

IN THE UNITED STATES DISTRICT COURT FOR THE 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.

Case No. 3:16-cv-00215

STEVEN MNUCHIN, Secretary of the United States Department of Treasury; DAVID J. KAUTTER, Acting Commissioner of the Internal Revenue Service;¹ 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.

DEFENDANTS' DOCKETING STATEMENT

Pursuant to Circuit Rule of the United States Court of Appeals for the Seventh Circuit 3(c)(1), defendants Steven Mnuchin, Secretary of the United States Department of Treasury, David J. Kautter, Acting Commissioner of the Internal Revenue Service, and the United States of America submit this Docketing Statement.

¹ Pursuant to Fed. R. Civ. P. 25(d), the current Acting Commissioner of the Internal Revenue Service is substituted for the former Commissioner, John Koskinen.

I. Parties Appearing In Their Official Capacities

The Secretary of the Treasury and the Commissioner of Internal Revenue are appearing in their official capacities. The current occupant of the office of the Secretary of the Treasury is Steven Mnuchin. The current occupant of the office of the Commissioner of Internal Revenue (Acting) is David J. Kautter.

II. Prior Or Related Appellate Proceedings

In 2014, the United States appealed a judgment in a related case from the United States District Court for the Western District of Wisconsin to the United States Court of Appeals for the Seventh Circuit.² Nearly identical plaintiffs challenged the constitutionality of 26 U.S.C. § 107(2).³ Because the plaintiffs had not, at that time, personally been denied the benefit of § 107(2), the United States argued that the plaintiffs did not have standing to sue and that § 107(2) is constitutional. The district court ruled that the plaintiffs did have standing, which gave the court subject matter jurisdiction, and that § 107(2) was unconstitutional.⁴ The United States appealed on both grounds.⁵ The Seventh Circuit ruled that the plaintiffs lacked standing, and did not reach the issue of the constitutionality of § 107(2).⁶ The Seventh Circuit remanded the case to the district court with instructions to dismiss the complaint for lack of subject matter jurisdiction.⁷

In 2009, there was an appeal taken to the United States Court of Appeals for the Ninth Circuit in a related case that ended before any proceedings in the Western District of Wisconsin

² *Freedom From Religion Foundation, Inc. v. Lew*, No. 14-1152 (7th Cir.).

³ *Freedom From Religion Found., Inc. v. Lew*, 983 F. Supp. 2d 1051 (W.D. Wis. 2013).

⁴ *Id.*

⁵ *Freedom From Religion Found., Inc. v. Lew*, 773 F.3d 815, 818 (7th Cir. 2014).

⁶ *Id.*

⁷ *Id.*

began.⁸ The suit in the Eastern District of California challenged the constitutionality of, among other statutes, 26 U.S.C. § 107.⁹ In that suit, a minister who used the exclusion from income in § 107 sought to intervene in the proceedings to defend the statute.¹⁰ The district court denied his motion.¹¹ The minister appealed the decision.¹²

The Ninth Circuit affirmed in part and vacated in part the district court's decision.¹³ Soon thereafter, the United States moved to dismiss the Complaint for lack of jurisdiction.¹⁴ The parties then agreed to voluntarily dismiss the suit,¹⁵ and the suit was ordered dismissed¹⁶. Therefore, the district court did not have occasion to implement the mandate of the Ninth Circuit.¹⁷

III. Jurisdictional Statement

A. District Court's Subject-Matter Jurisdiction

Here, Plaintiffs challenged the constitutionality of 26 U.S.C. § 107, but were found to have standing to challenge only § 107(2).¹⁸ They invoked the jurisdiction of the District Court pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1346, 28 U.S.C. § 2201, and 28 U.S.C. § 1343.

Defendants agree that the District Court had subject matter jurisdiction to hear plaintiffs' claims under § 107(2).

⁸ See *Freedom From Religion Foundation, Inc. v. Rodgers*, No. 09-17753 (9th Cir.); *Freedom From Religion Foundation, Inc. v. Geithner*, Civ. No. 2:09-2894 (E.D. Cal.).

⁹ *Geithner*, Compl. (Oct. 16, 2009).

¹⁰ *Id.*, Mot. to Intervene & Mem. in Supp. (Oct. 22, 2009).

¹¹ *Id.*, Mem. & Order (Dec. 2, 2009).

¹² *Id.*, Notice of App. (Dec. 9, 2009).

¹³ *Rodgers*, Op. (May 9, 2011).

¹⁴ *Geithner*, Mot. to Dismiss (May 26, 2011).

¹⁵ *Id.*, Stipulation & Proposed Order (Jun. 17, 2011).

¹⁶ *Id.*, Order Dismissing Case (Jun. 20, 2011).

¹⁷ See *id.*, Mandate of USCA (Jul. 5, 2011) (entered after district court case closed).

¹⁸ ECF No. 15 at 3-4.

B. Appellate Court's Subject-Matter Jurisdiction

The District Court entered final judgment on December 15, 2017.¹⁹ The District Court's order disposes of all of the claims of all of the parties. Defendants filed a timely notice of appeal in the District Court on February 8, 2018.²⁰ Thus, the Seventh Circuit has jurisdiction to hear this direct appeal of a final judgment under 28 U.S.C. § 1291 with respect to the claims regarding § 107(2).

Dated: February 8, 2018

Respectfully submitted,

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¹⁹ ECF No. 96.

²⁰ ECF No. 100; 28 U.S.C. § 2107(b).

CERTIFICATE OF SERVICE

I certify that, on February 8, 2018, service of the foregoing DEFENDANTS' DOCKETING STATEMENT was made upon all parties by filing it with the Clerk of Court using the CM/ECF system.

/s/ Erin Healy Gallagher
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