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- *Below is the original opinion. The update appears on page 5.*
- *We will keep you updated on the appeals process.*

Recent Housing Allowance Opinion - Its Contents and Reasoning

On October 6, 2017, U.S. District Judge Barbara B. Crabb of the Western District of Wisconsin found that 26 U.S.C. § 107(2) violates the establishment clause of the First Amendment to the United States Constitution. A copy of this decision (Gaylor v. Mnuchin) can be found here.

This is the second time that Judge Crabb has made such a finding, the first time occurring in 2013 in Freedom from Religion Foundation, Inc. v. Lew, 983 F. Supp. 2d 1051 (W.D. Wis. 2013). Her earlier opinion was overturned by the Court of Appeals for the Seventh Circuit on grounds that the plaintiffs in that case did not have standing to sue. Freedom from Religion Foundation, Inc. v. Lew, 773 F3rd 815 (7th Cir. 2014).

At issue in these cases is the constitutionality of § 107(2) of the Internal Revenue Code ("IRC"), which allows a "minister of the gospel" to exclude from gross income any "rental allowance paid to him as part of his compensation." The plaintiff organization, Freedom from Religion Foundation (FFRF) and some of its officers brought this lawsuit to challenge § 107(2) as a violation of both the First Amendment and the Equal Protection portion of the Fifth Amendment. The federal government is the defendant in the current case. Three individual ministers benefiting from the exclusion were allowed to be intervenor-defendants. (The plaintiffs originally included a challenge also to § 107(1), but the judge dismissed it on lack of standing reasons. Section 107(1) excludes from a minister's gross income "the rental value of a home furnished to [the minister] as part of his compensation.")

Generally, Judge Crabb followed the reasoning she espoused in the earlier 2013 opinion, finding that the section in question "violates the establishment clause because it does not have a secular purpose or effect and because a reasonable observer would view the statute as an endorsement of religion." Opinion, at 4. Because of this conclusion, she did not consider the alternative Equal Protection argument proffered by the plaintiffs.

The court dealt with the following issues in the opinion:

A. Standing.

One of the requirements to file suit in federal court is "standing," which requires plaintiffs to show that they actually suffer an "injury in fact" that is "fairly traceable" to a defendant's conduct, and that the injury can be redressed by a favorable decision by the court. Here, the IRS had denied the attempt to take the exclusion by the officers of FFRF, who freely admitted they were not "ministers of the gospel".

The Court was not, in the end, concerned about the fact that the denials came after the lawsuit was filed, since (§ 6532(a)(1) of the Internal Revenue Code allows the filing of a federal lawsuit either after a refund denial has been received or after "the expiration of six months from the filing of the claim to the IRS." The IRS had not responded to the individual plaintiffs' claims for over a year before the lawsuit was filed.

The intervenor-defendants tried a novel argument, contending the plaintiffs lacked standing to seek an injunction or declaration because they failed to produce evidence suggesting that the IRS will again deny the exemption in the future. This contention was premised on the fact that, for reasons unknown, two of the FFRF officers' requests for refunds were actually granted, without comment, for one of the tax years in question. The judge quickly dismissed this position, finding the most recent IRS action (the denial) to be more important in gauging the future than the earlier IRS allowance of a refund to the FFRF officers.

Having found the individual officers to have standing, Judge Crabb then found that FFRF also enjoyed the same status, under the doctrine of "organizational standing." This doctrine allows an organization to file a lawsuit if (1) at least one of its members otherwise has standing; (2) the interests at stake are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires an individual member's participation in the lawsuit.

B. Specific Issues

1. Secular purpose and effect

An important question in cases involving the establishment clause is whether the statute being analyzed has a secular purpose. This consideration often revolves around the "convenience of the employer" doctrine, the basic premise being that certain benefits can be tax exempt to the employee if the benefit somehow serves the convenience of the employer.

In the view of the judge here, "[t]he relevant question for this case is whether it was permissible for Congress to expand the convenience of the employer doctrine for ministers in a

manner that eliminated *any* requirement to show that their choice of housing actually is for the convenience of the employer." Opinion, at 20.

The government defendants proffered four allegedly secular purposes for special treatment for ministers, namely: (1) the need to provide for the "unique housing needs" of ministers; (2) eliminating discrimination among religions; (3) reducing entanglement between church and state; and (4) alleviating financial hardship on ministers.

Regarding the first argument, Judge Crabb found that § 107(2) was not part of any grand statutory treatment allowing exemptions to people who require particular housing for job-related reasons. Instead, she recognized that many different types of workers (for example, "healthcare providers, hotel manager, maintenance staff, funeral service directors and many others" – Opinion, at 23) need to live near where they work – but none of these groups have received a blanket tax exemption for housing expenses, like § 107(2) grants to ministers. Instead, each of the other categories of workers must meet the requirements of the "convenience of the employer" doctrine. Further cementing the judge's view was her observation that § 107(2) exemptions have been granted to people who work in a variety of positions, including a rabbi working as a teacher, a minister working as a guidance counselor or coach, or the entire faculty at a college. Based on this observation, the judge finds that ministers are receiving tax benefits that are not available to non-ministers doing the same jobs.

The argument that § 107(2) should be permitted to stand, since it was added to the Code to help ensure no favoritism among different denominations, was also unavailing. According to Judge Crabb (and perhaps foreshadowing a future opinion by her on § 107(1) should its constitutionality be brought by plaintiffs with appropriate standing to her court), § 107(1) goes well beyond simply codifying for ministers the "convenience of the employer" doctrine. Thus, according to her, the exemption in § 107(1) for ministers is broader than any exemptions others receive. While not opining specifically on the constitutionality (or lack thereof) of § 107(1), the court finds wanting the idea that "the government may eliminate a perceived disparity among religions by *creating* (or exacerbating) a disparity between religious persons and secular person." Opinion, at 28. Said another way, as Judge Crabb does in her opinion, "[I]f § 107(1) is discriminatory, then so is § 107(2)." Opinion, at 31. The judge goes on to bury defendant's contention by finding that § 107(2) was actually added to the Internal Revenue Code, not for the reasons espoused by the government in this case, but rather (citing the bill's sponsor) to "fight against" a "godless and anti-religious world movement." According to Judge Crabb, that is not a secular purpose.

Past courts looking at the constitutionality of statutes under the establishment clause sometimes look at whether the statute fosters "excessive entanglement" between government and religion. Here the defendants turned the "excessive entanglement" consideration on its head, arguing that § 107(2) avoids the entanglement that would occur should ministers be forced

to comply with the same rules (the convenience of the employer doctrine) that must be followed by secular employees. The judge was not convinced, finding that such a concern played no role in passage of what became § 107(2), and that there was no evidence presented by the defendants that having to follow the same rules as those governing secular employees would be more intrusive for ministers.

Finally, defendants contended that ruling § 107(2) unconstitutional would be a hardship on ministers and would interfere with the ability of churches to carry out their mission. Judge Crabb said she had no doubt many ministers earned less than they are worth, but noted that § 107(2) is not limited to those receiving low income. Indeed, given the higher marginal tax rates embedded in our federal income tax structure, wealthy ministers receive a bigger benefit that do poorer ministers. Finally, the judge cites a quote from a Department of the Treasury report: "There is no evidence that the financial circumstances of ministers justify special tax treatment. The average minister's compensation is low compared to other professionals, but not compared to taxpayers in general." Opinion, at 37.

2. Exemption versus subsidy.

The government also repeated an argument made in the earlier case, namely that tax exemptions are not considered by courts as strictly vis a vis the establishment clause as are tax subsidies. While seeming to agree with the general thrust of this contention, Judge Crabb finds that it does not follow that exemptions, like the one found in § 107(2), get a "pass" from establishment clause scrutiny. Opinion, at 38. While seemingly agreeing that the question to be asked is whether the exemption "alleviate[s] significant governmental interference with the ability of religious organizations to define and carry out their religious missions," she goes on to find that payment of taxes for receipt of housing allowances of a church employer does not qualify as a "significant governmental interference". Nor, according to Judge Crabb, was this exemption merely a "religious accommodation" alleviating special burdens on ministers. Opinion, at 38-39.

3. The history of religious tax exemption.

The intervenor-defendants contended that the judge should recognize that many religious tax exemptions have been held to be constitutional over the years. Judge Crabb did not find this history to be convincing, since the exemptions cited to the court were church property tax exemptions – not exemptions from income tax for church employees.

4. Effect on other statutes

The intervenors also contended that invalidating § 107(2) will "endanger scores of tax provisions throughout federal and state law." Opinion, at 41. Looking beneath the general assertion, however, Judge Crabb found that the only other tax provision cited by the intervenors was § 1402(e), which allows a self-employment tax exemption for ministers who are "conscientiously opposed to, or because of religious principles … opposed to, the acceptance … of any public insurance." Opinion, at 42. To Judge Crabb, this section is different from the one that is the subject of the case before her because: (a) it applies only when payment of the tax would violate a minister's religious beliefs; and (b) it applies only when the minister not only objects to payment of the tax but also to the receipt of public insurance.

C. Conclusion

Judge Crabb concludes that "any reasonable observer would conclude that the purpose and effect of § 107(2) is to provide financial assistance to one group of religious employees without any consideration to the secular employees who are similarly situated to ministers. Under current law, that type of provision violates the establishment clause." Opinion, at 43.

D. Open Issues still to be determined

Two issues remain to be decided by the judge in this case, namely: (a) what remedy should be ordered in this case. For example, she must decide whether she should order the government to refund money to these plaintiffs; and (b) should she stay the impact of her opinion pending any potential appeal of her decision (as she did after her 2013 decision). The parties were asked to file briefs on these two issues by October 30, 2017, with responsive briefing due November 8, 2017.

E. UPDATE

As mentioned previously, on October 6, 2017 U.S. District Judge Barbara B. Crabb of the Western District of Wisconsin found that 26 U.S.C. § 107(2) violates the establishment clause of the First Amendment to the United States Constitution. At that time there were still two issues to be decided, the remedy and whether or not the decision would be stayed pending any potential appeals. Judge Crabb issued an order on December 13, 2017 addressing these two issues. She enjoined the IRS from enforcing section 107(2), which is the section permitting a housing allowance for ministers of the gospel, but she stayed the injunction until 180 days after either the conclusion of any pending appeals or the failure to file an appeal by an party. This means that the clergy housing allowance is still available while any appeals are pending.

GCFA's Legal Services Department
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[NOTE: The Legal Services Department will continue to monitor this case and will update its analysis when necessary. Updates will be found at www.gcfa.org. If you should have any questions, please feel free to contact us at legal@gcfa.org.]