Team 8 - Respondent

Docket 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 COMMISSIONER OF TAXATION,

Respondents.

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

BRIEF FOR THE RESPONDENTS

Attorneys for Respondents

QUESTIONS PRESENTED

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

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

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CONSTITUTIONAL PROVISIONS

The text of the following constitutional provisions is provided below:

The First Amendment provides:

> 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.

U.S. Const. amend. I.

STATUTORY PROVISIONS

The text of the following statutory provisions is provided below:

26 U.S.C. § 107 provides:

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

STATEMENT OF THE CASE

I. FACTUAL HISTORY

In 2018, the Internal Revenue Service (IRS) and Commissioner of Taxation (Commissioner) sent John Burns (Burns) a letter denying his claimed exemption under 26 U.S.C. § 107(2) because Burns was not a "minister of the gospel." R. at 4.

Burns was employed as a secular teacher by Whispering Hills Academy (the Academy). *Id.* at 3. While the Academy was supervised by the Whispering Hills Unitarian Church (the Church), Burns taught solely secular subjects, including: eleventh and twelfth grade English, Renaissance Literature, and several foreign languages. *Id.* Burns also served as one of several school guidance counselors, offering students educational and personal advice. *Id.*

Burns was never ordained as a minister. *Id.* However, he created and ran an after-school club; incorporated religious sentiments with mental and behavioral health techniques in his teachings; and hosted Sunday gatherings for students who could not travel home on the weekends. *Id.* There, Burns discussed the week's church services with the students, amongst other secular topics. *Id.* None of these additional duties were mandated by the Academy. *Id.*

To shorten his commute, Burns chose to move closer to the Academy. *Id.* at 3-4. As part of his compensation, the Academy gave Burns a $2,500 relocation credit to help cover the costs of hiring a moving company. *Id.* The Academy also agreed that part of Burns' monthly salary ($2,100) would be included as rental allowance. *Id.* at 4. This amount was based upon the fair rental value of Burns' home and his expected utility costs. *Id.*

The Academy did not inform Burns of the tax exemption under 26 U.S.C. § 107(2). *Id.* Instead, Burns heard about the exemption through Pastor Nick, Burns' co-worker who was qualified to receive the exemption. *Id.* Burns then decided to claim the exemption on his 2017 tax return for the portion of his monthly salary designated as rental allowance. *Id.* The IRS and Commissioner sent Burns a letter denying his claim for an exemption under § 107(2) in the summer of 2018. *Id.* The IRS and Commissioner informed Burns he did not qualify for the exemption, and owed additional taxes, because he could not prove he was acting as a "minister of the gospel." *Id.*

II. PROCEDURAL HISTORY

Burns filed a complaint in United States District Court in the Southern District of Touroville, naming the IRS and Commissioner as Defendants. *Id.* at 1. The complaint challenged the IRS's denial of Burns' claimed exemption under § 107(2). *Id.* at 4. Citizens Against Religious Convictions, Inc. (CARC), filed a motion to intervene pursuant to Federal Rule of Civil Procedure 24(a)(2), which was granted by the District Court. *Id.* at 2. CARC alleged in their complaint that § 107 violated the Establishment Clause of the First Amendment. *Id.* The IRS and Commissioner filed motions for summary judgment on both Burns' and CARC's claims. *Id.* at 14. Those motions were denied by the District Court. *Id.*

The IRS and Commissioner appealed the denial of both motions in the United States Court of Appeals for the Eighteenth Circuit. *Id.* at 15. The Court of Appeals reversed the ruling of the District Court in its entirety, granting summary judgment to the IRS and Commissioner on both claims. *Id.* at 24. Burns and CARC petitioned this Court for a writ of certiorari, which was granted in October 2020. *Id.* at 26.

SUMMARY OF THE ARGUMENT

Burns is not a minister of the gospel, and therefore does not qualify for the parsonage exemption under 26 U.S.C. § 107, because he fails to meet any of the elements required to be identified as such. He does not assist with sacraments or worship services and his counseling duties and after-school program do not suggest a significant pastoral role. Burns is not a duly ordained, commissioned, or licensed minister of the Church and has not been hailed as a spiritual leader by the Church's congregation. Rather, he serves a secular teaching function at the Academy. Burns' failure to establish that his duties are sacerdotal in nature is amplified by the fact that the Academy is not an integral agency of the Church. Allowing employees like Burns to reap the tax benefits of § 107 would impermissibly strain Congress' legislative intent behind the exemption.

The parsonage tax exemption contained in § 107 survives constitutional scrutiny under every metric approved by this Court. As evidenced by the early writings and debates of the drafters of the religion clauses, their animating concern was to prevent the levying of taxes used for the direct support of a state-sponsored church. Tax exemptions like § 107 do not amount to state sponsorship. Section 107 also enjoys status as an early priority in the federal tax scheme. After being expeditiously enacted by Congress, § 107 has endured for almost a century. The exemption also promotes the legitimate purpose and effect of separating church and state. Its hands-off structure prevents the constitutionally suspect entanglement between government and religion. It also allows religious organizations to pursue their individual missions without inviting the dangers of state-surveillance into private religious matters.

ARGUMENT

I. BURNS IS NOT A "MINISTER OF THE GOSPEL" UNDER 26 U.S.C. § 107, AND THUS MAY NOT EXEMPT THE HOUSING ALLOWANCE PAID TO HIM FROM HIS INCOME TAXES.

It is a well-established rule that federal income tax exemptions are "matters of 'legislative grace'" and only allowed where a provision of the Tax Code explicitly provides. *Kirk v. Comm'r*, 425 F.2d 492, 494 (D.C. Cir. 1970) (quoting *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440 (1934)). The taxpayer carries the burden of showing that a particular exemption is authorized by either Congress or the IRS through regulation. *Id.* (quoting *United States v. Olympic Radio & Television, Inc.,* 349 U.S. 232, 235 (1955)).

One such tax exemption authorized by Congress is 26 U.S.C. § 107(2), stating: "[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[.]" 26 U.S.C.A. § 107(2) (West 2002). While the Tax Code does not explicitly define the phrase "minister of the gospel," *see Lawrence v. Comm'r*, 50 T.C. 494, 497 (1968), multiple Treasury Regulations clarify the meaning of the phrase and who qualifies. For example, Treasury Regulation § 1.107-1(2) establishes, in part, that in order to qualify for the exemption, the home or rental allowance must be provided as "remuneration for services which are ordinarily the duties of a minister of the gospel." Treas. Reg. § 1.107-1(2) (as amended in 1963). Moreover, ordinary duties of a minister include "the ministration of sacerdotal functions and the conduct of religious worship, and the control, conduct, and maintenance of religious organizations (including […] 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)2 (as amended in 1968).

Fundamental to this case is this Court's ability to make factual determinations as to Burns' status under § 107. In *Gaylor v. Mnuchin*, the court determined that it had the authority to

determine whether an individual is a minister of the gospel. 919 F.3d 420, 434 (7th Cir. 2019); *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190-95 (2012) (engaging in a fact-bound analysis to determine whether the petitioner qualified as a minister). While courts are prohibited from excessive entanglement with the inner workings of a religious organization, some church-state interaction is "unavoidable." *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971). As the court stated in *Gaylor*, "[s]ection 107(2) avoids government inquiry into the use of a minister's home, but it still requires the IRS to determine who qualifies as a minister eligible for the exemption." *Id.*

In determining whether a taxpayer is a "minister of the gospel," the Tax Court has developed a five-factor test through its interpretation of § 107, Treas. Reg. § 1.1402(c)-5(b)2, and prior case law. *Knight v. Comm'r*, 92 T.C. 199, 204 (1989). The test evaluates "whether the individual (1) administers sacraments, (2) conducts worship services, (3) performs services in the 'control, conduct, and maintenance of a religious organization,' (4) is 'ordained, commissioned, or licensed,' and (5) is considered to be a spiritual leader by his religious body." *Id.* (quoting Treas. Reg. § 1.1402(c)-5(b)2).

In the present case, Burns has raised no genuine issue of material fact supporting his status as a minister of the gospel, and the IRS and Commissioner are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

1. Burns Does Not Administer Sacraments for the Church.

A teacher who was employed by a church, preached, and led the congregation in worship when the church's pastor was away was held not to be a "minister of the gospel" for purposes of § 107(2). *Lawrence*, 50 T.C. at 499-50. In *Lawrence v. Commissioner*, the petitioner was employed as a minister of education at a Baptist church in Tennessee. *Id.* at 494. The church performed

sacraments resembling baptism and communion. *Id.* at 496. However, Lawrence never participated in either sacramental function, even when the normal pastor was away. *Id.*

The court held that Lawrence failed to sustain his burden of proving that he was a minister of the gospel within the meaning of § 107(2). *Id.* at 500. This was, in part, because he did not perform sacraments like baptism or communion. *Id.* at 499. The court reasoned the performance of sacraments was an essential duty of ministers of the gospel. *Id.* at 500. Lawrence's failure to administer sacraments disqualified him from claiming the exemption. *Id.*

In the present case, Burns does not administer sacraments in the Church. Burns was hired to teach strictly secular subjects – not to lead or to assist with the Church's sacraments in any capacity. While Burns hosts gatherings for students who cannot go home for the weekend, these functions do not equate to administering sacraments like baptism or communion. All of Burns' additional duties occur after and outside the scope of the Church's service, including lunch, snacks, social interaction, and discussions. Burns is simply a teacher who leads extracurricular activities that include religious elements. Under the *Lawrence* analysis, Burns is not a minister of the gospel because he does not administer any sacraments offered by the Church.

2. Burns Does Not Conduct Worship Services for the Church.

Leading Sunday worship services in emergency situations was found "insufficient to warrant a finding that [a taxpayer] has attained the status of minister of the gospel." *Id.* at 499-500. Along with his normal educational duties, Lawrence made all the pulpit announcements and offered an opening prayer at Sunday worship services. *Id.* Additionally, Lawrence, who was not ordained, occasionally preached, led Sunday worship services, and assisted with funeral services at the church when the usual pastor was unavailable. *Id.*

Along with assisting during Sunday worship services and filling in for the pastor during emergencies, Lawrence primarily led educational and service organizations for the church. *Id.* at 496. Those organizations included Sunday School, the Training Union, the Women's Missionary Organization, the Baptist Brotherhood, the youth program, and a visitation program – all religious in nature. *Id.* Lawrence trained teachers and workers, recruited new members for the church, visited the sick, and provided spiritual counseling. *Id.* at 495-96. Once again, the Tax Court held that these duties did not make Lawrence a minister of the gospel. *Id.* 498-99; *see also* I.R.S. P.L.R. 8614010 (Dec. 20, 1985) (finding an employee who led liturgy, prayer, and scripture readings in "extraordinary circumstances" was not a minister of the gospel).

Here, Burns does not participate in Sunday worship services at all. He has never delivered a sermon. He has never led opening prayer or given pulpit announcements. He is not called upon to fill in for the normal pastor during emergencies. Given Burns' complete lack of participation in any formal worship services, he cannot qualify as a minister of the gospel.

Similarly, Burns' counseling services and "youth ministry" at the Academy do not make him a minister of the gospel. Burns serves students by offering counseling services that combine mental and behavioral health techniques with the religious teachings of the Church. Burns is not leading students in formal worship services, rather he is advising students on both educational and personal matters. The facts do not suggest that he was offering counseling strictly on the religious teachings of the Church. Moreover, the counseling occurred exclusively in the school setting and did not take place in the Church or other formal religious setting.

Solely incorporating religious elements to the school counseling program does not make Burns a minister of the gospel. If that were the case, any counselor, whether employed by a religious organization or not, would qualify as a minister of the gospel simply by incorporating

religious values with other counseling techniques. This would set an overinclusive categorization that would go beyond the intent of the parsonage exemption.

Additionally, Burns' after-school program is not religious worship simply because it is affiliated with a religious school. The record is silent as to what occurs during Burns' after-school club, and Burns asks this Court to assume it qualifies as a worship service. However, Burns' failure to develop the record as to what his role is in leading the after-school club is fatal to his claim. The Court has no facts to analyze whether or not the after-school program amounts to leading a worship service. Therefore, this Court should find that Burns is not a minister of the gospel because he does not conduct worship services.

3. Burns Does Not Perform Services in the "Control, Conduct, and Maintenance" of an Integral Agency of the Church.

A taxpayer who does not perform ministerial functions under the direct employ of a religious organization may nonetheless be considered a "minister of the gospel" if they perform services in the "control, conduct, and maintenance" of an "integral agency" of the religious organization. *Flowers v. United States*, No. CA 4-79-376-E, 1981 U.S. Dist. LEXIS 16758, at *9 (N.D. Tex. Nov. 25, 1981); *see also* Treas. Reg. § 1.1402(c)-5(b)2. Here, Burns is not directly employed by the Church. Therefore, under the third prong of the five-factor test, this Court must evaluate whether the Academy is an "integral agency" of the Church.

The IRS developed an 8-factor-test to determine if a church-related institution is an integral agency of a religious organization. The factors are:

> (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.[1]

The IRS determined in Rev. Rul. 72-606 that "an ordained minister employed by an old age home that is affiliated with but not controlled by a church denomination may not exclude from gross income compensation designated by the home as rental allowance." *Id.* The home's corporate name pointed to a close relationship with the church, and its articles of incorporation provided that in the event of its dissolution its assets would be turned over to the church. *Id.* However, none of the other enumerated factors were present. *Id.* Thus, in the present case, the Church and the Academy share a common name, but this alone does not establish that the Academy is an integral agency of the Church.

Similarly, a school that was neither incorporated by a religious organization nor continuously controlled, managed, or maintained by the religious organization was found not to be an integral agency of the organization. *Flowers*, 1981 U.S. Dist. LEXIS 16758, at *16. Additionally, the court held the school was not integral because its trustee or directors cannot be removed by the church, its finances are not required to be disclosed to the church, and, in the event of dissolution, the assets would not be turned over to the church. *Id.*

In *Flowers*, the court found TCU did not establish sufficient criteria to be considered an integral agency. *Id.* at 11-12. The Articles of Incorporation of TCU originally required that more

[1] Revenue Rulings are the opinion of the IRS and "an agency's reasonable, consistently held interpretation of its own regulation is entitled to deference." *I.N.S. v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189-90 (1991). "Provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Stinson v. United States*, 508 U.S. 36, 45 (1993) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

than 50 percent of the board of trustees be members of the church – but the church was not one of the original incorporators of the university. *Id.* at 3. Moreover, the church had no control over the appointment or removal of the trustees. *Id.* at 3-4. TCU received an annual allocation from the central treasury of the church and, to qualify, the university was required to file certain annual reports with the church – but financial reports were not otherwise required. *Id* at 4. The *Flowers* court therefore determined that TCU only met two of the eight criteria established in Rev. Rul. 72-606 and was not an integral agency of the church. *Id.* at 11-12.

Burns does not control, conduct, or maintain an integral agency of the Church because the Academy is not an integral agency of the Church. Based on the minimal facts in the record regarding the Academy's connection to the Church, the institutions scarcely meet three of the factors for determining whether the academy is integral. The District Court stated that the name of the Academy indicated a close relationship between the institutions, the Church likely exercised a minimal level of control over the Academy, and some financial support was likely provided. R. at 8. While the entities have similar names, this is the only factor present in this case. It is unknown whether the Church controls the Academy's faculty decisions, the curriculum, day-to-day decisions, or long-term strategic decisions. *Id.* Moreover, there is nothing to suggest a portion of the Academy's budget is provided by the Church. Without more facts, it is impossible to establish that the Academy is an integral agency of the Church.

The Academy also fails to meet all remaining factors. It is unknown whether the Church exercises any control over the operations of the school board or, if it does, to what extent. It is also unknown whether any trustees, directors, or board members may be removed by the Church. Finally, it is unknown whether the Church incorporated the Academy, whether annual reports of finances and general operations are required to be made to the Church, or whether, in the event of

dissolution of the Academy, its assets would be turned over to the Church. The record is fatally silent as to all of these factors.

Like *Flowers*, there is a connection between the Academy and the Church, but the connection does not rise to the level of an integral agency. The connection does not extend beyond the common name. The most basic facts regarding control – like finances, personnel decisions, and governing structure – are not present in this case. As a result, Burns has failed to develop a factual record that is adequate to sustain his burden of showing that the Academy is an integral agency of the Church.

Even if this Court finds that the Academy is an integral agency of the Church, Burns did not assist in the control, conduct, or maintenance of the school. The court in *Flowers* reasoned that teaching a secular college course and offering counseling services at a university, which is not an integral agency of the church, were not sufficient "sacerdotal function[s]" to meet the qualifications of § 107 or Treas. Reg. § 1.107-1(2). *Id.* at 14, 16. Similarly, Burns was hired to teach secular classes at the Academy and his extra counseling and youth programming duties are not "sacerdotal functions." *See supra* Section I.1.

4. Burns is Not "Ordained, Commissioned, or Licensed" by the Church.

At least one Article III court, the Court of Appeals for the District of Columbia Circuit, has *required* that an employee be a "duly ordained, commissioned, or licensed minister of a church or a member of a religious order" to qualify for the tax exemption in § 107. *Kirk*, 425 F.2d at 495. In *Kirk*, the taxpayer was employed as the director of the Department of Public Affairs for the General Board of Christian Social Concerns of the Methodist Church. *Id.* at 493. The organization promoted, sponsored, and administered programs of "social research, education, and action" related to the Methodist Church. *Id.* Nine of Kirk's co-workers were ordained ministers in the

Methodist Church, but Kirk was not. *Id.* The duties performed by Kirk and his ordained co-workers were virtually identical. *Id.*

The Circuit Court adopted the Tax Court's finding that the organization employing Kirk was religious in nature. *Id.* However, the court stated:

> Granting that petitioner performed services that are ordinarily the duties of a minister of the gospel, another requirement of the regulations is that petitioner *be* a minister of the gospel. Specifically, the regulations *require* him to be a duly ordained, commissioned, or licensed minister of a church or a member of a religious order.

Id. at 495 (quoting *Kirk v. Comm'r*, 51 T.C. 66, 71 (1968)) (emphasis original). As a result, Kirk was denied the tax benefits of § 107 because he was not ordained, while his ordained co-workers, who performed substantially the same work, were granted the tax benefit. *Kirk*, 425 F.2d at 495.

Like Kirk, Burns is not a duly ordained, commissioned, or licensed minister of the Church. The record does not suggest that Burns was officially commissioned or licensed by the Church or any other religious organization. Further, the District Court made clear that Burns "is not a trained or ordained member of the clergy." R. at 5. Burns was informed of the § 107 exemption by Pastor Nick, who is a co-worker at the Academy. Pastor Nick's title suggests that he is ordained, licensed, or commissioned by the church. Burns does not carry the same title. Burns is not a minister of the gospel because he is not ordained, commissioned, or licensed as such.

Additionally, a church explicitly recognizing an employee as a "Commissioned Minister of the Gospel" is not, by itself, enough to establish that the employee is a minister for tax purposes. *Lawrence*, 50 T.C. at 495, 498. In *Lawrence*, the employee's church adopted a resolution declaring him a "Commissioned Minister of the Gospel" which stated he may receive "benefits of laws relative to the Social Security Act and Internal Revenue Services." *Id.* at 495. Nevertheless, the Tax Court found the resolution nothing more than "paperwork" designed to "help him get a tax

benefit […] without giving him any new status." *Id.* at 498. The court held that a minister designation for tax purposes is toothless if the employee does not also act as a minister. *Id.* at 500.

Burns has not been held out as a minister nor explicitly designated a minister by the Academy or the Church. Unlike *Lawrence*, the Church did not attempt to classify Burns as a minister of the gospel for tax purposes or otherwise. The conversation with Pastor Nick does not reflect the Church's opinion on Burns' status, it was simply a suggestion from Pastor Nick to do more research regarding the parsonage exemption under § 107. It was Burns who made the determination of his status for tax purposes – not his employer. Burns was simply incorrect when he self-identified as a minister of the gospel.

5. Burns is Not Considered to be a Spiritual Leader by the Church.

In rare circumstances where a religious leader cannot be "duly ordained, commissioned, or licensed," the Tax Court has considered whether the employee is regarded a spiritual leader by his or her religious body. *Silverman v. Comm'r*, 57 T.C. 727, 731 (1972). In disputes where the IRS has found a non-ordained individual to be a minister of the gospel, the vast majority involve the Jewish faith, in which ordination is not a common practice. *See Salkov v. Comm'r*, 46 T.C. 190 (1966). In *Silverman*, the taxpayer was a full-time cantor of the Jewish faith, "called" by his congregation to perform ministerial duties. *Silverman*, 57 T.C. at 727. As a cantor, Silverman officiated with the rabbi at virtually all the synagogue's services, including weddings and funerals. *Id.* However, because the Jewish religion does not require ordination, the court held that Silverman performed the required ministerial duties of a spiritual leader and was nevertheless entitled to the exemption in § 107. *Id.* at 732.

Burns was not "called" by his congregation to serve as a minster; he was hired as a teacher of secular classes. Although the facts do not explicitly outline the ordination or commissioning

process at the Church, there is no evidence that the congregation "calls" individuals to serve within their religious community. Burns was hired by the Academy, not selected by the congregation itself to fulfill ministerial functions. The "calling" process present in *Silverman* is not present in the current case. Because Burns was not called by the congregation to serve ministerial functions, he is not a minister of the gospel.

In sum, Burns is not a minister of the gospel, and therefore is not eligible for the parsonage exemption under § 107. He is employed strictly to teach secular high school courses at the Academy and does not assist with sacraments or weekly worship services. Likewise, he is not ordained, commissioned, or licensed by his religious organization – nor answered a spiritual calling from the Church's parishioners to serve as a leader of the congregation. Finally, Burns' failure to establish that the Academy is an integral agency of the Church is fatal to his self-identification as a minister. A finding that Burns is a minister of the gospel would leave the parsonage exemption open to exploitation by any parochial employee, no matter how minimal their religious duties. This Court should therefore find Burns has failed to establish any of the requisite factors and is not entitled to the tax exemption under § 107.

II. THE PARSONAGE TAX EXEMPTION UNDER 26 U.S.C. § 107 IS CONSTITUTIONAL UNDER THE ESTABLISHMENT CLAUSE.

1. Historical Evidence Surrounding the Adoption of the First Amendment Suggests Benevolent Neutrality Toward Exemptions Similar to 26 U.S.C. § 107.

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. Const. amend. I. In modern constitutional parlance, these two clauses of the First Amendment are known as the "religion clauses." *Hosanna-Tabor*, 565 U.S. at 184. They are sweeping and ambiguous. *Lemon*, 403 U.S. at 612. This Court has grappled with their meaning

and scope since their inception, recognizing that the two necessarily exist in a constant state of tension. *Lynch v. Donnelly*, 465 U.S. 668, 672 (1984). The interplay between them and their ultimate effect on the instant case necessitates a brief historical overview of the First Amendment itself and the social and political atmosphere that gave rise to its birth. *See Marsh v. Chambers*, 463 U.S. 783, 790 (1983) ("[H]istorical evidence sheds light […] on what the draftsmen intended the Establishment Clause to mean[.]"); *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) ("[T]he Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" (quoting *Cty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989)).

A. The drafters of the Religion Clauses intended to prevent the government from levying taxes to directly support a state-established church, not religious tax exemptions.

Many of the first inhabitants of the American colonies arrived on our shores fleeing the religious persecution running rampant across Europe for centuries. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947). Religion and government were so enmeshed on the continent during the 16th and 17th centuries that the King of England simultaneously reigned as the monarch and the head of the state-sanctioned church. *Hosanna-Tabor*, 565 U.S. at 182 (citing G. Elton, The Tudor Constitution: Documents and Commentary, 331-32 (1960)). Religious dissidence was particularly perilous in Europe, as members of minority religious groups faced harsh state-inflicted punishments for refusing to pay taxes levied in support of the government-sponsored church. *Everson*, 330 U.S. at 9. Looking to abscond themselves from further oppression, these religious pilgrims settled America with the hopes of establishing a government that would leave them free to worship and support a church of their choice. *Hosanna-Tabor*, 565 U.S. at 182.

However, not all of the American colonies were so quick to throw off the bonds of state-sanctioned religion. In Virginia, the English tradition of the state-sponsored church had taken root

and was beginning to draw public scrutiny from advocates of religious freedom. *Everson*, 330 U.S. at 11. In 1785-86, the General Assembly of Virginia debated the renewal of a tax levy in support of its state-sponsored church. *Id.* Based in part on the strong public dissent of James Madison, "the leading architect of the religion clauses," the measure failed. *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 141 (2011) (citing *Flast v. Cohen*, 392 U.S. 83, 103 (1968)). Instead, the General Assembly enacted the Virginia Bill for Religious Liberty, which forbade the state from compelling its citizens to remit tax dollars in support of a state church. *Id.* The Virginia Bill for Religious Liberty created the popular momentum and the ideological framework for the eventual adoption of the First Amendment in the Bill of Rights some five years later. *Hosanna-Tabor*, 565 U.S. at 183.

It is through this historical context that this Court has since extrapolated meaning from the words contained in the religion clauses. *Everson*, 330 U.S. at 14-15. While the precise contours of their prohibitions and prescriptions are difficult to delineate, the clauses have been said to embody Thomas Jefferson's oft repeated intention to create "a wall of separation between church and State." *Id.* at 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)). This wall of separation was designed to afford protection from the "evils [of] sponsorship, financial support, and active involvement of the sovereign in religious activity." *Lemon*, 403 U.S. at 612 (quoting *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 668 (1970)).

The issue now before this Court does not breach that wall. CARC alleges the tax exemption contained in § 107, which allows ministers of the gospel to deduct from their gross income certain rental allowances paid by their religious employer, violates the Establishment Clause of the First Amendment. However, their position belies the relevant historical context surrounding the adoption of the First Amendment and the history of the parsonage exemption itself.

B. The parsonage exemption is a deeply rooted historical practice that has enjoyed almost a century of legislative and judicial approval.

When analyzing laws allegedly violative of the Establishment Clause, this Court interprets the constitutional limits contained in the clause with "reference to historical practices and understandings." *Town of Greece*, 572 U.S. at 576 (2014). While it is true that a law violative of the Constitution cannot be upheld on the mere grounds of its longevity, "an unbroken practice […] is not something to be lightly cast aside." *Walz*, 397 U.S. at 678. When the historical evidence indicates a specific practice has "withstood the critical scrutiny of time and political change" this Court has found it unnecessary to precisely define the boundary of permitted practices under the Establishment Clause. *Town of Greece*, 572 U.S. at 577. Rather, this Court evaluates the historic acceptance or disapproval of the state action to better "distinguish between real [constitutional] threats and mere shadow." *Marsh*, 463 U.S. at 795 (quoting *Panhandle Oil Co. v. Mississippi ex. rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting.).

The parsonage exemption was a historic priority for Congress's federal tax scheme. In 1913, Congress ratified the 16th Amendment to the Constitution, giving it the power to levy a federal income tax. U.S. Const. amend. XVI; s*ee also Gaylor*, 919 F.3d at 423. Congress, in conjunction with the Treasury Department, defined the categories of income subject to tax and those exempted. *Gaylor*, 919 F.3d at 423. In 1921, the Treasury Department announced that the fair rental value of parsonages provided as living quarters *would* be included in the taxable income of ministers. *Id.* at 424. Within two years of that announcement Congress took swift action to legislatively reverse that ruling. *Id.* It drafted specific legislation excluding church-provided parsonages from the taxable income of ministers, and the parsonage exemption was born. *Id.* The exemption underwent amendment in the 1950s, *see Williamson v. Comm'r*, 224 F.2d 377, 381 (8th Cir. 1955), and again in 2002, *see Clergy Housing Allowance Clarification Act of 2002*, Pub. L.

No. 107-181, 116 Stat. 583, but for almost 100 years, the exemption has never been held unconstitutional by this Court or eliminated by the legislature.

Nor did the parsonage exemption found in § 107 stand alone. *Gaylor*, 919 F.3d at 436. "Congress enacted federal tax exemptions for religious organizations as far back as 1802." *Id.* In fact, this Court recognized the constitutional validity of similar property tax exemptions for religious organizations as far back as 1886. *See Gibbons v. District of Columbia*, 116 U.S. 404, 408 (1886) (validating congressional authority to exempt religious buildings from property taxes). By 1989, at least 45 states had enacted some form of tax exemption for religious institutions or their ministers. *See Texas Monthly, Inc., v. Bullock*, 489 U.S. 1, 31 n.3 (1989) (Scalia, J., dissenting) (citing specific state tax exemptions for religious organizations and ministers). This class of religious tax exemptions continues to "permeate the state and federal codes" suggesting a long and favorable history within the constitutional confines of the Establishment Clause. *Texas Monthly*, 489 U.S. at 32.

Here, the relevant historical context of both the Establishment Clause and the parsonage exemption militates in favor of upholding the constitutionality of § 107. It is no argument to suggest that a constitutionally infirm law should be upheld because it has been successful in persisting. However, when a practice is so woven into the fabric of our national laws and history, that practice should not be lightly cast aside in the face of an errant constitutional conquest. *Walz*, 397 U.S. at 678. The American tradition in favor of religious tax exemptions like § 107 falls squarely within the contemplation of this Court's rulings in cases like *Marsh* and *Town of Greece*. Section 107 should be upheld on this basis alone: as a steadfast landmark demarcating the often blurry line between church and state. As borne out by the exemption's history and its tradition in

federal tax jurisprudence, CARC does not present a real constitutional threat in its challenge to § 107. It is merely a shadow.

2. Section 107 is Constitutional Under the *Lemon* Test Because It Furthers a Permissible Purpose and Effect and Does Not Encourage Excessive Entanglement.

Beyond the historical analysis contained in *Marsh* and its progeny, there exists another form of analysis used by this Court to determine whether a law violates the Establishment Clause. This Court's holding in *Lemon v. Kurtzman* created a three-part test commonly known as the *Lemon* test. *See Larson v. Valente*, 456 U.S. 228, 252 (1982) (recognizing the holding in *Lemon* as establishing "the *Lemon* test"). This Court has not clearly stated under what circumstances the application of the *Marsh* analysis is favored or disfavored over the application of the *Lemon* test. However, the distinction is not dispositive in this case as § 107 survives the application of the *Lemon* test as well.

To comply with the Establishment Clause under the *Lemon* test, the challenged statute must satisfy each of the following requirements: (1) the statute must have a secular legislative purpose; (2) the statute's principal or primary effect must be one that neither advances nor inhibits religion; and (3) the statute must not foster an excessive entanglement with religion. *Lemon*, 403 U.S. at 612-13. Under this lens, § 107 endures.

A. Section 107 advances a secular legislative purpose with only incidental benefits to religion.

To avoid enacting laws that violate the Establishment Clause, the government must act with a secular purpose. *Id.* The secular purpose stated by the government must be "genuine, not a sham, and not merely secondary to a religious objective." *McCreary Cty. v. ACLU*, 545 U.S. 844, 864 (2005) (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). However, this

Court shows deference to the government's sincere articulation of a stated secular purpose. *Edwards v. Agulliard*, 482 U.S. 578, 586-87 (1987).

Only when the government acts "with the ostensible and predominant purpose of advancing religion" does it violate the Establishment Clause. *McCreary Cty.*, 545 U.S. at 860 (citing *Corp. of Presiding Bishop of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987)). In other words, the challenged statute can work toward "neither the advancement nor the inhibition of religion." *Walz*, 397 U.S. at 672. This does not mean that government policy can never touch upon the subject of religion. *Lemon*, 403 U.S. at 614. "Some relationship between government and religious organizations is inevitable." *Id.* (citing *Zorach v. Clauson*, 343 U.S. 306, 312 (1952)). Nor does it mean that government policy may never benefit religion. *Texas Monthly*, 489 U.S. at 10. In fact, "this Court has never required that public authorities refrain from implementing reasonable measures to advance legitimate secular goals merely because they would thereby relieve religious groups of costs they would otherwise incur." *Id.* (citing *Muller v. Allen*, 463 U.S. 388, 393 (1983)).

Moreover, the legislature is afforded broad discretion in "formulating sound tax policies." *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). Those tax policies are not rendered unconstitutional merely because they differentiate between classes of persons, *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 562 U.S. 277, 287 (2011), or because they "incidentally benefit religion," *Texas Monthly*, 489 U.S. at 10. So, while the Establishment Clause prohibits the state from acting with the predominant purpose of advancing religion, "it does not require the state to be [religion's] adversary." *Everson*, 330 U.S. at 18.

Here, the secular purpose the IRS and Commissioner put forth is the desire of Congress to effectuate the continued separation of church and state. The significance of this goal should not

be understated. By attempting to remove government from involvement in private religious affairs, tax exemptions "[restrict] the fiscal relationship between church and state, and [tend] to complement and reinforce the desired separation insulating each from the other." *Walz*, 397 U.S. at 676. Indeed, "[t]he hazards of churches supporting government are hardly less than the hazards of government supporting churches[.]" *Id.* at 675. Section 107 achieves this purpose and avoids these hazards entirely by exempting from taxation certain rental allowances paid to ministers by their religious employers.

Lending further credence to the stated secular purpose is the principle that "government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Amos*, 483 U.S. at 334 (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987)). Under the current United States Tax Code, there exists a corresponding tax exemption for secular employees for the value of housing provided by the employer. *See* 26 U.S.C. § 119(a)(2). Upholding the constitutionality of § 107 will maintain the "benevolent neutrality" that is not only permissible, but potentially required of Congress when dealing with matters of church and state. *Amos*, 483 U.S. at 334 (quoting *Walz*, 397 U.S. at 669)).

B. Section 107's primary effect does not advance religion, but merely allows religious organizations to advance their own cause.

The second prong of the *Lemon* test prohibits laws whose primary effect advances religion. *Lemon*, 403 U.S. at 612 (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968)). The modification of "effect" by the adjective "primary" is critical to this analysis. "A law is not unconstitutional simply because *allows* churches to advance religion, which is their very purpose." *Amos*, 483 U.S. at 337 (emphasis original). Rather, if a law fails constitutional review under the second prong of the *Lemon* test, it is because it can be fairly said that "the *government itself* has advanced religion through its own activities and influence." *Id.* (emphasis original). In other words, the primary effect

of the challenged law must amount to "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz*, 397 U.S. at 668.

Tax exemptions do not amount to sponsorship of religion. *Id.* at 675. In enforcing § 107, the IRS transfers no part of the general fisc to religious organizations. Rather, it "simply abstains from demanding that the church support the state." *Id.* While this Court has differed on whether tax exemptions should be considered functionally the same as direct economic support of religious institutions, *see e.g., Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983), "[t]here is no genuine nexus between tax exemption and establishment of religion," *Walz*, 397 U.S. at 675. Justice Harlan's concurrence in *Walz* makes the logically unassailable distinction with maximum effect:

> Tax exemptions and general subsidies, however, are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes.

Id. at 690.

Here, § 107 in no way has the effect of advancing religion. Like the plethora of religious tax exemptions that came before it, and those that still exist in the tax code today, § 107's primary effect is to remove government interference from the private practice of religion. Although the parsonage exemption undoubtedly has an incidental benefit to religious ministers, this exemption allows freedom for churches and their ministers to advance their religion on their own accord, nothing more. Such incidental benefits have never been enough to invalidate a law of this kind before, and this Court should not use this occasion to take that drastic step today.

C. Section 107 does not foster excessive entanglement with religion; it does the opposite.

The final prong of the *Lemon* test prohibits laws that foster excessive entanglement with religion. *Lemon*, 403 U.S. at 613 (quoting *Walz*, 397 U.S. at 674). This Court looks to three factors when determining whether a law excessively entangles government and religion: (1) the character and purpose of the institutions benefited; (2) the nature of the aid that the state provides; (3) the resulting relationship between government and religious authority. *Lemon*, 403 U.S. at 615. Certain fact scenarios also tend to indicate excessive entanglement. *Id.* at 619. These include the presence of continuing state surveillance, inspections, or evaluations of religious institutions. *Id.* at 619-20.

i. The character and nature of the institutions benefited, when read in context with the entire code, do not indicate a preference for religion.

It is a common canon of statutory construction that the questioned provision must be read in the context of the whole code. *See* Antonin Scalia & Bryan A. Garner, Reading Law 167 (2012) ("[T]he judicial interpreter [must] consider the entire text, in view of its structure, and of the physical and logical relation of its many parts.") Read in isolation, it is possible to construe § 107 as having the forbidden intent to confer a benefit solely on religious institutions and their ministers. But under the illumination of context, this misconception quickly fades away. As mentioned above, Congress has enacted a corollary tax exemption in 26 U.S.C. § 119 for the benefit of secular employees. While it is true that in order to qualify for the exemption secular employees must meet some additional requirements, this too is unpersuasive when thoughtfully considered. By leaving the qualifications under the parsonage exemption broad, Congress avoids the very problem of excessive entanglement forbidden by *Lemon*. Congress sought merely to place religion on equal footing with the privileges enjoyed by the secular world. Therefore, when read in context with the

whole tax code, § 107 cannot honestly be construed as showing preferential treatment to religious institutions.

ii. The nature of the aid provided by the state merely amounts to indirect aid to religious organizations and their ministers, not state sponsorship.

Section 107 is a tax exemption. Tax exemptions do not amount to the state sponsorship of religion, but rather, provide incidental benefits to those qualified to receive them. *Walz*, 397 U.S. at 675. Incidental benefits to religious institutions do offend the Establishment Clause. *Texas Monthly*, 489 U.S. at 10. As such, § 107 does not fail the *Lemon* test on the basis of the nature of aid provided under its exemption. *See supra* Section II.2.B.

iii. The resulting relationship between the government and religion with the enforcement of § 107 is one of constitutionally permissible benevolent neutrality.

Not every interaction between the church and state is constitutionally prohibited. *Lemon*, 403 U.S. at 614. "Some relationship between government and religious organizations is inevitable." *Id.* (citing *Zorach*, 343 U.S. at 312). The parsonage exemption, like countless other tax exemptions, relegates the IRS to a mere administrator. It requires no inquiry into the sincerity of a minister's religious beliefs. It imposes no religious tests. It requires only that the generally applicable qualifications be met. The resulting relationship is a constitutionally permissible "benevolent neutrality" looked upon with favor by this Court. *Walz*, 397 U.S. at 669.

The analysis of *Lemon*'s excessive entanglement factors reveals what Congress has acknowledged for 100 years: § 107's parsonage exemption fosters a constitutionally permissible relationship between church and state. While recognizing these two foundational institutions can never fully operate in a vacuum, Congress has done its best to distance itself from entanglement with church functions by authoring § 107 and exemptions like it. Moreover, none of the suspicious fact-scenarios tending to indicate excessive entanglement exist here. Other than the ordinary

administrative functions conducted by the IRS in relation to all tax matters, § 107 imposes no requirement of state surveillance or inspection. This type of hands-off approach weighs heavily in favor of a finding for the statute's constitutionality.

3. To the Extent *Texas Monthly* Can Be Argued to Govern This Case, This Court Should Apply It Only on the Narrowest Grounds.

In 1989, this Court invalidated a state sales tax exemption that applied exclusively to religious periodicals. *Texas Monthly*, 489 U.S. at 24. Justice Brennan authored the plurality opinion, which invalidated the exemption on the grounds it violated the Establishment Clause. *Id.* Justice Brennan reasoned because the exemption applied only to religious institutions it resulted in unconstitutional sponsorship of religion. *Id.* However, given the nature of the opinion as a plurality, an examination of the narrower concurring opinions is necessitated under the rule laid down in *Marks v. United States*. 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds.").

The narrowest concurring opinion in *Texas Monthly* was that of Justice White. *Texas Monthly*, 489 U.S. at 25-26. Considering all the issues raised by the respondents, Justice White found that the exemption, which only applied to published periodicals that were religious in nature, violated the Free Press Clause of the First Amendment. *Id.* at 26. Noting what seemed an obvious content-based restriction on speech, Justice White declined to reach the constitutional issue of the Establishment Clause that enticed the Brennan plurality. *Id.* Given the rule from *Marks*, this Court should cabin the *Texas Monthly* opinion to the concurrence of Justice White and, therefore, find it does not control the outcome of this case.

Moreover, the existence of the corollary exemption found in § 119 dispositively distinguishes *Texas Monthly* from this case. While the parsonage exemption itself applies only to religious ministers, it is not the only law on the books pertaining to employee housing exemptions. The animating concern in Justice Brennan's plurality was the idea that the Texas state legislature was "direct[ing] a subsidy exclusively to religious organizations" through the sales tax exemption. *Id.* at 15. This is not the case here. Even if Justice Brennan's plurality opinion is found persuasive by this Court, it should observe the critical distinction that § 107 is not the only rental allowance exemption found in the federal tax scheme. Given the existence of § 119, § 107 does not amount to an exclusive religious subsidy, and this Court should properly distinguish *Texas Monthly* on that basis.

In sum, the parsonage exemption under § 107 of the Internal Revenue Code bears all the hallmarks of constitutionally permitted church and state interaction. Its long history of judicial and legislative approval, as well as the history of the principal evils with which the drafters of the religion clauses were concerned, indicates the founders would not have viewed this law as repugnant to our Constitution. Analysis under the *Lemon* test likewise raises no red flags about the law's purpose, effect, or entanglement. Holding otherwise would send a chilling signal to Congress: while it may be on dangerous ground treating religion as an enemy, it is absolutely fatal to treat religion as a friend.

CONCLUSION

For the aforementioned reasons, Respondents, the Internal Revenue Service and Commissioner of Taxation, respectfully request that this Court affirm the Eighteenth Circuit's ruling in its entirety.

Respectfully submitted,

Team 8

ATTORNEYS FOR
RESPONDENTS