UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVSION

PRISON LEGAL NEWS, et. al., Plaintiffs; UNITED STATES OF AMERICA, Applicant for Intervention v. BERKELEY COUNTY SHERIFF'S OFFICE and SHERIFF H. WAYNE DeWITT Defendants.	)	Civil Action No. 2:10-02594-MBS **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNITED STATES' MOTION TO INTERVENE PURSUANT TO 42 U.S.C. § 14141 AND 42 U.S.C. § 2000cc (CIVIL RIGHTS)**

I. INTRODUCTION

The Berkeley County Detention Center ("BCDC") deprives persons incarcerated at that facility from access to religious texts, books, newspapers, magazines and other expressive materials in violation of the Constitution and federal law. The United States has the authority pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 ("Section 14141"), and the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc ("RLUIPA"), to bring an action to enforce compliance with the Constitution and federal law and to protect the rights of the inmates incarcerated at BCDC. In the interests of judicial economy, rather that file a new action, the United States seeks to intervene in this litigation. The United States requests declaratory and injunctive relief against the Berkeley County Sheriff's Office ("BCSO") and Sheriff H. Wayne DeWitt (collectively, "Defendants").

II. FACTUAL BACKGROUND AND STATEMENT OF THE CASE

Defendants enacted and enforce BCDC's prohibition on inmates' receipt and possession of virtually all forms of expressive materials. According to BCDC policies and practices, inmates may not receive books, magazines, newspapers or other expressive materials through the mail, regardless of whether the materials are routed directly from commercial publishers or sent by friends or family members. Defendants have repeatedly denied inmate requests for a variety of publications, including educational materials needed for a correspondence education course, more than a dozen legal newsletters, and copies of religious texts such as the Koran and Torah. Defendants exacerbate these restrictions by not operating a library or providing any other resource for inmates seeking access to expressive material at BCDC.

Indeed, the only book, magazine or newspaper that Defendants consistently permit inmates to possess is the Bible. Defendants distribute copies of the King James Bible to inmates at no cost and allow inmates to purchase other versions of the Bible from BCDC's on-site Commissary. The ready availability of Bibles contrasts sharply with the barriers Defendants erect to accessing other religious texts. BCDC officials have informed multiple inmates that they may possess other religious texts, including the Koran and Torah, only if family members personally deliver the desired books to the facility. And even inmates able to arrange an in-person delivery may not gain access their desired religious text. Despite its purported "family member delivery policy," BCDC officials recently refused to deliver a Koran brought to the facility by an inmate's girlfriend.

BCDC's policies and practices implicate important federal interests in protecting the Constitutional and statutory rights of institutionalized persons under Section 14141 and RLUIPA. Federal law recognizes the important rehabilitative role religion and the

communication with outside parties can play during a person's incarceration, and that discrimination and deprivation of religious texts and educational materials are inimical to these rehabilitative goals. See, e.g., Pell v. Procunier, 417 U.S. 817, 822-25 (1974); 146 CONG. REC. S6678-02, at S6689 (daily ed. July 13, 2000) (statement of Senator Kennedy) ("[s]incere faith and worship can be an indispensible part of rehabilitation."); 146 CONG. REC. S7774-01 (daily ed. July 27, 2000) (joint statement of Senators Hatch and Kennedy) (describing purpose of and need for RLUIPA). Section 14141 empowers the Department of Justice to bring an action to enjoin conduct by law enforcement officers "that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." 42 U.S.C. §14141(a). Here, Defendants' pattern or practice of broadly prohibiting inmates' receipt of books, magazines, newspapers and other expressive material contravenes the rights afforded inmates by the Speech Clause of the First Amendment. Further, Defendants' pattern or practice of favoring the religious exercise of Christian inmates over non-Christians violates the First Amendment's Establishment Clause.

In addition to Section 14141, the United States has authority under RLUIPA to enforce compliance with that statute's command that a government may not impose a substantial burden on an inmate's religious practice unless the burden is the least restrictive means to achieve a compelling state interest. 42 U.S.C. § 2000cc-1, 2(f). The United States has a strong interest in enforcing RLUIPA in this matter, where Defendants' censorship of religious texts other than the Bible substantially burdens the religious exercise of non-Christians. Accordingly, the United States moves pursuant to Fed. R. Civ. P. 24 to intervene in this action.[1]

[1] Pursuant to Rule 24(c), the United States has attached its proposed Complaint in Intervention, which sets out the claim for which intervention is sought, and names the Berkeley County Sheriff's Office as an additional defendant. BCSO is an appropriate defendant to a RLUIPA and

This litigation presents legal and factual issues that overlap with those the United States will raise as intervenor. PLN[2] alleges that Defendants' repeated failure to deliver books and magazines to persons confined at BCDC violates the publisher's First and Fourteenth Amendment rights. See Complaint, Prison Legal News, et. al. v. DeWitt, et. al, No. 2:10-cv-02594-MBS (D.S.C., filed Oct. 6, 2010). Specifically, Plaintiffs contend that Defendants enforce restrictive censorship policies that bar inmates from receiving any materials from outside the detention center except for personal letters, photographs and copies of the Bible, in violation of the Speech and Establishment Clauses of the First Amendment, and that Defendants failed to notify PLN of their refusal to deliver expressive materials, in violation of the Fourteenth Amendment's Due Process Clause.

To date, the parties have not filed substantive motions nor taken any depositions. On March 21, 2011, this Court entered an Amended Scheduling Order allowing discovery to continue through September 6, 2011, providing for the parties to identify expert witnesses by June 3, 2011 (Plaintiffs) and July 5, 2011 (Defendants), file dispositive motions by September

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14141 claim, as RLUIPA provides that no "*government*" shall impose a substantial burden on an inmate's religious practice. 42 U.S.C. § 2000cc-1(a). Similarly, Section 14141 provides that "[i]t shall be unlawful for any *governmental authority* . . . to engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." 42 U.S.C. § 14141(a) (emphasis added). Pursuant to Rule 20(a)(2), joinder of the Berkeley County Sheriff's Office is proper because the right to relief asserted against this defendant arises out of the same transaction or occurrence, or series of transactions of occurrences, namely its pattern or practice of censoring inmates receipt and possession of religious and other expressive materials. Thus, the RLUIPA and Section 14141 claims present questions of law or fact common to all defendants.

[2] Prison Legal News is a wholly owned subsidiary of Human Rights Defense Center, a 501(c)(3) corporation registered in the state of Washington. Human Rights Defense Center is also a named plaintiff in this action. In the instant motion, the United States refers to these entities collectively as "Prison Legal News," "PLN," or "Plaintiffs."

19, 2011, and file pretrial briefs by December 29, 2011. Jury selection is slated to begin on January 3, 2012.

III. APPLICABLE LEGAL STANDARDS

A. Section 14141

The Violent Crime Control and Law Enforcement Act of 1994 (Section 14141) provides that "[i]t shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." 42 U.S.C. § 14141(a). Section 14141 authorizes the Attorney general to "obtain appropriate equitable and declaratory relief to eliminate the pattern or practice" of unconstitutional conduct by law enforcement officials whenever the Attorney general has "reasonable cause to believe" that such a pattern or practice has occurred. § 14141(b).

B. RLUIPA

RLUIPA provides that no government institution, including correctional facilities, "shall impose a substantial burden on the religious exercise of a [resident]." 42 U.S.C. § 2000cc-1(a). This prohibition includes a substantial burden on religious exercise resulting from a rule of general applicability. Id. "Religious exercise" is broadly defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §2000cc-5(7)(A).

To justify a substantial burden on religious exercise, a government must demonstrate that the burden is: (1) "in furtherance of a compelling governmental interest"; and (2) "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a).

RLUIPA confers jurisdiction upon the Department of Justice to enforce compliance with § 2000cc-1 by instituting an action for injunctive or declaratory relief. 42 U.S.C. § 2000cc-2(f).

C. Intervention Pursuant to Rule 24

Fed. R. Civ. P. 24 provides for two forms of intervention: "Intervention of Right" and "Permissive Intervention." Specifically, Rule 24 provides:

> **(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.
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> **(b) Permissive Intervention:** . . .
>
> > **(2) By a Government Officer or Agency**. On timely motion, the court may permit a federal . . . governmental officer or agency to intervene if a party's claim or defense is based on:
> >
> > **(A)** a statute or executive order administered by the officer or agency . . .
>
> > **(3) Delay or Prejudice**. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

Fed. R. Civ. P. 24.

IV. ARGUMENT

This Court should grant the United State's motion to intervene. The United States satisfies the requirements for both intervention as of right and for permissive intervention. In considering a motion to intervene, courts construe Rule 24 broadly in favor of potential intervenors. See, e.g., Feller v. Brock, 802 F.2d 722, 729 (4th Cir. 1986) ("[L]iberal intervention is desirable to dispose of as much of a controversy 'involving as many apparently concerned persons as is compatible with efficiency and due process.' "); United States v. Ritchie Special

Credit Invs. Ltd., 620 F.3d 824, 831 (8th Cir. 2010) ("We construe Rule 24 liberally and resolve any doubts in favor of the proposed intervenors."); 6 James W. Moore et al., MOORE'S FEDERAL PRACTICE 24.03[1][a], at 24-22 (3d ed. 2008) ("Rule 24 is to be construed liberally . . . and doubts resolved in favor of the intervenor."). Given the posture and facts of this case, as discussed below, the Fourth Circuit's liberal standard for intervention under Rule 24 weighs heavily in favor of granting the United States' Motion for Intervention of Right, or, alternatively, for Permissive Intervention.

A. The United States is Entitled to Intervention of Right

The United States is entitled to intervention of right. Intervention of right is appropriate when an applicant satisfies a four factor test: (1) the application for intervention is timely; (2) the applicant has a significantly protectable interest relating to the subject of the action; (3) disposition of the action may impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the existing parties in the lawsuit. See Gould v. Alleco, Inc., 883 F.2d 281, 286 (4th Cir. 1989). The United States' application for intervention of right satisfies all four requirements.

1. The United States' Motion is Timely

The United States' Motion to Intervene in this case is timely. Courts assessing the timeliness of a motion to intervene consider how far the suit has progressed, the prejudice which delay might cause other parties, and any reasons for tardiness in moving to intervene. Gould, 883 F.2d at 286. "The mere passage of time [] does not render an application untimely." Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder Inc., 72 F.3d 361, 369 (3d Cir. 1995) (citing Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE § 1908, at 272-274 (1986)). Instead, "the critical inquiry is: what proceedings of substance on the merits

have occurred?" Id.; see also Midwest Realty Mgmt. Co. v. City of Beavercreek, 93 F. App'x 782, 786 (6th Cir. 2004) ("The progress made in discovery and motion practice" is "more critical" than the time elapsed since the filing of the complaint.). Indeed, the Fourth Circuit has explained that "[a] motion for intervention is not necessarily untimely" even if it is filed "after judgment was entered in the case. The most important consideration is whether the delay prejudiced the other parties." Patterson v. Shumate, 912 F.2d 463 (4th Cir. 1990) (per curiam).

Here, trial is at least eight months away, the Court recently entered a discovery schedule providing for an additional five months of fact discovery, and no party has filed a substantive motion or taken a single deposition. The suit has not progressed significantly and the United States' intervention at this juncture would not prejudice the existing parties. Indeed, intervention here would promote judicial economy by consolidating the United States' claims with those at issue here and avoid the necessity for parallel litigation.

In Patterson, the Fourth Circuit reversed a district court's denial of a motion to intervene filed five days after entry of judgment. 912 F.2d at 463. There, Patterson – the trustee in bankruptcy for Joseph Shumate – intervened in Shumate's suit seeking compensation for services rendered to a furniture company. Patterson asserted that Shumate had concealed $45,000 from his bankruptcy estate, giving Patterson an interest in placing the money in a secure account until a court resolved the estate's interest in the judgment. Id. Noting that Patterson's motion was "only five days after judgment was entered" and before the furniture company had paid the money to Shumate, the Fourth Circuit held that the motion was timely. Id. More recently, the Fourth Circuit reversed the denial of a motion to intervene filed after the original parties had completed summary judgment briefing. See JLS, Inc. v. Pub. Serv. Comm'n of West Virginia, 321 F. App'x. 286 (4th Cir. 2009). In JLS, the district court concluded that several

motor passenger carrier companies lacked a sufficient interest to intervene in another carrier's suit seeking a declaration that its transportation activities constituted interstate commerce and thus were governed by federal regulations. Id. at 287-288. The Fourth Circuit reversed, finding that the proposed intervenors' had an adequate interest in the litigation. Id. Neither the district court nor the Court of Appeals criticized the timing of the intervention, even though three parties sought intervention after JLS moved for summary judgment and two additional companies moved to intervene after the completion of all summary judgment briefing. Id. at 288. See also Felman Prod. v. Indus. Risk Insurers, 2009 U.S. Dist. LEXIS 117672, at *15 (S.D.W.V. Dec. 16, 2009) (granting motion to intervene where no depositions had been taken and "only one dispositive motion has been filed").

Unlike these cases, the present litigation remains at a preliminary stage with ample discovery remaining, no pending or decided substantive motions, and at least eight months until the beginning of trial. Indeed, discovery presently consists only of the exchange of initial disclosures and one set of document requests. The United States' application to intervene in such circumstances is timely.

2. The United States' Has a Substantial Legal Interest in this Action

In addition to filing a timely motion for intervention, the United States has a substantial legal interest in this case because it implicates the rights secured by two federal statutes, 42 U.S.C. § 14141 and 42 U.S.C. § 2000cc. Section 14141 confers authority upon the United States to seek declaratory and injunctive relief for the pattern and practice of unconstitutional restrictions on inmates receipt and possession of religious and expressive materials at the Berkeley County Detention Center. The United States likewise has authority under RLUIPA to enjoin Defendants' practices that impose a substantial burden on the religious exercise of

inmates at BCDC. This interest satisfies Rule 24(a)'s requirement that a party have "an interest relating to the property or transaction which is the subject of the action." In re Sierra Club, 945 F.2d 776, 779 (4th Cir. 1991) (citing R. Civ. P. 24(a)).

The United States' interest here is particularly acute because the present litigation involves the protection of individual liberties, such as the freedom of speech and religion. See Edmisten v. Werholtz, 287 F. App'x 728, 735 (10th Cir. 2008) (It is well-settled that "the public has an interest in protecting the civil rights of all persons."). "There is the highest public interest in the due observance of all the constitutional guarantees." United States v. Raines, 362 U.S. 17, 27 (1960). The federal government's interest in protecting individual liberties is paramount in the context of protecting religious liberty, one of our society's most fundamental rights. See Mayweathers v. Newland, 314 F.3d 1062, 1067 (9th Cir. 2002) (RLUIPA is designed to "guard against unfair bias and infringement on fundamental freedoms"). As President Clinton said in signing RLUIPA, "[r]eligious liberty is a constitutional value of the highest order, and the Framers of the Constitution included protection for the free exercise of religion in the very first Amendment. This Act recognizes the importance the free exercise of religion plays in our democratic society." See Statement by President William J. Clinton Upon Signing S. 2869, 2000 U.S.C.C.A.N. 662 (September 22, 2000). In short, the United States has a strong interest in the subject of this action.

3. Disposition of This Action May Impair the United States' Interests

The United States also satisfies Rule 24(a)'s third requirement that its interest may be impaired if it is not permitted to intervene in the present litigation. United States v. Exxonmobil Corp., 264 F.R.D. 242, 246 (N.D.W. Va. 2010) (Rule 24 "does not require, after all, that [potential intervenors] demonstrate to a certainty that their interests *will* be impaired in the

ongoing action. It requires only that they show that the disposition of the action may as a practical matter impair their interests."); see also Northeast Ohio Coalition for Homeless v. Blackwell, 467 F.3d 999, 1007 (6th Cir. 2006) (Applicant for intervention must "show only that impairment of its substantial legal interest is possible if intervention is denied.").

The potential negative precedential effect of an adverse ruling constitutes a sufficient impairment to justify intervention. The United States' claims in intervention involve similar questions of law as those presented by Plaintiffs and arise from predominantly the same facts. Both Plaintiffs and the United States allege that Defendants' policies and practices contravene the Speech and Establishment Clauses of the First Amendment to the United States Constitution. Because of this high degree of overlap, the precedential effect of an adverse ruling on the merits of Plaintiffs' claims could impair the United States' ability to remedy BCDC's violations of federal law in separate litigation.

4. The United States' Interest is Not Adequately Represented by the Existing Parties

Finally, the United States satisfies Rules 24's requirement that an applicant for intervention show that the existing parties may not adequately represent the United States' interests. As with Rule 24's impairment requirement, an applicant for intervention satisfies the "inadequate representation" element merely by showing that "representation of its interest *may be* inadequate." Sierra Club, 945 F.2d at 779 (quoting Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972)); see also JLS, Inc., 321 F. App'x. at 289 (An applicant for intervention "need not show that the representation by existing parties will definitely be inadequate. Rather, he need only demonstrate that representation of his interest may be inadequate.") (internal citations omitted). "For this reason, the Supreme Court has described the applicant's burden on this matter as minimal." JLS, 321 F. App'x. at 289.

Although the United States and Prison Legal News share some ultimate objectives in the present litigation, the parties' interests are not wholly aligned. Unlike Plaintiffs, the United States asserts a claim under RLUIPA to enjoin the substantial burden placed on the religious exercise of non-Christian inmates at BCDC. See JLS, 321 F. App'x at 291 (finding inadequate representation of interests where "[m]ovants have also advanced some significant legal points that [existing plaintiff] did not present.").

Nor do the interests underlying Plaintiffs' First Amendment claims mirror those of the United States. While Plaintiffs and the United States arguably seek the same ultimate outcome on their claims that Defendants' practices violate the First Amendment's Speech and Establishment Clauses, courts recognize that private parties have "more narrow, parochial interests" than the government. Forest Conservation Council v. U.S. Forest Serv., 66 F.3d 1489, 1499 (9th Cir. 1995). As the Fourth Circuit explained, "even when a governmental agency's interests appear aligned with those of a particular private group at a particular moment in time, the government's position is defined by the public interest, not simply the interests of a particular group of citizens." JLS, 321 F. App'x. at 291. The United States' interests go beyond Plaintiffs' individual interest in the delivery of books and newsletters. Instead, they are tethered to the correct application of Section 14141 and the First Amendment generally, and to the uniform application of these provisions nationally. The Fourth Circuit articulated the analog of this principle in Sierra Club, acknowledging that while the "Sierra Club and South Carolina DHEC may share some objectives," intervention was appropriate because "we would expect Sierra Club to offer a different perspective." 945 F.2d at 780.

Finally, a private plaintiff seeking an injunction and damages – as Plaintiffs seek here – may inadequately represent the United States' interest in obtaining an injunction that vindicates

rights protected by the Constitution and federal law because the nature of a private plaintiff's lawsuit might understandably encourage the plaintiff to concentrate on recovering damages. Given the United States' differing interests, the United States satisfies the inadequate representation element.

B. Permissive Intervention

Alternatively, the Court should grant the United States "permissive intervention" under Rule 24(b). Rule 24(b) establishes that, upon a timely motion, a district court may grant intervention to a party that "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). Under Rule 24, a court weighing permissive intervention must consider whether intervention "will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). As with intervention of right, courts liberally construe requests for permissive intervention "to dispose of as much of a controversy involving as many apparently concerned persons as is compatible with efficiency and due process." Felman Prod., 2009 U.S. Dist. LEXIS 117672, at *7-8 (quoting Feller, 802 F.2d at 729) (granting motion to intervene).

The United States' motion to intervene satisfies each of the three requirements for permissive intervention enumerated by Rule 24(b)(1): (1); that its claims share a common question of law or fact with the underlying litigation; (2) ; that the motion to intervene is timely; and (3) that intervention will not unduly prejudice or delay the adjudication of the original suit.

First, the United States' claims pursuant to Section 14141 and RLUIPA share a common question of law or fact with Plaintiffs' assertions that Defendants' practice of censoring inmates' receipt and possession of expressive materials violates the First and Fourteenth Amendments. In this case, the claims presented by both the United States and the Plaintiffs require determining

whether the Defendants are engaged in a policy, pattern or practice of unlawfully restricting the materials that may be sent to and possessed by inmates housed at BCDC. Resolution of this legal question depends upon the same factual evidence that will be produced during discovery, such as the facility's written policies, grievances filed by inmates, and testimony from Defendants about their censorship practices. Thus, the United States' claims share questions of both law and fact with Plaintiff's original action.

Second, the United States' motion is timely. "The purpose of the timeliness requirement is to prevent a tardy intervener from derailing a lawsuit within sight of the terminal." Greene v. Bartlett, 2010 WL 2812859 (W.D.N.C. 2010) (quoting Scardelletti v. Debarr, 265 F.3d 195, 202 (4th Cir. 2001)). As set forth more fully in Section IV.A.1 above, the United States files this motion to intervene in the early stages of litigation. The Court's recently adopted scheduling order provides five additional months of discovery and does not contemplate trial until at least January 2012. To date, neither party has taken a single deposition or filed a substantive motion.

Finally, the United States satisfies the third Rule 24(b) requirement for many of the same reasons. Given the early stage of the present suit and the dearth of meaningful discovery or motions practice, granting the United States' motion would not prejudice the original parties to the action. Intervention by the United States will not require the Court or the parties to conduct any additional proceedings. Nor will intervention by the United States require the Court or the original parties to address a significant number of new claims. Indeed, two of the three claims asserted by the United States challenge the constitutionality of the Berkeley County Detention Center's censorship policies, a challenge also presented by Plaintiffs' original action.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court grant its Motion to Intervene.

Respectfully submitted,

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