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Seventh Circuit Holds the Parsonage Allowance Constitutional

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The parsonage allowance under Internal Revenue Code section 107(2), also known as the minister housing allowance, provides that a minister may exclude from his or her taxable income a "rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home." This exclusion has been subject to judicial challenge in recent years, primarily by an advocacy group known as the Freedom From Religion Foundation, but standing issues for plaintiffs were long a preliminary issue staving off greater judicial scrutiny. In 2017, however, to the great concern of a number of churches, a federal district court in Wisconsin ruled that there was "no secular justification" for the parsonage allowance, and that it, accordingly, violated the Constitution's Establishment Clause. *Gaylor v. Mnuchin*, 278 F. Supp. 3d 1081, 1096 (W.D. Wis. 2017). Appealed since then, on March 15, 2019, the United States Court of Appeals for the Seventh Circuit delivered its long-awaited decision and reversed the district court to hold that the parsonage allowance is constitutional. *Gaylor v. Mnuchin*, No. 18-1277, 2019 WL 1217647 (7th Cir. Mar. 15, 2019).

The Seventh Circuit's decision applied two tests: (i) the "three-prong test" from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which requires that a statute have "a secular legislative purpose," not have the "primary effect" of advancing or inhibiting religion, and "not foster an excessive government entanglement with religion;" and (ii) the "historical significance" test from *Town of Greece v. Galloway*, 572 U.S. 565 (2014), which looks to "historical practices and understandings." The Seventh Circuit concluded both tests were satisfied.

Applying *Lemon*, the Seventh Circuit held that the government had a "secular legislative purpose" in eliminating discrimination against ministers," given that Congress originally enacted the parsonage exception in response to an old Treasury Department interpretation that the "convenience of the employer" exclusions available to other employees (currently codified at Internal Revenue Code section 119(a)(2)), were not available to ministers. Although the parsonage allowance under section 107(2) is broader – excluding payments in cash as well as in kind, for example – the Seventh

Circuit held that "to the extent § 107(2) may be over inclusive, that alone does not render the statute unconstitutional." The Seventh Circuit also accepted the government's arguments that: (i) "providing the tax exemption only to ministers given in-kind housing tend[s] to exclude ministers of smaller or poorer denominations," and that "eliminat[ing] discrimination between ministers" is also a "secular legislative purpose;" and (ii) "exempt[ing] ministers from the proof requirements of § 119(a)(2) prevents the IRS from conducting intrusive inquiries into how religious organizations use their facilities," and "[s]eeking to avoid government entanglement is a secular legislative purpose." Finally, the Seventh Circuit held that the grant of a tax exemption does not involve the government advancing or inhibiting religion under the *Lemon* test, but instead merely allows religious organizations to advance religion.

With respect to the "historical significance" test, the Seventh Circuit noted that religious property tax exemptions have been in effect at the state level since the country's founding, and that Congress enacted the original parsonage exception shortly after the Sixteenth Amendment permitted Congress to levy an income tax. Accordingly, the court found no reason to find that section 107(2) violated the Establishment Clause under the historical significance test.

As the court finally concluded, "this tax provision falls into the play between the joints of the Free Exercise Clause and the Establishment Clause: neither commanded by the former, nor proscribed by the latter."

The issue may not end here, though. Plaintiffs recently advised the Associated Press that they were "weighing whether to ask the full 7th Circuit to review the case or take it to the U.S. Supreme Court."

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