IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ORACLE AMERICA, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF LABOR; U.S. OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS; EUGENE SCALIA, Secretary of the U.S. Department of Labor; CRAIG E. LEEN, in his official capacity as Director of the U.S. Office of Federal Contract Compliance Programs

Defendants.

Civ. Action No. 1:19-cv-3574 (APM)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S OPPOSITION TO PROPOSED INTERVENORS' MOTION TO INTERVENE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases[1]

[1] Authorities principally relied upon are designated by an asterisk (*)

Statutes, Rules, & Regulations

Executive Orders

Other Authorities

INTRODUCTION

The Communications Workers of America (CWA) and the United Steelworkers (USW) (collectively, Proposed Intervenors) seek to intervene so they can defend the Office of Federal Contract Compliance Programs (OFCCP) from an action seeking its "abolition." ECF No. 10, Mot. to Intervene at 11 (Mot.). The problem with that is: Oracle seeks no such thing.

Oracle's lawsuit challenges OFCCP's *ultra vires* regime of in-house prosecution, adjudication, and remediation. It does not challenge the use of anti-discrimination provisions in federal contracts that OFCCP oversees. Nor does Oracle's suit ask the Court to invalidate OFCCP's ability to investigate contractual violations or its authority to refer matters for litigation in federal courts. The Complaint is explicit in this regard: "At issue is not *whether* claims of discrimination" and other equal opportunity matters "connected with government contracts should be adjudicated, but rather *where* and *in what manner* such claims can be adjudicated." ECF No. 1, Compl. ¶ 11. Oracle contends the venue and structure of OFCCP's current regime exceed the agency's statutory authority and violate the constitutional separation of powers. *Id.* ¶ 10. The government is actively defending against those claims. *See* ECF No. 12, Gov't Mot. Dismiss. There is no basis for CWA or USW to intervene for the same purpose, let alone to intervene to defend against a phantom suit for OFCCP's "eliminati[on]." Mot. at 11.

CWA and USW's motion should be denied because their interest in the lawfulness of OFCCP's current enforcement regime meets neither Article III standing requirements nor the requirements to intervene under Federal Rule of Civil Procedure 24. Standing and intervention, in different ways, prevent parties like Proposed Intervenors here from transforming litigation between two parties into a public debate on policy. CWA and USW have not shown that OFCCP's adherence to statutory authority would directly injure their daily operations, as they

must for organizational standing. CWA, the only proposed intervenor that invokes associational standing, also does not identify any member with more than a generalized grievance concerning the agency's operations. Nor do CWA and USW identify a legal interest that would be impaired in this action absent their intervention.

CWA and USW's proposed participation in this case depends on a principle that will encourage limitless intervention. CWA and USW are not unions specifically for the employees of federal contractors, nor do any of their members work at Oracle. At most, any interest they have is no different from any other union that happens to have a member employed by a federal contractor or a member who has applied for a job with a federal contractor. Given that one fifth of the American workforce is employed by federal contractors, *infra* 15, that means any union representing any one of tens of millions of Americans would be eligible to intervene under Proposed Intervenors' theory. CWA and USW's generalized interest, however, is not even limited to federal contractors. If their theory of intervention sufficed, any organization with members who are tangentially affected by a federal law or regulatory scheme would be able to intervene with the full rights of a party in a litigation involving that federal law. That would be just about any case involving a challenge to federal law. That cannot be. It is the role of the Department of Justice (DOJ) to defend, as appropriate, federal laws and regulations. DOJ is already defending against this lawsuit. If CWA and USW would like to share their point of view on the question of OFCCP's authority to administer a sweeping enforcement regime, they can seek leave to do so as amici. This Court should deny the motion to intervene.

BACKGROUND

I. The Office of Federal Contract Compliance Programs (OFCCP) was, true to its name, conceived to supervise compliance with non-discrimination clauses in federal contracts. *See*

Compl. ¶ 25; Dep't of Labor Secretary's Order No. 26-65 (Oct. 5, 1965), 31 Fed. Reg. 6921, 6921 (May 11, 1966). Federal contracts have since 1941 included an Equal Opportunity Clause, barring contractors from discrimination against their employees on protected bases. *See* Compl. ¶¶ 20-22. Responsibility for implementing the Equal Opportunity Clause moved to the Department of Labor in 1965, with Executive Order 11,246. *See* Compl. ¶¶ 25-30; Exec. Order 11,246, Equal Employment Opportunity, 30 Fed. Reg. 12,319, at § 201 (Sept. 24, 1965). Executive Order 11,246 contemplates delimited administrative enforcement activity. The Department "may investigate" contractors' compliance with the Equal Opportunity Clause. *Id.* § 206(a). The Executive Order also contemplates certain "[s]anctions and [p]enalties" for contractors. *Id.* subpt. D, § 209(a). And, while the Department cannot bring "proceedings … to enforce" the Equal Opportunity Clause in government contracts, where the Department determines that a contractor substantially or materially violates its obligation under the Equal Opportunity Clause, it may "[r]ecommend" to DOJ or the Equal Employment Opportunity Commission (EEOC) that they bring an action in federal court for breach of contract or for violation of Title VII. *Id.* § 209(a)(2)-(4). The Department of Labor uses OFCCP to carry out its contract-compliance duties. *See* Compl. ¶ 25.

II. After decades of operation under Executive Order 11,246, OFCCP determined it could bypass referral to DOJ, EEOC, and the federal judiciary. OFCCP instead authorized itself to directly "institute administrative enforcement proceedings" in which it could unilaterally impose massive compensatory damages awards and broad injunctive relief. *See* Office of Federal Contract Compliance Programs Final Rulemaking, 42 Fed. Reg. 3454, 3456 (Jan. 18, 1977); 41 C.F.R. § 60-1.26(a)(2); Compl. ¶¶ 31, 34-35. Even while commentators warned that

OFCCP's enforcement proceedings were unauthorized, Compl. ¶¶ 37, 40, OFCCP maintained, and in fact expanded, its regime, *id.* ¶¶ 43-50.

OFCCP enforcement proceedings take place before an Administrative Law Judge (ALJ), who oversees discovery, resolves motions, and issues recommended findings and conclusions. Compl. ¶ 36; 41 C.F.R. §§ 60-30.8-30.11, 60-30.27. Appeals are permitted within the agency to a board of still more Department ALJs. Compl. ¶ 47; 41 C.F.R. § 60-30.28. Administrative proceedings can lead to injunctive relief, as well as awards of class relief, including back pay sometimes alleged by OFCCP to be in the hundreds of millions of dollars. Compl. ¶ 35; 41 C.F.R. § 60-1.26(a)(2). OFCCP brought one of these unauthorized proceedings against Oracle in 2017, seeking back pay, class-wide remedies, and injunctive relief as well as debarment of Oracle as a federal contractor. Compl. ¶¶ 130, 132.

III. In November 2019, Oracle filed this lawsuit challenging the lack of statutory authorization for OFCCP's administrative prosecutorial, adjudicative, and remedial regime. *See id*. ¶ 1. The Complaint does not challenge lawful adjudication of discrimination or breach-of-contract claims in federal courts or the value of anti-discrimination laws. *Id.* ¶¶ 11, 136. Rather, as the Complaint explains, OFCCP—which was conceived to *investigate* contractor compliance with government contracts—exceeds its authority in *prosecuting* and *adjudicating* employment-discrimination claims within the agency and *imposing* against contractors discrimination-based damages that are totally alien to contract remedies. *Id.* ¶¶ 4, 116-17. No Act of Congress authorizes OFCCP's aggrandizement, and OFCCP's actions are even at odds with Executive Order 11,246. *Id.* ¶¶ 51-107, 111-13. Oracle seeks declaratory judgment that OFCCP's regulatory regime violates the Constitution. *Id.* Prayer for Relief.

IV. Before the government was scheduled to respond to the Complaint, Proposed Intervenors CWA and USW filed a motion to intervene. Proposed Intervenors premise their request on an overreading of the Complaint as seeking the "effective abolition of OFCCP." Mot. at 11. They assert that a "ruling eliminating" OFCCP would injure CWA, USW, and their members. *Id.* Before even seeing the government's response to the Complaint, Proposed Intervenors contended that the government would not "adequately represent their interests in defending" OFCCP's regulatory regime and protecting "workers from discrimination." *Id.* at 2. The government has since filed a motion to dismiss this suit.

ARGUMENT

CWA and USW's requested intervention is improper and impermissible. Neither group has demonstrated Article III standing, a threshold requirement to intervene. CWA and USW point to no actual injury in fact because the injuries they claim are based on overreading the relief sought by Oracle in this action. That leaves only general grievances insufficient to establish standing. § I. CWA and USW also do not satisfy the requirements under Federal Rule of Civil Procedure 24(a)(2) to intervene as of right. Specifically, they lack a particular legal interest that will be impaired by this litigation, and the government adequately represents any broader interest in the defense of its regulations and actions. § II. For similar reasons, this Court should deny CWA and USW permission to intervene under Rule 24(b)(2). § III.

I. CWA And USW Lack Standing.

"Putative intervenors must satisfy the traditional three elements of Article III standing." *Cigar Ass'n of Am. v. FDA*, 323 F.R.D. 54, 59-60 (D.D.C. 2017); *see Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013); *id.* at 195 (Silberman, J., concurring). "[B]ecause [Proposed Intervenors] are not directly subjected to the regulation they [defend],

standing is substantially more difficult to establish." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 914 (D.C. Cir. 2015) (quotation marks omitted). Neither CWA nor USW have established the "irreducible constitutional minim[a]" of injury in fact, causation, and redressability. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Proposed Intervenors lack a cognizable injury in fact to their organizational interest, § I.A; only CWA even alleges associational standing, and yet no CWA member can establish actual and concrete injury in fact, § I.B; and CWA and USW's organizational and associational claims for standing both fail for lack of causation and redressability, § I.C.

A. Neither CWA nor USW alleges an injury in fact sufficient to support organizational standing.

"[O]rganizational standing requires" CWA and USW, "like an individual plaintiff," to show injury in fact, causation, and redressability. *Food & Water Watch*, 808 F.3d at 919 (quotation marks omitted). Whether an organization has suffered an injury in fact turns on "a two-part inquiry": "'[F]irst, whether the agency's action or omission to act injured the organization's interest and, second, whether the organization used its resources to counteract that harm.'" *Id.* (alteration omitted) (quoting *PETA v. USDA*, 797 F.3d 1087, 1094 (D.C. Cir. 2015)). Notably, here, Proposed Intervenors do not seek to intervene to challenge an act or omission by an agency; rather they would intervene to argue against a lawsuit filed by a private party and thus to *defend* an agency's regulatory scheme. In any case, neither organization would suffer a cognizable organizational injury from the relief sought here.

Proposed Intervenors doom their claim for organizational standing in tying their alleged injuries to a misreading of the Complaint. The Motion and each supporting declaration assert in lockstep that Proposed Intervenors' various harms flow from "[s]tripping OFCCP of its enforcement authority," leading to its "effective abolition." Mot. at 7, 11; *accord* van Schaick

Decl. ¶ 6; Redmond Decl. ¶¶ 2, 8; Poe Decl. ¶ 1; Perry Decl. ¶ 2. None of those harms are "actual," however, because the relief sought by Oracle does not seek to effectively abolish or eliminate OFCCP. OFCCP could, for instance, continue to investigate and audit contractors for employment discrimination, compile data, and refer matters to DOJ and the EEOC. OFCCP, the Department of Labor, or the contracting agency could engage in conciliation efforts before OFCCP refers the matter to DOJ or EEOC to bring a suit in federal court (or, for EEOC, to issue right-to-sue letters for individuals to bring their own Title VII suits). Likewise, if DOJ or EEOC (or EEOC-authorized individuals) sue in federal court and prevail, the breaching contractors could be suspended or debarred, their contracts cancelled or suspended, and their names published. Those federal lawsuits could also result in damages awards and other remedies against the contractor, including for breach of contract and for employment discrimination. All of those enforcement activities would be available even after Oracle prevails here.

The difference if Oracle prevails is a simple return to all such litigation being, as Congress authorized, in federal court. OFCCP could no longer *unilaterally* prosecute, adjudicate, and impose monetary awards and injunctive relief for discrimination and breach of contract through in-house administrative proceedings. *See, e.g.*, Compl. ¶ 148; Prayer for Relief. That does not "severely undermine[] OFCCP's power to enforce Executive Order 11,246." Mot. at 6. OFCCP could continue to enforce statutes and Executive Order 11,246, strengthened by a renewed focus on investigating and uncovering discrimination and breaches of contract. Once Proposed Intervenors' misreading of the Complaint is corrected, CWA and USW's alleged injuries evaporate, leaving no possible injury in fact.

The particular injuries Proposed Intervenors identify similarly do not withstand scrutiny. Not only are they disconnected from the relief Oracle seeks, even were they actual injuries, none

"inhibit[s]" the Proposed Intervenors' "daily operations" of supporting labor relations, as it must to show standing. *Food & Water Watch*, 808 F.3d at 919 (quoting *PETA*, 797 F.3d at 1094).

Communications Workers of America. CWA repeatedly alleges, for instance, that a key harm it faces is loss of "OFCCP data." *See* van Schaick Decl. ¶ 14; *see also* Mot. at 8. CWA's declaration points to three sets of data it is worried will no longer be collected and made available if OFCCP is abolished. *See* van Schaick Decl. ¶ 13. The first is the "results of … enforcement-related investigations." *Id.* This lawsuit does nothing about publishing of data. Moreover, as noted, OFCCP could continue to investigate contractors for breach of anti-discrimination clauses, and investigations that result in enforcement actions in federal court could further be made public through that litigation. Second, CWA seeks data on "conciliation agreements," which it worries will no longer exist if OFCCP is not investigating and enforcing anti-discrimination clauses in government contracts. *Id.* But, as discussed, OFCCP can still engage in conciliation efforts before referring a case to DOJ or EEOC, *see, e.g.*, Executive Order 11,246 § 209(b), and those agencies can (and sometimes must) engage in their own conciliation efforts, *see, e.g.*, 42 U.S.C. § 2000e-5(b), (f).[2] Finally, CWA is interested in access to a list of companies deemed ineligible to receive federal contracts based on past discrimination. *See* van Schaick Decl. ¶ 13. That list can continue to exist based on OFCCP investigations and DOJ and EEOC litigation. Because CWA cannot show that this suit, if successful, would eliminate the relevant data or CWA's access to that data, this case is entirely different from the cases CWA cites. *See Am. Anti-Vivisection Soc'y v. USDA*, 946 F.3d 615, 619 (D.C. Cir. 2020) (organization denied information to which it had "a legal right"); *PETA*, 797 F.3d at 1095 (agency failed to

[2] CWA also offers no reason to doubt that existing conciliation agreements will not be honored or could not be enforced by DOJ or EEOC. *Contra* Mot. at 1, 9.

generate standard inspection reports); *Air All. Houston v. U.S, Chem. & Safety Hazard Investigation Bd.*, 365 F. Supp. 3d 118, 124-26 (D.D.C. 2019) (agency failed to meet statutory obligation to collect and publish data).

The other "injuries" CWA alleges are no more compelling. CWA argues that it "would have to devote substantial additional resources to provide updated informational materials." Mot. at 7. But there is no private right of action in OFCCP proceedings, and so CWA's current informational materials must surely provide extensive guidance about EEOC and Title VII (which also cover federal contractors). *See, e.g.*, CWA, C*WA Human Rights Manual* 29-31, 33-34, https://tinyurl.com/u6g5jku (describing avenues of relief through Title VII and the EEOC). CWA continually updates its guidance anyway to stay "current" and avoid stale information, regardless of this lawsuit. *See* Communications Workers of America, *Committee on Civil Rights and Equity*, https://tinyurl.com/raothtm; *see also Food & Water Watch*, 808 F.3d at 920 ("[A]n organization does not suffer an injury in fact where it 'expend[s] resources to educate its members and others' unless doing so subjects the organization to 'operational costs beyond those normally expended.'" (quoting *Nat'l Taxpayers Union, Inc v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995)).

Finally, CWA asserts it will be forced to redirect its resources to new legal strategies and representation. *See* Mot. at 7. The "mere fact," however, "that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of [government] is insufficient to impart standing upon the organization." *Nat'l Taxpayers Union*, 68 F.3d at 1434 (quotation marks omitted).[3] At any rate, the "broader set of systemic … remedies" CWA

[3] *National Fair Housing Alliance v. Travelers Indemnity Co.*, 261 F. Supp. 3d 20 (D.D.C. 2017), is not to the contrary. That case was brought under the Fair Housing Act, a unique context in which "courts must interpret standing as broadly as possible." *Id.* at 25. Moreover, plaintiffs

would strategize to attain, *see* van Schaick Decl. ¶¶ 22, 24(c), are available under Title VII and through the EEOC, which itself provides representation. *See* 42 U.S.C. § 2000e-5(g)(1) (describing available remedies, including injunctive relief, affirmative action orders, reinstatement, and back pay); *id.* § 2000e-5(f)(1) (authorizing EEOC to sue private employers). Given that only a fraction of CWA's members are employed by federal contractors subject to OFCCP's oversight, CWA is no doubt familiar with these generally available avenues of legal strategy and representation. Furthermore, to the extent members are best "served by making an OFCCP complaint," Mot. at 7, they still could. Even if Oracle were granted all the relief it seeks, OFCCP would continue to be able to receive and investigate complaints of employment discrimination by government contractors. But even now, OFCCP's practice is not to investigate most complaints itself. OFCCP "generally refer[s] individual complaints alleging employment discrimination … to the EEOC." OFCCP, *Federal Contract Compliance Manual* § 6B01 Bases of Complaint Allegations (2019), https://tinyurl.com/rd7fzc2.[4] Under the relief Oracle seeks, OFCCP would continue to refer complaints to EEOC for agency prosecution or individual right-to-sue authorizations. It causes no injury whatsoever, and certainly none that rises to the level of creating constitutional standing, for CWA to counsel its members—the bulk of whom do not seem to work for federal contractors subject to OFCCP authority—that they can report

under the Fair Housing Act are "private actors suing other private actors" under statute, in stark distinction to the situation here, where Proposed Intervenors "present[] only abstract concerns or complaints about government policy or conduct." *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990) (Ginsburg, J.).

[4] While OFCCP may investigate certain complaints, it does so infrequently. OFCCP conducts far more audits annually than complaint investigations. *See* U.S. Department of Labor, OFCCP By The Numbers, https://www.dol.gov/ofccp/BTN/ (follow links for "Supply and Service Compliance Evaluations Conducted" and "Complaint Investigation Outcomes" under "Fiscal Year Data") (last visited March 31, 2020).

employment-discrimination issues to one of two government agencies with a description of the different roles each agency plays.

United Steelworkers. USW's claims of injury largely mirror CWA's, and so they fail for the same reasons. *See* Redmond Decl. ¶ 17 (tracing injury to costs of providing updated training materials and unavailability of conciliation agreements). For instance, like CWA, USW alleges its costs will rise because it will have to resolve more claims directly and represent more of its members in suits. Mot. at 10-11. Such legal costs are insufficient to confer standing. *Nat'l Taxpayers Union*, 68 F.3d at 1434. Those costs also do not follow from the relief sought because there are no private rights of action within the OFCCP scheme, and DOJ and EEOC can bring suits against contractors without private representation of individuals.[5]

USW adds that it "may" have to change its collective bargaining practice, for instance by "negotiat[ing] additions to collective bargaining agreements allowing for the arbitration of discrimination claims" or "expanding the grievance process." Mot. at 10-11; *see* Redmond Decl. ¶ 18. That speculation betrays the weakness of the link between the injuries USW (and CWA) claim and the relief sought in this lawsuit. USW never explains why either would be the case, or what this suit has to do with any future changes to collective bargaining. Why, for example, would this suit require USW to expend political capital with businesses to negotiate for arbitration of employment-discrimination claims if it does not do that currently for Title VII claims? It wouldn't. There plainly is no nexus between arbitration clauses for individual employment-discrimination claims and Oracle's suit. In any event, Proposed Intervenors' own

[5] In any event, individual and class-wide employment discrimination claims are typically brought on contingency, such that plaintiffs need not pay for representation. *See* Andrew H. Friedman, *Litigating Employment Discrimination Cases* § 4:109.4 (2018) ("The most widely-used fee arrangement in employment cases for attorneys representing plaintiff employees is the contingent-fee.").

exhibits concede that employers are likely to agree to and even to "require private arbitration," so USW would not have to sacrifice anything in negotiations to reach arbitration agreements. *See* Ex. 1 at 10.

Beyond the fundamental disconnect between the relief sought and the injuries claimed, both Proposed Intervenors' organizational injuries are too speculative for Article III. An allegation that an organization "must modify its representational activities to devote additional resources—including time, money, and effort"—in response to the challenged action does not suffice to show its organizational standing. *Nat'l Treasury Employees Union v. United States*, 101 F.3d 1423, 1425-26, 1430 (D.C. Cir. 1996). "[I]n those cases where an organization alleges that a defendant's conduct has made the organization's *activities* more difficult, the presence of a direct conflict between the defendant's conduct and the organization's *mission* is necessary—though not alone sufficient—to establish standing. If a defendant's conduct does not conflict directly with an organization's stated goals, it is entirely speculative whether the defendant's conduct is impeding the organization's activities." *Id.* at 1430. Here, returning OFCCP to its investigative roots and permitting DOJ and EEOC to reassert their prosecutorial authority is not contrary to CWA or USW's mission. Indeed, a more focused OFCCP might better aid Proposed Intervenors' anti-discrimination mission.

A direct conflict—absent here—ensures the organization advances more than a general grievance against government action. "[I]n those cases where governmental action is challenged, if the government's conduct does not directly conflict with the organization's mission, the alleged injury to the organization likely will be one that is shared by a large class of citizens and thus insufficient to establish injury in fact." *Id.* Such is the case here. Proposed Intervenors are akin to the proposed intervenors in *Cigar Association*: The allegation that government action

"will help them achieve their organizational objectives" and modification of government action "would make it harder to achieve those objectives" is insufficient to support standing. 323 F.R.D. at 63.[6] CWA and USW's general interest in OFCCP's enforcement regime does not confer Article III injury in fact.

B. USW does not claim associational standing, and CWA's members do not have a cognizable injury that would support CWA's associational standing.

Only CWA—not USW—claims associational standing, and even then only in a cursory manner. *See* Mot. at 12-13. "To establish associational standing, an organization must demonstrate: (1) that at least one member would have Article III standing in his or her own right; (2) that the interests it seeks to protect are germane to its purposes; and (3) neither the claim asserted nor the relief requested requires an individual member participate in the lawsuit." *Cigar Ass'n*, 323 F.R.D. at 64 (quotation marks omitted). CWA's associational standing claim fails at step one because CWA has not alleged a member has a sufficiently "actual or imminent" or "concrete and particularized" injury for Article III. *Deutsche Bank*, 717 F.3d at 134.[7]

CWA has failed to demonstrate that its members suffer or will imminently suffer an actual injury. The only member CWA puts forward is Erin Poe, whose asserted injuries flow from the misunderstanding that "in th[is] lawsuit, Oracle seeks to strip" OFCCP of authority to enforce anti-discrimination clauses in federal contracts. Poe Decl. ¶ 1. This lawsuit does no

[6] In *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312 (D.C. Cir. 2015), by contrast, intervenors were the *direct beneficiary* of the FEC's decision to dismiss a complaint against *them*. Party plaintiffs challenged the dismissal in court, and the D.C. Circuit found intervenors had standing as the direct beneficiaries of the challenged agency action. *Id.* at 317. Proposed Intervenors do not try to compare themselves to intervenors in *Crossroads*. For good reason: "furthering an institutional goal is not the type of 'benefit' that the court had in mind." *Cigar Ass'n*, 323 F.R.D. at 63.

[7] USW does not claim even one of its members has a cognizable injury in fact.

such thing. *See supra* 6-7. Poe does not allege that OFCCP's in-house prosecution regime is necessary to prevent discrimination in her workplace. Instead, Poe's only particular claims are that she is interested in applying for a different position with her employer, *id.* ¶ 8, and she believes the conciliation agreement her employer entered "could provide more information about how hiring and promotion decisions work," *id.* ¶ 10. Nothing about Oracle's lawsuit undermines that conciliation agreement, prevents OFCCP, DOJ, or the EEOC from engaging in future conciliation efforts, or stops OFCCP from investigating employment discrimination by federal contractors. The relief sought would in no way prevent Poe's employer or other federal contractors from providing information about hiring and promotion to employees.

Nor is CWA members' injury concrete or particularized. CWA asserts its members have an interest in "an OFCCP with robust enforcement authority," Mot. at 12, and its only member to provide a declaration states she believes "there is no room for discrimination," Poe Decl. ¶ 4. Oracle's lawsuit would not dampen the federal government's robust enforcement of employment-antidiscrimination laws. *See supra* 4, 7. Furthermore, CWA's members' interest in the validity of OFCCP's robust enforcement authority "is by definition a generalized one." *Hollingsworth v. Perry*, 570 U.S. 693, 713 (2013). "To have standing, a litigant must seek relief for an injury that affects him in a 'personal and individual way'"—not merely possess a desire "to vindicate the constitutional validity of a generally applicable regulation." *Id.* at 705-06 (quoting *Lujan*, 504 U.S. at 560 n.1). Like the proposed defendant-intervenors in *Hollingsworth*, Proposed Intervenors do not have a particularized interest in the scope of OFCCP's valid authority. *Id.* at 707.

Article III also does not recognize members' claimed interest in OFCCP's exercise of its purported enforcement authority. *Contra* Mot. at 12 (claiming interest in OFCCP "power to

award a broader set of remedies" and enforcement of conciliation agreements). "[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Diamond v. Charles*, 476 U.S. 54, 64 (1986) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)). Like the intervenor in *Diamond* who lacked standing to defend the constitutionality of a state statute on appeal, Proposed Intervenors cannot claim injury in fact from the government's enforcement actions against contractors. Article III does not grant intervenors "the right to compel a State to enforce its laws" or "retain the legal framework within which individual enforcement decisions are made." *Id.* at 65.

Article III does not recognize generalized grievances like those asserted here. Proposed Intervenors recognize that unions are only "[s]ome of the parties" who would share in the generalized grievance they raise, and they themselves are only two of many unions. Mot. at 1. Were this Court to find that CWA, USW, or CWA's members have standing to defend the constitutionality of OFCCP's practices, so would "any organization" with a member who is a current or former employee or applicant to any federal contractor and any individual who works for, used to work for, or applied to work for a federal contractor. *Nat'l Taxpayers Union*, 68 F.3d at 1434. Particularly in light of the fact that federal contractors employ one fifth of the entire U.S. labor force, *see* Compl. ¶ 103 (citing OFCCP, *History of Executive Order 11,246*, https://www.dol.gov/ofccp/about/50thAnniversaryHistory.html), a rule that would give any and all those people standing to intervene and defend OFCCP administrative scheme is "a result [that] is untenable." *Nat'l Taxpayers Union*, 68 F.3d at 1434.

C. CWA and USW cannot show causation or redressability.

Proposed Intervenors' overreading of the Complaint also dooms their argument for causation and redressability. Causation and redressability are "substantially more difficult" to

establish when, "as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*." *Lujan*, 504 U.S. at 562 (quotation marks omitted). That is because causation and redressability then "hinge on the response of the regulated" party—"and perhaps on the response of others as well." *Id.* Here, the first link in the causal chain to Proposed Intervenors' injury is plainly broken: CWA and USW tie their injury to a fictional version of this lawsuit seeking the "effective abolition" of OFCCP, Mot. at 11, rather than the "regulation (or lack of regulation)" the prayer for relief actually seeks. *See supra* 6-7. Further, the Motion does not allege, much less establish, that regulated contractors will discriminate more if enforcement proceedings against them are brought by DOJ, EEOC, or individual employees in federal court—possibly after audit and investigation by OFCCP. *See Nat'l Maritime Union of Am. v. Commander, Military Seal Command*, 824 F.2d 1228, 1235-36 (D.C. Cir. 1987) (holding "causal chain" of "independent variables" dependent on "decisions of third parties not before [the] court" precludes causation and redressability (quotation marks omitted)).

The abolition of OFCCP that CWA and USW fear seems, at bottom, rooted in speculation about the Administration's policy and enforcement prerogatives. *See* Mot. at 2 & Exs. 2, 5, 7. Whatever injury may arise from the Administration's policymaking, it is not redressable in this litigation. This Court is not a proper or viable forum to redress Proposed Intervenors' concerns about this Administration's enforcement priorities. Proposed Intervenors lack standing, and thus their motion to intervene should be denied.

II. CWA And USW Cannot Intervene As Of Right.

Even if CWA and USW could establish standing, neither meets the criteria to intervene as of right under Federal Rule of Civil Procedure 24(a)(2).[8] The D.C. Circuit has "divided Rule 24(a)(2) into four elements":

> 1) the application to intervene must be timely, 2) the party must have an interest relating to the property or transaction which is the subject of the action, 3) the party must be so situated that the disposition of the action may, as a practical matter, impair or impede the party's ability to protect that interest, and 4) the party's interest must not be adequately represented by existing parties to the action.

Defs. of Wildlife v. Perciasepe, 714 F.3d 1317, 1322-23 (D.C. Cir. 2013) (quoting *Bldg. & Constr. Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994)). To intervene as of right, CWA and USW must satisfy each element. *Bldg. & Constr. Trades Dep't*, 40 F.3d at 1282. Significant problems with CWA and USW's claims to interest, impairment, and lack of adequate representation prevent their intervention.

A. CWA and USW's interests are too abstract to satisfy Rule 24.

CWA and USW must establish a legally protected interest to intervene of right. *See Deutsche Bank*, 717 F.3d at 192. This Circuit holds that the "*kind* of interest that Rule 24" protects is of the same kind protected by Article III standing; accordingly, Proposed Intervenors' failure to show cognizable injury defeats their claim under the "interest" element of Rule 24(a)(2). *See Deutsche Bank*, 717 F.3d at 194-95. But Rule 24 not only requires a cognizable legal interest, it further demands that the interest "relat[e] to the property or transaction that is the subject of the action." Fed. R. Civ. P. 24(a)(2). Intervention of right accordingly imposes "a sort

[8] Rule 24(a)(2) provides: "On timely motion, the court must permit anyone to intervene who … claims 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."

of nexus requirement more akin to third-party prudential standing," whereby a third party seeking to litigate the rights of another must show it bears a close relationship with the right-bearer, who cannot protect its own rights. *Deutsche Bank*, 717 F.3d at 195.[9] Proposed Intervenors cannot meet that requirement.

While Proposed Intervenors assert an interest in "preserving the authority of the OFCCP," Mot. at 15, an abstract interest in defending government regulations is not the "significantly protectable interest" in "property" or a "transaction" Rule 24 requires. *Donaldson v. United States*, 400 U.S. 517, 531 (1971); *see Diamond*, 476 U.S. at 75-76 (O'Connor, J., concurring, joined by Burger, C.J., and Rehnquist, J.) (concluding a "desire" that the law, as intervenors understand it, "be obeyed" is too "abstract" to satisfy Rule 24 (quotation marks omitted)); *see also Alt. Research & Dev. Found. v. Veneman*, 262 F.3d 406, 411 (D.C. Cir. 2001) (affirming denial of association's motion to intervene of right for, among other things, lack of sufficient interest); *Doe 1 v. FEC*, No. 17-2694, 2018 WL 2561043, at *4 (D.D.C. Jan. 31, 2018) (holding an "interest in having the FEC comply with its disclosure requirements under the law" cannot support intervention). A proposed intervenor who seeks to act as a third party to enforce a "general" interest, like the government's interest in defending the law, lacks a sufficient interest for purposes of Rule 24(a)(2). *Deutsche Bank*, 717 F.3d at 195; *id.* at 194. CWA and

[9] The "interest" element of Rule 24(a)(2) cannot be equivalent to the Article III injury-in-fact requirement or else the interest element would serve no purpose. Proposed Intervenors assume they do not need to establish their interest if they can show standing, relying on language from *Fund for Animals, Inc. v. Norton*, 322 F.3d 728 (D.C. Cir 2003), and related cases which suggest injury in fact "is alone sufficient," *id.* at 735. Mot. 15. But the D.C. Circuit has warned that "the broad language" Proposed Intervenors rely on "must be understood in context as not precluding considerations of prudential standing under different statutes." *Deutsche Bank*, 717 F.3d at 195; *see also United States v. 36.96 Acres of Land*, 754 F.2d 855, 859 (7th Cir. 1985) ("The interest of a proposed intervenor, however, must be greater than the interest sufficient to satisfy the standing requirement.").

USW are third parties to the "transaction" at the core of this litigation; they are neither the OFCCP nor subject to OFCCP's enforcement regime. The most they can possibly claim to be is beneficiaries of a broadly applicable federal-enforcement scheme—a category that includes tens of millions of Americans. If such a generalized interest "entitle[s them] to intervene, there is no apparent reason why any" union, or association of employees at a federal contractor, or even any one employee, "could be denied a similar opportunity." *Id.* at 192; *see id.* at 195.

B. This litigation will not impair CWA or USW's ability to protect their legal interests.

Proposed Intervenors' motion also fails under the third element because they cannot show that the relief Oracle seeks will "impair or impede" their ability to protect their interests. Fed. R. Civ. P. 24(a)(2). The relief sought in this case would not "affirmatively set [the Proposed Intervenors'] interests back." *Mass. School of Law at Andover, Inc. v. United States*, 118 F.3d 776, 780 (D.C. Cir. 1997). Indeed, for all the reasons discussed above (at 6-12), CWA and USW cannot make such a showing because the relief sought by Oracle does not abolish OFCCP, its ability to investigate employment discrimination by federal contractors, or the government's ability to enforce anti-discrimination laws and anti-discrimination clauses in federal contracts.

CWA and USW assert their interest will be impaired by relying on out-of-circuit authority and by comparing themselves to intervenors defending against third-party challenges to agency decisions directly benefiting the intervenors. The analogy fails. In *Crossroads v. FEC* and *Cayuga Nation v. Zinke*, the in-circuit authority CWA and USW cite, the rights of each proposed intervenor were themselves at issue in the agency action being questioned: In *Crossroads*, the FEC dismissed a complaint against intervenor Crossroads, 788 F.3d at 315, 320, and in *Cayuga Nation*, the Bureau of Indian Affairs determined intervenor Cayuga Nation Council was the official representative of the Nation, 324 F.R.D. 277, 282-83 (D.D.C. 2018). In

each case, reversal of the agency decision would impose direct burdens on the proposed intervenors' rights. *Crossroads*, 788 F.3d at 321 (FEC "could seek to regulate Crossroads directly and immediately" if plaintiffs prevailed); *Cayuga Nation*, 324 F.R.D. at 282-83 (successful challenge to agency's decision would revoke Council's recognition and its eligibility for federal funds). By contrast, OFCCP does not directly or immediately regulate CWA, USW, or their members. OFCCP does not regulate them at all.

At most, Proposed Intervenors allege that if OFCCP hews to its statutory authority, it will not advance their interests as far as they would like. But "mere failure to secure better remedies for a third party … is not a qualifying impairment" for Rule 24. *Mass. School of Law*, 118 F.3d at 780. As in *Massachusetts School of Law*, the possibility that a Proposed Intervenors' interests could be "more zealously" pursued, leading to a "greater … resulting *advance*" in their interest, is not enough for Rule 24; a proposed intervenor must show the action would "affirmatively" set back its interests. *Id.* Proposed Intervenors' interests will not be impaired from this action. *See supra* 6-12. Thus, CWA and USW cannot meet Rule 24(a)(2)'s impairment requirement.

C. The government is an adequate representative.

This Court should deny CWA and USW's motion to intervene for the additional reason that the government already represents their interests in defending OFCCP's administrative regime. Whether a party is an adequate representative "must be assessed in relation to the specific purpose that intervention will serve." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1293 (D.C. Cir. 1980). Where, as here, a proposed intervenor seeks to intervene for the purpose of defending a general interest in nondiscrimination and the constitutionality of a regulatory scheme, the government's representation is adequate. *See Cascade Nat. Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 149-50 (1967) (Stewart, J., and Harlan, J., dissenting)

("It has been the consistent policy of this Court to deny intervention to a person seeking to assert some general public interest in a suit in which a public authority charged with the vindication of that interest is already a party."); *Doe 1*, 2018 WL 2561043, at *5 (same); 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1909 (3d ed. 2019) (recognizing government "is presumed to adequately represent the interests of its citizens").

Proposed Intervenors' attempt to distinguish their interest from the government's is unpersuasive. They contend the government cannot not adequately represent their interests because it "necessarily represent[s] a broader array of interests and stakeholders." Mot. 17. On that logic, however, the government could never be an adequate representative; it is always subject to a multitude of interests and obligations, and proposed intervenors will always have narrower interests. That has not stopped the D.C. Circuit or this Court from concluding the government adequately represents a proposed intervenor's interest. *See, e.g.*, *Mass. School of Law*, 118 F.3d at 781 (DOJ adequately represented law school's interest even though other interests may also influence DOJ's litigation strategy); *Bldg. & Constr. Trades Dep't*, 40 F.3d at 1282 (Department of Labor is an adequate representative for trade association in labor law matter).[10] And any narrower interest would not be relevant here: "[T]he parties are limited to arguing for or against the validity of [OFCCP] regulations," and thus any "[i]ndividual interests" the Proposed Intervenors may "advance are largely irrelevant." *Envtl. Def. Fund, Inc. v. Costle*, 79 F.R.D. 235, 243 (D.D.C. 1978).

[10] *See also Alfa Int'l Seafood v. Ross*, 321 F.R.D. 5, 9 (D.D.C. 2017) ("[W]here the government is defending a rule it promulgated," its interests will necessarily "be broader than any one private party's interest.… Thus, to say generally that the government has multifarious interests, while the intervenor only has a narrow one, cannot, by itself, satisfy Rule 24."), *appeal dismissed and remanded*, No. 17-5138, 2018 WL 4763179 (D.C. Cir. Feb. 1, 2018), *and vacated* 320 F. Supp. 3d 184 (D.D.C. 2018).

Proposed Intervenors hypothesize that the government may not continue its defense on appeal, and it is therefore an inadequate representative. Mot. 17-18. "But this is a speculative concern." *Doe 1*, 2018 WL 2561043, at *5 (rejecting the argument that "the agency is unlikely to appeal if plaintiffs prevails" so it "cannot be depended upon to represent [proposed intervenor's] interests"); *cf. Deutsche Bank*, 717 F.3d at 193 (noting "the prospect" of the government entering an "unfavorable settlement … is hopelessly conjectural").[11] CWA and USW's arguments about an appeal are altogether premature, particularly as the government has sought to dismiss this lawsuit. If a question about the government's willingness to defend OFCCP's administrative scheme materializes in the future, CWA and USW may then move for intervention. *See, e.g.*, *Moten v. Bricklayers, Masons & Plasterers, IUA*, 543 F.2d 224, 234 (D.C. Cir. 1974) (denying intervention and noting if a party's interest diverges from a would-be intervenor's, the latter "may intervene at that time"). No such divergence of interests exists.

Proposed Intervenors' arguments in favor of the constitutionality of OFCCP's statutory regime are more appropriately offered in the form of an amicus brief, and CWA and USW can seek leave to participate as amici. As amici, their "views … will receive a full hearing, and, to the extent they believe Defendants do not adequately defend … they have a means to make that position known to the court." *Cigar Ass'n*, 323 F.R.D. at 66. Participation as amici assures that their points of view, issues, and arguments are aired. Intervention, on the other hand, makes CWA and USW parties to the case, risking unnecessary complications and difficulties.

[11] If the government does not appeal, it will be for good reason, and only after this Court has ruled in Oracle's favor.

III. This Court Should Not Permit CWA Or USW To Intervene.

Finally, CWA and USW request permission to intervene on the grounds that they assert a "defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Because Proposed Intervenors' participation "is not essential for the just and equitable adjudication of the legal question[s] presented," *Cigar Ass'n*, 323 F.R.D. at 66 (quotation marks omitted, alteration in original), the court should deny permission to intervene. As in *Cigar Association*, Proposed Intervenors fail to show a "sufficient reason to believe that Defendants will not" fully defend against Oracle's lawsuit. *Id.* CWA and USW can seek leave to provide additional perspectives on the legal issues in this case as amici.

If this Court is inclined to permit intervention, it will need to break new ground in deciding whether permissive intervention requires standing. *See id.* (noting whether standing is required for permissive intervention "remains" an "open question in this circuit" (quoting *Defs. of Wildlife*, 714 F.3d at 1327)); Mot. 19 n.3. The court should follow persuasive authority from the D.C. Circuit that "all intervenors" must "demonstrate Article III standing." *Deutsche Bank*, 717 F.3d at 195 (Silberman, J., concurring). The D.C. Circuit requires intervenors of right to establish their standing because they seek to "participate[] on equal footing with the original parties to a suit," *Bldg. & Constr. Trades Dep't*, 40 F.3d at 1282—and that is precisely what CWA and USW seek to do as permissive intervenors. The need to establish a concrete injury is no less present.

If the court were to "dispense with the standing requirement for a defendant-intervenor, then any organization or individual with only a philosophic identification with a defendant—or a concern with a possible unfavorable precedent—could attempt to intervene and influence the course of litigation" and "settlement negotiation." *Deutsche Bank*, 717 F.3d at 195 (Silberman,

J., concurring). These concerns are especially live here, where Proposed Intervenors seek to assert a generalized grievance and defend against a phantom suit for OFCCP's elimination that Oracle has not in fact brought. CWA and USW have not explained why they need party status to advance the interests they assert. The Court should not permit CWA and USW to intervene.

CONCLUSION

For the foregoing reasons, CWA and USW's motion to intervene should be denied.

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Respectfully submitted,

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