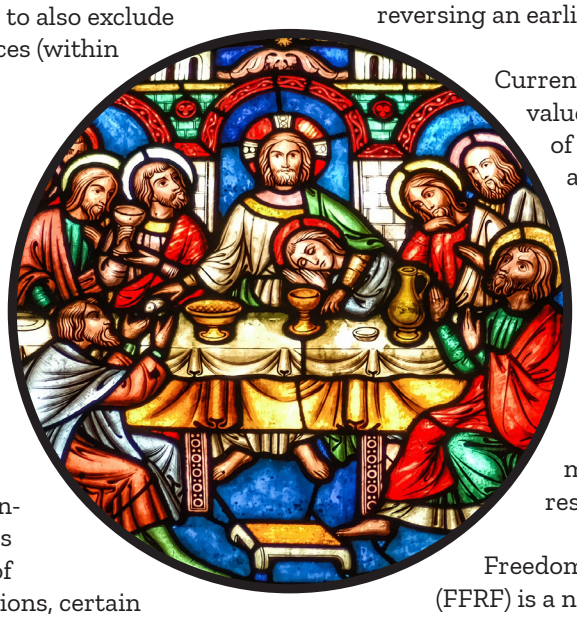
CLERGY HOUSING EXCLUSION RULED CONSTITUTIONAL IN CIRCUIT COURT CHALLENGE

By R. Dan Fesler, DBA, CPA, CMA, CIA, and Richard Rand Ph.D., CPA

As of the most recent U.S. Religious Census, there were more than 27,000 churches, synagogues, temples, mosques and other religious congregations in Texas. Since the 1920s, Code Section 107[1] has allowed ministers and other similarly situated religious officials in these congregations to exclude from income the value of in-kind housing provided by the religious organization. In the 1950s, Section 107[2] was added to also exclude ministerial cash housing allowances (within limits) from income.



In 2013, the exclusion for clergy cash housing allowances was ruled unconstitutional by a federal court in Wisconsin,[3] possibly setting the stage for eventual elimination of clergy housing exclusions nationally. On appeal in 2019, however, the 7th Circuit Court of Appeals ruled such exclusions are constitutional.[4] Going forward, further legal challenges to religion-friendly Section 107 are likely. This article provides a brief overview of Section 107 clergy housing exclusions, certain background information and discussion of the 7th Circuit Court's 2019 decision.

Background Information

Prior to the 1913 passage of the 16th Amendment, the government allowed tax exemptions for church property. After the passage of the 16th Amendment and the establishment of a federal income tax, the IRS established a rule that exempts employer-provided housing from being taxable, referred to as the "convenience-of-the-employer" doctrine. This would include housing provided to sailors aboard navy ships, on-base housing for other members of the military, work camp housing, etc. However, the doctrine was not made available for housing provided to ministers.

In 1921, Congress created an exemption for church-provided in-kind housing for ministers via what is now Section 107(1) of the tax code. Until the passage of Section 107(2) in 1954, however, there was no exemption for cash housing allowances paid to ministers. In a 1955 8th Circuit Court of Appeals decision, *Williamson v. Commissioner of the IRS*,[5] Section 107(2) was upheld, reversing an earlier Tax Court decision.

Currently, ministers may exclude the value of in-kind housing or the lower of (1) the amount of any cash housing allowance designated in advance by their employing organization, (2) the amount of the designated allowance actually used for housing, including utilities, furnishings and maintenance, or (3) the fair rental value of the housing (including utilities, furnishing and maintenance) the minister uses as his/her personal residence.

Freedom From Religion Foundation (FFRF) is a national nonprofit organization[6] opposing the exclusion of Section 107 ministerial housing allowances. FFRF has continuously and regularly engaged in legal actions challenging entanglement of religion and government, as well as government endorsement or promotion of religion. Per the FFRF website:

with more than 30,000 members ... (FFRF) works as an effective state/church watchdog and voice for free thought (atheism, agnosticism, skepticism).

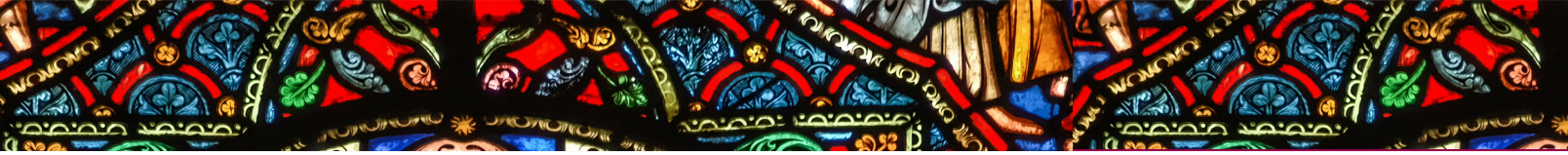
The FFRF website also provides a listing of its active lawsuits and recently won lawsuits.[7] FFRF lawsuits have challenged things like prayers at City Council meetings and in government-owned facilities, Ten Commandments monuments, Bible classes in public schools and distribution of New Testaments in public schools by the

Gideons International[8] organization. Annie Gaylor and Dan Barker (co-presidents of FFRF) were plaintiffs in the ministerial housing litigation reported on in this article.

As previously mentioned, a 2013 decision for the plaintiffs in the Federal Court for the Western District of Wisconsin ruled that Section 107(2) was a violation of the Establishment clause of the U.S. Constitution.[9] In 2011, to gain standing in the courts to challenge 107(2), Co-Presidents Gaylor and Barker had started receiving cash housing allowances from FFRF. They filed suit against the government (IRS) arguing that leadership of groups similarly situated to ministers (including FFRF leadership) should be entitled to housing allowance exclusions.

Upon commencement of the 2011 case, Gaylor and Barker had never actually claimed housing exclusions on their returns, arguing vigorously that they were NOT ordained, commissioned or licensed as ministers. Absence of the exclusion being formally denied caused significant delay of the issue being reheard at the appeals court level until 2018-2019.

In the 2013 case, the government indicated that Gaylor and Barker could have possibly successfully claimed the



exclusion given the broad interpretation and application of the statute's "ministers of the gospel" terminology. In support of this position, the government suggested that atheistic beliefs can sometimes play a role similar to traditional religious beliefs. The government also contended that the de-baptism certificates issued by FFRF (signed by Barker) were somewhat akin to a sacerdotal function in some organized religions.

Continuing with this line of reasoning, the government cited the fact that Gaylor had earlier been named by Wisconsin's *Madison Magazine* as Madison's favorite religious leader. To advance the case to the appeals level, it was necessary for Gaylor and Barker to file amended returns claiming exclusion of their housing allowances, which the IRS then denied. Denial of the exclusion, and the resultant injury, gave the plaintiffs legal standing for the circuit court to reconsider the lower court decision.

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Circuit Court's 2019 Decision

Court reasoning in the 2019 decision draws heavily from a three-prong test in the 1971 Lemon case.[10] There, it was ruled that to be constitutional, a statute must have a *secular purpose*, not advance nor inhibit religion, and not foster excessive government entanglement. The court also considered the *historical significance* test in making its decision.

Secular Purpose. The circuit court opined that Section 107 does have a secular purpose, in that it explicitly puts ministers on par with secular employees allowed housing exclusions under the Section 119(d) convenience-of-the-employer doctrine. The court cited several examples of other "carve-outs" for certain types of employees with special housing needs/arrangements.

Not all ministers benefitting from Section 107 housing exclusions use their homes in their ministries or as an extension of church property. The court recognized this fact and explicitly stated that Section 107, like certain other Code Sections, is therefore overinclusive. On this point, the court also indicated that Section 107, like certain other legal rules (that are also overinclusive), is imprecise and not required to be a perfect fit with all of reality.

The court further pointed out that the strict requirements of 119(d) are sometimes eased for the sake of administrative efficiency. Such easing eliminates the necessity of case-by-case analysis of relevant factors to determine the extent the minister's home is used in ministry and thus the percentage of housing allowances that are excludable. It was stated that Section 107 is not just a special tax benefit for ministers, but rather part of an overarching arrangement in the law for taxpayers (religious and secular) with employer-provided housing.

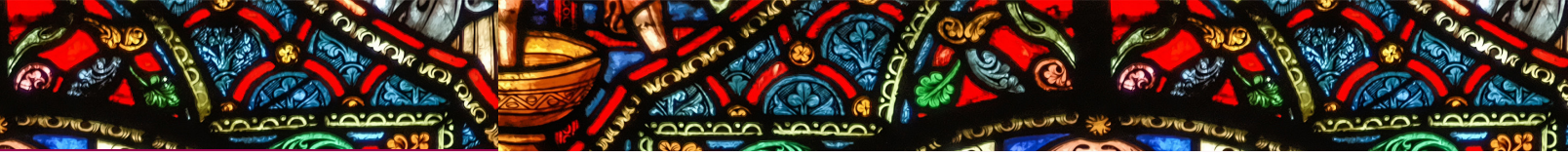
Neither Advances nor Inhibits Religion. From the 1953 record, the plaintiffs quoted the sponsor of Section 107(2), Representative Peter Mack, to make the point that the statute was meant to be a special benefit for ministers/religion from its inception:

Certainly, in these times when we are being threatened by a godless and antireligious world movement, we should correct this discrimination against certain ministers who are carrying on such a courageous fight against this foe.[12]

The "certain ministers" language in this quote refers to ministers receiving cash housing allowances as opposed to those provided in-kind church owned housing (e.g., parsonages).

The circuit court pointed out that Mack made other statements in 1953 endorsing passage of Section 107(2), due to its elimination of discrimination between ministers living in church provided housing vs. those living in housing they must pay for themselves (a valid secular purpose of legislation). Also, the court took the position that one statement by Mack did not necessarily establish his motive(s) for sponsoring Section 107(2). In addition, even if Mack's motivation was to enact a statute benefitting religion, the fact that the statute was voted on by a House of Representatives with 435 members precluded ascribing responsibility for the statute on religious motivations.

FFRF contended that a tax benefit or exemption for religious workers is identical to a government subsidy for religion and, thus, advanced religion. The circuit court dismissed this FFRF charge by quoting the Supreme Court:



The grant of a tax exemption is not sponsorship, since the government does not transfer part of its revenue to churches, but simply abstains from demanding that the church support the state.[13]

Excessive Entanglement. Per the circuit court opinion, as referred to above, the Section 107 bright-line rule allowing exclusion of ministerial housing allowances precludes any need for the government to intrude, on a case-by-case basis, on religious organizations by conducting inquiries into how, and to what extent, their facilities or resources are used for church business. The result is less government entanglement in religion than would exist absent Section 107.

Historical Significance Test. The court pointed out that the federal government has enacted federal tax exemptions for religious organizations as far back as 1802. In 2013, the district court's opinion ruling that housing exclusions were unconstitutional had distinguished 107(2) as an income tax provision, as opposed to the myriad of other state and federal religious exemptions (which number more than 2600 and relate predominantly to property taxes). The circuit court said this was "too fine a distinction." Rather, Congress, with Section 107, was simply continuing its historical practice of exempting certain church resources from taxation.

Exclusions Remain Constitutional

For now, Section 107 exclusions for ministerial housing remain constitutional. However, both the circuit court decision and the earlier federal district court decision remain instructive, as arguments on both sides of the issue will (no doubt) resurface in the courts. Will FFRF and its officials gain a rehearing of the issue with the U.S. Supreme Court?

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[1]U.S. Religious Census (2010), TexasCounties.net/statistics/churches2010.htm.

[2]Text of the tax code refers specifically to "ministers of the gospel." However, courts have consistently held that the statute applies to religious leaders of any denomination/religion regardless of formal title; e.g., for purposes of Section 107, a Jewish cantor is a "minister of the gospel," as well as Buddhist, Taoist and Secular Humanist religious leaders. Also, in this article, the term "church" includes temples, synagogues, etc.

[3]Freedom From Religion Foundation, *Gaylor and Barker v. United States of America.* U.S. District Court for the Western District of Wisconsin, Case No. 11-cv-0626.

[4]*Gaylor, et al., v. Mnuchin, et al.,* U.S. Court of Appeals for the Seventh Circuit, Case Nos. 18-1277 and 1280, (March 15, 2019).

[5]*Gideon B. and Audrey J. Williamson v. Commissioner of Internal Revenue*, 224 F.2d 377 (8th Cir. 1955).

[6]FFRF members nationwide select state representatives to the organization's Executive Board of Directors.

[7]For more on FFRF lawsuits, see https://ffrf.org/legal/challenges/ongoing-lawsuits.

[8]Gideons International is an association of Christian businessmen organized in 1908 to provide Bibles globally. The association has placed more than two billion Scriptures worldwide in more than 95 languages and 200 countries, territories and possessions.

[9]The Establishment Clause (separation of church and state) mandates equal treatment of different religious organizations and secular groups per *United States v. Lee*, 455 U.S. 252, 263 n2, 102 S. Ct. 1051, 71 L. Ed. 2nd 127 (182).

[10]*Lemon v. Kurtzman,* 403 U.S 602 (1971).

[11]Section 911 excludes housing above a certain level provided to citizens living abroad while Section 912 excludes housing provided to government employees. Other Code Sections exclude housing provided for employees away on business for less than a year and to current or former members of the U.S. military.

[12]Hearings before the Committee on Ways and Means: Statement of Hon. Peter F. Mack, Jr., on H.R. 4275, Concerning the Taxability of a Cash Allowance Paid to Clergymen in Lieu of Furnishing Them a Dwelling, 83d. Cong. 31, at 1576 (June 1953).

[13]Walz, 397 U.S. at 675.