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No. 11-673

IN THE
SUPREME COURT OF THE UNITED STATES

BROADWAY LICENSING CORP.,
Petitioner
v.
COUNTERPOINT REPERTORY TROUPE &
MAPLETON CHURCH OF THE TRINITARIAN GOSPEL,
Respondents

APPEAL FROM THE UNITED STATES COURT
OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF OF PETITIONER
BROADWAY LICENSING CORP.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

Regulations

QUESTIONS PRESENTED

1. Whether the Thirteenth Circuit erred in holding that two unlicensed performances of *Godspell*, a hit Broadway musical, for which 6,000 community residents paid $30,000 total admission, satisfied the religious services exemption to copyright infringement, 17 U.S.C. § 110(3) (2006).

2. Whether Thirteenth Circuit's construction of the religious services exemption, which expressly conveys a greater exemption to religious institutions than to non-religious institutions, violates the Establishment Clause of the First Amendment.

OPINIONS BELOW

The opinion of the court of appeals is not reported, but the slip opinion is available at No. 10-25641 (13th Cir. June 11, 2011). The opinion of the district court is also not reported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 11, 2011. The petition for a writ of certiorari was granted on November 9, 2011. This Court's jurisdiction is provided by 28 U.S.C. § 1254(1) (2006).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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 110 of the Copyright Act of 1976, 17 U.S.C. §§ 101–810 (2006), provides in relevant part:

> Limitations on exclusive rights: Exemption of certain performances and displays
>
> Notwithstanding the provisions of section 106, the following are not infringements of copyright: . . .
>
> (3) performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly[.]

STATEMENT OF THE FACTS

On February 8 and 9, 2008, Friday and Saturday night, 6,000 members of the greater Mapleton community paid $30,000 in admission fees and attended a performance of a substantial portion of *Godspell*, a hit Broadway musical. *See Counterpoint Repertory Troupe v. Broadway Licensing Corp.*, No. 10-25641, slip op. at 3–5 (13th Cir. June 11, 2011) (hereinafter *Counterpoint*). The performance had been advertised throughout the Mapleton community for a month. *Id.* at 5. Flyers were posted "in grocery stores, local gyms, medical offices, and other community gathering places." *Id.* at 5; *see also* JA 1 (example of one of the flyers). On

both performance nights, 3,000 people took their seats in an "auditorium-style" venue. *Counterpoint*, slip op. at 3. Counterpoint Repertory Troupe ("Counterpoint"), a twenty-person theatrical troupe, treated the audience to a substantial portion of songs and dialogue from *Godspell*. *Id.* at 5–6. Counterpoint was paid $30,000 from ticket sales for the production. *Id.* at 5. Broadway Licensing Corporation ("Broadway"), which holds the performance copyrights to *Godspell*, neither licensed the performances nor received any royalties from them. *Id.* at 6.

Since its initial Broadway run in the 1970s, *Godspell* remains "one of the most popular Broadway works." JA 3. John Michael-Tebelak, a Carnegie Mellon University graduate student, conceived of *Godspell* as his master's thesis project. *Id.* *Godspell* draws upon figures and themes from the New Testament to tell an allegorical tale "about how charismatic leaders can inspire diverse societies to overcome prejudice and form enduring communities." *Id.* It "includes no portrayals of miracles, no references to [Jesus's] divinity, and no resurrection scene." *Id.* As originally performed, it featured ten nameless clowns in a series of "vaudeville-style" skits. *Id.* In the 1970s, *Godspell* made the jump to Broadway after Stephen Schwartz composed an "eclectically-styled musical score." *Id.* Schwartz has described his lyrics as presenting a "broader message of tolerance and unity." *Id.* Although drawing upon Biblical themes, Schwartz has denied intending to create "a Christian work." *Id.*

During 2007 and 2008, Counterpoint toured the nation performing *Godspell*. *Counterpoint*, slip op. at 2. Counterpoint negotiated a license with Broadway for the public performance rights to *Godspell*. *Id.* Counterpoint received the right to perform *Godspell* at ten venues, agreeing to pay Broadway a standard licensing fee of 20% per production. *Id.*

The pastor of the Mapleton Church of the Trinitarian Gospel ("Mapleton Church") attended one of Counterpoint's *Godspell* performances during the troupe's tour. *Counterpoint*, slip op. at 4. Impressed by what he saw, the pastor invited Counterpoint to perform *Godspell* selections at Mapleton Church. *Id.* The *Godspell* production would be part of Mapleton Church's community outreach campaign. *Id.* at 3–4. Mapleton Church's previous community events featured a star football player and a Grammy Award winning singer. *See id.* at 4.

Counterpoint accepted the pastor's offer. In December 2007, Counterpoint and Mapleton Church formalized their agreement. Counterpoint would perform excerpts of *Godspell* at Mapleton

Church on February 8 and 9, 2008, in exchange for $30,000. *Id.* at 4–5. The Mapleton Church performances were not covered by Counterpoint's license agreement with Broadway. Neither Counterpoint nor Mapleton Church informed Broadway about the upcoming performances.

Mapleton Church members advertised the performance throughout the community and assisted in the production. They were so efficient at filling seats and managing logistics that Counterpoint's manager publicly declared that it was akin to "a full Broadway performance." JA 5. He admitted that he "underestimated the power of a megachurch." *Id.*

The February 8 and 9 performances followed the same script. The performances took place at 7 PM in Mapleton Church's sanctuary, JA 2, an auditorium-style space with seating for 3,000. First, the pastor welcomed the members of the public, informed them about the outreach event, and introduced Counterpoint. Counterpoint's manager then took the stage and presented the history of *Godspell*. JA 5. The manager disclaimed "any specific doctrinal interpretations of the work" and reminded the audience about the upcoming, licensed performances in Mapleton. Counterpoint players then put on an hour's worth of *Godspell*, *see* JA 5–15—selections Counterpoint was solely responsible for choosing, *Counterpoint*, slip op. at 4. The production closed with the pastor again taking the stage, encouraging attendance at outreach events, and offering a brief prayer. JA 16.

When Broadway learned about the February 8 and 9 performances, it sued Counterpoint, which joined Mapleton Church as an additional defendant. Counterpoint and Mapleton Church have conceded that the performances constituted *prima facie* copyright infringement. *Counterpoint*, slip op. at 6–7. But Counterpoint and Mapleton Church asserted that they were not liable because the performances were fair use under 17 U.S.C. § 107 (2006) and fell within the religious services exemption, 17 U.S.C. § 110(3) (2006). After both sides filed cross-motions for summary judgment, the district court awarded judgment to Broadway on all counts. *Counterpoint*, slip op. at 6–7.

The court of appeals reversed. The court of appeals held that the performances at Mapleton Church fell within the religious services exemption, 17 U.S.C. § 110(3). Creating its own test, the court held that *Godspell* was a work of a religious nature because "the text is religious and a reasonable member of Mapleton Church's audience would have viewed the performance as religious." *Counterpoint*, slip op. at 12. It further held that the per-

formances of *Godspell* "constituted religious services." *Id.* at 14. Finally, the court held that its construction of the religious services exemption did not violate the Establishment Clause of the First Amendment because it "imposed no more than a *de minimis* burden" on copyright holders. *Id.* at 18.

SUMMARY OF THE ARGUMENT

I. By its plain language and Congress's discernible intent, the religious services exemption to copyright infringement, 17 U.S.C. § 110(3) (2006), does not apply to the performance of popular Broadway musicals outside of the relatively narrow context of religious services. For the *Godspell* performances at Mapleton Church to qualify for the exemption, this Court must hold both that *Godspell* is a "dramatico-musical work of a religious nature" and the performance occurred "in the course of services." § 110(3).

The plain meaning of a "religious" work requires that the work possess the object and manifestation of belief in a divine being. In support of this narrow construction, the legislative history of § 110(3) reveals that Congress intended only to cover performances of sacred music—not popular musicals and operas like *Godspell*. *Godspell* utilizes Biblical figures and themes to tell an expressly humanist story of leadership and community. Any remaining vestiges of uncertainty about *Godspell*'s theme are cleared after consulting the intent of *Godspell*'s creators, which was to disseminate a non-Christian, non-religious view.

The exemption's requirement of occurrence during religious services has a similarly narrow applicability. Courts, government regulations, and popular meaning all recognize that, to qualify as a religious service, an event must possess certain core, objective indicia. These indicia may include a collective activity, proceeding according to a formal order, and under the guidance of a religious or organizing text. The *Godspell* performances at Mapleton Church lacked these indicia. Therefore, the religious services exemption does not apply.

II. The religious services exemption violates the Establishment Clause because it improperly endorses Mapleton Church, *see Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971), and does not accommodate the free exercise of religion but instead promotes religion outright, *see Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005).

First, the religious services exemption has an explicitly religious purpose. Congress designed the exemption to relieve religious institutions from certain kinds of copyright infringement. Congress did not provide the same benefits to similar non-

religious, non-profit and educational institutions. Because the religious services exemption provides a greater benefit to religious organizations it has an impermissibly religious effect, and, in granting a broader exemption to religious institutions like Mapleton Church, the religious services exemption impermissibly endorses religion.

Second, this endorsement is not a permissible accommodation of religion. Although some exemptions—which may benefit religious institutions by creating an accommodation for their free exercise of religion—may not violate the Establishment Clause, exemptions that merely promote religion are unconstitutional. The religious services exemption is not a permissible accommodation because it does not alleviate a state-imposed burden on religious exercise; it exempts more than religious conduct from copyright infringement; it places an undue burden on Broadway and other copyright holders; it conveys secular authority upon Mapleton Church; and, it conveys a message of government endorsement of Mapleton Church's religion.

ARGUMENT

I. THE UNLICENSED *GODSPELL* PERFORMANCES AT MAPLETON CHURCH WERE NOT COVERED BY THE RELIGIOUS SERVICES EXEMPTION AND INFRINGED BROADWAY'S COPYRIGHT.

Godspell is a protected work under § 102 of the Copyright Act of 1976, 17 U.S.C. §§ 101–810 (2006). Broadway possesses an exclusive right to perform *Godspell* publicly. *Counterpoint*, slip op. at 2; *see also* 17 U.S.C. § 106. Religious organizations may be liable for copyright infringement for unlicensed or unauthorized uses of works. *See Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1115 (9th Cir. 2000) (noting that the rights of copyright holders are not "affected by the religious nature of [the infringer's] activity"); *F.E.L. Publ'ns, Ltd. v. Catholic Bishop of Chi.*, No. 81-1333, 1982 WL 19198, at *2 (7th Cir. Mar. 25, 1982) ("Neither the religious element nor the non-profit element of a performance will protect illegal copying or publishing.").

To qualify for the religious services exemption to copyright infringement, Counterpoint and Mapleton Church must show that the performances on February 8 and 9 were: (1) "performance[s] of a . . . dramatico-musical work"; (2) "of a religious nature"; and (3) "in the course of services at a place of worship." 17 U.S.C. § 110(3). Each element of the exemption must be present during the per-

formance in question. *See Simpleville Music v. Mizell*, 451 F. Supp. 2d 1293, 1298 (M.D. Ala. 2006) (rejecting an argument that a radio broadcast of an exempt religious services performance also qualified for the exemption because the radio broadcast was a separate performance). It is not enough, for example, that the performance occurs in the same place where religious services are conducted. The performance must occur "in the course of" a religious service. 17 U.S.C. § 110(3).

The language of § 110(3) and Congress's legislative intent commend that secular musicals like *Godspell* performed at a community-wide event, for which admission is charged and no formal religious service conducted, are not covered by the religious services exemption.[1] Neither the plain meaning of the statute nor the religious services exemption's legislative history support a conclusion that *Godspell* is a work of a religious nature or that the February performances occurred in the course of religious services.

Under this Court's well-established precedent, any issue of statutory interpretation "start[s] with an examination of the statutory text." *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985). In construing the exemption, this Court should "assume that the ordinary meaning of the language that Congress employed 'accurately expresses the legislative purpose.'" *Mills Music, Inc.*, 469 U.S. at 164 (quoting *Park 'N Fly Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)). For copyright cases, this Court also has consistently relied on legislative history as persuasive authority. *See, e.g.*, *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 354–55 (1991); *Stewart v. Abend*, 495 U.S. 207, 218–19 (1990). This Court, moreover, has recognized that "[s]ound policy, as well as history, supports our consistent deference to Congress" in copyright matters. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984).

A. *Godspell* is not a work of a religious nature.

For *Godspell* to be a work of a religious nature, it must be "relating to or manifesting faithful devotion to an acknowledged ultimate reality or deity." *Merriam-Webster's Collegiate Dictionary* 988 (10th ed. 1996) (defining "religious"); *see also* 13 *Oxford English Dictionary* 570 (2d ed. 1989) (defining a "religious" as being "[i]mbued with religion"). Possessing a religious nature thus re-

1. There is no dispute that *Godspell* is a "dramatico-musical work" and that Mapleton Church is a place of worship under § 110(3).

quires an intrinsic, spiritual connection to deistic worship, rather than a work that merely draws from or describes religious themes or texts. Indeed, this Court has recognized that the Bible and other religious texts play an important role in furthering secular, educational understandings of "English literature" and "the tragic story of mankind." *People* ex rel. *McCollum v. Bd. of Educ.*, 333 U.S. 203, 236 (1948) (Jackson, J., concurring); *see also id.* ("One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared."). Thus, secular works may draw from the Bible or other spiritual texts without converting the work into a religious endeavor.

The legislative history confirms that Congress explicitly considered the types of works that should qualify as of a religious nature. Congress intended for the religious services exemption to cover "performances of sacred music" that would include "oratorios, cantatas, [and] musical settings of the mass." H. Rep. No. 94-1476, at 84 (1976); S. Rep. No. 94-473, at 76 (1975). The exemption specifically was "not intend[ed] to cover performances of secular operas, musical plays, motion pictures and the like." *Id.* A work could have "an underlying religious or philosophical theme" without possessing a religious nature. *Id.* Indeed, Congress's inclusion of the qualifier "of a religious nature" stemmed from a concern that, absent this limiting function, the religious services exemption "might allow unauthorized performances of all or part of a secular opera or musical play." H. Comm. On the Judiciary, 89th Cong., Copyright Law Revision Part 6: Supplementary Register's Report on the General Revision of the U.S. Copyright Law 38 (Comm. Print 1965).

The facts here demonstrate that *Godspell* does not itself manifest divine worship and is not a work of a religious nature. *Godspell* is a "rock musical." *Leeds Music Ltd. v. Robin*, 358 F. Supp. 640, 655 (S.D. Ohio 1973); *see also id.* at 654 (characterizing *Tommy* and *Jesus Christ Superstar* as other examples of rock operas or musicals). It is loosely based on an adaptation of "Christian mythology" from the New Testament's Gospel of Matthew. JA 3. *Godspell* drew upon religious themes to make a larger societal point, namely "how charismatic leaders can inspire diverse societies to overcome prejudice and form enduring communities." *Id.* at 3. As acknowledged by Congress and Justice Jackson, this use of religious themes does not convert a secular work into a religious performance. *See McCollum*, 333 U.S.at 236 (Jackson, J., concurring).

Godspell does not deify Jesus. It is instead an example, like the rock opera *Jesus Christ Superstar*, of "contemporary culture which has sought to humanize or politicize the *historical* Jesus." *Leeds Music Ltd.*, 358 F. Supp. at 655 (emphasis added). Mapleton Church's own advertising flyers highlighted that it would be a performance of a "Tony Award-Nominated musical." JA 1. The Tony-Award reference "provides further evidence that the performance is intended to come as close as possible to the original dramatico-musical." *Robert Stigwood Group Ltd. v. Sperber*, 457 F.2d 50, 55 (2d Cir. 1972). Thus, *Godspell* does not fall within the ambit of a religious work.

In the event of uncertainty about whether a work is religious in nature, the Court should defer whenever possible to the creator's intent. Such intent may be apparent from the creator's statement of meaning, the circumstances of the work's creation, and the work's text. To the extent that the Thirteenth Circuit looked to "the perception of a reasonable audience," it was in error. *See Counterpoint*, slip op. at 11. The focus of copyright law is to grant and protect the rights of private copyright owners. *See* 17 U.S.C. § 106 (prescribing the exclusive rights solely in terms of copyright owners); *see also* 17 U.S.C. § 101 (defining "copyright owner" as possessing "any one of the exclusive rights comprised in a copyright"). This Court has considered the reasonable observer only when examining the public acts of government—not the acts of private citizens. *See Salazar v. Buono*, 130 S. Ct. 1803, 1819 (2010) (plurality opinion) ("As a general matter, courts considering Establishment Clause challenges do not inquire into 'reasonable observer' perceptions with respect to objects on private [property]."). The extent of a copyright owner's rights does not depend on public perception. Indeed, copyright law protects copyright owners' from third-party attempts to appropriate works for the third-party's interest.

The well-documented intent of *Godspell*'s creators confirms that the musical was not intended as a religious work. John Michael-Tebelak wrote the musical in 1971 as a master's thesis. JA 3. It was first performed as a "vaudeville style" play with "10 unnamed clowns." *Id.* at 3, 5. *Godspell* is not concerned with Jesus as a divine figure. *See id.* at 3 ("[*Godspell*] includes no portrayals of miracles, no references to His divinity, and no resurrection scene."). The cast of characters from Counterpoint's production of *Godspell* includes Jesus, the "food cart vendor"; Herb, the "hippie"; and Joanne, the "suited businesswoman." *Id.* at 5. Moreover, Stephen Schwartz, who composed the music for *Godspell*'s theatri-

cal Broadway debut, did not intend to create a Christian work. *See id.* at 3. Thus, even though it draws upon religious themes and figures, *Godspell* is not a work of a religious nature.

B. A community-wide performance of *Godspell* that charges admission and does not follow a formal order does not constitute a religious service.

To qualify for the religious services exception, *Godspell* must have been performed "in the course of services" at Mapleton Church. 17 U.S.C. § 110(3). Although the statute leaves "services" undefined, Congress intended to omit "activities at a place of worship that are for social, educational, fund raising, or entertainment purposes." H. Rep. 94-1476, at 84 (1976). The plain meaning of the statutory terms, moreover, which this Court imports to Congress, is readily apparent. A service is "[a] ritual or series of words and ceremonies prescribed for public worship." 15 *Oxford English Dictionary* 35 (2d ed. 1989); *see also Merriam-Webster's Collegiate Dictionary* 1070 (10th ed. 1996) (defining "service" to mean "a form followed in worship or in a religious ceremony"). Federal and state regulations also define a religious service. *See, e.g.*, 29 C.F.R. § 1975.4 (2011) (distinguishing religious services "from secular or proprietary activities whether for charitable or religion-related purposes"); 23 Va. Admin. Code § 10-210-310 (2011) ("*Religious worship service* means regularly scheduled church services and includes . . . weddings, bar mitzvahs, bat mitzvahs, baptisms, christenings, funerals . . . .").

The Second Circuit recently construed a school policy that prohibited use of school facilities for "religious worship services." *Bronx Household of Faith v. Bd. of Educ.*, 650 F.3d 30, 33 (2d Cir. 2011), *cert. denied* No. 11-386, 2011 WL 4479210 (Dec. 5, 2011). The court found that the policy prohibits "solely the conduct of a particular type of event: a collective activity characteristically done according to an order prescribed by and under the auspices of an organized religion, typically but not necessarily conducted by an ordained official of the religion." *Id.* at 37. The court distinguished an ordered, collective religious service from basic "[p]rayer, religious instruction, expression of devotion to God, and the singing of hymns." *Id.* at 36.

Courts regularly scrutinize alleged religious institutions and alleged religious practices in a variety of contexts. For instance, this Court needed to examine the prevailing factual circumstances to determine whether a church employee qualified as a minister. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v.*

EEOC, No. 10-553, 2012 WL 75047, at *12–13 (U.S. Jan. 11, 2012); *see also LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007) (applying an eight factor test to determine the applicability of the religious exemption to the employment discrimination protections in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1(a)).

The Thirteenth Circuit erroneously abdicated responsibility for determining what constitutes a religious service for copyright purposes. *Counterpoint*, slip op. at 13. As this Court demonstrated in *Hosanna-Tabor Evangelical Lutheran Church*, courts can make a nonintrusive inquiry may be made into religion. In the copyright context, this Court should look to an event's circumstances to determine whether it constituted a religious service. Such an inquiry neither judges the validity of religious beliefs and nor interferes with church affairs. It simply compares a particular event against the template of a religious service, the presence of which is required by statute for a specific exemption to copyright infringement. *Cf. Bronx Household of Faith*, 650 F.3d at 39 (upholding a school policy that "applies only to the conduct of a certain type of activity—the conduct of worship services—and not to the free expression of religious views associated with it").

This Court should look for the indicia of a religious service to determine the religious services exemption's applicability. These criteria ensure that Congress's intent to "narrowly limit[] the privilege" is fulfilled. *Worldwide Church of God*, 227 F.3d at 1115. At base, these indicia include a collective activity, proceeding according to a formal order, and under the guidance of a religious or organizing text. The Mapleton Church performances lacked these key criteria.

The Mapleton Church performances were not a collective worship experience. They were widely advertised to the larger Mapleton community with flyers posted in "grocery stores, local gyms, medical offices, and other community gathering places." *Counterpoint*, slip op. at 5; *see also* JA 1. The production was not publicized as an opportunity to observe or participate in a religious service.

By purchasing an admission ticket, a theatergoer at Mapleton Church could have limited their experience to arriving at the Church, taking a seat in an auditorium-style space, watching a substantial production of *Godspell*, hearing a short prayer, and then departing for home. There were no hallmarks of a religious service. Mapleton Church's pastor opened the event with a brief introduction to Mapleton Church and a description of the other

recruitment efforts. JA 4. Then, Counterpoint's manager took the stage to describe *Godspell* and offer the express disclaimer that Counterpoint "does not endorse any specific doctrinal interpretations of the work." JA 5. After that, a substantial portion of *Godspell* was performed, *see* JA 6–15, and the event concluded with a brief prayer, JA 16.

None of those events were ordered or organized according to a prescribed religious form. That the performances took place in the Church's sanctuary is of no matter; at the time, it served as an auditorium. The statute requires that the performance take place "in the course of [religious] services" not merely in a church. 17 U.S.C. § 110(3). A theatergoer at Mapleton Church would have sensed no overt displays of religious worship aside from the brief concluding prayer. Indeed, Mapleton Church's practice is to hold formal religious services on Sundays; the *Godspell* performances took place on Friday and Saturday. *Counterpoint*, slip op. at 3. And a short prayer offered *after* an unlicensed performance of a Broadway musical is not enough to transform the event into a religious service. *See Bronx Household of Faith*, 650 F.3d at 36. The concluding prayer by Mapleton Church's pastor does not turn the *Godspell* performance into a religious service any more than the opening prayer at a NASCAR race turns the competition into a religious service.

II. THE RELIGIOUS SERVICES EXEMPTION, AS CONSTRUED AND APPLIED BY THE THIRTEENTH CIRCUIT, VIOLATES THE ESTABLISHMENT CLAUSE BECAUSE IT IMPROPERLY ENDORSES RELIGION AND IS NOT A PERMISSIBLE ACCOMMODATION OF RELIGION.

To satisfy the Establishment Clause, a statute must have a secular purpose, not have the effect of advancing religion, and must not create excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). The government violates the Establishment Clause if intends to endorse religion or has the effect of endorsing religion. *Lynch v. Donnelly*, 465 U.S. 668, 687–94 (1984) (O'Connor, J., concurring). A statute may also improperly accommodate the free exercise of religion. *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005).

The religious services exemption expressly promotes religion. It has the effect of benefiting groups like Mapleton Church over other non-religious communities. And it fosters excessive church and state entanglement by embroiling courts in religious contro-

versies. In creating greater benefits for religious groups, the religious services exemption constitutes a government endorsement of religion. Far from accommodating the free exercise of religion, the religious services exemption unlawfully fosters religion.

A. The religious services exemption improperly endorses religion.

The Establishment Clause of the First Amendment provides: "Congress shall make no law respecting the establishment of religion." U.S. Const. amend. I. A statute does not violate the Establishment Clause when it has a secular purpose; its principal or primary effect neither advances nor inhibits religion; and the statute does not foster an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612–13. The government violates the Establishment Clause if it intends to communicate a message that endorses religion, or if, regardless of the government's intentions, its action has the effect of communication a message of endorsement. *Lynch*, 465 U.S. at 687–94 (O'Connor, J., concurring).

When Congress conveys benefits to a religious institution, it must do so as part of a neutral scheme that provides comparable benefits to a broad variety of other organizations. *Walz v. Tax Comm'n*, 397 U.S. 664, 689 (1970). For example, in *Walz v. Tax Comm'n*, the Court upheld New York's charitable exemption to the state's sales tax. The charitable exemption did not violate the Establishment Clause because it had a legitimate secular purpose—namely, encouraging charitable organizations. The exemption did not have the effect of advancing religion because any benefit to a religious institution was also available to a broad array of other charitable societies; and it did not foster entanglement or serve as a government endorsement of religion. *Id*. at 688. By contrast, in *Texas Monthly, Inc. v. Bullock*, the Court struck down an exemption to Texas's sales tax for religious publications. 489 U.S. 1, 13 (1989). The religious publication exemption was only available to religious institutions and therefore violated the Establishment Clause because it had the purpose and effect of improperly promoting religion.

Here, the religious services exemption violates the Establishment Clause, under any standard. Congress's explicit purpose behind the religious services exemption was to benefit religious groups: It intended to exempt religious organizations from copyright requirements for the performance of religious works. *See* S. Rep. 94-473, at 76 (1975) ("The purpose here is to exempt certain performances of sacred music that might be regarded as 'dra-

matic' in nature, such as oratorios, cantatas, musical settings of the mass, choral services, and the like.").

Further, because it benefits religious groups over non-religious groups at the expense of copyright holders, the religious services exemption improperly endorses religion. Although the religious services exemption is part of a larger scheme that purports to convey benefits to nonprofit, religious, and educational groups, the benefits conveyed to religious institutions are greater than the benefits offered to any other group. For example, section 110(4) of the Copyright Act exempts from liability the performance of "a nondramatic literary or musical" work but only if there is no fee for the performance directed to any of its performers, or, if a there is a fee, "the proceeds are used are used exclusively for educational, religious, or charitable purposes and the copyright owner has not objected in advance." 17 U.S.C. § 110(4) (2006). Unlike § 110(4), the religious services exemption contains no prohibition forbidding performances "for private financial gain." *Id*. Instead, any performance of copyrighted works is permitted so long as it is of a religious nature and performed in a religious assembly. § 110(3). Because other organizations, including non-profit and educational groups, cannot perform plays of a religious nature for private gain, the religious services exemption improperly endorses religion and violates the Establishment Clause.

B. The religious services exemption is not a permissible accommodation because it improperly promotes religion.

Exemptions, which may focus on religious groups and have a non-secular purpose, will not violate the Constitution if they properly accommodate the free exercise of religion. *See Cutter*, 544 U.S. at 713 (holding that the government may accommodate religious practices without violating the Establishment Clause); *Corp. Presiding Bishop Church of Jesus Christ Latter-day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring) (noting that if a regulation had the effect of advancing religion, it could still be constitutional so long as it accommodated the free exercise of religion and did not provide unjustifiable assistance to religious organizations). Laws that purport to accommodate religious practices, however, may improperly promote religion and violate the Establishment Clause. *See Texas Monthly, Inc.*, 489 U.S. at 40 (Scalia, J., dissenting) ("It is not always easy to determine when accommodation slides over into promotion . . . ."); *Amos*, 483 U.S. at 334–35 ("At some point, accommodation may devolve into 'an unlawful fostering of religion.'") (*quoting Hobbie v. Unemployment*

Appeals Comm'n, 480 U.S. 136, 145 (1987)). To illustrate, on the one hand, a regulation that generally forbids religious discrimination but exempts religious organizations from this requirement for the purposes of religion-based employment will not violate the Establishment Clause because religious discrimination is necessary to religion-based employment. *E.g.*, *Amos*, 483 U.S. at 339. On the other hand, a regulation that creates a general tax upon a population but exempts religious organizations from this requirement in order to promote religion will violate the Establishment Clause because it does not accommodate the free exercise of religion but, instead, promotes religion outright. *E.g.*, *Texas Monthly, Inc.*, 489 U.S. at 25.

To distinguish between accommodation and promotion the Court examines several factors. First, the Court considers whether the exemption alleviates a state-imposed burden on religious exercise. *See id.* at 15. Second, the Court considers whether the exemption covers specifically religious conduct. *See, e.g.*, *Amos*, 483 U.S. at 342–43. Third, the Court considers the social cost of the exemption and the burden that it places upon non-beneficiaries. *See Texas Monthly, Inc.*, 489 U.S. at 15. Fourth, the Court considers whether the exemption conveys secular power upon a religious organization. *See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 696 (1994). Finally, the Court considers whether the exemption conveys a message of government endorsement of religion. *Amos*, 483 U.S. at 348 (O'Connor, J., concurring).

Here, the religious services exemption fails to accommodate free exercise and instead improperly promotes religion because it does not alleviate a state-imposed burden upon Mapleton Church; the *Godspell* performance did not involve religious conduct; it places an undue burden upon Broadway; it conveys secular, copyright authority upon Mapleton Church; and it sends a message of government endorsement for Mapleton Church.

1. The religious services exemption does not alleviate a state-imposed burden on religious exercise.

An accommodation should alleviate a state-imposed burden on religious exercise. *See Texas Monthly, Inc.*, 489 U.S. at 15 (plurality opinion) (striking down a Texas law because it "cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion"); *id*. at 18 n.8 (acknowledging that prior cases permitted exemptions that were designed to alleviate government intrusions that might significantly deter adherents of

a particular faith from exercising their faith); *Grumet*, 512 U.S. at 724 (Kennedy, J., concurring) (agreeing that a New York law should be upheld because it "alleviate[s] a specific and identifiable burden on the Satmars' religious practice").

The religious services exemption is unlike any accommodation this Court has upheld before. Every valid accommodation has alleviated a state-imposed burden upon an essential religious practice. In *Cutter*, for example, the Supreme Court unanimously upheld the Religious Land Use and Institutionalized Persons Act (RLUIPA) because, by its terms, RLUIPA prohibited state-run institutions from "substantially burdening religious exercise." 544 U.S. at 715. RLUIPA did not convey a benefit to religious persons; instead, it simply protected institutionalized persons' rights to the free exercise of religion. *Id*. at 721 n.10.

Similarly, in *Employment Div. v. Smith*, 494 U.S. 872 (1990), this Court upheld an Oregon ban on peyote possession, which had no allowance for sacramental use of the drug. It noted, however, that an exemption for sacramental peyote use would be a constitutional accommodation. *Id*. at 890. This exemption would have been constitutional because "[p]eyote is a sacrament of the Native American Church and is regarded as vital to respondents' ability to practice their religion." *Id*. at 903 (O'Connor, J., concurring); *c.f. Fraternal Order of Police v. Newark*, 170 F.3d 359 (3d Cir. 1999) (requiring an exemption from the Newark Police Department's policy prohibiting officers from having facial hair for Muslim officers whose faith required them to have beards).

Further, in *Amos*, this Court upheld an exemption to Title VII's prohibition on religious discrimination in employment because the ability to discriminate based on religion was essential to preserving the religious community. *See* 483 U.S. at 337; *id*. at 342–43 (Brennan, J., concurring) ("We deem it vital that, if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities."). These cases highlight the severity of the burden that must be alleviated for a permissible accommodation.

By contrast, this Court has struck down exemptions that do not alleviate a particular burden but simply aid religion. For example, in *Texas Monthly*, a plurality of this Court struck down a state sales tax exemption for religious publications. *See* 489 U.S. at 25. This Court held that compliance with government regulations by religious institutions did not substantially impede the evangelical activities of religious organizations. *Id*. at 19. To be sure, any tax

that a religious institution is required to pay burdens religious exercise by forcing the religious institution to take money away from its religious publications and divert it to pay the government. Taken to its extreme this would preclude the government from collecting any tax or fee on any activity that a religious organization engages in—even, for instance, a sales on groceries purchased by church staff for a church social activity.

This Court, however, did not adopt this extreme approach. *See id.* at 25 ("[T]axes or regulations would not subject religious organizations to undue burdens and the government's interest in their uniform application is far weightier."). Instead, general regulatory schemes that incidentally burden religious exercise are permitted. *See, e.g.*, *id.*; *Smith*, 494 U.S. at 890 (holding that the Free Exercise Clause does not prevent Oregon from enforcing a blanket ban on peyote with no allowance for sacramental use of the drug). Religious exceptions to general regulatory schemes are forbidden unless they alleviate a substantial state-created impediment to the free exercise of religion. *Texas Monthly, Inc.*, 489 U.S. at 25. Because the exemption did not eliminate substantial government interference with religious activity, this Court held that it violated the Establishment Clause. *Id*. at 24–25.

Here, the Copyright Act does not impose a substantial burden upon religious exercise. Unlike the ban on peyote contemplated in *Smith*, the Copyright Act does not specifically burden religious groups. The performance of copyrighted material, like *Godspell*, is not a sacrament of Mapleton Church. Any burden the Copyright Act places upon religious institutions is a burden shared by nonprofits, educational groups, and any other individuals that might wish to perform copyrighted musicals. Further, unlike the prohibitions on peyote in *Smith* and religious discrimination in *Amos*, the Copyright Act does not forbid an activity that is essential to Mapleton Church congregation's religious exercise. The Copyright Act simply provides that, when musicals are performed for money, the play's author should receive part of the proceeds.

In this regard, the religious services exemption more closely resembles the sales tax exemption for religious publications that this Court held unconstitutional in *Texas Monthly*. In *Texas Monthly*, the sales tax at issue was a part of a generally applicable regulatory scheme that only burdened religious groups incidentally. *See* 489 U.S. at 25. The tax did not burden religious institutions any more than it burdened nonprofit groups, political groups, or the non-religious who were also required to pay tax on publications. But Texas's attempt to exempt religious publications from

the tax upset this balance by unconstitutionally promoting religious institutions over any other group.

Copyright law is a similar, generally applicable regulatory scheme. *Sony Corp. of Am.*, 464 U.S. at 429. Any burden to the free exercise of religion is incidental and insubstantial.[2] Like a sales tax, the Copyright Act does not burden religious institutions any more than it burdens nonprofit groups, political groups, or the non-religious who are also required to honor copyright requirements when performing copyrighted material. The religious services exemption upsets this balance by allowing religious institutions to perform copyrighted material when non-religious institutions cannot. In doing so, the religious services exemption improperly promotes religious institutions over any other group and violates the Establishment Clause.

2. The Thirteenth Circuit's interpretation of the religious services exemption protects more than religious conduct from copyright infringement.

An accommodation should cover only specifically religious conduct. *See, e.g.*, *Amos*, 483 U.S. at 342–43 (permitting a religious exemption for religion-based hiring because self-definition was a vital part of religious practice); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (permitting schools to release their students from class to attend religious instructions). By its terms, the religious services exemption covers "dramatico-musical work[s] of a religious nature" performed "in the course of [religious] services." 17 U.S.C. § 110(3). As interpreted by the Thirteenth Circuit, however, this exemption extends to community activities, including paid performances that are offered at a church but take place outside of a worship service such as the performance of *Godspell*. *Counterpoint*, slip op. at 4.

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2. It is not clear that, absent the religious services exemption, churches would suffer any burden to the free exercise of their religion. First, religious institutions would still be able to utilize existing copyright exceptions for fair use and for nonprofit and educational performances. Second, if adequate substitutes exist for a copyrighted work—as is often the case given that most religious materials are not copyrighted and in the public domain then there is no suppression of free exercise when a copyright owner asserts his rights. *See* Thomas F. Cotter, *Accommodating the Unauthorized Use of Copyrighted Works for Religious Purposes Under the Fair Use Doctrine and Copyright Act § 110(3)*, 22 Cardozo Arts & Ent. L.J. 43, 59 (2004) (noting that most works that are used for religious services "are already in the public domain, and therefore would not require permission even in the absence of § 110(3)").

Religious conduct is a broad term, but it does not encompass any and all activities performed in a church. Although efforts to draw fine distinctions on religious are problematic, *Mitchell v. Helms*, 530 U.S. 793, 828 (2000), fine distinctions are not necessary in this case. Religious conduct involves activities that are necessary to the free exercise of that religion such as sacramental rituals, religious hiring, and religious instruction. *See Smith*, 494 U.S. at 890; *Amos*, 483 U.S. at 342–43; *Zorach*, 343 U.S. at 314. Religious conduct does not include activities like the Mapleton Church *Godspell* performances that are primarily social. *See* S. Rep. 94-473, at 76 (1975) ("[The religious services exemption] exclud[es] activities at a place of worship that are for social, educational, fund raising, or entertainment purposes.").

3. The religious services exemption places an undue burden upon Broadway.

An accommodation must not create great social cost or place an undue burden upon non-beneficiaries. *See Cutter*, 544 U.S. at 722 ("[A]n accommodation must be measured so that it does not override other significant interests."); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (striking down a Connecticut statute, which guaranteed workers the right not to work on a Sabbath, because it did not consider, among other things, the substantial economic burdens to the employer). A burden is unreasonable when it imposes more than a *de minis* financial burden upon a non-beneficiary. *See, e.g.*, *Cutter*, 544 U.S. at 723. Accommodations that wholly ignore financial burdens to non-beneficiaries create an unreasonable burden and will violate the Establishment Clause. *See, e.g.*, *Estate of Thornton*, 472 U.S. at 710 (striking down an accommodation because it did not consider, among other things, the substantial economic burdens to the employer and other employees); *Texas Monthly, Inc.*, 489 U.S. at 18 n.8 ("Texas' tax exemption . . . burdens nonbeneficiaries by increasing their tax bills by whatever amount is needed to offset the benefit bestowed on subscribers to religious publications."); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) ("To require TWA to bear more than a *de minimis* cost in order to give [an employee] Saturdays off is an undue hardship.").

The religious services exemption fails to account for significant social and financial burdens to Broadway and other non-religious groups. The most readily apparent social cost is the stifling of artistic creativity. Like John Michael-Tebelak and Steven Schwartz, many writers, composers, and other artists may wish to create

works that tackle religious issues. Perversely, the religious services exemption makes it less likely that playwrights, for example, will write such plays because these works will not enjoy copyright protection if an institution like Mapleton Church hosts a production. That is not consistent with the goals of the copyright scheme. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545 (1985) ("[C]opyright is intended to increase and not to impede the harvest of knowledge.").

The financial costs of the religious services exemption are equally harmful. Copyright composers and holders of copyrights are entitled to "a fair return" for their creative endeavors. *Id.* at 546. The religious services exemption diminishes these returns. Because of the religious services exemption, Broadway cannot charge churches like Mapleton for the use of its material. Broadway would suffer not only diminished licensing fees but also a concomitant loss of demand.

The *Godspell* performances at Mapleton Church offer a vivid example of how theater troupes can unite with religious institutions to effectively launder mainstream Broadway hits through the religious services exemption. After a community-wide marketing campaign, 6,000 Mapleton residents attended the two *Godspell* performances. Counterpoint was paid $30,000 from ticket sales. *Counterpoint*, slip op. at 5. Counterpoint's manager was so impressed by the facilities, which included a 3,000-seat venue, and production support that he exclaimed, "I underestimated the power of a megachurch." *Id.* The likelihood that other megachurches and theatre troupes will replicate the success of the Mapleton Church performances increases the burden on copyright holders for loss of licensing fees. It likely would increase costs to audiences, who do not attend performances held at churches, because copyright holders will need to increase licensing fees to recoup for uncompensated performances. Thus, the religious services exemption imposes a financial burden upon copyright holders and privileges religious audiences at the expense of other audiences.

4. The religious services exemption increases church and state entanglement and improperly conveys secular authority upon Mapleton Church.

An accommodation should not convey secular power to a religious organization. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982) ("This statute enmeshes churches in the exercise of

substantial governmental powers contrary to our consistent interpretation of the Establishment Clause."). Here, the religious services exemption conveys a secular power upon a religious organization. The exemption grants an exceptional power to religious institutions alone: It allows religious institutions to sell performances of copyrighted works free from any obligation to the copyright holder. Religious institutions like Mapleton Church may then decide whether or not to pay Broadway for the public performance of its work. In short, the religious services exemption grants Mapleton a veto over religious copyrights.

5. The religious services exemption conveys a message of government endorsement of Mapleton Church's religion.

An accommodation must not convey a message of government endorsement of religion. *Amos*, 483 U.S. at 348 (O'Connor, J., concurring) (noting that the proper inquiry for analyzing an accommodation is to determine whether the government's purpose is to endorse religion and whether the statute conveys a message of endorsement); *Estate of Thornton*, 472 U.S. at 711 (O'Connor, J., concurring) (same). The religious services exemption conveys a message of government endorsement of religion by explicitly favoring religious groups, like Mapleton Church, over any other group. *See* Thomas F. Cotter, *Gutenberg's Legacy: Copyright, Censorship, and Religious Pluralism*, 91 Cal. L. Rev. 323, 390 (2003) ("[B]y creating a more favorable exemption for religious use than for other purposes, the federal government appears to promote or endorse religious performances to the exclusion of other uses."). Compared to the religious services exemption in § 110(3), the other exemptions in § 110 are far less generous.

Sections 110(1), (2), and (4) all create some limited exemptions for performances and displays that are not for profit or used for educational purposes. None of these exemptions allow performances for private gain. The religious services exemption, by contrast, has no such restriction. Because the religious services exemption allows religious institutions more freedom from copyright infringement, it impermissibly endorses religion.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.