UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TOUROVILLE

John Burns, Plaintiff, and Citizens Against Religious Convictions, Inc., Plaintiff-Intervenor v. Internal Revenue Service and Commissioner of Taxation, Defendants.	)	NO. 19-111

Decided: December 18, 2019

Introduction

Plaintiff John Burns ("Burns") brings suit against the Internal Revenue Service ("IRS") and Commissioner of Taxation ("Commissioner") (collectively, "Defendants") after being denied the parsonage exemption under 26 U.S.C. § 107(2), which allows a "minister of the gospel" to be exempt from taxes on the total housing allowance paid to him by his employer. Burns argues that, because of his unique employment at Whispering Hills Academy, a religious educational

institution governed under the auspices of the Whispering Hills Unitarian Church, he is entitled to receive the annual parsonage exemption as a "minister of the gospel."

Additionally, we address the claim of Citizens Against Religious Convictions, Inc. ("CARC"). This group filed a motion to intervene under Rule 24(a)(2) of the Federal Rules of Civil Procedure. Pursuant to Rule 24(a)(2), upon a timely motion, the court must permit any third party to intervene in an action as either a plaintiff or defendant, as a right, if such party "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interests unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). We hereby grant CARC's motion to intervene and therefore add CARC as a plaintiff-intervenor party. This court finds that CARC has standing to contest the constitutionality of 26 U.S.C. § 107(2) because it has a significant interest in the outcome since the statute, as it currently stands, excludes its members from applying for the exemption. Since CARC cannot apply for an exemption as Burns has done, it claims that the exemption favors religion over non-religion and thus, violates the Establishment Clause of the First Amendment.

It is Defendants' position that 26 U.S.C. § 107(2) is constitutional, since it allows the government to refrain from excessive entanglement with religion, which would be unavoidable if "ministers of the gospel" claimed housing exemptions under any other section. Moreover, it is Defendants' position that Burns cannot claim exemptions under section 107(2) because he is not a "minister of the gospel." Defendants move for summary judgment and ask this court to hold that (1) Burns is not a "minister of the gospel" and (2) section 107(2) is constitutional.

We deny the Defendants' motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 56. We hold that Burns is a "minister of the gospel"

because he actively performs sacerdotal functions, educates his students on secular matters as part of the faith-based curriculum employed by the Whispering Hills Academy, and counsels his students on both personal and religious matters. With respect to CARC's claim, we further hold that 26 U.S.C. § 107(2) is unconstitutional, as it fails the *Lemon* test. *See Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971).

Facts

Burns is employed by Whispering Hills Academy ("Whispering Hills" or the "school"), a religious boarding school operated by the Whispering Hills Unitarian Church. The school is located in upstate Touroville on a sprawling property just steps away from the historic church. Burns was hired to teach eleventh and twelfth grade English, Renaissance Literature, and several foreign languages, including French, Italian, and Latin. He is also one of several school guidance counselors and often advises students on both educational and personal matters. He combines mental and behavioral health techniques with the commonly held religious teachings of the school's faith and has received several school awards for his newly created after-school club: Prayer After Hours.

Since there are a large number of students who cannot go home on the weekends, Burns frequently hosts gatherings for them, where he provides lunch, snacks, and social interaction. His gatherings usually take place after Sunday services at the on-campus church. His students have described these gatherings as a sort of "youth ministry," where they discuss the topics of the week's church services and any other topics on their minds.

In 2016, when Burns accepted the job, he moved to a house five minutes away from the school to cut back on travel time from his previous home, which was over an hour away. The

school provided a $2,500 moving credit to Burns to help cover the costs of the moving company and travel. Additionally, Burns and the school agreed that $2,100 a month would be included as part of his monthly salary for rental allowance. The amount was calculated to include the fair rental value of the home, plus Burns' expected utility costs. In 2017, Burns decided to conduct research on possible tax exemptions. Since he moved to be closer to his job and has been receiving a housing allowance from the school, he sought to exempt those amounts from his gross income to lower his tax liability.

During a casual conversation at lunch one day, a co-worker, Pastor Nick, mentioned to Burns that he should look into claiming the parsonage exemption under section 107(2) since he was employed by a religious institution, held daily prayer sessions with his afterschool club, and provided spiritual counseling to the students. Pastor Nick explained how he claimed exemption under section 107(2) every year and was able to pay lower taxes. Burns took Pastor Nick's advice, investigated this exemption, and decided to claim the same for the school's housing allowance on his 2017 tax return. In the summer of 2018, he received a letter of denial from the IRS and Commissioner of Taxation, disqualifying him for the exemption since he could not prove that he was, in fact, a "minister of the gospel." As a result, Burns owed additional money to the IRS.

Burns decided to bring suit in the District Court for the Southern District of Touroville claiming that he is a "minister of the gospel" and thus, eligible to claim the parsonage exemption. CARC, a local organization, learned of the pending lawsuit and decided that the parsonage exemption Burns was seeking under section 107(2) violated the Establishment Clause of the First Amendment because the statute favored religion over non-religion. CARC filed a motion with the district court, asserting its right to intervene and establishing standing to claim that section 107(2) is unconstitutional.

Discussion

I. John Burns is a "minister of the gospel" and thus, qualifies for the parsonage exemption

First, we address whether Burns is a "minister of the gospel" when, as Burns himself contends, he conducts secular lessons as part of a faith-based curriculum and frequently counsels students on both personal and religious matters. Burns argues that he *is* a minister because he carries out sacerdotal functions in the ordinary course of his work as a teacher, and the school held him out to be a source of religious instruction to their students. Defendants argue that, despite Burns' adherence to the school's faith-based curriculum, he was hired only to teach secular subjects (English, Renaissance Literature, and several foreign languages). Although he incorporates religious ideals and knowledge in his counseling sessions, he is not a trained or ordained member of the clergy.

The government has the compelling obligation to remain far removed from the inner workings of religious institutions. As such, it is Burns' belief that the IRS inappropriately made the determination to deny his position as a "minister of the gospel." Burns contends it would be inappropriate for this Court to make that determination as well, arguing that only his employer should make this determination. We disagree.

Since it is crucial to any further evaluation of this case, we must address the question of the court's ability (and discretion) to evaluate the status of religious employees as ministers. We are guided by the Supreme Court's more recent cases on the matter. In 2012, the Court decided that the defendant schools appropriately classified two teachers as ministers when they taught secular subjects in conjunction with the religious teachings of their faith. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 192 (2012). Admittedly, this case

was decided in the narrow scope of employment discrimination claims, and the Court created, in this case, a "ministerial exception" to violations of federal employment discrimination laws. However, it is important to note that the Court's decision in this matter was not a determination on *how* the defendant religious institutions should define their ministers, but simply an evaluation of whether those institutions held the plaintiff teachers out to be ministers. *Id.* at 189-90. Despite its limited holdings, the *Hosanna-Tabor* Court confirmed that it *could* make factual determinations about the status of a religious employee based on the job functions they were hired to perform. *Id.* at 190. "The amount of time an employee spends on particular activities is relevant in assessing that employee's status, but that factor cannot be considered in isolation, without regard to the nature of the religious functions performed. . . ." *Id.* at 194.

While Defendants are correct in supposing that the IRS classification of "minister of the gospel" controls, this Court's capacity to evaluate the facts of the current case is supported by *Hosanna-Tabor*, and the evaluation will remain within the scope of whether Burns, in fact, fits within the IRS classification.

This Court is guided by *Hosanna-Tabor* only for a very limited purpose; it turns to more pertinent case law to decide on the matter of Burns' job functions. In *Kirk v. Commissioner*, 425 F.2d 492 (D.C. Cir. 1970), the D.C. Circuit affirmed the tax court's ruling that appellant Kirk was not a "minister of the gospel" for the purpose of claiming the parsonage exemption under section 107(2). *Id.* at 495. Kirk was a member of the General Board of Christian Social Concerns of the Methodist Church. *Id.* at 493. He served as director of the Department of Public Affairs. *Id.* Like the other eleven members of the Board, Kirk's responsibilities did not include "the conduct of religious worship" and were not "sacerdotal in nature." *Id.*

Similarly, in 1981, the Northern District of Texas held that a professor was not entitled to the parsonage exemption because the university at which he taught was not sufficiently under the control and management of the affiliated religious organization, and his teachings were not of a religious or sacerdotal nature. *Flowers v. United States*, No. CA 4-79-376-E, 1981 U.S. Dist. LEXIS 16758, at *14-15 (N.D. Tex. Nov. 25, 1981). In deciding this case, the district court cited a 1970 IRS ruling that evaluated the relationship between a church and its affiliate to determine if the two were sufficiently integrated. *Id.* at *10. Where a school is operated by a parent church, and that church exercises control (either directly or indirectly) over the school, the two entities are integrated and any teacher or board member who exercises control over some aspect of the school is entitled to the parsonage exemption. Rev. Rul. 70-549, 1970-2 C.B. 16. The *Flowers* court further relied on a 1972 Revenue Ruling, which highlighted eight factors to consider in determining whether a church exercised considerable control over an affiliated institution. The Revenue Ruling's eight factors include:

> (1) whether the religious organization incorporated the institution; (2) whether the corporate name of the institution indicates a church relationship; (3) whether the religious organization continuously controls, manages, and maintains the institution; (4) whether the trustees or directors of the institution are approved by or must be approved by the religious organization or church; (5) whether trustees or directors may be removed by the religious organization or church; (6) whether annual reports of finances and general operations are required to be made to the religious organization or church; (7) whether the religious organization or church contributes to the support of the institution; and (8) whether, in the event of dissolution of the institution its assets would be turned over to the religious organization or church.

Rev. Rul. 72-606, 1972-2 C.B. 78. In *Flowers*, because the university was not integrated with the church, the plaintiff professor was not a purveyor of sacerdotal functions and, therefore, was not eligible to claim the parsonage exemption. *Flowers*, 1981 U.S. Dist. LEXIS 16758, at *15.

The IRS's eight-factor test outlined in Rev. Rul. 72-606, 1972-2 C.B. 78 offers valuable insight, but no one factor weighs more heavily than another. Without a more detailed analysis of

the relationship between the church and school, it is difficult to address each factor in the case at bar. For example, we do not know whether the church exercises any control over the operations of the school board or, if it does, to what extent. We also do not know whether any trustees, directors, or board members may be removed by the church. We can infer, however, that there exists a corporate relationship as the school and church share the same name. We can also infer that the church exercises some level of control over the school because it requires its students to attend religious services and learn basic tenets of the common faith as part of the academic curriculum. We can also infer that the church likely contributes to the support of the school both financially (since the school is located on church property) and in reputation among its parishioners. Thus, we hold that the school is sufficiently integrated with the church.

Burns, as a teacher and guidance counselor, exercises significant control over crucial aspects of the church-integrated school. Unlike the professor in *Flowers*, Burns teaches secular subjects, but he incorporates the faith-based ideals of Whispering Hills. He attends required worship services with his students on weekends and hosts religious discussions with his students after services. The *Flowers* court determined that the professor (who also counseled students) did not counsel in a way that was different than a secular guidance counselor. *Flowers,* 1981 U.S. Dist. LEXIS 16758, at *15. However, Burns incorporates religious teachings into his counseling sessions, making for a uniquely faith-based approach to his brand of adolescent therapy. Interestingly, the professor in *Flowers was* an ordained minister, but did not perform any sacerdotal functions in his capacity as a university professor and counselor. *Id.* Burns *is not* an ordained minister, but he was hired by Whispering Hills not merely to teach secular subjects to students, but also to teach those subjects in harmony with the precepts of its faith.

This case is also distinguishable from *Flowers* because the functions and activities performed by Burns were integral to the curriculum of the school, and the school was integral to the operation of the church. There existed a direct link between the goal of Whispering Hills to educate its members and students in the ways of its faith and Burns's daily practices. Therefore, this Court finds that Burns satisfies the IRS's definition of "minister of the gospel" and is entitled to claim the parsonage exemption under section 107(2).

II. 26 U.S.C. § 107(2) is unconstitutional under the Establishment Clause

We now address the claim raised by the Plaintiff-Intervenors, CARC. Notwithstanding our holding that Burns is a "minister of the gospel," it is beyond dispute that section 107(2) confers a significant tax benefit to religious organizations which is not available to anti-religious or secular organizations. It allows a "minister of the gospel" to exclude from gross income "the rental allowance paid as part of his compensation." 26 U.S.C. § 107(2) (2002). This allowance is available to ministers even if they own their own home; however, this allowance is available *only* to ministers. While it is true that secular taxpayers are afforded some exemptions under other portions of the Code, those exemptions come with restrictions that are not included in section 107(2). Based upon the differing treatment of religion as opposed to non-religion, in terms of the exemptions under the Code, we hold that section 107(2) lacks neutrality, impermissibly favors religion, creates excessive government entanglement, and provides an impermissible subsidy to religious establishments. We agree with CARC that section 107(2) violates the Establishment Clause of the First Amendment.

Under the *Lemon* test, "the statute must have a secular legislative purpose; its principal or primary effect must be one that neither advances nor inhibits religion; [and] the statute must not

foster an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). There is a glaring failure of neutrality in section 107(2) that violates the second prong of the *Lemon* test. The Establishment Clause was designed to prevent government action that amounts to apparent approval of religion over non-religion. *United States v. Lee*, 455 U.S. 252, 263 (1982). It commands that religion shall not be favored over non-religion. *Larson v. Valente*, 456 U.S. 228, 244 (1982). Any tax that essentially "endorses [solely] religious belief" will fail the *Lemon* test. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 17 (1989). Such preferential treatment is ultimately seen as an endorsement of religion by the rest of the community. *Id.* at 15.

When the primary or "ostensible" purpose of a statute is to advance religion, it cannot meet the Establishment Clause's obligation of neutrality. *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 991 (7th Cir. 2006). The First Amendment "mandates governmental neutrality. . . between religion and non-religion." *Id.* Housing allowances should not be distributed in such a way that a reasonable person would understand them to be "a message of endorsement." *Id.* at 993. Other sections of the Code, such as section 119, mandate that in order to be eligible for a housing exemption, the housing must be in kind, on site, required by the employer, and for the employer's convenience; section 107(2) imposes no such restrictions on a "minister of the gospel." Thus, Section 119 provides a far more limited exemption to secular employees than section 107(2) provides to ministers. That could easily be construed as a message of endorsement of religion.

Here, it is undisputed that Burns sought a tax exemption of his rental allowance only under section 107(2) because he believed he was a "minister of the gospel." In fact, being a "minister of the gospel" was the only requirement he needed to meet in order to claim this tax exemption. This same exemption is not available to members of CARC, a non-religious entity. Thus, on its face, section 107(2) sends a clear message to a reasonable person that the statute endorses religion over

non-religion. It is for precisely these reasons that this court finds that section 107(2) lacks neutrality in violation of the *Lemon* test.

This court also finds that section 107(2) excessively entangles government with religion, in violation of the third prong of the *Lemon* test. To determine whether a government program is excessively entangled with religion, the court must "examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Lemon*, 403 U.S. at 615. To constitute excessive entanglement, the government's action must be either intrusive participation, supervision, or investigation into the affairs of the religious organization. *Vision Church*, 468 F.3d at 995. "The test is inescapably one of degree." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 674 (1970).

Section 107(2) requires the courts to undertake a fact-intensive inquiry to determine who qualifies as a "minister of the gospel" in order to take advantage of the parsonage exemption. This constitutes inherently excessive government entanglement. For example, in *Silverman v. C.I.R.*, No. 72-1336, 1973 WL 2493, at *1 (8th Cir. July 11, 1973), the Eighth Circuit had to undertake a fact-intensive inquiry, studying relevant sections of Jewish law, to determine whether a full-time cantor of the Jewish congregation qualified as a "minister of the gospel," as required by section 107. Such an inquiry clearly would be deemed excessive, intruding deeply into the affairs of the synagogue and the religion itself.

With respect to neutrality, at least one lower court declared a tax exemption unconstitutional when it applied only to religious organizations. *Budlong v. Graham*, 488 F. Supp. 2d 1252, 1258 (N.D. Ga. 2007) (holding unconstitutional two state sales tax exemption provisions that only applied to materials a religious organization published and sacred texts common to

religious organizations). Most importantly, the Supreme Court refused to uphold a tax exemption that was exclusively provided to a religious organization. *Texas Monthly*, 489 U.S. at 5. However, in a similar case, the Court upheld a tax exemption that was provided to a religious organization. *Walz*, 397 U.S. at 680. The tax exemption at issue in *Walz* was a New York property tax exemption that applied to organizations having "religious, educational, or charitable purposes." *Id.* at 666-67. The deciding factor in that case was the broad class of non-religious beneficiaries that were afforded the exemption granted to the religious beneficiaries. *Walz*, 397 U.S. at 673. Unlike the dispositive factor that was present in *Walz*, the exemption in the case at bar applies to "ministers of the gospel" *only*.

Furthermore, this court is guided by the Supreme Court's warning that "tax schemes with exemptions may be discriminatory." *CSX Transp., Inc. v. Ala. Dept. of Revenue*, 562 U.S. 277, 287-89 (2011). By implementing a tax scheme that favors only religion, the government is essentially promoting the activity that it is subsidizing. This "seeks to achieve the same basic goal of encouraging the development of certain organizations through the grant of the tax benefits." *Bob Jones Univ. v. United States*, 461 U.S. 574, 587 (1983). Whenever the government grants a subsidy exclusively to a religious organization, it unjustifiably assists religious organizations. *Texas Monthly*, 489 U.S. at 15. It is a fact that almost every tax exemption is a "subsidy that affects non-qualifying taxpayers by forcing" them to indirectly donate to the entity that is receiving the tax benefit.[1] *Id.* at 14. Unlike the tax exemption in *Walz* that applied to secular and non-secular

[1] In fact, one commentator argues that elimination of the parsonage exemption would cost religious entities billions of dollars. Erwin Chemerinsky, *The Parsonage Exemption Violates the Establishment Clause and Should Be Declared Unconstitutional*, 24 Whittier L. Rev. 77, 713 (2003).

organizations alike, section 107(2) only confers a tax benefit on religious organizations, which indirectly forces the non-qualifying secular taxpayers to pick up the tab.[2]

It is through this paradigm that we analyze this case. It is undeniable that section 107(2) provides greater benefits to ministers than other exemptions provide to secular employees. While that factor alone is not dispositive, the great lengths this Court must undertake to determine if Burns qualifies as a "minister of the gospel" excessively entangles the government with religion. Furthermore, section 107(2) applies to *only* "ministers of the gospel." No other secular entity or person can claim the housing allowance under section 107(2). If CARC, for example, an organization with clearly non-religious objectives, created residential housing for its employees in proximity to its headquarters, those employees would not be able to claim the very attractive housing allowance available only to religious ministers. Thus, this exemption aids only religion and religious entities. This is precisely what the Establishment Clause is meant to guard against—the advancement or endorsement of religion over non-religion. Since section 107(2) undeniably provides preferential benefits to ministers which is generally not applicable to a broad range of taxpayers, and it excessively entangles government with religion, we find that section 107(2) violates the Establishment Clause.

[2] Even the Supreme Court has noted that a targeted tax exemption is like a subsidy to the receiving entity. Adam Chodorow, *The Parsonage Exemption*, 51 U.C. Davis L. Rev. 849, 894 (2018) (citing Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 14 (1989)).

Conclusion

For the foregoing reasons, Defendants' motion for summary judgment is denied in its entirety. We hold that Burns is a "minister of the gospel" because of his performance of various sacerdotal duties; however, we further hold that 26 U.S.C. § 107(2) is unconstitutional, as it violates the Establishment Clause.

Evanora Cruz

Evanora Cruz
District Court Judge
Southern District of Touroville

CIV. NO. 20-231

UNITED STATES COURT OF APPEALS
FOR THE EIGHTEENTH CIRCUIT

Internal Revenue Service and Commissioner of Taxation,	)
Appellants,	)
v.	)
John Burns,	)
Appellee,	)
and	)
Citizens Against Religious Convictions, Inc.,	)
Appellee-Intervenor	)

Decided: June 9, 2020

Decision and Order

Internal Revenue Service and Commissioner of Taxation (collectively, "Appellants") appeal from the order of the United States District Court for the Southern District of Touroville, denying summary judgment on two claims. First, the district court held that John Burns ("Appellee") is eligible to claim the parsonage exemption under 26 U.S.C. § 107 as a "minister of

the gospel." Second, the district court agreed with CARC's ("Appellee-Intervenor") claim that 26 U.S.C. § 107(2) is unconstitutional. The facts and procedural history of this case are set forth in the district court's opinion. The motion to intervene as a right and any contest of standing were not raised on appeal, thus this court will not address such issues.

Appellants raise two issues. First, is Appellee eligible to enjoy the parsonage exemption when he is not an ordained, licensed minister? Appellants claim that he is not, and the district court's ruling was contrary to the precedent set forth by the tax court. Second, Appellants argue that they are entitled to judgment as a matter of law because section 107(2) is constitutional, as it supports our county's long-standing principle against the intermingling of church and state, which naturally would result from a more intensive fact-finding mission of a religious entity or employee which would be required for the IRS to grant exemptions under a different section of the Code.

Since Appellee fails to prove that he was hired or regarded by his employer as a minister, and because section 107(2) serves the necessary purpose of removing state inquiry from church affairs, we reverse the district court's denial of summary judgment and grant summary judgment to Appellants on both claims.

Discussion

I. Appellee is not a "Minister of the Gospel"

The district court determined that courts may review a religious employee's status as a minister; we concur. Despite our similar stance on that matter, we disagree with the district court's evaluation of the facts and circumstances of this case and hold that Appellee is not a "minister of the gospel." Our holding is directed by IRS definitions and long-standing jurisprudence, and we decline to unnecessarily expand court precedent.

It is well-established that courts may be required to engage in a minimal degree of religious entanglement to determine the nature of a religious employee's position and whether it qualifies that person as a minister. *Gaylor v. Mnuchin*, 919 F.3d 420, 434 (7th Cir. 2019); *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190-91 (2012) (holding that fact-based analysis of a church-school employee was justified to determine if that employee, in fact, qualified as a minister.) We reiterate and clarify that our analysis in this matter is not to define "minister of the gospel," but rather to determine whether Appellee is a "minister of the gospel" based on the existing IRS definitions and federal case law under *Hosanna-Tabor* and *Gaylor*.

The Supreme Court has consistently recognized and deferred to the discretion of legislative bodies to shape definitions and classifications to form sound policies. *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). That broad discretion is especially crucial in the field of taxation because classifications are important for "fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden." *Id.* More than forty years after *Madden*, the Court reiterated that "legislatures have especially broad latitude in creating classifications and distinctions in tax statutes." *Regan v. Taxation with Representation*, 461 U.S. 540, 547 (1983). Those classifications are typically upheld if they "bear a rational relation to a legitimate governmental purpose." *Id.* While we are not of the opinion that the IRS "minister of the gospel" classification, itself, violates any precept of constitutionality, we rule only that Appellee does not fit the role.

In *Kirk v. Commissioner*, 425 F.2d 492, 495 (D.C. Cir. 1970), the D.C. Circuit upheld the tax court ruling that Appellant Kirk was not a "minister of the gospel" because he was not an ordained minister, had no sacerdotal functions "formally conferred upon him," and "no congregation or other body of believers was committed to his charge." The court made it clear that

its evaluation of Kirk's role was not simply predicated on whether he occasionally performed ministerial duties, but on whether he *actually* was a minister. *Id.* (emphasis added). The court expressed several ways in which a religious institution might convey its recognition of an employee as a minister (license, certification of ordination, or formal commission of duty to spread the gospel). *Id.* The employer did not hold Kirk out to be a minister since his work was not sacerdotal in nature and did not "involve the conduct of religious worship." *Id.* at 493. He was simply a board member of a division within the church. *Id.* Similarly, we find that Appellee was not commissioned with the charge of leading a congregation (or student body, as it was) in religious worship. He was not an ordained or licensed minister. Further, neither his classroom teachings nor his guidance counseling included the conduct of religious worship.

Likewise, in *Tanenbaum v. Commissioner*, 58 T.C. 1, 8 (1972), a Rabbi was found not to be a "minister of the gospel" for purposes of the housing exemption because his employment contract did not charge him with the conduct of religious worship or any other sacerdotal function. The tax court reasoned that, even though Tanenbaum may have performed some religious activities, he did so of his own volition, not because he was hired to do so. *Id.* This case also highlights the critical element of the religious employer's expectation of the employee when determining if they are ministers eligible for exemption under section 107(2). If the employer does not hold the employee out to be a minister with specific religious responsibilities, the employee is much less likely to succeed in proving his case for eligibility. Like the Rabbi in *Tanenbaum*, Appellee was hired to be a guidance counselor, a teacher of literature, and a teacher of foreign languages. None of these responsibilities is inherently sacerdotal in nature, involving the conduct of religious worship. Considering the fairly secular nature of his job functions, it would be inaccurate to say that his employer held him out to be a minister. Moreover, if Appellee conducted

any religious worship with his students, it was done of his own volition (like the Rabbi in *Tanenbaum*) and seemingly outside the scope of his employment.

Interestingly, in *Lawrence v. Commissioner*, 50 T.C. 494, 500 (1968), the tax court ruled that an ordained minister was not a "minister of the gospel" because there was insufficient evidence to show that the work he performed was equivalent to that of a minister performing traditionally sacerdotal functions. Lawrence was hired as Minister of Education, but stated that he occasionally filled in for the regular pastor during emergencies, and sometimes led the congregation in prayer along with other lay members of the church. *Id.* at 499. These occasions were too sporadic for the court to support a finding that the religious institution held him out to be a minister. *Id.* In the case at bar, we also find that Appellee has not presented sufficient facts to indicate that he should qualify as a "minister of the gospel" merely because occasional sacerdotal duties were performed. If the record indicates any acts of worship conducted by him, they were not significant enough to prove that he was categorized as a minister within the church-school.

In a light most favorable to Appellee, there is an argument to be made for the fact that, on many weekends, he gathered groups of students to commune and reflect on the week's religious services. However, our aim is not to determine whether he *ever* conducted religious worship. Our aim is to determine whether Appellee was hired to be a minister, and actually performed the functions of a minister. We hold that he was not and did not.

The district court relied heavily on two IRS decisions to determine that Appellee was a "minister of the gospel," but it failed to apply many of the factors set forth in those IRS rulings. A 1970 IRS ruling stated that where a parent-church exercises some control over a sister-school, the two entities are integrated, and any teacher or board member who exercises control over some aspect of the school is entitled to the parsonage exemption. Rev. Rul. 70-549, 1970-2 C.B. 16.

Later, in 1972, the IRS issued another ruling to clarify the previous one. It provided several factors to evaluate church-school integration for the purpose of the parsonage exemption. Those factors include: incorporation, the school's relationship with the church, the church's level of control over the school, the church's approval/removal of school administration, reporting of annual finances, and the church's financial contributions to the school. The lower court found the "incorporation" factor satisfied based on the fact that the school was similarly named to the church and was located on church grounds. We simply do not see sufficient evidence in the facts of this case to conduct a proper weighing of the factors. The lower court used the few factors it could identify to distinguish this case from *Flowers v. United States*, No. CA 4-79-376-E, 1981 U.S. Dist. LEXIS 16758, at *14-15 (N.D. Tex. Nov. 25, 1981) and drew numerous inferences based on these few factors. In *Flowers*, the court held that a professor was not entitled to the parsonage exemption because his responsibilities were non-sacerdotal and the university at which he was employed was not sufficiently integrated with its parent-church. *Id.* This case is analogous. There is insufficient factual evidence in the record to support a finding that the church and school (both named Whispering Hills) are integrated. For the foregoing reasons, we reverse the district court's finding that Appellee qualifies as a "minister of the gospel."

II. 26 U.S.C. § 107(2) is constitutional under the Establishment Clause

Section 107(2) respects the Establishment Clause and supports our nation's historical deference to the relationship between employer and employee. To support this finding, we must interpret the Establishment Clause according to its historic practices and understandings. *Marsh v. Chambers*, 463 U.S. 783, 790 (1983). An "unbroken practice" should not be lightly casted aside. *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 678 (1970). Exempting parsonage

property (church-sponsored housing) from gross income is a tradition that is deeply embedded in our nation's history. This tradition dates as far back as 1921, when Congress enacted the parsonage exemption. Many denominations compensated their ministers with either parsonages or cash housing allowances because the minister was viewed as a personification of his church. *Hosanna-Tabor*, 565 U.S. at 188. As such, a minister's housing was an extension of the church itself, used for various "religious purposes such as a meeting place for various church groups [or]…[to] provid[e] religious services." *Immanuel Baptist Church v. Glass*, 497 P.2d 757, 760 (Okla. 1972). Therefore, minister housing allowances have historically been understood to be provided for the church-employer's "convenience." *Williamson v. Comm'r*, 224 F.2d 377, 380 (8th Cir. 1955). Ministerial housing allowed the ministers to efficiently fulfill their religious duty, as well as the church's mission. *Eveland v. Erickson*, 182 N.W. 315, 319 (S.D. 1921).

In addition to aligning with the historic traditions of this nation, section 107(2) satisfies the *Lemon* test and thus, passes muster under the Establishment Clause. Under the *Lemon* test, "the statute must have a secular legislative purpose; its principal or primary effect must be one that neither advances nor inhibits religion; [and] the statute must not foster an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

Section 107(2) articulates secular purposes for granting housing allowances to ministers. One of the most important secular purposes for this statute is maintaining the separation between church and state. Congress's policy choice to ease the administration of the convenience-of-the-employer doctrine by applying a categorical exclusion is a secular purpose, not "motivated wholly by religious considerations." *Gaylor v. Mnuchin*, 919 F.3d 420, 429 (7th Cir. 2019). Section 107(2) is one of several tax code sections that provide exemptions to employees with work-related housing requirements. This particular section, however, is designed to limit government

interference "in the internal management of churches." *Schleicher v. Salvation Army*, 518 F.3d 472, 474-75 (7th Cir. 2008). So, it makes sense that the language of section 107(2) is intentionally broad because, as the *Hosanna-Tabor* Court explained, the church-minister relationship concerns "the internal governance of the church." *Hosanna-Tabor*, 565 U.S. at 188-90.

Another permissible purpose of section 107(2) is "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987). Section 107(2) is, on its face, less restrictive than other tax exemptions applied to secular employees. However, it allows churches to decide whether and how best to furnish parsonage to its ministers. Eliminating this section and forcing ministers to apply for exemption under one of the other employee housing sections would trigger excessive government involvement in the form of intricate tax inquiries. Engaging in such actions would, undoubtedly, interfere in the internal operations of religious organizations. Therefore, section 107(2) is a neutral statute which endorses the permissible purpose of "limiting governmental interference with the exercise of religion." *Id.* at 339.

Appellee-Intervenor argues that section 107(2) has the primary effect of granting a direct subsidy to churches and such "sponsorship" is prohibited by the Establishment Clause. To make a successful argument that the statute has the primary effect of subsidizing or advancing religion, Appellee-Intervenor must prove that the government has "advanced religion through its own activities and influence." *Id.* at 337. However, the Supreme Court has held that tax exemptions for religious institutions do not qualify as subsidies, regardless of the *incidental* "economic benefits" they may offer churches. *Walz*, 397 U.S. at 674-75. Property tax exemptions neither advance nor inhibit religion and therefore do not violate the second prong of the *Lemon* test. *Id.* at 672. A

housing exemption cannot be considered a subsidy because "the government does not transfer part of its revenue to churches…[it] simply abstains from demanding that the church support the state." *Id.* at 675. Permitting housing allowances to ministers in a way that puts them on equal footing with secular employees does not constitute government action or influence that advances or endorses religion.

Lemon states that government entanglement with religion is not, itself, unconstitutional, but it becomes so when the entanglement is excessive. *Lemon*, 403 U.S. at 614. To determine whether entanglement is excessive "we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the [government] provides, and the resulting relationship between the government and the religious authority." *Id.* at 615. *Lemon* especially warns against "'programs, whose very nature is apt to entangle the state in details of administration.'" *Id.* at 615 (quoting *Walz*, 397 U.S. at 695). Under the *Walz* framework, section 107(2) does not rise to the level of *excessive* entanglement because it specifically disassociates itself from the intricate tax inquiries that would be required under other possible tax exemptions.

Because of its well-established secular purpose, its non-advancement or inhibition of religion, and its lack of excessive entanglement between the government and the religious institution, section 107(2) satisfies the *Lemon* test and therefore, is constitutional.

Conclusion

ACCORDINGLY, we reverse the district court's order denying Appellants' motion for summary judgment and hold that Appellee is not a "minister of the gospel," and section 107(2) is constitutional. Appellants' motion for summary judgment is granted in its entirety.

NO. 20-199

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 2020

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

ORDER GRANTING CERTIORARI

John Burns (Petitioner) and Citizens Against Religious Convictions, Inc. (Petitioner-Intervenor) have filed a petition for certiorari in this Court from the Order of the Court of Appeals for the Eighteenth Circuit under Case No. 20-199.

IT IS HEREBY ORDERED that the petition for certiorari is granted.

Questions Presented

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