Case No. 20–199

IN THE SUPREME COURT OF THE UNITED STATES
APRIL TERM 2021

JOHN BURNS,

Petitioner,

and

CITIZENS AGAINST RELIGIOUS CONVICTIONS, INC.,

Petitioner-Intervenor,

v.

INTERNAL REVENUE SERVICE AND COMMISSIONER OF TAXATION,

Respondent.

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

BRIEF FOR PETITIONER

March 12, 2021

Team 13
Counsel for Petitioner

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QUESTIONS PRESENTED

I. Whether this Court and the IRS have the authority to intrude into the inner workings of a religious institution to extensively assess a school teacher's status as a minister, and should the court grant itself the authority to do so, whether Mr. Burns qualifies as a minister through his sacerdotal duties and conduct of religious worship in his gospel-centered curriculum, spiritual counseling, and weekend youth ministry work?

II. Whether a statute violates the Establishment Clause of the First Amendment when the statute provides a tax benefit solely to religious organizations, has no secular legislative purpose, advances religion, and fosters excessive government entanglement with religion?

CONSTITUTIONAL PROVISIONS OR STATUTES INVOLVED

This case involves the First Amendment to the United States Constitution and 26 U.S.C. § 107(2). The First Amendment to the United States Constitution 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. Section 107(2) provides: "In 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 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(2).

STATEMENT OF THE CASE

Statement of Facts

In 2016, Petitioner John Burns was hired by Whispering Hills Academy. R. at 3. Whispering Hills is a religious boarding school, operated and located just steps away from the Whispering Hills Unitarian Church. *Id.* Whispering Hills hired Burns to both teach upperclassmen and to employ as a guidance counselor advising students on personal and religious matters. *Id.* Being a hired teacher and a devoted religious leader in his community, Burns not only diligently teaches his students English, Renaissance Literature, and foreign languages, but also guides students in their personal religious journeys by combining health techniques with the school's religious teachings. *Id.*

To further promote and encourage religious doctrine with his students, Burns created an after-school club, Prayer After Hours. *Id.* Prayer After Hours hosts large gatherings that provide lunch, snacks, and social interaction with students. *Id.* These gatherings have been deemed as a "youth ministry" because they take place after Sunday services and at the on-campus church. *Id.* Burns is a well admired religious leader within Whispering Hills, having received several awards for this groundbreaking after-school club. *Id.*

Knowing and understanding all of Burns's ministerial duties and accomplishments, a coworker, Pastor Nick, recommended to Burns that he look into claiming the parsonage exemption under 26 U.S.C. § 107(2). R. at 4. Pastor Nick understood Burns would easily qualify for the exemption since he was employed by a

religious institution, held daily prayer sessions, and provided spiritual counseling. *Id.* Burns diligently conducted an investigation to assess his qualification for the exemption. *Id.* Burns reflected on how he moved into a new home and new community to be closer to his teaching job, and how the school provided him with a $2,500 moving credit to help with his costs of moving and travel. R. at 3-4. Moreover, Burns recalled how he and Whispering Hills contractually agreed that an additional $2,100 per month would be given to Burns as his rental allowance. R. at 4. After reflecting on his duties as a teacher at Whispering Hill and reviewing his own research on the exemption, Burns determined that because he moved to the home to be closer to the school and because the religious institution provided him with a housing allowance, he qualified for the exemption. *Id.*

Burns claimed the parsonage exemption on his 2017 tax return. *Id.* In the summer of 2018, the IRS denied his exemption, claiming that he was not a "minister of the gospel" despite Burns's daily religious activities and that he was, in fact, employed by Whispering Hills as a teacher. *Id.* After the IRS's denial, the district court investigated further and determined that Burns actually was a minister. R. at 9. On appeal, yet another court investigated the inner workings of Whispering Hills Academy and reversed, claiming Burns was not a minister. R. at 20. Now, after the IRS and two individual courts have investigated and entangled themselves within the realm of a private, independent religious institution, this Court grants review to again assess Burns's eligibility under the parsonage exemption. R. at 26. All of this

government investigation has occurred despite Whispering Hills's own assessment and determination of Burns's status as a teacher.

Procedural History

Plaintiff Burns filed a claim in the United States District Court for the Southern District of Touroville having been denied the housing exemption under 26 U.S.C. § 107(2). R. at 1. Plaintiff-Intervenor was granted entry into the lawsuit with an alternative claim - that § 107(2) is unconstitutional. R. at 2. Defendant, the Internal Revenue Service and Commissioner of Taxation, filed a motion for summary judgement on both the Plaintiff and the Plaintiff- Intervenor claims. *Id.* On December 18, 2019, the United States District Court for the Southern District of Touroville held that Burns is a minister of the gospel and § 107(2) is unconstitutional, properly denying Defendant's motion for summary judgement. R. at 2-3. On June 9, 2020, the United States Court of Appeals for the Eighteenth Circuit erroneously reversed the district court on both claims and granted the motion for summary judgement. R. at 15. This Court then granted certiorari for the October term of 2020. R. at 26.

SUMMARY OF THE ARGUMENT

Petitioner

The First Amendment requires that religious institutions be free from governmental influence and intrusion. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 184 (2012). But even if the Court determines that it is proper to consider the ministerial duties of Burns, he still is covered by 26 U.S.C. § 107(2) because he fulfills the functions of a minister in his employment, and he has been conferred the authority of a minister by Whispering Hills Academy.

Petitioner-Intervenor

The First Amendment also requires that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. 26 U.S.C. § 107(2) violates the First Amendment by breaking governmental neutrality and providing a benefit solely to religion, providing greater benefits to religion than nonreligion, not containing a secular purpose, advancing religion and fostering excessive governmental entanglement with religion. Therefore, the Court should reverse the decision of the United States Court of Appeals for the Eighteenth Circuit.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE CIRCUIT COURT'S DECISION BECAUSE EVEN IF THE COURT DETERMINES IT IS APPROPRIATE TO ASSESS THE "MINISTERIAL EXCEPTION," AN INDIVIDUAL WHO IS LABELED BY HIS EMPLOYER AS A MINISTER AND REGULARLY PERFORMS SACERDOTAL FUNCTIONS QUALIFIES AS A "MINISTER OF THE GOSPEL."

The First Amendment ensures that religious institutions are free from government influence and intrusion in determining who may and may not serve as

its religious leaders. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 184 (2012). The court-created "ministerial exception" enforces this notion by prohibiting state intrusion into inquiries assessing whether an individual may bring an employment discrimination claim against their religious institutions. *Id.* at 188-89. Recent precedent holds that this exception serves not as an invitation for courts to engage in a "rigid formula" assessment, but rather as a guideline to ensure religious institutions maintain autonomy and independence in "matters of church government." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049, 2060 (2020). When a court does find it appropriate to engage in this fact-sensitive inquiry, the IRS provides that a taxpayer is a "minister of the gospel" when its duties include "the ministration of sacerdotal functions," "the conduct of religious worship," or the "control, conduct, and maintenance of religious organizations . . . including [their] integral agencies . . . ." 26 C.F.R. § 1.1402(c)-5.

Government intrusion into the inner workings of religious institutions is subject to the First Amendment. The separation between church and state is explicitly mandated in instances where an individual qualifies as a minister. However, where a taxpayer is a teacher, courts are encouraged to avoid this inquiry altogether. After recent precedent, the only route available for this Court is to defer to the interpretation of the religious institution, thus avoiding an inquiry that upsets religious autonomy. However, if this Court finds it appropriate to engage in a fact-sensitive analysis, it will look to the regular duties performed by Burns and conclude that he does qualify as a "minister of the gospel" in his role and authority at

Whispering Hills Academy. Therefore, this Court should reverse the circuit court's decision.

A. It Is Inappropriate For The IRS and For This Court To Assess Ministerial Status Because The Government Is Obligated To Remain Far Removed From The Workings Of Religious Institutions.

The First Amendment mandates that the government be far removed from the inner workings of religious authorities. U.S. Const. amend. I. This Court has reinforced this mandate through the court-created "ministerial exception," which prohibits judicial intrusion into the relationships between a religious organization and its ministers. *Hosanna-Tabor*, 565 U.S. at 188-89. Where a religious leader falls within this exception, courts are absolutely barred from interfering with the religious institution's decision regarding that employee. *Id.* at 181. This Court went to great lengths to ensure this exception, unique only to employment discrimination claims, was not a "rigid formula," but rather an explicit recognition that certain aspects of religious institutions must remain absolutely free from government infringement. *Id.* at 190. In practice, the ministerial exception has served as more of a guideline for a religious institution to maintain its autonomy and independence in "matters of church government." *Our Lady of Guadalupe*, 140 S.Ct. at 2060. The prohibition of judicially imposed obligations on religious institutions is particularly stark in instances where a religious employee has been deemed a "teacher." *Id.* at 2069. Finally, although courts have previously engaged in analyses to determine whether an employee falls within a classification defined by the legislature, after the recent *Our Lady of Guadalupe* clarification, these analyses are no longer feasible. *See Gaylor*

v. Mnuchin, 919 F.3d 420, 434 (7th Cir. 2019); *see also Our Lady of Guadalupe*, 140 S.Ct at 2049.

Under the First Amendment, the Court and the IRS, as government authorities, are obligated to distance their involvement with religious institutions. *Hosanna-Tabor*, 565 U.S. at 188. In *Hosanna-Tabor*, the Court assessed whether an employment discrimination claim may be brought against a religious organization exercising discretion in determining its own ministers. *Id.* The Court ultimately deferred to the church's own conclusion that Plaintiffs fell within the ministerial exception and barred the claim. *Id.* at 194. In interpreting the First Amendment, the Court reasoned that forcing a religious institution to compromise its beliefs and succumb to a court mandated obligation would "interfere with the internal governance of the church" and "deprive[] the church of control over the selection of those who will personify its beliefs." *Id.* at 188-89. Despite the Court's brief assessment that Plaintiffs did, in fact, qualify as ministers, the Court was clear in concluding that "the church must be free to choose those who will guide it on its way," and ultimately held that judicial imposition in this realm would "intrude upon more than a mere employment decision." *Id.* at 188, 196.

Recently, this Court broadly held that judicial intervention into disputes between religious institutions and its employees violates the First Amendment. *Our Lady of Guadalupe*, 140 S.Ct. at 2069. In *Our Lady of Guadalupe*, Plaintiffs brought suit against their respective religious employers claiming they were discharged in violation of federal law. *Id.* at 2056-59. Both institutions maintained that they had

the authority to discharge the plaintiffs because, under their own understanding, the plaintiffs were teachers who qualified under the ministerial exception. *Id.* Although this Court again conducted an analysis of whether Plaintiffs fell within the exception, it went to great lengths to recognize the Constitutional obligation to give a religious institution's denotation of their own employees heavy weight. *Id.* at 2066. This Court reasoned that judicial intrusion into the church's internal workings would inappropriately interfere with the church's authority to make decisions free from government intrusion, especially because "judges cannot be expected to have a complete understanding and appreciation" of each individual role within religious institutions. *Id.* at 2060, 2066.

Giving courts free range to judicially impose obligations on religious institutions is contrary to the First Amendment and not supported by this Court's precedent. *Hosanna-Tabor*, 575 U.S. at 188. In *Hosanna-Tabor*, this Court concluded that forcing a church to employ an unwanted minister would "interfere with the internal governance of the church" and "deprive[] the church of control" in violation of the First Amendment. *Id.* This Court was careful to recognize that judicial imposition into the employment realm could threaten more than a "mere employment decision." *Id.*

Not only would this Court undermine Whispering Hill's autonomy by imposing a judicial assessment of a religious institution's own employee, but it would also undermine this Court's own precedent to broadly permit judicial imposition in the realm of religious tax schemes. Before employing Burns, Whispering Hills, in its own

capacity, agreed to supply Burns with both a moving credit and a rental allowance to ensure his stability and commitment in his new position as a minister. R. at 4. Burn's fellow co-worker, Pastor Nick, recommended the parsonage exemption, reflecting his own understanding of Burns position within the academy. *Id.* Burns, after diligently investigating his qualifications for the exemption and receiving no information to the contrary from his employer, determined that he was eligible for the exemption. *Id.* By imposing, and thus promoting, judicial preclearance before allowing a qualified employee to obtain a tax exemption supported by his employer, this Court would broadly expand the narrow and limited holding of *Hosanna-Tabor.*

More recent case law has firmly solidified the government's obligation to remain far removed from a religious institution's own understanding of its employees. *Our Lady of Guadalupe*, 140 S.Ct. at 2067. In *Our Lady of Guadalupe*, the Court strongly backed away from encouraging courts to deploy a rigid formula in assessing an employee's status, and instead firmly deferred to the religious employer's denotation of its own employees, particularly where the employee is a teacher. *Id.* at 2060. Although the Court did ultimately conclude that the plaintiff in *Our Lady of Guadalupe* fell within the ministerial exception, this analysis should serve more as a guideline for religious institutions to ensure their own autonomy, rather than an invitation for courts to entangle themselves within the inner workings of these institutions. *Id.* at 2066. This Court explained in *Our Lady of Guadalupe* that it would be irrational for courts to engage in such a rigid analysis, because courts do not have the same level of understanding and appreciation as the religious institutions do in

employing their own leaders. *Id.* Following the reasoning outlined by *Our Lady of Guadalupe*, Burns's status as a teacher within a religious academy is enough to insulate him from an intrusive, fact-sensitive inquiry conducted by entities who lack the specific understanding and appreciation of Burns's role.

Finally, it is necessary to note that while courts have previously engaged in fact-sensitive analyses to assess whether a taxpayer qualifies for a particular tax scheme, these analyses are no longer feasible under *Our Lady of Guadalupe*. See *Gaylor*, 919 F.3d at 434; *see also Our Lady of Guadalupe*, 140 S.Ct at 2069. While it is true that the Supreme Court consistently defers to the legislature as the most appropriate branch to construe tax classifications, it is not Petitioner's position that the legislature's tax statute is unworkable. *Madden v. Kentucky*, 308 U.S. 83, 88 (1940). Petitioner only asks that the government abide by its First Amendment obligation to remain far removed from the inner workings of religious institutions, and trust that the religious institution is the only entity who has the authority to properly classify its own employees. Therefore, because the government is obligated to remain far removed from assessing the inner workings of religious institutions, especially when between a school and a teacher, this Court and the IRS should refrain from determining Burns's status and defer to the interpretation of his employer.

B. If the Court Decides That it Has the Authority to Determine Whether Burns Is a "Minister of the Gospel," Burns Fulfills the Role of a "Minister" and Is Held Out by Whispering Hills Academy to Be a "Minister," Entitling Him to The Parsonage Exemption Under 26 U.S.C. § 107(2).

Any taxpayer who performs the duties "which are ordinarily the duties of a minister of the gospel" is entitled to the housing allowance in § 107 as remuneration

for such services. 26 C.F.R. § 1.107-1(a). It is not before this Court to define what a "minister" is, but rather whether Burns qualifies as a "minister." *Hosanna-Tabor*, 575 U.S. at 190. This Honorable Court has consistently recognized and deferred to the discretion of legislative bodies to shape definitions and classifications. *Madden*, 309 U.S. at 88. Congress has remained relatively silent on the matter; Judicial decisions and IRS Rules assessing who qualifies as a "minister" per § 107(2) guide the analysis.

There is no established test to qualify as a minister, but courts and the IRS alike have sought evidence of several facts to prove a taxpayer is a "minister of the gospel" under § 107(2). A taxpayer is a qualifying minister if he or she can establish three facts: (1) the taxpayer fulfills the function of a minister by doing what a minister of that particular faith ordinarily does, Rev. Rul. 78-301, 1978-2 C.B. 103 (1978), (2) the taxpayer is set forth by a religious employer as having the authority of a minister, *Kirk v. Commissioner*, 425 F.2d 492 (D.C.Cir.1970), and (3) the taxpayer is affiliated with an identifiable religious body, 26 C.F.R. § 1.1402(c)-5. There is no question about whether Whispering Hills Academy and Whispering Hills Unitarian Church are affiliated with a religious body. The question of whether Burns qualifies as a "minister of the gospel" per § 107(2) turns on two questions. First, whether Burns fulfills the function of a minister in his employment at Whispering Hills Academy. Second, whether Burns has been conferred the authority of a minister by his religious employer Whispering Hills Academy.

1. As a Teacher, Counselor, and Youth Ministry Leader, Burns Fulfills Sacerdotal Duties and Conducts Religious Worship, as Well as Plays a Pivotal Role at Whispering Hills Academy—an Integrated Agency of its Neighbor Parent-Church Whispering Hills Unitarian Church.

The IRS provides that a taxpayer is fulfilling the functions of a "minister of the gospel" when the exercise of his ministry includes "the ministration of sacerdotal functions," "the conduct of religious worship," or the "control, conduct, and maintenance of religious organizations . . . including [their] integral agencies . . . ." § 1.1402(c)-5. A taxpayer that, in their assigned duties and regular course of work, engages in either sacerdotal duties or conducts religious worship, fulfills the role of a "minister of the gospel." *Id.* A teacher at a church's integrated agency, such as a parent-church's sister-school, are also entitled to the parsonage exemption as remuneration for his religious teachings and commitment to the church's goals. *See* Rev. Rul. 70-549, 1970-2 C.B. 16 (1970).

A taxpayer whose duties are traditionally ministerial qualifies as a "minister of the gospel." In *Libman v. Commissioner*, a Rabbi employed by the United Jewish Appeal as the Director of the Rabbinic Advisory Council qualified for the parsonage exemption because "the services [he] performed . . . were in substantial part rabbinic in nature." 44 T.C.M. (CCH) 370 (T.C. 1982). Satisfactorily "rabbinic" duties included serving as a consultant to the organization's staff regarding matters of Jewish law and practices, providing rabbinic counseling to staff and conducting services at staff meetings, and conducting weddings for the staff. *Id. See also* Rev. Rul. 58-221, 1958-1 C.B. 53 (1958) (finding that a Rabbi's duties at the local Jewish Community Center—including conducting weekly and festival services for children, training the

children in the Jewish religion, and supervising children's religious obligations such as the training for the Bar Mitzvah—were "duties ordinarily performed by a rabbi," thus qualifying him for the parsonage exemption).

The traditionally ministerial duties should be the taxpayer's regular duties to qualify for the parsonage exemption. In *Lawrence v. Commissioner*, the Tax Court found that the appointment of an employee to a minister of education position was "nothing more than paperwork procedure," rather than an actual ministerial appointment. 50 T.C. 494, 498 (1968). While the taxpayer in *Lawrence* occasionally filled in for a regular pastor during services and did occasionally conduct religious worship by leading a congregation in prayer, his ministerial duties were not regular enough to qualify the taxpayer as a "minister." *Id.* at 499. Similarly, a fully ordained Rabbi that engaged in few ministerial duties for the American Jewish Committee did not qualify for a parsonage exemption. *See Tanenbaum v. Comm'r of Internal Revenue*, 58 T.C. 1, 9 (1972). The Rabbi occasionally conducted religious worship before congregation, but it was "by his own personal desire" and not a regular duty. *Id.* at 8. Instead, his duties were primarily studying, researching, lecturing, and conducting seminars on the relationships between Judaism and Christianity. *Id.* at 4. Despite being fully ordained, the taxpayer's lack of regular sacerdotal duties meant he could not claim the exemption. *Id.* at 9.

In addition to granting the exemption to those fulfilling traditional ministerial roles, the IRS has also extended the parsonage exemption to teachers and administrators at a church's integrated agency. An integral agency is "an

organization which operates under the authority of a church denomination." *Toavs v. Comm'r of Internal Revenue*, 67 T.C. 897, 904 (1977). The IRS intends for the parsonage exemption to be remuneration for teachers that play an important role in a church's integral agency. Rev. Rul. 70-549, 1970-2 C.B. 16, *1 (1970). The taxpayer must first show that the school is integrated. Relevant, but nonexhaustive, factors include the financial relationship with the church and the role of the gospel in secular and nonsecular classes. *See id.* (finding that a college which receives donations from the church, has a board of directors under the control of church elders, requires that teachers be church members, and features the gospel in each class is an integrated agency). The IRS has provided eight additional nonexhaustive factors that guide the integration analysis:

> (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 by 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 (1972). The IRS also examines the level of direct and indirect control the church has over the school, as well as whether the school would be able to function if the relationship to the church were disrupted. *See Toavs*, 67 T.C. at 904–05 (finding that a nursing home was not integrated because the loss of recognition of its relationship to the church would not "impair [its] ability to carry

out its primary purpose"). *See also Flowers v. United States*, No. CA 4-79-376-E, 1981 WL 1928, at *3 (N.D. Tex. Nov. 25, 1981) (finding that the church did not have sufficient control over the University because the church's influence is "limited to suggesting the moral persuasion" of the school). Second, the taxpayer must show that he has some level of control over the integrated agency to be entitled to the parsonage exemption. § 1.1402(c)-5. *See, e.g.*, *Flowers*, No. CA 4-79-376-E, 1981 WL 1928, at *3 (finding that the professor's activities were not integral to the school's curriculum, barring him from claiming the exemption).

Burns, as a teacher and counselor at Whispering Hills Academy, regularly engages in sacerdotal duties and conducts religious worship. Each of Burns's enumerated duties are steeped in an obligation to uphold the church's beliefs and spreading the gospel. In addition to integrating religion into core and elective classes, Burns is a spiritual counselor: a traditional role for a minister. R. at 3. A counselor in a religious organization—such as the United Jewish Appeal in *Libman* or the community center in Rev. Rule 58—is fulfilling sacerdotal duties. 44 T.C.M. (CCH) 370; Rev. Rul. 58-221. Just as these Rabbis counseled their peers and their pupils, so too is Burns fulfilling his sacerdotal duties when he imputes religious teachings and the school's faith in the students he counsels. R. at 3. Burns's religious teaching stretch from the classroom, to after school, and even to the pulpit when he leads Sunday youth ministries. *Id.* In contrast, the taxpayers in *Lawrence* and *Tanenbaum* had no such meaningful relationship with religious pupils or a congregation. 50 T.C. at 499; 58 T.C. at 1. While Burns is, by definition, a spiritual counselor to the students

of Whispering Hills Academy, he has taken on additional duties by creating an after-school club that focuses entirely on the gospel through prayer. R. at 3. Burns has also taken on regular spiritual counselor duties by creating yet another spiritual space for the students when he hosts "youth ministry" gatherings for them on weekends. *Id.* Burns is a central and impactful spiritual counselor to the students of Whispering Hills, performing sacerdotal duties and conducting religious worship at every opportunity.

Burns is entitled to the parsonage exemption as a teacher and counselor at a school that is integrated under Whispering Hills Unitarian Church. The proximity of the school to its parent church of the same name, *id.*, satisfies an implied incorporated relationship outlined in factor 1 and 2, Rev. Rul. 72. Just as the students' attendance in Rev. Rule 70-549 was a persuasive illustration of integration, so too is the attendance of Whispering Hills Academy's student body at the Whispering Hills Unitarian Church a clear indicator of integration, R. at 3. When answering the requisite question of whether Whispering Hills Academy can continue its goals without Whispering Hills Unitarian Church, *Toavs*, 67 T.C. at 904–05, it is difficult to conceive of how an identically named neighboring private school will fare when its religious pupils are left without a chapel and without a ministry. *See* R. at 3.

2. Whispering Hills Academy Licenses and Commissions Burns as a Minister by Installing Him as a Spiritual Counselor and Entrusting Him With the Minds and Faiths of Students With Whom He Shares the Gospel.

A "minister of the gospel" has been conferred authority by his religious employer. *See Kirk*, 425 F.2d at 493. This does not require formal ordainment. *Id.*

Rather, an employer's conferral of authority can be through ordainment, commission, or license. *Id.* at 495. A minister that performs services under the assignment by a church qualifies for the § 107(2) exclusion. § 1.1402(c)-5.

As the appellate court highlighted, when a religious employer holds an employee out as an employee, then the employee is entitled to the parsonage exemption. In *Kirk*, the D.C. Circuit Court held that the taxpayer was not entitled to the parsonage exemption because he had not been ordained, licensed, or commissioned as a "minister" by his employer. 425 F.3d at 495. The taxpayer in *Kirk* was an unordained member of the General Board of Christian Social Concerns for a Methodist Church. *Id.* at 493. The court held that the church had not ordained, licensed, or commissioned the taxpayer because his responsibilities were largely administrative as a board member of the church. *See Id.* at 495.

Whispering Hills Academy both licenses and commissions Burns as a "minister," conferring authority upon him and entitling him to the parsonage exemption. While the appellate court is correct that *Kirk* highlights the requirement that an employer must hold an employee out as a "minister," the appellate court is mistaken in likening Burns to the taxpayer in *Kirk*. The taxpayer in *Kirk* was an administrator.425 F.3d at 493. Burns is a teacher, counselor, and spiritual guide to his students. R. at 3. The taxpayer's duties in *Kirk* had little to do with the congregation. 425 F.3d at 493. Burns is responsible for spiritually guiding his students every moment he is on the clock. Whispering Hills hired Burns not only as a teacher, but as a counselor, responsible for spiritual counseling and guidance of the

students in his charge. R. at 3. The school's employment of Burns is a clear indicia of permission to spiritually educate and guide his students. *See* 425 F.3d at 495. The entrustment of these students' faiths and spiritual growth is a clear commission of Burns as a minister responsible for teaching the gospel to the Academy's students and the Church's congregants. *Id.*

II. THE PARSONAGE EXEMPTION UNDER 26 U.S.C. § 107(2) VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT AND IS UNCONSTITUTIONAL.

The parsonage exemption within 26 U.S.C. § 107(2) allows for ministers of the gospel to exclude the value of their lodging from their income at a level that is not provided to the taxpayers who work for nonreligious organizations. The statute violates the Establishment Clause of the First Amendment to the Constitution, which states that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. By exempting ministers of the gospel over nonreligious workers, the statute breaks the "governmental neutrality" with religion that is required by the Constitution. *Epperson v. State of Ark.*, 393 U.S. 97, 104 (1968). Furthermore, the parsonage exemption within § 107(2) provides greater benefits to religion than other provisions in the tax code provide to taxpayers working for nonreligious organizations.

The test developed in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) is the prominent test that courts use to determine when a governmental entity has violated the Establishment Clause. Amy J. Alexander, *When Life Gives You the Lemon Test: An Overview of the Lemon Test and Its Application*, 3 Phoenix L. Rev. 641 (2010). The *Lemon* test consists of three elements that look to the "purpose," "effect" and

"entanglement" of a statute. *Lemon*, 403 U.S. at 612-13. Failing any one of these three elements would make a statute unconstitutional, and because § 107(2) fails all three elements of the *Lemon* test, in addition to breaking governmental neutrality and providing greater benefits to religion than nonreligion, the statute is unconstitutional. Therefore, the Court should reverse the decision of the United States Court of Appeals for the Eighteenth Circuit.

A. 26 U.S.C. § 107(2) Violates The Establishment Clause Because It Provides A Tax Benefit Solely To Religious Organizations.

The Establishment Clause of the First Amendment requires "governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson*, 393 U.S. at 104. The Supreme Court has consistently held that neutrality exists in a governmental program when the program seeks to "provide benefits to a broad class of citizens defined without reference to religion." *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993). These programs that provide benefits to religious and nonreligious organizations "are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit." *Id.*

Conversely, governmental programs that expressly differentiate between religious organizations and nonreligious organizations are "generally doomed from the start." *Am. Atheists, Inc. v. City Of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 289 (6th Cir. 2009). When governmental actions benefits go "exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens non-beneficiaries markedly or cannot reasonably be seen as removing a

significant state-imposed deterrent to the free exercise of religion . . . it provides unjustifiable awards of assistance to religious organizations and cannot but convey a message of endorsement to slighted members of the community." *Texas Monthly v. Bullock*, 489 U.S. 1, 15 (1989) (internal quotation marks omitted). The Free Exercise Clause does not require the federal government to create a parsonage exemption for religious organizations as the Court in *Locke v. Davey* held that governments can deny financial benefits to religious organizations without violating the Free Exercise Clause. 540 U.S. 712, 719 (2004).

The plain language in § 107(2) shows a complete lack of neutrality from the legislature in its parsonage exemption plan. The statute's language makes clear that "[i]n the case of a *minister of the gospel*, gross income does not include . . . the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home 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(2) (emphasis added). The statue only applies to ministers of the gospel. This is a clear choice to enact a statue that benefits only religious organizations. If a taxpayer is not performing functions under the authority of a religious organization, then they cannot qualify for the exemption.

Plaintiff-Intervenors and other taxpayers who are employed by nonreligious organizations cannot apply for an exemption under § 107(2). The benefits of the statute go exclusively to taxpayers like Burns and his coworkers. Furthermore, Whispering Hills's employees have been able to take advantage of the parsonage

exemption every year to lower their taxes. R. at 4. There is no situation where someone who was not a minister of the gospel could qualify for the parsonage exemption under § 107(2). The blatant decision to choose religion over neutrality makes this statute unconstitutional. Therefore, the Court should reverse the Eighteenth Circuit's decision and find § 107(2) to be unconstitutional.

B. Greater Benefits Are Provided To Religion Under 26 U.S.C. § 107(2) Than Other Internal Revenue Code Sections Provide To Nonreligious Organizations and Taxpayers.

The only requirements for the parsonage exemption in § 107(2) are that the taxpayer be a minister of the gospel and that the rental allowance does not exceed the fair rental value of the home, which will include the furniture in the home and utilities. Taxpayers working for nonreligious organizations do have the ability to exclude the lodging provided by an employer if the lodging is provided for the convenience of the employer, provided on the business premises of the employer, and the employee is required to accept the lodging as a condition of employment. 26 U.S.C. § 119. In addition to these restrictions, the lodging almost always has to be in-kind, *see C.I.R. v. Kowalski*, 434 U.S. 77, 77 (1977), while § 107(2) allows for ministers of the gospel to receive tax-free income.

In order for taxpayers to qualify for an exclusion the in-kind value of lodging receive by an employer, the taxpayer must be able to show each of the following three tests have been met: "(1) the employee must be required to accept the lodging as a condition of his employment; (2) the lodging must be furnished for the convenience of the employer; and (3) the lodging must be on the business premises of the employer." *Adams v. United States*, 585 F.2d 1060, 1063 (Ct. Cl. 1978). The parsonage exemption

in § 107(2) provides a clear benefit to religion over nonreligion as Burns could not meet any of the tests that an employee of a nonreligious organization would need to show.

Burns was not required to accept any form of lodging as a condition of his employment. When Burns was hired, he received a $2,500 moving credit to help assist with moving closer to Whispering Hills. R. at 3-4. The move was done for the benefit of Burns, and not Whispering Hills, as Burns was shortening his commute from over an hour to five minutes. R. at 3. There is nothing in the record to suggest that Whispering Hills placed any requirement on Burns to move closer to the school before they would hire him. In *Adams*, the taxpayer "was required to accept the housing, and the residence was directly related to [the taxpayer's] position as president, both in terms of physical facilities and psychic significance." 585 F.2d at 1064. When Burns was hired, there were no strings attached to the moving credit nor is there anything in the record to indicate that Whispering Hills was requiring Burns to select lodging that was related, in any way, to his position at the school.

Similarly, Burns cannot pass the second and third test of § 119 because the school had zero input on where he lived. The requirements of Burns's position at the school do not require him to host students at his home; rather he provides a place for "social interaction" for some students who cannot go home on weekends. R. at 3. Additionally, the home that Burns moved into is five minutes away from the school, *id.*, therefore, the home is not on the business premises of Whispering Hills.

Burns would not be eligible for a parsonage exemption as he received a cash moving credit and cash for a monthly rental allowance. These payments are "undeniabl[y] accessions to wealth, clearly realized, and over which [Burns has] complete dominion." *Comm'r v. Glenshaw Glass Co.,* 348 U.S. 426, 431 (1955). His employment offer was not in any way tied to him moving closer to the school, nor were there any job-related requirements on where he lives, nor was he required to live on property owned by the school. Burns does not qualify for the parsonage exemption in § 119 and if exempted, he would be receiving an unconstitutional benefit under § 107(2).

C. 26 U.S.C. § 107(2) Violates The Establishment Clause Under the *Lemon* Test.

The Establishment Clause was intended to protect our nation from three main evils: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970). To protect against these evils, the Supreme Court developed a three-part test, the *Lemon* test, to determine the constitutionality of a statute. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, [and] finally, the statute must not foster an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-13. Because § 107(2) fails all three elements of the *Lemon* test, the statute is unconstitutional.

1. 26 U.S.C. § 107(2) Is Unconstitutional as it Does Not Have a Secular Legislative Purpose.

The government is required to have a secular purpose for its messages and actions. *Id.* at 612. When the primary purpose of a statute is to "advanc[e] religion, it

violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." *McCreary Cty., Ky. v. Am. C.L. Union of Ky.*, 545 U.S. 844, 860 (2005). When a statute has no secular legislative purpose, the legislature is sending a message to "nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members." *Santa Fe Independent School Dist. v. Doe,* 530 U.S. 290, 309–310 (2000) (internal quotation marks omitted). A "plausible secular purpose" could save the constitutionality of a statute. *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983).

Under § 107(2), the only requirement that a taxpayer needs to meet is that he must be a minister of the gospel. The parsonage exemption of the statute is not available to anyone other than ministers of the gospel. The entire purpose of the statute is to provide an exemption to and promote members of religious organizations over members of nonreligious organizations. Any reading of the plain language of the statute is clear that the government's purpose was to exempt only ministers of the gospel. Through this endorsement of religion over nonreligion, the legislature has told practitioners of religion that they are favored by the legislators and that non-practitioners are outsiders. Thus, the statute fails the first element of the *Lemon* test and is unconstitutional.

2. The Principal and Primary Effects 26 U.S.C. § 107(2) Advance and Prohibit Religion.

The second element of the *Lemon* test is related to the legislative purpose and asks whether the statute in question has a "principal or primary effect . . . [of]

advance[ing] [or] inhibit[ing] religion. 403 U.S. at 612. An indirect or secondary benefit to a religious group would not violate the secular "primary effect mandated by the Establishment Clause." *Texas Monthly*, 489 U.S. at 15. "However, when government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion . . . it provide[s] unjustifiable awards of assistance to religious organizations and cannot but conve[y] a message of endorsement to slighted members of the community." *Id.* (internal quotation marks removed).

In *Texas Monthly*, Texas law exempted religious organizations from paying sales tax on various publications that promoted religious ideals. *Id.* at 5-6. The benefits of the Texas law went directly to religious organizations and were not shared by any secular organization. *Id.* at 17. The law could have survived constitutional scrutiny if the benefits had "flowed to a large number of nonreligious groups as well" as religious groups. *Id.* at 11. Because the law only applied to religious groups, it had the primary effect of promoting religion over nonreligion. *Id.* at 17.

Similar to the statue in question in *Texas Monthly*, § 107(2) applies exclusively to religious organizations. There is no possible secular group that can benefit from the statute, as the only prerequisite to obtaining the parsonage exemption is to be a minister of the gospel. The exemption is not applicable to Petitioner-Intervenors nor to any other nonreligious organization. Not only is the principal and primary effect of

the statute to advance and prohibit religion, but there is also no benefit available to any nonreligious organization or taxpayer at all. Thus, the effect of the statute fails the second element of the *Lemon* test and is unconstitutional.

3. 26 U.S.C. § 107(2) Fosters Excessive Government Entanglement With Religion.

The third element of the *Lemon* test prohibits the government from acting in a way that would excessively entangle the government with religion. *Lemon*, 403 U.S. at 613. Excessive entanglement occurs when there is a need for a "comprehensive, discriminating, and continuing state surveillance" for the government to ensure that its statute is being properly enacted. *Id.* at 619.

The current drafting of § 107(2) requires the IRS and courts to undertake a complex, invasive, and subjective inquiry into religious organizations in order to determine who qualifies as a minister of the gospel. Tax regulations implementing § 107(2) have then gone on to require that ministers of the gospel perform specific duties, such as the ministration sacerdotal functions, conduct of religious worship, administration of religious organizations, and performance of teaching and administrative duties at religious seminaries. T. Reg. 1.1402(c)-5. Furthermore, the government must go through this routine for every individual seeking the exemption under § 107(2) because "[w]hether service performed by a minister constitutes the conduct of religious worship or the ministration of sacerdotal functions *depends on the tenets and practices of the particular religious body constituting his church or church denomination*." *Id.* (emphasis added).

The length and depth of the inquiry into religious organizations was evident in *Silverman v. Comm'r*, No. 72-1336, 1973 WL 2493, at *1 (8th Cir. July 11, 1973), when the Eighth Circuit was forced to determine if a "full-time cantor or *hazzan*" was duly ordained under the Jewish faith in order to qualify as a minister of the gospel under § 107(2). The court looked into the training, the rules governing the religion, the taxpayer's role during religious services, the knowledge of the faith required for such a position, and the religious text that one in the taxpayer's position must be familiar with for the role. *Id.* at *1-*3. The level of inquiry that the government must delve into to determine if someone qualifies as a minister of the gospel is much more in-depth than the requirements that other taxpayers endure in § 119.

In this case, the IRS had to review Burns's 2017 tax return and determine if he met the qualifications of § 107(2). R. at 4. After Burns brought suit in the District Court for the Southern District of Touroville, the district court was forced to conduct a thorough review of Burns's role with Whispering Hills to determine if he was considered a minister of the gospel. R. at 5-9. After the district court reached a different conclusion on the issues than the IRS reached, the case was then appeal to the Eighteenth Circuit, where, again, another government actor was forced to review the inner workings of Burns's role with the church and determine whether he would qualify as a minister of the gospel. R. at 16-20. After three inquiries into religious qualifications of Burns, his role with the church is now being evaluated for the fourth time.

As addressed *supra*, under § 119, Burns would not qualify for an exemption on his housing for four reasons. First, the housing was not received in-kind. Second, the lodging was not a required condition for his employment. Third, Burns's lodging was not furnished for the convenience of Whispering Hills. And finally, Bruns's lodging was not on Whispering Hills's business premises. Any one of these four reasons would have been enough to reject an exemption request under § 119, and all four were decided without ever needing to take a look into any of the objective or subjective elements that differentiate one religious organization from another.

The level of inquiry that the IRS and courts are forced to engage in for § 107(2) exemption requests create an unconstitutional entanglement between the government and religion. The level of entanglement is highlighted by the fact that Burns's request would have been denied without ever needing to examine his religious duties under the approach that secular taxpayers are forced to take. The entanglement § 107(2) causes between government and religion is unconstitutional.

CONCLUSION

For the foregoing reasons, Petitioners respectfully requests that this Court REVERSE the decision of the United States Court of Appeals for the Eighteenth Circuit.

Respectfully submitted,

Team 13
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