

Clergy housing allowance is constitutional, appeals court rules

## **Leaders of the Freedom From Religion Foundation argue that the allowance discriminates in favor of ministers.**

by [Adelle M. Banks](#) in the [April 24, 2019](#) issue



Dan Barker and Annie Laurie Gaylor, copresidents of the Freedom From Religion Foundation. [Some rights reserved](#) by [S Pakhrin](#).

A federal appeals court has ruled that the clergy housing allowance authorized by the Internal Revenue Service is constitutional.

The Freedom from Religion Foundation had argued successfully in a Wisconsin district court that the long-standing exemption for religious housing in the IRS tax code violated the First Amendment's establishment clause. But a three-judge panel of the Seventh US Circuit Court of Appeals reversed the lower court decision on March 15.

The FFRF argued that the allowance gives ministers and churches a financial benefit that is not available to secular nonprofit groups. But the court determined in a unanimous ruling that it did not overly entangle church and state.

"Any financial interaction between religion and government—like taxing a church, or exempting it from tax—entails some degree of entanglement," [wrote Judge Michael Brennan](#). "But only excessive entanglement violates the Establishment Clause."

He noted that the allowance also is not forbidden by the free exercise clause of the First Amendment.

Under current IRS regulations, clergy do not have to pay taxes on housing that is supplied by their congregation in a parsonage or on the portion of their salary that they use for housing expenses. FFRF claimed that the clergy housing allowance "renders unto God that which is Caesar's," Brennan said at the conclusion of the decision. "But 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."

Annie Laurie Gaylor, copresident of the association of atheists and agnostics, said FFRF is analyzing the ruling and has not made a decision about whether it will appeal.

"The housing allowance is so clearly a handout to churches and clergy, and it so clearly shows preferential treatment and discriminating in favor of ministers," Gaylor said.

The appeals court stated that the allowance is one of many rules that permit employees with work-related housing requirements to get a tax exemption. The court noted the IRS denied refunds for housing allowances to FFRF officials because they were not ministers.

It sided with the arguments of the Treasury Department, whose secretary, Steven Mnuchin, was a defendant in the case, that it treats religious employees in the same way as some secular ones. The court also held that the allowance had historical significance.

“For over two centuries, the states have implemented church property tax exemptions in various forms,” Brennan wrote. “When challenged on establishment grounds, such tax exemptions typically have been upheld.”

The decision cited a friend-of-the-court brief from the University of St. Thomas School of Law in Minnesota that said between 200,000 and 300,000 of some 384,000 US congregations provide a housing allowance to their ministers under the housing allowance rule.

Alliance Defending Freedom, whose attorneys filed a separate brief on behalf of 8,899 churches and ministers defending the allowance, hailed the decision.

“The power to tax is the power to destroy, and so refusing to tax a minister’s housing expenses is simply the best way to ensure the free exercise of religion and prevent the excessive entanglement of government with religion,” said Erik Stanley, ADF senior counsel.

The Joint Committee on Taxation estimates the housing exemption for ministers is worth about \$700 million a year.

FFRF is also suing the IRS over the revocation of its tax-exempt status, which occurred after Nonbelief Relief, its charitable arm, failed to file Form 990 for three consecutive years. In a complaint that the charity filed in October in a US district court, it objected to “churches and church-related organizations” not being penalized for failure to submit the informational form. —Religion News Service

**FOLLOWING UP (Updated July 9):** The Freedom from Religion Foundation declined to appeal its case against the clergy housing allowance to the US Supreme Court. The Madison, Wisconsin-based nonprofit promoting secularism opposes the Internal Revenue Service provision on the basis that it “preferentially favors the clergy as a special class, while penalizing those of us who are similarly situated in other 501(c)(3) organizations,” the FFRF wrote in a statement. It also contends the allowance harms taxpayers by giving clergy a tax benefit amounting to hundreds of millions of dollars a year. “We began this challenge years ago, when the composition

of the Supreme Court was very different,” the group wrote. “After ‘counting heads,’ we concluded that any decision from the current court would put the kibosh on challenging the housing allowance for several generations. . . . By ending our challenge at this time, the Freedom from Religion Foundation is making it possible for another challenge to be taken in the future.”

*A version of this article appears in the print edition under the title “Court upholds clergy housing allowance.”*