Docket No. 09-17753

In the

United States Court of Appeals

for the

Ninth Circuit

FREEDOM FROM RELIGION FOUNDATION, INC., et al.,

Plaintiffs-Appellees,

v.

TIMOTHY GEITHNER,
Secretary, U.S. Department of the Treasury, et al.,

Defendants,

and

MICHAEL RODGERS, Pastor,

Defendant-Intervenor/Appellant.

Appeal from a Decision of the United States District Court for the Eastern District of California, No. 09-CV-02894 · Honorable William B. Shubb

BRIEF OF APPELLANT

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INTRODUCTION

This appeal represents an inherent and irreconcilable conflict of interest between the defendants and Pastor Rodgers. It is self-evident that the state tax board and the federal department of the treasury has the goal of collecting taxes and treasure. In contrast, the minister in this case is seeking to lesson personal tax liability. There is therefore an existential conflict of interest between the proposed intervenor and defendants. Because of this, the lower court committed error in denying the motion to intervene.

STATEMENT OF JURISDICTION

In accordance with 9th Cir. R. 28-2.2, the U.S. District Court for the Northern District of California has original jurisdiction over all defendants in this case under 28 U.S.C. § 1331, in that the Complaint alleges violations of the United States Constitution actionable under 42 U.S.C. § 1983. E.R. at 109, ¶ E Additionally, the district court has authority over the state defendant Selvi Stanislaus under 28 U.S.C. §§ 1343(a)(3) and 1367. E.R. at 98, ¶ 2.

The judgment and order issued on December 2, 2009 denying Pastor Rodgers' motion to interevene is a final appealable order because "[d]enial of a motion to intervene as of right under Rule 24(a)(2) is appealable as a final order." E.R. at 1; *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983).

For denials of permissive intervention, this Court has jurisdiction "as a practical matter because…the jurisdictional issue necessarily involves a consideration of the merits." *In re Benny*, 791 F.2d 712 (9th Circ. 1986). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

The Notice of Appeal was filed December 9, 2009. E.R. at 25. The Notice was filed within thirty days of the Order being appealed, as required by Fed. R. App. P. 4(a).

ISSUES PRESENTED FOR REVIEW

1. Was intervention as of right properly denied to ministers in a case challenging the constitutionality of a tax exemption for ministerial housing allowances when:
   a) The ministers stand to suffer a direct, adverse financial impact from a negative decision;
   b) The defendants have an inherent financial interest in maximizing tax revenue while the proposed intervenors have a pecuniary interest in maximizing their tax exemptions and decreasing their tax burdens;
   c) The federal defendants have previously sought a narrow construction, adverse to ministers, of the challenged statutes; and
   d) The plaintiffs affirmatively assented to intervention and the state defendants never responded to the motion to intervene.

2. Under the same facts, was permissive intervention properly denied on the basis that the proposed Defendants-Intervenors, who have no counter-claims or cross-claims, lacked "independent grounds for jurisdiction"?

STATEMENT OF THE CASE

The Freedom From Religion Foundation ("FFRF") filed suit in the U.S. District Court for the Northern District of California on October 16, 2009. E.R. at 97. Pastor Rodgers filed a Motion to Intervene on October 22, 2009, which was served on all parties. E.R. at 94. On October 23, 2009 Pastor Rodgers filed the Supplemental Declaration of Matthew McReynolds in which plaintiff-appellee's counsel Michael Newdow stated that he would affirmatively consent to Pastor Rodgers' motion to intervene. E.R. at 64. Thereafter, plaintiff's counsel filed his own request that Pastor Rodgers' motion be granted. E.R. at 63.1. Defendant-s Timothy Geithner and Douglas Shulman, represented by the U.S. Department of Justice ("federal defendants), filed a response in opposition to Pastor Rodgers' motion to intervene on November 6, 2009. E.R. at 54. Pastor Rodgers' motion to intervene was denied by Judge William B. Shubb on December 2, 2009. E.R. at 1. Pastor Rodgers filed his Notice of Appeal to this Court on December 9, 2009. E.R. at 25. The state defendant, Selvi Stanislaus ("state defendant"), did not file a response in opposition or appear at the motion hearing, and in fact made its first

appearance on February 1, 2010 by way of a proposed order requesting an extension of time. E.R. at 18.

STATEMENT OF THE FACTS

The material facts are not in dispute. On October 16, 2009 the Freedom From Religion Foundation and several of its individually named members (collectively, "FFRF") filed a complaint in the U.S. District Court for the Northern District of California seeking injunctive relief and a declaration that 26 U.S.C. §§ 107 and 265(a)(6) violate the Establishment Clause of the U.S. Constitution. Excerpts of Record ("E.R.") at 108-109, ¶¶ B, D. Sections 107 and 265(a)(6) provide tax exemptions to "ministers of the gospel" and are administered by the Internal Revenue Service ("IRS") and the Department of the Treasury ("Treasury"). Plaintiffs-appellees also sought a declaration that §§ 17131.6 and 17280(d)(2) of the California Revenue and Taxation Code violates the Establishment Clause of the U.S. Constitution as well as the California Constitution as administered by the California Franchise Tax Board ("Tax Board"). E.R. at 103, 109, ¶¶ 37-38, E.

On October 22, 2009, Pastor Michael Rodgers ("Pastor Rodgers") and Does 1-100 ("Pastor Rodgers") moved to intervene as defendants in this action. E.R. at 94-96. Pastor Rodgers is a minister of the gospel in the Sacramento area who, from 1995 to the present, has claimed both the federal and state tax exemptions.

E.R. at 78, ¶ 7. An adverse ruling in this case would have a "direct, immediate, negative financial impact" on Pastor Rodgers and his family. E.R. at79, ¶ 14.

SUMMARY OF THE ARGUMENT

Motions to intervene are construed broadly to favor applicants for intervention. For intervention as of right, there are four elements that must be shown: (1) timeliness; (2) applicant must have a protectable interest; (3) applicant would be practically impaired as a result of the action; and, (4) the applicant's interest is inadequately represented. After serving all parties with the motion to intervene, the FFRF filed a non-opposition motion, the federal defendants filed a response in opposition to intervention, and the state defendant filed no motions in response. The federal defendants conceded the timeliness and protectable interest elements, but challenged practical impairment by proposing Pastor Rodgers had other means to protect his interest by way of an amicus brief. Defendants further argued that there is no inadequate representation because both parties share the same ultimate objective of defending the constitutionality of the federal statutes. The trial court determined there was practical impairment that would not be solved my amicus status. This holding was correct under the law. The trial court also determined that Pastor Rodgers was adequately represented by the U.S. defendants as they both had the same ultimate objective of defending the constitutionality of the federal statutes and Pastor Rodgers did not rebut the presumption of adequate

representation. This holding is in error because in order to show inadequate representation, intervenors need only show a mere likelihood that the government would abandon or concede a potentially meritorious reading of the statutes in question. This holding is also in error because Pastor Rodgers' interest lay within both the federal and state statutes, and the federal defendants have only purported to defend the constitutionality of the federal statutes, hence creating an inadequacy of representation on state issues.

It is a cardinal principle that the government, when faced with a challenge of the constitutionality of a statute, must apply limiting construction of that statute to determine whether the question could be avoided altogether. Application of this principle proves more than a mere likelihood that the government, in defending the constitutionality of a statute, will either abandon or concede a potentially meritorious reading of the statute. Moreover, the IRS, one of the federal defendants, has already proffered a different construction of the federal statute than do ministers by way of litigation. Additionally, the district court ignored the fact that the state defendants had been served with Pastor Rodgers' motion to intervene and opted not to oppose it. The district court relies on one case for the proposition that this Court has allowed intervention of right post-judgment for the purposes of appealing and ignores an entire body of case law in which this Court has denied post-judgment intervention because those motions were deemed untimely or the

proposed intervenor lacked standing. Finally, the district court dismissed Pastor Rodgers' contention that there is an inherent conflict of interest for both federal and state defendants as they have been asked to defend not only Pastor Rodgers' interests in maintaining a tax-free housing allowance, but also the interests of the government in maximizing tax revenue. Pastor Rodgers rebutted the presumption of adequate representation by the federal defendants and should have been granted intervention as of right.

For permissive intervention, the district court held that an applicant must show (1) independent grounds for jurisdiction; (2) the motion is timely; and, (3) the applicant's claim or defense, and the main action, have a question in law or a question of fact in common. The district court did not make a ruling on timeliness of the motion or whether there was a common question of law or fact, but did determine that Pastor Rodgers did not show independent grounds for jurisdiction and lacked Article III standing. This holding was also in error in that Pastor Rodgers was seeking to intervene as a defendant and did not file a counter-claim or cross-claim against any other parties. In cases where the district court has original jurisdiction concerning the constitutionality of statutes, intervening defendants need not show independent jurisdiction as they are submitting themselves to the personal and subject matter jurisdiction of the district court. If Pastor Rodgers was precluded from intervention as of right, he should have been

granted permissive intervention as he has the strongest interest in the outcome of the litigation.

ARGUMENT

I. The Standard of Review Is De Novo.

This Court reviews de novo the denial of a motion to intervene as of right under FRCP 24(a). *Waller v. Financial Corp. of America*, 828 F.2d 579, 582 (9th Cir. 1987). Although a motion for permissive intervention pursuant to FRCP 24(b) is directed to the discretion of the district court, if the district court's decision "turns on a legal question…its underlying legal determination is subject to *de novo* review." *San Jose Mercury News, Inc. v. U.S. Dist. Court—Northern Dist. (San Jose)*, 187 F.3d 1096, 1100 (9th Cir. 1999). Here, the district court determined that the denial of permissive intervention came from the appellant's supposed lack of independent jurisdiction, a purely legal question. Therefore, the motion for permissive intervention should also be reviewed de novo.

II. The District Court Erroneously Denied Intervention As Of Right Because Pastor Rodgers Has No Other Forum By Which To Protect His Interests In The Challenged Statutes And He Has Rebutted Any Presumption Of Adequate Representation By The Federal Defendants.

Rule 24(a) is "construed broadly in favor of applicants for intervention." *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993). This Court has divided Rule 24(a)(2) into four elements:

> "(1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action."

California ex rel Lockyer v. United States, 450 F.3d 436, 440-41 (9th Cir. 2006) (citing *Sierra Club v. EPA*, 995 F.2d 1478 (9th Cir. 1993)). The federal defendants conceded the first two elements: Pastor Rodgers' motion to intervene as of right was timely, being filed six days after service of the plaintiff's complaint, and Pastor Rodgers had a significantly protectable interest by way of financial interest in the challenged federal and state statutes. E.R. at 56-57. Thus, only the third and fourth elements of FRCP 24(a) were contested.

A. Pastor Rodgers meets the third element of intervention as of right because he lacks an alternative forum in which he can mount a constitutional defense of the challenged federal and state statutes.

Federal courts have been careful to note that, under the third element of intervention as of right, prospective intervenors need only show that an unfavorable disposition in the case "'*may* ... impair or impede [their] ability to protect [their] interest.'" *Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991) (quoting FRCP 24(a)(2) and adding emphasis), that is, that impairment is "possible." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir.

1997). *See also*, *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983). Other federal courts have considered this requirement indistinct from the previous element, declaring that "'the question of impairment is not separate from the question of the existence of an interest.'" *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1253 (10th Cir. 2001) (quoting *Natural Res. Def. Council v. United States Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th Cir. 1978)).

A ruling in this case would practically impair Pastor Rodgers' ability to protect his financial interest in both the federal and state statutes. Both Pastor Rodgers and the federal defendants agree that "[a] ruling on the constitutionality of the [federal and state] statutes at issue is a disposition that might affect [Pastor Rodgers'] interests." E.R. at 57. However, the federal defendants contend that Pastor Rodgers has "other means" by which to protect his significantly protectable interests by way of "raising his arguments in an amicus brief." E.R. 57. If an action "would *affect* the proposed intervenors' interests, their interests might not be *impaired* if they have 'other means' to protect them." *Lockyer*, 450 F.3d at 441.

Amicus is not an "other means" by which Pastor Rodgers can protect his interests in the statutes because it is not an alternative forum by which he can protect his interests. In *Lockyer* the court noted that if intervention was not allowed, the intervenors would "have no alternative forum where they can mount a robust defense of the Weldon Amendment." *Id*. (emphasis added). *See also*, *U.S.*

v. Alisal Water Corp., 370 F.3d 915 (9th Cir. 2004) (intervenors having a separate district court process for approving claims against debtors found sufficient to protect proposed intervenor/creditor interests); *U.S. v. City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002) (possibility of individual suits against police officers found sufficient to protect interest of community groups seeking to protect members from unconstitutional police practices). In contrast, amicus status is not an "other means" by which Pastor Rodgers can protect his interests in that it is not an alternate forum.

The federal defendants have failed to show how amicus status should be considered "other means" by which Pastor Rodgers can protect his interests in both the federal and state statutes. Indeed, the federal defendants cite no cases for the novel proposition that filing a friend of the court brief can be considered as "other means" or as an "alternative forum" for Pastor Rodgers to protect his interest under *Lockyer*. *Id*. at 441. As a practical matter, in light of this Court's favorability toward intervenors, as amicus, Pastor Rodgers could not realistically expect his arguments to be taken as seriously as party positions—even though Pastor Rodgers has much more to lose from an adverse decision than do the federal defendants. It is not subject to reasonable dispute that the defendants (Treasury and the Tax Board) would benefit by an adverse ruling which would result in increased tax revenues. By contrast, the construction offered by the federal defendants would

render Rule 24 meaningless. If it is determined that Pastor Rodgers could simply become amicus to protect his significantly protectable interests, it is difficult to imagine any situation in which Rule 24 could not be similarly skirted. Thus, Pastor Rodgers should be allowed to intervene as of right because the federal defendants have not shown any "other means" by which Pastor Rodgers can protect his interests in the federal and state statutes.

B. Pastor Rodgers meets the fourth element of intervention as of right because his interests in the federal and state statutes are inadequately represented by the federal defendants.

1. There is a rebuttable presumption that the federal government, as a party, will represent Pastor Rodgers' interests in the federal statutes.

If an absentee will be substantially affected in a practical sense by the determination made in an action, as a general rule that absentee should be entitled to intervene. *Sw. Ctr. For Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) (discussing advisory committee note to Rule 24). A showing of inadequate representation is minimal and is satisfied if a proposed intervenor shows that representation of their interest may be inadequate. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (citing *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 (1972)). Although there is a presumption of adequate representation when the government is acting on behalf of its constituency, the presumption is overcome where the intervenor shows there is a likelihood that the

government will possibly abandon or concede a potentially meritorious reading of the statute. *Arakaki*, 324 F.3d at 1086; *Lockyer*, 450 F.3d at 444.

2. Pastor Rodgers has rebutted the presumption of adequate representation by the federal defendants.

In assessing whether the federal defendants can adequately represent Pastor Rodgers' interests, this Court considers "whether [a present party] will undoubtedly make all of the intervenor's arguments, whether [a present party] is capable of and willing to make such arguments, and whether the intervenor offers a necessary element to the proceedings that would be neglected." *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006) (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983)) (bracketed text in original, emphasis added). Here, the federal defendants cannot adequately represent Pastor Rodgers. First, the federal defendants will not "undoubtedly" make all of Pastor Rodgers' arguments because of the cardinal principle of limited construction. Indeed, the IRS has already proffered in litigation an interpretation of the statute that conflicts with the interests of ministers. Second, the federal defendants have not claimed that they will defend the state statutes, defeating any presumption that the federal defendants can and will make all the arguments made by Pastor Rodgers. Third, Pastor Rodgers would provide a necessary element to the litigation by way of an appealing party if the federal defendants cannot or will not appeal an adverse decision. Finally, Pastor Rodgers provides a necessary element by way of keeping

in check the federal and state defendants' financial conflict of interest and their duty to not only represent Pastor Rodgers but also the interests of the general public, including the individual members of the FFRF listed as plaintiffs-appellees.

i. The federal defendants have already proffered a narrow interpretation of the challenged statutes which conflicts with ministers' interpretation, thereby rebutting the presumption of adequate representation.

It is well established that, when faced with a constitutional challenge to a statute, the courts will attempt to salvage the constitutionality of the statute by narrowly construing it. "Often, defending Acts of Congress leads the Solicitor General to lean heavily on the Ashwander principle of construing a statute so as to avoid constitutional doubt." *Lockyer*, 450 F.3d at 444. The Ashwander principle, taken from the U.S. Supreme Court case *Ashwander v. TVA*, 297 U.S. 288 (1936), states that when a Congressional act is in question "it is a cardinal principle that this Court will first ascertain whether a construction of the statutes is fairly possible by which the question may be avoided." *Id*. at 348 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

This cardinal principle of the government adopting a limiting construction defense when a statute is challenged is illustrated in *Lockyer,* where the plaintiffs challenged the constitutionality of the Weldon Amendment which prevented federal, state, and local governments from receiving federal funding if they

discriminated against health care providers that refused to provide, pay for, provide coverage of, or refer for abortions. *Id*. 450 F.3d at 439. Health care providers moved to intervene in the action, and were denied by the district court, but were granted intervention as of right by this Court after a finding of a significantly protectable interest and practical impairment. *Id*. at 441-43. This Court found that even if the proposed intervenors and the government had the same "ultimate objective" (defending the constitutionality of the Weldon Amendment) and that an "assumption of adequacy" arose "when the government is acting on behalf of a constituency," the proposed intervenors rebutted any presumptions of adequacy because the government defendants had offered a limiting construction defense in defense relative to the Weldon Amendment. *Id*. at 443-44; *Arakaki*, 324 F.3d at 1086. The proposed intervenors made a compelling showing of inadequate representation by demonstrating that the government had taken a narrow interpretation of the challenged statutes which were in conflict with their broad interpretation. *Lockyer*, 450 F.3d at 444-45.

In this case the IRS, one of the federal defendants, has already made a showing of its differing view of the federal statute that conflicts with the interpretation of ministers in the case *Warren v. C.I.R*, 114 T.C. 343 (U.S. Tax Ct. 2000). In *Warren*, the IRS sought to narrowly construe the housing allowance under § 107(2) to deny Pastor Rick Warren of the Saddleback Valley Community

Church the ability to exclude from his income any more than the fair market rental value of his home. *Id*. at 343. The IRS enforced § 107(2) under its interpretation that the language and legislative history implied that the income exclusion by ministers could not "exceed the lesser of the amount used to provide a home or the fair market rental value of the home." *Id*. at 346. Pastor Warren appealed the IRS' decision and the tax court reversed, finding that nothing supported the IRS' narrow interpretation of § 107(2). The IRS then appealed to this Court where the parties filed stipulations to dismiss and the appeal was dismissed. *Warren v. C.I.R.*, 302 F.3d 1012 (9th Cir. 2002).

Pastor Rodgers can make a very compelling showing of inadequate representation because the federal defendants, the IRS, have already proffered a narrow interpretation of the challenged statutes. *Warren*, 114 T.C. 343. Similar to *Lockyer*, where the government had already proffered a limiting construction of the challenged statutes that conflicted with the proposed intervenors' broad interpretation of the statutes, here the IRS in *Warren* has already proffered a narrow construction of the challenged statutes that conflicts with ministers' broad interpretation of the challenged statutes. *Lockyer*, 450 F.3d at 439; *Warren*, 114 T.C. at 346. Moreover, the IRS in *Warren* was willing to appeal their decision to this Court in order to have their narrow interpretation of § 107(2) recognized. *Warren*, 302 F.3d at 1012. The IRS' zeal in pursuing their narrow interpretation of

the challenged statutes demonstrates a likelihood that the government will possibly abandon or concede a potentially meritorious reading of the statute, thereby rebutting the presumption of adequate representation. *Lockyer*, 450 F.3d at 444. Therefore, Pastor Rodgers should be allowed to intervene as of right.

ii. The federal defendants can only claim to defend the federal statutes and therefore cannot adequately represent Pastor Rodgers' interest in the state statutes.

The federal defendants claim that "the United States and [Pastor Rodgers] share the same ultimate objective: to uphold 26 I.R.C. §§ 107 and 265(a) against constitutional attack. E.R. at 58, Footnote 3. However, Pastor Rodgers has "significant interests in both the federal ***and state*** statutes being challenged." E.R. at 48 (citing the Decl. of Pastor Rodgers, E.R. at 78). The federal defendants rightly make no claims that it can defend the federal and state constitutionality of §§ 17131.6 and 17280(d)(2) of the California Revenue and Taxation Code, which are at issue in this litigation. E.R. at 103, ¶¶ 37-38. Indeed, the federal defendants lack the legal capacity to defend the state statutes. Therefore, it cannot be shown, or much less assumed, that the federal defendants "will undoubtedly make all of the intervenor's arguments, [or] whether [a present party] is capable of and willing to make such arguments." *Prete*, 438 F.3d at 956.

State defendants Selvi Stanislaus and the Tax Board were served with Pastor Rodgers' motion to intervene on October 26, 2009. E.R. at 71.1.. The state

defendants filed no opposition to Pastor Rodgers' motion to intervene, neither did the state defendants make any appearance at the motion for hearing Pastor Rodgers' motion. The state defendant did not make an appearance in this case until February 2, 2010, requesting an extension of time to respond to the complaint. E.R. at 18. It could not be shown, or much less assumed, that the state defendants would "undoubtedly make all of [Pastor Rodgers'] arguments" or the state defendants would be "capable of and willing to make such arguments" in defending §§ 17131.6 and 17280(d)(2) against federal and state constitutional attack. *Prete*, 438 F.3d at 956.

iii. Pastor Rodgers is able and willing to appeal an adverse ruling in contrast to the federal defendants who may not be allowed by the Solicitor General to appeal or even be willing to choose to appeal an adverse ruling.

One of the important considerations in whether to grant intervention is whether an existing party would appeal an adverse decision. The government may not appeal an adverse ruling by a district court unless first obtaining approval by the Solicitor General, whose duties include "[d]etermining whether, and to what extent, appeals will be taken by the Government to all appellate courts." 28 C.F.R. § 0.20(b). If Pastor Rodgers is denied intervention, he would not be able to appeal an adverse decision and has no guarantee that the federal defendants would be able or willing to appeal that decision. If allowed to intervene, Pastor Rodgers would be

able to adequately defend his interest by being able to appeal an adverse decision should the government be unable or unwilling to appeal. *See, e.g. Didrickson v. U.S. Dep't of Interior*, 982 F.2d 1332, 1338 (9th Cir. 1992) (intervenors, environmental group, appealed decision of district court which granted summary judgment to plaintiffs challenging a U.S. Fish and Wildlife Service regulation when government chose not to appeal); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1398 (9th Cir. 1995) (intervening environmental group allowed to appeal an adverse ruling on listing a type of snail as an endangered species); *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1104 (9th Cir. 2002) (intervenors, environmental groups, appealed decision invalidating U.S. Forest Service's "Roadless Rule" restricting potential environmental impact after federal government chose not to appeal); *Calif. Dept. of Social Svcs. v. Thompson*, 321 F.3d 835 (9th Cir. 2003) (allowing intervenor to appeal decision even though state chose not to do so).

The district court erred in relying upon *Yniguez v. State of Ariz.*, 939 F.2d 727 (9th Cir. 1991) for the proposition that this Court would allow Pastor Rodgers to appeal post-judgment because this Court generally denies post-judgment intervention as untimely or that the proposed intervenor lacks standing. E.R. at 12-13. This Court specified three factors used in weighing whether a motion to intervene is timely: "(1) the stage of the proceeding at which an applicant seeks to

intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *U.S. v. State of Wash.*, 86 F.3d 1499, 1503 (9th Cir. 1996) (quoting *United States ex rel. McGough v. Covington Technologies Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992)). In *U.S. v. State of Wash.* this Court denied intervention to fishing groups who filed motions to intervene for purposes of appeal after the district court issued its order because it was untimely. *U.S. v. State of Wash.*, 86 F.3d at 1507. This was repeated in *Smith v. Marsh*, 194 F.3d 1045 (9th Cir. 1999) where this Court affirmed the district court's denial of intervention to prospective students because their post-judgment motion to intervene was untimely. *Id*. at 1053.

If Pastor Rodgers in not allowed to intervene there is a strong possibility that his status as a nonparty would bar standing for appealing the district court's decision. This Court has stated that a "nonparty has standing to appeal a district court's decision 'only in exceptional circumstances'" and that these appeals are allowed when "(1) the appellant, though not a party, participated in the district court proceedings, and (2) the equities of the case weigh in favor of hearing the appeal." *So. Cal.*, 307 F.3d at 804 (quoting *Bank of Am. v. M/V Executive*, 797 F.2d 772, 774 (9th Cir. 1986)). In *So. Cal.* this Court found that the proposed intervenors did not meet the first requirement because "[a]part from their applications for intervention, the Proposed Intervenors did not participate in the district court proceedings," in contrast to *Bank of Am.* where the appellant had filed

papers and presented oral arguments. Here, if Pastor Rodgers is not allowed to intervene and participate in the lawsuit, this Court could find that he lacks standing to appeal the district court's order.

The federal defendants fail to address Pastor Rodgers' concerns that the federal defendants would be willing to, or even able to, appeal an adverse ruling from the district court. As Pastor Rodgers has already pointed out, an adverse ruling declaring the federal and state statutes as unconstitutional would result in a "staggering windfall of new tax revenues" for both federal and state defendants. E.R. at 47. While Pastor Rodgers has everything to lose in this litigation, and the federal defendants stand to gain from an adverse ruling, it is important to consider whether Pastor Rodgers' interests are truly adequately represented in light of such an inherent conflict of interest. Pastor Rodgers should be allowed to intervene as of right because the federal defendants may not choose to appeal an adverse decision and this Court has generally denied intervention for purposes of appeal due to timeliness and standing.

iv. The federal and state defendants face an inherent conflict of interest in representing not only the interests of ministers but also the general public.

If a conflict arises where a government agency, as a party, is charged with protecting not only the interests of the proposed intervenor and the interest of the public, that conflict satisfies the minimal burden of showing inadequate

representation. *Natural Res. Def. Council v. Kempthorne*, 539 F.Supp.2d 1155, 1187-88 (E.D. Cal. 2008). In *Kempthorne*, the district court found that the federal defendant, the Secretary of the U.S. Department of the Interior, could not adequately represent the interests of intervening contractors because the federal Secretary of the Interior was "required to protect the interests of the [other defendants], and the public" while at the same time "would be required to protect the interest of [intervenors]." *Id*. at 1188. Such a conflict satisfied the minimal showing that the federal defendant could not adequately represent the intervenors' interests. *Id*.

Pastor Rodgers should be granted intervention as of right because the federal and state defendants cannot adequately represent the interest of the public, which includes the interests of the individual members of the FFRF named as parties in this case, and the interests of Pastor Rodgers. It is the duty and function of the U.S. Department of the Treasury to guard the public moneys. As the Supreme Court has noted, "The primary goal of the income tax collection system, in contrast, is the equitable collection of revenue; the major responsibility of the Internal Revenue Service is to protect the public fisc…In view of the Treasury's markedly different goals and responsibilities [than the taxpayer's goals and responsibilities] understatement of income is not destined to be its guiding light." *Tibor Power Tool Co. v. C.I.R.*, 439 U.S. 522, 542 (1979) (explaining the

difference between financial accounting principles and tax accounting) (bracketed text added).

Both federal and state defendants have a duty to protect and serve the public. Serving the public necessarily includes representing the interests of all 21 individually listed members of the FFRF who are "federal and California taxpayers." E.R. at 99, ¶ 8. Moreover, as the Supreme Court said in *Tibor*, the federal and state defendants have the primary goal of collecting revenue, in contrast to Pastor Rodgers who seeks to minimize his tax liability. *Id.*, 439 U.S. at 542. The federal and state defendants cannot adequately represent the interests of Pastor Rodgers because their duty to the public conflicts with their duty to represent the interests of Pastor Rodgers.

Other appellate circuits are in agreement. In *National Farm Lines v. I.C.C.*, 564 F.2d 381 (10th Cir. 1977), in which an action was brought concerning the constitutionality of statutes and regulations promulgated by the Interstate Commerce Commission. A large number of common carriers who had certificates issued by the I.C.C. sought to intervene, and were denied by the district court. On appeal, the 10th Circuit reversed finding that even though there was an assumption of adequacy of representation, "the [I.C.C.] is seeking to protect not only the interest of the public but also the private interest of the petitioners in intervention, a task which is on its face impossible." *Id*. at 384. The 10th Circuit continued by

stating that "this kind of a conflict satisfies the minimal burden of showing inadequacy of representation." *Id*. See also *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 295 F.3d 1111 (10th Cir. 2002) (reversing district court's denial of intervention finding government's conflict of protecting the interests of the public as well as proposed intervenors); *Conservation Law Foundation of New England, Inc. v. Mosbacher*, 966 F.2d 39 (1st Cir. 1992); *Dimond v. District of Columbia*, 792 F.2d 179 (D.C. Cir. 1986). While the district court wrote off Pastor Rodgers' contentions of inadequate representation as "cynical", other courts and appellate circuits have found these contentions to be very real and have acted upon them. E.R. at 13.

This Court should reverse the trial court's denial of intervention because Pastor Rodgers has no alternative forum by which to defend the constitutionality of the federal and state statutes and he has rebutted any presumption of adequate representation by the federal defendants. The federal defendants cannot adequately represent Pastor Rodgers because the IRS has already demonstrated a likelihood of conceding a broad interpretation of the challenged statutes in *Warren v. C.I.R.* The federal defendants cannot adequately represent Pastor Rodgers' interests in protecting the state statutes from federal and state constitutional attack. The federal defendants cannot adequately represent Pastor Rodgers' interests because they may be unable or unwilling to appeal an adverse decision. Pastor Rodgers'

interests conflict with the interests of the federal and state defendants in serving the general public, showing inadequate representation. Therefore, Pastor Rodgers should be granted intervention as of right.

III. The District Court Erred In Denying Pastor Rodgers Permissive Intervention Because He Shares A Common Question Of Law In The Federal And State Constitutionality Of The Challenged Statutes And As An Intervening-Defendant Is Submitting To The Personal And Subject Matter Jurisdiction Of The District Court.

The federal defendants rely on *So. Cal. Edison v. Lynch*, 307 F.3d 794 (9th Cir. 2002) for the proposition that an intervenor "must, at a minimum, show '(1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *Id*. at 803; E.R. at 59. The federal defendants conceded that Pastor Rodgers' motion was timely. E.R. at 56. Concerning the element of jurisdiction the Ninth Circuit has "resolved intervention question without making reference to standing doctrine." *Portland Audubon Soc. v. Hodel*, 866 F.2d 302, 308 n. 1 (9th Cir. 1989). This Court has further stated that "the standing requirement [of Rule 24] is at least implicitly addressed by our requirement that the applicant must "assert [ ] an interest relating to the property or transaction which is the subject of the action." *Portland*, 866 F.2d at 308 n. 1 (quoting *Orange County v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986)). Pastor Rodgers should be granted permissive intervention because he shares the

common question of law in the constitutionality of the statutes, if required can show jurisdiction as an intervening defendant, and has the strongest interest in the outcome of the litigation.

A. Pastor Rodgers meets the requirement of Rule 24(b) because he shares the common question of law in the constitutionality of the federal and state statutes.

Rule 24(b)(2) allows a court to grant permissive intervention when "an applicant's claim or defense and the main action have a question of law or fact in common." In this case, Pastor Rodgers seeks to defend the constitutionality of the challenged federal and state statutes. As such, Pastor Rodgers defense of the statutes and the FFRF's claim against the federal and state defendants have a common question of law: the constitutionality of the statutes.

The federal defendants conclude that because Pastor Rodgers "lacks distinct claims or defenses relating to the case" he has "failed to meet the threshold requirements for permissive intervention." E.R. at 61 (emphasis added). The federal defendants also conclude that "[Pastor Rodgers] only shares a common question of law insofar as an identical question of law is 'common' and not merely redundant." E.R. at 60. The federal defendants seek to override the plain language of the statute by claiming that Pastor Rodgers must have distinct and original defenses in order to meet the requirements for permissive intervention. Based on the plain language of the statute, Pastor Rodgers does meet the requirement

because he shares the common question of law in defending the constitutionality of the statutes.

B. Pastor Rodgers has submitted to the personal and subject matter jurisdiction of the district court.

1. An independent jurisdictional showing should not apply to Pastor Rodgers because he is seeking to intervene as a defendant and has not filed a counter-claim or a cross-claim.

Pastor Rodgers has, both implicitly and explicitly, submitted himself to the personal jurisdiction of the district court by making a motion to intervene in the lawsuit. It is implicit in motions for intervention that the applicant is submitting to the personal jurisdiction of the court. See *City of Santa Clara v. Kleppe*, 428 F.Supp. 315, 317 (N.D. Cal. 1976); *In re Bayshore Ford Truck Sales, Inc.*, 471 F.3d 1233, 1249 (11th Cir. 2006); *County Sec. Agency v. Ohio Dept. of Commerce*, 296 F.3d 477, 483 (6th Cir. 2002); *Pharm. Research & Mfrs. V. Thompson*, 259 F.Supp.2d 39, 59 (D.D.C. 2003); Wright, Miller & Kane, *Federal Practice and Procedure*, Vol. 7C § 1920 (3rd ed. 2007). Although this Court has stated that submission to the personal jurisdiction of the court is not automatic for intervention of right, it limited this ruling to apply to cases for intervention of right only, not cases concerning permissive intervention. *S.E.C. v. Ross*, 504 F.3d 1130, 1149-50, footnote 16 (9th Cir. 2007). Moreover, in Pastor Rodgers' reply to the federal defendant's response, Pastor Rodgers stated that he has moved "to intervene as Defendant[] in this case [and is] consenting to the court's

jurisdiction." E.R. at 50. The district court had personal jurisdiction over Pastor Rodgers.

The federal defendants' reliance on *So. Cal. Edison v. Lynch*, 307 F.3d 794 (9th Cir. 2002) for the proposition that an intervenor "must, at a minimum, show '(1) independent grounds for jurisdiction" is faulty because defendant-intervenors who do not cross-claim or counter-claim against an existing party do not need to show independent grounds for jurisdiction. *Id*. at 803; E.R. at 59. This understanding of the elements for permissive intervention is embodied in the line of cases leading from *Venegas v. Skaggs*, 867 F.2d 527 (9th Cir. 1989) (plaintiff's attorney seeking permissive intervention on claim to confirm lien for attorneys fees) to the *So. Cal.* case. *Id*. 307 F.3d 794 (wholesale generators of electricity and trade association seeking permissive intervention on claim for money owed to them by plaintiff).[1] Showing of independent jurisdiction is meant to enforce the policy that intervention is "not intended to allow the creation of whole new lawsuits by the intervenors." *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998).

[1] Within this line of cases is *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825 (9th Cir. 1996). This Court denied environmental organization intervention as of right, finding no significantly protectable interest, and denied permissive intervention for lack of independent grounds for jurisdiction. However, the parties apparently assumed without addressing the rationale of applying a standard borrowed from plaintiff-intervenor cases to defendant-intervenors.

This understanding of showing independent jurisdiction only where intervenors have a claim to litigate is found in *Beckman Industries, Inc. v. International Ins. Co.*, 966 F.2d 470 (9th Cir. 1992) where this Court stated that the three elements enumerated in *Venegas* are required "to litigate a claim on the merits" (emphasis added) and yet this Court granted permissive intervention without a showing of independent jurisdiction. *Beckman*, at 473. In *Beckman* the intervenor-defendants were seeking to intervene to advocate for a modification of a protective order, not seeking to file their own claim against any existing parties. *Id*. at 473. This Court affirmed the granting of permissive intervention without a showing of independent jurisdiction because the "intervenors do not ask the district to rule on additional claims." *Id*. Indeed, this case echoes the principle stated in *U.S. v. City of Los Angeles, Cal.*: "permissive intervention has been granted by the courts on a case-by-case basis, founded on analysis of the factors identified in Rule 24(b)." 288 F.3d 391 (9th Cir. 2002) (emphasis added).

Permissive intervention was designed to be decided on the circumstances of each case, not determined by hard and fast rules that do not apply to every situation. Pastor Rodgers is not seeking to circumvent or abuse permissive intervention. As an intervening defendant, Pastor Rodgers is not seeking to "create a whole new lawsuit," but is only seeking to defend the constitutionality of the challenged federal and state statutes. Pastor Rodgers has not and does not seek to

file counter-claims against the FFRF nor cross-claims against the federal or state defendants. The district court erred by requiring Pastor Rodgers to show independent jurisdiction, thereby holding Pastor Rodgers to a higher burden of proof than necessary for the disposition of this case. Pastor Rodgers requests that this Court consider the rationale of a showing of independent jurisdiction for permissive intervention in this case and why it is needed.

2. Even if independent jurisdiction is required for an intervening defendant who has not filed a counter-claim or a cross-claim, Pastor Rodgers can claim supplemental jurisdiction under 28 U.S.C. § 1367.

This Court can consider the issue of subject-matter jurisdiction because a federal appellate court can raise the issue of subject-matter jurisdiction on its own motion. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). It is the duty of the federal courts when analyzing jurisdiction to "look beyond the pleadings, and arrange the parties according to their sides in the dispute." *City of Indianapolis v. Chase Nat. Bank of City of New York*, 314 U.S. 63 (1941) (quoting *Dawson v. Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co.*, 197 U.S. 178, 180 (1905).

The district court has original jurisdiction over this claim under 28 U.S.C. § 1331 because the FFRF's claim arises under the Constitution and laws of the United States. E.R. at 102-03, ¶¶ 33, 37-38. Pastor Rodgers can claim supplemental jurisdiction under § 1367(a) because his motion for intervention is

"part of the same case or controversy": the constitutionality of the challenged statutes. Section 1367(b) does not bar Pastor Rodgers from supplemental jurisdiction because the district court has original jurisdiction in a federal question under § 1331 and not under diversity under § 1332. Moreover, § 1367(b) only bars supplemental jurisdiction to those "seeking to intervene as plaintiffs under Rule 24" (emphasis added) and Pastor Rodgers is seeking to intervene as a defendant. See *Development Finance Corp. v. Alpha Housing and Health Care, Inc.*, 54 F.3d 156, 160-61 (3rd Cir. 1995) (supplemental jurisdiction not barred by § 1367(b) for intervening defendant). Therefore, Pastor Rodgers can claim supplemental jurisdiction under § 1367 and meets the jurisdictional showing for permissive intervention.

C. Pastor Rodgers, as a minister, has the strongest interest in the outcome of the litigation and should not be denied permissive intervention under the guise of judicial economy.

A court may deny permissive intervention as discretionary only where "intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b)(2). The federal defendants propose that "allowing intervention would provide a rationale for any other 'minister of the gospel'…to intervene, thus undermining judicial economy and creating potential for undue delay or prejudice." E.R. at 61. The federal defendants also state that allowing Pastor Rodgers to intervene is unnecessary because "any additional party

'would unnecessarily encumber the litigation'" (quoting *PEST Committee v. Miller*, 648 F.Supp.2d 1202, 1214 (D. Nev. 2009)). E.R. at 61. The federal defendants, under the guise of judicial economy, seek to deny Pastor Rodgers intervention on mere suspicion of delay, prejudice, and encumbrance without proof.

Justice is not unduly hindered by the ministers' intervention because ministers have the strongest interest in the outcome of this litigation. In *U.S. v. City of Los Angeles, Cal.*, 288 F.3d 391 (9th Cir. 2002) the defendants argued that allowing intervention would slow the legal process and delay justice. *Id*. at 404. This Court rejected that argument, stating that "the idea of 'streamlining' the litigation…should not be accomplished at the risk of marginalizing those [intervenors] who have some of the strongest interest in the outcome." *Id*. As a minister, Pastor Rodgers has the strongest interest in the outcome of this litigation because he has the most to lose in an unfavorable outcome, in contrast with the federal defendants who has nothing to lose in a favorable ruling and everything to gain in an unfavorable one. Moreover, any subsequent ministers seeking to intervene would have the burden of proving anew all four elements of Rule 24(a), including how Pastor Rodgers does not adequately represent their interests as a minister.

D. Pastor Rodgers should be granted permissive intervention because deference should be given to a party with the strongest interest in the outcome of the litigation.

Overall, the courts have deftly avoided rigidity in granting or denying intervention, opting instead to craft creative, case-specific solutions which will ensure the most complete representation of all parties and disposition of the issues. Courts have, for example, granted intervention as of right and, in the alternative, permissive intervention. See, *e.g., Pacific Gas & Electric v. Lynch*, 216 F.Supp. 2d 1016, 1025 (N.D. Cal. 2002). Even in cases where the court has determined that federal law precludes intervention as of right, intervention has been allowed on a more limited basis. For instance, in *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105 (9th Cir. 2000) this Court held that the unique structure of the National Environmental Policy Act (NEPA) prevented environmental groups from intervening as of right, because only the government could enforce or be liable as a defendant under NEPA. *Id*. at 1114. Nevertheless, this Court still allowed the environmental groups to intervene in the remedial phase of the litigation. *Id*. *See also, Purnell v. City of Akron*, 925 F.2d 941 (6th Cir. 1991) (even where intervention as of right was not warranted, permissive intervention should have been granted).

Pastor Rodgers, as a members of the clergy, presents a strong interest in this litigation because the challenged statutes directly applies to him and affects his

financial and ministry interests. Pastor Rodgers seeks to protect not merely a generalized, ethereal interest in preserving statutes granting tax benefits to clergy; rather, he seeks to protect his financial interests, as well as the time, energy, and resources made available to him in order to serve the community. Even if this Court should determine that not all of the requirements of Rule 24(a) have been met, it should permit the requested intervention under Rule 24(b).

CONCLUSION

The advisory committee notes for Rule 24 state that "if an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001). Pastor Rodgers' ability to support his family on his modest salary will be at risk if his personal tax liability increases. In direct contrast, the state and federal defendants' mission and goals are to collect as much tax revenue as possible. Hence there is an existential conflict of interest between Pastor Rodgers and the federal and state defendants. Because of that inherent conflict, and for the reasons discussed in this brief, the order denying the motion for intervention should be reversed and we request that this Court grant intervention.

Date: March 26, 2010

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 8,125 words.

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STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery to the following non-CM/ECF participants:

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