UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, COMMONWEALTH OF PENNSYLVANIA, STATE OF CALIFORNIA, STATE OF COLORADO, STATE OF DELAWARE, DISTRICT OF COLUMBIA, STATE OF ILLINOIS, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF OREGON, STATE OF RHODE ISLAND, STATE OF VERMONT, COMMONWEALTH OF VIRGINIA, and STATE OF WASHINGTON, Plaintiffs, v. EUGENE SCALIA, *in his official capacity as Secretary of the United States Department of Labor*; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES OF AMERICA, Defendants.	No. 1:20-cv-01689-GHW

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO INTERVENE BY INTERNATIONAL FRACHISE ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, HR POLICY ASSOCIATION, THE NATIONAL RETAIL FEDERATION, ASSOCIATED BUILDERS AND CONTRACTORS, AND THE AMERICAN HOTEL AND LODGING ASSOCIATION

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Plaintiff states and the District of Columbia (together, the "States") respectfully submit this memorandum of law in opposition to the motion to intervene submitted by the International Franchise Association, the Chamber of Commerce of the United States of America, HR Policy Association, the National Retail Federation, Associated Builders and Contractors, and the American Hotel and Lodging Association ("Proposed Intervenors"), pursuant to Federal Rule of Civil Procedure 24(a)(2) or 24(b) (ECF No. 76) ("Motion").

PRELIMINARY STATEMENT

The Court should deny Proposed Intervenors' Motion. Neither intervention as a matter of right nor permissive intervention is warranted here.

Proposed Intervenors fail to meet the requisite elements for intervening as of right under Rule 24(a)(2), which ensure that intervention does not encumber litigation with a multiplicity of parties whose participation is unnecessary to protect and promote their interests and would instead impede efficient and effective adjudication of the action. Proposed Intervenors have not come close to rebutting the strong presumption that the federal government adequately represents the public interests it is charged by law with representing, and Proposed Intervenors' Motion is untimely. For either of these reasons, the Court should deny the request to intervene as of right.

Permissive intervention is similarly inappropriate. Proposed Intervenors' intervention would not meaningfully advance their interests because the federal government already sufficiently represents those interests. The Court should also deny permissive intervention because Proposed Intervenors' participation as a party in this litigation will unnecessarily prejudice and delay the proceedings in this case, impeding Rule 24(b)'s purpose of promoting judicial economy and efficiency.

BACKGROUND

This action challenges a final rule issued by the U.S. Department of Labor (the "Department"), entitled *Joint Employer Status Under the Fair Labor Standards Act*, 85 Fed. Reg. 2820 (Jan. 16, 2020) (to be codified at 29 C.F.R. §§ 791.1–791.3) (the "Final Rule"). The States allege that the Final Rule unlawfully narrows the joint employment standard under the Fair Labor Standards Act ("FLSA"), undermines critical workplace protections for the country's low- and middle-income workers, and will lead to increased wage theft and other labor law violations. Compl. ¶¶ 94–112, 134–139, 147–152 (ECF No. 1). The States further allege that the Final Rule departs from the Supreme Court's seminal decision in *Rutherford v. McComb*, 331 U.S. 722 (1946), and decades of federal appellate court precedent interpreting the joint employment standard under the FLSA, which have consistently held that a business that suffers or permits work is considered an "employer" under the statute's expansive definitions.

On February 26, 2020, the States filed suit to vacate the Final Rule and enjoin its enforcement. ECF No. 1. On May 11, 2020, Defendants moved to dismiss the States' complaint for lack of standing. ECF No. 62. The Court denied Defendants' motion on June 1, 2020, ECF No. 74, and held a status conference on June 3, 2020, after which the Court set a summary judgment briefing schedule, ECF No. 75. The States' summary judgment motion and supporting papers are due on June 22, 2020. Summary judgment briefing will conclude on August 5, 2020.

On June 10, 2020, Proposed Intervenors filed their motion to intervene in this action as defendants under Rule 24(a)(2) or, in the alternative, Rule 24(b). ECF No. 76.

ARGUMENT

I. Proposed Intervenors are not entitled to intervene as a matter of right under Rule 24(a)(2).

To intervene as of right under Rule 24(a)(2), a proposed intervenor must (1) file a timely motion; (2) "assert[] an interest relating to the property or transaction that is the subject of the action"; (3) demonstrate that "without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest"; and (4) show that its "interest is not adequately represented by the other parties." *MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 389 (2d Cir. 2006). "Failure to satisfy *any one* of these four requirements is a sufficient ground to deny the application." *Floyd v. City of N.Y.*, 770 F.3d 1051, 1057 (2d Cir. 2014) (quoting *"R" Best Produce, Inc. v. Shulman-Rabin Mktg. Corp.*, 467 F.3d 238, 241 (2d Cir. 2006)); *see Authors Guild v. Google, Inc.*, No. 05–CV–8136, 2009 WL 3617732, at *1 (S.D.N.Y. Nov. 4, 2009). "In seeking intervention under this Rule, the proposed intervenor bears the burden of demonstrating that it meets the requirements for intervention." *Kamdem-Ouaffo v. Pepsico, Inc.*, 314 F.R.D. 130, 134 (S.D.N.Y. 2016); *see also Floyd v. City of N.Y.*, 302 F.R.D. 69, 100 (S.D.N.Y. 2014) ("The burden to demonstrate a right to intervene, including a cognizable interest, is at all times on the applicant."), *aff'd in part, appeal dismissed in part*, 770 F.3d 1051 (2d Cir. 2014).

Proposed Intervenors' request to intervene as of right should be denied for two reasons—either of which is enough to deny their application.[1] Proposed Intervenors fail to show that their

[1] This opposition addresses adequacy of representation and timeliness because the clear deficiencies in those two factors suffice to deny intervention. Plaintiffs do not concede that Proposed Intervenors have established the second and third requirements: "an interest relating to the property or transaction that is the subject of the action" and a demonstration that "without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest." *MasterCard Int'l Inc.*, 471 F.3d at 389.

interests are not adequately represented by the federal government, and Proposed Intervenors' Motion is not timely.

A. Defendants adequately represent any interest that Proposed Intervenors may have in this litigation.

Proposed Intervenors state that to meet the Rule 24(a) standard, "[a]n applicant must show that the representation of its interests by the existing parties 'may be' inadequate." ECF No. 78 at 15 (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). But the Second Circuit "ha[s] demanded a more rigorous showing of inadequacy in cases where the putative intervenor and a named party have the same ultimate objective." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179 (2d Cir. 2001). When a proposed intervenor and a current party share "an identity of interest," the proposed intervenor "must rebut the presumption of adequate representation by the party already in the action." *Id.* at 179–80.

This presumption is particularly compelling—indeed, it is the "controlling principle," 7C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1909 & nn.24–27 (3d ed. 2007 & supp. 2019)—in cases where, as here, the government represents the public interest: "[t]he proponent of intervention must make a particularly strong showing of inadequacy in a case where the government is acting as *parens patriae*." *United States v. City of N.Y.*, 198 F.3d 360, 367 (2d Cir. 1999) (citing *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 985 (2d Cir. 1984)); *see also* 7C Fed. Prac. & Proc. Civ. § 1909 ("The rare cases in which a member of the public is allowed to intervene in an action in which the United States, or some other governmental agency, represents the public interest are cases in which a very strong showing of inadequate representation has been made."). To meet the "very strong showing" of inadequacy in this case, Proposed Intervenors "may offer, for example, 'evidence of collusion, adversity of interest, nonfeasance, or incompetence' by the named party sharing the same interest." *New*

York SMSA Ltd. P'ship v. Vill. of Nelsonville, No. 18 CV 5932 (VB), 2019 WL 1877335, at *2 (S.D.N.Y. Apr. 26, 2019) (quoting *Butler*, 250 F.3d at 180). Proposed Intervenors have made no such showing, nor could they.

Most significantly, Proposed Intervenors cannot articulate an interest that will not be adequately represented by Defendants. Proposed Intervenors and Defendants share the same goal: to uphold the Rule. But Defendants have vigorously defended the Rule and there is no reason to suspect they will not continue to do so. Defendants have already moved to dismiss the complaint and have declined to delay the implementation of the Rule despite the ongoing COVID-19 pandemic and this litigation. ECF No. 62; Letter from Plaintiffs to Eugene Scalia, Secretary, U.S. Dep't of Labor (Mar. 30, 2020) (Exhibit 1); Letters from Cheryl M. Stanton, Administrator, Wage and Hour Division, U.S. Dep't of Labor to Letitia James and Josh Shapiro, Attorneys General (June 8, 2020) (Exhibit 2). Proposed Intervenors may wish to brief the lawfulness of the Final Rule with a different emphasis than Defendants will choose, but that interest can be satisfied by filing a brief *amicus curiae*—it by no means establishes inadequacy of representation where Proposed Intervenors and Defendants seek the same ultimate goal.[2]

[2] The Proposed Intervenors are familiar with this legal principle and have adopted it successfully to *oppose* intervention in similar litigation. Five of the six Proposed Intervenors here were plaintiffs in a 2016 lawsuit challenging a different FLSA regulation issued by the Department of Labor. *See 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 Texas AFL-CIO moved to intervene as a defendant in that lawsuit on the ground that the then-upcoming change of presidential administration could cause the Department to modify the challenged regulation or to weaken its defense of the regulation in litigation. *Id.* at *3. The business plaintiffs in that case (including five of the six Proposed Intervenors here) strenuously opposed intervention on the ground, among others, that the federal government was presumed to adequately represent potential intervenors' interests. *See* Business Pls.' Opp. Mot. to Intervene 5, *Nevada v. U.S. Dep't of Labor*, No. 4:16-cv-731, ECF No. 72 (E.D. Tex. filed Dec. 15, 2016). The district court agreed with this position, denying the AFL-CIO's motion to intervene and holding that the Department was entitled to a presumption of adequate representation in its defense of the challenged regulation. *Nevada*, 2017 WL 3780085, at *3.

The comments Proposed Intervenors submitted during the public comment period for the Proposed Rule confirm this unity of interest. Those comment letters communicated broad support for the Department's reasoning and offered only minor suggestions. *See, e.g.*, ECF No. 78-1 at 17 ("IFA also supports the Department's attempt to list certain excluded practices" and "specifically urges the Department to expand its list of practices excluded . . . ."); ECF No. 78-2 at 1, 6 ("The Chamber believes the Proposed Rule provides needed clarity and national consistency . . . ." and "believes the Department can strengthen it with some minor changes" including "breaking down types of reserved contractual control that are not relevant to the joint employer analysis into three broad categories . . . ."). Indeed, Defendants adopted some minor changes suggested by Proposed Intervenors. *E.g.*, 85 Fed. Reg. at 2849 ("In response to these comments, as well as the [International Franchise Association]'s request for additional content in the final rule addressing permissible franchisor practices, the Department has decided to elaborate on the facts provided in the example.").

Finally, the argument that Proposed Intervenors must defend "the business community against the States' misguided attack" on particular business practices is not the sort of "direct, substantial, and legally protectable" interest required for intervention. *Floyd*, 770 F.3d at 1060 (quotation omitted). The States argue that Defendants' failure to consider the effect of those business practices renders the Rule contrary to law and arbitrary and capricious; the States do not directly attack the business practices as illegal.

B. Intervention should be denied because Proposed Intervenors' motion is not timely.

The motion to intervene should be denied for the independent reason that it is not timely. Although Rule 24(a) does not establish a hard and fast deadline by which to measure timeliness,

intervention here would disrupt (and already has disrupted) the expedited schedule set by the Court.

The States filed this complaint—and Proposed Intervenors became aware of their interest in this litigation—on February 26, 2020, a full fifteen weeks before Proposed Intervenors filed their motion to intervene. The Court has already denied Defendants' motion to dismiss. If Proposed Intervenors intend to brief summary judgment on the Court-ordered schedule, ECF No. 78 at 6–7, it would be an understatement to say the Court must rule on Proposed Intervenors' Motion quickly to avoid altering the current schedule for briefing the parties' cross-motions for summary judgment. In fact, the motion to intervene has already disrupted the timing of the litigation, requiring briefing and a decision in such an abbreviated timeframe that the Court departed from its default rules, ordering expedited briefing on the motion. ECF No. 81. And Proposed Intervenors' delay in seeking to intervene has already burdened the States by requiring a response to the motion to intervene at the same time that they must finalize and file their motion for summary judgment.

Because Proposed Intervenors cannot establish that they meet all of the requirements to intervene as of right under Rule 24(a)(2), their motion to intervene should be denied.

II. Permissive intervention under Rule 24(b) is unwarranted.

This Court should also deny Proposed Intervenors' motion for permissive intervention. Rule 24(b) allows the Court to permit intervention by one who "has a claim or defense that shares with the main action a common question of law or fact," subject to the Court's consideration of "whether the intervention will unduly delay or prejudice the adjudication of the

original parties' rights." Fed. R. Civ. P. 24(b)(1)(B), (b)(3).[3] The district court has "broad discretion" to deny permissive intervention, *Catanzano by Catanzano v. Wing*, 103 F.3d 223, 234 (2d Cir. 1996), and a "denial of permissive intervention has virtually never been reversed." *AT&T Corp. v. Sprint Corp.*, 407 F.3d 560, 561 (2d Cir. 2005) (quoting *Hooker Chems.*, 749 F.2d at 990 n.19).

As an initial matter, the Court should deny the motion for permissive intervention for the same reasons that intervention of right is unwarranted. *See Menominee Indian Tribe of Wis. v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996) ("When intervention of right is denied for the proposed intervenor's failure to overcome the presumption of adequate representation by the government, the case for permissive intervention disappears."). And applying the factors identified in Rule 24(b), the Court should deny permissive intervention because Proposed Intervenors' participation as a party "will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

A key consideration in determining whether intervention will cause delay or prejudice is whether the "potential intervenor will essentially repeat the same sort of testimony given by existing parties," in which case "intervention is counterproductive because it will only clutter and prolong the litigation unnecessarily." 6, James W. Moore, Moore's Federal Practice § 24.10[2][b] at 72–73 & n.24 (citing cases). As discussed above, Proposed Intervenors' goal is identical to Defendants' goal: both seek to defend the validity of the Rule as issued. Proposed Intervenors identify no cognizable interests in the present litigation that are not adequately protected by the federal government's participation. Permitting intervention will therefore

[3] Proposed Intervenors do not claim that they are "given a conditional right to intervene by a federal statute" per Rule 24(b)(1)(A), and no such statute would authorize permissive intervention in this instance.

simply result in duplication of the federal government's arguments, cluttering and unnecessarily prolonging the litigation. Their participation would only serve to impede efficient adjudication of this matter, and intervention should be denied. *See, e.g.*, *Hoots v. Commonwealth of Pa.*, 672 F.3d 1133, 1135–36 (3d Cir. 1982) ("[T]he district court is well within its discretion in deciding that the applicant's contributions to the proceedings would be superfluous and that any resulting delay would be 'undue.'").

To the extent that Proposed Intervenors have some unique perspective on the issues before the Court as members of the business community, their insights may be offered as *amici curiae*. *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) ("To the extent that Taxi Federation members may have had relevant experiences with TRIP . . . the Taxi Federation may request to participate as an amicus curiae."); *British Airways Bd. v. Port Auth. of N.Y. & N.J.*, 71 F.R.D. 583, 585 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 554 (2d Cir. 1976); *see also Bush v. Viterna*, 740 F.2d 350, 359 (5th Cir. 1984) ("Additional parties always take additional time. . . . Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention.") (quoting *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.*, 51 F. Supp. 972, 973 (D. Mass. 1943)); *Cigar Ass'n of Am. v. U.S. Food & Drug Admin.*, 323 F.R.D. 54, 66 (D.D.C. 2017) (denying permissive intervention to public health organizations that sought to defend agency rulemaking in a challenge by cigar manufacturers, where the proposed intervenors "have not given the court sufficient reason to believe that Defendants will not defend those requirements to the fullest," and where intervenors could "join these proceedings as amicus curiae").

Proposed Intervenors' participation as a party to the present litigation will only impede the efficient adjudication of this matter, and any insight they may have to offer may be offered as *amici curiae*. For these reasons, the Court should deny permissive intervention.

CONCLUSION

For the reasons stated above, the States respectfully request that the Court deny Proposed Intervenors' Motion.

DATED: June 18, 2020

Respectfully submitted,

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**Appearing pro hac vice or application for admission pro hac vice forthcoming*