IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ADAM P. FAUST,
et al.,

Plaintiffs,

Case No. 1:21-cv-00548-WCG

v.

THOMAS J. VILSACK, in his official capacity
as Secretary of Agriculture, and

ZACH DUCHENEAUX, in his official capacity
as Administrator of the Farm Service Agency,

Defendants.

PLAINTIFFS' RESPONSE TO MOTION FOR JOINDER BY NON-PARTY COREY LEA (DKT. 6)

Corey Lea requests permission to join this lawsuit and to assert a cross-claim against Plaintiffs, including a request that Plaintiffs post a four billion dollar bond. Lea's motion should be denied in its entirety.

I. Whether considered as a request for joinder or a motion to intervene, Lea's request to join the lawsuit should be denied.

Lea requests to join this lawsuit pursuant to Fed. R. Civ. P. 20, which provides that a person may join a suit as a plaintiff if he asserts any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction or occurrence, and any question of law or fact common to all plaintiffs will arise in the action. Fed. R. Civ. P. 20(a)(1).

Lea's motion should be denied. As an initial matter, Lea has articulated no colorable claim against the plaintiffs to this suit, outside of his belief that they should not prevail. Furthermore, the Seventh Circuit has concluded that Rule 20 is not the proper vehicle by which a non-party may join a lawsuit. *Thompson v. Boggs*, 33 F.3d 847, 858 n.10 (7th Cir. 1994). Instead, one seeking to join an existing suit should seek to intervene under Rule 24. Other courts are in agreement. *Bourgeois v. Vanderbilt*, 251 F.R.D. 368, 370 (W.D. Ark. 2008) ("only a person or entity that is already a party may make a motion for joinder"); *Parker-Hannifin Corp. v. Samuel Moore & Co.*, 436 F. Supp. 498, 500 (N.D. Ohio 1977) (joinder inappropriate where proposed new party "is not a party to this action and neither of the existing parties seeks leave to join [the new party] through any of the appropriate joinder devices"); *Paine, Webber, Jackson & Curtis, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 564 F. Supp. 1358, 1371 (D. Del. 1983) (same, citing *Parker-Hannifin*).

But construing Lea's motion as one for intervention in this case fares no better. Rule 24(a) concerns intervention as of right, while Rule 24(b) concerns permissive intervention. Neither provision supports granting Lea's request to participate in this lawsuit.

Rule 24(a) provides that a court must permit anyone to intervene who "claims an interest relating to the property or transaction that is the subject of the action . . . *unless existing parties adequately represent that interest*." (Emphasis added).[1] There are four conditions for intervention as of right: 1) timely application; 2) the

[1] Lea has not identified any federal statute that gives him a right to intervene, so intervention on that basis is not discussed further here.

applicant must have a direct and substantial interest in the subject matter of the litigation; 3) the applicant's interest must be impaired by disposing of the action without the applicant's involvement; and 4) the applicant's interest must not be represented adequately by one of the existing parties to the action. *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985).

Plaintiffs do not dispute that Lea's application is timely, but he cannot satisfy the remaining criteria for intervention as of right. As an initial matter, Lea does not have an interest meriting intervention because there is no right to reap the benefits of an unconstitutional policy. *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't Health*, 699 F.3d 962, 986 (7th Cir. 2012) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)) (the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests"). And while Lea claims that Plaintiffs will diminish the money available to him as a socially disadvantaged farmer[2] if this action is successful, even if this Court assumes this is true, the defendants already represent Lea's interests. Whether Lea is a party to this litigation or not, the defendants will defend the law that Congress passed; any interest he has would not be impaired by his absence, because even if Lea intervened, he would be entitled to no relief apart from the benefits he may receive if the statute is upheld. Lea therefore has no particular interest requiring his involvement in the litigation.

[2] Lea does not allege his race in his motion, but for the purposes of this motion Plaintiffs will assume that he falls within one of the racial categories that would allow him to benefit under the statute.

Finally, "[w]here the prospective intervenor and the named party have the same goal . . . there is a rebuttable presumption of adequate representation that requires a showing of some conflict to warrant intervention." *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019) (internal quotation marks and citation omitted). This presumption "becomes even stronger when the representative party is a governmental body charged by law with protecting the interests of the proposed intervenors"; the presumption of adequate representation will stand "unless there is a showing of gross negligence or bad faith." *Id.* (internal quotation marks and citation omitted). Here, the United States Department of Justice will represent the Defendants. Lea has not argued, and has no basis upon which to argue, that DOJ's representation will not adequately represent his interest under this standard. It is both unnecessary and impractical to permit each and every farmer who would benefit from the statute as written to intervene in the suit when the government has attorneys charged by law specifically charged with defending the law.

This Court should not permit Lea to intervene under Rule 24(b)(1)(B) either. That section of the rule provides that the court may permit someone to intervene who "has a claim or defense that shares with the main action a common question of law or fact." Lea has requested to intervene as a plaintiff to file a claim against the existing plaintiffs. To the extent Lea seeks to have the statute upheld, that interest is already represented by the defendants in this case. Lea otherwise has no claim or defense that he shares with any other party. As is true for intervention as of right,

the "case for permissive intervention disappears" where the intervenor cannot overcome the presumption of adequate representation. *Id.* (citing *One Wis. Inst., Inc. v. Nichol*, 310 F.R.D. 394, 399 (W.D. Wis. 2015) and *Menominee Indian Tribe of Wis. v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996)).

"Permissive intervention under Rule 24(b) is wholly discretionary and will be reversed only for abuse of discretion." *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000) (citing *Keith*, 764 F.2d at 1272). This discretion vests this Court "with ample authority to manage the litigation before it." *Planned Parenthood of Wis.*, 942 F.3d at 803. It is appropriate for this Court to consider the potential impact of granting Lea's motion to intervene on the scope of the case. *See Habitat Educ. Ctr., Inc. v. Bosworth*, 221 F.R.D. 488, 496 (E.D. Wis. 2004) (permissive intervention denied where "there is no indication that applicants can make a significant contribution to the development of the factual and legal issues"); *Coburn v. DaimlerChrysler Servs. N. Am., L.L.C.*, 218 F.R.D. 607, 610 (N.D. Ill. 2003) (expressing concern "that granting intervention could lead to a torrent of motions to intervene from other parts of the country, which would further prejudice the adjudication of the original parties' rights"). Lea has not identified any relevant factual or legal issue in his motion that the DOJ would have unavailable to it if his motion is denied. The decision to include a pro se individual whose interests are already represented by government counsel would only create delay to the adjudication of the legal issues presented in this lawsuit. Lea's motion to join or intervene in this lawsuit should be denied.

II. Plaintiffs' remaining arguments are without merit.

Because Lea has not satisfied the criteria for intervention in this suit, his other arguments need not be analyzed further, but in the event this Court reaches them, it should reject them.

Lea argues that Plaintiffs failed to exhaust administrative remedies before bringing this lawsuit because Plaintiffs did not cite a final agency decision from the Secretary of Agriculture. (Dkt. 6 at 4.) He refers to three cases in support of this argument, none of which apply here. *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 163 (1967) concerned a premature challenge to proposed administrative rules regulating certain cosmetics, and *Bethlehem Steel Corp. v. United States Envt'l Protection Agency*, 536 F.2d 156, 161 (7th Cir. 1978) rejected a challenge to a pollution regulation by the EPA on the grounds that the agency's action was not final.[3] Neither case concerned a challenge to a federal law passed by Congress that directs an agency to discriminate on the basis of race in the provision of a government benefit, as is the case here. There is no agency rulemaking or enforcement action to challenge; the law simply provides that the USDA will distribute the funds to the minority groups identified as "socially disadvantaged farmers" without any further deliberation, decision, or record required by the agency. Therefore, any exhaustion that might normally be required under the Administrative Procedures Act does not apply here.

[3] Lea also offers a third partial citation that Plaintiffs' counsel could not locate (Dkt. 6 at 4), but accepting Lea's parenthetical summary of the holding at face value, it concerns ripeness and the finality of an agency enforcement action that is likewise inapplicable here.

Finally, Lea maintains that Plaintiffs should be required to post a bond in the amount allocated by Congress to fund the program—over four billion dollars. (Dkt. 6 at 5.) Rule 65(c) of the Federal Rules of Civil Procedure provides, "The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained."

Notwithstanding the literal language of the rule, courts construe this language to mean that under some circumstances a bond may not be required, with the decision of whether to require a bond an in what amount addressed to the sound discretion of the district judge. *Scherr v. Volpe*, 466 F.2d 1027, 1035 (7th Cir. 1972) (no abuse of discretion not to require a bond from plaintiffs challenging highway project on environmental grounds). The purpose of a bond is to compensate a defendant for losses suffered due to an erroneously issued preliminary injunction. *Ty, Inc. v. Publications Int'l, Ltd.*, 292 F.3d 512, 516 (7th Cir. 2002). Here, the defendants will suffer no loss even if this Court issues such an injunction but ultimately rules against Plaintiffs on the merits because the complaint seeks simply to stop the unconstitutional expenditure of public funds that have been set aside for a specific purpose. A bond in any amount (much less a ten-figure bond) is inappropriate because the funds will still be available in the event that the defendants prevail. This is not a situation in which the defendants would incur losses or expenses due to an injunction between the initiation and the suit and a

decision on the merits, such as when two competitors compete over the use of trademarks and one could use the mark to the detriment of the other during the litigation. *Cf. Mead Johnson & Co. v. Abbott Labs.*, 201 F.3d 883, (7th Cir. 2000) (district court should have required higher bond in trademark suit due to the "incentive business rivals have to pursue relief that gives them a competitive edge" during litigation). Such reasoning does not apply here, where the amount of loans to be forgiven is fixed by the congressional act under review and the defendants would face no loss if they ultimately prevail. *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 765, 925 (S.D. Ind. 2011) (no bond required where preliminary injunction results in no loss).

Furthermore, courts have recognized that plaintiffs seeking to vindicate constitutional rights are acting in the public interest, and this factor weighs against requiring a bond in any amount. *Ogden v. Marendt*, 264 F. Supp. 2d 785, 795 (S.D. Ind. 2003) (bond waived where security would "impact negatively on Plaintiffs' exercise of their constitutional rights and the rights of other members of the public") (citations omitted); *Barron v. City of Granite City, Ill.*, Case No. 19-cv-834-SMY-MAB, 2019 WL 5067603 at *2 (S.D. Ill. Oct. 9, 2019) (waiving bond requirement due to "the constitutional rights involved" in challenge to compulsory eviction law).

CONCLUSION

For the forgoing reasons, this Court should deny Lea's motion in its entirety.

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Dated: May 25, 2021

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CERTIFICATE OF SERVICE

I certify that on the 25th day of May, 2021, service was made of a copy of Plaintiffs' Response to Motion for Joinder by Non-Party Corey Lea by first class mail, postage prepaid, on the following:

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Dated this 25th day of May, 2021.

/s Stacy A. Stueck