UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Miami Division

UNITED STATES OF AMERICA, Plaintiff, v. SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, and FLORIDA, DEPARTMENT OF CORRECTIONS, Defendants.	Case No. 1:12-cv-22958-PAS
REGINALD E. ROSE, VERNON ALEXANDER, JEFFREY MILLER, OMAR SHARIFF JONES, Individually and on behalf of a Class of All Others Similarly Situated, Applicants for Intervention.	

MOTION TO INTERVENE

With incorporated

MEMORANDUM OF LAW

And attached

PLEADING OF APPLICANTS FOR INTERVENTION

Reginald E. Rose, and other similarly situated Muslim inmates (hereinafter "Applicants" or "Applicants for Intervention"), move for good cause shown to intervene as of right, pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure, or alternatively, move for permissive inter-

vention, pursuant to Rule 24(b)(2), to receive a halal meal or, alternatively, a kosher meal, and attach pursuant to Rule 24(c), the pleading of the Applicants for Intervention, and in support state:

1. Applicants for Intervention seek to intervene as a matter of right, or alternatively, seek permissive intervention, as a class of Plaintiffs-Intervenors. Applicants have a direct and substantial interest in this matter. Applicants for Intervention are devout and sincere adherents to the Muslim faith.

2. Applicants' efforts to obtain religious parity with other religions in order to abide by Islamic dietary requirements have been years in the making and have included a prior lawsuit captioned Reginald Rose, et al. v. McCrae, et al., Case No. 3:06-cv-01071-TJC-HTS (M.D. Fla.).[1] For example, Defendants had long provided Jewish inmates with a kosher meal when requested. Rule 33-204.003(5), Florida Administrative Code (2006). Accordingly, in 2004, Applicants began requesting through the required inmate grievance procedure that they be given an Islamic halal meal, or in the alternative, a kosher meal as the two religious diets are similar.

3. The response of the Defendants was to state that if the Muslim inmates would convert to Judaism, they could receive a kosher meal; otherwise Defendants denied the Muslim inmates' request for a halal meal, or in the alternative a kosher meal. Rose DE 8-3.

4. After fully exhausting the required inmate grievance process, on December 7, 2006, Applicants filed a class action lawsuit requesting that Defendants provide them and all other similarly situated Muslim prisoners with nutritionally-sufficient halal meals or, in the alternative,

kosher meals. (Rose DE 1). The complaint from the 2006 lawsuit alleged that Defendants' conduct violated the Free Exercise and Establishment Clauses of the First Amendment to the United States Constitution and the Religious Land Use and Institutionalized Persons Act of 2000 (hereinafter "RLUIPA") and abridged the freedom of religion to which all inmates are entitled by denying Muslim inmates the right to adhere to the tenets of their faith by refusing to provide halal meals (or, in the alternative, kosher meals), in accordance with the commands of the Quran, while at the same permitting those with other dietary religious beliefs to adhere to the tenets of their faiths. A copy of the complaint in Reginald Rose, et al. v. McCrae, et al., Case No. 3:06-cv-01071-TJC-HTS (M.D. Fla.) is attached hereto as Exhibit 1.

5. Defendants then filed a Motion to Dismiss, or in the alternative, a Motion for Summary Judgment alleging that these same applicants had failed to exhaust their administrative remedies and the case was moot. Rose DE 8. Defendants' Motion was denied. Rose DE 33. Defendants then filed yet another Motion for Summary Judgment. Rose DE 35. It was denied as moot and an extension of time was granted to respond or reply to the complaint. Rose DE 41. On or about April 26, 2007, the Defendant Secretary announced the appointment of the Religious Dietary Study Group. In conjunction with the formation of the Study Group, the Secretary placed a hold on inmate participation in the Jewish Dietary Accommodation Program (hereinafter "JDA" Program) at participation levels as of that date, permitting no new enrollment until the Study Group completed its work. The Study Group was charged with conducting a review of religious dietary meal requirements:

---

[1]References to documents previously filed in Rose, et al. v. McCrae, et al., Case No. 3:06-cv-01071-TJC-HTS (M.D. Fla.) will be referred to as (Rose DE __). References to docu-

- To conduct an analysis of the requirements of the religious dietary laws of the major faith groups represented in the Department of Corrections' inmate population which have dietary requirements as part of the tenets of the faith.

- To review and analyze the impact of an additional influx of participants to the religious dietary accommodation program and how the department may be able in the future to accommodate the religious dietary requirements of various faiths.

- To conduct an analysis of religious meal accommodations within the parameters of an institutional prison setting in federal, state, and private prison systems.

- To review the religious meal programs currently provided by the Department of Corrections pursuant to Florida Administrative Rules and pursuant to the Jewish Dietary Accommodations Procedure Number 503.005, reviewing, among other things, data in regard to food purchase and preparation, physical plant requirements, security and classification issues, administrative matters, utilization and participation, and cost.

6. On July 26, 2007, the Study Group returned its report and recommendations to the Secretary. DE 55-8. The Study Group recommended: "Based on the findings presented and discussed by the Religious Dietary Study Group during the course of its meetings, as set forth in this report, the following are the Study Group's recommendations to Secretary McDonough:

- Eliminate all pork and pork products from the Department of Corrections' food service menus.

- Retain a kosher dietary program, but limit the participants to those inmates who have been expertly appraised or vetted by a rabbi as eligible to participate.

- Eliminate the JDA Program kitchens currently used if vetting of inmates who claim to be Jewish, as recommended above, significantly reduces the officially recognized Jewish inmate population, replacing the kosher meals prepared in the JDA kitchens with purchased pre-packaged meals.

- If an inmate misses ten percent or more of the kosher meals purchased or prepared for him/her in the course of one month, that inmate be removed from the kosher dietary program."

---

ments filed in the case at bar will be referred to as DE ___.

DE 55-8.

7. On August 20, 2007, the Defendant Secretary filed Notice to the Court of the Action of the Secretary on Recommendations of the Religious Dietary Study Group. Rose DE 38 and 38-1; Exh. 2. The Secretary never filed a copy of and informed the court of the Recommendations of the very Religious Dietary Study Group he had appointed. Instead, the Defendant Secretary rejected the recommendations of his Religious Dietary Study Group by letter dated August 15, 2007 to the Chairman of the Religious Dietary Study Group:

- The Jewish Dietary Accommodation (JDA) Program will be discontinued as of August 16, 2007.
- The JDA kitchen and utensils will be kept clean and maintained pending further direction from the Office of the Secretary.
- All pork and pork products will be eliminated from the Department of Corrections' food service immediately.
- The vegan and no-meat alternative entrée meal patterns which are currently provided for all inmates, as set forth in the administrative rules of the department, will continue to be available to all inmates who wish to observe the dietary laws of their respective religions.

Rose DE 38-2; Exh. 4.

8. In roundly rejecting the recommendations of his own Religious Dietary Study Group to maintain the JDA and to reject the Rose Plaintiffs' requests for either a halal meal or to be allowed to partake in the kosher meal as an alternative, the Defendant Secretary refused to offer religious dietary meals to both Muslim and Jewish inmates alike.

9. Therefore, on September 19, 2007, the Rose Plaintiffs filed a Stipulation of Dismissal and subsequently an Order of Dismissal without prejudice was entered on September 24, 2007. Rose DEs 45 and 46.

10. Unbeknownst to the 2006 Rose Plaintiffs, and without filing a notice of a rule change as required by the Florida Administrative Code, the Defendant Secretary reinstituted the JDA as a "pilot program" at South Florida Reception Center sometime in 2010 as can best be determined. DE 1 at ¶ 5. Indeed, it was not until the matter at bar was filed and publicity occurred that the Rose Plaintiffs learned of the JDA "pilot" kosher meal program.

11. Thereafter, the Plaintiff USA filed the lawsuit at bar, and the FDOC engaged in mediation and discovery was stayed. After an impasse on mediation and the discovery stay was lifted, the Plaintiff USA filed a Motion for a Preliminary Injunction in this action. DE 29. A hearing on the Motion is now set for June 4, 2013.

12. While the pleadings from the USA request a kosher meal for inmates, it is not clear whether the USA is also advancing that a halal meal must be provided to Muslim inmates as well. It appears from the pleadings that only a kosher meal is being requested. Moreover, it is unclear whether the relief sought would provide a kosher meal to those Muslim inmates desiring a kosher meal as a reasonable alternative.

13. Pursuant to the Prison Litigation Reform Act and despite that they had grieved this very matter unsuccessfully once before in 2006, the Rose applicants at bar over the past several months have just now completed the formal grievance process a second time to request that they be allowed to have a halal meal or in the alternative a kosher meal. As anticipated, Applicants

for Intervention's grievances have either been denied or not responded to at the institutional and Departmental levels.

14. While the Defendant Secretary is to be commended for reoffering kosher meals to Jewish inmates as a pilot program, in the interest of fairness if nothing else, he should have certainly provided Muslim inmates with a halal meal or in the alternative made kosher meals available during the "pilot program." Instead, he did neither, thereby placing Muslim inmates in the exact same situation as they were when they filed the Rose class action complaint on December 7, 2006.

15. While the decision of the United States to file the matter at bar is also to be commended, its complaint on information and belief is filed on behalf of Jewish inmates, not Muslim inmates. Nowhere in the complaint is there any mention of Muslim inmates not being provided a halal meal, or in the alternative a kosher meal. The complaint fails to specifically seek the same relief as is being sought here, namely to either be provided a halal meal, or in the alternative a kosher meal. Unlike Applicants' attached proposed complaint, the one at bar does not even mention seeking religious meal parity for Muslim inmates by either providing a halal meal or alternatively a kosher meal.

16. The Applicants for Intervention are so situated that disposition of this action, as a practical matter, may impede or impair their ability to protect their constitutional and legal right to receive a halal meal, or in the alternative a kosher meal. If this matter goes forward without the interests of the Muslim inmates being represented, the Applicants will suffer two grievous losses. First, from a timing standpoint, whatever relief is sought by the Plaintiff may not include Muslim inmates, for as is readily apparent from the complaint, no relief for observing the dietary

laws of Muslim inmates was sought or even contemplated. None of the inmates listed in the complaint at bar on information and belief are known to be Muslim. DE 1 ¶¶ 32(a)-(m). Second, if intervention is denied, the Muslim inmates will have to file yet another class action should this action be resolved by either mediation or settlement, or by trying the matter to judgment, and not providing Muslim inmates with a halal meal or an alternative kosher meal.

17. Attached hereto as Exhibit 5 is Applicants for Intervention's proposed pleading.

18. **Certificate of Counsel**. Plaintiff United States of America does not oppose the intervention of the Applicants. Defendants oppose the granting of this Motion to Intervene.

MEMORANDUM OF LAW

Rule 24, Federal Rules of Civil Procedure, in relevant part, provides that:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

I. Intervention as a Matter of Right

A party seeking to intervene as of right must show "(1) his application to intervene is timely; (2) he has an interest relating to the property or transaction which is the subject of the action; (3) he is so situated that disposition of the action, as a practical matter, may impede or

impair his ability to protect that interest; and (4) his interest is represented inadequately by the existing parties to the suit." Fox v. Tyson Foods, Inc., 519 F.3d 1298, 1302 (11th Cir. 2008) (citing Chiles v. Thornburgh, 865 F.2d 1197, 1213 (11th Cir. 1989)). When the applicant makes the required showing, intervention must be permitted. Stone v. First Union Corp., 371 F.3d 1305 (11th Cir. 2004); U.S. v. State of Ga., 19 F.3d 1388 (11th Cir. 1994). The Applicants' motion for intervention meets each of these criteria identified in Fox and Chiles. Accordingly, the Applicants' motion for intervention should be granted.

A. The Motion to Intervene is Timely. The Applicants' motion for intervention is timely in that this litigation is in its infancy, having only been filed on Aug. 14, 2012 and stayed until April 19, 2013. Furthermore, Applicants only recently completed the lengthy grievance process which took several months, and which is required prior to bringing potential claims against the Defendant.

Perhaps the most complete examination of the factors to be used to judge timeliness is found in Stallworth v. Monsanto Co., 558 F.2d 257 (5th Cir. 1977). There the former Fifth Circuit held that: "Timeliness is not limited to chronological considerations but 'is to be determined from all the circumstances'." 558 F.2d at 263. In Georgia v. U.S. Army Corps of Engineers, 302 F.3d 1242 (11th Cir. 2002), the court emphasized that: "Timeliness is not a word of exactitude or of precisely measurable dimensions. The requirement of timeliness must have accommodating flexibility toward both the court and the litigants if it is to be successfully employed to regulate intervention in the interest of justice.'" 302 F.3d at 1259 (quoting McDonald v. E.J. Lavino Co., 430 F.2d 1065, 1074 (5th Cir. 1970). Stallworth identified four factors as possibly relevant to the issue of timeliness.

The first factor, "[t]he length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene," was rejected as not relevant. Stallworth, 558 F.2d at 265. The second factor, "[t]he extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known on his interest in the case" turns on whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Id. The issue is "not how much prejudice would result from allowing intervention, but rather how much prejudice would result from the would-be intervenor's failure to request intervention as soon as he knew or should have known of his interest in the case." Id.

Permitting intervention in the instant case will not delay or prejudice the adjudication of the rights of the original parties. The litigation is in its infancy. While a Motion for a Preliminary Injunction was recently filed, no dispositive motions are pending, discovery has only recently begun and trial is not scheduled until March 2014. Furthermore, Applicants have promptly pursued their administrative remedies and filed the instant motion seeking to intervene after they exhausted.

The third factor, "[t]he extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied," clearly dictates that the Applicants for Intervention should be allowed to intervene. Id. at 265-66. The history of this litigation makes clear that the Defendant Secretary is unwilling to expand the availability of special religious diets to Muslim inmates. Furthermore, the United States' complaint and motion for injunctive relief does not adequately represent the interests of Muslim inmates and does not clearly seek relief on their be-

half, as none are listed in the complaint. Thus, the litigation at bar may be resolved favorably to Jewish inmates, but any such settlement may exclude relief for Muslim inmates.

The fourth factor, "[t]he existence of unusual circumstances militating either for or against a determination that the application is timely" should dictate favorable consideration of the motion to intervene, given the prior lawsuit by the Applicants in 2006. Although timeliness is really not at issue here, where intervention is delayed, "a court should look to the purpose for which intervention is sought, the necessity for intervention as a means of preserving the applicant's rights, and the improbability of prejudice to those already parties in the case." F.T.C. v. Am. Legal Dist., Inc., 890 F.2d 363, 365 (11th Cir. 1989). Therefore, a consideration of the relevant factors plainly demonstrates that this application is timely.

B. An Interest Relating to the Transaction Which is the Subject of the ActionError! Bookmark not defined. This element only requires the intervenor to demonstrate that they have a legally protectable interest. United States v. South Fla. Water Mgmt. Dist., 922 F.2d 704, 707 (11th Cir. 1991). There is no simple formula, and the interests that will suffice can only be determined on a case by case basis.

In this case, the Applicants have a legal interest in protecting their rights under the United States Constitution and RLUIPA. The Eleventh Circuit recently reaffirmed the rights of inmates to receive special religious diets under RLUIPA in Rich v. Secretary of Florida Department of Corrections et al., Case No. 12-11735, 2013 WL 1953526 (11th Cir. May 14, 2013). Courts have permitted a party to intervene under similar circumstances. Some examples of interests similar to those advanced by the Applicants include cases where courts have concluded that a party has a right to intervene in disputes challenging regulatory schemes. See, e.g., Fiandaca v.

Cunningham, 827 F.2d 825 (1st Cir. 1987) (male patients permitted to intervene in a suit by female patients at a state mental hospital seeking equivalent services since granting relief to the female patients might impair the interests of the male patients); United States v. Oregon, 839 F.2d 635 (9th Cir. 1988) (residents of state mental health facility permitted to intervene in civil rights action brought by United States); County of Fresno v. Andrus, 622 F.2d 436 (9th Cir. 1980) (permitting an organization that represented small farmers and which had instigated a regulatory procedure to intervene in an action challenging the validity of the regulations).

C. Disposition Of The Action, As A Practical Matter, May Impede Or Impair The Applicant for Intervention's Ability To Protect Their Interests. The test of practical impairment is a flexible one, United States v. Texas E. Transmission Corp., 923 F.2d 410 (5th Cir. 1991), which can be met in a variety of contexts. See Fleming v. Citizens for Albermarle, Inc., 577 F.2d 236 (4th Cir. 1978), cert. denied, 439 U.S. 1071, 99 S.Ct. 842, 59 L.Ed.2d 37 (1979) (citizens and taxpayers allowed to intervene in rezoning action alleging that plan would contaminate county water supply); Natural Res. Def. Council v. Costle, 561 F.2d 904 (D.C. Cir. 1977) (manufacturers' allowed to intervene in action brought to require rule making which would regulate the manufacturers' industries); United States v. Oregon, 839 F.2d 635 (9th Cir. 1988) (residents of state mental health facility permitted to intervene in civil rights action brought by United States). Because the United States is not seeking relief on behalf of the Applicants for Intervention, they would be prejudiced if they are not permitted to intervene. Indeed, the United States does not oppose intervention by the Applicants. As a practical matter, if the United States is successful, Muslim inmates would also be entitled to similar relief, and it would be inefficient to force them to pursue their rights separately in another law suit and result in unnecessary delay.

D. The Applicants for Intervention's Interests Are Represented Inadequately By The Existing Parties To The Suit. It appears, although not without some dispute, that the Applicants bear the burden of proof to demonstrate inadequate representation, although the burden is usually described as "minimal." Chiles, 865 F.2d at 1214. Inadequate representation will most commonly be found when the interests of the existing parties are adverse to, or different from, those of the applicant for intervention. Thurman v. FDIC, 889 F.2d 1441 (5th Cir. 1989). *See* Stone v. First Union Corp., 371 F.3d 1305, 1312 (11th Cir. 2004) ("Although all of the plaintiffs allege to have been subject to the same plan of age discrimination, the manner in which they were discriminated against may not be identical."). However, "[a]ny doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single action." Federal Sav. & Loan v. Falls Chase Sp. Taxing Dist., 983 F.2d 211, 216 (11th Cir. 1993).

Here, the rights of Muslim inmates are not adequately represented because the United States has not stated that they are pursuing the rights of Muslim inmates or requested relief for Muslim inmates, no Muslim inmates were included in the complaint at bar, and the Defendant Secretary has not demonstrated a willingness to accommodate Muslim inmates' requests for halal meals, or in the alternative, kosher meals.

II. Permissive Intervention

Alternatively, an applicant for permissive intervention must show "(1) his application to intervene is timely; and (2) his claim or defense and the main action have a question of law or fact in common." Chiles, 865 at 1213. The Applicants' application meets these criteria.

A. Timely. This application is timely for the reasons advanced in support of intervention as a matter of right. The only impediment to the Applicants filing sooner than now, was due to the exhaustion requirement of filing grievances as required by the Prison Litigation Reform Act; otherwise, this Motion would have been filed much sooner. Moreover, the parties were well aware for the past several months this Motion would be filed as soon as exhaustion was completed, as they were so informed by Applicants' counsel.

B. Common Questions of Law or Fact. Applicants' efforts to obtain religious parity with other religions in order to abide by Islamic dietary requirements shares common questions of fact and law with the claims being pursued by the United States on behalf of Jewish inmates. Furthermore, a generalized economic interest in sustaining the challenged action is generally enough to satisfy this requirement. Champ v. Atkins, 128 F.2d 601 (D.C. Cir. 1942) (judgment holder allowed to intervene in action by taxi cab owners to invalidate procedure whereby their licenses could be suspended for non-payment, suspension was likely to induce payment and the applicant's economic interest in that inducement justified intervention); Brooks v. Flagg Bros., Inc., 63 F.R.D. 409 (S.D.N.Y. 1974) (trade association allowed to intervene in action challenging lien statute because of generalized economic interest in sustaining such statutes, nationwide).

Like the groups in Champ and Brooks, the Applicants have an interest in sustaining the rights pursued by the United States, including the right to abide by Islamic dietary requirements. They should be permitted to intervene to do so.

WHEREFORE, Applicants for Intervention respectfully requests permission to intervene as a party Co-Plaintiff.

Respectfully submitted,

FLORIDA JUSTICE INSTITUTE, INC.

Randall C. Berg, Jr., Esq.
Fla. Bar No. 318371
Dante Trevisani, Esq.
Fla. Bar No. 72912

3750 Miami Tower
100 South East Second Street
Miami, Florida 33131-2309
305-358-2081
305-358-0910 fax
Email: RBerg@FloridaJusticeInstitute.org
DTrevisani@FloridaJusticeInstitute.org

CARLTON FIELDS, P.A.

John A. Camp, Esq.
Florida Bar No. 848115
Jennifer Christianson, Esq.
Florida Bar No. No. 589950

4000 Miami Tower
100 South East Second Street
Miami, FL 33131-9101
305-539-7228
305-530-0055 fax
Email: jcamp@carltonfields.com

Attorneys for the Applicants for Intervention

s/ Randall C. Berg, Jr.
By: Randall C. Berg, Jr., Esq.
Florida Bar No. 318371

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed today, May 30, 2013, the foregoing with

the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all persons registered for this case on the following service list, including all opposing counsel.

s/ Randall C. Berg, Jr.
By: Randall C. Berg, Jr., Esq.

By CM/ECF

Susan A. Maher
Chief Assistant Attorney General
Office of the Attorney General
The Capitol – PL01
Tallahassee, FL 32399
Susan.Maher@myfloridalegal.com
Attorney for Defendants

Michael J. Songer
Special Florida Bar #A5501751
Attorney
United States Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, N.W.
Washington, DC 20530
michael.songer@usdoj.gov
Attorney for Plaintiff
United States of America