

**No. 00-71217**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**RICHARD D. and ELIZABETH K. WARREN,**

**Petitioners-Appellees**

**v.**

**COMMISSIONER OF INTERNAL REVENUE,**

**Respondent-Appellant**

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**ON APPEAL FROM THE DECISION  
OF THE UNITED STATES TAX COURT**

**OPPOSITION TO STIPULATED DISMISSAL AND NOTICE OF MOTION  
TO INTERVENE BY AMICUS CURIAE ERWIN CHEMERINSKY**

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The parties to this lawsuit, Richard D. and Elizabeth K. Warren, Petitioners-Appellees, and the Commissioner of Internal Revenue, Respondent-Appellant, have filed a stipulated dismissal of this lawsuit. The stipulated dismissal is a result of a federal statute, signed into law by President George W. Bush on May 20, 2002, which was enacted for the purpose of making this lawsuit moot.

Amicus Curiae Erwin Chemerinsky hereby opposes the stipulated dismissal and notifies this Court and the parties to this action that he will file a motion to intervene within seven days. For the reasons stated in the attached Declaration of Erwin Chemerinsky, it is requested that the Court not dismiss this action until it has the opportunity to consider the motion for intervention to be filed by Erwin Chemerinsky.

Respectfully submitted,

*Erwin Chemerinsky*

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## DECLARATION OF ERWIN CHEMERINSKY

I, Erwin Chemerinsky, hereby declare:

1. On March 5, 2002, this Court appointed me as an Amicus Curiae in this appeal to brief three questions

1) Does the Court have the authority to consider the constitutionality of IRC section 107(2)?

2) If so, should the Court exercise that authority?

3) Is section 107(2) constitutional under the Establishment Clause?

2. Pursuant to the Court's order, on May 3, 2002, I filed a brief in this Court addressing these issues. The parties to this action, Richard D. and Elizabeth K. Warren and the Commissioner of Internal Revenue, also filed briefs addressing these questions. Several other amicus curiae briefs also were filed. By order, of this Court, reply briefs are due on Friday, May 24, 2002.

3. On Monday, May 20, 2002, President George W. Bush signed into law a bill that was enacted with the express purpose of making this case moot. The bill continues the parsonage exemption found in Internal Revenue Code section 107(2), but prospectively adopts the government's position that the parsonage exemption is limited to the fair rental value of the property.

4. On Monday, May 20, 2002, I was notified by the attorneys for the parties, Andrea R. Tebbets (Attorney, Department of Justice) and John Eastman (Attorney for Richard D. and Elizabeth K. Warren) that they are filing a stipulated dismissal of this action.

5. The new statute does not resolve the constitutional issue properly raised by this Court. As amended, section 107(2) continues to provide "ministers of the gospel" an enormous financial benefit not available to any other taxpayers. As explained in the Amicus Brief of Erwin Chemerinsky, providing such a benefit to clergy and religious institutions that employ them violates the Establishment Clause of the First Amendment.

6. This case is not rendered moot by the new statute because the constitutional issue remains and because it is well established that voluntary cessation of an illegal practice is not sufficient to make a case moot. See, e.g., *Mesquite v. Aladin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-633 (1953); *Public Utilities Commission v. Federal Energy Regulatory Commission*, 100 F.3d 1451, 1460 (9th Cir. 1996); *Barilla v. Evans*, 886 F.2d 1514, 1519 (9th Cir. 1989).

7. In light of the new law and the stipulated dismissal of the parties, Amicus

Curiae Erwin Chemerinsky plans to file a motion to intervene in this lawsuit to challenge the constitutionality of Internal Revenue Code section 107(2).

A. Erwin Chemerinsky has standing as a taxpayer to challenge the constitutionality of section 107(2). As the government correctly stated in its Supplemental Brief: "In *Bowen v. Kendrick*, 487 U.S. 589 (1988), and *Flast v. Cohen*, 392 U.S. 83 (1968), the Supreme Court held that taxpayers may bring a challenge under the Establishment Clause to the use of the federal taxing and spending power." Supplemental Brief for the Appellant Pursuant to the Court's March 5, 2002 Order, at 11.

B. Intervention by Erwin Chemerinsky will preserve a justiciable controversy in this matter. As the Supreme Court observed in discussing the mootness doctrine: "The imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions." *United States Parole Commission v. Geraghty*, 445 U.S. 388, 403-404 (1980). These requirements are met here because the constitutionality of the parsonage exemption contained in section 107(2) is presented in a concrete factual situation and the many briefs filed on May 3, 2002, show that there certainly are "self-interested parties vigorously

advocating opposing positions."

C. As will be argued in the motion to intervene, intervention at stage is appropriate under Rule 24 of the Federal Rules of Civil Procedure and the decisions of this Court. Indeed, this Court has recognized that it is permissible for those not parties in the lower court to intervene for purposes of appeal. See, e.g., *State of Alaska v. Suburban Propane Gas Co.*, 123 F.3d 1317 (9th Cir. 1997); *Legal Aid Society of Alameda County v. Brennan*, 608 F.2d 1319 (9th Cir. 1979).

8. I will file a motion to intervene in this matter within seven days, by May 29, 2002. This Opposition to Stipulated Dismissal and Notice of Motion to Intervene is filed so as to request that this Court not dismiss this matter prior to considering the motion to intervene.

Respectfully submitted,

*Erwin Chemerinsky*

Erwin Chemerinsky

**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, "Opposition to Stipulated Dismissal and Notice of Motion to Intervene of Amicus Curiae Erwin Chemerinsky," was sent by express mail service, postage prepaid, to the following:

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Margaret A. Miller  
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