



## Housing Allowance Case Update

### Executive Summary

On Friday, October 6, a federal district court judge ruled that the exclusion from taxation of a minister's cash housing allowance is unconstitutional. The exclusion allows a minister to exclude from taxable income a cash housing allowance designated and paid by his or her church. Wespath Benefits and Investments (Wespath) and the Church Alliance will continue to monitor the case.

### Background

Judge Barbara Crabb of the Federal District Court of the Western District of Wisconsin issued a declaratory ruling in *Annie Laurie Gaylor, Dan Barker, et al; and Freedom From Religion Foundation, Inc. v. Steve Mnuchin et al*. The court held that the cash clergy housing allowance exclusion under Internal Revenue Code Section 107(2) is **unconstitutional**, as an impermissible preferential treatment of religion under the Establishment Clause of the Constitution. Judge Crabb stayed entering her final judgment in the case to allow the parties a few weeks to brief the question of the appropriate remedies in the case (e.g., an injunction against the government, tax refunds to the plaintiffs, etc.). Importantly, the plaintiffs' challenge to Code Section 107(1), the "in-kind" housing exclusion for clergy, was dismissed from the case due to lack of standing. The opinion is available [here \(link\)](#).

### Wespath / Church Alliance Interest

Wespath is a member of the Church Alliance, a coalition of the chief executives of 37 church benefit boards representing mainline and evangelical Protestants, Jewish movements and Catholic schools and institutions. Wespath and the Church Alliance have an interest in this case because many retired clergy benefit from the cash housing allowance exclusion under Section 107(2). In addition, similar to other denominations' benefit plans, Wespath's retirement and other benefit plans are designed with assumptions based on Section 107(2). Wespath's Legal department and the Church Alliance's Core Lawyer Working Group will continue to monitor the case.

### History

The plaintiffs, the Freedom From Religion Foundation (FFRF) and some of its officers, pursued a similar claim in 2013, in the same court and before the same judge. In the 2013 case, Judge Crabb similarly ruled that Section 107(2) was unconstitutional. The government appealed that ruling to the Seventh Circuit U.S. Court of Appeals in Chicago. In 2014, the Seventh Circuit held that the plaintiffs did not have standing to challenge Section 107(2), because the plaintiff officers had not requested refunds of taxes paid on the housing allowance that FFRF provided them. In the current case, Judge Crabb ruled that the plaintiffs have cured their lack of standing from the earlier case, arguably having been denied refunds by the Internal Revenue Service.

## Wespath Housing Allowance Case Update (continued)

### Future Outlook

After the final judgement, there almost certainly will be an appeal to the Seventh Circuit. The federal government is typically obligated to defend federal statutes that are held unconstitutional. (Exceptions to this general rule are rare). Moreover, there are intervenors (several individual clergy) in the current case who have **stated (link)** that they will appeal the district court's decision. The intervenors are represented by the Beckett Fund, a First Amendment religious liberty legal aid organization, with significant appellate experience.

If Judge Crabb does not stay the effect of her final judgment to allow time for appeals, as she did in the 2013 case, the government or intervenors may seek a stay from the Seventh Circuit.

On appeal, the question of whether the plaintiffs have standing might still be argued by the parties, though the government conceded the issue in the district court. The Seventh Circuit is more likely to reach a decision on the underlying merits of the case. There likely will be numerous amicus briefs filed in the Seventh Circuit. In the 2013-2014 case, the Church Alliance filed an amicus brief in support of the government, which was joined by many of the headquarters offices or administrative offices of the Church Alliance pension board denominations. The Church Alliance again may consider filing an amicus brief on appeal in the current case.

Unless Judge Crabb makes her judgment immediately effective, the practical effect of any ruling will be delayed until the appeals are exhausted, which may take several years. Moreover, a final ruling could be prospective only in its application, depending on the court, or regulatory adjustments by the IRS in response. As the litigation proceeds, the Church Alliance will assess the viability of legislative options to remedy, if possible, or mitigate the impacts on clergy retirement and welfare benefits of such a ruling.

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