**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

Civil Action No. 19-cv-00752-WJM-SKC

MATTHEW HALE, J.D.,

Plaintiff,

v.

RUDY MARQUES,
AMY KELLEY,
DEBORAH PAYNE,
JAMES WIENCEK,
SUSAN PROSE,
ANDRE MATEVOUSIAN,
JAMES FOX,
PAUL KLEIN,
CHRISTOPHER SYNSVOLL,
C. PORCO,
J. OSLAND,
M. WYCHE,
L. ROBINSON,
D. HUMPHRIES,
S. HANSEN,
FEDERAL BUREAU OF PRISONS,

Defendants.

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**RESPONSE TO MOTIONS TO INTERVENE OR OTHERWISE JOIN SUIT**
**ECF NOS. 17, 26, 28, 31, 37, 39**

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Defendants Rudy Marques, Amy Kelley, Deborah Payne, James Wiencek, Susan Prose, Andre Matevousian, James Fox, Paul Klein, Christopher Synsvoll, C. Porco, M. Wyche, L.

Robinson, and the Federal Bureau of Prisons ("BOP") (collectively, "Defendants")[1] hereby respond in opposition to the motions to intervene or otherwise join this lawsuit filed by: Gregory A. Morris (ECF No. 17), Stephanie Slater (ECF No. 26), Evelyn Hutcheson (ECF No. 28), Mark Quitta (ECF No. 31), Ranier C. deIntinis, Jr. (ECF No. 37), and John Crookston (ECF No. 39) (collectively, "Movants").[2]

**INTRODUCTION**

Movants are six of Plaintiff's correspondents outside of prison who seek to join this lawsuit to force Defendants to lift the security-based restrictions on Plaintiff's mail and other communications with the outside. Unlike Plaintiff, 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, friends, and family of Plaintiff. But the fact that they are part of Plaintiff's group (the white supremacist ideology of "Creativity," which the Tenth Circuit has concluded is not a religion, *see Hale v. Fed. Bureau of Prisons*, 759 F. App'x 741, 743-48 (10th Cir. 2019)), or may want him to have more privileges in prison, does not show that they should be allowed to intervene.

The claims on which Movants seek to intervene are personal to Plaintiff. Plaintiff's claims generally challenge restrictions related to his BOP confinement and actions he claims were taken against him, personally, to limit his communications with his followers regarding Creativity. Plaintiff's remaining claims in this lawsuit are:

[1] The Court has dismissed most of Plaintiff's claims, ECF No. 11, but Plaintiff has not filed an amended pleading. The remaining defendants are only those named as defendants on Plaintiff's remaining claims (Claims 1, 10, 11, 12, 15, 20, and 21). *See id.* at 10.

[2] Three of the motions are truly identical, and all six raise the same basic issues. To promote the "just, speedy, and inexpensive determination" of this matter, Fed. R. Civ. P. 1, Defendants are filing this single response to all six motions.

- Claim 1, in which he asserts that the defendants intercept his incoming and outgoing mail discussing Creativity, and harass him because he is not a Christian;
- Claim 10, based on defendant's alleged refusal to permit Plaintiff to mail out an article for publication;
- Claim 11, for alleged retaliation in response to his efforts to disseminate the article;
- Claim 12, in which Plaintiff asserts he was not afforded a hearing before some of his telephone privileges were temporarily suspended;
- Claim 15, in which Plaintiff alleges that some of his mail is being intercepted;
- Claim 20, for alleged retaliation in response to Plaintiff's attempt to have his mother sell some of his property; and
- Claim 21, for alleged improper delay of incoming and outgoing mail.

*See generally* ECF No. 1; *see also* ECF No. 48 (motion to dismiss) at 4-5.

Three Movants seek to intervene only on Plaintiff's Claims 1 and 10, *see* ECF Nos. 17 at 7; 19 at 3; 28 at 3, while the others submitted identical single-paragraph motions that do not specify on which claims they seek to intervene, *see* ECF Nos. 31, 37, 39. Some of the Movants also assert that whenever "the United States Constitution is at or in a state of . . . 'Peril,' any member of the General Public" has a right to intervene in any lawsuit to protect it. ECF No. 17 at 10; *see also* ECF Nos. 26 at 3; 28 at 3. Movants' own legal rights are not at stake and do not need to be represented in this case, rather, Movants seek to join this case based on Plaintiff's interest in unrestricted correspondence about Creativity. But Plaintiff can adequately represent his own interests. If the Court were to permit Movants to join this suit, then any person outside the prison system with some interest in an inmate could participate in any federal inmate's lawsuit.

In Plaintiff's earlier lawsuit, the court denied a flurry of intervention motions under virtually identical circumstances. *See Hale v. Fed. Bureau of Prisons*, No. 14-cv-00245-MSK-MJW, ECF No. 155 (Apr. 26, 2017). This Court should do the same, and deny the motions.

**ARGUMENT**

While Movants have filed their motions under three different Federal Rules of Civil Procedure, as detailed below, in reality they are all seeking intervention under Rule 24. Because Movants have not complied with the requirements for seeking intervention under Rule 24(c) by failing to include a pleading or clearly state the grounds for intervention, the Court may deny the motions on that basis alone. Moreover, Movants cannot establish their entitlement to either intervention as a matter of right, or to permissive intervention, and so the Court may deny the motions on their merits.

**A. The Court Should Construe All of the Motions as Motions to Intervene Under Fed. R. Civ. P. 24.**

Movants attempt to join this lawsuit under three different provisions: intervention under Rule 24 (Morris, ECF No. 17), joinder of a necessary party under Rule 19 (Slater and Hutcheson, ECF Nos. 26 & 28), and permissive joinder under Rule 20 (the remaining Movants, ECF Nos. 31, 37 & 39). The Court, however, should evaluate all of the motions under Rule 24.

Rule 24 "governs intervention *by nonparties* in an existing litigation." *Viesti Assocs, Inc. v. McGraw-Hill Global Educ. Holdings, LLC*, No. 12-cv-00668-WYD-DW, 2014 WL 3766185, *3 (D. Colo. July 30, 2014) (emphasis added). "A nonparty cannot on its own motion join as a party under Rule 19 or 20." *Premier Foods of Bruton, Inc. v. City of Orlando*, 192 F.R.D. 310, 312 (M.D. Fla. 2000). Rules 19 and 20 apply where "an existing party is seeking to bring in an outsider," while Rule 24 governs requests by "outsider[s] . . . seeking to enter the suit of [their]

own accord." *Id.* (quoting *Hubner v. Schoonmaker*, No. 89-3400, 1990 WL 149207, at *4 (E.D. Pa. Oct. 2, 1990)). For that reason, the Court "may treat a non-party's motion for joinder as a motion 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).

Thus, regardless of the legal basis stated in each of the motions, the Court should evaluate all of the requests under the intervention standard of Rule 24.

**B. None of the Movants Include the Required Pleading or Clearly State the Grounds for Intervention, in Violation of Rule 24(c).**

Under Rule 24(c), a prospective intervenor's pleading "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). As an initial matter, none of the Movants has filed "a pleading that sets out" the claims they wish to pursue in this lawsuit. The Court can deny the motions on that basis alone. *See Shell v. Henderson*, No. 09-cv-00309-MSK-KMT, 2010 WL 2802651 at *1 (D. Colo. July 15, 2010) ("As a threshold matter, the court notes that it would be warranted to deny [proposed intervenor's] motion based on his failure to file a pleading with his motion, pursuant to Rule 24(c), alone.").

Moreover, the motions do not "state the grounds for intervention" with particularity sufficient for the Court to evaluate Movants' requests. Three of the motions—those filed by Quitta (ECF No. 31), deIntinis (ECF No. 37), and Crookston (ECF No. 39)—consist of a single, identical paragraph that states only that they "wish to protect and vindicate [their] own First Amendment right to correspond with [Plaintiff] without the defendants interfering with, preventing, delaying, or oppressing same." ECF No. 31 at 1; *see also* ECF No. 27 at 1 (identical language); ECF No. 39 at 1 (identical language). These statements give no facts concerning each

Movants' attempts to correspond with Plaintiff, or identify even a single instance in which they have tried—successfully or not—to correspond with him. The complete lack of factual allegations would leave Defendants and the Court largely guessing as to the substance of Movants' claims.

The other three motions are lengthier, but suffer from the same basic failure to identify the grounds for intervention. The motions filed by Slater (ECF No. 26) and Hutcheson (ECF No. 28) are identical, and state only that the restrictions placed on Plaintiff by the BOP interfere with each movants' "First Amendment Freedom of Religion and the Free Exercise of it." ECF No. 26 at 3. They state that the restrictions "deny [them] the right to receive and read and express [their] thoughts regarding the Plaintiff attempting to send out said Sermon or Sermons to his church congregation." *Id.* The Morris motion (ECF No. 17) cites case law and includes a bit more detail regarding Plaintiff's claims, but its operative statement as to Mr. Morris's interest is virtually identical to the brief statements contained in the Slater and Hutcheson motions. *Compare* ECF No. 17 at 8 *with* ECF No. 26 at 3. Like the three one-paragraph motions, Slater, Hutcheson, and Morris do not plead any facts that would give rise to a right to relief in them personally.

Because the Movants have not complied with the requirements of Rule 24(c), their motions should be denied.

**C. Movants Do Not Meet the Standard for Intervention 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). Movants cannot make either showing, and intervention is not appropriate.

**1. Movants Have Not Met the Standard for 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). Timeliness is not at issue here, but Movants do not meet any of the other criteria. Mandatory intervention should be denied.

Movants do not "claim[] an interest relating to the property or transaction which is the subject of the action." Fed. R. Civ. P. 24(a)(1). 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./N.M. 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 the BOP and individual defendants have made about Plaintiff,

including how to manage an inmate who, among other things, "encouraged a neo-Nazi leader to pursue mass activism tactics, and . . . targeted a federal magistrate judge." *Hale*, 759 F. App'x at 744. The "subject of this action" is thus alleged violations of Plaintiff's constitutional 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.

Moreover, to the extent Movants claim their interest in this action stems from their right to correspond or associate with Plaintiff, those claims do not merit intervention. Movants have not alleged that they are prohibited from writing to Plaintiff, from speaking with him on the telephone, or from visiting him in prison, if they want. The BOP does not control what Movants do, but it must control what Plaintiff 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.

Next, Movants have not shown that their interests will be impaired if they are not permitted to intervene. 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 Plaintiff's. They should not be permitted to intervene in this case where the question of their First Amendment rights is not even at issue.

Finally, Movants' interests will be adequately protected by Plaintiff's prosecution of this litigation. Movants are fellow travelers of Plaintiff, and wish to correspond with him regarding his ideology of Creativity. Their interests and his are perfectly aligned, in that they seek precisely the same end—the removal of any Creativity-based restrictions on Plaintiff's correspondence. None of the Movants has shown why Plaintiff cannot adequately represent their interests in this case. *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 . . .").[3]

In sum, Movants have not made the required showing to support intervention as a matter of right.

**2. Movants Have Not Met the Standard for 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

[3] Morris claims that Plaintiff cannot adequately represent him because Plaintiff "is a federal prisoner and as such, unfortunately does not have the same constitutional protections as the Intervenor does." ECF No. 17 at 12. This is a distinction without a difference however, because the resolution of Plaintiff's claims will turn on whether the BOP has a legitimate penological interest in the restrictions it has placed *on Plaintiff*, not on Morris. Morris does not explain how his First Amendment rights as a non-incarcerated person could possibly trump the BOP's legitimate penological interests in regulating the conduct of Plaintiff who—by Morris's own admission—*is* incarcerated and whose rights are thus legitimately constrained. *See, e.g., Shaw v. Murphy*, 532 U.S. 223, 229 (2001) (constitutional rights of prisoners "are more limited in scope than the constitutional rights held by individuals in society at large").

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. 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 Plaintiff'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). Movants' legal rights are not at stake and do not need to be represented in this case, and insofar as Movants share Plaintiff's interest in unrestricted correspondence about Creativity, Plaintiff can "adequately represent" the Movants' interest. *See N. Colo. Water Conservancy*, 251 F.R.D. at 599. And, should any of Movants ever find themselves in a position in which the BOP were curtailing their constitutional rights, they could sue the BOP in their own lawsuits. Not permitting 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.

**CONCLUSION**

For the foregoing reasons, the motions should be denied.

Dated August 30, 2019

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 30, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

Clay Cook, BOP

and I hereby certify that I will mail to the following non-CM/ECF participants in the manner (mail, hand delivery, etc.) indicated by the nonparticipant's name:

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