No. 20-199

In The

Supreme Court of the United States

JOHN BURNS,

Petitioner,

and

CITIZENS AGAINST RELIGIOUS CONVICTIONS, INC.,

Petitioner-Intervenor,

v.

INTERNAL REVENUE SERVICE AND COMMISSIONER OF TAXATION,

Respondents.

On Writ Of Certiorari To The

United States Court Of Appeals

For The Eighteenth Circuit

BRIEF FOR THE PETITIONERS

Team No. 5

Attorneys for Petitioner and Petitioner-Intervenor

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QUESTIONS PRESENTED

1. Whether Mr. Burns is a minister of the gospel under 26 U.S.C. § 107(2) when he is not ordained or licensed, teaches secular classes at a church-operated school, engaged students in prayer sessions and discussions, and was recommended by the school pastor to apply for the parsonage exemption?
2. Whether 26 U.S.C. § 107(2) (commonly referred to as the "parsonage exemption"), a property tax exemption for "ministers of the gospel," violates the Establishment Clause of the First Amendment of the United States Constitution, which prohibits any laws "respecting an establishment of religion" by the government?

STATEMENT OF THE CASE

A. Factual History

Mr. Burns is employed by Whispering Hills Academy ("the School"), a religious boarding school operated by and located only a few steps away from the Whispering Hills Unitarian Church. R.3. Mr. Burns, not an ordained or trained clergy, was hired to teach English, Literature, and several languages. R.3, 5, 16.

In addition to teaching classes, Mr. Burns has several religious functions at the School. *Id.* As a school guidance counselor, Mr. Burns often advises students on educational and personal matters; in this capacity, Mr. Burns not only uses mental and behavioral health techniques but also employs the faith-based religious teachings. *Id.* Furthermore, Mr. Burns has received several school awards for the daily after-school club "Prayer After Hours," which Mr. Burns newly created. R.3, 4. Mr. Burns frequently hosts gatherings for many students who cannot go home on the weekends. R.3. These gatherings usually occurred after Sunday services

at the on-campus church, and Mr. Burns discussed with the students the topics of the Sunday services. *Id.* The students described the gatherings as "youth ministry." *Id.*

Meanwhile, the School provided him $2,100 rental allowance as part of his monthly salary. R.4. Pastor Nick, Mr. Burns' co-worker, suggested that Mr. Burns consider claiming the parsonage exemption under section 107(2) because Mr. Burns works at a religious institution, conducts daily prayer sessions, and provided spiritual counseling. *Id.* The section allows a "minister of the gospel" to exempt such rental allowance from gross income, R.5, 16. Although Mr. Burns took the advice and claimed this exemption, the Internal Revenue Service ("IRS") and Commissioner of Taxation denied, stating Mr. Burns failed to prove he was a minister of the gospel. R.4. As a result, Mr. Burns owed more money to the IRS. *Id.* Afterwards, Mr. Burns brought the instant case to the District Court. *Id.* Citizens Against Religious Convictions, Inc., a local non-religious organization that cannot apply for this exemption, joined the suit as plaintiff-intervenor. R. 2, 4, 10.

B. Procedural History

Sometime after the summer of 2018, Petitioner Burns filed a claim in the District Court for the Southern District of Touroville, raising a civil cause of action against the IRS for denying his application for 26 U.S.C. §107(2) ("the parsonage exemption"). Almost immediately thereafter, the District Court granted a motion to intervene filed by Petitioner Citizens Against Religious Convictions, Inc., arguing an alternative claim that §107(2) is in violation of the First Amendment's Establishment Clause. Respondents, the IRS and Commissioner of Taxation, filed motion for summary judgment on the merits which was subsequently denied by the District Court. On December 18, 2019, the District Court found in favor of the respective claims raised by each Petitioner – that Mr. Burns was a minister of the gospel and, additionally, that the

parsonage exemption failed Constitutional analysis. Respondents appealed this decision to the Eighteenth Circuit Court, who decided on June 9, 2020 to reverse both decisions of the lower court. In October of 2020, the Supreme Court granted the petition for certiorari for the instant case.

SUMMARY OF ARGUMENT

The Eighteenth Circuit erroneously held that Mr. Burns is not a minister under the section 107(2) parsonage exemption. This Court should hold that Mr. Burns is a minister of the gospel for two primary reasons.

First, Mr. Burns satisfies a majority of the five *Wingo* factors, thereby qualifying as a minister. The fact that Mr. Burns is not ordained or licensed is not a dispositive factor. Mr. Burns' inability to perform formal sacraments such as baptism did not diminish his ministry at the School including daily prayer sessions and counseling. Mr. Burns not only clearly conducted worship service through leading the prayer sessions after school but involved himself in the conduct and maintenance of the School by counseling and leading students in the prayer sessions and youth ministry on the weekend. Lastly, the School perceived him as a spiritual leader: he received several awards from the School for his daily prayer club and the students regarded his weekend gatherings as youth ministry.

Second, under this Court's ruling in *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, Mr. Burns should qualify as a minister. This Court should expand *Our Lady* to Mr. Burns' case: otherwise, this Court would face a risk of forfeiting religious school teachers of both employment discrimination claims and parsonage exemptions. By engaging deeply in religious functions such as daily prayer sessions, Mr. Burns fulfilled an important role in transmitting faith to his students. For these reasons, this Court should hold that Mr. Burns is a minister of the gospel.

In addition to whether Mr. Burns qualifies as a minister under the parsonage exemption, the Court must also address the Constitutionality of the statute in the first place. Relying on an analytical test laid out in *Lemon v. Kurtzman*, the Seventh Circuit found that the parsonage exemption was not in violation of the Establishment Clause of the First Amendment of the United States Constitution. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971); U.S. Const. amend. I. This was, given prior cases making use of the *Lemon* test within this context, erroneously decided.

Because the parsonage exemption fails to meet any one of the prongs of the *Lemon* test, the Seventh Circuit should have found it unconstitutional, invalidating it entirely. Unlike constitutionally upheld statutes which can cite secular legislative purposes behind their enactments, the parsonage exemption only serves inherently religious purposes. Similarly, since the parsonage exemption's primary effect has been to advance the goals of religious institutions through subsidizing their respective ministries, the parsonage exemption fails the second prong of the *Lemon* test. Finally, because the parsonage exemption necessitates excessive government entanglement with the religious affairs of the church by requiring applicants to prove their roles as ministers of their respective congregations, it cannot pass the final prong of the *Lemon* test. Although the parsonage exemption would be facially unconstitutional if it failed to meet just one of these prongs, it does not satisfy any of them.

Additionally, because "historical weight" justifications proffered by the Appellate Court are not applicable to the facts of the instant case, the lower court improperly applied them in its decision. Therefore, this Court must invalidate the parsonage exemption and allow our tax code to exist in harmony with the spirit of the First Amendment.

ARGUMENT

A. This Court should hold that Mr. Burns qualifies as a minister under the section 107(2) parsonage exemption.

I. Mr. Burns qualifies as a minister because he satisfies a majority of the five factors laid in the *Wingo* Test.

This Court should hold that Mr. Burns is a minister because his duties and functions as a teacher at the School, as well as the school community's perception of his position, make him satisfy a majority of the *Wingo* Test. *See Wingo v. Commissioner*, 89 T.C. 911 (1987). IRS promulgated that the section 107(2) parsonage exemption must be provided as renumeration for services "which are ordinarily the duties of a minister of the gospel." 26 C.F.R. § 1.107–1(a) (2021).

In order to qualify as a minister, the tax court considers whether a petitioner 1) is ordained, commissioned, or licensed to be a minister, 2) administers sacerdotal functions, 3) conducts religious worship, 4) is involved in the control, conduct, or maintenance of the religious organization, and 5) is recognized by the religious organization as a religious leader. *Wingo*, 89 T.C. at 930, 931, 933 (citing 26 C.F.R. § 1.1402(c)–5(b)(2)). However, as "[t]his is not an arithmetical test but a balancing test," the court must weigh failure to meet one or more of those factors in each case. *Knight v. Commissioner*, 92 T.C. 199, 204-05 (1989).

1. Being ordained, commissioned, or licensed is neither dispositive nor necessary for qualifying as a minister.

Mr. Burns should not be disqualified as a minister just because he is a teacher not ordained or licensed. In fact, IRS has stated that "[l]ack of control by a church or denomination

prevents [teachers at religious schools] from qualifying [as ministers] even if the school has a religious purpose." I.R.S. Priv. Ltr. Rul. 8646018 (Aug. 14, 1986). Whether an organization "operate[s] under the authority or control of a church denomination or is an independent institution can only be determined after reviewing . . . the relationship between the church denomination and the organization." Rev. Rul. 72—606, 1972—2 C.B. 78; *see also Toavs v. Commissioner*, 67 T.C. 897, 904-05 (1977) (finding that an organization operating itself as a nondenominational entity does not operate under the denomination's control).

IRS later ruled that teachers at church-controlled schools "cannot qualify as ministers *if they are not ordained or commissioned and their duties are indistinguishable from those of employees at secular schools*." I.R.S. Priv. Ltr. Rul. 200318002 (Jan. 7, 2003) (emphasis added). The Tenth Circuit concluded in *Ballinger v. Commissioner* that the determination of when the taxpayer became a minister "did not depend on the timing or even the fact of ordination" but "depended on when he assumed the duties and functions of a minister." *Wingo*, 89 T.C. at 930-31 (citing *Ballinger v. Commissioner*, 728 F.2d 1287, 1289-90 (10th Cir. 1984)).

Although Mr. Burns is not ordained or licensed, he can still qualify as a minister because he is a teacher at the church-operated School. Unlike the organization operating itself independently as a nondenominational entity in *Toavs*, 67 T.C. at 905, the School is clearly "operated by the Whispering Hills Unitarian Church" and thus is under control of the church. R.3. Also, even if Mr. Burns is assumed to not have been commissioned, Mr. Burns can still qualify as a minister in accordance with the IRS ruling and *Ballinger*: IRS had opened the possibility that teachers at religious schools may qualify as ministers so long as they perform duties distinguishable from those at secular schools; more importantly, whether Mr. Burns assumed duties and functions of a minister is a deciding factor. I.R.S. Priv. Ltr. Rul. 200318002

(Jan. 7, 2003); *Ballinger*, 728 F.2d at 1289-90. Therefore, whether Mr. Burns is ordained or licensed is neither dispositive nor necessary.

2. The fact that Mr. Burns did not perform formal sacraments such as conducting baptism and officiating at weddings does not diminish the ministry he performed, thereby not disqualifying him as a minister.

Mr. Burns should not be disqualified as a minister just because he did not perform formal sacraments. Petitioner who did not conduct sacraments or officiate at weddings or funerals may disqualify as a minister if petitioner's other duties were only secular. *Haimowitz v. Commissioner*, T.C. Memo. 1997-40, 3 (1997) (finding that petitioner was not a minister because he did not officiate at weddings and funerals and his religious functions were all secular). However, IRS promulgated that religious school teachers not ordained, commissioned, or licensed may qualify as ministers so long as they perform functions distinguishable from those at secular schools; hence, it infers that the religious school teachers' inability to conduct formal sacraments that only ordained, commissioned, or licensed ministers may conduct will not be weighed against the teachers. I.R.S. Priv. Ltr. Rul. 200318002 (Jan. 7, 2003).

In balancing the *Wingo* factors, the Tax Court has also reviewed whether petitioner's inability to perform formal sacraments such as the Lord's Supper, baptism, and marriage "diminished the ministry that petitioner did perform." *Knight*, 92 T.C. at 204 (finding that petitioner unable to perform formal sacraments was a minister because such inability did not diminish his ministry as "he did perform one of the three significant ecclesiastical functions described in section 1.1402(c)-5(b)(2), . . . conduct of religious worship").

Although Mr. Burns did not perform formal sacraments or officiate at weddings or funerals, his religious functions at the School qualify him as a minister. Mr. Burns'

circumstances are analogous to *Knight*, where the court found that the petitioner unable to perform formal sacraments was a minister because his inability did not diminish the religious worship he conducted. *Id.* Similarly, Mr. Burns' incapacity to perform formal sacraments or officiate at weddings and funerals was remotely relevant to his ministry: formal sacraments were not needed when he conducted daily prayer services, hosted weekend "youth ministry," and counseled students with religious teachings. R.3. Also, Mr. Burns' religious functions are clearly distinguishable from teachers' at secular schools. I.R.S. Priv. Ltr. Rul. 200318002 (Jan. 7, 2003). Thus, Mr. Burns may qualify as a minister although he did not perform formal sacraments.

3. Mr. Burns has conducted religious worship for his students at the School and thus satisfied the second prong of the Wingo test.

Mr. Burns has clearly conducted religious worship for his students, therefore satisfying one prong of the *Wingo* test. *Wingo,* 89 T.C. at 931. IRS promulgated that the duties of a minister include the conduct of religious worship. 26 C.F.R. § 1.107–1(a) (2021). Such conduct of religious worship should "depend[] on the tenets and practices of the particular religious body constituting [the petitioner's] church or church denomination." 26 C.F.R. § 1.1402(c)–5(b)(2).

Petitioner does not qualify as a minister if he did not perform any religious services including religious worship. *Kirk v. Commissioner*, 425 F.2d 492 (D.C. Cir. 1970). In *Kirk*, the petitioner, director at a religious organization that administered research and education programs for national and international issues, sued IRS after his application for section 107(2) parsonage exemption was rejected. *Id.* at 493. The court found that he was not a minister because "all the services performed by petitioner . . . were of secular nature." *Id.* at 495 (quotation omitted).

In determining whether a petitioner is a minister, courts have always noted whether the petitioner conducted religious worship. *Wingo*, 89 T.C. at 934. Petitioner in *Wingo*, a licensed

pastor and ordained deacon, conducted divine worship, ministered to the needs of the community, and counseled troubled families. *Id.* at 926. The court found that he was a minister partly because he did conduct worship service, one of the duties promulgated under section 1402. *Id.* at 934.

The petitioner in *Knight*, although not ordained, contracted with a Presbyterian church as a "licentiate minister of the Gospel." *Knight*, 92 T.C. at 200. He was unable to administer the sacraments as he was not ordained, but he preached, conducted the worship service, and ministered to the needy. *Id.* In finding that he was a minister, the court noted that his conduct of worship service satisfied the second prong of the *Wingo* test. *Id.* at 205.

Administrative and occasional assistance with religious worship does not constitute the conduct of religious worship. *Haimowitz*, T.C. Memo. 1997-40, at 4. Petitioner in *Haimowitz*, hired by a Jewish temple as an executive director performing administrative functions, assisted rabbis during religious services: his duties entailed assigning certain honors to congregants, managing cemetery lots, conducting services for mourners. *Id.* at 1. The court found he was not a minister because his duties as director were "secular in nature" and he merely "assisted" the rabbi "only to enhance the efforts" of the rabbi. *Id.* at 3.

Mr. Burns conducted religious worship at the School, therefore fulfilling the third prong of the *Wingo* test. *Wingo*, 89 T.C. at 934. Unlike the petitioner in *Haimowitz* who merely assisted the rabbi with worship administratively and conducted infrequent services for funerals, Mr. Burns led daily prayer sessions for students and frequently hosted gatherings for students after Sunday service to discuss the topic of the week's worship service. *Haimowitz*, T.C. Memo. 1997-40 at 4; R.3; *cf. Kirk v. Commissioner*, 425 F.2d at 493 (petitioner is not a minister because he did not conduct any religious service). Mr. Burns' prayer sessions and "youth ministry" also fall

within the definition of the conduct of worship in section 1.1402(c)–5(b)(2): Mr. Burns' religious functions educated and helped the students stay in faith. Thus, Mr. Burns' worship service is analogous to that in *Wingo* and *Knight*. *Wingo*, 89 T.C. at 934; *Knight*, 92 T.C. at 205.

4. Mr. Burns has been involved in the conduct and maintenance of the School, therefore meeting the fourth prong of the Wingo test.

Mr. Burns met the fourth prong of the *Wingo* Test because he has been actively involved in the conduct and maintenance of the School by fulfilling his functions. *Wingo*, 89 T.C. at 931. The control, conduct, and maintenance of a religious organization include training people of a congregation, directing the congregation's programs, and supervising the chorus during the worship service. *Id.* at 932-33 (citing *Salkov v. Commissioner*, 46 T.C. 190, 196 (1966)). Taking charge of organizational concerns of a religious entity also qualifies as such. *Id.* at 935. As for a religious school, this Court's opinion in 2020 provides guidance: "[t]he religious education and formation of students is the very reason for the existence of most private religious schools . . . ." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) (finding that petitioners, teachers at religious schools, were ministers of the gospel in employment discrimination context).

Mr. Burns' functions at the School play critical roles in conducting and maintaining the School's objective. Just as this Court stated in *Our Lady of Guadalupe School*, the School exists to educate and lead students in faith. *Id.* Mr. Burns has been fulfilling the School's objective by teaching various classes to students, counseling them with religious teachings, and hosting daily prayer sessions. R.3. Moreover, given that the School is a boarding school, it is significantly more important for teachers to care students; Mr. Burns frequently gathers students who cannot go home on the weekends to discuss the topics of Sunday services and provides food and

chances for social interaction. R.3. Thus, just as the petitioner's in *Salkov* conducted and maintained his congregation by training young people and directing programs, Mr. Burns has not only done so but also promoted its educational and spiritual objectives. *Salkov,* 46 T.C. at 196.

5. The Whispering Hills community has recognized Mr. Burns as a spiritual leader, therefore satisfying the last prong of the Wingo test.

There are strong indications that the Whispering Hills community has perceived Mr. Burns as a spiritual leader as specified in *Wingo*. *Wingo*, 89 T.C. at 933. Petitioner may qualify as a minister if recognized explicitly by his or her religious organization. *Id*. at 191 (finding that petitioner qualified as a minister under section 107(2) because he was unanimously recommended and chosen as a Jewish cantor). Lack of proof or testimony that petitioner has been perceived as a religious leader can be a dispositive factor. *Lawrence v. Commissioner*, 50 T.C. 494, 499 (1968) (although petitioner, a minister of education at a church, provided spiritual counseling, offered the opening prayer during the Sunday worship service, and occasionally filled in for the pastor, he failed to show the church recognized him as a spiritual leader due to absence of testimony and evidence); *see Haimowitz*, T.C. Memo. 1997-40 at 4 (petitioner failed to provide testimony that he was acknowledged as a spiritual leader at his Jewish temple).

Whispering Hills Academy has recognized Mr. Burns as a spiritual leader. First, he received several awards from the school for his newly created after-school club, "Prayer After Hours." R.3. Such multiple awards strongly indicate the school's long-lasting appreciation of and trust in Mr. Burns' efforts to lead the students in faith. Also, Pastor Nick, Mr. Burns' co-worker, first suggested that Mr. Burns apply for parsonage exemption, expecting that Mr. Burns' functions and status at the school would qualify for it. *Id.* In other words, the pastor perceived Mr. Burns as performing functions at least very similar to the pastor's.

Furthermore, Mr. Burns hosted those students who could not go home on weekends and discussed with them the topics of the week's church services; more importantly, those students called the gatherings "youth ministry." *Id.* Hence, in accordance with the Tax Court's ruling in *Salkov* and warning against lack of evidence in *Lawrence* and *Haimowitz*, there is clear evidence that the Whispering Hills community has been perceiving Mr. Burns as a minister. *Salkov*, 46 T.C. at 197; *Lawrence*, 50 T.C. at 499; *Haimowitz*, T.C. Memo at 4. Thus, Mr. Burns satisfies a majority of the *Wingo* test, thereby qualifying as a minister. *Wingo*, 89 T.C. at 930, 931, 933.

II. In balancing the *Wingo* factors, this Court should expand *Our Lady of Guadalupe School* to this case and hold that Mr. Burns is a minister.

In weighing the *Wingo* factors, this Court should consider how this Court decided who qualified as a minister in the employment discrimination context and hold that Mr. Burns is a minister. In that context, this Court held that "[w]hat matters, at bottom, is what an employee does." *Our Lady*, 140 S.Ct. at 2064. A minister is "any employee who . . . serves as a messenger or *teacher of its faith*." *Id.* (emphasis added) (citation omitted). This Court also warned against insisting on "rigid academic requirements" for teachers wishing to qualify as minister because "a distorting effect" could ensue. *Id.*

What petitioner does is the most important in the employment context for determining whether a teacher qualifies as a minister. *Id.* In *Our Lady*, this Court consolidated two different cases: the first petitioner taught a religion class, took religious courses at the school's request, led students in prayer, and taught them how to pray. *Id.* at 2057. The second petitioner taught all subjects including religion and worshipped and prayed with students. *Id.* at 2058, 2059. Both petitioners alleged that they were wrongfully discharged. *Id.* Noting that what an employee does is most important to determining whether the employee qualifies as a minister, this Court found

that both petitioners were ministers as they were teachers of the schools' faith and barred their discrimination claims. *Id.* at 2064.

This Court's emphasis in *Our Lady* on what a teacher does to qualify as a minister in the employment discrimination context is consistent with the earlier cases dealing with who qualifies as a minister eligible for tax exemption. *Id.* at 2068; *See Kirk*, 425 F.2d at 494 (finding that petitioner is not a minister partly because the services he performed were not sacerdotal in nature and did not involve the conduct of religious worship); *Tanenbaum v. Commissioner*, 58 T.C. 1, 7 (1972) (finding that the ordained petitioner was not a minister as the type of activity he performed was not a ministerial function).

Just as this Court did in *Our Lady*, lower courts have seriously considered the teacher's role in guiding students in faith. *Our Lady*, 140 S.Ct. at 2064; *Conlin v. Intervarsity Christian Fellowship*, 777 F.3d 829 (6th Cir. 2015) (declaring that petitioner was a minister as she assisted others in cultivating intimacy with God); *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190 (2d Cir. 2017) (holding that a lay principal in a Catholic school, who was a practicing Catholic with a commitment to the church's teachings, qualified as a minister); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169 (5th Cir. 2012) (finding that the music director who furthered the mission of the church by exercising liturgical ministry was a minister).

This Court's decision in *Our Lady* and lower courts' decisions in the employment discrimination context should be extended to Mr. Burns' case because of policy reasons: every case in that context where petitioner was determined to be a minister was barred from filing an employment discrimination suit. *Our Lady*, 140 S.Ct. at 2064. It would implicate a contradictory policy: teachers at religious schools are forfeited of any means of relief for employment discrimination because they are considered as ministers; simultaneously, they can also be denied

tax benefits for small rental allowances for the same reason. *Id.* Such policy implications will negatively affect private religious schools by demoting employment conditions for teachers.

Mr. Burns should qualify as a minister under *Our Lady*. *Id.* Although Mr. Burns does not teach a religion class like the petitioners in *Our Lady*, he engaged more deeply in conducting religious worship than them: while Mr. Burns himself created and continued prayer services with his students, the *Our Lady* petitioners merely joined prayer with their students. *Id.* at 2058, 2059; R. 3;. Mr. Burns not only counseled his students with religious teachings but frequently discussed the religious topics with students every weekend. R.3. Therefore, Mr. Burns fulfilled a vital role in "transmitting" the faith of the school to the next generation just as petitioners in *Our Lady* and *Colin* did. *Our Lady*, 140 S.Ct. at 2064 (citing *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171, 192 (2012)); *see Colin*, 777 F.3d 829.

It may also be argued that Mr. Burns should not qualify as a minister because he performed religious functions voluntarily while petitioners in *Our Lady* were hired to do so. *Our Lady*, 140 S.Ct. at 2056, 2057. In *Our Lady*, petitioners' employment agreements required the petitioners to join religious activities including prayer sessions. *Id.* at 2055, 2056. However, Mr. Burns was hired to not only teach classes but also counsel students as a counselor, for which he employed religious teachings. R.3. Moreover, this Court in *Our Lady* "declined to adopt a rigid formula for deciding when an employee qualifies as a minister" and emphasized that any employee is a minister if he or she serves as a "teacher of its faith." *Our Lady*, 140 S.Ct. at 2062, 2064 (quotations omitted) (citation omitted). Thus, whether Mr. Burns was hired to conduct religious functions is not dispositive, but what he actually did is.

For these reasons, this Court should hold that Mr. Burns qualifies as a minister of the gospel under the section 107(2) parsonage exemption.

B. 26 U.S.C. §107(2) is unconstitutional and should thus be invalidated.

I. The Seventh Circuit Court ruled incorrectly on its application of the *Lemon* test with respect to whether the parsonage exemption is constitutionally valid; since the First Amendment has been violated, 26 U.S.C. §107(2) should be invalidated.

The leading case for the second issue on appeal – acknowledged by both the District Court and Circuit Court in previous proceedings – is *Lemon v. Kurtzman*. 403 U.S. at 612. The *Lemon* Court confronted the constitutionality of a pair of statutes (one Pennsylvania statute that reimbursed schools for salaries and course materials in secular subjects and one Rhode Island statute which paid nonpublic teachers directly an additional supplement of 15% of their total salary); each had the effect of the respective state governments providing financial assistance to religious schools and were both challenged on the grounds that they violated the Establishment Clause of the First Amendment for this reason. *Id*. at 613. The *Lemon* Court ultimately struck down both statutes for violating the Establishment Clause and provided their reasoning in the form of a three-prong test synthesized from prior relevant case law, now referred to aptly as the *Lemon* test. *Id*. at 612. Under this test, a challenged statute must 1) serve a secular legislative purpose, 2) have a principal or primary effect that neither advances nor inhibits religion, and 3) must not foster excessive government entanglement with religion to remain enforceable. *Id*. If a statute fails to meet any one of these requirements, the *Lemon* Court determined, it violates the First Amendment. *Id*.

Before proceeding, the recent ruling by the Supreme Court in *American Legion* must be discussed: there, the Court ruled the *Lemon* test not necessarily the most effective means to

analyze alleged First Amendment violations. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2080 (2019). Namely, the Court stated that the "test presents particularly daunting problems in cases… that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations." *Id*. at 2081. Because the parsonage exemption is a piece of legislation in form and kind directly analogous to the kinds of legislative pieces that the test was originally designed to analyze, this recent ruling in *American Legion* cannot be interpreted as affecting the *Lemon* test's application here. *Lemon v. Kurtzman*, 403 U.S. at 606. Therefore, the argument for the second issue on appeal shall follow the three prongs of the *Lemon* test as originally ordered within that opinion since it remains the most established and reliable precedent for legislation like the parsonage exemption. Since 26 U.S.C. § 107(2) fails to meet any one of the three prongs of the *Lemon* test, it violates the Establishment Clause of the First Amendment and must be invalidated.

1. *Since the parsonage exemption does not serve a secular legislative purpose, it fails to meet the requirements set out in the Lemon test.*

Unfortunately, the legislative record of the parsonage exemption is silent as to the motivation behind its initial implementation, so it will be difficult to parse out its official legislative purpose. Several potential purposes have been advanced by the government in previous litigation, most recently in the Seventh Circuit case of *Gaylor v. Mnuchin*. 919 F.3d 420, 432 (7th Cir. 2019). There, the *Gaylor* Court found arguments advanced by the Treasury Department persuasive: namely that the parsonage exemption was implemented to 1) end discrimination of religious employees compared to nonreligious employees, 2) end discrimination between ministers of different economic backgrounds, and 3) to avoid excessive entanglement with religion. *Id*. The Seventh Circuit incorrectly found the Treasury Department's

arguments persuasive enough to deem the first prong of the *Lemon* test satisfied in that case – rather than rely on the Circuit Court's decision in this case, it would be most proper to analogize the parsonage exemption to other pieces of legislation that this Court has analyzed. *Id.*

Because the parsonage exemption functions to provide funding for ministers of the gospel (indirectly via excluding them from paying property taxes), it is analogous to the kind of legislation tested in at least two other cases. *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 3 (1947); *Mueller v. Allen*, 463 U.S. 388, 390 (1983). The *Everson* Court determined that legislation that provided financial reimbursement for bus fairs for all students – regardless of whether they attended religious institutions or not – its legislative purpose to advance generally the educational process was deemed constitutionally permissible and would thus satisfy the first prong of the *Lemon* test had the test been enacted before the *Everson* Court's decision. *Everson*, 330 U.S. at 7. In *Mueller*, the Court found that the government offering subsidies for the educational expenses for parents of school children – again, no matter if their children were attending secular or parochial schools – furthered the constitutionally permissible goal of advancing education generally. 463 U.S. at 395. Unlike in *Everson* and *Mueller*, the parsonage exemption exclusively targets religious ministers for financial benefit conferred by the federal government – if the legislative purpose of the parsonage exemption is truly secular in nature, there would be no need to specify the beneficiaries' status as religious ministers and carve out an isolated tax exemption for them. *Id.*; *Everson*, 330 U.S. at 7. Therefore, the purpose of the parsonage exemption cannot rightly be said to be secular in the same way that this Court has labeled other legislative pieces secular in the past.

Because the parsonage exemption's legislative purpose is not secular in nature – namely, that it was enacted to ease tax burdens specifically on ministers of the faith and thus make the

performance of their jobs less financially burdensome – it fails to meet the standard set by the first prong of the *Lemon* test. 403 U.S. at 612. Unlike the laws in *Everson* and *Mueller*, which were crafted specifically to encapsulate both secular and religious schools to advance the secular goals of either class of institution, the parsonage exemption was crafted specifically to target religious ministers and give them distinct tax benefits. Therefore, it is in violation of the First Amendment and must be invalidated.

2. Since the principal effect of the parsonage exemption is to advance the aims of religion, it fails to meet the requirements set out in the Lemon test.

As stated in a concurring opinion in *Lemon*, the number of Catholic parish schools in the United States over the period of 1840 to 1964 increased sixty-fold. 403 U.S. at 628. As the population of the United States (and certainly not the population of Catholics) has not tracked with such an increase, it is logical to infer that the expansion of religious institutions across the country has some other underlying cause aside from simple population growth. Interestingly, over that same span of time, the parsonage exemption was codified in its original iteration in the United States federal tax code. 26 U.S.C. § 107(2). The function of the statute is clear on its face: exclude from property tax collection portions of income from ministers of the gospel. In effect, the parsonage exemption subsidizes religious ministers as a distinct class, making the performance of their religious duties less constrained by financial restrictions. Or, in the words of Justice Douglas's dissenting opinion: "…in common understanding one of the best ways to 'establish' one or more religions is to subsidize them, which a tax exemption does." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 701 (1970). The effect, quite simply, advances the goals of the religious institutions which these ministers serve.

In this way, the parsonage exemption is analogous to the legislation struck down in the previously mentioned *Mueller* case. In *Mueller*, the Supreme Court determined that so long as the expense deductions were used exclusively for secular educational materials and not religious texts, the tax scheme would remain constitutional. 463 U.S. at 402. The court reasoned that providing funding for religious educational material would have the primary effect of "[inculcating] such tenets, doctrines, or worship" that the texts provide, thus advancing the religion in question. *Id*. at 403. If subsidizing religious educational materials is considered by this Court to unconstitutionally advance religion, subsidizing ministers of the gospel through the parsonage exemption is surely a similar advancement of religion – one that violates the First Amendment.

Further, the parsonage exemption closely mirrors a sales tax exemption invalidated in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 5 (1989). There, the Court evaluated the legality of a statute adopted by Texas that allowed for a sales tax exemption specifically and uniquely for religious periodicals. *Id.* Relying on the *Lemon* test, the Court invalidated the sales tax exemption in part because the financial benefits these religious organizations received from the exemption did not "flow to… nonreligious groups as well" and likened the sales tax exemption to "state sponsorship of religion." *Id*. at 11. In other words, its primary effect was to offer financial aid to the religious institutions behind these magazines, subsidizing the spread of their religious messaging. Similarly, the parsonage exemption's subsidization of the living expenses of ministers is an analogous means of assisting the spread of the ministers' respective religious teachings financially unrestricting their ability to perform their duties. Therefore, the Court would be correct to invalidate the exception.

Because the parsonage exemption has the principal effect of subsidizing ministers of the gospel by withholding property tax collection from them, it advances the goals of the religious institutions that those ministers work for. As the legislation in the instant case closely mirrors legislation struck down in *Mueller* and *Texas Monthly*, it is most proper for this Court to find that the parsonage exemption does not meet the standard set by the second prong of the *Lemon* test. *Id.*; *Mueller*, 463 U.S. at 402. Therefore, it is unconstitutional.

3. Since the parsonage exemption fosters excessive government entanglement with religion, it fails to meet the requirements set out in the Lemon test.

The final prong of the *Lemon* test that the parsonage exemption must fulfill in order to remain enforceable is that it must not foster "excessive government entanglement with religion," as that would be in violation of the principles behind the Establishment Clause. *Lemon*, 403 U.S. at 612. The *Lemon* Court determined that both statutes in question there failed to satisfy this third prong primarily because the surveillance and evaluation required to ensure that no financial assistance given to parochial schools would be used to advance religious goals would create an "intimate and continuing relationship between church and state," something that blatantly defies the spirit of the Establishment Clause. *Id.* at 622. As in *Lemon* as well as in the following cases, the parsonage exemption necessitates a similarly intrusive relationship between the federal government and the various ministers who would apply for the exemption.

A key kind of excessive government entanglement in this context is the necessity of government to closely supervise the beneficiaries of money allocated by the government to ensure such money is being used by religious individuals only for secular purposes. In *Wolman v Walter* (later overturned, though not on grounds related to the third prong of the *Lemon* test), this Court examined legislation that allowed the funding of field trips for both secular and sectarian

schools. 433 U.S. 229, 233 (1977), overruled by *Mitchell v. Helms*, 530 U.S. 793 (2000). Though such funding was held to have a secular purpose behind them (the advancement of education), the Court found that because "authorities will be unable adequately to [ensure] secular use of the field trip funds without close supervision of the nonpublic teachers," the statute would necessitate a constitutionally impermissible level of government entanglement with religious affairs. *Wolman*, 433 U.S. at 254. Similarly, applying for the parsonage exemption – as is the case with Mr. Burns himself – necessitates that the Internal Revenue Service conduct an audit of the minister applying to ensure that their role as such conforms to what is required to receive the exemption. In other words, the government must "close[ly] supervise" the intimate goings-on of a minister within his institution to ensure he qualifies. Just as such entanglement was found to nullify the legislation in *Wolman*, it is proper to come to the same finding with respect to the parsonage exemption. *Id.*

A seemingly compelling counterexample, however, lies within *Mueller*. There, the Court held that determining whether educational materials were religious or nonreligious in nature was not excessive government entanglement under the *Lemon* test. *Mueller*, 463 U.S. at 403. One may argue that determining whether someone is a minister within their church is a similarly easy categorization the government may engage in without excessively entangling themselves within the affairs of a particular religious institution. Further, it may be argued that forgoing tax collection from ministers distances the government from the affairs of churches. Six years after *Mueller* was decided, however, the Court importantly held that, when on balance with the inquiry the government would have to conduct to classify periodicals as religious or nonreligious and thus which qualified for sales tax exemptions, tax compliance "generally [does] not impede the evangelical activities of religious groups." *Texas Monthly*, 489 U.S. at 21. In *Texas Monthly*,

the Court flatly stated that with respect to the collection of taxes, the government does not excessively entangle itself with the affairs of the church when doing so. *Id*. Therefore, any similar argument in favor of the parsonage exemption's Constitutionality must necessarily fail.

Because the parsonage exemption does foster excessive government entanglement with religion by requiring that ministers seeking to be granted the property tax exemption be reviewed by the controlling government agencies – as is the case with Mr. Burns himself in the instant proceedings – it fails to meet the standard set by the third prong of the *Lemon* test. As laid out in *Texas Monthly*, compliance with existing property tax laws is – when compared to the entanglement necessary for qualifying for exemptions – not excessive government entanglement for the purposes of the First Amendment's Establishment Clause. *Id.* Therefore, the parsonage exemption violates the Establishment Clause and must be invalidated by the Court.

II. The Seventh Circuit Court ruled incorrectly with respect to the weight that historical deference should hold in this case.

Additionally, the Seventh Circuit relied on precedent claiming that historical deference should be given to long-standing practices, even if they may seem to be violative of the Establishment Clause of the First Amendment.

The leading case in this area of the law is the relatively recent decision of *Town of Greece*, 572 U.S. 565, 570 (2014). There, the Court confirmed that prior references to historical deference "must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." *Id*. at 576. The facts of *Greece*, as well as prior precedent which it relied upon, were squarely focused on the niche issue of the Constitutionality of legislative prayer. *Id.* In upholding such practices, the Court recognized that the longstanding

traditions essentially served sectarian purposes – providing gravity and solemnity to legislative activities. *Id*. at 570; *Marsh v. Chambers*, 463 U.S. 783, 784 (1983). As the parsonage exemption utterly fails all three prongs of the *Lemon* test and the nature of a federal taxation scheme is not analogous to the issues examined within *Greece* and its forebears, it does not apply here. Thus, historical relevance should not weigh significantly on the Court's decision today on balance with the results of the *Lemon* test.

For all reasons previously discussed, this Court should hold honor the spirit of the First Amendment, declare the parsonage exemption an unconstitutional violation of the Establishment Clause, and strike it from the United States tax code.

CONCLUSION

For these reasons, this Court should hold that Mr. Burns is a minister of the gospel under section 107(2) and that section 107(2) is unconstitutional.