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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The Federal Defendants-Appellees have constructed a dense forest of arguments that have managed to obscure, but not quite hide, the central, nagging question in this case: If ministers receiving a tax exemption are not allowed to intervene when the statutes providing that exemption to them are attacked, has FRCP Rule 24 been robbed of its purpose?

The Federal Defendants, for the first time on appeal, offer illusory "other means" whereby ministers can protect their interests. Upon closer examination, these other means – that the Defendants admit are "complicated" – turn out to be wildly speculative and arguably precluded by basic principles of res judicata, offering no alternatives if the ministers are not allowed to intervene in the pending action. Defendants further argue that their previous attempts to limit ministers' tax exemptions under the same statute being challenged, are irrelevant because the statute has since been amended. While the ministers might like to believe the Defendants' professions of solidarity, they cannot quite ignore the old maxim, "Fool me once, shame on you; fool me twice, shame on me." To say that the interests of a zealous tax collection agency and the ministers' interests in maintaining their current tax exemptions are divergent is perhaps an understatement.

Defendants' arguments as to permissive intervention are more plausible, but ultimately fail to persuade. Defendants, like the court below, rely reflexively on statements from this court requiring "independent grounds of jurisdiction" as a condition for granting permissive intervention, while divorcing an otherwise beneficial requirement from its proper context. The independent jurisdiction rule, which has its genesis in cases involving ***plaintiff*** intervenors, simply does not make sense in cases such as the present, where a proposed ***defendant*** intervenor will not add any new claims or counter-claims to the suit. Moreover, the rule clashes with this Court's reluctance to impose Article III standing requirements on intervenors as of right, as well as Rule 24(a)'s other means or alternative forum prong.

When the underbrush is cleared away, this becomes a fairly straightforward case. Proposed Defendants-Intervenors who stand to suffer a direct financial impact, in the event of an adverse decision, should be allowed to intervene either as of right, or permissively to defend their unique interests alongside the state government, which has never opposed their intervention, and the federal government, which has everything to gain and nothing to lose from an adverse decision.

ARGUMENT

I. Intervention as of Right.

A. The Federal Defendants' "other means" argument is untenable.

The Defendants[1] assert for the first time additional "other means" which are both inconsistent with the purpose of Rule 24(a) and are highly speculative. Further, the Defendants' arguments lack case law precedent to support their contentions. Although the Defendants inject new arguments regarding the significant impairment of Pastor Rogers' interest, this brief will address these contentions nonetheless.

Despite Defendants' contentions attempting to provide another means for Pastor Rodgers to protect his interest, the reality is that he lacks an alternative forum to mount a constitutional defense of the challenged federal and state statutes. Federal courts have stated that the required showing for the third element of intervention as of right is that the 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

[1] Federal Defendants will hereinafter sometimes be referred to simply as Defendants, since the State Defendants have chosen not to participate in any of the intervention proceedings, including this appeal.

FRCP 24(a)2 and adding emphasis). Further, other federal courts have considered this element as indistinguishable from the previous element, stating 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)).

The Defendants correctly cite the proposition from the Advisory Committee Notes to Rule 24(a)(2), which states 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." Advisory Committee Note to Fed. R. Civ. P. 24 (1966 Amendment). (Fed. Br. at 30.) Conceding that Rodgers has a protectable interest, the Defendants assert that possessing an interest alone is insufficient based on the *Lockyer* supposition that if an action "would *affect* the proposed intervenors' interests, their interest might not be *impaired* if they have 'other means' to protect them. *California ex rel Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006). (Fed. Br. at 30.)

The federal Defendants grossly understate the impact of an adverse ruling by stating that such a ruling "might complicate" Pastor Rodgers' interest. (Fed. Br. at 33.) However, bound by principles of *stare decisis*, once a court "has applied a rule of law to the litigants in one case it must do so with respect to all others not

barred by procedural requirements or res judicata." *Melton v. Moore*, 964 F.2d 880 (9th Cir. 1992) (quoting *James B. Beam Distilling Co., v. Georgia* 501 U.S. 529, 539 (1991)). In fact, intervention as of right "may be required when considerations of *stare decisis* indicate that applicant's interest will be practically impaired." *Greene v. U.S.,* 996 F.2d 973, 977 (9th Cir. 1993).

The Federal Defendants' "other means" assertions fail to alleviate the reality that Pastor Rodgers lacks any alternative forum to protect his current interest. (Fed. Br. at 32-34.) His interest would be significantly impaired if Freedom From Religion Foundation (FFRF) were to win on the merits of the case, as now appears probable, at least as to its challenge to I.R.C. § 107[2]. Any "other means" proffered by the Defendants fail to address the underlying fact that Pastor Rodgers' tax exempt status would not only potentially be significantly impaired, but could possibly be completely eviscerated. While the standard is not "whether the suit will *necessarily* impair [their interests]," *City of Los Angeles*, 288 F.3d at 401 (emphasis added), the current trajectory of the underlying case in the District Court unmistakably imperils and impairs the ministers' rights "as a practical matter." *Id.*

[2]On May 21, 2010, the District Court in the underlying case, issued an Order granting in part and denying in part Motions to Dismiss filed by the Federal and State Defendants. Judge Shubb denied the motions as to I.R.C. § 107, indicating his opinion that the challenged statute is likely unconstitutional. See Appellant's Further Excerpts of Record, Page 1.

Thus, any of the offered alternative fo rums fall far short of provi ding an other means by which Pastor Rodgers coul d protect his i nterest. For exam ple, the *mere possibility* that Pastor Rodgers may move outside the jurisdiction and be able to sue is fanciful and is not supported by any precedent as a sufficient alternative forum. (Fed. Br. at 33.) Sim ilarly, the contention that Pastor Rodgers would be able to obtain prepaym ent review to prot ecting this interest is irrelevant to protecting his current tax interests in li ght of the pot ential success of FFRF on the merits. (Fed. Brief at 32.) Lastly, the ability to file a successful tim ely administrative claim for a refund disregards the potential damage that would result from a ruling on the merits of this case, which already appears imminent.

Further, both cases cited by the Def endants fail to adequately address the underlying issue tha t an adverse ruling l eaves Pastor Rodge rs no real practical other means to prot ect his int erest. First, in *United States v. Alisal Water Corp.*, 370 F.3d 915 (9t h Cir. 2004), th is Court held, in a case involving an intervening-creditor, that a su mmary claims process, used by a receiver, and reviewed by the district court provided su fficient "other means." *Alisal*, 370 F.3d at 921. This Court reasoned that the procedural safeguards in the summary claims process fully protect the creditors' rights because the cr editors are given the opportunity to fully present their clai ms to the receiver maki ng the creditor a quasi-party to the suit. *Id.*; *Commodity Futures Trading Com'n v. Chilcott Portfolio Management, Inc.* ,

725 F.2d 584, 586 (10th Cir. 1984). If the claim is rejected in whole or in part, then the claimant may apply to the court for adjudication of the claim. *Id.*

However, Pastor Rodgers does not have the same procedural safeguards as afforded in *Alisal*. Pastor Rodgers does not have a separate summary claims process providing adequate protection of his interest. Further, if the claim for intervention is denied, the case is adjudicated independently of Pastor Rodgers without any further ability to defend his rights prior to a court's ruling which establishes binding precedent. *See Alisal*, 370 F. 3d 915 (citing to *Commodity Futures Trading Com'n v. Chilcott Portfolio Management, Inc.*, 725 F.2d 584, 586 (10th Cir. 1984). Therefore, *Alisal* is unhelpful to the Defendants.

Second, in *U.S. v. City of Los Angeles*, 288 F.3d 402 (9th Cir. 2002), the court denied intervention by a community group in a suit against Los Angeles by the United States to prevent an unlawful police practice. The court reasoned that the community members' interest was not significantly impaired because they had a right to sue based on unconstitutional police practices regardless of this suit and they could continue to work on police reform. *City of Los Angeles*, 288 F.3d 402. The present case is simply not analogous. The likely FFRF victory on the merits effectively prevents Pastor Rodgers from protecting his rights. *See Greene v. U.S.,* 996 F.2d 973, 977 (9th Cir. 1993); *U.S. v. Oregon*, 839 F.2d 635, 638 (9th Cir. 1988). Further, unlike the community groups' ability to lobby for reform at the

local level, Pastor Rodgers would be powerless to change IRS policies implemented as the result of a Federal Court injunction.

B. The Federal Defendants' previous interpretation of the challenged statutes adverse to minister's meets the *Lockyer* showing of inadequacy of representation and is inconsistent with the purposes of Rule 24(a)

In determining whether Rule 24(a) requirements are met, "courts are guided primarily by practical and equitable considerations. *U.S. v. City of Los Angeles*, 288 F.3d 391, 401 (9th Cir. 2002). Courts generally construe a liberal policy in favor of intervention because it provides for the "efficient resolution of issues and [broadens] access to courts." *Green v. U.S.*, 996 F.2d 973, 980 (9th Cir. 1993). By allowing putative intervenors with a practical interest to intervene, courts "often prevent or simplify future litigation involving related issues; at the same time…[allowing] an additional interested party to express its views before the court." *Id.* Intervention is one of the rare areas that harmonize the usual conflicts of efficiency and access to the courts. *Id.* at 979-80.

To hear Defendants tell it, the stars must be nearly perfectly aligned in order for a proposed defendant intervenor to join the government to defend its significantly protectable interests alongside the government. This Court's precedence reveal, however, that the inquiry is designed not to discourage all but the most stout-hearted but rather to ensure that the parties litigating a case are those who will be most affected by the outcome. In *California ex rel Lockyer v. United*

States, this court permitted a group of health care providers to defend the Weldon amendment, alongside the federal government, even though the Department of Justice had deployed its "formidable resources" to defend the challenged statute. *Id.* at 444.

Lockyer acknowledged that a presumption of adequate representation exists where the government is defending one of its own statutes. However, the Court permitted intervention in that case because of the divergence in interests between the health care providers and the federal government, including differing interpretations of the statute at issue. *Id.*

The federal Defendants in the case at bar read *Lockyer* as a narrow portal through which only another case nearly identical to *Lockyer* may be granted intervention. Of course, the present case is not identical to *Lockyer*, but it does bear a striking resemblance in at least three important respects. First, the challenged statute was enacted for the benefit of the ministers, just as the Weldon Amendment was enacted for the benefit of the health care providers, who were granted intervention. *Id* at 440. Second, as noted by the district court in this case, the ministers lack a realistic alternative forum in which to litigate their concerns. E.R. at 6:12 to 8:6. Third, narrow construction of the statute by the government as in *Lockyer* is more than a theoretical possibility in the case at bar—it has already happened. *Lockyer* at 444.

Defendants earnestly seek to dodge the third point, by insisting that their attempts to narrowly construe the challenged statutes, as evidenced by *Warren v. C.I.R.*, 302 F.3d 1012 (9th Cir. 2002), are irrelevant since the statute has subsequently been amended. But Defendants' arguments miss the point. The focus of this inquiry, as with the overarching purpose of Rule 24, is to ensure that all *interests* are adequately represented before the court. Plainly the interests of the IRS and the Treasury Department are irrevocably at odds with the ministers' interests. In short, the ministers cannot accept that the same parties who doggedly pursued one of their fellow ministers in a high profile manner under the challenged statutes have now switched sides and will represent their interests.

The Defendants' arguments rest heavily on hair-splitting and highly technical distinctions, yet *Lockyer* emphasized that application of Rule 24 turns on more than technical distinctions, *Lockyer* at 440; it also invokes common sense. By any measure, the ministers for whose benefit the challenged statutes were created, having once been burned by the IRS should not now be forced to depend on the same entity to represent their interests. *California ex rel Lockyer v. United States*, 450 F.3d 436 (9th Cir. 2006). *See Sagebrush Rebellion, Inc. v. Watt* 713 F.2d 525, 528-529 (9th Cir. 1983) (proposed defendant wildlife group allowed to intervene where federal defendant had previously represented plaintiffs, even

though Department of Justice lawyers acted "professionally and diligently" in pending case).

C. Adverse interests—not arguments—are the touchstone of intervention analysis.

The conflict of interest between the goals of the Defendants and Pastor Rodgers inherently makes this case about adverse interests. The Defendants try to distort the issue by stating Pastor Rodgers has not identified "any difference between the position he would take and the actual position taken by the United States in this case." (Fed. Br. at 41.) However, the two parties have adverse interests in the outcome of the suit, despite any similar or different arguments either party would make.

While the Defendants claim they will defend the statute with "vigor," in an analogous case involving the Secretary of the U.S. Department of the Interior, the court found that the Secretary could not adequately represent both the interests of the intervenors. (Fed. Br. at 38.) *Natural Res. Def. Council v. Kempthorne*, 539 F.Supp.2d 1155, 1188 (E.D. Cal. 2008). The Secretary was incapable of defending both interests because the Secretary was "required to protect the interests of the [other defendants] and the public" while at the same time "would be required to protect the interests of [intervenors]." *Id.* This situation poses the very same concerns. It is both the duty and the function of the U.S. Department of the Treasury to guard the public moneys. As the Supreme Court noted, "The primary

goal of the income tax collection system…i s the equitable collection of revenue; the major responsibility of the Internal Revenue Service is to protect the public fisc…" *Tiber Power Tool Co. v. C.I.R.* , 439 U.S. 522, 542 (1979). However, Pastor Rodgers seeks to m inimize his ta x liability. Thus, there is an inherent conflict of interest which poses a bona fi de threat to Rodger's interest. As in *Sagebrush*, the competence of the Department of Justice Attorneys is not the issue. *Sagebrush Rebellion, Inc. v. Watt* 713 F.2d 525, 528 (9th Ci r. 1983). Pastor Rodgers does not question th e Federal attorney's dil igence and professionalism in representing their client, the U.S. Govern ment. Rather, the problem lies in the insurmountable conflict of int erest posed by those same attorneys' a ttempts to represent the ministers, that the ministers have no intention of waiving.

II. Permissive Intervention

A. Requiring independent grounds for jurisdiction of Proposed Defendants-Intervenors does not comport with this Court's prior Holdings.

This Federal Defendant states that this Court requires t hat the propose d Defendant-Intervenor show independe nt grounds for juri sdiction. *City of Los Angeles*, 228 F.3d at 403; (Fed Br. at 45). However, the requirem ent for "independent grounds for j urisdiction" is meant to enforce the p olicy that intervention is "not intende d to allow the creation of whole new lawsu its by the intervenors." *Donnelly v. Glickman* , 159 F.3d 405, 412 (9th Cir. 1998). In fact,

permissive intervention was affirmed by this Court without a showing of independent jurisdiction because the "interve nors [did] not ask the district to rule on additional claims." *Beckman Industries , Inc. v. International Ins. Co.*, 996 F.2d 470, 473 (9th Cir. 1992).

As such, Pastor Rodgers is not seeking adjudication on addit ional claims or to "create a who le new lawsuit;" rather, he is seeking to defend the constitutionality of the challenged federa l and state statutes. Contrary to the Defendants' assertions, this Court does not limit the exception to t he independent jurisdictional grounds for the very "l imited purpose of obtaining access to documents…" (Fed. Br. at 49); *Beckman*, 996 F. 2d at 473. Rather, this Court granted intervention because th e "[intervenors did] not ask the district to rule on additional claims or seek to b ecome parties to the action. *Beckman*, 966 F.2d at 473. Thus, such a narrow reading of the exception by the Defendants is not tenable. Rather, because Pastor Rodgers is not seeking to create an entirely new lawsuit but is seeking to uphold the constitutionality of the statutes, the *Beckman* exception should apply. *Id.*

1. This Court does not require Article III standing for proposed intervenors as of right.

For more than twenty years, this Court has chosen not to add full-fledged Article III standing analysis to Rule 24 requirements. *Portland Audubon Soc. v. Hodel,* 866 F.2d 302, 308 n. 1 (9th Cir.1989).

> FN1. The plaintiffs urge us to find that a party seeking to intervene must have standing, as the D.C. Circuit has held. *See Cook v. Boorstin,* 763 F.2d 1462, 1470-71 (D.C.Cir.1985). However, we in the past have resolved intervention questions without making reference to standing doctrine. *See, e.g., Sagebrush Rebellion, Inc. v. Watt,* 713 F.2d 525, 527-29 (9th Cir.1983). The Supreme Court recently declined to decide "whether a party seeking to intervene before a district court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III." *Diamond v. Charles,* 476 U.S. 54, 68-69 & n. 21 (1986) (observing that "[t]he Courts of Appeals have reached varying conclusions as to whether a party seeking to intervene as of right must himself possess standing"). Without an en banc review, we must follow the *Sagebrush Rebellion* analysis and decline to incorporate an independent standing inquiry into our circuit's intervention test. However, the standing requirement 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." *County of Orange,* 799 F.2d at 537 (quoting *Stringfellow,* 783 F.2d at 826).

This court has most recently reiterated this position in *Prete v. Bradbury* 438 F.3d 949, 956 n.8 (9th Cir 2006), and *Perry v. Proposition 8 Official Proponents* 587 F.3d 947, 950 n.2 (9th Cir. 2009).

In light of this Court's approach for intervention as of right, it seems anomalous that a higher standard – independent grounds for jurisdiction – would be required of proposed defendants seeking permissive intervention. Pastor Rodgers submits that the differing requirements that have been applied to him under Rule 24(b) are illogical and out-of-step with this Court's foregoing pronouncements under Rule 24(a).

2. The rationale for requiring independent grounds for jurisdiction for plaintiff-intervenors simply does not extend to defendant-intervenors.

This Court has required independent grounds for jurisdiction for permissive-intervenors relying on decisions outside this circuit. *See Venegas v. Skaggs*, 867 F.2d 527, 529 (9th Cir. 1989) (citing to *Cook v. Pan American World Airways, Inc.*, 636 F.Supp. 693, 698 (S.D.N.Y 1986)). In absence of a clear rationale for this requirement, the courts have assumed that the independent jurisdictional requirement encompasses both permissive plaintiff and defendant-intervenors. *Greene* v. *U.S.*, 996 F.2d 973, 979 (9th Cir. 1993). Presumably, part of the rationale for preventing plaintiff-intervenors without independent grounds for jurisdiction would rely on the well pleaded-complaint rule which establishes the plaintiff is the master of his suit. *Caterpillar v. Williams*, 482 U.S. 386, 392 (1987). Furthermore, requiring independent grounds for jurisdiction prevents sham interventions that may result in windfall for putative intervenors. *Edmondson v. State of Neb. Ex. Rel. Meyer*, 383 F.2d 123, 128 (8th Cir. 1967) (the court held that when improper motives appear in seeking intervention, the trial court should be wary to grant the request).

While these considerations are valid, they should not extend to inter-venor-defendants as in this case because Pastor Rodgers is motivated to protect his interest in the ongoing suit rather than gain a windfall or other improper motives.

Further, requiring independent grounds of jurisdiction for permissive intervention almost assuredly determines that Pastor Rodgers is either able to satisfy intervention as of right or permissive intervention, but not both. For example, if for the sake of argument Defendants' assertions that Pastor Rodgers has "other means" are correct, then Pastor Rodgers would not satisfy the requirements for intervention as of right but still could satisfy permissive intervention. *Lockyer*, 450 F.3d at 440; *City of Los Angeles*, 288 F.3d at 403. On the other hand, if Pastor Rodgers lacks an alternative forum, he also lacks independent grounds for jurisdiction because he would not otherwise be able to bring a lawsuit. Thus, he would not satisfy permissive intervention. *City of Los Angeles*, 288 F.3d at 403.

Therefore, within this line of reasoning, one might logically conclude that it is incongruous to allow both intervention as of right and permissive intervention. Yet district courts in this Circuit have granted both intervention as of right and permissive intervention. *See Newdow v. Congress of the U.S.*, F.Supp.2d 2006 47307 (E.D. Cal., January 06, 2006) (District court granted both intervention as of right and permissive intervention); *Audobon v. Sutherland*, 2007 WL 130324 (W.D. Wash., January 16, 2007).

In sum, a well-intentioned and otherwise useful criterion for evaluating new claimants who seek to join lawsuits as plaintiff-intervenors does not carry the same weight in relation to defendant-intervenors. In the present case, where independent

grounds of jurisdiction have been used to contravene the otherwise liberal construction and core aims of Rule 24. The original purposes behind this prong should be reexamined, and Proposed Defendants-Intervenors should be excepted.

CONCLUSION

In light of the District Court's order and imminent ruling that strikes down I.R.C. § 107, the window is quickly closing for Pastor Rodgers to protect his significant interest in the underlying litigation. By contrast, the State and Federal Defendants will face little more than mild bureaucratic inconvenience while ultimately benefitting from a ruling that strikes down I.R.C. § 107. Hence there is an inherent conflict of interest between Pastor Rodgers and the Federal and State Defendants. Because of the conflicting interests, and for the reasons discussed in this brief, the order denying the motion for intervention should be reversed.

Date: May 24, 2010.

By: _/s/_ Matthew B. McReynolds__
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CERTIFICATE OF TYPE SIZE AND STYLE

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I certify that pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains no more than 14,000 words. According to Microsoft Word's "Statistics," this document contains 3,910 words.

May 24, 2010 _/s/_Matthew B. McReynolds__

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I hereby certify that on May 24, 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.

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s/ John Hur