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 of the Treasury, DOUGLAS SHULMAN, Commissioner of Internal Revenue, and SELVI STANISLAUS, Executive Officer of the California Franchise Tax Board, in their official capacities,

Defendant-Appellees

MICHAEL RODGERS,

Intervenor-Appellant

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR THE FEDERAL APPELLEES

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GLOSSARY

FFRF	Freedom From Religion Foundation
I.R.C.	Internal Revenue Code
IRS	Internal Revenue Service

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-56479

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

Plaintiffs-Appellees

v.

TIMOTHY GEITHNER, Secretary of the Treasury, DOUGLAS SHULMAN, Commissioner of Internal Revenue, and SELVI STANISLAUS, Executive Officer of the California Franchise Tax Board, in their official capacities,

Defendant-Appellees

MICHAEL RODGERS,

Intervenor-Appellant

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE FEDERAL APPELLEES

STATEMENT OF JURISDICTION

1. Jurisdiction in the District Court

Freedom from Religion Foundation, Inc. and 21 of its individual members (collectively, FFRF) brought this suit for declaratory and

injunctive relief against Timothy Geithner, Secretary of the Treasury, Douglas Shulman, Commissioner of Internal Revenue, and Selvi Stanislaus, Executive Officer of the California Franchise Tax Board, in their official capacities. (ER 97-109.)[1] The gravamen of the complaint was that federal and California statutes extending certain income tax benefits to the clergy[2] violate the Establishment Clause of the First Amendment to the United States Constitution and a like clause in Article 1, § 4 of the California Constitution, as well as the latter's "no preference" and "no aid" clauses. (ER 102-104.) FFRF sought a declaration that these tax benefits are unconstitutional (ER 108) and

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[1] "ER" references are to the appellant's excerpts of record. "SER" references are to the supplemental excerpts of record filed by the federal appellees concurrently with this brief. "CR" references are to the documents in the original record, as numbered by the Clerk of the District Court.

[2] The challenged provisions are an exclusion for the rental value of a parsonage (or for an equivalent allowance used to rent or provide the parsonage), I.R.C. § 107 and Cal. Rev. & Tax Code § 17131.6 (West 2005), and the allowance of deductions for mortgage interest and real property taxes notwithstanding the receipt of an excludable parsonage allowance, I.R.C. § 265(a)(6)(B) and Cal. Rev. & Tax Code § 17280(d)(2) (West 2005).

an injunction against "continuing to grant or allow tax benefits" under those laws (ER 109).

Appellant Michael Rodgers and "Does 1-100" moved to intervene as defendants, contending that they were entitled to intervene as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure or, alternatively, permissively under Rule 24(b). (ER 95.) At issue in this appeal is whether the District Court properly denied Rodgers' intervention motion. Intervention, moreover, presupposes the pendency of an action in a court of competent jurisdiction. Since we think the District Court lacks jurisdiction over FFRF's original action, a matter we discuss in the pages that follow, intervention is not permitted for that reason as well.

i. Plaintiffs lack standing to sue because their abstract, generalized grievances are not judicially cognizable

The District Court lacks subject matter jurisdiction over the underlying action because plaintiffs lack standing to maintain it. The "core component" of standing, derived directly from the "cases" or "controversies" requirement of Article III of the Constitution, requires

the plaintiff to "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 750-751 (1984). That injury cannot be an "abstract" one (*O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)); it must be "distinct and palpable" (*Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)). "[S]tanding to sue may not be predicated upon an interest of the kind alleged * * * which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 218 (1974). FFRF does not establish standing simply by alleging that it is a "non-profit * * * organization that advocates for the separation of church and state and educates on matters of non-theism." (ER 98.) This allegation articulates no injury that is not shared by citizens in general. *Apache Bend Apartments, Ltd. v. United States*, 987 F.2d 1174, 1177 (5th Cir. 1993) (*en banc*) (denying standing on prudential grounds to plaintiffs challenging "unequal treatment" accorded to other taxpayers in transition rules). Nor have plaintiffs alleged that they personally have

been denied the challenged tax benefits. *Cf. Texas Monthly v. Bullock*, 489 U.S. 1, 9 (1989).

ii. Plaintiffs lack "taxpayer" standing to sue

To the extent plaintiffs base their claims on their status as taxpayers, they still fail to allege a cognizable injury in fact. *Frothingham v. Mellon*, 262 U.S. 447 (1923) (generally prohibiting taxpayer standing). To be sure, in *Flast v. Cohen*, 392 U.S. 83 (1968), the Supreme Court recognized the standing of taxpayers to mount an Establishment Clause challenge the expenditure of funds under a federal statute granting financial aid to religious schools. But the decision in *Flast* creates only a "narrow exception * * * to the general rule against taxpayer standing established in *Frothingham v. Mellon*, 262 U.S. 447 (1923)." *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988). Standing under *Flast* depends upon a challenge to "the constitutionality of a spending program." 392 U.S. at 102; *see also id.* at 104. Plaintiffs in this case have failed to identify any manner in which "tax money is being *extracted and spent* in violation of specific constitutional protections against such abuses of legislative power." *Id.*

at 106 (emphasis supplied); *PLANS, Inc. v. Sacramento City Unified School Dist.*, 319 F.3d 504, 507 (9th Cir. 2003) (noting that taxpayer standing generally "requires an injury resulting from a government's expenditure of tax revenues"). This case, unlike *Flast*, involves no appropriation of federal funds for an unconstitutional purpose. It does not involve a legislature's power to spend tax monies for the general welfare. All that is at issue here is the legislature's power to create classifications exempting certain taxpayers from the operation of specific taxing measures. As a result, plaintiffs have not established the requisite link between their status as taxpayers and the provisions they seek to challenge.

iii. Nor do plaintiffs have "competitor" standing

Finally, FFRF and its members lack standing to sue under the theory that, although it "competes with churches and religious organizations, * * * the competition is unfair," because it is assertedly "placed at a competitive disadvantage relative to churches and other employees whose employees receive tax subsidies." (ER 108.) The Supreme Court has recognized that a competitive injury can confer

standing on a plaintiff to challenge a government action. *See*, *e.g.*, *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). But the courts have otherwise rejected the notion that "*Data Processing* should be read to endorse standing for any private business, individual or corporate, which wishes to contest the tax treatment of a competitor." *American Society of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145, 151 (D.C. Cir. 1977) (rejecting for-profit travel agents' association "competitor standing" to challenge tax-exempt status of nonprofits offering travel services). In a tax case, such an injury fails to satisfy Article III because the causal connection between a competitor's fortunes and an injury to its competitor is too tenuous; the injury is not "fairly traceable" (*Allen v. Wright*, 468 U.S. at 751) to the challenged benefit.

In the wake of *Travel Agents*, the courts have generally rejected claims of "competitor standing" in tax cases. In *In re United States Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989), for example, the Second Circuit held that "pro-choice" plaintiffs lacked standing to challenge the tax exemption of the Roman Catholic Church, because

the Church's alleged electioneering with the aid of tax-deductible contributions did not affect them in a direct and immediate way. Similarly, in *Fulani v. Brady*, 935 F.2d 1324 (D.C. Cir. 1991), the court held that an independent presidential candidate lacked standing to challenge the tax exemption of the Commission on Presidential Debates, for allegedly excluding her from participating in Presidential in the debates on the basis of her race and sex.[3] And in *Research Consulting Associates v. Electric Power Research Institute, Inc.*, 626 F. Supp. 1310 (D. Mass. 1986), the manufacturer of an electrical device lacked standing to challenge the tax-exempt status of a research institute that allegedly promoted the product of a competitor.

So, too, here, the tax benefits accorded members of the clergy by §§ 107 and 265(a)(6) of the Code could only result in an alleged injury to FFRF after the intervention of other causal factors, including the

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[3] Although in *Fulani v. League of Women Voters Education Fund*, 882 F.2d 621, 628 (2d Cir. 1989), the same plaintiff was found to have standing to challenge the tax exemption of a sponsor of Presidential primary debates on the same theory (that she was denied participation because of her race and sex) – a claim the court rejected on the merits – the court's ruling on jurisdiction conflicts with fundamental limitations upon standing imposed by Article III.

religious organizations' actions and the behavior of individual ministers. It is purely speculative, therefore, what consequences might flow from holding §§ 107 and 265(a)(6) unconstitutional. Clergy might be willing to absorb the tax without any compensating increase. Alternatively, the occasion might serve to spur increased charitable giving by parishioners, aimed at compensating pastors for the resulting tax bill, without otherwise affecting church resources. In either event, FFRF would still be in the same position as it is now, making it clear that its alleged "injury" is not fairly traceable to the Government's action nor redressable by the court.

iv. California's position and the status of the case

Stanislaus has also argued that the District Court lacks jurisdiction, citing sovereign immunity and the Eleventh Amendment. (SER 28-33.) The defendants' jurisdictional objections have been presented to the District Court in the form of motions to dismiss (SER 24-91) which, as of the time of this writing, are fully briefed and

awaiting disposition. Oral argument on the motions to dismiss is scheduled to be heard by the District Court on May 10, 2010.

2. Jurisdiction in the Court of Appeals

i. Timeliness of appeal

Rodgers' motion to intervene in the underlying action was denied on December 2, 2009. (ER 1.) Rodgers filed a timely notice of appeal to this Court on December 9, 2009. (ER 25-26.) *See* 28 U.S.C. § 2107(b), Fed. R. App. P. 4(a)(1)(B).

ii. Appealability of order

An order denying of intervention as of right under Rule 24(a)(2) is immediately appealable. *Brotherhood of R.R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 524 (1947); *League of United Latin Am. Citizens (LULAC) v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997).[4] This Court therefore has jurisdiction of Rodgers's appeal from the denial of his bid for intervention as of right under Rule 24(a)(2).

[4] If the putative intervenor is denied intervention as of right, but is granted permissive intervention, the denial of intervention as of right is not appealable. *Stringfellow v. Concerned Neighbors in Action*, 380 U.S. 370, 378 (1987). Since Rodgers was precluded from becoming a party in *any* respect, that rule does not apply here.

An order denying a motion for permissive intervention under Rule 24(b) is appealable, however, only if the trial court has abused its discretion in denying the motion. *Brotherhood of R.R. Trainmen*, 331 U.S. at 523; *LULAC*, 131 F.3d at 1307. Determining whether this Court has jurisdiction over the appeal from the denial of Rodgers' Rule 24(b) motion, then, necessarily involves a consideration of the merits, *i.e.*, whether the District Court abused its discretion in denying the motion. As a result, this Court has said that it has *practical* (if not always actual) jurisdiction over appeals from the denial of Rule 24(b) motions. *LULAC*, 131 F.3d at 1308. Because the District Court did not abuse its discretion in denying Rodgers's request for permissive intervention (*see* Argument II, *infra*), however, this Court technically lacks jurisdiction over that portion of the appeal.

STATEMENT OF THE ISSUES

1. Whether the District Court correctly denied Rodgers intervention as of right under Rule 24(a)(2), because his ability to protect his interest would not thereby be impaired and because, in any event, his interest is adequately represented by existing parties.

2. Whether the District Court correctly exercised its discretion in denying Rodgers permissive intervention under Rule 24(b), due to the absence of an independent basis for jurisdiction over the putative claim against him.

STATEMENT OF THE CASE

FFRF brought this suit against the Secretary of the Treasury, the Commissioner of Internal Revenue, and the Executive Director of the California Franchise Tax Board, in their official capacities,[5] seeking a declaration that federal and California statutes relating to the so-called "parsonage allowance" – §§ 107 and 265(a)(6) of the Code and Cal. Rev. & Tax Code §§ 17131.6 and 17280(d)(2) – are unconstitutional, as well as an injunction preventing those officials from "continuing to grant or allow tax benefits" under the statutes. (ER 108-109.)

Before Stanislaus had even been served with the complaint, Michael Rodgers moved to intervene as a defendant to the action,

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[5] Because the officials have been sued solely in their official capacities, the suit is in reality one against the United States and California. *Dugan v. Rank*, 372 U.S. 609 (1962); *Hutchinson v. United States*, 677 F.2d 1322, 1327 (9th Cir. 1982). As a result, the proper defendants are the United States and California.

purportedly to protect his interest as a minister who qualifies for the parsonage allowance. (ER 78, 95-96.) The United States opposed the motion. Regarding intervention as of right under Rule 24(a)(2), the United States argued that Rodgers failed to qualify for two reasons. First, it argued that, because he had other means of protecting his interest, he would not be "impaired" within the meaning of the rule if he were precluded from intervening. Second, the United States argued that, because it intended to defend the constitutionality of the statutes, Rodgers's interest in the parsonage allowance was adequately protected by existing parties, which also precluded intervention as of right. Regarding permissive intervention under Rule 24(b), the Government contended that, because the District Court lacked independent jurisdiction to hear an action against Rodgers, he was not eligible to intervene on a permissive basis. (ER 54-62.) The District Court denied Rodgers' motion to intervene, but it granted his alternative request to participate in the case as *amicus*. (ER 1-17.) This appeal followed. (ER 25-26.)

STATEMENT OF THE FACTS

A. The parsonage allowance and the *Warren* case

In the case of a "minister of the gospel," § 107 of the Code excludes from gross income the "rental value of a home furnished to him as part of his compensation" or a "rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home." Many years ago, the IRS took the position that the amount of the "rental allowance" a minister could exclude from his gross income was limited to the fair market rental value of his home. *See* Rev. Rul. 71-280, 1971-2 C.B. 92.

In the 1990s, however, the Rev. Richard D. Warren of Saddleback Valley Community Church took the position that he could exclude his entire rental allowance, without regard to the fair market rental value of his home, so long as the allowance did not exceed his actual housing expenditures. He prevailed on that contention in the Tax Court. *See Warren v. Commissioner*, 114 T.C. 343 (2000).

The Commissioner appealed to this Court. At oral argument in the *Warren* appeal, this Court asked counsel for both parties to address

whether it must consider the constitutionality of the rental allowance under the Establishment Clause. *See Warren v. Commissioner*, 282 F.3d 1119, 1123 (9th Cir. 2002) (*Warren I*) (Tallman, J., dissenting). Both parties advised the Court that "they did not raise this issue in the Tax Court," that "they do not wish to make a constitutional challenge," and that they "believe the parsonage exclusion is constitutional." *Id.* at 1124. After argument, the Court appointed Prof. Erwin Chemerinsky as an (additional) *amicus curiae* and requested Warren, the Commissioner and *amici* to brief the Establishment Clause issue. *Id.* at 1119-1120. In so doing, the Commissioner defended the constitutionality of the parsonage allowance. *Warren v. Commissioner*, No. 00-71217, Supp. Brief for Appellant (Docket No. 50) (9th Cir. May 3, 2002).

While the appeal in *Warren* was still under submission to this Court, Congress passed the Clergy Housing Allowance Clarification Act of 2002, Pub. L. No. 107-181, 116 Stat. 583 (May 20, 2002). The Act amended § 107 of the Code to provide generally that for tax years beginning after 2001, the exemption for the rental allowance in § 107(2)

is limited to the fair market rental value of a minister's home. *Id.*, § 2(b)(1), 116 Stat. at 583. In general, a minister's rental allowance in earlier years was not so limited. *Id.*, § 2(b)(3), *supra*. Because the Act mooted the issue of statutory interpretation disputed by the parties in *Warren*, the parties stipulated to dismiss the appeal, and the Court accordingly dismissed it. *Warren v. Commissioner*, 302 F.3d 1012, 1014 (9th Cir. 2002) (*Warren II*).

B. The nature of this suit and the proceedings on the motion to intervene

On October 16, 2009, FFRF filed the complaint for declaratory and injunctive relief in this case. (ER 97-109.) FFRF sought a declaration that the exemption for the parsonage allowance and the deductions for mortgage interest and real property taxes paid with respect to such an allowance under §§ 107 and 265(a)(6) of the Code, respectively, as well as their respective analogs in Cal. Rev. & Tax Code §§ 17131.6 and 17280(d)(2), violated the Establishment Clause of the First Amendment to the United States Constitution and a like clause in Article 1, § 4 of the California Constitution, as well as the

latter's "no preference" and its "no aid" clauses. (ER 102-104.) FFRF sought to have the District Court enjoin the defendants "from continuing to grant or allow tax benefits" under the challenged statutes. (ER 109.)

Six days after the complaint was filed, and before any other party had appeared in the case, Rodgers and "Does 1-100" filed a motion "for an order granting intervention as defendants" to FFRF's complaint. (ER 95.) Rodgers argued that, as someone who had claimed, and would continue to claim, the challenged federal and state tax benefits accorded parsonage allowances that were being challenged by FFRF (ER 78), the disposition of the action "would directly impede [his] interests and resources to minister and serve the community" (ER 89). He contended that his interests were not adequately represented by existing parties, on the theory that the Treasury and the California Franchise Tax Board were "at bottom politically-motivated bodies" who would defend the statutes only "to the extent that it is politically expedient to do so." (ER 90.) He also argued that they were subject to an inherent "conflict of interest" in doing so, due to the "increase in tax

revenue" that stood to be realized if the statutes were struck down. (*Id.*) Rodgers sought both intervention as of right (Fed. R. Civ. P. 24(a)(2)) and permissive intervention (Rule 24(b)). (ER 91.) In the alternative, Rodgers requested the District Court to permit him to participate in the litigation as *amicus*. (ER 92.)

FFRF and its plaintiff members did not oppose Rodgers' motion to intervene. (CR 15.) The United States appeared in the case and opposed the motion. (ER 54.) For as long as the motion was pending, Stanislaus did not appear, because he was not served with the complaint until January 12, 2010. (CR 32, at 2.)

In its opposition, the United States argued that intervention as of right should be denied. Although the United States noted that Rodgers might have a "significantly protectable interest" in the litigation, it asserted that he could protect that interest by other means, such as by participating as an *amicus*. (ER 57.) The United States further contended that there is a presumption that Rodgers's interest is adequately represented by existing parties in this case, and it asserted that his speculative assertions regarding the Treasury's political

motives and financial conflicts were insufficient to overcome that presumption. (ER 58-59.)

The United States also opposed Rodgers's request for permissive intervention. It contended that, in the absence of an independent basis for jurisdiction over Rodgers's claims or defenses, permissive intervention was not appropriate. It also contended that his intervention would encumber, rather than streamline, the judicial process. (ER 60-61.)

C. The District Court's denial of the motion to intervene

On December 2, 2009, the District Court denied Rodgers's motion to intervene. Before denying him intervention as of right, the court rejected the argument of the United States that the filing of an *amicus* brief is generally sufficient to protect an intervenor's interest in litigation from impairment. (ER 6.) The court agreed with the United States, however, that Rodgers's interest was adequately represented by existing parties to the case. (ER 8-14.) The court opined that Rodgers had not overcome the "very strong presumption" of adequate

representation with his "cynical" speculation that the taxing authorities might be tempted to allow the statutes to be overturned in order to gain the "windfall" in new revenue that might result. (ER 13.) Instead, the Court pointed to "the fact that the United States has consistently enforced the revenue statutes at issue here and the inherent interest the United States has in seeing its statutes upheld and enforced." (*Id.*)

The District Court went on to reject Rodgers's further argument that the United States could not represent his interests because it would not be defending the analogous California statutes. Noting that "the state defendant has not yet been served," the court concluded that Rodgers "cannot go around the showing required by Rule 24(a)(2) that existing parties may not adequately represent their interest simply by moving to intervene before the parties to the suit have appeared." (ER 14.) This aspect of Rodgers motion, then, was "premature." (*Id.*) The court was unpersuaded by the prospect that the Solicitor General might not authorize appeal of an adverse ruling that Rodgers's interests

would not be adequately represented. It reasoned that, in that event, he could "move to intervene for purposes of appeal." (ER 13.)

Finally, the District Court declined to grant Rodgers permissive intervention under Rule 24(b). It noted that Rodgers "admits in his motion that a court would likely find no 'case or controversy' existed unless and until the plaintiffs in this lawsuit succeeded." (ER 16.) Because he "makes no effort to show that independent grounds for jurisdiction exist," the court concluded, the motion for permissive intervention must be denied. (*Id*.)

D. Proceedings in the District Court after the denial of the motion to intervene

Rodgers lodged this appeal from the denial of his motion to intervene on December 9, 2009. (ER 25-26.) On January 12, 2010, Stanislaus was served with the complaint. (CR 32, at 2.) On February 26, Stanislaus and the United States each filed motions to dismiss the complaint. (SER 24, 40.) In addition to contending that the District Court lacks subject matter jurisdiction to entertain the suit because the plaintiffs lack standing to sue, Stanislaus and the United States

defended the constitutionality of the challenged state and federal tax provisions concerning parsonage allowances, respectively. Specifically, the United States and California moved to dismiss for failure to state a claim. The United States contended that the provisions of the Code concerning parsonage allowances do not violate the First Amendment's Establishment Clause (SER 58-91), while Stanislaus argued that the like provisions of the California tax law do not violate the Establishment Clause of either the United States or California Constitutions, the latter's "no preference" clause or its "no aid" clause (SER 33-39). These motions are fully briefed, and oral argument is scheduled to be heard by the District Court on May 10, 2010.

SUMMARY OF ARGUMENT

1. As relevant here, Rule 24(a)(2) permits intervention as of right only if the putative intervenor demonstrates that his interest would be impaired absent his participation and that his interest is not adequately represented by existing parties to the suit. Rodgers's bid to intervene founders on each count.

In order to be entitled to intervene as of right, the movant must demonstrate, under Rule 24(a)(2), that he "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect [his] interest." But even if the lawsuit might affect the movant's interest, his interest might not be "impaired" if he has other means of protecting it. And Rodgers undeniably has "other means" of contesting his entitlement to tax benefits accorded to the parsonage allowance that preclude his intervention here. The District Court rejected the Government's argument below that Rodgers could protect his interest simply by appearing as *amicus*. But it also bears noting that he has other statutory remedies for any future denial of the tax benefits under the challenged provisions of the Internal Revenue Code. If the Commissioner were to determine a deficiency based on the disallowance of those benefits, Rodgers could obtain prepayment review of that determination in the Tax Court. Alternatively, he could pay the tax, file a timely administrative claim for refund and, after that claim is denied or no action is taken on it for at least six months, sue for a refund in a district court or the Court of Federal Claims. Of course,

FFRF's success in the District Court or on appeal to this Court would complicate Rodgers's chances of prevailing in his own deficiency or refund action, if he were still to live within this Circuit at the time he brings such a suit. But until such time as the Supreme Court actually strikes down the tax benefits long accorded to the parsonage allowance, Rodgers cannot be said to lack another remedy. And while he has such recourse, his bid to intervene is precluded.

In any event, the District Court was correct that Rodgers failed to make the required showing that his interest is not adequately represented by existing parties. Where, as here, the Government and the applicant are on the same side of the litigation, there is a presumption that the applicant's interest is adequately represented, which presumption can only be overcome with a "very compelling showing" to the contrary. Because Rodgers has failed to make such a very compelling showing, the District Court's denial of intervention as of right should be affirmed.

Specifically, it is beside the point that the Commissioner and the taxpayer in the *Warren* case differed on their construction of a bygone

version of § 107. Congress has since amended the statute to obviate the dispute over whether the exclusion is limited to the fair rental value of the parsonage. Rodgers further contends that the Government is conflicted by its Treasury function to an extent that might lead it to acquiesce in the unconstitutionality of the parsonage allowance for pecuniary reasons. This argument is not only speculative, but it is also belied by the fact that the Government has represented that it will defend the constitutionality of the parsonage allowance in this case, and has consistently done so in this and every other case. Rodgers's similar speculation that the Government might be tempted to avoid the constitutional question entirely it is completely undermined by the fact that that question is unavoidable in this case. Rodgers's arguments that the State of California might not represent his interest, or that Solicitor General might not authorize appeal is premature, and with respect to the state claims, wrong. The Franchise Tax Board is, in fact, defending the California parsonage allowance from attack under the federal and state constitutions.

2. It is well settled that a court may permit intervention in the exercise of its discretion under Rule 24(b) only where the applicant demonstrates an independent basis for jurisdiction over the applicant's claims or defenses. Rodgers's situation does not fall within the only, narrow exception to that rule, which applies when a third party seeks to intervene for the limited purpose of obtaining access to documents protected by a confidentiality order. And, contrary to Rodgers's assertions, his application for intervention does seek to have the District Court assert jurisdiction over a new claim: he seeks to intervene as a defendant to FFRF's claims for declaratory and injunctive relief. But the District Court is without subject-matter jurisdiction over an action against Rodgers for declaratory and injunctive relief. Nor can Rodgers "consent" to subject-matter jurisdiction. There was, accordingly, no abuse of discretion in the District Court's denial of permissive intervention, and this portion of the appeal should be dismissed for lack of appellate jurisdiction.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY DENIED RODGERS INTERVENTION AS OF RIGHT BECAUSE HIS INTEREST IN THE CONSTITUTIONALITY OF THE PARSONAGE ALLOWANCE WILL NOT BE IMPAIRED AND, IN ANY EVENT, IT IS ADEQUATELY REPRESENTED BY THE EXISTING PARTIES

Standard of Review

The District Court's denial of the motion to intervene as of right is reviewed *de novo*. *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009).

A. Introduction

Regarding intervention as of right, Fed. R. Civ. P. 24(a)(2) provides in pertinent part as follows:

> **Rule 24. Intervention**
>
> **(a) Intervention of Right.** On timely motion, the court must permit anyone to intervene who:
>
> * * * * *
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so

> situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

In keeping with the text of the rule, this Court has summarized the requirements of intervention as of right under Rule 24(a)(2) as follows:

> * * * (1) the applicant must timely move to intervene; (2) the applicant must have a significantly protectable interest relating to the property or transaction that is the subject of the action; (3) the applicant must be situated such that the disposition of the action may impair or impede the party's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by existing parties.

Perry, 587 F.3d at 950 (citing *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003)). The applicant bears the burden of showing that each of the four elements is met. *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006). Failure to satisfy any one of the four requirements is fatal to the application. *Perry,* 587 F.3d at 950.

In this case, the United States did not dispute the timeliness of Rodgers's application to intervene, made only a matter of days after suit was instituted. Nor did it dispute that Rodgers, a pastor who

alleges that he has claimed the federal and state tax benefits accorded the parsonage allowance, has a "significantly protectable" interest in the subject matter of the suit for purposes of the rule. Instead, the United States contended (1) that disposition of the action would not as a practical matter impair or impede Rodgers's ability to protect his interest and (2) that, in any event, Rodgers's interest was adequately represented by the existing parties to the suit. The District Court concluded that Rodgers had shown that his ability to protect his interest might be impaired absent intervention (ER 5-8), but it agreed with the United States that Rodgers was not entitled to intervene because his interest was adequately represented (ER 8-14). As we demonstrate below, the District Court was correct in concluding that Rodgers did not meet the requirements for intervention as of right.

B. Because Rodgers has other means of protecting his interest, his ability to protect that interest would not be impaired if he is not allowed to intervene

In order to be entitled to intervene as of right under Rule 24(a)(2), the movant must demonstrate that he "is so situated that disposing of

the action may as a practical matter impair or impede the movant's ability to protect [his] interest." Fed. R. Civ. P. 24(a)(2). The Advisory Committee Notes to the rule, the guidance of which this Court follows, *see Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001), explain in this regard that "[i]f 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." Advisory Committee Note to Fed. R. Civ. P. 24 (1966 Amendment).

Because Rodgers has a significant protectable interest in the litigation for purposes of the rule, it would seem to follow that the lawsuit will affect his bid to enjoy the tax benefits accorded to the parsonage allowance. But that is not sufficient. As this Court has explained, "[e]ven if this lawsuit would *affect* the proposed intervenors' interests, their interests might not be *impaired* if they have 'other means' to protect them." *California ex rel. Lockyer v. United States*, 450 F.3d 436 442 (9th Cir. 2006), quoting from *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004).

In *Alisal*, for example, where the United States sought to place the defendant in receivership to remedy environmental violations the defendant had committed, this Court rejected an attempt by the defendant's judgment creditor to intervene. It reasoned that the suit would not impair the creditor's interest because the district court had established a separate process for making claims against the defendant that were sufficient to protect the creditor's interest. *Alisal*, 370 F.3d at 921.

So, too, in *United States v. City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002), this Court rejected an attempt by community groups to intervene in a suit by the United States against Los Angeles to enjoin certain police practices, albeit on other grounds. But it also noted that, since anyone whose constitutional rights were violated by the police could sue the police, or even or the City, if it tolerated a pattern or practice of such violations, it was "doubtful" that the movants' interests were "impaired" in the sense meant by the rule. *Id.* at 402.

By the same token, Rodgers has "other means" of contesting the denial of benefits that preclude his intervention here. The District

Court rejected the Government's argument below (ER 57) that Rodgers could appear as *amicus*. But in a larger sense, it bears noting that Rodgers has other remedies for any future denial of the tax benefits accorded to parsonage allowances under the challenged provisions of the Code. If the Commissioner were to determine a deficiency against him based on his claim of such benefits, he could obtain prepayment review of that determination in the Tax Court following the issuance of a notice of deficiency. *See* I.R.C. §§ 6212, 6213(a), 7442. Alternatively, Rodgers could fully pay the tax, file a timely administrative claim for refund and, after that claim is denied or no action is taken on it for at least six months, sue for a refund in a district court or the Court of Federal Claims. I.R.C. §§ 6511(a), 6532(a)(1), 7422(a); 28 U.S.C. §§ 1346(a)(1), 1491; *Flora v. United States*, 357 U.S. 63 (1958), *on rehearing*, 362 U.S. 145 (1960). As the Fifth Circuit pointed out in *Apache Bend Apartments*, 987 F.2d at 1177:

> * * * Congress has erected a complex structure to govern the administration and enforcement of the tax laws, and has established precise standards and procedures for judicial review of tax matters. Even if the plaintiffs succeeded in gaining the relief they seek–nullification of the transition

> rules–the affected taxpayers, who are not parties, would remain free to challenge any deficiencies asserted.

To be sure, the possibility that FFRF might persuade the District Court, and perhaps even this Court in any appeal, that it has standing to sue and that the parsonage allowance violates the Establishment Clause, might complicate Rodgers's chance of success in his own refund or deficiency action. But there is no assurance that Rodgers would still reside within this Circuit by the time he brings any such suit. *See* I.R.C. § 7482(a)(1) (laying appellate venue, in the case of a Tax Court appeal, in the Circuit where the taxpayer resides at the time he brings suit in the Tax Court); 28 U.S.C. § 1396 (laying venue for a refund suit in the district(s) where the liability for the tax accrues, where the taxpayer resides or where the return was filed); *see Apache Bend Apartments*, 987 F.2d at 1177 (noting that its decision, if it were to entertain and agree with the plaintiffs' challenge to the transition rules accorded other taxpayers, "would constitute binding precedent only in this Circuit."). Until such time as the Supreme Court were to consider the matter and agree with FFRF that the Establishment Clause forbids

the tax benefits long accorded by the Code to the parsonage allowance, it cannot be said that Rodgers lacks a remedy, or "other means," of protecting his interest. Because he has such a remedy, Rodgers's request for intervention is subject to denial on the ground that his interest would not be "impaired" within the meaning of the rule.

C. The District Court correctly held that Rodgers failed to make the required "very compelling showing" that his interests are not adequately represented by existing parties

In any event, the District Court correctly denied Rodgers' application for intervention for failure to meet the fourth requirement – that is, to show that his interest is not "adequately represented" by existing parties. (ER 8-14.) In assessing whether an applicant is not adequately represented by a present party, this Court considers "(1) whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect."

Northwest Forest Resource Council v. Glickman, 82 F.3d 825, 838 (9th Cir. 1996).

The "most important factor" in assessing the adequacy of representation is "how the [applicant's] interest compares with the interests of existing parties." *Arakaki*, 324 F.2d at 1086. When the applicant and a party have the same ultimate objective, a presumption of adequacy of representation arises. *Id.*; *LULAC*, 131 F.3d at 1305.

Moreover, when a governmental unit is acting on behalf of a constituency that it represents, there is a strong presumption that the government adequately represents its citizens sharing the same interest. *California ex rel. Lockyer*, 450 F.3d at 443-444. Nowhere is this presumption more applicable than in a case, such as this one, "where the Department of Justice deploys its formidable resources to defend the constitutionality of a congressional enactment." *Id.* at 444. The presumption of adequacy of representation can only be overcome by a "very compelling showing" to the contrary. *Id.* at 443; *Arakaki*, 324 F.3d at 1086.

It is a "rare" case in which a member of the public is allowed to intervene in an action in which the United States or its agencies represent the public interest. 7C Wright, Miller & Kane, *Federal Practice and Procedure,* § 1909 at 429 (3d ed. 2007). Intervention has generally been allowed in such cases only upon an affirmative showing of adversity of interest, collusion or nonfeasance. *See Moosehead San. Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979); 7C Wright, Miller & Kane, § 1909, at 392, 427 (discussing these three circumstances as being those cited by then-Judge Blackmun, writing for the Eighth Circuit in *Stadin v. Union Elec. Co.*, 309 F.2d 912, 919 (8th Cir. 1962), where representation is inadequate).

For instance, this Court has found adversity of interest where the federal government's position in the litigation actually diverged from that of the intervenors, *Lockyer*, 450 F.3d at 444, where the federal defendant previously ran the plaintiff's organization, *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1986), and where a city government was acting not on behalf of an intervenor, but as an employer and antagonist in collective bargaining, *United States v. City*

of Los Angeles, 288 F.3d 391, 401-02 (9th Cir. 2002). But this Court has refused to find adversity of interest simply on the basis of "[c]ampaign rhetoric and perceived philosophic differences," *id.* at 403, "dispute[s] over litigation strategy or tactics," *Perry*, 587 F.3d at 954, or "minor differences of opinion" over the arguments to be raised in a case, *Northwest Forest Resource Counsel*, 82 F.3d at 838. Likewise, a showing that the applicant for intervention and the government have taken adverse positions, on other statutes, in the past, is insufficient to overcome the presumption of adequacy. *Id.* Also lacking is the mere contention that the government "may be inclined to give an unnecessarily narrow construction" of a statute, without proof that the government actually is, in the pending litigation, construing the statute more narrowly than the applicant. *Prete*, 438 F.3d at 958. Speculation will not suffice. *Id.*

In this case, the "ultimate objective" of both the government and Pastor Rodgers is the same – upholding the validity of §§ 107 and 265(a)(6) and their state analogs. As a result, it is undisputed that Rodgers and the government are "on the same side," *Arakaki*, 324 F.3d

at 1087, and that there is a presumption that the government will adequately represent Rodgers' interests. (Br. 12-13.)

D. Because the government has vigorously defended, and continues to defend, the parsonage allowance, Rodgers's attempt to show inadequacy of representation falls short

Rodgers presents four arguments on appeal why he has rebutted the presumption that the government will adequately represent his interests. None has any merit.

1. First, Rodgers argues (Br. 14-15) that a conflict may arise between his position and that of the United States because of what he calls the *Ashwander* principle, *i.e.*, the "cardinal principle" that courts must "ascertain whether a construction of the statute [being challenged] is fairly possible by which [a constitutional] question may be avoided." *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). As Rodgers describes this principle, however, it is apparently one that the courts must consider no matter what positions are taken by the parties to a case. And although at least one former Solicitor General has suggested, in commentary, that his office has

often attempted to construe statutes to avoid constitutional questions when defending acts of Congress, *see* Seth P. Waxman, *Defending Congress*, 79 N.C. L. Rev. 1073, 1079-80 (2001), there is no indication that the United States has or will construe §§ 107 and 265(a)(6) of the Code more narrowly than Rodgers would to avoid a constitutional question in this case. Indeed, it is not clear, and Rodgers does not suggest, how a narrow construction might avoid FFRF's constitutional challenge to §§ 107 and 265(a)(6). Rodgers's speculation that the United States *might* construe these statutes more narrowly than he would is insufficient to overcome the presumption of adequacy. *Prete*, 438 F.3d at 958.

Moreover, it is beside the point for Rodgers to assert (Br. 15-17) that the Commissioner offered a more narrow construction of § 107, as then in effect, than did the taxpayer-pastor in *Warren v. Commissioner*, *supra*. Since 1971, the IRS interpreted § 107 to mean that the amount of the parsonage allowance is limited to the fair market rental value of the minister's home. Rev. Rul. 71-280, 1971-2 C.B. 92. Although the taxpayer in *Warren* took the position that the parsonage allowance was

not so limited, *see Warren II*, 302 F.3d at 1013-1014, any ambiguity, and therefore any dispute, about the meaning of § 107 in this regard has been completely eliminated by the Clergy Housing Allowance Clarification Act of 2002, Pub. L. No. 107-181. In that act, Congress amended the statute (albeit with generally prospective effect), to except the parsonage allowance from gross income only "to the extent such allowance does not exceed the fair rental value of the home," as the Commissioner had maintained all along. Rodgers's concern that the Commissioner took a different position, against another minister, on the prior version of the statute, in an unrelated case, falls far short of demonstrating that his interests are not adequately represented in *this* case. *Northwest Forest Resource Counsel*, 82 F.3d at 838.

Most importantly, however, Rodgers's speculation that the United States might not defend the constitutionality of the parsonage allowance is wholly undermined by the events as they have actually unfolded. When the constitutionality of § 107 was raised in *Warren,* the Commissioner defended the statute, without limitation, even though he would have prevailed in the case in the event the statute had

been struck down. *Warren v. Commissioner*, No. 00-71217, Supp. Brief for Appellant (Docket No. 50) (9th Cir. May 3, 2002). In *Warren*, the government's interest in seeing its laws upheld clearly trumped any purported pecuniary interest in "collecting taxes and treasure" (Br. 1), and the Commissioner's and the taxpayer's positions were to that extent aligned. *Warren I*, 282 F.3d at 1123-1124 (Tallman, J., dissenting). And in this case, the United States not only represented that it would defend the constitutionality of the parsonage allowance, as Rodgers would, but it has consistently defended, and will continue to defend, those provisions. (SER 40-91.)

Indeed, Rodgers has not identified any difference between the position he would take and the actual position taken by the United States in this case. That failure is telling, because the United States filed its motion to dismiss – which argues specifically that FFRF fails to state a claim because §§ 107 and 265(a)(6) do not violate the Establishment Clause – one month before Rodgers filed his opening brief on appeal. (SER 40, 91.)

2. Second, Rodgers argues (Br. 17-18) that the United States cannot possibly represent his interest in the analogous California statutes (Cal. Rev. & Tax Code §§ 17131.6 and 17280(d)(2)) that FFRF challenges in the complaint. Rodgers further argues (Br. 18) that the District Court erred in assuming that Stanislaus, the state defendant, would defend the state statutes from constitutional attack, even though Stanislaus had yet to appear in the case.

But Rodgers mischaracterizes the District Court's decision. The District Court did not assume anything. Instead, it characterized as "premature" (ER 14) Rodgers's request for a determination of the adequacy of the State of California's representation of his interests. Rodgers made his request only six days after the complaint was filed, before the State of California had even been served with process. (CR 15, at 2.) In any event, it is by no means wrong to "assume" that a governmental body would represent the interest of a constituent attempting to intervene as co-defendant. Instead, that is the nature of the legal presumption that governs this case. *Arakaki*, 324 F.3d at

1087; *Prete*, 438 F.3d at 957. And Rodgers has not identified any basis for a contrary ruling on appeal.

On February 26, 2010, moreover, Stanislaus did appear, and he specifically argued in a motion to dismiss FFRF's complaint that Cal. Rev. & Tax Code §§ 17131.6 and 17280(d)(2) do not violate the Establishment Clause, California's "no preference" clause or its "no aid" clause. (SER 24-39.) So it appears that Rodgers' concern that the State might not defend these statutes has been assuaged.

3. Third, Rodgers argues (at 18-21) that his interests are not represented in the pending litigation because, in the event of an adverse ruling, it would be up to the Solicitor General whether or not to authorize an appeal, and it is uncertain whether he would do so. This is true, of course, in every case in which the United States is a party. *See* 28 C.F.R. § 0.20(b). As a result, to hold that the uncertainty of appeal is grounds for intervention as of right would open up all Government litigation to a myriad of intervening parties. Moreover, there is no reason to believe that the Solicitor General would *not* appeal a decision that struck down a federal statute. To the contrary,

Congress has imposed an affirmative obligation on the Attorney General to report to it any instance in which it is determined to refrain from defending the constitutionality of any federal statute, or not to pursue appeal or review of an adverse determination thereof. 28 U.S.C. § 530D(a)(1)(B)(ii). At bottom, Rodgers offers little more than "speculation of the purported inadequacy," and such speculation is insufficient to justify intervention as of right. *LULAC*, 131 F.3d at 1307.

Finally, Rodgers' argument that he should be permitted to intervene now in order to generate jurisdiction over a possible appeal falls of its own weight. 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). As a result, the District Court did not err in deciding that Rodgers is not entitled to intervention as a matter of right.

II

THE DISTRICT COURT CORRECTLY EXERCISED ITS DISCRETION IN DENYING RODGERS PERMISSIVE INTERVENTION, IN THE ABSENCE OF AN INDEPENDENT BASIS FOR JURISDICTION OVER HIS CLAIMS OR DEFENSES

Standard of Review

The District Court's denial of the motion for permissive intervention is reviewed for abuse of discretion. *Perry*, 587 F.3d at 955.

Federal Rule of Civil Procedure 24(b) empowers a court to grant permissive intervention if the person applying for intervention demonstrates (1) that there are independent grounds for jurisdiction; (2) that the motion is timely; and (3) that the applicant's claim or defense, and the main action, have a question of law or a question of fact in common. *City of Los Angeles*, 288 F.3d at 403 (9th Cir. 2002). "Even if an applicant satisfies those threshold requirements," however, the District Court "has discretion to deny permissive intervention." *So. Cal. Edison v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (citing *Donnelly*,

159 F.3d at 412). Factors to consider in making this discretionary determination include "the nature and extent of the intervenors' interest" and "whether the intervenors' interests are adequately represented by other parties." *Spangler v. Pasadena City Bd. of Educ.*, 552 F.3d 1326, 1329 (9th Cir. 1977). Moreover, the Court must consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). As this Court has observed, moreover, "[t]his discretionary procedure is properly utilized in a case in which it appears that the intervenor has a separate and independent basis for jurisdiction and in which failure to adjudicate the claim will result only in unnecessary delay." *See Benavidez v. Eu*, 34 F.3d 825, 830 (9th Cir. 1994) (emphasis omitted).

In this case, as the District Court observed, Rodgers "admits in his motion that a court would likely find no 'case or controversy' existed until the plaintiffs in this lawsuit succeeded." (ER 16.) Moreover, far from relying upon a separate and independent basis for jurisdiction (and demonstrating that failure to adjudicate his claim will result in only in unnecessary delay), as the court further noted, Rodgers "makes

no effort to show that independent grounds for jurisdiction exist." (*Id.*) As a result, Rodgers simply does not meet the requirements for permissive intervention.

Rodgers nevertheless argues that jurisdiction is established because he "is consenting to the court's jurisdiction." (Br. 27-28.) But the District Court cannot adjudicate any matter on personal jurisdiction alone. Rather, it is the independent subject-matter jurisdiction of the federal courts that an applicant must establish under Rule 24(b). And parties cannot establish subject-matter jurisdiction by consent. *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1139 (9th Cir. 2006) (noting that there is no doctrine "that would allow a party who would not otherwise be subject to a federal court's subject-matter jurisdiction to enter into a consensual relationship * * * that would confer subject matter jurisdiction on a federal court.").

Rodgers also argues (Br. 30-31) that the supplemental jurisdiction statute, 28 U.S.C. § 1367, provides the grounds for jurisdiction over the putative claim against him. But Rodgers did not raise this argument before the District Court. (*See* ER 50-51, 91-92; SER 1-23.) Certainly,

Rodgers cannot establish that the District Court abused its discretion in denying him permissive intervention by failing to consider an argument that he never raised. *See, e.g., Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("The district court did not abuse its discretion by failing to consider an argument that was never presented to it"). Moreover, supplemental jurisdiction is not the "*independent* grounds for jurisdiction" that this Court's Rule 24(b) cases require. *Perry*, 587 F.3d at 955 (emphasis added); *EEOC v. Nevada Resort Ass'n*, 792 F.2d 882, 886 (9th Cir. 1986). And § 1367 – as well as the Declaratory Judgment Act, 28 U.S.C. § 2201(a), under which the plaintiffs proceed (ER 98) – are predicated on an actual controversy between the plaintiff (FFRF) and the putative defendant (Rodgers), a controversy that Rodgers himself concedes (ER 88) is not likely to arise

"until and unless Plaintiffs succeed."[6] Consequently, Rodgers has not established reversible error by pointing to § 1367.

Finally, Rodgers argues in the alternative (Br. 29-30) that he need not establish an independent basis for jurisdiction. He relies, in this regard, on a narrow exception to this requirement in Rule 24(b) cases. His reliance is inapposite. This Court does recognize the "narrow exception to the rule that permissive intervention generally requires an independent jurisdictional basis," 7C Wright, Miller & Kane § 1917, at 594, when a third party seeks to intervene for the limited purpose of obtaining access to documents protected by a confidentiality order. *See Beckman Industries, Inc. v. International Ins. Co.*, 966 F.2d 470 (9th Cir. 1992). But that exception does not apply to this case.

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[6] An "actual controversy" involving Rodgers's parsonage allowance would only arise between Rodgers and the United States, and only if the IRS were to determine that the allowance should be included in gross income (or, alternatively, that his mortgage interest deduction should be disallowed). And in any event, Congress has generally confined litigation over such disputes to deficiency actions in the Tax Court or refund suits in a district court or the Court of Federal Claims. *See* I.R.C. §§ 6213(a), 7422(a), 7442; 28 U.S.C. § 1346(a)(1), 1491. This Court would therefore lack jurisdiction over any anticipatory attempt by Rodgers to establish his entitlement to the tax benefits in this suit.

Nor is there any basis for creating a new exception to the requirement of independent jurisdiction as a predicate to permissive intervention under Rule 24(b). Rodgers is simply wrong when he asserts (Br. 29) that his case is like *Beckman* in that he does not ask the District Court to rule on additional claims. Rodgers is seeking to intervene as a defendant, presumably, to the claims of FFRF. These claims are, *inter alia*, for a "declaration that the actions of all defendants violate the Establishment Clause of the First Amendment to the United States Constitution" (ER 108), and an order "enjoining the defendants from continuing to grant or allow tax benefits" under the applicable statutes, as well as "relief and remedies" under 42 U.S.C. § 1983 (ER 109). Rodgers is effectively asking the Court to rule on new claims against him for declaratory and injunctive relief. But the District Court lacks jurisdiction over any such claim by FFRF against Rodgers.

Of course, Rodgers' desire to intervene as a defendant makes no sense. Rodgers is neither a state actor, nor is he acting under color of state law. That being so, so he can violate neither the Constitution nor

42 U.S.C. § 1983. What he *can* do is argue in favor of the constitutionality of the parsonage allowance by way of filing an *amicus* brief, without being legally bound by the result or subject to discovery, costs or attorney's fees.

The District Court did not abuse its discretion in limiting Rodgers' participation in this regard. Absent an abuse of discretion, the order denying permissive intervention is not appealable. *LULAC*, 131 F.3d at 1305. As a result, this aspect of Rodgers' appeal should be dismissed for lack of jurisdiction.

CONCLUSION

For the reasons stated above, this Court should affirm the order of the District Court to the extent that it denied Rodgers intervention as of right under Rule 24(a)(2), and it should dismiss the appeal for lack of jurisdiction to the extent that Rodgers seeks to contest the denial of permissive intervention under Rule 24(b)(2).

Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel for the United States respectfully inform the Court that they are not aware of any related cases.

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Dated: May 10, 2010

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It is hereby certified that, on this 10th day of May, 2010, this brief was electronically filed 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.

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