IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

ADAM P. FAUST, *et al.*, *Plaintiffs*, v. THOMAS J. VILSACK, in his official capacity as Secretary of Agriculture, *et al.*, *Defendants*.	)	Civil Action No. 21-cv-548-WCG

DEFENDANTS' RESPONSE TO
LEE PERRY'S MOTION TO INTERVENE

Lee Perry, who asserts that his mineral and land rights have been stolen from him, moves under Federal Rule of Civil Procedure 24 to intervene in this action concerning certain benefits for holders of USDA farm loans. However, Mr. Perry has failed to file "a pleading that sets out the claim or defense for which intervention is sought," as required by that Rule. Fed. R. Civ. P. 24(c). This Court should deny Mr. Perry's motion for that reason alone. Moreover, even if Mr. Perry had met the procedural requirements of Rule 24(c), he has not met the requirements for intervention as of right under Rule 24(a) or for permissive intervention under Rule 24(b). With respect to intervention as of right, Mr. Perry points to no statute giving him an unconditional right to intervene, identifies no interest that will be affected by the outcome of this action, and fails to allege that Defendants will inadequately represent any such interest. With respect to permissive intervention, Mr. Perry states no claim or defense that shares common issues of law or fact with this action. And in any case, multiple discretionary factors counsel against permissive intervention. Mr. Perry's

participation in these proceedings would prejudice the parties and waste judicial resources by diverting them to address his unrelated arguments. This Court should deny his motion to intervene.

BACKGROUND

Defendants have set forth the background of this matter in previous filings. *See* ECF Nos. 9, 17, 35. Herein, Defendants include the background most pertinent to the instant motion and respectfully refer the Court to Defendants' previous filings for additional background as necessary.

On March 11, 2021, the President signed into law the American Rescue Plan Act of 2021 ("ARPA"), providing $1.9 trillion in economic stimulus. *See* H.R. 1319. Among that $1.9 trillion, Congress appropriated funds to pay up to 120 percent of certain direct or guaranteed USDA farm loans held by "socially disadvantaged farmers or ranchers" ("SDFRs"), and outstanding as of January 1, 2021. *See* H.R. 1319, § 1005. For purposes of Section 1005, Congress gave the term "socially disadvantaged farmer or rancher" the same meaning as in Section 2501(a) of the Food, Agriculture, Conservation, and Trade Act of 1990, codified at 7 U.S.C. § 2279(a). *See id.* § 1005(b)(3). That provision defines an SDFR as "a farmer or rancher who is a member of a socially disadvantaged group," 7 U.S.C. 2279(a)(5), which is further defined as "a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities," *id.* § 2279(a)(6).On April 29, 2021, Plaintiffs, farmers who identify as white, filed suit to challenge the USDA's implementation of Section 1005 of APRA. *See* Compl., ECF No. 1.[1] Plaintiffs allege that they hold loans with the USDA and would otherwise qualify for debt relief under Section 1005 "except that [they are] white." Am. Compl. ECF No. 7, ¶ 8; *see also id.* ¶¶ 8-17. They claim that the USDA's interpretation of "socially

[1] Plaintiffs filed an amended complaint on May 19, 2021, adding additional plaintiffs among other things. *See* Am. Compl., ECF No. 7.

disadvantaged farmer or rancher" in Section 1005 to include farmers and ranchers who identify as "Black/African American, American Indian or Alaskan native, Hispanic or Latino, or Asian American or Pacific Islander," *id.* ¶ 44, "violate[s] the Equal Protection guarantee in the United States Constitution," *id.* ¶ 48. They ask this Court to declare that the USDA's interpretation of Section 1005 is unconstitutional, *id.* at 13, ¶ B, and to enjoin the USDA "from applying racial classifications when determining eligibility for loan modifications and payments under Section 1005 of ARPA," *id.* ¶ C.

On June 21, 2021, Lee Perry filed a motion to intervene in this action. *See* Mot. to Intervene in Compl. for Declaratory and Injunctive Relief (hereinafter "Perry Mot."), ECF No. 38. Mr. Perry identifies himself as a joint venture auditor whose prior suit alleging a conspiracy among federal agencies, state agencies, and private companies to steal Black-owned land and mineral rights was dismissed with prejudice. *See* Perry Mot. ¶¶ 4, 6; *Perry v. Christian*, 846 F. App'x 279 (5th Cir. 2021). Mr. Perry's motion asks this Court to deny Plaintiffs' requests for relief and dismiss Plaintiffs' claims. *See id.* at 3, ¶¶ A-D.

ARGUMENT

Mr. Perry's motion to intervene should be denied for failing to comply with the threshold requirements of Rule 24(c). Mr. Perry fails to set out a cognizable claim or defense against the parties in this action. His motion refers to claims against the USDA dismissed in a prior lawsuit, but he seeks no relief against the USDA. He seeks dismissal of Plaintiffs' claims, but states no claim or defense against them. Even putting this defect aside, Mr. Perry does not meet the requirements either for intervention as of right under Rule 24(a) or for permissive intervention under Rule 24(b). And if he could meet the requirements for permissive intervention, this Court should still use its discretion to deny Mr. Perry's motion.

Mr. Perry claims that he may intervene by right, citing Rule 24(a) and 28 U.S.C. § 2403. Perry Mot. 1. That statutory provision, however, provides a right to intervene for the United States and for individual states, not for private parties. *See* 28 U.S.C. § 2403. Mr. Perry also fails to identify any protectable interest inadequately represented by Defendants, which might otherwise entitle him to intervene under Rule 24(a)(2). He has not alleged that he has any qualifying loans for the purposes of Section 1005 of ARPA, and has done nothing to overcome the presumption that Defendants will adequately represent any interest Mr. Perry might have in Section 1005's debt payment program.

Nor has Mr. Perry shown that he can meet the requirements for permissive intervention under Rule 24(b). He states no claim or defense that shares common factual or legal questions with this action. Even if he could meet the minimum requirements of Rule 24(b), multiple discretionary factors counsel against intervention. Mr. Perry's connection to this case is attenuated, he has given no indication that he can contribute to the development of factual or legal issues in this case, and he has not alleged that Defendants will provide inadequate representation. This Court should not allow Mr. Perry to divert the its and the parties' resources away from the current action, and should deny his motion to intervene.

I. Standard of Review

Federal Rule of Civil Procedure 24 allows non-parties to join a lawsuit through two types of intervention: intervention as of right under Rule 24(a), and permissive intervention under Rule 24(b). *See Pavlock v. Holcomb*, 337 F.R.D. 173, 176-77 (N.D. Ill. 2020). Both forms of intervention require a timely motion. *See* Fed R. Civ. P. 24(a), 24(b)(1). That 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).

Under Rule 24(a), a court must permit intervention as of right in two situations. First, a movant may intervene by right when "given an unconditional right to intervene by a federal statute." Fed. R. Civ. P. 24(a)(1). Second, in the absence of such a statutory right, a movant may intervene as of right under Rule 24(a)(2) if he shows four requirements: "(1) timely application; (2) an interest relating to the subject matter of the action; (3) potential impairment, as a practical matter, of that interest by the disposition of the action; and (4) lack of adequate representation of the interest by the existing parties to the action." *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 797 (7th Cir. 2019). Additionally, the Seventh Circuit has held that the interest relating to the action must be sufficient to show standing. *See id.* at 798 ("A party without standing cannot intervene as of right."). The movant bears the burden of establishing each requirement, and failure to establish any one requirement is reason to deny the motion to intervene. *Id.*

Under Rule 24(b), the court has the discretion to permit a movant to intervene if he "is given a conditional right to intervene by a federal statute," or "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)(A), 24(b)(1)(B). The movant bears the burden of showing a common question of law or fact. *See Cavelle v. Chicago Transit Auth.*, No. 17-CV-5409, 2020 WL 6681344, at *5 (N.D. Ill. Nov. 12, 2020) (citing Sec. Ins. Co. of Hartford v. Schipporeit, Inc., 69 F.3d 1377, 1381 (7th Cir. 1995)).

If the movant meets the requirements for permissive intervention, the court still has discretion to deny it. *See Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000) ("Permissive intervention under Rule 24(b) is wholly discretionary."). Rule 24(b) "requires the court to consider 'whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.' Fed. R. Civ. P. 24(b)(3), but otherwise does not cabin the district court's discretion." *Planned Parenthood of Wisconsin*, 942 F.3d at 803.

II. Mr. Perry Has Not Carried His Burden to Intervene Under Rule 24.

Mr. Perry has not met the requirements of Rule 24. To begin, his motion lacks a pleading that sets out the claim or defense for which he seeks to intervene, as required by Rule 24(c). Mr. Perry appears to refer to conclusory claims about stolen land and mineral rights from prior litigation against USDA, *see* Perry Mot. ¶¶ 4, 7, but does not actually seek any relief against Defendants, *see id.* at 3, ¶¶A-D. Nor could he, since those claims were already dismissed with prejudice in his prior suit. *See Perry*, 846 F. App'x at 279. Mr. Perry asks that this Court deny Plaintiffs' requests for relief and dismiss their claims, but he raises no specific cross-claim or defense against them. *See* Perry Mot. at 3, ¶¶A-D. Indeed, there is no defense Mr. Perry could raise in this case, because Plaintiffs' requested relief would not require him to do, or prohibit him from doing, anything. *See* Caleb Nelson, *Intervention*, 106 Va. L. Rev. 271, 274 (2020) (explaining that "a 'defense' is a particular type of legal argument that the targets of a claim assert to explain why the court should not grant relief against them"). In failing to set out a claim or defense for which he seeks to intervene, Mr. Perry's motion fails to meet the threshold requirements of Rule 24(c). For that reason alone, this Court should deny it. *See, e.g.*, *Hankins v. Alpha Kappa Alpha Sorority, Inc.*, 447 F. Supp. 3d 672, 691-692 (N.D. Ill. 2020) (explaining that a motion to intervene may be denied solely for failure to comply with Rule 24(c)). Even if Mr. Perry had met the requirements of Rule 24(c), however, his motion to intervene still fails to show either that he is entitled to intervene as of right under Rule 24(a) or that he should be permitted to intervene under Rule 24(b).

A. Mr. Perry Has Not Shown that He is Entitled to Intervene as of Right.

In order to intervene as of right, Mr. Perry must show that he has an unconditional statutory right to intervene or that he meets the requirements of Rule 24(a)(2). He has shown neither. Mr. Perry claims that 28 U.S.C. § 2403 provides grounds for his intervention. *See* Perry Mot. at 1. That

statutory provision, however, is inapposite. It permits intervention by the United States and by individual states in cases questioning the constitutionality of statutes, and does not contemplate intervention by private parties. *See* 28 U.S.C. § 2403(a) ("[T]he court . . . shall permit the United States to intervene."); 28 U.S.C. § 2403(b) ([T]he court . . . shall permit the State to intervene."). Mr. Perry thus fails to identify any right to intervene granted by a statute.

Mr. Perry also fails to meet the requirements to intervene under Rule 24(a)(2). Aside from a timely application, Rule 24(a)(2) requires showing an interest relating to the subject matter of the main action, the potential impairment of that interest by the disposition of the action, and a lack of adequate representation of that interest by existing parties. *See Planned Parenthood of Wisconsin,* 942 F.3d at 797. Mr. Perry cannot meet any of these requirements because he has not established a sufficient interest in this action in the first place. The Seventh Circuit requires intervenors to establish an interest in the main action sufficient to establish standing. *See Planned Parenthood of Wisconsin,* 942 F.3d at 798. Here, Mr. Perry has not alleged that he possesses a loan eligible for assistance under Section 1005 or otherwise has any personal stake in ARPA's debt payment program. His motion expresses his disagreement with Plaintiffs' legal theories and his belief in the constitutionality of ARPA's debt payment program. *See* Perry Mot. at 3, ¶¶ B, D. But the "generalized interest of all citizens in constitutional governance" is not enough to confer standing. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974). Accordingly, it is not a sufficient interest for intervention under Rule 24(a)(2).

Even if Mr. Perry could establish a sufficient interest in the defense of Section 1005's debt payment program, he cannot show that Defendants will inadequately represent any such interest. The Seventh Circuit has explained that there is a "presumption of adequate representation" when a proposed intervener shares the same interest as an existing party or when a governmental party

is charged by law with representing that interest. *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 747 (7th Cir. 2020). Both of those situations apply here, where Defendants are charged with defending the laws of the United States and where Mr. Perry seeks denial of Plaintiffs' requests for relief and dismissal of their claims. *See* Perry Mot. at 3, ¶¶ A-D. Mr. Perry thus "must carry a heightened burden to establish inadequacy of representation," and he does not carry that high burden. *Driftless Area Land Conservancy*, 969 F.3d at 747. Nowhere in his motion does he allege, let alone establish, that Defendants will not adequately defend against Plaintiffs' claims. Mr. Perry has failed to show that he is entitled to intervene as of right in this action.

B. Mr. Perry Has Not Shown that He Should Be Permitted to Intervene Under 24(b).

Mr. Perry identifies no statute giving him a conditional right to intervene under Rule 24(b)(1)(A). He also fails to show that he has "a claim or defense that shares with the main action a common question of law or fact," because he has failed to state any claim or defense at all. Fed R. Civ. P. 24(b)(1)(B). Since Mr. Perry has not met that requirement, this Court must deny permissive intervention before exercising its discretion under Rule 24(b). *See Reich v. Wolfe*, 1997 WL 83303, at *2 (N.D. Ill. Feb. 19, 1997) (denying permissive intervention because applicant presented "no cognizable claim or defense").

In the context of Rule 24(b), claims or defenses "manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending lawsuit."*Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (quoting *Diamond v. Charles,* 476 U.S. 54, 76–77 (1986) (O'Connor, J., concurring in part and concurring in judgment)). In other words, a claim or defense requires an "actual, present interest that would permit [the movant] to sue or be sued by [the parties] in an action sharing common questions of law or fact with those at issue in th[e] litigation." *Diamond*, 476 U.S. at 77 (O'Connor, J., concurring). As explained above, Mr. Perry

has set out no claim or defense in this sense. He possesses no defense in this case, and has no authority to raise defenses on the Government's behalf. He does not seek to sue any of the parties in this case. With "no direct claim or right in the case before the court," Mr. Perry is not permitted by Rule 24(b) to intervene. *Keith v. Daley*, 764 F.2d 1265, 1272 (7th Cir. 1985) (internal quotation marks omitted) (upholding denial of permissive intervention on that basis).

Even if Mr. Perry could meet the requirements to be considered for permissive intervention, this Court should use its discretion to deny it for multiple reasons. First, Mr. Perry asserts only an attenuated connection to this case, alleging neither eligibility for Section 1005's debt payment program nor any interest implicated by Plaintiffs' requested relief. *Cf. Habitat Educ. Ctr., Inc. v. Bosworth*, 221 F.R.D. 488, 496 (E.D. Wis. 2004) (considering "relatively attenuated" connection to case as reason to deny permissive intervention). Relatedly, he has given no indication that he will contribute to the development of factual or legal issues in this case. *Cf. id.* (considering this as reason to deny permissive intervention). On the contrary, Mr. Perry's motion contains conclusory statements that seem largely to reiterate the content of a prior suit alleging a wide-ranging conspiracy among governmental and private entities, which was dismissed with prejudice. *See Perry*, 846 F. App'x at 279. Finally, when "the government is likely to provide adequate representation," as it is here, "the case for permissive intervention is much weakened." *Habitat Educ. Ctr.*, 221 F.R.D. at 678 (citing Menominee Indian Tribe of Wisconsin v. Thompson, 164 F.R.D. 672, 678 (W.D. Wis. 1996)). Thus, even if Mr. Perry were able to satisfy the minimum requirements of Rule 24(b), this Court should use its discretion to deny permissive intervention.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Mr. Perry's motion to intervene.

Dated: July 12, 2021

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

LESLEY FARBY
Assistant Branch Director
Civil Division, Federal Programs Branch

/s/ Emily Newton
EMILY SUE NEWTON (VA Bar No. 80745)
Senior Trial Counsel
KYLA M. SNOW (Ohio Bar No. 96662)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, D.C. 20005
Tel: (202) 305-8356 / Fax: (202) 616-8460
emily.s.newton@usdoj.gov

Counsel for Defendants