

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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RICHARD D. WARREN AND  
ELIZABETH K. WARREN,

*Petitioners-Appellees,*

v.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent-Appellant*

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No. 00-71217

APPELLEES' CONDITIONAL REPLY IN SUPPORT OF  
STIPULATED DISMISSAL AND CONDITIONAL  
OPPOSITION TO AMICUS CURIAE'S MOTION TO INTERVENE

**INTRODUCTION**

On May 22, 2002, the parties filed a Stipulation of Dismissal because, as the result of legislation enacted by Congress and signed into law by the President on May 20, 2002, the Internal Revenue Service no longer had the legal authority to seek a deficiency judgment from the taxpayer Appellees in this case. *See* Clergy Housing Clarification Act of 2002, P.L. 107-181, 116 Stat. 583 (May 20, 2002) (copy attached to Stipulation of Dismissal as Ex. A). Because there is no longer a case or controversy, and because the stipulation of dismissal complied with the terms of FRAP 42(b) and did not require additional action by this Court, the only appropriate action was for the court clerk to enter the stipulation of dismissal—a

ministerial task that the Court clerk performed on May 23, 2002. *See* F.R.A.P. 42(b).<sup>1</sup> This case is thus terminated, and no further action is warranted or even permitted.

Despite the obvious mootness and termination of this Court's jurisdiction, the court-appointed amicus curiae, Erwin Chemerinsky, filed an opposition to the parties' stipulation of dismissal on May 22, 2002, together with a notice of intent to file a motion to intervene. Professor Chemerinsky subsequently filed a motion to intervene on May 29, 2002—a week after the parties had filed their stipulated dismissal terminating this case. Although it is Appellees' position that this Court does not have jurisdiction even to entertain Professor Chemerinsky's opposition or motion to intervene, both have been entered on the case docket. Accordingly, Appellees file this conditional reply in support of the stipulation of dismissal and conditional opposition to Professor Chemerinsky's motion to intervene.

For the reasons more fully articulated below, Professor Chemerinsky's highly unusual actions have no legal basis. As an amicus curiae, he has no standing to oppose the stipulation of dismissal filed by the parties, and his attempt to intervene in this dispute between the Internal Revenue Service and an individual taxpayer is not only without merit but comes too late in the day to be given serious consideration. More fundamentally, Professor Chemerinsky's attempt to keep alive a controversy in this case over an issue that the parties have never disputed is precisely the kind of officious intermeddling that the courts have long warned against, and against which the jurisdictional limits contained in Article III are

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<sup>1</sup> The signed stipulation of dismissal was transmitted to the court clerk in the same overnight package as Appellees' Motion to Suspend Briefing, which was entered on the docket as filed on May 22, 2002.

designed to protect. Professor Chemerinsky’s attempt to manufacture and perpetuate a constitutional case out of this routine tax dispute should be rebuffed; indeed, this Court does not even have jurisdiction to consider it.

## ARGUMENT

### I. The Court No Longer Has Jurisdiction Over This Case.

#### a. Rule 42(b) Stipulations of Dismissal that do not require the Court to issue a mandate or other process should be entered by the clerk as a matter of course.

Rule 42(b) of the Federal Rules of Appellate Procedure provides three mechanisms for dismissing an appeal: First, “[t]he circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due”; second, the parties can file a stipulation of dismissal requiring some action by the court (such as vacating a lower court ruling), “[b]ut no mandate or other process may issue without a court order”; and third, “[a]n appeal may be dismissed on the appellant’s motion on terms agreed to by the parties or fixed by the court.” FRAP 42(b).

In the latter two contexts, court action is often required, and the court has discretion whether or not to enter the dismissal on the terms proposed by the parties, or in some circumstances even whether to enter the dismissal at all. *See, e.g., American Auto. Mfrs. Ass’n v. Commissioner, Mass. Dept. of Env’tl. Protection*, 31 F.3d 18, 23 (1st Cir. 1994); *Shellman v. United States Lines, Inc.*, 528 F.2d 675, 677-78 (9th Cir. 1975); *Blount v. State Bank and Trust Co.*, 425 F.2d 266 (4th Cir. 1970). Absent the consent of all parties to the appeal and full agreement about the allocation of costs, such motions for dismissal are not routine

and are not to be treated by the clerk as a routine motion that can be entered without the court's involvement. *Margulin v. CHS Acquisition Corp.*, 889 F.2d 122, 124 (7th Cir. 1989).

But in the first context—a stipulated dismissal of an action by all the parties to the action that requires no further action by the court, such as the stipulated dismissal at issue here—dismissal should be (indeed, already has been) entered by the circuit court clerk simply as a ministerial matter. *See, e.g., Wallace v. Department of Navy*, 64 F.3d 671 (Fed. Cir. 1995). As the Third Circuit has held, once the parties have filed such a stipulation, “no action by [the] court is necessary or contemplated under this route. The parties may make whatever arrangement they agree on and need not notify or involve the court of appeals panel.” *Clarendon Ltd. v. Nu-West Industries, Inc.*, 936 F.2d 127, 128 (3rd Cir. 1991);<sup>2</sup> *see also Margulin*, 889 F.2d at 124 (describing such stipulated dismissals as “a routine motion” to be entered by the court clerk).

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<sup>2</sup> Rule 42(b) was amended in 1998. At the time *Clarendon* was decided, Rule 42(b) read as follows:

If the parties to an appeal or other proceeding shall sign and file with the clerk of the court of appeals an agreement that the proceeding be dismissed specifying the terms as to payment of costs, and shall pay whatever fees are due, the clerk shall enter the case dismissed, but no mandate or other process shall issue without an order of the court. An appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the court.

Fed. R. App. P. 42(b) (1967). The Advisory Committee that proposed the amendment noted that the changes were “intended to be stylistic only,” however, so the 1998 amendment does not affect the holding in *Clarendon*. *See* Fed. R. App. P. 42 advisory committee's note (1998).

Professor Chemerinsky's opposition to the stipulation of dismissal does not alter this conclusion. Professor Chemerinsky is a court-appointed amicus curiae. "An amicus curiae is not a party to litigation." *Miller-Wohl Co., Inc. v. Commissioner of Labor and Indus., State of Montana*, 694 F.2d 203, 204 (9<sup>th</sup> Cir. 1982) (citing *Clark v. Sandusky*, 205 F.2d 915, 917 (7<sup>th</sup> Cir.1953)). To be effective, a stipulation of dismissal need only be filed by the *parties* to the litigation, not by amici curiae. Fed. R. App. P. 42(b). The clerk's entry on May 23, 2002 of the stipulation of dismissal signed by all the parties is thus all that was required to terminate this case. Counsel for Appellees are unaware of *any* relevant case to the contrary, in this circuit or elsewhere.<sup>3</sup> Indeed, in a comparable situation, this Court perfunctorily denied a motion to intervene for purposes of recalling the mandate after the case had been dismissed. *Alpha Therapeutic Corp. v. Kyokai*, 237 F.3d 1007 (9<sup>th</sup> Cir., Jan. 12, 2001); *id.*, No. 98-55642 (PACER Dkt. Entry for 6/19/01 denying motion to appear as amicus and/or intervene for purposes of moving to recall the mandate). Professor Chemerinsky's motion warrants the same treatment.

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<sup>3</sup> Professor Chemerinsky has cited two cases where this Court allowed intervention to challenge a stipulated dismissal, which he claims involve "exactly the situation presented here." Mot. to Intervene, at 11, citing *United States ex rel. Gibeault v. Texas Instruments*, 25 F.3d 725 (9<sup>th</sup> Cir. 1994), and *United States ex rel. Killingsworth v. Northrup*, 25 F.3d 715 (9<sup>th</sup> Cir. 1994). Both cases are qui tam actions, in which "the government is the real party in interest." *Killingsworth*, 25 F.3d at 720. That the real party in interest should be permitted to intervene to challenge a stipulated dismissal that would foreclose its right to recover for false claims submitted to it is far from the situation presented here. Indeed, this Court expressly acknowledged that the qui tam statutory scheme is "unique in the law." *Id.* at 720 n.2. Those cases are thus entirely inapposite.

**b. The Filing of A Stipulated Dismissal Moots The Case, Thus Depriving this Court of Jurisdiction.**

When the parties executed and filed their stipulated dismissal, this case became moot. *See, e.g., Stewart v. Southern Ry.*, 315 U.S. 784 (1942).

As a result, this court no longer has jurisdiction, and the only permissible action was for the stipulation of dismissal to be entered, as the court clerk did on May 23, 2002.

This Court has previously recognized that “[w]hen, during the pendency of an appeal, a case becomes moot, so that there is no longer any case or controversy before this court, there is a loss of jurisdiction; this lack of jurisdiction results from the constitutional limitation contained in Article III, § 2 of the Constitution.”

*Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720, 721 (9th Cir. 1982) (quoting *Cover v. Schwartz*, 133 F.2d 541, 546-47 (2d Cir. 1942)). The mootness limitations of Article III require that the controversy *remain* alive on appeal—not merely that the controversy was real when it was decided by the court whose decision is under review. *Blair v. Shanahan*, 38 F.3d 1514, 1518-1519 (9th Cir. 1994). Indeed, to hold otherwise would be to permit this Court to issue advisory opinions, contrary to one of the most firmly-established commands of the Constitution. *See Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792); *see also* E. CHEMERINSKY, FEDERAL JURISDICTION at 48 (“the prohibition on advisory opinions is at the core of Article III”).<sup>4</sup>

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<sup>4</sup> *Benavidez v. Eu*, 34 F.3d 825, 829 (9<sup>th</sup> Cir. 1994), cited by Professor Chemerinsky in his Motion to Intervene, at 12, is not to the contrary. In *Benavidez*, a group representing “Latino California residents” had intervened in a lawsuit by California’s congressional delegation challenging the 1991 reapportionment. The suit was dismissed on *Younger* abstention grounds because of ongoing state court proceedings. Unlike the mootness at issue here, this Court

To be sure, the courts have recognized several exceptions to the mootness doctrine: 1) cases involving collateral consequences to the parties, *see Sibron v. New York*, 392 U.S. 40, 53 (1968); 2) cases capable of repetition yet evading review, *see Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 514-15 (1911); 3) the defendant's voluntary cessation of the allegedly improper behavior, *see United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953); and 4) class actions in which the case has become moot only with respect to the named plaintiffs, *see Sosna v. Iowa*, 419 U.S. 393, 399 (1975). None of these exceptions apply here.

Professor Chemerinsky only even purports to rely upon one of the recognized mootness exceptions: voluntary cessation of an allegedly illegal practice. *See* Opp. to Stipulated Dismissal and Notice of Motion to Intervene By Amicus Curie Erwin Chemerinsky ¶ 6 (filed May 22, 2002). That exception is clearly inapposite here. Indeed, the grievance motivating Professor Chemerinsky's highly unusual attempt to intervene in this moot case is that the Government *continues to permit* ministers to take the parsonage housing allowance provided in Section 107(2) of the Internal Revenue Code, contrary to Professor Chemerinsky's personal view of the Establishment Clause. Professor Chemerinsky's objection to dismissal clearly does not fit within the "voluntary cessation" exception to mootness, and none of the cases he cites even remotely supports his contention to the contrary.

Nor does it matter that the stipulation of dismissal filed by the parties, which rendered this case moot, resulted from an Act of Congress that was adopted "with the express purpose of making this case moot," as Professor Chemerinsky has

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specifically acknowledged in *Benavidez* that "*Younger* abstention is *not* jurisdictional." *Id.* at 829.

asserted. *See* Motion to Intervene, at 2. In *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1868), the Supreme Court dismissed a *habeas corpus* action after Congress repealed the statutory provision giving the Court jurisdiction over such appeals. Even where the Congress may have acted in order to avoid an adverse ruling, the Court held that it could not exercise jurisdiction where that jurisdiction had been legally revoked. “We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.” *Id.* at 514.

Professor Chemerinsky also asserts that the case “is not rendered moot by the new statute because the constitutional issue remains.” *Opp. To Stipulated Dismissal*, at ¶ 6. Of course, there never was a constitutional issue in this case. Neither of the parties ever raised the Establishment Clause issue to which Professor Chemerinsky refers, and this Court never decided that it even had jurisdiction to reach it, *see* March 5, 2002 Order, 282 F.3d 1119, 1119 (directing parties to first brief whether the Court even has authority to consider the constitutionality of Section 107(2)). Indeed, one member of the panel vigorously objected to the suggestion by another member of the panel that the Court had already decided to address the Establishment Clause issue. *See* March 5 Order, 282 F.3d at 1122 (Reinhardt, J., concurring) (“one of the questions on which our order requests briefing is *whether* we should address the constitutional question”).

More fundamentally, Professor Chemerinsky’s assertion simply overlooks a key aspect of federal court jurisdiction. “[T]here must be a substantial likelihood that a favorable federal court decision will have some effect.” CHEMERINSKY, FEDERAL JURISDICTION at 47. Even if Professor Chemerinsky were permitted to

intervene in this case, and even if this Court were to accept his contention that Section 107(2) of the Internal Revenue Code amounts to an unconstitutional establishment of religion, such a ruling would have no effect on Appellees' tax liability for the years at issue in this case. As correctly noted in Appellant's supplemental brief, the Internal Revenue Service is prohibited by law from obtaining any additional income tax deficiency for the tax year in question beyond that sought in the notice of deficiency. Appellant's Supplemental Br. at 7 (citing IRC §§ 6212(c), 6214(a); Tax Ct. R. 41). This Court similarly "lacks jurisdiction to decide an issue that was not the subject of the Tax Court proceeding or to grant relief that is beyond the powers of the Tax Court itself." *Commissioner v. McCoy*, 484 U.S. 3, 6 (1987). In short, this court simply may not "decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam).

**II. Because This Is The Wrong Case, Involving The Wrong Parties, In The Wrong Forum, The Untimely Motion Of The Court-Appointed Amicus Curiae To Intervene In Order To Address An Issue Not Raised By Either Party Must Be Stricken or Denied.**

Professor Chemerinsky, the court-appointed amicus curiae in this now-mooted appeal from a decision of the tax court, seeks to intervene either as of right or permissively pursuant to Rule 24 of the Federal Rules of Civil Procedure. The problems with his motion are legion.

First, Rule 24, like all of the Federal Rules of Civil Procedure, "govern the procedure in the United States district courts," Fed. R. Civ. P. 1, not in the Courts of Appeal nor in the Tax Court from which this appeal originated. The Tax Court has its own "Rules of Practice and Procedure," Tax Ct. Rule 1, and they simply do

not provide for intervention in the circumstances of this case, *Siegel's Estate v. Commissioner of Internal Revenue*, 67 T.C. 1033, 1039 (Tax Court, 1977). Similarly, “it is well settled that ‘the Federal Rules of Civil Procedure ... apply only in the federal district courts’ and not in the Courts of Appeal. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 840 (1989) (quoting *Automobile Workers v. Scofield*, 382 U.S. 205, 217, n. 10 (1965)); see also *United States v. Bursey*, 515 F.2d 1228, 1239 n.24 (5<sup>th</sup> Cir. 1975).

Second, although the Supreme Court has recognized that “the policies underlying [Rule 24] intervention may be applicable in appellate courts,” *Scofield*, 382 U.S., at 217 n.10, neither it nor any other court has, to our knowledge, ever permitted intervention in circumstances such as these. In *Bursey*, for example, the Fifth Circuit granted a motion to intervene on appeal only after finding that the case involved “exceptional circumstances” in which the intervener asserted a “substantial stake in the matter on appeal.” 515 F.2d, at 1239 n.24. Professor Chemerinsky’s assertion of generalized taxpayer standing does not come close to that threshold.

The cases cited by Professor Chemerinsky are wholly inapposite. *State of Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317 (9<sup>th</sup> Cir. 1997), did not even involve a motion to intervene in the Court of Appeals, but the appeal of a *district court*’s denial of a motion to intervene in order to appeal the denial of class certification. The same is true of *Legal Aid Society of Alameda County v. Brennan*, 608 F.2d 1319 (9<sup>th</sup> Cir. 1979). The case involved a challenge to the granting of federal contracts to contractors who allegedly did not comply with affirmative action requirements in place at the time. After partial summary judgment was granted, several of the affected contractors, who had not been parties to the district

court proceedings, “sought to intervene generally for the purpose of reopening the proceedings. The *district court* denied their motion, but permitted intervention for the purpose of appeal.” *Id.* (emphasis added). This Court upheld the intervention only because the contractors had alleged a “sufficiently direct threat of personal detriment” from the district court’s ruling. Again, Professor Chemerinsky’s alleged generalized taxpayer harm does not come close to meeting that standard. And he did not move to intervene in the tax court in order to bring an appeal.

Third, Professor Chemerinsky would not have been able to intervene in the Tax Court even had he sought intervention there. The derivative right to intervene for purposes of the appeal must necessarily fail, as well.

“The jurisdiction of [the Tax] Court is strictly limited under section 6213(a) to persons who file a petition with this Court within 90 days . . . after the notice of deficiency authorized in section 6212 has been mailed to that person.” *Guarino v. Commissioner of Internal Revenue*, 67 T.C. 329, 331 (Tax Court, 1976) (citing *Estate of Frank Everest Moffat*, 46 T.C. 499, 501 (1966)). Joinder is similarly limited to parties who have been issued a notice of deficiency. Tax Court Rule 61. Unless the Tax Court “acquires jurisdiction over a person to whom a notice of deficiency or liability has been issued, [it] has no jurisdiction to join or even permit joinder of that person in a case pending before” it. *Siegel's Estate*, 67 T.C. at 1039.

Intervention in the Tax Court is likewise allowed by the Internal Revenue Code only under very limited circumstances. In partnership cases, for example, where I.R.C. §§ 6226 *et seq.* apply, if the designated tax matters partner agrees to accept an IRS settlement offer, the Tax Court rules require that all notice partners (as defined by the Code) be given an opportunity to accept or reject the offer. Any such partner rejecting the offer has a right to intervene in the Tax Court case and

litigate the partnership adjustment on his own. Similarly, I.R.C. §6015(e) permits intervention by spouses who sign a joint return in a case where the other spouse is seeking innocent spouse relief, but only for the limited purpose of proving that the other spouse is not entitled to innocent spouse relief. *See Corson v. Commissioner*, 114 T.C. 354, 354 (U.S. Tax Ct., 2000).

Apart from these few statutory exceptions not relevant here, the Tax Court's "Rules of Practice and Procedure contain no reference to 'intervention,'" *Siegel's Estate*, 67 T.C. at 1039, and the Court has permitted intervention only by those having a direct interest in the tax liability at issue in the case. *See Central Union Trust Co. of New York v. C.I.R.*, 18 B.T.A. 300, 302-03 (Bureau of Tax Appeals 1929) (intervention by estate beneficiary who was liable for tax deficiencies pursuant to a collateral agreement); *Louisiana Naval Stores, Inc.*, 18 B.T.A. 533 (B.T.A. 1929) (intervention permitted to hear argument of a person claiming to be the only authorized liquidator of the company that had been issued the tax deficiency). Of particular relevance here, the Tax Court granted intervention in *Central Union Trust* only after noting that the petition for intervention "offers no new issue." 18 B.T.A. at 303. Because Professor Chemerinsky seeks to intervene *only* to raise a new issue, his motion should be denied on that ground alone. "Injection of new issues ought not to be allowed to delay disposition of the main litigation." *Missouri-Kansas Pipe Line Co. v. U.S.*, 61 S.Ct. 666 (1941) (citing *United States v. Northern Securities Co.*, 128 F. 808, 813 (D. Minn. 1904)).

More recently, the Tax Court in *Sampson v. Commissioner*, 81 T.C. 614 (1983), thoroughly articulated the circumstances in which it would permit intervention. There, the Court noted that it would only allow intervention by a third party if the third party could demonstrate that he or she had an "interest in the

controversy which is contrary to that of the parties and which might not be protected in the proceeding.” *Id.* at 617. The interest to be protected has to be “of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment.” *Id.* (quoting *Smith v. Gale*, 144 U.S. 509, 519 (1892)). By way of example, the Tax Court has allowed estate beneficiaries to intervene in a case involving an IRS challenge to the valuation and deductibility of a charitable contribution taken the Estate itself, but only for issues that directly affected the beneficiaries’ pecuniary interests in the estate. *Estate of Proctor*, T.C. Memo. 1994-208. And in *Sampson* itself, the Tax Court *refused* to allow a taxpayer’s trust to intervene in the taxpayer’s case that involved the validity of the trust itself. Because Professor Chemerinsky’s asserted generalized interest as a taxpayer is of a much less “direct and immediate character” than was the Trust’s interest in *Sampson*, it clearly would not have been sufficient to warrant intervention in the tax court proceedings in this case.

Professor Chemerinsky’s inability to intervene in the Tax Court proceedings is a jurisdictional bar to his intervention here. As this Court held in *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1397 n.1 (9<sup>th</sup> Cir. 1995), “[t]he question of intervention is jurisdictional in this case because only the intervenors appeal the district court judgment. If intervention was not properly granted, ICL/CIHD cannot appeal as intervenors.” Because Professor Chemerinsky could not have intervened in the Tax Court, this Court simply has no jurisdiction to consider his motion to intervene here, particularly now that the case is moot.

Fourth, even assuming something like a Rule 24 intervention might have been permitted by the Tax Court, “[a]n interest strong enough to permit intervention is not necessarily a sufficient basis to pursue an appeal abandoned by

the other parties.” *Didrickson v. U.S. Dept. of Interior*, 982 F.2d 1332, 1338 (9<sup>th</sup> Cir. 1992) (citing *Yniguez v. State of Arizona*, 939 F.2d 727, 731 (9th Cir.1991)). “The intervenor also must satisfy the requirements of Article III.” *Id.* (citing *Diamond v. Charles*, 476 U.S. 54, 68 (1986)).

To satisfy the case or controversy requirement of Article III, the intervenor must show that he has suffered an injury in fact, which is fairly traceable to the challenged action and is likely to be redressed by the relief requested. *Allen v. Wright*, 468 U.S. 737, 751 (1984); *see also Didrickson*, 982 F.2d at 1338-39; *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1513 (9th Cir.1992); *Yniguez*, 939 F.2d at 731-33. Even assuming that the particularized injury requirement is relaxed with the proposed intervenor-on-appeal seeks to raise an Establishment Clause issue—Professor Chemerinsky has cited no case in support of that specific proposition<sup>5</sup> and counsel for Appellees are aware of none—Professor Chemerinsky clearly fails both the “fairly traceable” causality prong and the redressability prong of this three-part test.

This Court has elaborated on the causality prong as follows: “[A]n intervenor seeking to establish standing under Article III must show a causal

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<sup>5</sup> Professor Chemerinsky does cite *Flast v. Cohen*, 392 U.S. 83 (1968), in which the Supreme Court recognized a narrow exception to the prohibition on general taxpayer standing for taxpayers to bring suit challenging governmental expenditures as contrary to the Establishment Clause. *Flast* did not involve intervention of any kind, much less intervention on appeal from a decision by the Tax Court, after the case was moot. And *Flast* dealt with *expenditures*, not tax *exemptions*, and has subsequently been limited to its facts, *see, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 480 (1982); *Cantrell v. City of Long Beach*, 241 F.3d 674, 683 (9th Cir. 2001).

connection between the injury and the conduct complained of—the injury must be fairly traceable to the challenged action.” *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1398-99 (9<sup>th</sup> Cir. 1995) (citing *Seattle Audubon Soc’y v. Espy*, 998 F.2d 699, 702 (9<sup>th</sup> Cir. 1993)). Professor Chemerinsky’s only asserted injury is as a taxpayer, but he has not—and cannot—pointed to a single dime of tax funds that have been expended here, allegedly in violation of the Establishment Clause. Rather, his complaint appears to be that by *not taxing* housing allowances paid to ministers, the government conveys a message of endorsement for religion. We have previously argued why that complaint is meritless, but the point here is that it has nothing to do with Professor Chemerinsky’s status as a *taxpayer*.

The redressability prong is an even bigger hurdle for Professor Chemerinsky’s motion. As noted above, *supra* at 9-9, even were this Court to rule that Section 107(2) is an unconstitutional establishment of religion, such a ruling could have no effect in Appellees’ tax liability in this case. By law, the Tax Court is not permitted to impose greater tax liability than was contained in the IRS’s notice of deficiency. *See* IRC §§ 6212(c), 6214(a); Tax Ct. R. 41. Such a ruling would be no more than an advisory opinion, therefore, and this Court simply has no jurisdiction to issue it, or to permit intervention by someone who in the end can be seeking nothing more than that.

Fifth, Professor Chemerinsky’s reliance on *Fuller v. Volk*, 351 F.2d 323 (3<sup>rd</sup> Cir. 1965), for the proposition that intervention should be permitted to prevent “unnecessary delay” in the adjudication of the constitutional issue he wants to raise is beside the point. Intervention in this appeal from a decision from the Tax Court by a court-appointed amicus curiae who simply could not have brought suit in the Tax Court itself would effect something entirely different than “avoid[ing] the

senseless delay and expense of a new suit, which at long last will merely bring the parties to the point where they are now.” *Id.*, at 329. It would essentially begin an entirely new suit here in the Court of Appeals, raising issues never presented in the Tax Court, without benefit of evidentiary proceedings so important in Establishment Clause cases, by a party who could not participate in Tax Court proceedings in any event. That is not the avoidance of unnecessary delay, but circumvention of the clearly-establishment modes of procedure.

In sum, Professor Chemerinsky has chosen the wrong case, with the wrong parties, in which to assert *Flast v. Cohen* standing; the forum below was the wrong forum for his Establishment Clause arguments; he has relied upon an intervention rule that does not even apply in this Court or in the Tax Court below; and his motion was untimely because filed after the parties filed a stipulated dismissal that mooted the case.

The following passage from the Fifth Circuit’s decision in *Levy Trust v. C.I.R.*, 341 F.2d 93, 94-95 (5th Cir. 1965), perhaps best describes the correct disposition of Professor Chemerinsky’s motion to intervene here:

When, on July 15, 1963, the Tax Court denied the motion for leave to intervene, there was nothing to intervene in. The intervention was ancillary and subordinate to the main cause, and when that suit ceased to exist by virtue of a final and non-appealable judgment [entered after execution of a stipulation decision document], there remained no case in which there could be an intervention. If this Court were to reverse and allow the intervention at this time, we would be breathing new life into an action no longer justiciable.

Were this Court to grant Professor Chemerinsky's motion to intervene, it, too, would be breathing new life into an action no longer justiciable. Article III of the Constitution simply does not permit such an action.

### CONCLUSION

“Not surprisingly, many litigants dissatisfied with the results of the legislative process on the question of tax exemptions have encouraged the federal courts to ignore these basic restrictions on their power to supply or revise legislative judgments.” Thomas McCoy & Neal Devins, *Standing And Adverseness in Challenges of Tax Exemptions for Discriminatory Private Schools*, 52 FORDHAM L. REV. 441, 443 (Mar. 1994). By seeking to intervene in this moot case, the court-appointed amicus curiae is attempting to evade the justiciability requirements which for two hundred years have prevented the federal courts from issuing advisory opinions or becoming “publicly funded forums for the ventilation of public grievances.” *Valley Forge*, 454 U.S. at 473. The case has been rendered moot by the parties’ filing of a stipulation of dismissal, and as a result must be dismissed regardless of whether the Establishment Clause claim the proposed intervenor wishes to make is one of “substantial national importance.” *Diffenderfer v. Central Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 415 (Douglas, J., dissenting).

The motion to intervene should be *denied* and the stipulation of dismissal already filed given full effect.

Respectfully submitted,

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Dated: June 7, 2002.

## CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing Appellees' Conditional Reply in Support of Stipulation of Dismissal and Conditional Opposition to Amicus Curiae's Motion to Intervene has been made on counsel for the appellant and the *amici curiae* on this 7th day of June, 2002, by sending a copy thereof by facsimile to the numbers listed below and by United States mail, postage prepaid, in an envelope properly addressed to each of them as follows:

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