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ANONYMIZED ORTHODOX JEWISH SCHOOL

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Dear Ploni,

I am writing in response to your inquiry concerning the question of whether Orthodox Jewish women—who are teaching at ANONYMIZED ORTHODOX JEWISH SCHOOL in RANDOM AMERICAN CITY and who have not previously been ordained as rabbis¹—qualify for parsonage when they perform duties identical to those performed by an ordained male rabbi. These might include, but are not limited to, teaching Judaic studies, supervising prayers, and providing religious counseling otherwise provided by rabbis in the school.

In my view, such women—when they perform these ministerial duties and are certified and commissioned as such by ANONYMIZED ORTHODOX JEWISH SCHOOL itself—are eligible for parsonage as ministers under IRS Code section 107 (26 USC §107). The section states:

- In the case of a minister of the gospel, gross income does not include—
1. the rental value of a home furnished to him as part of his compensation; or
 2. the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home.

Defining who is a Jewish "minister of the gospel," and thus eligible for parsonage under §107, is a quite difficult task for obvious reasons.

IRS Revenue Ruling 78-301, which concludes that cantors can be given parsonage, summarizes the law regarding Section 107 of the Revenue Code by stating as follows: in order to qualify for parsonage, a person's work must include "the performance of sacerdotal

¹ This is because the denomination does not ordain women in seminary for theological reasons.

functions, the conduct of religious worship, the administration and maintenance of religious organizations and their integral agencies, **and the performance of teaching and administrative duties at theological seminaries.**"

The IRS has recognized that standards for ordination vary from denomination to denomination, and that the functions of ministers vary from denomination to denomination. The IRS Revenue Ruling 78--301 further states:

[N]or is there a standard in the regulations that the ordination, commissioning, or licensing bestow the power to perform certain religious functions that could not be performed by another member of the congregation. When the individual's regular, full-time duties to the congregation are spiritual or religious in nature, such as leading the worship service, those duties are in the exercise of the ministry.

Based on that approach, the IRS has gone on to rule that a cantor, for example, even though not formally ordained, qualified for parsonage as a minister of the gospel, since the synagogue has hired him and commissioned him to be clergy. This was on account of a mere certification (which is not required by Jewish Law to function as a cantor) that they were trained as a cantor. While, undoubtedly, a cantor is untrained to conduct many of the services that a rabbi is trained to perform, and, indeed, the central qualification for being a rabbi (able to answer questions of Jewish law) is lacking in a cantor, nevertheless this person is considered by the IRS to be involved in the "performance of the sacerdotal rites of Judaism" and is thus a 'minister of the gospel' for section 107 purposes.

Centrally, what we have here is a law and religion problem in tax law. The definitions of "ordination," "commission," or "license" as applied in Revenue Ruling 78-301 in the sense of sacerdotal authorization that "bestows the power to perform certain religious functions that could not be performed by another member of the congregation" simply does not readily apply to the Jewish tradition, and even more so to women who function in such roles. Jewish Law differs centrally with other substantive religious legal systems (such as Canon law) that rigidly distinguish between lay and clergy leadership and which have thus refused to grant parsonage to lay women who minister to the community.²

The Jewish legal tradition centrally offers almost no examples of ecclesiastical functions

² The Jewish tradition contrasts sharply with the Catholic tradition on the role filled by ordination. In the Catholic tradition, valid ordination is a necessary component of priestly ministry. Only clerics may minister the sacraments of confession, the Eucharist, confirmation, or anointing. See Coriden, Green & Heintschel, *The Code of Canon Law: A Text and Commentary*, canon 965, canon 900, canon 882, canon 1003. The absence of a validly ordained cleric would result in the sacraments being invalidly administered. Only clerics, furthermore, may hold certain offices of governance within the Church (canon 274:1). The absence of a validly ordained bishop breaks this chain and results in Holy Orders being invalidly administered. Similarly, the absence of a validly ordained minister would result in the above-mentioned sacraments being invalidly administered. Only a subsequent juridic act, known as a *sanatio in radice*, a "curing from the roots," suffices to remedy this defect (see canons 1161-1165).

that can be performed **only by ordained rabbis**; it recognizes that lay leaders rise to the level of clergy in functionality, form, title and duties. Indeed, historically, cantors lacked any certification or ordination at all—many cantors to this day are uncertified. Even rabbinic ordination is a matter of custom or tradition in Jewish Law, rather than a formal mandate. Many great rabbis were never formally ordained; one can even head a rabbinical seminary in the Jewish tradition without formal ordination. Thus, an institution like ANONYMIZED ORTHODOX JEWISH SCHOOL should have no internal questions related to noting that sacerdotal authority in the Jewish tradition is defuse and the women certified and commissioned by ANONYMIZED ORTHODOX JEWISH SCHOOL itself as clergy do qualify for parsonage given the functional definition accepted by IRS Revenue Ruling 78-301.

Consider for example, a simple responsa found in Rabbi Moses Feinstein's *Iggrot Moshe*, Yoreh Deah 3:70. There, Rabbi Feinstein discusses whether a prominent scholar who was never formally ordained may be removed from his rabbinical pulpit merely because he lacks ordination. Rabbi Feinstein, the premier Jewish Law decisor in America of the last century, answers that such a person may not be removed from the rabbinate even if he lacks ordination. This is because this person has been functioning as one who is providing ecclesiastical guidance to those who have accepted his authority as one who is wise in matters of Jewish Law. Thus, this person is entitled to be the spiritual leader of the congregation even though, in fact, this scholar is without any rabbinical ordination.³ There is no doubt in my mind that the religious leader in this case also qualifies for parsonage under 26 USC §107

A school like the ANONYMIZED ORTHODOX JEWISH SCHOOL is not a congregation, but a parochial school and seminary devoted to the teaching of Judaic studies in conformity with the doctrines of Orthodox Judaism. This means that a person hired by the school who performs all of the functions performed by an ordained rabbi would qualify for parsonage as a minister under Section 107, when the school so certifies, commissions or ordains. This would allow women who teach Judaic studies, supervise prayers, and provide religious counseling of the kind provided by rabbis in the school to qualify for parsonage based on the centrally sacerdotal nature of their function within ANONYMIZED ORTHODOX JEWISH SCHOOL and the school's certification of such.

I would recommend that school explicitly add to the contracts of teachers that are eligible for parsonage the following language in their annual contract.

Your job to our institution is both spiritual and religious in nature, and includes such religious tasks as leading prayer services, conducted religious instruction, and many other tasks that entail religious function. You are commissioned as "clergy" as defined by 26 USC 107 at our religious

³ Indeed this result derives explicitly from the notations of Rabbi Moses Isserless (d. 1575) on the classical code of Jewish law, Shulchan Aruch, Yoreh Deah 245:22 which notes that one who lacks any formal external appointment to the rabbinate, but functions in a position of authority may not be removed readily. Similar such sentiments can be found in the responsa of Rabbi Isaac ben Sheshet Perfect (d. 1408) *Rivash* 271.

educational institution.

I explain this in more detail in my article entitled *Orthodox Yeshivas, Female Instructors, and the Parsonage Allowance*, which was published in: *Taxation of Exempts* 18:1 (July/August 2006), 44–8.

Of course, this legal analysis does not represent the views or positions of Emory University as an institution and is just my opinion.

Thank you very much.

Sincerely,

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