IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

DAVID P. WILSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:24-cv-00111
	)	
JOHN Q. HAMM,	)	
Commissioner of the Alabama	)	
Department of Corrections,	)	
	)	
Defendant.	)	

DEFENDANT'S REPLY TO
THE MOTION TO INTERVENE

COMES NOW Defendant John Q. Hamm and, according to this Court's May 19, 2025, order (Doc. 45), replies to Jon Yorke's Motion to Intervene (Doc. 44) under Rule 24 of the Federal Rules of Civil Procedure as follows:

PROCEDURAL HISTORY

Currently before this Court is Wilson's amended complaint (Doc. 35), Defendant's motion to dismiss the amended complaint (Doc. 38), and Wilson's response to the motion to dismiss (Doc. 46). Defendant's reply is currently due June 3, 2025. (Doc. 50.)

In the interim, Jon Yorke ("Proposed Intervenor"), through counsel, filed a

motion to intervene.[1] (Doc. 44.) This Court ordered the parties to file a response, instructing, "To the extent the parties are able to file a joint response, they are encouraged to do so." (Doc. 45.) The parties conferred via telephone on May 28, but they have opposing positions regarding the motion. As a result, Defendant files the instant response and objection to Proposed Intervenor's motion.

LEGAL STANDARD

Under Rule 24, there are "two avenues for a nonparty to intervene in a lawsuit: intervention as of right and intervention with permission of the court." *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1246 (11th Cir. 2006). Rule 24(a)(2) provides that a nonparty may intervene as of right when he timely "claims

1. Proposed Intervenor's motion contains inaccurate or incomplete facts. For example, the motion asserts that police "entered [the home of Wilson's mother] at 3:00 a.m. without a warrant, and arrested" Wilson. (Doc. 44 at 3 (citing *Wilson v. State*, 142 So. 3d 732, 765 (Ala. Crim. App. 2010).) The state court found, however, that after accomplices implicated Wilson, police knocked on the door of Wilson's mother's home around 3:50 a.m. *Wilson*, 142 So. 3d at 765; s*ee also* Doc. 59-8 at 118-20. Police remained outside the residence while Wilson's mother woke him. *Wilson*, 142 So. 3d at 765. Once Wilson came to the door, police advised him that they wanted to talk to him about "an incident," and he was advised that he was not under arrest. *Id.* Wilson agreed to go to the police station for questioning. *Id.* Further, the state court found that even if Wilson did not consent, police had probable cause to arrest him. *Id.* at 767. Given the inaccurate or incomplete facts contained within Proposed Intervenor's motion are not material to the instant issue, Defendant is not addressing them in the instant response. Defendant, however, denies the factual allegations contained within Proposed Intervenor's motion (Doc. 44) and does not waive any future response or defenses to the factual allegations by solely addressing the right to intervene here.

an interest relating to the property or transaction that is 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." *See also Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989) ("A party seeking to intervene as of right under Rule 24(a)(2) must show that: (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."). This means that "intervention must be supported by a "direct, substantial, legally protectible interest in the proceeding." *Id.* (citation omitted). The Eleventh Circuit has held that "a legally protectable interest is an interest that derives from a legal right." *Mt. Hawley Ins. Co. v. Sandy Lake Props., Inc.*, 425 F.3d 1308, 1311 (11th Cir. 2005). This "alleged interest cannot be speculative." *Macon Cnty. Invs., Inc. v. Warren*, 3:06-cv-00224, 2006 WL 2927470, at *3 (M.D. Ala. Oct. 12, 2006) (citing *Laube v. Campbell*, 215 F.R.D. 655, 657 (M.D. Ala. 2003) ("Interests that are contingent upon some future events and which are purely a matter of speculation are not the kind of protectable interest necessary to support intervention as of right.")); *see also ManaSota-88, Inc. v. Tidwell*, 896 F.2d 1318, 1322 (11th Cir. 1990) (finding that interest was "purely a matter of speculation at this time" and

"d[id] not impart…the kind of legally protectable interest…necessary to support intervention as of right"). Thus, to have a legally protectable interest, "the intervenor must be at least a real party in interest in the transaction which is the subject of the proceeding." *Athens Lumber Co. v. Fed. Election Comm'n*, 690 F.2d 1364, 1366 (11th Cir. 1982) (finding that "[t]he sole basis of its interest is general concern for the disproportionate corporate expenditures which may result if the FECA restrictions are lifted. IAM's alleged interest is shared with all unions and all citizens concerned about the ramifications of direct corporate expenditures").

When "a nonparty lacks the right to intervene, Rule 24(b) allows the court to grant it permission to do so 'when a statute of the United States confers a conditional right to intervene,' or 'when [the] applicant's claim or defense and the main action have a question of law or fact in common.'" *Bayshore*, 471 F.3d at 1246 (quoting FED. R. CIV. P. 24(b)). This Court has discretion to grant permissive intervention when the requirements of Rule 24(b) are met, *see id.*, and when "the intervention will not unduly prejudice or delay the adjudication of the rights of the original parties[,]" *Mt. Hawley*, 425 F.3d at 1312. But even if the requirements of Rule 24(b) are otherwise satisfied, "the court may refuse to allow intervention." *Worlds v. Dep't of Health & Rehabilitative Servs.*, 929 F.2d 591, 595 (11th Cir. 1991).

ARGUMENT

Proposed Intervenor is a university professor who seeks to intervene to

advance his personal anti–death penalty stance, particularly concerning nitrogen hypoxia. This is not an appropriate or proper use of Rule 24, and the motion should be denied. Although the motion sets out the extensive anti–death penalty advocacy and research performed by Proposed Intervenor, it fails to articulate any protectable legal interest that supports intervention as a right under Rule 24(a). The assertion that "[h]is professional and institutional obligations would be severely impaired by a ruling from this Court allowing" Wilson's execution by nitrogen hypoxia does not qualify as a direct, substantial, and legally protectible interest. Instead, Proposed Intervenor asserts only a general ideological interest in prohibiting the death penalty, with a focus here on nitrogen hypoxia. This is insufficient for intervention.

Even if Proposed Intervenor had identified an adequate interest, this lawsuit does not interfere with or prevent Proposed Intervenor's anti–death penalty advocacy efforts. Indeed, this is evident by the fact that five prior nitrogen hypoxia executions[2] (Kenneth Eugene Smith, Alan Miller, Carey Dale Grayson, Demetrius

2. Citing Wilson's complaint, Proposed Intervenor alleges that Wilson's execution "involves an untested protocol" that "may be…prohibited at a cruel, inhumane, or degrading punishment." (Doc. 44 at 21.) Yet, as of this filing, Alabama has successfully and without incident judicially executed four inmates using the August 2023 protocol for nitrogen hypoxia. Likewise, Louisiana successfully and without incident judicially executed an inmate using a similar protocol in March 2025. *See* Erik Ortiz & Abigail Brooks, *Louisiana Executes Man with Nitrogen Gas After 15-Year Pause*, NBC NEWS (Mar. 18, 2025, 8:46 PM), www.nbcnews.com/news/us-news/louisiana-execute-jessie-hoffman-using-nitrogen-gas-rcna196619.

Frazier, and Jessie Hoffman) have taken place within the United States without any alleged effect on Proposed Intervenor's professional and institutional obligations.

The Court should also deny permissive intervention under Rule 24(b). Proposed Intervenor's avowed purpose is to prevent judicial executions, particularly those utilizing nitrogen hypoxia, and to "obtain further information about the use of nitrogen gas asphyxiation" to further his anti-death penalty work. (Doc. 44 at 26.) Allowing intervention here would likely cause prejudice to Defendant; thus, permissive intervention should be denied.

I. Intervention as of Right Under Rule 24(a)

Proposed Intervenor has not met the requirements to intervene as a matter of right under Rule 24(a)(2), as he has not identified a legally protectable interest, shown that such interest will be impaired by this lawsuit, or shown that his interest will not be adequately represented.

A. Proposed Intervenor has not identified a legally protectable interest.

Proposed Intervenor describes himself as a professor and an international anti–death penalty advocate. (Doc. 44 at 9-15.) He claims to engage in policy and litigation worldwide, particularly advocating against the use of nitrogen in judicial executions. (*Id.* at 11.) In support of his request to intervene, Proposed Intervenor asserts that he has a generalized interest in preventing nitrogen hypoxia judicial executions worldwide based on his beliefs that the method is torturous and that it

may violate international law. (*Id.* at 19, 21, 27.) He argues that refusal by this Court to allow intervention would "undermine" his work and "frustrate his ability to carry out his profession." (*Id.* at 19.) Yet, despite his assertion otherwise, Proposed Intervenor has not asserted a "direct, substantial, legally protectible interest" that justifies his intervention as of right. *Chiles*, 865 F.2d. at 1213.

Although the rule governing interventions as of right allows the interest requirement to be "flexible," *id.* (citation omitted), it must "be one which the *substantive* law recognizes as belonging to or being owned by the applicant," *Mt. Hawley*, 425 F.3d at 1311 (citation omitted). The claimed interest must "derive[] from a legal right," *id.*, such that the applicant is "at least a real party in interest in…the subject of the proceeding." *Athens Lumber Co.*, 690 F.2d at 1366. Proposed Intervenor speculates that an adverse ruling in Wilson's lawsuit will "severely" affect his ability to continue his work (*see* Doc. 44 at 19), which is an economic interest held solely by the Proposed Intervenor, *see Mt. Hawley*, 425 F.3d at 1311 (explaining that a legally protected interest must be more than an economic interest).

Even assuming arguendo that Proposed Intervenor's stated interest goes beyond economic, he has still failed to show a direct, substantial, and legally protected interest. At most, Proposed Intervenor identifies a future interest to continue his advocacy (internationally and within the United States) against the death penalty by nitrogen hypoxia. A "general ideological interest in the lawsuit" is

insufficient to justify intervention. *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 782 (6th Cir. 2007) ("Where…an organization has only a general ideological interest in the lawsuit—like seeing that the government zealously enforces some piece of legislation that the organization supports—and the lawsuit does not involve the regulation of the organization's conduct, without more, such an organization's interest in the lawsuit cannot be deemed substantial."). There are many anti–death penalty advocates and entities around the world that share Proposed Intervenor's goal of abolishing the death penalty; thus, his "generalized grievance" does not support intervention as of right. *ManaSota-88*, 896 F.2d at 1322; *Chiles*, 865 F.2d at 1212 (noting that an "intervenor's interest must be a particularized interest rather than a general grievance"); *Athens Lumber Co.*, 690 F.2d at 1366 ("The sole basis of its interest is general concern for the disproportionate corporate expenditures which may result if the FECA restrictions are lifted. IAM's alleged interest is shared with all unions and all citizens concerned about the ramifications of direct corporate expenditures. Because this interest is so generalized it will not support a claim for intervention of right."); *United States v. State of Alabama*, 2:06-cv-00392, 2006 WL 2290726, at *4 (M.D. Ala. Aug. 8, 2006) ("Because the alleged interest could be claimed by any voter, the interest is only of a general—not a direct and substantial—concern."). Proposed Intervenor only asserts a generalized interest in prohibiting judicial executions that is insufficient to establish an interest for

purposes of Rule 24(a)(2).

The advocacy efforts of Proposed Intervenor do not change this determination. (*See* Doc. 44 at 9-15.) As the Seventh Circuit has held, even an organization that has directly lobbied in support of a law that is being challenged does not thereby gain a sufficient interest to intervene to defend that law. *Keith v. Daley*, 764 F.2d 1265, 1270 (7th Cir. 1985) (lobbying organization's "communicative and persuasive" efforts did not justify intervention); *see also Resort Timeshare Resales, Inc. v. Stuart*, 764 F. Supp. 1495, 1499 (S.D. Fla. 1991) (adopting the reasoning of *Keith* and holding that a lobbying interest is insufficient to justify intervention in a constitutional challenge to a state statute). In this case, Proposed Intervenor did not lobby in favor of judicial executions by nitrogen hypoxia but instead advocates to governmental entities that this mode of execution is potentially torturous. Like *Keith*, though such efforts indicate Proposed Intervenor's genuine interest in the outcome of this case, it does not entitle him to intervene as of right.

B. Proposed Intervenor's interests will not be impaired by this lawsuit.

Even if, arguendo, Proposed Intervenor's asserted interests were direct, substantial, and legally protectable, such interests would not be impaired by this lawsuit. *Chiles*, 865 F.2d at 1213. He argues that the potential *stare decisis* effect warrants intervention because "[a] negative ruling by this Court will practically

impair [his] ability to successfully advocate on behalf of individuals facing the death penalty…as it would allow for inconsistent State compliance with international legal obligations." (Doc. 44 at 28.) But "a potential *stare decisis* effect does not automatically supply the practical disadvantage warranting intervention." *ManaSota-88*, 896 F.2d at 1323. ("Resolution of ManaSota-88's litigation in its favor will not produce any immediate effect on FCG and will not impede its ability later to be heard if specific rules are developed directly affecting FCG's interests."). Indeed, this Court's disposition of Wilson's § 1983 claims has no bearing on Proposed Intervenor's ability to further assert his interests. *Cf. In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 199 (2d Cir. 2000) ("The[] potential obstacles to the pursuit of an independent lawsuit do not 'impair or impede the applicant's ability to protect [its] interest.'"). This is evident by the fact that, despite five prior § 1983 lawsuits[3] challenging this method or its protocol, Proposed Intervenor's anti–death penalty advocacy has continued.

Indeed, although Proposed Intervenor notes he critiqued the executions of Smith and Miller by nitrogen hypoxia on international law grounds (Doc. 44 at 2, 11, 28), he does not allege that his ability to advocate against the death penalty was

3. Although Proposed Intervenor claims he has "not been able to assert his rights in a separate action" (Doc. 44 at 30), he does not explain why he has failed "assert his rights" in any of the previous litigation surrounding execution by nitrogen hypoxia.

negatively impacted after those executions. To the contrary, it seems that the judicial execution of capital murderers in Alabama has enabled and sustained, not hindered, his professional work. He even received an award, in part, for his "campaign[]…against Alabama's use of nitrogen gas inhalation to execute Kenneth Eugene Smith."[4]

Proposed Intervenor also does not allege that a negative disposition of Wilson's claims would prevent him from continuing his anti–death penalty advocacy. Instead, he argues that a negative ruling by this Court would "undermine" his "ability to advance similar legal arguments." (Doc. 44 at 29.) But he does not explain how and why. And even if this Court rules against Wilson, the decision will not have the global impact suggested here. At most, outside of the Middle District of Alabama, it would have some persuasive effect on subsequent lawsuits filed by death-row inmates within the United States. *Cf. Fox v. Tyson Foods, Inc.*, 519 F.3d 1298, 1304 (11th Cir. 2008) ("Although these aspects of the Fox litigation could result in some persuasive *stare decisis* effect, the effect would be, at most, minimal."). The assertion that any ruling would be persuasive to entities outside the United States is speculative and undeveloped. As a result, any potential *stare decisis*

4. *Law Professor Recognized for Lifetime Achievement in Death Penalty Work*, BIRMINGHAM CITY UNIV. (Nov. 14, 2024), https://www.bcu.ac.uk/news-events/news/law-professor-recognised-for-lifetime-achievement-in-death-penalty-work.

effect of this Court's decision does not meet the impairment requirement of Rule 24(a)(2), and intervention as of right should be denied.

C. Proposed Intervenor's interests are adequately represented.

Proposed Intervenor's "professional interest" in "upholding the international prohibition against forms of the death penalty that constitute torture" (Doc. 44 at 32) is adequately represented here. *See* FED. R. CIV. P. 24(a) (an intervenor may not intervene as of right when "existing parties adequately represent [his] interest"); *Athens Lumber*, 690 F.2d at 1366. He does not assert that Wilson failed to raise a claim, make an appropriate argument, or cite applicable legal authority, or allege that Wilson is incapable of or unwilling to make the appropriate arguments that adequately represent Proposed Intervenor's interests. Indeed, he acknowledges that Wilson seeks "declaratory relief by asserting that his execution would amount to torture and cruel and unusual punishment under international standards[.]" (Doc. 44 at 33.)

Proposed Intervenor instead speculates that Wilson's representation is inadequate because Wilson "may ultimately…abandon or deprioritize" this argument (*id.*), but he offers no "argumentation or evidence" that Wilson intends to abandon or deprioritize his claims. *United States v. US Stem Cell Clinic*, 0:18-cv-61047, 2019 WL 3890843, at *2 (S.D. Fla. July 12, 2019) ("Intervenor neither explains how his interests in the SVF product and/or the terms of the injunction

diverge in any way from Defendants' nor has he provided argumentation or evidence that Defendants do not intend to appeal this Court's order, as Intervenor apparently desires."); *see also Athens Lumber*, 690 F.2d at 1366 ("But even if IAM were able to allege a sufficient interest in the proceedings, its claim for intervention of right also must fail because its interest is adequately represented by the FEC. The goal of the union is to uphold the constitutionality of section 441b(a) of the FECA. This is precisely the interest which has been vigorously presented by the FEC throughout these proceedings. Because both the union and the FEC have the same objective, we presume that the union's interest is adequately represented."); *Commodity Futures Trading Comm'n v. Patel*, 9:22-cv-80092, 2022 WL 1507061, at *2 (S.D. Fla. Mar. 17, 2022) (finding that proposed intervenor's interests were adequately represented by Plaintiff when proposed intervenor "has not suggested that there is any collusion, that Plaintiff holds an opposing interest, or that Plaintiff has failed to fulfill any of its duties").

Given Proposed Intervenor and Wilson have the same objective in this case at this time, Proposed Intervenor's right is adequately represented. *Chiles*, 865 F.2d at 1215 ("The duplicative nature of the claims and interests they asserted threatens to unduly delay the adjudication of the rights of the parties in the lawsuit and makes it unlikely that any new light will be shed on the issues to be adjudicated."); *Athens Lumber*, 690 F.2d at 1366.

II. Permissive Intervention Under Rule 24(b)

Alternatively, Proposed Intervenor seeks permissive intervention. He asserts that he "seeks to challenge Alabama's use of nitrogen…arguing that it violates international law standards" and that his intervention "will not cause undue delay or prejudice the original parties' rights." (Doc. 44 at 36-37.) This Court should deny his request.

Permissive intervention is permissible when an applicant's claim or defense and the main action have a common question of law or fact. FED. R. CIV. P. 24(b)(1)(B); *Chiles*, 865 F.2d at 1213. Proposed Intervenor's "professional interest" (Doc. 44 at 33) in Wilson's method of execution is not an adequate basis for intervention. His pure international law "claim" is not grounded in the Eighth Amendment and implicates vastly different facts. *Cf. In re HealthSouth Corp. Ins. Litig.*, 219 F.R.D. 688, 694 (N.D. Ala. 2004) ("These state law issues are unrelated to the federal claims that movants are pressing in the ERISA litigation.").

Further, even if the two elements for permissive intervention are met, this Court should deny the request. The Eleventh Circuit has recognized that "the introduction of additional parties inevitably delays proceedings." *Athens Lumber*, 690 F.2d at 1367. Although permissive intervention may be appropriate in some cases, here, the danger of potential delay and prejudice is acute. *See* FED. R. CIV. P. 24(b)(3) (this Court "must consider whether the intervention will unduly delay or

prejudice the adjudication of the original parties' rights"). Proposed Intervenor's expressed purpose is to "obtain further information about the use of nitrogen gas asphyxiation" to further his global anti–death penalty work. (Doc. 44 at 26.) As Chief Justice Roberts has noted, "Intervenors do not come alone—they bring along more issues to decide" and "more discovery requests." *South Carolina v. North Carolina*, 558 U.S. 256, 288 (2010) (Robert, J., concurring and dissenting). This intervention will not only create, as a practical matter, issues regarding the scope of discovery but also further complicate the logistics of maintaining the confidentiality of any protected discovery, which has been a problem with litigation over the nitrogen hypoxia protocol in the past year. *Burke v. Ocwen Fin. Corp.*, 833 F. App'x 288, 294 (11th Cir. 2020) ("Given the inevitability of expanded discovery, and the possibility that the existing parties would be forced to litigate new issues, the district court did not make a clear error of judgment in determining that the existing parties would suffer prejudice and undue delay had the Burkes intervened."). Moreover, because there is nothing special about Proposed Intervenor's interest in this suit, allowing intervention by an anti–death penalty advocate under these circumstances would license and perhaps encourage intervention by any anti–death penalty advocate in any method-of-execution or other challenge to a judicial execution.

CONCLUSION

For the above reasons, Defendant objects to the motion to intervene and respectfully requests that this Honorable Court deny the motion.

Respectfully submitted,

STEVE MARSHALL
Alabama Attorney General
BY—

s/ Audrey Jordan
Audrey Jordan
Assistant Alabama Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will provide notification of such filing to the following CM/ECF participants: **Bernard E. Harcourt**, **Gulika Reddy**, and **LaJuana S. Davis**.

s/Audrey Jordan
Audrey Jordan
Assistant Attorney General

ADDRESS OF COUNSEL:

Office of the Attorney General
Capital Litigation Division
501 Washington Avenue
Montgomery, Alabama 36130
Telephone: (334) 242-7300
Facsimile: (334) 353-8400
Email: Audrey.Jordan@AlabamaAG.gov