IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FREEDOM FROM RELIGION FOUNDATION, INC., JANE DOE, JOHN ROE, and JANE NOE,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO. H-17-881
JUDGE WAYNE MACK and MONTGOMERY COUNTY, TEXAS,	§	
Defendants.	§	

ORDER DENYING MOTION TO INTERVENE AND SETTING MOTION HEARING

Pending is the Texas Commission on Law Enforcement's Motion to Intervene (Document No. 15). After carefully considering the motion, response, reply, and applicable law, the Court concludes for the reasons that follow that the motion should be denied.

This suit challenges the courtroom prayer practices of Defendant Judge Wayne Mack ("Judge Mack") under the Establishment Clause of the First Amendment. Shortly after assuming office as a Justice of the Peace of Defendant Montgomery County, Texas, Judge Mack established a chaplaincy program and began his practice--which continues to this day--of opening each court session with a prayer delivered by a guest chaplain.[1] Plaintiffs Jane Doe, John Roe, and Jane Noe are individuals who have been exposed to and object to

[1] Document No. 22 ¶¶ 21, 25 (1st Am. Compl.).

Judge Mack's courtroom prayer practice. All three are members of Plaintiff Freedom From Religion Foundation, Inc. ("FFRF"), a non-profit organization that advocates for the separation of church and state.[2] Plaintiffs allege that Judge Mack's courtroom prayer practice unconstitutionally endorses and advances religion--and specifically, Christianity--and coerces them to participate in the prayer practice in violation of the Establishment Clause.[3]

The Texas Commission on Law Enforcement ("TCOLE"), represented by the Texas Attorney General, moves to intervene.[4] TCOLE is a state agency that "[i]n addition to performing certain executive functions, . . . also functions in a quasi-judicial capacity regarding the licenses of law enforcement officers."[5] TCOLE opens its Commission meetings with a solemnizing invocation, which may include a prayer either by a Commissioner or a volunteer who asks in advance to pray.[6] Arguing that this lawsuit is part of FFRF's effort to purge acknowledgment of religion from all parts of Texas government and that TCOLE's prayer practice is threatened by this

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[2] Id. ¶¶ 8-11.

[3] Id. ¶¶ 61-68.

[4] Document No. 15.

[5] Document No. 15-2 at 7.

[6] Document No. 15-1 ¶¶ 7, 9-10.

suit, TCOLE moves to intervene as a defendant both as a matter of right under Rule 24(a)(2) and permissively under Rule 24(b)(1)(B).[7]

A party seeking to intervene as of right under Rule 24(a)(2) must satisfy four requirements:

> (1) The application must be timely; (2) the applicant must have an interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede its ability to protect its interest; and (4) the applicant's interest must be inadequately represented by the existing parties to the suit.

Brumfield v. Dodd, 749 F.3d 339, 341 (5th Cir. 2014) (citing Sierra Club v. Espy, 18 F.3d 1202, 1204-05 (5th Cir. 1994)); FED. R. CIV. P. 24(a). "Failure to satisfy any one requirement precludes intervention of right." Haspel & Davis Milling & Planting Co. v. Bd. Of Levee Comm'rs, 493 F.3d 570, 578 (5th Cir. 2007) (citing Espy, 18 F.3d at 1205). The movant bears the burden of establishing its right to intervene, although Rule 24 is to be liberally construed. Brumfield, 749 F.3d at 341. "The inquiry 'is a flexible one, and a practical analysis of the facts and circumstances of each case is appropriate.'" Id. at 342 (citations omitted).

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[7] Document No. 15 (Motion); Document No. 15-2 (Memorandum in Support). Plaintiffs oppose intervention. Document No. 21.

It is undisputed that TCOLE's motion to intervene was timely.[8] Turning to the second element, "[t]o prove the requisite interest, an intervenor must demonstrate a 'direct, substantial and legally protectable' interest in the property or transaction that is the subject of the suit." League of United Latin Am. Citizens v. Clements, 884 F.2d 185, 187 (5th Cir. 1989) (citing New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 463 (5th Cir. 1984) (en banc)). "The touchstone of the inquiry is whether the interest alleged is 'legally protectable,'" and an interest is sufficient "if it is of the type that the law deems worthy of protection, even if the intervenor does not have an enforceable legal entitlement or would not have standing to pursue her own claim." Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n, 834 F.3d 562, 566 (5th Cir. 2016) (citations omitted).

TCOLE argues that it has a direct, substantial, legally protectable interest in the property or transaction that is the subject of the action, which it identifies as "government agencies or officers solemnizing official meetings with invocations."[9] Arguing that FFRF "wants to purge government acknowledgment of religion, in all parts of Texas government, from state-wide agencies to justices of the peace," TCOLE asserts that "this case

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[8] Document No. 21 at 2 n.1.

[9] Document No. 15-2 at 6.

is not just about Judge Mack and whether he may invite chaplains to give an invocation before *his* court begins. Rather, this case asks whether government officials throughout Texas, and in other units of Texas government, like TCOLE, may solemnize their deliberative meetings and adjudicatory proceedings with prayer."[10]

Assuming *arguendo* that TCOLE in fact has an interest in protecting the prayer practices of any agencies other than itself, which Plaintiffs dispute, TCOLE misstates the subject of this suit. Plaintiffs challenge the courtroom prayer practice of a single justice of the peace in a single precinct in one Texas county. Plaintiffs' First Amended Complaint does not seek statewide injunctive or declaratory relief, and does not challenge any practices of TCOLE or of any other Texas agency. The fact that FFRF in other cases has brought Establishment Clause challenges to different practices by different Texas officials does not transform *this* case into a statewide attack on all Texas officials such that any state agency may intervene as of right. TCOLE has no legally protectable interest in the constitutionality of Judge Mack's courtroom prayer practice.[11]

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[10] Id. at 3, 8 (footnote omitted).

[11] Additionally, in arguing that Judge Mack does not adequately represent its interest, TCOLE emphasizes that its practice differs from Judge Mack's. Document No. 23 at 5 ("Judge Mack wishes to defend the constitutionality of *his* practice of invocations, whereas TCOLE is interested in defending its own practice, which differs.").

At most, TCOLE may be said to have an interest in the precedential impact of an opinion in this case on a hypothetical future challenge to its own prayer practice. At the scheduling conference on August 25, 2017, TCOLE represented that it has been opening its proceedings with invocations for several decades, has never received any official complaints, and is unaware of anyone even having objected to the practice. Even if TCOLE had reason to believe its practice would some day be challenged, any interest in the impact of this suit on a hypothetical future challenge is far too slight and improbable to support intervention. Clements, 884 F.2d at 188 ("Midland also argues that it has an interest in the case because the outcome may affect other suits challenging county elections. We believe, however, that this threat of litigation is too tenuous to support intervention under Rule 24(a)(2)."). Accordingly, because TCOLE does not have "an interest relating to the property or transaction that is the subject of the action," it is not entitled to intervention as of right under Rule 24(a)(2).[12]

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[12] TCOLE also cannot satisfy the third and fourth requirements for intervention under Rule 24(a)(2). TCOLE argues that its ability to protect its own invocation practice will be impaired if it does not intervene because "TCOLE's intervention ensures that the Court considers the common practices among Texas agencies when its makes its final determination." Document No. 15-2 at 9. This suit, however, does not involve the practices of any Texas agencies and will not impair TCOLE's ability to protect its interests in a hypothetical future suit. Moreover, assuming that TCOLE desires to defend Judge Mack's judicial prayer practice because of its putative or purported broader interest in protecting government prayer throughout Texas, the only prayer practice challenged in

Rule 24(b), governing permissive intervention, provides that "the court may permit anyone to intervene who . . . 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). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Id. 24(b)(3). "When acting on a request for permissive intervention, a district court should consider, among other factors, whether the intervenors are adequately represented by other parties and whether they are likely to contribute significantly to the development of the underlying factual issues." Clements, 884 F.2d at 189 (citing United Gas, 732 F.2d at 472). "When 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." Id. (citations omitted). Permissive intervention is "wholly discretionary" with the district court, even when there is a common question of law or fact or the

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this case is Judge Mack's, and Defendants' representation of themselves therefore adequately represents TCOLE's interest in upholding that practice. *See* Haspel & Davis, 493 F.3d at 579 (affirming denial of motion to intervene and explaining that "even assuming that the State's interest is broader than that of the Levee Board, the more narrow issue regarding execution of the judgment against the Levee Board is the only matter currently before us. Thus, the Levee Board and the State have the same ultimate objective in this case").

requirements of Rule 24(b) are otherwise satisfied. United Gas, 732 F.2d at 470-71.

TCOLE asserts that it should be permitted to intervene because "TCOLE's defense shares common questions of law and fact with the main action" inasmuch as Plaintiffs call into question the practices of "Texas agencies, counties, cities, and officials throughout the state," and "TCOLE will provide a state-wide perspective."[13] As discussed above, the issues in this case are much narrower than TCOLE contends, and the only prayer practice Plaintiffs challenge is that of Judge Mack in a single justice of the peace precinct. With respect to that narrow issue, TCOLE shares the same ultimate objective as Defendants--to defend the constitutionality of Judge Mack's prayer practice--and there is no indication of "adversity of interest, collusion, or nonfeasance." To permit TCOLE to broaden the scope of this suit to address the constitutionality of all types of governmental prayer throughout Texas would unduly delay the adjudication of the parties' rights. Under these circumstances, TCOLE's motion for permissive intervention is denied.

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[13] Document No. 15-2 at 11. "TCOLE's defense" evidently refers to the defense that TCOLE would expect to present in a hypothetical challenge to its own practice.

It is therefore

ORDERED that the Texas Commission on Law Enforcement's Motion to Intervene (Document No. 15) is DENIED. It is further

ORDERED that a motion hearing on Defendant Judge Wayne Mack's Motion to Dismiss (Document No. 24) and Defendant Montgomery County's Motion to Dismiss Pursuant to Rule 12(b)(1) and Rule 12(b)(6) (Document No. 29) is set as follows:

Date: ***January 10, 2018***
Time: ***2:30 p.m.***

U.S. Courthouse & Federal Building
Courtroom 11D
515 Rusk Avenue
Houston, Texas 77002

The Clerk will enter this Order, providing a correct copy to all counsel of record.

SIGNED in Houston, Texas, on this 12TH day of December, 2017.

EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE