UNITED STATES DISTRICT COURT
FOR THE SOUTHRN DISTRICT OF TEXAS
HOUSTON DIVISION

FREEDOM FROM RELIGION FOUNDATION, INC., JANE DOE, JOHN ROE, and JANE NOE	§	
Plaintiffs,	§	
	§	
v.	§	**CASE NO. 4:17-cv-881**
	§	
Judge Wayne Mack	§	
Defendant.	§	

PLAINTIFFS' BRIEF IN OPPOSITION TO TEXAS COMMISSION ON LAW ENFORCEMENT'S MOTION TO INTERVENE

INTRODUCTION

This case challenges a Montgomery County, Texas judge's practice of recruiting guest chaplains to deliver prayers in his courtroom before the start of each court session. The Texas Commission on Law Enforcement ("TCOLE"), a Texas state regulatory agency, has moved to intervene in this suit, alleging that this case is instead about "whether government officials . . . may solemnize their deliberative meetings and adjudicatory proceedings with prayer." (Dkt. 15-2 at 13). Not only is this formulation of the issues grossly overbroad, but more importantly it conflates two types of governmental activity—legislative on the one hand and judicial on the other—for which vastly different lines of Establishment Clause doctrine have developed. Because of the factual and legal differences between TCOLE's practices and those challenged in the present suit, TCOLE's motion to intervene should be denied.

ARGUMENT AND AUTHORITIES

I. TCOLE may not intervene as of right.

A party seeking to intervene as of right must (1) "have an interest relating to the property

or transaction that is the subject of the action;" (2) "be so situated that the disposition of the action may, as a practical matter, impair or impede its ability to protect its interest;" and (3) "be inadequately represented by the existing parties to the suit." *Sierra Club v. Espy*, 18 F.3d 1202, 1204 (5th Cir. 1994) (citing *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir. 1984) (en banc)).[1] TCOLE bears the burden of proving its right to intervene. *E.g.*, *Brumfield v. Dodd*, 749 F.3d 339, 341 (5th Cir. 2014). Because TCOLE has failed to meet its burden on these elements, however, its application to intervene as of right should be denied.

A. TCOLE lacks an interest relating to the subject of this action.

TCOLE claims it "possesses a substantial interest in protecting the ability of government agencies and officials to solemnize meetings through ceremonial prayer." (Dkt. 15-2 at 11). At the outset, it is not clear that TCOLE in fact has such an interest. TCOLE's brief contains the conclusory statement that it has this interest, but it goes no further in showing that it, rather than some other body, for example the State of Texas, has the right to claim and protect this interest. At most, TCOLE might have an interest in protecting its own prayer practices, and TCOLE does claim an interest in opening its commission meetings with a prayer by one of the commissioners, coupled with the assertion that sometimes it performs quasi-judicial functions "similar" to those exercised by a state judge. (Dkt. 15-2 at 12). But TCOLE does not appear to be asserting *that* interest except insofar as it is included in the much larger category of the ability of *any* government agency or official to open their proceedings with prayer, whatever those proceedings may be. TCOLE's motion to intervene should thus be denied *ab initio* because TCOLE has failed to make the threshold showing that it possesses the interest it has claimed for itself.

1 An application to intervene must also be timely. *Sierra Club*, 18 F.3d at 1204. Plaintiffs do not object to the timeliness of TCOLE's motion.

Even if TCOLE had established that it possesses an interest in "the ability of government agencies and officials to solemnize meetings through ceremonial prayer," such a vague interest is insufficient to allow TCOLE to intervene as of right; TCOLE's intervention should be denied unless it further proves that the subject of this action is "the ability of government agencies and officials to solemnize meetings through ceremonial prayer," which it is not. TCOLE appears to believe that this case is either about (1) the ability of legislative bodies to open their sessions with prayer, (Dkt. 15-2 at 12), or (2) the ceremonial deism in which court sessions are opened with an exhortation such as "God save the United States and this Honorable Court." (Dkt. 15-2 at 13). In fact, this case is about neither. Instead, this case raises two separate and related questions. First, may a state judge open court sessions with a prayer practice that goes far beyond a standardized, one-sentence ceremonial invocation? Second, if so, may that judge further seek out chaplains to deliver such prayers? These two questions present this Court with both a far narrower set of facts, and a more constrained area of doctrine, upon which to base its decision. Neither of these questions implicate the ability of, say, a city council to open its monthly meetings with a prayer. *Cf. Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). As such, TCOLE has no interest at stake in the present litigation.

B. Disposition of this action will not impair or impede TCOLE's ability to protect its interest.

Regardless of whether TCOLE has the narrow interest of protecting its ability to have its own members open commission meetings with prayers, or the much broader interest of protecting the ability of all governmental bodies everywhere to open sessions with prayer, TCOLE's motion to intervene should be denied because the disposition of this case will not affect either interest. TCOLE's argument on this point appears to be grounded in the hyperbolic

speculation that a judgment in favor of the Plaintiffs in this action will provide Plaintiff Freedom From Religion Foundation "a vehicle to erode religious liberty throughout Texas and the nation." (Dkt. 15-2 at 14). Repeatedly, TCOLE worries about "similar lawsuits" against "similar practices," *e.g.* (Dkt. 15-2 at 14–15), but even assuming that TCOLE's practices and Defendant Mack's are similar in a relevant way—itself a questionable proposition—the disposition of the present lawsuit will not affect TCOLE. Here again, TCOLE ignores the substantial distinctions that courts, including the Supreme Court, have drawn between deliberative bodies such as legislatures, city councils, and administrative commissions, on the one hand, and unique governmental entities such as courts. *See, e.g.*, *Town of Greece*, 134 S.Ct. at 1842 (Kagan, J., dissenting) (raising hypothetical courtroom prayer scenario after noting that it does not involve "a proceeding that could be characterized as a legislative session"); *id.* at 1834 (Alito, J., concurring) (arguing that Justice Kagan's hypothetical courtroom prayer does not follow from the *Town of Greece* decision).

Mere speculation that an incremental change in one area of Establishment Clause doctrine may have some future effect on an entirely different type of governmental practice is not enough for TCOLE to meet its burden of proof on this point. The most TCOLE can claim, then, is a concern that resolving this case in favor of Plaintiffs will create unfavorable precedent in a related area of Establishment Clause doctrine, which is insufficient to justify intervention as of right. *See Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 533 (7th Cir. 1988) (concluding that unless the putative intervenor's position depends on facts specific to the case, intervention as of right is inappropriate); *see also Stone v. First Union Corp.*, 371 F.3d 1305, 1310 (11th Cir. 2004) (drawing a distinction between intervention cases where the interests were identical and those

where the interests were not); *Atlantis Development Corp. v. United States*, 379 F.2d 818, 829 (5th Cir. 1967) (same).

C. TCOLE has not proven that they will be inadequately represented by the existing parties.

A party seeking to intervene as of right must show that it will be inadequately represented by the parties to the suit. TCOLE cites *Brumfield v. Dodd*, 749 F.3d 339, 345 (5th Cir. 2014), for the proposition that this burden is "minimal," but ignores the very next paragraph from *Brumfield*, which makes clear that the inadequacy requirement "must have some teeth," and that representation by a party is presumed to be adequate (and intervention is unnecessary) where " 'the would-be intervenor has the same ultimate objective as a party to the lawsuit,' in which event 'the applicant for intervention must show adversity of interest, collusion, or nonfeasance on the part of the existing party to overcome the presumption.' " *Id.* (quoting *Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996)). TCOLE bears the burden of showing that its ultimate objectives are different from those of Defendant Mack, but nothing in TCOLE's brief suggests this. On the contrary, much of TCOLE's brief attempts to show its interests and purposes are closely aligned with Defendant Mack's.

TCOLE then argues that Defendant Mack will inadequately represent it because this case "is not really just about Judge Mack, but about any Texas judge or agency that engages in similar practices," (Dkt. 15-2 at 15), and Judge Mack will defend only his own practices, not TCOLE's. The Fifth Circuit Court of Appeals considered and rejected an identical argument in *Haspel & Davis Milling & Planting Co. v. Board of Levee Commissioners*, 493 F.3d 570 (5th Cir. 2007). In *Haspel*, the court observed that "even assuming that the State's interest is broader than that of the Levee Board, the more narrow issue . . . is the only matter currently before us." *Haspel*, 493

F.3d at 579. Likewise, the matter of Defendant Mack's practices is the only one before this Court. TCOLE has presented no evidence to show that its interests are not aligned with Defendant Mack on *that* issue, and much argument to suggest that its interests regarding that issue are identical.

The "minimal" requirement language from *Brumfield*, just as with the observation from cases such as *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972), that the putative intervenor need only show that representation of his interest "may be" inadequate, does nothing to alter this analysis. Rather, these statements merely stand for the proposition that a putative intervenor need not show inadequacy with absolute certainty. *Brumfield*, 749 F.3d at 345 (citing 6 MOORE'S FEDERAL PRACTICE § 24.03[4][a] at 24–27); *Edwards*, 78 F.3d 1005 (cautioning that the burden "cannot be treated as so minimal as to write the requirement completely out of the rule") (internal citations and quotations omitted). As the discussion from *Brumfield* above makes clear, putative intervenors do not get a free pass, at least not where, as here, their interests are in complete alignment with one of the parties.

II. This Court should deny TCOLE's request for permissive intervention.

A court may also permit intervention where a putative intervenor "has a claim or defense that shares with the main action a common question of law or fact." FED. R. CIV. P. 24(b)(1)(B). In deciding whether to grant permissive intervention, a court should consider, among other things, " 'whether the intervenors' interests are adequately represented by other parties' and whether they 'will significantly contribute to full development of the underlying factual issues in the suit.' " *New Orleans Pub. Svc., Inc., United Gas Pipe Line Co.*, 732 F.3d 452, 472 (5th Cir.

1984) (citing *Spangler v. Pasadena City Bd. of Ed.*, 552 F.2d 1326, 1329 (9th Cir. 1977); *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 191–92 (2d Cir. 1978)).

First, for the reasons stated above, it does not appear that TCOLE's claims and the issues raised by the present litigation share a common question either of law or of fact. TCOLE's administrative commission meetings are distinct from the judicial proceedings in which the challenged prayers take place. Moreover, the way the prayers are delivered differ as well. *Compare* (Dkt. 15-2 at 12) (TCOLE meetings begin with a prayer by one of the commissioners) *with* (Dkt. 1 at 1, 5, 8) (the prayers in Defendant Mack's courtroom are delivered by recruited chaplains). The multifaceted nature of Establishment Clause jurisprudence means that the legal issues raised by these divergent factual scenarios will likewise differ. Thus, TCOLE lacks a factual or legal issue common to this suit.

Second, in considering adequacy of representation for permissive intervention, courts apply the same presumption that is applied when determining whether to allow intervention as of right: "[w]hen a proposed intervenor possesses the same ultimate objectives as an existing litigant, the intervenor's interests are presumed to be adequately represented absent a showing of adversity of interest, collusion, or nonfeasance." *LULAC v. Clements*, 884 F.2d 185, 189 (5th Cir. 1989) (citing *Kneeland v. Nat'l Collegiate Athletic Ass'n*, 806 F.2d 1285, 1288 (5th Cir. 1987); *Bush v. Viterna*, 740 F.2d 350, 355 (5th Cir. 1984)). A putative intervenor seeking to overcome this presumption must show "something more than speculation as to the purported inadequacy." *Id.* (quoting *Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979). As was the case in the discussion of inadequacy of representation above, TCOLE fails to raise any reason to believe that Defendant Mack will inadequately represent any interest it may

have in this case. TCOLE promises that it will "make additional arguments based on Texas's authority to engage in solemnizing prayers during official meetings" and "raise additional legal issues that bear significantly on FFRF's theory that solemnizing prayers by state officials violate the Establishment Clause." (Dkt. 15-2 at 16–17). Yet TCOLE admits that Defendant Mack "has capable legal counsel," (Dkt. 15-2 at 15), and does not explain why these arguments could not be made by Defendant Mack. In short, while TCOLE claims that it has significant interests, and that Defendant Mack will not represent them, bald statements are insufficient to meet its burden. TCOLE must say *what* its interests are, and *how* they are different from Defendant Mack's or *why* he will not adequately represent them. TCOLE has failed to do so, and it has therefore failed to meet its burden on this issue.

Finally, TCOLE's arguments make clear that, rather than contributing to the full development of the underlying factual issues in the suit, they wish to transform the present litigation into a sprawling examination of myriad factual and legal issues unrelated to the issues raised in Plaintiffs' complaint. Indeed, Plaintiffs have no direct experience or exposure to the issues raised by TCOLE's prayer practice. Allowing TCOLE to intervene would only serve to multiply the issues, expand discovery into other, unrelated areas, and delay resolution of this litigation, rather than helping to develop the facts presently at issue. TCOLE's request for permission to intervene should therefore also be denied.

CONCLUSION

TCOLE lacks any interest in the present litigation. Even if it had an interest in this litigation, TCOLE's interests would be identical to those of Defendant Mack, with the result that

Defendant Mack will adequately represent TCOLE's interests. TCOLE's motion to intervene should therefore be denied.

Respectfully submitted,

/s/ Patrick A. Luff
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on June 7, 2017, a true and correct copy of the foregoing document was served on all counsel of record and any unrepresented parties pursuant to Federal Rules of Civil Procedure.

/s/ Patrick A. Luff
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