IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 14-cv-00245-MSK-MJW

REVEREND MATT HALE,

Plaintiff,

v.

FEDERAL BUREAU OF PRISONS,

Defendant.

RESPONSE IN OPPOSITION TO FIFTEEN MOTIONS TO INTERVENE
[DOCS. 115-123, 127-132]

There is no legal justification for allowing at least fifteen new plaintiffs ("Movants") to intervene in this long-pending lawsuit against the Federal Bureau of Prisons ("BOP").[1] Unlike Mr. Hale, Movants are not in the custody of the BOP and are not subject to any of the BOP's rules or restrictions. They are apparently followers, family, and friends of Mr. Hale. But the fact that they are part of Mr. Hale's group, or may want him to have more privileges in prison, does not show that they should be allowed to intervene.

The remaining claims in this lawsuit are personal to Mr. Hale. They challenge restrictions related to his BOP confinement, and some of those restrictions no longer apply even

[1] The BOP responds to all currently pending motions to join, which are substantively duplicative. Six additional motions have been filed since the Court ordered the BOP to respond. Doc. 124. The BOP anticipates even more such motions, as Mr. Hale is actively soliciting his followers to join this lawsuit. *See* http://freematthale.net/ (providing forms for "Creators" and "Non-Creators" . . . "to File to Join Matt in His Lawsuit Against the Federal Bureau of Prisons – January 3, 2017"). The Court should dismiss any future motions like the pending motions for the reasons set forth in this response.

to him. The claims are:

> (1) First Amendment and Religious Freedom Restoration Act ("RFRA") claims challenging two sets of restrictions on Mr. Hale's correspondence privileges that were removed in January 2011 and August 2013 (Order on Motion to Dismiss, Doc. 66 at 17, 24-25);
>
> (2) A First Amendment claim alleging that these mail restrictions were imposed by the BOP in retaliation for Mr. Hale exercising his First Amendment rights (*id.* at 20-21);
>
> (3) A First Amendment free speech claim challenging Mr. Hale's alleged inability to obtain a copy of a book called *Nature's Eternal Religion* (*id.* at 18); and
>
> (4) First Amendment free exercise and RFRA claims related to Mr. Hale's demand that the BOP provide him a diet consisting entirely of raw foods (*id.* at 19-20).

These are claims for Mr. Hale to litigate, not Movants. Were the Court to find otherwise, any person outside the prison with some interest in an inmate, no matter how attenuated, could participate in his federal lawsuit. The law does not require that.

There are additional reasons for the Court to deny the motions. Movants are actually seeking to intervene in this case, and potential intervenors must attach a pleading to their motions. The one-paragraph forms here do not comply with this rule. The Court can deny the motions on that basis alone.

The Court should also deny the motions because they do not meet the standards for either intervention as of right or permissive intervention. Critically, the motions are untimely. Adding fifteen new parties now would unduly prolong this case, which was filed in January 2014. The BOP and Mr. Hale have spent the past three years moving the case toward resolution. The BOP plans to comply with the current discovery cut-off of April 17, 2017. But this progress would be

upended if some fifteen new parties are added. The Court should prevent this from happening and deny these eleventh-hour motions.

ARGUMENT

I. The motions should be treated as motions to intervene under Rule 24.

The motions are styled as motions to join pursuant to Rule 20 of the Federal Rules of Civil Procedure. That is the wrong procedure for what Movants are attempting to do. Rule 24, which governs intervention, applies to non-parties who seek to join a lawsuit.

The Tenth Circuit has held that relief "under Rule 20 is a right belonging *to plaintiffs*." *Hefley v. Textron, Inc.*, 713 F.2d 1487, 1499 (10th Cir. 1983) (emphasis added). Rule 24, by contrast, "governs intervention *by nonparties* in an existing litigation." *Viesti Associates, Inc. v. McGraw-Hill Global Education Holdings, LLC*, No. 12-cv-668-WYD-DW, 2014 WL 3766185, *3 (D. Colo. July 30, 2014) (emphasis added); *see also Premier Foods of Bruton, Inc. v. City of Orlando*, 192 F.R.D. 310, 312 (M.D. Fla. 2000) ("If an existing party is seeking to bring in an outsider the court should apply the joinder provisions of Rule 19 and 20; if the outsider is seeking to enter the suit of his own accord, the court should apply the intervention provisions set forth in Rule 24.").

Because Movants are nonparties, the Court should consider their motions as motions to intervene under Rule 24. *Am. Fed'n of State, City, & Mun. Employees (AFSCME) Council 79 v. Scott*, 278 F.R.D. 664, 668 (S.D. Fla. 2011) ("The court may treat a non-party's motion for joinder as a motion to intervene pursuant to Rule 24."). As explained below, Movants have failed to comply with Rule 24 in several significant ways.

II. Movants have not filed the required notice and pleading under Rule 24(c).

Movants have not filed the pleading required by Rule 24(c):

> **Notice and Pleading Required.** A motion to intervene must be served on the parties as provided in Rule 5. The motion *must* state the grounds for intervention *and* be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

Fed. R. Civ. P. 24(c) (emphasis added). The Court can deny Movants' motions on this basis alone. *See Shell v. Henderson*, No. 09-cv-00309-MSK-KMT, 2010 WL 2802651, *1 (D. Colo. July 15, 2010) ("As a threshold matter, the court notes that it would be warranted to deny Mr. Howse's motion based on his failure to file a pleading with his motion, pursuant to Rule 24(c), alone.") (citations omitted). But if the Court decides to overlook this deficiency, it should "not supply additional factual allegations to round out [Movants' motions] or construct a legal theory on [Movants'] behalf." *Whitney v. New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997) (quotations and citations omitted); *see also Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (court should not "assume the role of advocate for the pro se litigant").

Movants have not sufficiently explained "the grounds for intervention." Fed. R. Civ. P. 24(c). The abbreviated motions leave the BOP and this Court largely guessing as to the substance of Movants' claims. Some Movants cite "a right to relief" in relation to alleged violations of Mr. Hale's mail rights, while the remaining Movants reference "a right to relief" in relation to alleged religious discrimination. All Movants state that they seek to protect their First Amendment rights to communicate with Mr. Hale. But they do not offer any reasoning or justification to show why they should be allowed to pursue Mr. Hale's particular claims. This does not satisfy Rule 24(c). The Court should deny the motions.

III. Movants do not meet the standards to intervene under Rule 24.

Rule 24 provides for two types of intervention: mandatory and permissive. Intervention is a matter of right when the putative intervenor "claims an interest relating to . . . 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." Fed. R. Civ. P. 24(a)(2). Intervention is permissible when the 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). Permissive intervention is subject to the Court's sound discretion. *City of Stilwell, Okla. v. Ozarks Rural Elec. Co-op Corp.*, 79 F.3d 1038, 1043 (10th Cir. 1996). "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(b)(3).

A. Movants do not have a right to mandatory intervention.

The Tenth Circuit requires that an applicant for intervention make four showings to qualify for intervention as a matter of right: "(1) the application is timely, (2) the applicant claims an interest relating to the property or transaction which is the subject of the action, (3) the applicant's interest may be impaired or impeded, and (4) the applicant's interest is not adequately represented by existing parties." *Elliott Indus. Ltd. P'ship v. B.P. Am. Prod. Co.*, 407 F.3d 1091, 1103 (10th Cir. 2005). Movants do not meet these criteria. Mandatory intervention should be denied.

1. The motions are untimely.

Timeliness should be examined "in light of all the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties,

prejudice to the applicant, and the existence of any unusual circumstances." *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001) (quoting *Sanguine, Ltd. v. United States Dep't of Interior*, 736 F.2d 1416, 1418 (10th Cir. 1984)). The prejudice prong of this inquiry "measures prejudice caused by the intervenors' delay—not by the intervention itself." *Id.* at 1251 (quoting *Ruiz v. Estelle*, 161 F.3d 814, 828 (5th Cir. 1998)).

The motions are untimely. Mr. Hale filed this lawsuit in January 2014. From the beginning, he has transmitted information about this lawsuit on websites directed to his followers and supporters—in particular, the "Free Matt Hale" and "Creativity Movement Toronto" websites. Those websites publish important documents in this case, including court filings, the BOP's responses to discovery, and orders issued by the Court. *See* http://freematthale.net/; http://creativitymovementtoronto.blogspot.com/search?q=garrow. Indeed, it was by means of the "Free Matt Hale" website that most of the Movants appear to have been solicited to join this case. *See* http://freematthale.net/ (joinder forms for "Creators" and "Non-Creators"). Moreover, any Movants who have communicated with Mr. Hale for some time—including his mother, Evelyn Hutcheson (Doc. 118)—would know that Mr. Hale's correspondence was restricted for a period of time in 2010 and 2013. *See* Amended Complaint, Doc. 10 at ¶¶ 42, 77. Yet, not one Movant has explained why it took years for them to seek to intervene.

Allowing intervention after this lengthy delay will severely prejudice the BOP. In the last three years, BOP staff and legal counsel have expended considerable time and resources in defending this case. They have researched and briefed a dispositive motion which resolved a large piece of Mr. Hale's case. Personnel from many departments throughout the BOP have worked to respond to Mr. Hale's discovery requests, which continue to be updated. The BOP

has retained an expert who has prepared a lengthy written report. The BOP has also designated two BOP prison security experts pursuant to Fed. R. Civ. P. 26(a)(2)(C). In all, hundreds of hours have been committed to defending *Mr. Hale's* case.

These resources have focused on Mr. Hale and the issues that relate to restrictions placed on him *in a prison setting*. To allow some fifteen new parties with separate legal issues from Mr. Hale to join the lawsuit at this late juncture would require the BOP to rework its case, to restart discovery as to the new parties, and potentially, to seek new experts—all before the discovery cut-off of April 17, 2017. To further complicate matters, the BOP does not even know the true extent of Movants' purported claims due to their failure to comply with the pleading requirements of Rule 24(c).

In sum, the BOP should not be required to defend itself against fifteen new (still largely unknown) claims from fifteen new parties three years into a case predicated solely on one plaintiff. *See Georgacarakos v. Wiley*, No. 07-cv-1712-MSK-MEH, 2009 WL 1608984 (D. Colo. April 6, 2009) (denying a Rule 24 motion to intervene as untimely where the movant sought intervention just before the discovery cut-off date and "nearly two years after the litigation commenced"). The Court should deny the motions because they are untimely.

2. Movants' allegations do not relate to Mr. Hale's claims.

The second part of the mandatory intervention test is that Movants must show that they have "an interest relating to the property or transaction which is the subject of the action." Fed. R. Civ. P. 24(a)(2). The Tenth Circuit has interpreted this to mean that a movant's interest in the proceedings must be "direct, substantial, and legally protectable" before intervention is allowed

under Rule 24. *Coalition of Ariz./New Mex. Counties for Stable Economic Growth v. Dep't of Interior*, 100 F.3d 837, 840-41 (10th Cir. 1996) (citations omitted).

This case involves decisions that the BOP made about Mr. Hale, including how to safely manage an inmate whose purported "proselytizing" religion denigrates many members of the inmate population. *See* Doc. 10 at ¶ 9 (asserting that "Creativity is a proselytizing faith"); *see also* https://freematthale.net/wp-content/uploads/2017/02/Sermon-From-Solitary-Jan-44AC.pdf (January 2017 "Sermon from Solitary" discussing Hale's "captors of the Jewish Occupational Government" and the "sexual predations of the mud races"). The "subject of this action" is thus an alleged violation of *Mr. Hale's* constitutional and statutory rights. Were the Court to allow Movants to intervene here, anyone who claims an interest in a prisoner—including shared political or religious views—could intervene in any civil suit filed by that prisoner in federal court. The BOP could never make a decision without triggering a lawsuit from members of the general public who may sympathize with an inmate or disagree with the BOP's correctional judgment.

To the extent Movants may claim their interest in this action stems from their right to correspond or associate with Mr. Hale,[2] those claims do not merit intervention. Movants have not alleged that they are prohibited from writing to Mr. Hale, from speaking with him on the telephone, or from visiting him in prison, if they want. Nor were they the subject of the alleged retaliation that supposedly prompted past restrictions on Mr. Hale's correspondence.

[2] Once again, the BOP is left to guess as to Movants' arguments, as they have not articulated grounds for either permissive or mandatory intervention.

If Movants' interest in the case is the BOP's decision not to recognize the Creativity Movement as a religion, that is also not their claim to bring. The BOP does not interfere with Movants' ability to worship as they choose, and the BOP need not be concerned about the impact of Movants' communications on a large and volatile inmate population. It is different for Mr. Hale. And Movants have no legal right to insist that the BOP remove all restrictions on Mr. Hale's ability to resume his old duties as the "Pontifex Maximus" of the Creativity Movement—again, if that is what they want. In the first place, that is not a claim that is at issue in this case. Moreover, it is well-established that Mr. Hale's constitutional rights "are more limited in scope than the constitutional rights held by individuals in society at large." *Shaw v. Murphy*, 532 U.S. 223, 229 (2001); *see also*, *e.g.*, *Hudson v. Palmer*, 468 U.S. 517, 523 (1984) (recognizing that inmates retain only those First Amendment rights "not inconsistent with their status as prisoners or with the legitimate penological objectives of the corrections system"); *Jones v. N. Carolina Prisoners' Labor Union*, 433 U.S. 119, 126 (1977) ("The concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside of the penal institution."). Leadership roles in professional, political, and religious organizations are among the many rights that inmates surrender at the prison door.

The BOP does not control what Movants do, but it must control what Mr. Hale does. His lawsuit relates to individual rights that inure to him alone. Movants cannot demonstrate that their interest in the proceedings is "direct, substantial, and legally protectable." *See Coalition of Ariz.*, 100 F.3d at 840-41.

3. Movants' interests will not be impaired without intervention.

The Tenth Circuit has noted that "the question of impairment is not separate from the question of existence of an interest." *Utah Ass'n of Counties*, 255 F.3d at 1253 (quoting *Natural Res. Def. Council v. United States Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th Cir. 1978)). Movants have not alleged that their interest will be impaired if they are not allowed to intervene in the current suit. As shown above, Movants' legal rights and interests are separate from Mr. Hale's. They should not be permitted to intervene in this case where the question of their First Amendment rights is not even at issue.[3]

At bottom, Movants seem to justify their motions to intervene on their interest in corresponding, associating, or worshipping with Mr. Hale *in the future*. These speculative, forward-looking interests are not being litigated in this action.[4] Movants' interests will not be impaired if they are not allowed to intervene because their ability to engage with Mr. Hale in the future is not at issue in this case.

4. Movants cannot show that their rights are not adequately represented.

Movants have no interest in this case because their First Amendment rights as free individuals are not at issue, and they do not need to be represented in this matter. To the extent

[3] One movant, Evelyn Hutcheson, states that she is Mr. Hale's mother and wants to protect her First Amendment rights to communicate with her son. Doc. 118. One remaining claim concerns Mr. Hale's placement on restricted general correspondence status in 2010 and 2013. But Mr. Hale alleges that he was still allowed to correspond with his immediate family during that time. Doc. 10 at ¶ 32. Thus, Mr. Hale's complaint rebuts any allegation that his mother was prevented from communicating with him, even during the time of the "mail bans."

[4] The only forward-looking claims in this lawsuit are the claims concerning Mr. Hale's "religious" diet and "religious" texts. None of Movants' motions are premised on these claims. Nor could they be, as those claims allege constitutional deprivations particular to Mr. Hale, which a third party has no standing to litigate.

their goal is to have this Court order the BOP to recognize the Creativity Movement as a religion, that is the same outcome that is already being sought by Mr. Hale. Thus, their interests are adequately represented here by Mr. Hale, the former leader of the Creativity Movement. *See Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976) ("When the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented . . ."). Certainly, no Movant could better articulate the ideas behind the Creativity Movement than its former "greatest priest." Doc. 10 at ¶ 20.

In sum, Movants have failed to demonstrate that they have a right to mandatory intervention under Rule 24 because they do not meet any of the necessary criteria. "Failure to satisfy even one of the [Rule 24(a)(2)] requirements is sufficient to warrant denial of a motion to intervene as of right." *Devaul v. TK Construction, LLC*, No. 13-cv-2632-PAB-KMT, 2013 WL 6073888, at *1 (D. Colo. Nov. 19, 2013) (quoting *Commodity Futures Trading Comm'n v. Heritage Capital Advisory Servs., Ltd.*, 736 F.2d 384, 386 (7th Cir. 1984)). Movants are not entitled to mandatory intervention.

B. The Court should not grant permissive intervention.

Upon timely motion, a 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)(B). "In determining whether permissive intervention is warranted, a court may consider such factors as: (1) whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights; (2) whether the would-be intervenor's input adds value to the existing litigation; (3) whether the petitioner's interests are adequately represented by the existing parties; and (4) the availability of an adequate remedy in another action." *United States v. N. Colo. Water*

Conservancy Dist., 251 F.R.D. 590, 599 (D. Colo. 2008). Movants should be denied permissive intervention for the same reasons that they are not entitled to mandatory intervention.

First, Movants' three-year wait in seeking to intervene makes their motions untimely and will reset the entire litigation process, leading to undue delay and prejudice to both Mr. Hale and the BOP. The BOP, in particular, will be prejudiced because it will have to defend itself against entirely new and separate legal issues, long after the present issues in this case have been narrowed and litigated. Furthermore, Movants are not represented by counsel and are geographically spread throughout the United States. Their presence in the case will make the litigation unwieldy and substantially more time-consuming.

Second, Movants' inclusion in this lawsuit would not add value to the existing litigation. Their claims would raise entirely new facts and legal issues, but their presence would not contribute toward the resolution of *Mr. Hale's* case. *See Arney v. Finney*, 967 F.2d 418, 422 (10th Cir. 1992) (finding that "intervention would not aid" the parties and denying permissive intervention).

Third, Movants' legal rights are not at stake and do not need to be represented in this case. Insofar as Movants share Mr. Hale's interest in compelling the BOP to recognize the Creativity Movement as a religion, Mr. Hale—as the group's former "greatest priest"—can "adequately represent" the Movants' interest. *See N. Colo. Water Conservancy*, 251 F.R.D. at 599. Mr. Hale appears to be seeking the same end result and is therefore indirectly representing Movants' interests.

Finally, if Movants ever find themselves in a position in which the BOP is violating their personal constitutional rights, they can sue the BOP in their own lawsuits. Not allowing them to

intervene in this case, in which they have no cognizable interest, will not prevent them from bringing their own legitimate claims in federal court. This is not that case. The Court should deny Movants permission to intervene.

CONCLUSION

For the foregoing reasons, the Court should the motions. Docs. 115-123, 127-132.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on February 13, 2017, I served the foregoing document, including copies of unpublished judicial opinions, on the following non-CM/ECF participants by U.S. mail:

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