



## **I. A STIPULATED DISMISSAL DOES NOT REQUIRE DISMISSAL WHEN THERE IS A PROPER MOTION FOR INTERVENTION**

The primary argument made by the government and Reverend Warren against intervention is that a stipulated dismissal denies the court of jurisdiction and requires dismissal of the action. There are several reasons why this argument is incorrect in this context. First, *none* of the cases cited by the government or by Reverend Warren involves a situation in which there was a motion for intervention. Thus, none of the cases speaks to the issue before this Court: can a motion for intervention be granted when there is a stipulated dismissal? Can intervention be a basis for continuing a dispute, when the intervenor has standing and when the Court would have jurisdiction, even if the parties want to dismiss the action? Not a single case cited by the parties addresses this issue.

Second, this Court has recognized that there are circumstances in which intervention can be a basis for continuing a lawsuit, even when there is a stipulated dismissal. United States ex rel. McGough v. Covington Technologies Co., 967 F.2d 1391 (9<sup>th</sup> Cir. 1992); United States ex rel. Killingsworth v. Northrup Corp., 25 F.3d 715 (9<sup>th</sup> Cir. 1994). Although these cases arose in the context of *qui tam* suits, they are important because they involved situations in which a non-party to the action prevented dismissal by intervention even when the parties filed

a stipulated dismissal. These cases undermine the claims of the government and Reverend Warren that stipulated dismissal is automatic and support the position that intervention can prevent stipulated dismissals.

Third, the law is clear that intervention can provide a federal court with jurisdiction to continue a lawsuit, even when there otherwise would not be jurisdiction. This is crucial here because the claim is that intervention by Erwin Chemerinsky provides the Court with jurisdiction to resolve the constitutional issue presented: whether the parsonage exemption, in §107(2), is constitutional.

In Benavidez v. Eu, 34 F.3d 825, 830 (9<sup>th</sup> Cir. 1994), this Court stated: “In setting standards for determining when an intervening party may continue to litigate after the original party has been dismissed, most circuits have adopted the approach of Fuller v. Volk, 351 F.2d 323, 328-29 (3d Cir. 1965).” The government, in its opposition to the motion for intervention, quotes Fuller v. Volk as saying that “intervention will not be permitted to breathe life into a non-existent lawsuit.” Appellant’s Opposition to Amicus Chemerinsky’s Motion to Intervene, at 5. But the government omits the very next sentences in Fuller v. Volk, which were approvingly quoted in Benavidez v. Eu:

“However, a court has discretion to treat the pleading of an intervenor as a separate action in order that it might adjudicate the claims raised

by the intervenor. This discretionary procedure is properly utilized in a case in which it appears that the intervenor has a separate and independent basis for jurisdiction and which failure to adjudicate the claim will result only in unnecessary delay. By allowing the suit to continue with respect to the intervening party, the court can avoid the senseless 'delay and expense of a new suit, which at long last will merely bring the parties to the point where they now are.'" 351 F.2d at 328-329.

This quotation describes exactly the situation now before this Court. This Court can treat the pleading of intervenor as a separate action so as "to adjudicate the claims raised by the intervenor." There is a separate basis for jurisdiction: intervenor has standing, as a taxpayer, to invoke the federal question jurisdiction of this Court and to challenge the constitutionality of §107(2) as violating the Establishment Clause.<sup>1</sup> Moreover, dismissing the action now pending before the

---

<sup>1</sup>The government and the Warrens argue that this Court does not have jurisdiction because the Tax Court would not have had jurisdiction to consider a taxpayer's claim that §107(2) is unconstitutional. Appellant's Opposition, at 7-13; Appellee's Conditional Reply in Support of Stipulated Dismissal, at 11-12. This misses the point: this Court has jurisdiction to hear the taxpayer claim that §107(2) violates the Establishment Clause because it is a federal question properly within its jurisdiction under 28 U.S.C. §1331. This is exactly what Fuller v. Volk was referring to when it said that a court may consider claims raised by an intervenor when there is a "separate and independent basis for jurisdiction." 351 F.2d at 328-

Court will result in “senseless ‘delay and expense of a new suit, which at long last will merely bring the parties to the point where they now are.’” Dismissing this case will mean that intervenor will need to file a new action in federal district court challenging the parsonage exemption. All of the extensive briefing done in this Court will need to be duplicated and eventually, no matter what the district court decides, the matter will come back to the point where it is now: briefed and ready for a decision by the United States Court of Appeals for the Ninth Circuit as to whether §107(2) is constitutional.

The government labels this “preposterous” and says that it “would support, if not compel, intervention by constitutional scholars (and perhaps any other taxpayer as well) in every single case the Tax Court hears.” Appellant’s Opposition, at 16. The government’s hyperbole completely misses the point. There is an important unresolved constitutional question, which according to the briefs filed in this Court is of vital importance to religious institutions and clergy across the country: whether the parsonage exemption of §107(2) is constitutional. The issue has been fully briefed pursuant to this Court’s order. If this case is dismissed, the issue will not go away; it will be raised in a separate district court

---

329. The jurisdiction of the Tax Court is not determinative of this Court’s jurisdiction to hear matters that properly fit within the scope of its jurisdiction under the Constitution and federal statutes.

action. Dismissing this case would mean requiring duplicative briefing and litigation in the district court and then again in this Court to place the matter exactly where it is now. Allowing intervention here hardly would mean that constitutional scholars or taxpayers could intervene “in every single case the Tax Court hears.” This is obviously an unusual circumstance: Congress enacted a statute with the express intent of preventing this Court from deciding a question properly before it. Under these circumstances, when the issue remains and has been fully briefed, intervention to protect the Court’s jurisdiction serves the interests of this Court, of future litigants who would engage in wasteful duplicative litigation, of lower federal courts, and of clergy across the country who would benefit from a definitive resolution of the important constitutional question.<sup>2</sup>

---

<sup>2</sup>The government declares: “As a taxpayer, Professor Chemerinsky is certainly free to take his dispute to a district court, on his own dollar and his own time. What he may not do is force the Commissioner and the Warrens to continue litigating a nonexistent case in a court without competent jurisdiction, in order to yield an outcome that he alone desires.” Appellant’s Opposition, at 12-13. Amicus Erwin Chemerinsky is participating in this Court “on his own dollar and his own time,” having been appointed as an Amicus Curiae in this action. If a separate action is filed in the District Court, the United States Department of Justice would represent the government, just as they are doing here. Although the Warrens would not be part of that action, they already have filed their briefs here and, besides, obviously would be directly affected by its outcome. Most important, intervention means that there is a real case and controversy here: a taxpayer challenge to the constitutionality of §107(2), over which this Court has

Other cases as well have recognized that a court may “hear the case of the intervenor when the main case lacked jurisdiction if this would avoid unnecessary delay in bringing a new suit.” McKay v. Heyison, 614 F.2d 899, 907 (3<sup>rd</sup> Cir. 1980). Indeed, in McKay, the Third Circuit said that “[t]he fact that the case of the original plaintiff had been dismissed in the Court of Appeals did not prevent further consideration of the intervenor’s claims. More recently, in United States Steel Corp. v. EPA, 614 F.2d 843 (3<sup>rd</sup> Cir. 1979), we specifically allowed an intervenor to challenge on the circuit court level a regulation of the Environmental Protection Agency, even though the original petitioner was voluntarily dismissed in the Court of Appeals prior to consideration of the merits.” 614 F.2d at 907.

In Benavidez v. Eu, 34 F.3d at 830, this Court held that an intervenor may continue to litigate a matter after dismissal of the party who originated the action. This Court said: “This approach, permitting the intervenor to continue when 1) an independent basis for jurisdiction exists, and 2) unnecessary delay would otherwise result, is sensible and consistent with our existing precedent. The rule

---

competent jurisdiction because it presents a federal question. The government again misses the point: if this Court grants intervention, there then will be a case and controversy over whether the parsonage exemption is constitutional. The government’s desire to avoid having this Court address the issue, so that it can prevail in having the law upheld, should not be a basis for this Court denying intervention.

promotes judicial economy and preserves litigant resources, and we adopt it.” *Id.* at 831. As explained above, this justifies the Court granting intervention here, notwithstanding the stipulated dismissal, because there is an independent basis for jurisdiction and otherwise there would be needless delay which would waste judicial resources and those of litigants.

## II. THE REQUIREMENTS FOR INTERVENTION ARE MET

The requirements for both intervention as of right and permissive intervention under Rule 24 are met. The Memorandum in Support of the Motion to Intervene details why these requirements are fulfilled. The government and the Warrens make several arguments against intervention.

First, Rule 24 governs intervention in district courts. Appellees’ Conditional Reply, at 9. Of course, this is true, but the Supreme Court has expressly held that “the policies underlying [Rule 24] intervention may be applicable in appellate courts.” *Automobile Workers v. Scofield*, 382 U.S. 205, 217 n. 10 (1965). Admittedly, this is a unique situation, Appellees’ Conditional Reply at 10, but that does not undermine the appropriateness of intervention if the requirements of Rule 24 are met.

Second, both the government and the Warrens argue that intervention would not have been proper in the Tax Court. Appellee’s Conditional Reply, at 11. But

as explained above, the issue is not whether intervention in the Tax Court would have been appropriate; the question is whether intervention in this Court is proper. This Court has independent jurisdiction to hear the taxpayer challenge to §107(2) under its general federal question jurisdiction.

Third, the government and the Warrens argue that intervenor does not have a “significant protectable interest.” Appellant’s Opposition, at 14; Appellee’s Conditional Reply, at 13. However, the Supreme Court has expressly held that taxpayers have standing to challenge federal laws adopted by Congress under its taxing and spending power as violating the Establishment Clause of the First Amendment. Flast v. Cohen, 392 U.S. 83 (1968); Bowen v. Kendrick, 487 U.S. 589 (1988). The Supreme Court thus has recognized that taxpayers have a “significant protectable interest” in not having laws adopted under the taxing and spending power infringe the Establishment Clause. Section 107(2), and the Clergy Housing Clarification Act of 2002, unquestionably were adopted by Congress under its taxing and spending power.

The government claims that the reliance on Flast v. Cohen is “circular.” Appellant’s Opposition, at 14. Not at all: Flast clearly holds that taxpayers may challenge government laws adopted under the taxing and spending power as infringing the Establishment Clause. That is exactly what intervenor is doing here.

Nor are the Warrens correct in asserting that causation and redressability pose a standing problem here. Appellee's Conditional Reply, at 14. Intervenor claims that §107(2) is an impermissible "tax expenditure" – the very phrase used by Congress to describe it – which violates the Establishment Clause and that this injures him as a taxpayer. The injury is caused by the unconstitutional law and would be remedied by this Court invalidating the statute.

What neither the government nor the Warrens can deny is that the requirements for Rule 24 are met in this instance. Intervention as of right is appropriate under Rule 24 because intervenor has a "significant protectable interest," the disposition of the action "may, as a practical matter, impair or impede the applicant's ability to protect that interest," the application is timely, and obviously none of the existing parties will represent that interest. Donnelly v. Glickman, 159 F.3d 405, 409 (9<sup>th</sup> Cir. 1998).

Unquestionably, this is a unique situation. But common sense, as well as the law concerning Article III and intervention, warrant this Court granting intervention and deciding the constitutional question presented. There is a significant constitutional question before this Court; a taxpayer unquestionably has standing to raise it; the issue has been fully briefed and is ripe for

determination. This Court should grant the motion for intervention and decide the constitutional issue presented.

Respectfully submitted,



Erwin Chemerinsky  
University of Southern California  
Law School  
699 Exposition Blvd.  
Los Angeles, CA 90089-0071  
(213) 740-2539

**Certificate of Service**

I, Margaret Miller, certify that I am a citizen of the United States, over the age of 18 years, and not a party to this action. I certify that the following document, titled, "Reply to Opposition to Motion to Intervene," was sent by express mail service, postage prepaid, to the following:

Gilbert S. Rothenberg  
Andrea R. Tebbets  
Attorneys  
United States Department of Justice  
Tax Division  
601 D Street, N.W.  
Washington, D.C. 20004

Arthur A. Oshiro  
Saavedra & Zufelt  
Suite 2160  
One World Trade Center  
Long Beach, CA 90831-2160

Professor John Eastman  
The Claremont Institute Center  
for Constitutional Justice  
c/o Chapman University School of Law  
One University Drive  
Orange, CA 92866

Date:

6/17/02

Margaret A. Miller  
Margaret Miller