UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

ANNIE LAURIE GAYLOR; DAN BARKER; IAN GAYLOR, Personal Representative of the estate of ANNE NICOL GAYLOR; and FREEDOM FROM RELIGION FOUNDATION, INC.,

Plaintiffs,

v.

JACOB LEW, Secretary of the United States Department of Treasury; JOHN KOSKINEN, Commissioner of the Internal Revenue Service; and the UNITED STATES OF AMERICA,

Defendants,

and

EDWARD PEECHER; CHICAGO EMBASSY CHURCH; PATRICK MALONE; HOLY CROSS ANGLICAN CHURCH; and the DIOCESE OF CHICAGO AND MID-AMERICA OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA,

Intervenor-Defendants.

Case No. 16-CV-215

INTERVENOR-DEFENDANTS' BRIEF IN OPPOSITION TO DEFENDANTS' EXPEDITED MOTION FOR PROTECTIVE ORDER

The Government's Expedited Motion for a Protective Order is an unfortunate distortion of the issues at hand. Shortly after being granted intervention, Intervenors served a routine request for a Rule 30(b)(6) witness to testify on four issues at the heart of this case: (1) how the IRS applies 26 U.S.C § 107; (2) whether the IRS has

recently changed how it applies § 107 to atheists such as Plaintiffs; (3) how the IRS applies similar tax exclusions for employer-provided housing; and (4) whether the IRS has granted a tax exclusion to Plaintiffs under § 107. The first and third issues go to the core constitutional question in this case—namely, whether § 107 is an anomalous special benefit for ministers, or is instead part of a broad scheme of tax exemptions serving an "overarching secular purpose." *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 14-15 n.4 (1989) (plurality). The second and fourth issues go to whether Plaintiffs are actually suffering any continuing harm that gives them standing to maintain this lawsuit.

When the Government complained that these requests were not time-limited, Intervenors promptly amended their request in writing to impose limits. And when the Government offered new, shifting rationales for why the requests were still too broad, Intervenors expressed a willingness to limit the requests still further. Nevertheless, the Government took the position that it would not agree to provide a 30(b)(6) witness on *any* topic—even a topic as obviously relevant as the Government's own current interpretation of § 107(2).

Intervenors remain willing to work with the Government to facilitate compliance with the broad standard of Rule 26 while meeting the dispositive motion deadline of March 8. To that end, and for purposes of this motion, Intervenors offer to further narrow their request to the following topics:

1. Current IRS policies concerning application of the income exclusion in 26 U.S.C § 107, including its application to atheists, agnostics, or other non-theists;

2. Any changes since January 1, 2011, concerning application of 26 U.S.C. § 107 to atheists, agnostics, or other nontheists;
3. Current IRS policies concerning application of the income tax exclusions or deductions for the value of employer-provided housing or housing allowances under 26 U.S.C. §§ 119(a)(2), 119(d), 132, 162, 911, and 912; and
4. The IRS's response to any attempt by Plaintiffs to exclude or deduct income pursuant to 26 U.S.C. § 107 in their tax returns, including the reasons for the response and any related communications since January 1, 2011.

Accordingly, Intervenors respectfully request that this Court deny the Government's motion for a protective order and order the Government to supply a witness to testify at a 30(b)(6) deposition of the IRS. Intervenors further request that the Court schedule a telephonic hearing to resolve this issue in a timely fashion so that the deposition can proceed as planned on February 23.

BACKGROUND

On February 1, just 9 business days after this Court granted intervention, counsel for Intervenors served the Government with a Notice of Rule 30(b)(6) Deposition of the Internal Revenue Service. *See* Ex. 1, Decl. Hannah Smith ¶ 7; Ex. 2; Opinion & Order Granting Intervention, ECF No. 35 (Jan. 19, 2017). The Notice identified four matters for the deposition, all tied to the IRS's interpretation and application of tax exclusions and deductions for the value of employer-provided housing or housing allowances. *See* Ex. 2 at 2-3.

Since then, the Government has raised numerous and shifting objections to the IRS deposition, which Intervenors have diligently tried to address. The Government first objected that the deposition was too broad because the subject matter was not time-limited. Ex. 1 ¶ 8. In response, Intervenors offered to limit Topics 1 and 3 to

current policies and the discussions since January 1, 2009, that led to them. *See* Ex. 3 at 1; Ex. 1 ¶ 10. Topics 2 and 4 were already time-limited. *See* Ex. 2 at 2-3. The Government then argued that it would be too burdensome to prepare a witness before the deposition date because Topic 3 involved tax provisions other than 26 U.S.C. § 107. Ex. 1 ¶ 10. When Intervenors again offered to compromise by further limiting the discussion to the IRS's current interpretation and enforcement of § 107 only, the Government simply objected on another ground—that IRS policies for applying § 107 are somehow irrelevant in a case that challenges the constitutionality of § 107 facially and as applied. Ex. 1 ¶ 12.

The Government has also refused to provide a witness to testify regarding Plaintiffs' attempts to utilize § 107 and the IRS's application of § 107 to Plaintiffs. The Government initially said it would "work with" Intervenors to provide a witness on Topic 4, but also stated in the same conversation that some of the requested discovery was protected from disclosure by 26 U.S.C. § 6103. *See* Ex. 1 ¶ 8-12. In a later conversation, Government counsel stated that Topic 4 would have to be significantly narrowed, and even then the parties might not be able to reach agreement. *Id.* ¶ 11-12. These conversations left counsel for Intervenors with the impression that even if the Government were to provide a witness for Topic 4, the witness would likely refuse to answer most questions pursuant to § 6103. *Id.* ¶ 8-12. The Government has now confirmed counsel's impression by objecting to providing a witness to answer any questions about how the IRS applied § 107 to Plaintiffs. *See* Br. Supp. Expedited Mot. For Protective Order, ECF. No. 38 at 15.

ARGUMENT

This Court should deny the Government's motion for a protective order because the deposition topics, particularly as Intervenors have offered to restrict them, meet the broad standard of Rule 26. *See* Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . . ."). "Public policy favors disclosure of relevant materials." *Boehm v. Scheels All Sports, Inc.*, No. 15-cv-379-JDP, 2016 WL 6811559, at *2 (W.D. Wis. Nov. 17, 2016). First, the deposition matters all concern the Government's application of tax provisions that allow for the exclusion of income from employer-provided housing or housing allowances and are therefore relevant to the claims and defenses in this case. Next, they are proportional to the needs of the case because neither the constitutionality of § 107(2) nor Plaintiffs' standing to challenge it can be properly resolved without inquiry into how the IRS actually applies the tax code to housing allowances. Finally, the information Intervenors seek is not privileged because Plaintiffs are parties to this proceeding that relates to tax administration, and because the IRS's "treatment" of Plaintiffs' requests to utilize § 107 is "directly related to the resolution of an issue in the proceeding." *See* 26 U.S.C. § 6103(h)(4)(A)-(B).

A. The deposition matters are relevant both to the constitutionality of § 107(2) and to FFRF's standing to challenge it.

The deposition topics are relevant because they go to the heart of whether § 107(2) is constitutional and whether Plaintiffs have standing to maintain this lawsuit. Rule 26 allows discovery on matters that are "relevant to any party's claim or defense."

Fed R. Civ. P. 26(b)(1). The relevance requirement is construed "broadly" and creates a "low threshold." *Innogenetics, N.V. v. Abbott Labs.*, No. 05-C-0575-C, 2006 WL 6091309, at *1-2 (W.D. Wis. Aug. 14, 2006). "When the discovery sought appears relevant, the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure." *Sanyo Laser Prods. Inc. v. Arista Records, Inc.*, 214 F.R.D. 496, 499 (S.D. Ind. 2003). The Government cannot overcome that presumption here.

The IRS's application of § 107 (Topic 1) and the other tax provisions that deal with employer housing and housing allowances (Topic 3) are relevant because they relate to the "overarching secular purpose" in exempting certain housing benefits from taxable income. *Tex. Monthly, Inc.*, 489 U.S. at 14-15 n.4. The application of these other provisions shows "the context of § 107 within the larger Internal Revenue Code," and demonstrates that § 107 fits comfortably within the "convenience of the employer" doctrine. United States' Reply Br. Supp. Mot. Summ. J. at 19-20, *Freedom from Religion Foundation v. Lew*, 983 F. Supp. 2d 1051 (W.D. Wis. 2013) (No. 11-cv-626), ECF No. 53. In fact, the Government itself raised these very arguments the first time that FFRF challenged § 107 in this Court, citing the provisions other than § 107 some 28 times. *See* Br. Supp. Mot. Summ. J., ECF No. 44 at 37-40; Reply Br., ECF No. 53 at 19-20. Thus deposition Topics 1 and 3 easily clear the low bar of relevance.

In this facial and as-applied challenge to § 107(2), the IRS's policies for applying § 107 to nontheists (Topic 2) and the facts and circumstances surrounding its particular application to the Plaintiffs (Topic 4) are at the core of the case. If Plaintiffs cannot show that § 107 discriminates against nontheists, their claims will fail. If Plaintiffs have not been denied the ability to utilize § 107 *because* they are nontheists, their claims will fail. Relatedly, if Plaintiffs have been granted the ability to utilize § 107, despite the fact that they are nontheists, then their claims must be dismissed for lack of standing. Discovery related to these issues is particularly critical here, because Intervenors' desire to raise these issues is part of what allowed them to intervene as of right in the first place. While the constitutionality of § 107 may have already been litigated once, these issues have not. Topics 2 and 4 are clearly relevant.

B. The scope of the deposition is proportional to the needs of the case.

The deposition topics are proportional to the needs of the case because they are a direct, and perhaps the only, way to resolve some of the core issues in the case. In evaluating the proportionality of a discovery request, the Court considers "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). Each of the relevant factors weighs heavily in favor of Intervenors' request.

First, this case has enormous implications for Intervenors and countless other ministers nationwide, not just financially, but with respect to their ability to engage

in core First Amendment activities. *See* Opinion & Order Granting Motion to Intervene, ECF No. 35 at 6 ("No other group of people has the potential to be more significantly affected by this case than ministers such as the proposed intervenors and those they represent."). If § 107(2) is struck down, Intervenors will be forced to curtail, and perhaps even end, their religious ministries. Mem. Supp. Mot. to Intervene, ECF No. 22 at 8-16. And in assessing "proportionality," it cannot be ignored that the judgment in this case may have nationwide effect. *See Freedom From Religion Foundation, Inc. v. Lew*, 983 F. Supp. 2d 1051, 1073 (W.D. Wis. 2013) (entering nationwide injunction). If § 107(2) is enjoined nationwide, houses of worship across the country will face *$800 million* in new tax liability—representing a dramatic shift in the nation's historic relationship between church and state. *See* Staff of the Joint Committee on Taxation, 114th Cong., Estimates of Federal Tax Expenditures for Fiscal Years 2015-2019 at Table 1 (Comm. Print 2015).

Second, Intervenors noticed this deposition because they were unsuccessful in getting critical information through other means. The Government itself recognizes that "the IRS has relatively better access to information on how it has applied [§ 107] than do the intervenors." Br. Supp. Expedited Mot. For Protective Order, ECF No. 38 at 13. Yet despite Intervenors' requests, the Government's counsel has refused to disclose why the IRS appears to have granted Plaintiffs' request for a refund pursuant to § 107(2) in one year while denying it in another. Ex. 1 ¶ 5. Nor has it disclosed whether there have been any changes in IRS policy for applying § 107, changes that

may bear on the likelihood of Plaintiffs suffering any future harm. Only the Government can supply this information, and, so far, it has refused to do so.

Third, Intervenors' modest resources, *see* Mem. Supp. Mot. to Intervene, ECF No. 22 at 9-13, pale in comparison to those of the IRS.

And fourth, the fact that the deposition topics deal with core issues in the case demonstrates that any burden to the Government is outweighed by the likely benefit of the discovery in resolving this dispute. The Government's description of the burden it faces in preparing for this deposition is somewhat fanciful. Intervenors have already limited the timeframe of each deposition matter either to current policies or to relevant policy changes and other IRS actions since Plaintiffs challenged § 107 in this Court. And Intervenors do not expect the witness to have memorized hundreds of cases and administrative decisions. Presumably an Internal Revenue Agent who reviews a tax return in which the taxpayer has excluded income pursuant to § 107 is sufficiently aware of IRS policies for applying that provision that he or she is capable of processing the return. The Government likewise exaggerates the number of individuals from whom it would have to collect information. Intervenors have no interest in hundreds of thousands of employees' personal thoughts about § 107—rather, Intervenors need to know about *agency* policies and the *agency's* application of § 107 to Plaintiffs. Intervenors do not know which IRS agents reviewed Plaintiffs' tax returns or communicated with them about their use of § 107. But the IRS does. This is precisely the purpose of Rule 30(b)(6). *See* Fed. R. Civ. P. 26, advisory committee's note

to 1970 amendment (noting that Rule 30(b)(6) "will curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to personas in the organization and thereby to it.").

The scope of this deposition is therefore proportional to Intervenors' needs in the case.

C. Intervenors are not seeking privileged information in the IRS deposition.

Most of the Government's arguments relating to privileged information amount to tilting at windmills. Before the Government ever filed its motion, Intervenors had already offered to restrict Topics 1-3 to IRS policies and to omit the discussions that led to those policies. *See* Ex. 1 ¶ 12. Thus the deliberative process privilege and attorney client privilege are not implicated.

In addition, Intervenors have agreed to limit Topic 4 to the IRS's treatment of *Plaintiffs'* attempts to utilize § 107. The IRS can disclose a taxpayer's "return or return information . . . in a Federal . . . judicial . . . proceeding pertaining to tax administration . . . if the taxpayer is a party to the proceeding" or if "treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding." 26 U.S.C. § 6103(h)(4)(A)-(B). "Tax administration" means the "the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws . . . ." § 6103(b)(4)(A)(i). A lawsuit seeking to enjoin the enforcement of a section of the Internal Revenue Code certainly implicates "the execution and application of the internal revenue laws," and therefore "pertains to

tax administration." And because Plaintiffs are parties to this suit—indeed, brought it—§ 6103 allows the IRS to answer questions about its treatment of Plaintiffs' attempts to utilize § 107. Furthermore, the IRS can discuss its "treatment" of Plaintiffs' attempts to utilize § 107 because, as described in Sections A and B, the constitutionality of § 107 and Plaintiffs' standing to challenge it cannot be "resol[ved]" without this inquiry. § 6103(h)(4)(B).

The Government's own actions confirm that inquiry into the IRS's treatment of Plaintiffs' attempts to utilize § 107 is appropriate. In its initial disclosures, the Government gave Intervenors a copy of Annie Laurie Gaylor and Dan Barker's 2012 amended return and Anne Nicol Gaylor's 2013 amended return. *See* Ex. 4 at 59-63. But those disclosures do not answer why the IRS granted or denied Plaintiffs' refund requests and fail to tell the complete story of how the IRS has applied § 107 to Plaintiffs. The IRS deposition can help resolve this.

Intervenors have no desire to examine Plaintiffs' finances and tax returns writ large. Intervenors thus are not concerned with Plaintiffs' tax information that is unrelated to their use of and challenges to § 107, and have made that clear in their offer to amend their discovery requests. Likewise, to the extent that 26 U.S.C. § 6013 or any other statute requires the redaction of extremely sensitive information like Plaintiffs' Social Security numbers, Intervenors have no objection. But a contention by the

Government that § 6103 prevents it from disclosing *any* information about Plaintiffs' attempts to utilize § 107 cannot be sustained.[1]

CONCLUSION

For the foregoing reasons, Defendants' Expedited Motion for a Protective Order should be denied, and the Court should order the Government to designate one or more witnesses to testify on the deposition topics as Intervenor-Defendants have agreed herein to restrict them.

Dated: February 15, 2017

Respectfully submitted,

/s/ Hannah C. Smith

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[1] Finally, the Government's request for attorneys' fees is frivolous and should be denied. First, the Government has failed to brief this issue. Second, as explained above, the scope of the deposition is reasonable and complies with Rule 26, and Intervenors' request was therefore substantially justified. Third, it would be unjust to require Intervenors to pay the Government's expenses when Intervenors have consistently tried to address the Government's concerns in negotiations over the deposition's scope.