violates the Establishment Clause of the First Amendment. The Supreme Court has laid out a three-prong test for assessing whether a statute passes muster under the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [and] the statute must not foster 'an excessive government entanglement with religion.'" *Lemon,* 403 U.S. at 612-13. If a statute fails any one prong, it violates the Establishment Clause. *Gaylor*, 919 F.3d at 427.

This section analyzes CARC's claim that § 107(2) is unconstitutional using the *Lemon* test, as both lower courts did. First, this section will analyze the secular purposes of § 107(2). Second, it will analyze how § 107(2) neither advances nor inhibits religion. Last, this section will analyze how § 107(2) does not excessively entangle religion and the government. We ask this Court to uphold the appellate court's finding that § 107(2) is constitutional.

A. 26 U.S.C. § 107(2) has a secular legislative purpose.

The first prong of the *Lemon* test is that the statute must have a secular legislative purpose. *Lemon*, 403 U.S. at 612-13. This does not mean that the law's purpose must be unrelated to religion. *Amos*, 483 U.S. at 335. Courts will defer to the government's articulation of secular purpose unless plaintiffs prove that the articulation is a sham. *Gaylor,* 919 F.3d at 427-28. The government lacks secular purpose only where there is no question that the motivation behind the statute or activity was wholly religious. *Id.* In *Lemon*, the Court deferred to the legislative purpose explicitly stated in the Rhode Island and Pennsylvania statutes which sought to enhance the quality of secular education by providing financial aid to nonpublic schools. *Lemon*, 403 U.S. at 613.

The legislative purpose behind § 107(2) is not singular. *Gaylor,* 919 F.3d at 431. This particular categorical tax exemption was created for three purposes: to avoid excessive entanglement with religion; to eliminate discrimination against ministers; and to eliminate discrimination between ministers. *Id.* at 427; *See also Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 841 (9th Cir. 2011) (where the government stated these same legislative purposes when the constitutionality § 107(2) was challenged).

First, § 107(2) was implemented to avoid entanglement of government and religion that was required by the principal housing exemption under § 119(a)(2), convenience-of-the-employer-doctrine. *Gaylor,* 919 F.3d at 432. While organizations, like CARC, have argued that this exemption confers a special benefit to ministers that is different and better than that offered to secular employees, it does not. Rather, § 107 "prevents the IRS from conducting intrusive inquiries into how religious organizations use their facilities," avoiding excessive entanglement with religion. *Id.* at 431. If a minister were to apply for an exemption under § 119(a)(2), the IRS would be forced to make determinations about the "business" of the church, and where and how

far its premises extended. This would require the IRS to "interrogate ministers on the specifics of their worship activities, [and] even determine which activities constitute 'worship.'" *Id.* at 432. These inquiries have been rejected as excessive entanglement, which gave rise to the exemption under § 107(2), which avoids excessive entanglement with religion. *Id.*

Further, the Supreme Court has held that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, 483 U.S. at 335 (the Court upheld categorical exemptions for religious organizations from Title VII of the Civil Rights Acts of 1964). This is exactly what § 107(2) attempts to do. It is attempting to alleviate the governmental interference and governmental inquiries into the internal affairs of religious organizations that would otherwise be required to determine their eligibility for the tax exemption.

Second, because ministers could not seek exemptions under § 119(a)(2) without excessive entanglement between religion and the government, § 107(2) sought to put ministers on an equal footing with secular employees who could receive those benefits. *Gaylor,* 919 F.3d at 428. This exemption is no different than the many exemptions in the Code provided to secular employees with work-related housing requirements. In *Gaylor*, the court examined some of these exemptions. It noted that Congress's policy choice to provide categorical exemptions is a secular purpose, not "motivated wholly by religious considerations." *Id.* (quoting *Lynch v. Donnelly*, 465 U.S. 668, 680 (1894)). Further, regardless of nuanced differences provided in each exemption, the purpose is the same: "excluding from taxable income certain employment-related expenses." *Id*. at 430.

Lastly, § 107(2) seeks to alleviate discrimination between ministers, specifically those of smaller and poorer denominations that cannot offer in-kind housing. *Id.* at 430. Prior to passing §

107(2), the tax exemption only applied to in-kind housing, excluding denominations that did not have this type of lodging on their premises. While this section confers to ministers the benefit of rental allowance not on the premises, this merely levels the playing field between larger, wealthier denominations and smaller, poorer denominations.

Here, the same exemption challenged in *Gaylor* is being challenged again as unconstitutional by CARC. Here, however, there is nothing presented in the facts of this case to undermine these already established secular legislative purposes for § 107(2) nor is there anything to suggest that the motivation behind § 107(2) was wholly religious. Like in *Lemon*, if the Court does not find anything to undermine the stated legislative intent, it should defer to the government's articulation of secular purpose. *Lemon*, 403 U.S. at 613; *Gaylor,* 919 F.3d at 428. Therefore, the Court should find that § 107(2) has a secular legislative purpose.

B. The principal or primary effect of § 107(2) neither advances nor inhibits religion.

The second prong of the *Lemon* test is that the primary effect of the statute neither advances nor inhibits religion. *Lemon*, 403 U.S. at 612-13. This prong effectively asks whether, irrespective of the legislative intent, the statute "in fact conveys a message of endorsement or disapproval." *Lynch v. Donnelly*, 465 U.S. at 690 (O'Connor, J., concurring). This, however, is not to say a law is "unconstitutional simply because it allows churches to advance religion, which is their very purpose." *Amos*, 483 U.S. at 337. Religious organizations are better able to advance their purposes on account to many laws which have passed constitutional muster. *Id*.; *see e.g*., *Board of Education v. Allen*, 392 U.S. 236 (1968) (where the Supreme Court upheld loans of school books to schoolchildren, including parochial school students). Rather, the government itself has to advance religion through its activities and influence for a law to have

the forbidden "effect" under *Lemon*. *Amos*, 483 U.S. at 337. This requires "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz*, 397 U.S. at 668.

Tax exemptions are not sponsorship even if they may afford religious organizations indirect economic benefits. *Id.* at 675. Exclusive benefits to religion are not per se unconstitutional. *Id.* at 673. In *Walz*, the Supreme Court held that the granting of tax exemptions on real property owned by religious organizations and used for religious worship does not violate the Establishment Clause. It does not advance religion because the "government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Id*. at 678. The Court noted that tax exemptions have never "given the remotest sign of leading to an established church or religion…[but] on the contrary [have] *operated affirmatively to help guarantee the free exercise of all forms of religious belief.*" *Id.* at 678 (*emphasis added*). Tax exemptions, especially for churches, express neutrality, rather than endorsement. *Id.* at 666-67.

Further, the tax exemption provided in § 107(2) is no different than tax exemptions provided to secular occupations; it is "simply one of many per se rules that provide a tax exemption to employees with work-related housing requirements." *Gaylor,* 919 F.3d at 428-29; *see also Lynch*, 465 U.S at 692 (O'Connor, J., concurring) (where Justice O'Connor argued that the display of a creche was not an endorsement of religion taken in the greater context of government celebration of holidays, such as Thanksgiving). Typically, if employees want to receive housing exemptions, they are subject to the convenience-of-the-employer-doctrine. These requirements are loosened throughout the Code for various types of employees, many of which are secular occupations. The code includes exemptions to certain teachers and university employees, and exclusions for housing provided to former and current military members and certain housing provided to citizens or residents living abroad. 26 U.S.C. §§ 119(d), 134, 911;

see also Gaylor, 919 F.3d at 429. The exemption under § 107(2) may be broader than other exemptions but taken in the context of the numerous exemptions provided to secular and non-secular occupations alike this section is just one of many housing tax exemptions, the only difference is it applies to religious organizations and "ministers of the gospel."

Here, § 107(2) must be taken in the greater context of all tax exemptions provided to employees with work-related housing requirements. This is similar to *Lynch*, where a city's display of a creche could have been seen as a religious endorsement when looked at in isolation, but the Court found the display did not endorse religion when looked at in the greater context of governmental celebration of holidays, which is a secular practice. Here, § 107(2) in isolation may appear to advance religion by offering some benefit to religious organizations, but in the context of numerous other exemptions, it does not endorse religion but rather aids many categories of employees, which is secular. Simply because this particular exemption confers an indirect economic benefit on a religious organization does not mean that it advances or endorses religion. As was held in *Walz*, the effect of some exclusive benefit to religion alone is not unconstitutional. Thus, § 107(2) does not have the effect of either endorsing nor inhibiting religion.

C. 26 U.S.C. § 107(2) does not foster excessive government entanglement with religion.

The third prong of the *Lemon* test is whether a statute fosters excessive entanglement with religion. *Lemon*, 403 U.S. at 612-13. Religion and government can never be fully separate; "the very existence of the Religion Clauses is an involvement of sorts -- one that seeks to mark boundaries to avoid excessive entanglement." *Walz*, 397 U.S. at 670. Thus, the Establishment Clause is violated only where there is *excessive* entanglement. *Lemon*, 403 U.S. at 614; *see also*

Gaylor, 919 F.3d at 431. Further, legislative determinations about the Establishment Clause are entitled to deference, specifically for classifications in tax legislation. *Gaylor,* 919 F.3d at 434. Continued oversight and state inspection excessively entangle religious organizations and the government. In *Lemon*, two separate state statutes, Rhode Island's and Pennsylvania's, were found to excessively entangle religious organizations and the government because they created an ongoing relationship between these entities. 403 U.S. at 619-21.

The Rhode Island statute which sought to provide support to nonpublic schools by supplementing teachers' annual salaries required ongoing state surveillance to determine how much of the total school expenditure was attributable to secular education and how much was attributable to religious activity. *Id.* at 620. The Court noted that this state inspection into the religious content of a religious organization is the type of entanglement the Constitution forbids. *Id.*

Pennsylvania's statute attempted to ensure that teachers receiving state supplemented salaries at nonpublic schools were teaching only secular subjects, which required the state's continued oversight. *Id.* at 621. These continued relationships which required state supervision and inquiry into religious organizations constituted excessive entanglement. Further, state aid in the Pennsylvania statute had been given directly to the religiously affiliated educational institutions—a factor the Court could not ignore as entanglement between church and state. *Id.*

Exemptions from taxation require less entanglement than taxation would. *Walz*, 397 U.S. at 674-75. In *Walz*, when the Supreme Court upheld an ad valorem property tax exemption for religious organizations, it noted that tax exemptions "complement and reinforce the desired separation [between church and state] insulating each from the other." *Id*. at 676.

Fact-bound analysis into who qualifies as a minister does not excessively entangle church and state. *Hosanna-Tabor*, 565 U.S. at 190-95. In *Hosanna-Tabor*, the Court examined the facts underlying Hosanna-Tabor's employment to determine whether she was a minister. *Id.* at 190-92. This analysis was not in regard to § 107(2), but this type of inquiry into whether an individual is considered a minister was nonetheless of a nature approved by the Supreme Court. *Id.* at 190-95; *see also Gaylor,* 919 F.3d at 434. This is the same type of inquiry the IRS engages in under § 107(2) to determine if a taxpayer qualifies as a "minister of the gospel," which is a level of entanglement the court the Supreme Court has already permitted.

Section 107(2) does not excessively entangle religious organizations and the government. Congress created § 107(2) as a work-around to the intrusion and excessive entanglement that an exemption under § 119(a)(2) requires. *Gaylor,* 919 F.3d at 432. Under § 107(2) the IRS must determine who qualifies as a minister for the exemption, a fact-bound that "is of a nature approved by the Supreme Court in *Hosanna-Tabor*." *Id*. at 434. As mentioned above, beyond this fact-bound analysis, § 107(2) does not entangle religion and government. Unlike § 119(a)(2), the exemption provided under § 107(2) does not require the IRS to interrogate ministers on the specifics of their worship activities, determine what constitutes worship, or inquire into the use of the minister's home—governmental inquiries that have been found to excessively entangle religion and state. *Id.* at 432. While § 107(2) creates some interaction between religion and state, it was specifically designed as to avoid *excessive* entanglement between these entities. *Id.*

Here, § 107(2) differs significantly from *Lemon*. First, the statutes in *Lemon* required the states to pay religious organizations, whereas § 107(2) merely exempts certain religious employees from housing taxes. Tax exemptions, as *Walz* highlights, actually require less entanglement between the government and religion than taxation does. Second, the statutes in

Lemon required continued oversight and inquiries into the internal affairs of the religious organizations. Section 107(2), on the other hand, was specifically designed to minimize governmental inquiry into these internal affairs. Without § 107(2), the government would be required to define worship, make determinations about the parameters of the worship spaces, and intrusively delve into religious activities, all of which would require excessive entanglement. Here, the IRS specifically designed this section of the Code to avoid such entanglement. Instead of an intense inquiry, the IRS must merely determine who qualifies as a "minister of the gospel" based on the tenets and practices of their respective religion. While CARC argues this is a fact-intensive inquiry excessively entangling religion and government, this fact-bound determination as to whether an individual is a minister was approved by the Court in *Hosanna-Tabor*.

Here, the government already made determinations about how § 107(2) affected the Establishment Clause, and while not binding, this determination should be afforded some deference. Section 107(2) was specifically designed to avoid excessive entanglement so that ministers would be afforded the same tax exemptions as others in secular employees. This exemption does not excessively entangle religion and the government because it removes many of the inquiries that would constitute excessive entanglement and replaces them with a single determination as to whether an individual qualifies as a minister, a fact-bound determination approved by the Supreme Court. The simple fact that § 107(2) confers an indirect benefit on religious organizations does not mean that the government is endorsing religion. The Code confers many categorical tax exemptions and § 107(2) is just one. Thus, § 107(2) passes the *Lemon* test because it has a secular purpose, it neither advances nor inhibits religion, and it does not excessively entangle religion and the state. Therefore, § 107(2) is constitutional.

CONCLUSION

For these reasons, the court should affirm Appellate Court's holding that John Burns is not a minister of the gospel for purposes of the income tax exemption set forth in 26 U.S.C. § 107(2) and that this section of the Code is constitutional.

CERTIFICATE OF SERVICE

We, attorneys for Respondent, do swear and declare that on the 12th day of March 2021, as required by Supreme Court Rule 29, we have served the enclosed BRIEF FOR RESPONDENT on each party to the above proceeding or that party's counsel, and on every other person required to be served, by filing with the Supreme Court's electronic filing system. We hereby declare under penalty of perjury that the forgoing is true and correct.

s/ *Counsel for Respondent*
Team #4