IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al*,	)	
	)	
Plaintiffs,	)	**Civil Action No. 20-cv-1689 (GHW)**
	)	
vs.	)	
	)	
EUGENE SCALIA, *et al*,	)	
	)	
Defendants.	)	

REPLY MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

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TABLE OF CONTENTS

I. ARGUMENT 1

A. **The States Have Failed To Refute The Proposed Intervenors' Entitlement to Intervene as a Matter of Right** 1

1. *The Proposed Intervenors' Motion to Intervene Remains Timely* 2

2. *The Proposed Intervenors Have Shown Why the Department May Not Adequately Represent the Interests of the Proposed Intervenors* 3

B. **Alternatively, this Court Should Permit the Proposed Intervenors to Intervene under Rule 24(b)(1)** 7

II. CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

Cases

Ass'n of Conn. Lobbyists LLC v. Garfield,
241 F.R.D. 100 (D. Conn. 2007).....7

Battle v. City of N.Y.,
No. 11-cv-3599, 2012 WL 112242 (S.D.N.Y. Jan. 12, 2012).....8

Butler, Fitzgerald & Potter v. Sequa Corp.,
250 F.3d 171 (2d Cir. 2001).....3, 4, 5

Clean Water Action v. Pruitt,
315 F. Supp. 3d 72, No. 1:17-cv-00817-DLF, ECF No. 33 (D.D.C. 2018).....2

First Data Merch. Servs. LLC v. MM Dev. Co.,
2020 U.S. Dist. LEXIS 80230 (S.D.N.Y. May 6, 2020).....3

Floyd v. City of New York,
770 F.3d 1051 (2d Cir. 2014).....7

Nat'l Resources Def. Council v. Nat'l Highway Traffic Safety Admin.,
894 F.3d 95 (2d Cir. 2018).....3

Nevada v. U.S. Dep't of Labor,
No. 4:16-cv-731, 2017 WL 3780085 (E.D. Tex. Aug. 31, 2017).....6

New York Public Interest Research Group, Inc. v. Regents of University of State of New York ("NYPIRG"),
516 F.2d 350 (2d Cir. 1975).....1, 3, 4, 5

New York v. Azar,
2019 U.S. Dist. LEXIS 129498 (S.D.N.Y. Aug. 2, 2019).....7

North River Ins. Co. v. O&G Indus.,
315 F.R.D. 1 (D. Conn. 2016).....3

Pennsylvania v. President of the United States,
888 F.3d 52, 61 (3d Cir. 2018).....5

Sierra Club v. Glickman,
82 F.3d 106 (5th Cir. 1996).....5

United States ex rel. Rubar v. Hayner Hoyt Corp.,
306 F. Supp. 478 (N.D.N.Y. 2018).....3

United States v. City of NY,
198 F.3d 360 (2d Cir. 1999).....4

W. Energy Alliance v. Zinke,
877 F.3d 1157 (10th Cir. 2017) 5

Waterkeeper Alliance, Inc. v. Wheeler,
330 F.R.D. 1 (D.D.C. 2018).....5

W*ildearth Guardians v. U.S. Forest Service*,
573 F.3d 992 (10th Cir. 2009) 5

Windsor v. United States,
797 F. Supp. 2d 320 (S.D.N.Y. 2011).....1, 2

Other Authorities

85 Fed. Reg. 2820 6

F.R.App.P. 15.....3

F.R.Civ.P. 24(a) 1, 2, 4

F.R.Civ.P. 24(b) 7, 8

Wright & Miller, Federal Practice and Procedure § 1909 (3d ed. 2007 & sup. 2019).....4, 5

I. ARGUMENT

A. The States Have Failed To Refute The Proposed Intervenors' Entitlement to Intervene as a Matter of Right.

As explained in the Proposed Intervenors' opening memorandum, F.R.Civ.P. 24(a)'s four-part test requires a court to permit an applicant to intervene where: (1) the applicant's motion is timely; (2) the applicant has an interest in the property or transaction at issue in the lawsuit; (3) without intervention, the applicant's ability to protect its interests would be impaired; and (4) the other parties in the lawsuit do not adequately represent the applicant's interests. Int. Mem. at 5-6, citing *Brennan v. N.Y. City Bd. of Educ.*, 260 F.3d 123, 128-29 (2d Cir. 2001) (reversing and remanding district court's failure to grant intervention); *Windsor v. United States*, 797 F. Supp. 2d 320, 323 (S.D.N.Y. 2011) (granting intervention); *see also New York Public Interest Research Group, Inc. v. Regents of University of State of New York ("NYPIRG")*, 516 F.2d 350, 352 (2d Cir. 1975) (granting intervention to trade associations who showed government's broader interests differed from the more focused concerns of business groups).

The States' opposition does not contest two of the four criteria for intervention, *i.e.*, that the Proposed Intervenors have an interest in the transaction at issue in the suit, and that without intervention the Proposed Intervenors' interests would be impaired. Opp. at 3. The States challenge only the timeliness of the intervention and the inadequacy of the Defendant's representation of the Intervenors' interests; but on each of these points the States fail to address or distinguish any of the cases cited by the Proposed Intervenors in support of the motion to intervene.

As further discussed below, the inapposite cases relied on in the States' opposition fail to refute the grounds for intervention by the Proposed Intervenors, and the motion to intervene should therefore be granted. The Proposed Intervenors stand by the uncontested case authority relied on in their motion, pursuant to which the Court should grant intervention as a matter of right.

1. *The Proposed Intervenors' Motion to Intervene Remains Timely*

As explained in the Proposed Intervenors' opening memorandum, numerous courts in this Circuit have found motions to intervene timely even when the motions were filed much later in proceedings than the Proposed Intervenors' motion here. *See, e.g., Windsor v. United States*, 797 F. Supp. 2d 320, 324 (S.D.N.Y. 2011) (finding a motion to intervene timely when it was filed 160 days after the complaint was filed); *Dow Jones & Co.*, *United States Dep't of Justice*, 161 F.R.D. 247, 252 (S.D.N.Y. 1995) (finding a motion to intervene timely even though the applicant did not file its motion until eighteen days after the court issued summary judgment and noting that post-judgment intervention may be timely).

Here, the Proposed Intervenors filed their motion within a week after the Court resolved the Article III standing issues, as to which the Proposed Intervenors took no position. The States do not identify any prejudice they will suffer from this Court's granting intervention now, and the Proposed Intervenors have not sought any delay in the summary judgment briefing schedule. *See also Clean Water Action v. Pruitt*, 315 F. Supp. 3d 72, No. 1:17-cv-00817-DLF, ECF No. 33 (D.D.C. 2018) (granting an applicant's motion to intervene where the court had not yet ruled on any substantive matters in the lawsuit, noting that "intervention will not unduly delay or prejudice the adjudication of the original parties' rights"). The Motion to Intervene is therefore timely under Rule 24(a).

In their opposition, the States cite *no* case authority for their contention that the Proposed Intervenors' motion is untimely. Instead, the States assert without support that the motion to intervene has "burdened" the States by requiring a response to the motion to intervene shortly before the due date of their motion for summary judgment. (Opp. at 7). Any such burden claimed by the States was an inevitable result of their choosing to oppose the motion to intervene. The

States did not seek an extension of time to file their summary judgment motion, and they have identified no impediment to the proceedings *going forward* that would result from granting the motion to intervene. In sum, the States' claim of untimeliness is baseless and offers no ground for denying the motion to intervene.

2. *The Proposed Intervenors Have Shown Why The Department May Not Adequately Represent the Interests of the Proposed Intervenors.*

The States also fail to refute the Proposed Intervenors' showing that the Department may not adequately represent the Intervenors' interests. The Proposed Intervenors' opening memorandum conclusively demonstrated inadequate representation, in accordance with the Second Circuit's grant of intervention by the pharmacists association in *NYPIRG*, 516 F.2d at 352 (discussed at length in Int. Mem. at 15). The States' opposition fails to address or distinguish *NYPIRG*, which is directly on point and controls the outcome here.[1] *See also Nat'l Resources Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95 (2d Cir. 2018) (granting trade associations' motions to intervene pursuant to the identical criteria for intervention under F.R.App.P. 15, despite the presence of a federal defendant).

None of the cases the States do cite supports their claim that the Department of Labor will adequately represent the Intervenors' interests here.

The States' opposition primarily relies on the Second Circuit's opinion in *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179 (2d Cir. 2001), but that case is inapposite. It did not involve a government defendant and did not address a claim remotely similar to the one

[1] The States make no claim that *NYPIRG* is no longer good law, and the case was recently cited by this Court in *First Data Merch. Servs. LLC v. MM Dev. Co.*, 2020 U.S. Dist. LEXIS 80230, *7 (S.D.N.Y. May 6, 2020) (granting intervention); *see also United States ex rel. Rubar v. Hayner Hoyt Corp.*, 306 F. Supp. 478, 491 (N.D.N.Y. 2018) (granting intervenors' motion to intervene and citing to *NYPIRG*); *North River Ins. Co. v. O&G Indus.*, 315 F.R.D. 1, 5 (D. Conn. 2016) (same).

the Proposed Intervenors are asserting. In *Butler*, a law firm sought to intervene in a suit involving its former client in order to recover attorney's fees. The court denied intervention because the law firm's interest was "unrelated to the underlying cause of action." *Id*. The court also was troubled by "the public policy repercussions" of allowing intervention by "discharged counsel." *Id*. at 178. And while the States quote *Butler* for the proposition that the standard for showing inadequate representation is higher when a proposed intervenor and party have the same objective, the Second Circuit did not need to decide in that case "what constitutes the necessary showing" because, under any standard, the proposed intervenor's unsubstantiated allegations of the defendant's insufficient financial resources fell short. *See id*. at 180. *Butler* is distinguishable from the present case at every turn and offers no support for the States' opposition.[2]

Lacking any Second Circuit authority in support of its argument, the States' opposition turns to a treatise stating that "representation will be presumed adequate" when the interest of the intervenor is "identical" with an existing party, including a governmental party, unless "special circumstances" are shown. Wright & Miller, Federal Practice and Procedure § 1909 & nn. 24-27 (3d ed. 2007 & sup. 2019). The States neglect to mention that the treatise clarifies this point three sentences later by stating that intervention need not necessarily be denied "if the interests of the [intervenor] and one of the parties are identical….It means only that there must be a concrete showing of circumstances in the particular case that make the representation inadequate." *Id*. The treatise then cites to numerous cases, including those cited in the Proposed Intervenors' memorandum, in which many courts have granted motions to intervene in support of

[2] Notably, the *Butler* court did not cite, and certainly did not overrule, the Second Circuit's much more relevant holding in *NYPIRG*, discussed above and in the Intervenors' motion. Equally inapposite is the States' citation to *United States v. City of New York*, 198 F.3d 360, 367 (2d Cir. 1999), in which the intervenor applicants did not satisfy *any* of the prongs of Rule 24(a).

governmental parties.

Indeed, the treatise specifically references numerous cases granting intervention because the government has "multiple objectives" and must represent the broader "public interest," thereby rendering inadequate the government's representation of intervenors' narrower concerns. *Id*., citing *Pennsylvania v. President of the United States*, 888 F.3d 52, 61 (3d Cir. 2018) (granting intervention where the government must defend "numerous complex and conflicting interests" in contrast to the narrower interest of the intervenor); *W. Energy Alliance v. Zinke*, 877 F.3d 1157, 1168 (10th Cir. 2017) ("Also, we have held that the government cannot adequately represent the interests of a private intervenor *and* the interests of the public."); W*ildearth Guardians v. U.S. Forest Service*, 573 F.3d 992, 996 (10th Cir. 2009) (finding U.S. Forest Service did not adequately represent coal mine owner because the Forest Service had "multiple objectives"); *Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996) (finding that USDA did not adequately represent Farm Bureau because the USDA had to represent the public interest and not just the economic interests of a particular industry); *Waterkeeper Alliance, Inc. v. Wheeler*, 330 F.R.D. 1, 8-9 (D.D.C. 2018) (finding that the EPA did not adequately represent the interests of the association of utility companies where the association focused on the financial interests of their members, in contrast to the EPA, which had broader policy concerns). *See also* additional cases cited without opposition in Int. Mem. at 16-17).

As the Proposed Intervenors have previously explained, the present motion falls squarely within the well-established doctrine recognized by the Second Circuit in *NYPIRG* and in the cases (and treatise) cited above. The States cannot deny that the Department of Labor is required to consider the interests of multiple stakeholders in defending its Joint Employer Rule, while the private businesses represented by the Proposed Intervenors represent a smaller and more focused

group of interested parties. Thus, the Department's interests are not "identical" with the Proposed Intervenors, as was made clear in the rulemaking by the Department itself. *See, e.g.*, 85 Fed. Reg. 2820 ("[T]he Department[] is updating and revising the Department's interpretation of joint employer status...to promote certainty for *employers and employees*"); and *see* additional citations to the Joint Employer Rule in the Proposed Intervenors' opening memorandum, at 18.

Finally, the States mischaracterize the nature of the interest the Proposed Intervenors' seek to protect. As discussed in the Proposed Intervenors' memorandum, this case presents the "special circumstance" of a Complaint filled with unwarranted, direct attacks on the business methods of the industries represented by the Proposed Intervenors, including franchising, construction, janitorial services, warehousing, logistics, and hospitality, as well as retail, healthcare, and manufacturing industries. The Proposed Intervenors are entitled to intervene in order to defend the business community against the States' false and misleading charges, all of which purport to relate to the merits of the Joint Employer Rule. In doing so, the Proposed Intervenors will bring to bear expertise regarding the different industries' business methods, that is deeper than the current parties possess.

It is thus incorrect for the States to contend that the Proposed Intervenors' sole interest is to uphold the rule (Opp. at 5);[3] the Intervenors'additional interest in defending their legitimate and

[3] The States' opposition stretches to find an inconsistency between the Proposed Intervenors' motion and a position that some of the associations took in opposing intervention by a labor union in a different case filed by state governments against the Department of Labor. *Nevada v. U.S. Dep't of Labor*, No. 4:16-cv-731, 2017 WL 3780085, at *1 (E.D. Tex. Aug. 31, 2017). The States ignore the significant distinctions between the two cases, including that the union in the Nevada case relied on an incorrect claim that the Secretary of Labor would not defend its rule (not the Proposed Intervenors' contention here). In addition, the union's interests were only tangentially affected by the *Nevada* complaint, whereas in the present case, the States' complaint directly targets the business methods of the Proposed Intervenors' members as one of the primary justifications for setting aside the Joint Employer Rule.

longstanding business methods is one which can only be properly achieved through intervention.[4]

B. Alternatively, this Court Should Permit the Proposed Intervenors to Intervene under Rule 24(b)(1).

In opposing the Proposed Intervenors' alternative request for permissive intervention, the States' opposition again fails to address the closest case authority on point in this Circuit, cited by the Proposed Intervenors. *See New York v. Azar*, 2019 U.S. Dist. LEXIS 129498, at *26 (S.D.N.Y. Aug. 2, 2019) (finding "no palpable harm" in permitting intervention); see also *Ass'n of Conn. Lobbyists LLC v. Garfield*, 241 F.R.D. 100, 103-04 (D. Conn. 2007) ("[I]ntervention will not prejudice any of the parties nor will it unduly delay the adjudication. In fact, the additional briefing and argument will only help to facilitate a speedy, fair and accurate resolution of the case.").

Instead of engaging these authorities, the States' opposition begins by asserting that a "denial of permissive intervention has virtually never been reversed." Opp. at 8. The States cite no case in which *granting* permissive intervention has been reversed either, but in any event the federal rule states a clear intention to "permit" intervention, not to discourage it.

The States next rely on a Wisconsin district court case which found, on different facts, that the case for permissive intervention "disappears" when the proposed intervenor has failed to overcome the presumption of adequate representation by the government. Opp. at 8, citing *Menominee Indian Tribe of Wis. v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996). To confirm that this is not the law of this Circuit, the court need look no farther than *New York v. Azar, supra*, which granted permissive intervention under such circumstances.

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[4] The States cite *Floyd v. City of New York,* 770 F.3d 1051, 1060 (2d Cir. 2014) for the proposition that defending the business community against the States' misguided attacks is not a legally protectable interest required for intervention. (Opp. at 6). The quoted language did not deal with adequacy of representation and addressed only whether "indirect reputational effect" of the City's "stop and frisk" policy on individual police officers was too remote to permit untimely intervention in the case, after the case had already settled and the plaintiffs withdrew their claims against individual officers. *Id*. at 1061. *Floyd* is totally inapposite here.

The States further err in contending that the Proposed Intervenors will essentially repeat the same sort of testimony given by existing parties. But this is just another iteration of the States' argument that the Proposed Intervenors' goal is identical to Defendants' goal of defending the Rule – and it is equally wrong. As explained above, the Proposed Intervenors' alone have an interest in defending the business community against the State's unfair and ill-informed attacks on longstanding, legitimate business methods. The Proposed Intervenors intend to make additional economic arguments and to use their greater expertise regarding the business methods of their represented industries to make the strongest possible case for a judgment against the States' Complaint.

Finally, the States argue that the Proposed Intervenors should be limited to an *amicus* role. But none of the cases cited by the States to that effect deals with the kinds of interests the Proposed Intervenors seek to protect.[5] The ability to participate as a party is vital to protecting those interests; serving as an *amicus* is insufficient. This Court should therefore exercise its discretion to permit the Proposed Intervenors to intervene, even if it determines that they are not entitled to intervene as a matter of right, as encouraged by Federal Rule 24(b).

[5] *See, e.g., Battle v. City of N.Y.*, No. 11-cv-3599, 2012 WL 112242, at *7 (S.D.N.Y. Jan. 12, 2012), where taxi drivers were denied permissive intervention because they did not assert any claim or defense that shared with the main action a common question of fact or law. The Proposed Intervenors here do assert claims and defenses in common with the main action but properly seek to advance their particular interests which are not adequately represented by the Department of Labor, as described above.

II. CONCLUSION

For all of the reasons set forth above, the Proposed Intervenors respectfully request that the Court grant their Motion and permit the Proposed Intervenors to intervene in the underlying lawsuit.

Respectfully submitted,
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CERTIFICATE OF SERVICE

Counsel certifies that is filing this Reply by ECF filing, with electronic service to counsel for all parties. Courtesy copies of all the motion papers have been sent by overnight delivery to the Court in accordance with the Court's individual standing rule.

/s/Eli Freedberg