NO. 20-199

IN THE
UNITED STATES SUPREME COURT

JOHN BURNS,

Petitioner,

and

C**ITIZENS AGAINST RELIGIOUS CONVICTIONS, INC.,**

Petitioner-Intervenor,

v.

INTERNAL REVENUE SERVICE and COMMISIONER OF TAXATION,

Respondents.

On appeal from the United States Court of Appeals for the Eighteenth Circuit

BRIEF FOR THE PETITIONERS

Team 1
Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

QUESTIONS PRESENTED

I. Whether a teacher qualifies as a minister of the gospel under 26 U.S.C. § 107(2) when he is employed by a religious institution and does not perform traditional sacerdotal duties.

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

STATEMENT OF THE CASE

Petitioner John Burns is an employee at Whispering Hills Academy, (the "school"), a religious boarding school operated by Whispering Hills Unitarian Church, ("the church"). Petitioner-Intervenor Citizens Against Religious Convictions, Inc., ("CARC"), is a local organization.

Material Facts

John Burns claims that he is entitled to receive the parsonage exemption available to "ministers of the gospel" due to the nature of his employment at Whispering Hills Academy. (R. at 4). Whispering Hills Academy is a religious boarding school operated by the Whispering Hills Unitarian Church in Touroville. *Id.* at 3. Citizens Against Religious Convictions is a local non-religious entity. *Id.* at 4. CARC claims that the parsonage exemption that Burns is asserting violated the Establishment Clause of the First Amendment. *Id.*

Burns' employment

Burns is employed by a religious school and teaches high school English, Renaissance Literature, and foreign languages. *Id.* at 3. Additionally, he works as a school guidance counselor, advising students on educational and personal matters. *Id.* Burns created Prayer After Hours, a daily after-school club, where he uses mental and behavioral health techniques and spiritual teachings of the Unitarian faith. *Id.* On Sundays after church services, he leads a "youth ministry" and hosts students who stay on campus on the weekends at the church. *Id.* Burns' co-worker, Pastor Nick, has claimed and qualified for the parsonage exemption annually. *Id.* at 4.

Housing

Burns moved homes when he accepted the job at Whispering Hills Academy. *Id.* at 3. The school provided him with a $2,500 moving credit and $2,100 a month for rental allowance. *Id.* at

4. The rental allowance was calculated by the fair rental value of the home plus additional expected utility costs. *Id.*

Based on these facts, the Petitioner argues that the Respondent incorrectly denied him of the parsonage exemption. *Id*. The Petitioner and Petitioner-Intervenor move the Court to deny Summary Judgment because Burns is entitled to the parsonage exemption and the exemption violates the Establishment Clause of the First Amendment.

Procedural History

Petitioner Burns brought suit against respondents, the Internal Revenue Service, ("IRS"), and Commissioner of Taxation in the District Court for the Southern District of Touroville, claiming that he is a "minster of the gospel" and therefore eligible to claim the parsonage exemption. (R. at 4). Citizens Against Religious Convictions, a local organization, filed a motion in district court, asserting its right to intervene and claiming that the parsonage exemption, under 26 U.S.C. § 107(2), violated the Establishment Clause of the First Amendment because it favored religion over non-religion. *Id.* Respondents moved for summary judgment. *Id.* at 2. The district court denied respondents' motion, holding that Burns was a "minister of the gospel" and that 26 U.S.C. § 107(2) was unconstitutional. *Id.* at 14.

The respondents appealed from the order of the United States for the Southern District of Touroville denying summary judgment on two claims. *Id.* at 15. The Court of Appeals for the Eighteenth Circuit reversed the district court's order denying respondents' motion for summary judgment, holding that petitioner was not a "minster of the gospel" and that § 107(2) is constitutional. *Id.* at 24. Thus, granting respondents' motion for summary judgment in its entirety. *Id.*

SUMMARY OF THE ARGUMENT

The Court of Appeals erred in granting summary judgment to the respondents for the following reasons:

First, the Court of Appeals applied a very narrow interpretation of the 26 U.S.C. § 107(2) when it should have applied a more encompassing definition of "minister of the gospel." Additionally, the Court of Appeals incorrectly applied the statutory test to determine the duties that qualify a "minister of the gospel." The court should have also categorized the school as an integral part, therefore making Mr. Burns eligible for the parsonage exemption.

Second, the Eighteenth Circuit improperly determined that the parsonage exemption under 26 U.S.C. § 107(2) is constitutional under the Establishment Clause. The Eighteenth Circuit incorrectly articulated the exemption's effect of advancing religion over non-religion and excessive government entanglement with religion, while focusing on the historical traditions. It is important to note that the authority the court used in their application of the statute's primary effect and government entanglement was regarding a property tax exemption that was available to non-religious institutions as well, which is not true with the parsonage exemption in question. In determining the constitutionality of the exemption, this Court should adopt the approach that a tax exemption available to religious entities only has a primary effect of subsidizing religion and excessive government entanglement. Applying this standard, the parsonage exemption violated the Establishment Clause of the First Amendment.

Thus, this Court should find in favor of Mr. Burns and Citizens Against Religious Convictions.

ARGUMENT

The Court of Appeals erred in finding that Mr. Burns was not a "minster of the gospel" and that 26 U.S.C. § 107(2) did not violate the Establishment Clause of the First Amendment. The regulation provides that an "ordained, commissioned, or licensed minister of the gospel" may be eligible to exclude rental allowances from their gross income for tax purposes. 26 C.F.R. 1.1402(c)-5. Additionally, the statute provides three tests that outline duties that qualify a "minister of the gospel." Mr. Burns qualifies as a "minster of the gospel" under at least one of these tests. Turning to CARC's claim, the parsonage exemption is unconstitutional under the Establishment Clause of the First Amendment because it lacks neutrality and favors religion over non-religion. The statute's primary effect advances religion over non-religion, the legislative purpose is religious, and results in excessive government entanglement with religion. Here, (1) Mr. Burns should be classified by respondents as a "minister of the gospel;" and (2) notwithstanding Burns' classification, section 107(2) is unconstitutional as it violates the Establishment Clause of the First Amendment.

I. MR. BURNS IS A "MINISTER OF THE GOSPEL" UNDER 26 U.S.C. § 107(2).

Mr. Burns fits within the statutory definition of a "minster of the gospel," and thus should be recognized as one by the respondents. The statute explicitly states that a commissioned "minister of the gospel" is eligible for the tax exemption. When applying past precedent to Mr. Burns' role and duties, he is a "minister of the gospel." He also comports with the traditional and Unitarian definitions of such role. Lastly, Whispering Hills Academy is an integral organization of Whispering Hills Unitarian Church, making Mr. Burns a "minister of the gospel." As such, this Court should reverse the Court of Appeals' grant of summary judgment for respondents.

A. Mr. Burns was commissioned by Whispering Hills Academy to be a "minister of the gospel."

In order to eligible for the parsonage exemption, one must be an "ordained, commissioned, or licensed minister of the gospel." *See* 26 C.F.R. 1.1402(c)-5 (interpreting the statute to limit the exclusion of persons eligible). The respondents have traditionally argued that only ordained ministers are eligible for the exemption. *See Abraham A. Salkov v. Comm'r*, 46 T.C. 190 (1966); *Silverman v. Comm'r*, No. 72-1336, 1973 WL 2493 (8th Cir. July 11, 1973). However, that is an inappropriate way to interpret the statute. The statute is a "disjunctive" phrase. *Silverman*, No. 72-1336, 1973 WL 2493 at *14 (citing *Salkov*, 46 T.C. 190 (1966)). Accordingly, the exemption applies to those ordained *or* licensed *or* commissioned as a minister of the gospel. *Silverman*, No.72-1336, 1973 WL 2493 at *14 (emphasis added). The *Silverman* court defined commission as "the act of committing to the charge of another or an entrusting." *Id.* Even though Mr. Burns is not an ordained minister, he is still a "minister of the gospel" as he was commissioned by Whispering Hills Academy to be one.

Mr. Burns received implicit authorization from the administration at Whispering Hills to conduct after-school and weekend religious gatherings, as well as to teach the gospel, and therefore he was entrusted with helping his student's on their religious journeys. In *Kirk v. Commissioner*, the appellant was not thought to be a commissioned minister due to the fact that "[n]o congregation or other body of believers was committed to his charge" and "[t]he duty of spreading the gospel, either by sermon or teaching was not entrusted to his care." *Kirk v. Comm'r*, 425 F.2d 492, 495 (D.C. Cir. 1970). The appellant in *Kirk* was simply a member of the board of directors of a church organization, "merely a non-ordained church employee." *Id.* However, Mr. Burns, though non-ordained and a church employee, does have a body of youth committed to his charge. Not only does he conduct daily religious gatherings with his after-school club, Prayer After Hours, he holds

weekly services as well. *See Mosley v. Comm'r*, T.C.M. 1994-457, 68 T.C.M. (CCH) at 708 (holding that daily services in an untraditional capacity were accepted as minister of the gospel duties). Students have described his weekly gatherings as "youth ministry," as they discuss religious topics and other issues relating to the students. It is clear that the school entrusted Burns to be not only a high school teacher, but a youth minister as well. Though Mr. Burns does not present a sermon every week, he still spreads the gospel by teaching and discussing religious topics thorough his extracurricular activities.

Additionally, Mr. Burns, as laid out in his employment contract, was not just responsible for teaching secular courses at Whispering Hills Academy. Mr. Burns was hired to teach language courses and to be a guidance counselor at the school. Mr. Burns "combines mental and behavioral health techniques with the commonly held religious teachings of the school's faith." As discussed, Mr. Burns also conducts a prayer club and weekend religious gatherings. Like in *Tanenbaum,* Mr. Burns may have conducted his religious gatherings on his own volition, but unlike the appellant in *Tanenbaum*, Mr. Burns was implicitly hired to do so. *Tanenbaum v. Comm'r*, 58 T.C. 1, 8 (1972). Appellant Tanenbaum was hired "to encourage and promote understanding of the history, ideals, and problems of Jews by other religious groups." *Id.* His primary function was "in the nature of public relations." *Id.* Mr. Burns was hired to be a teacher and guidance counselor at a religious boarding school. Arguably, Mr. Burns was also hired, and entrusted, with educating and teaching his students religious matters and the gospel, in whatever way he saw fit. The *Tanenbaum* court argues that if the employer recognizes the petitioner as a "minster of the gospel," it will be more likely that a court will as well. *Id.* It can be inferred that Whispering Hills recognized Mr. Burns as a youth minister. They allowed him to lead his Prayer After Hours club and his weekend

services. The school could've easily given those responsibilities to another if they did not believe that Mr. Burns was not capable, or in their eyes, a commissioned "minister of the gospel."

As for Mr. Burns' counseling of his students, he incorporated the religious beliefs of the Unitarian faith into his advice. In *Flowers*, the court held that the plaintiff "performed the same counselling functions for students in his department as a nonminister professor would perform." *Flowers v. United States*, No. CA 4-79-376-E, 1981 U.S. Dist. LEXIS 16758 (N.D. Tex. Nov. 25, 1981). However, in our case, Mr. Burns is not acting as a professor in these situations, he is acting more like a youth minister or pastor. He is guiding the children through their faith and helping to further their religious connections during religious services and activities. Whereas the plaintiff in *Flowers* was simply offering general advice to students, at what happened to be a Christian university. Mr. Burns is offering advice and guidance at a well-established, school that daily incorporates faith and religion into its secular teaching.

Through Mr. Burns' entrustment by the Whispering Hills administration to charge a congregation of the study body shows that he was "commissioned," the statutory definition of "minister of the gospel" is less clear. The statute does not provide an explicit definition of "minister of the gospel" nor does the legislative history provide much clarity. *See Lawrence v. Comm'r*, 50 T.C. 494 (1968). Courts have often looked to the traditional definition of minister. *See Silverman*, No. 72-1336, 1973 WL 2493; *Lawrence*, 50 T.C. 494 (1968). Webster's Dictionary defines 'minister' as "one duly authorized or licensed to conduct Christian worship, preach the gospel, administer the sacraments, etc." *Lawrence*, 50 T.C. at 497. The *Salkov* opinion supports that 'minister of the gospel' should be given a "reasonably expansive, pragmatic meaning." *Id.* (citing *Salkov*, 46 T.C. at 194). Mr. Burns, by conducting after-school and weekend services, is within the scope of the traditional definition of "minister of the gospel". He conducts Christian worship

and preaches the gospel, and has been authorized by the school to do so. Worship is loosely defined as showing reverence or adoration to God[1], and the gospel is defined as the teachings of Christ.[2] There is a wide range of activities that constitute conducting Christian worship and teaching the gospel, but it is likely that Mr. Burn's Prayer After Hours program and weekend youth services do both.

The statute in question provides that typical duties of a minster of the gospel include "ministration of sacerdotal functions, the conduct of religious worship, and the direction of organizations within the church." *Lawrence,* 50 T.C. at 501 (dissent). Again, due to his authorized religious gatherings, his duties are in line with the respondents' legal definition of "minister of the gospel."

Additionally, he fits within the definition of 'minster' within the Unitarian belief system, as he "act[s] as the spiritual… leader of [his] congregation…challenge[s] and guide[s] the congregation's spiritual focus, provide[s] pastoral care and counseling."[3] *See Silverman*, No. 72-1336, 1973 WL 2493 (allowing courts to look at the principles and tenants of the faith to provide a definition of minister of the gospel). The Unitarian faith provides broader meaning and duties of minster, which Mr. Burns still conforms with.

Mr. Burns is not an ordained minister, but he is a commissioned one. He was authorized by Whispering Hills Academy to lead his student congregation, and was entrusted to teach the gospel to them. By conducting daily prayer services, and weekend youth ministry, he has created a body of believers and shares the gospel with them. Additionally, Mr. Burns, through these activities, fits within the statutory, traditional, and Unitarian definitions of "minister of the gospel."

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[1] *Worship*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/worship.
[2] *Gospel*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/gospel.
[3] *Unitarian Universalist Ministers*, UNITARIAN UNIVERSALIST ASSOCIATION, https://www.uua.org/careers/ministers.

B. Mr. Burns performs the duties of a "minister of the gospel," meeting the statutory requirements to be classified as such.

Like the earlier, misconstrued requirement that a "minister of the gospel" must be ordained to qualify, the respondents provide a limited view on the duties that make a "minister of the gospel." The statute itself does not restrict such duties to those of a traditional minister, performing typical services and sermons, like the respondents believe. Section 1.1402(c)-5(b)(2) sets forth three basic tests to be used in the determination of duties that qualify a "minister of the gospel." *See Flowers v. United States*, 1981 U.S. Dist. LEXIS 16758; *Mosley v. Comm'r*, T.C.M. 1994-457, 68 T.C.M. (CCH) 708. They are as follows:

> (1) the ministration of sacerdotal functions and the conduct of religious worship; (2) the control, conduct, and maintenance of religious organizations (including the religious boards, societies, and other integral agencies of such organizations), under the authority of a religious body constituting a church or church denomination; and (3) service performed for an organization which is neither a religious organization nor operated as an integral agency of a religious organization, but which is pursuant to an assignment or designation by a religious body constituting his church.

Flowers, 1981 U.S. Dist. LEXIS 16758, at *15. In this case, Mr. Burns passes at least one of the tests, and thus his duties qualify him as a "minster of the gospel."

Mr. Burns controls, conducts and maintains services for a religious organization within the school. The *Mosley* court further explains this test and its requirements, by stating that one must direct, manage or promote the activities of the organization. *Mosley v. Comm'r*, T.C.M. 1994-457, 68 T.C.M. (CCH) 708. Additionally, it deems a religious organization 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 tenants and principles of a faith in accordance with either the requirements or sanctions governing the creation of institutions of the faith." *Id.* In *Mosley*, the plaintiffs ran Priority One, a religious organization within the Baptist denomination. The "primary tenant of the faith accepted by Baptist churches is evangelism." *Id*. The overall mission of Priority One was to

conduct worship services and spread the gospel - evangelism. *Id.* The religious organization in their case was Priority One, which authorized by the Baptist denomination. *Id.* The court held that because both plaintiffs' duties within Priority One "constituted the performance of sacerdotal functions with the tenants and practices of the Baptist denomination." *Id.*

Presently, the religious organization is Mr. Burn's Prayer After Hours club, and arguably his weekly weekend youth ministry, and the school, acting through the church, is the authoritative religious body. Mr. Burns' services help to advance the overall beliefs of the Unitarian faith, a "faith tradition which encourages each individual to develop a person faith…an ongoing search for meaning, purpose, value and spiritual depth in one's life."[4] Mr. Burns helps to guide his students through their individual religious learnings and growths, ultimately embracing the tenants of the Unitarian faith, similarly to those in *Mosley*. Mr. Burns directs, manages, and promotes his organization within the school, and therefore he performs duties of a "minister of the gospel," under the statutory test.

Although Mr. Burns' employee contract did not explicitly delegate the advisement of these organizations to him, it can be inferred that both the church and school administrators knew and approved of these extracurricular activities. *See Mosley,* T.C.M. 1994-457, 68 T.C.M. (CCH) 708 (holding that even though petitioner did not have an employment contract with the corporation, it was clear that his activities and services were known to and approved by the board of directors). The Prayer After Hours club and weekend services were dedicated and organized to carry out the principles and ideals of the Unitarian faith, and authorized by the school.[5]

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[4] *What We Believe*, UNITARIAN UNIVERSALIST, https://uuasheville.org/what-we-believe/.

[5] Alternatively, the school itself could be seen as the religious organization, operated and authorized by the Whispering Hills Unitarian Church. Though this does not change the analysis of Mr. Burns' duties as they are still performed for a religious body.

Additionally, Mr. Burns passes the third test, if it were determined that his club and youth services were not deemed to be a religious organization or an integral part of one. Prayer After Hours and his weekend youth gatherings are services conducted pursuant to an assignment or designation by a religious body constituting the church. The school is a religious body constituting the church, as the church operates and oversees the school. *See Mosley,* T.C.M. 1994-457, 68 T.C.M. (CCH) 708. The club and weekend services are conducted by the hand of the school because Whispering Hills allows Mr. Burns to conduct them. Mr. Burns was hired to not only be a teacher, but also a guidance counselor, and arguably a religious mentor seeing as the school itself is a religious institute. The incorporation of religion into both his classroom and counseling matters is likley expected by the school, and constitutes services performed for a religious body per an assignment or designation. Therefore, Mr. Burns conducts services based on a designation from a religious authoritative body.

Mr. Burns' is within the scope of the definition of "minster of the gospel," and his duties and services performed at Whispering Hills Academy only emphasize that he should be classified as one. Mr. Burns conducts, manages, and controls religious organizations authorized by the church body, and alternatively performs services per an assignment given by the church body. Therefore, Mr. Burns is entitled to receive any eligible tax exemptions as he is a "minster of the gospel."

C. Whispering Hills Academy is an integral part of Whispering Hills Unitarian Church, making Mr. Burns a "minister of the gospel," and eligible for the parsonage exemption.

The IRS has also set forth a ruling that when a school is operated and controlled by a parent-church, any teacher who exercises control, in any form, over the school is eligible for the parsonage exemption. Rev. Rul. 70-549, 1970-2 C.B. 16; *see also Flowers,* 1981 at *10. The *Flowers* court used eight factors to determine whether the school and church were sufficiently integrated. *Id.*

(citing Rev. Rul. 72-606, 1972-2 C.B. 78). When analyzing the factors set forth in *Flowers*, the school is an integral part of the church. There are not many facts about the innerworkings of the Whispering Hills Unitarian Church and its relationship between Whispering Hills Academy, but there are enough known to determine it as an integral part of the church.

In *Flowers v. United States*, the school in question was Texas Christian University ("TCU"), and the church was the Christian Church. *Flowers,* 1981 at 3. The court found that "although the university did have a close relationship with a church, there was no evidence of either direct or indirect control by the church over the university." *Id.* at 1. There, the church did not incorporate the school, the school's name did not indicate a direct relationship with the specific church, the church did not control or manage the school, nor could the directors of the school be removed by the church. *Id.* In that situation, TCU was founded as a Christian university, affiliated, but not controlled, by the Christian Church,[6] constituting a distant relationship between the church and school. *Id.*

However, the same cannot be said for Whispering Hills Academy and Whispering Hills Unitarian church. The name of the school and its close proximity to the church show that a much closer relationship is established here. The school is described as "a religious boarding school operated by Whispering Hills Unitarian Church," indicating that the church likely has control in its daily operations, decisions, and management. Applying the *Flowers* factors, Whispering Hills Academy is an integral part of Whispering Hills Unitarian Church. Mr. Burns controls the school in some aspect as he is in direct control and command of an organization on the campus, is a guidance counselor, a teacher, and a youth minister.

[6] *Mission & History*, TCU, https://www.tcu.edu/about/mission-history.php.

Due to the close relationship between the school and the church, Whispering Hills Academy is an integral part of the church. Mr. Burns role within the school constitutes his control over an aspect of the school, and therefore he is eligible to be considered a "minister of the gospel" and the parsonage exemption. Alternatively, Mr. Burns was commissioned by Whispering Hills Academy as a "minster of the gospel," and he performs the appropriate duties of one. He passes the statutory tests set forth by the respondent, and thus this Court should deny summary judgment and Mr. Burns should be recognized as a "minister of the gospel."

II. THE COURT SHOULD DENY SUMMARY JUDGMENT BECAUSE THE PARSONAGE EXEMPTION UNDER 26 U.S.C. § 107(2) IS UNCONSTITUTIONAL UNDER THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

The Establishment Clause of the First Amendment precludes the government from preferring any one religion over another or favoring religion over non-religion.[7] The parsonage exemption, states:

> 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 (2002). In 1971, the Supreme Court addressed the constitutionality of government subsidies to religious schools in the case of *Lemon v. Kurtzman*. The Court said a statute is unconstitutional under the Establishment Clause if it results in excessive government entanglement in religion, even if it is promoting a secular legislative purpose. *Lemon v. Kurtzman*, 403 U.S. 602, 613-614 (1971).

[7] Letter from Thomas Jefferson, President of the United States of America, to the Danbury Baptist Association in the State of Connecticut (Jan. 1, 1802) (on file with author) ("… I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and state.").

The *Lemon* test is still widely recognized and is the controlling test to evaluate whether a law violates the Establishment Clause. While there has been criticism of the *Lemon* test, the Court has yet to overturn *Lemon v. Kurtzman* and continues to apply it.[8] Under the *Lemon* test, a statute must satisfy three elements: "the statute must have a secular legislative purpose; 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 any element is not met, the statute is in violation of the Establishment Clause.

In CARC's case, 26 U.S.C. § 107(2) excludes its members from applying for the parsonage exemption as a nonreligious organization and does not meet any elements of the *Lemon* test. The statute's primary effect is to advance religion over non-religion. Even if the principal effect did not advance religion, the statute does not have a secular legislative purpose. Even if it did have a secular legislative purpose, the statute causes excessive government entanglement in religion. Therefore, CARC's motion to deny summary judgment should be granted.

A. The parsonage exemption's, under 26 U.S.C. § 107(2), primary effect is to advance religion over non-religion.

If a statute's primary effect advances religion or inhibits non-religion, the statute fails to meet the obligation of neutrality. The principal command of the Establishment Clause is that one denomination "cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 229, 244 (1982). The government cannot pass laws "which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Education of Ewing TP*, 330 U.S. 1, 15 (1947).

[8] It is important to note that the Supreme Court has applied other approaches to the Establishment Clause such as an endorsement test, coercion test, and historical test. In *Wallace v. Jaffree*, the Court applied an endorsement test, ruling that a statute authorizing a moment of silence for prayer endorsed religion in violation of the Establishment Clause. In *Lee v. Weisman*, the Court applied a coercion test and held that a school could not recite a prayer at graduation because it would coerce nonreligious students into a religious practice. In *Marsh v. Chambers*, the Court applied a historical test and upheld the practice of paying a chaplain to open sessions with a prayer because it is a longstanding tradition.

In *Caldor*, a Connecticut statute prevented employers from requiring employees to work on their day of Sabbath. *Estate of Thornton v. Caldor*, 472 U.S. 703, 706 (1985). The Court held the statute unconstitutional because its primary effect was to advance religion by an employee's religious practices having automatic control over any secular interests. *Id*. at 703. In *Walz*, a property tax exemption for real estate was available to a broad range of organizations having "religious, educational, or charitable purposes." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 666-667 (1970). The Court held that a property tax exemption for religious purposes did not violate the Establishment Clause because the benefit was not restricted to religious organizations only. *Id.* at 672-673.

In *Texas Monthly*, a Texas law provided religious organizations with a sales tax exemption for religious periodicals. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 5 (1989). The Court noted that the State did not provide evidence that paying a sales tax to religious periodicals "would offend their religious beliefs or inhibit religious activity." *Id.* at 18. The Court held that the Texas law was a "blatant endorsement" of religion. *Id.* at 20.

Turning to CARC's case, Section 107(2)'s primary effect advances and endorses religion over non-religion. Similar to *Caldor*, in which the statute provided an automatic benefit to religious employees over secular, here the exemption endorses religion by providing it only to organizations with religious employees. Unlike in *Walz*, where the Court held that a property tax exemption available to non-religious organizations did not violate the Establishment Clause, here the parsonage exemption is only provided to religious entities. Like the plaintiff in *Texas Monthly*, who did not qualify for the tax exemption for religious publications, here members of CARC also do not qualify for the parsonage exemption because they are a non-religious organization.

Similarly, the IRS has not pointed to any evidence that requiring ministers to pay taxes on their housing allowance would inhibit religion over non-religion.

There are other sections of the Internal Revenue Code that provide some exemptions to non-religious entities. However, those sections have restrictions that are not found in the parsonage exemption. Under Section 119, there is a tax exemption available for housing for secular employees with requirements that the lodging be "located on, or in the proximity of, a campus of the educational institution" and "furnished to the employee…on behalf of such institution for use as a residence." 26 U.S.C. § 119 (1998). Because the restrictions are only found in the exemption available to non-religious employees and there are no such limitations on the parsonage exemption, the statute endorses religion over non-religion. Thus, as the parsonage exemption is only available to "ministers of the gospel" and not CARC's employees, the principal effect advances and endorses religion over non-religion and the statute will fail the *Lemon* test.

B. The parsonage exemption, under 26 U.S.C. § 107(2), does not have a secular legislative purpose.

Even if the principal effect does not advance or inhibit religion over non-religion, the statute must have a nonreligious purpose. If the primary purpose of a law is religious, the law does not satisfy the secular purpose element of preserving separation between church and state. It is important to note that the requirement for a secular legislative purpose may incidentally benefit religion. *Texas Monthly*, 489 U.S. at 10. Therefore, a subsidy that has a secular legislative purpose, in which a religious organization incidentally benefits from it, would still satisfy the secular purpose requirement. A tax exemption constitutes a "subsidy that affects nonqualifying taxpayers, forcing them to become 'indirect and vicarious donors.'" *Texas Monthly*, 489 U.S. at 14 (quoting *Bob Jones University v. United States*, 461 U.S. 574, 591 (1983)). The secular purpose required

under the *Lemon* test "has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary County v. American Civil Liberties Union*, 545 U.S. 844, 864 (2005).

In *Texas Monthly*, the Court held that the tax exemption did not have a secular legislative purpose, instead the purpose of the tax exemption was to subsidize the religious teachings. *Texas Monthly*, 489 U.S. at 2. Therefore, the Texas sales tax exemption fails the *Lemon* test. *Id.* at 17. In *McCreary County*, copies of the Ten Commandments were posted in two Kentucky county courthouses. *McCreary County*, 545 U.S. at 844. The Counties argued that the Commandments are Kentucky's "precedent legal code." *Id.* The Court reasoned that the postings of the Commandments were not part of a secular display and were distinct from any traditionally symbolic representation. *Id.* at 868. The Court held that the postings were of a predominantly religious purpose. *Id.* In *Lemon*, the two state statutes had a secular purpose to help non-public school students receive a comparable secular education. *Lemon*, 403 U.S. at 616.

Turning to CARC's case, Section 107(2)'s primary legislative purpose is religious.[9] Similar to *Texas Monthly*, in which the exemption was to directly subsidize religious teachings without a secular purpose, here the purpose of the parsonage exemption is to exclusively subsidize a religious organization. In *McCreary County*, the displays of the Commandments were not a part of a secular display or traditionally symbolic representation. Likewise, here the statute is distinct from any secular tax exemption. Thus, in both the display in *McCreary County* and the statute in the instant case have a predominantly religious purpose and should be held unconstitutional in violation of the *Lemon* test.

[9] H.R. Comm. On Ways and Means, *Hearings on Forty Topics Pertaining to the General Revision of the Internal Revenue Code*, 83d Cong. 1576 (Aug. 11, 1953) (Representative Peter Mack, the author of the parsonage exemption, said, "in these times when we are being threatened by a godless and antireligious world movement we should correct this discrimination against certain ministers of the gospel who are carrying on such a courageous fight against this foe.").

C. The parsonage exemption, under 26 U.S.C. § 107(2), fosters an excessive government entanglement with religion.

Even if the statute has a secular legislative purpose, government subsidies are unconstitutional if they result in an excessive government entanglement with religion. In *Lemon*, a Rhode Island statute provided private school teachers with a salary supplement if they taught only secular courses taught in public schools. *Lemon*, 403 U.S. at 606. A Pennsylvania statute reimbursed private school teachers for their salaries and materials if they taught the same secular subjects as public schools. *Id.* In determining whether the entanglement of government with religion is excessive, the Court said to "examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Id.* at 615. The Court reasoned that the statutes would require intensive government monitoring and controlling to make sure the funding continued for a secular educational purpose. *Id.* at 619. The Court held that the two state statutes' providing aid to religious school teachers' salaries, even with the requirement of only teaching secular courses, resulted in excessive government entanglement in religion. *Id.* at 603.

When deciding if government entanglement with religion is excessive, there are various approaches taken by lower courts. In *Silverman*, a full-time cantor sought to claim the parsonage exemption. *Silverman v. Comm'r of Internal Revenue*, No. 72-1336, 1973 WL 2493, at *1 (8th Cir. July 11, 1973). The court had to conduct an intense examination of Cantor Silverman's duties and elements of the Jewish faith to determine whether he qualifies for the parsonage exemption. *Id.* at 4. This investigation constitutes inherently excessive government entanglement with religion. In *Vision Church*, a religious organization was denied a special use permit to build a church complex on the property. *Vision Church v. Village of Long Grove*, 468 F.3d 975, 981 (7th Cir. 2006). The Seventh Circuit Court of Appeals held that to meet excessive entanglement, there must be

"intrusive government participation in, supervision of, or inquiry into religious affairs." *Id.* at 995 (quoting *United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 631 (7th Cir. 2000)).

Turning to CARC's case, the fact-intensive inquiry that the government must examine constitutes excessive government entanglement with religion. Like the Court in *Lemon*, who examined the character of the religious organization, the nature of the governmental assistance, and the resulting interaction between them, here the IRS is in charge of investigating the individual claiming the parsonage exemption and determining who qualifies as a minister of the gospel. As the court in *Silverman* had to conduct a fact-intensive inquiry, here the IRS would have to examine the specific person claiming the exemption and regulate whether to grant or deny the exemption. Similar to *Vision Church*, in which the court explained to meet excessive entanglement there must be intrusive government inquiry into religious affairs, here the determination results in intrusive government inquiry into religious affairs and constitutes excess government entanglement with religion. Thus, the parsonage exemption excessively entangles government with religion, in violation of the *Lemon* test.

CONCLUSION

Therefore, as this brief has demonstrated, the petitioners have shown good reason for the summary judgment motion to be denied. Mr. Burns has established that he fits within the definition of a "minster of the gospel," and his duties qualify him as such. Notwithstanding Burns' classification, the parsonage exemption is unconstitutional under the Establishment Clause of the First Amendment because it favors religion over non-religion.

Petitioner Burns has shown that he was commissioned by Whispering Hills Academy to be a "minister of the gospel," and fits within the statutory, traditional, and Unitarian definition of 'minister.' The duties performed at the school also qualify him as a "minister of the gospel."

Alternatively, Whispering Hills Academy is an integral organization of Whispering Hills Unitarian Church, and thus Mr. Burns is eligible to receive the parsonage exemption based on his duties and that relationship.

Petitioner-Intervenor CARC has adequately shown that the parsonage exemption is unconstitutional. Even though the Supreme Court has taken different approaches to the question of constitutionality of government subsidies for religious organizations, the *Lemon* test remains the controlling law. Under the *Lemon* test, the statute's primary effect must not advance or inhibit religion over non-religion, must have a secular legislative purpose, and must not result in excessive government entanglement with religion. First, the statute's primary effect is to advance religion over non-religion because it is available only to "ministers of the gospel." Even if the Court found that the statute's primary effect did not advance religion, the statute is still unconstitutional because the legislative purpose is not secular. The parsonage exemption was authored to benefit "ministers of the gospel." Even if the Court found that the its legislative purpose was secular, the statute is still unconstitutional because it results in an excessive government entanglement with religion requiring an investigation into those claiming the exemption to determine if they qualify as a "minister of the gospel." Section 107(2) lacks neutrality and favors religion over non-religion in violation of the *Lemon* test. For these reasons, Respondent's motion for Summary Judgment should be denied.

For the foregoing reasons, this Court should find in favor of Mr. Burns and CARC and reverse the decision of the Court of Appeals.

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Respectfully submitted,

Team #1

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