IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ORACLE AMERICA, INC.,

Plaintiff,

vs.

U.S. DEPARTMENT OF LABOR, *et al.*

Defendants,

and

COMMUNICATIONS WORKERS OF AMERICA,
501 3rd Street NW
Washington, DC 20001

UNITED STEELWORKERS,
60 Boulevard of the Allies
Pittsburgh, PA 15222

Proposed Intervenor-Defendants,

Case No. 1:19-cv-3574 (APM)

MEMORANDUM OF LAW IN SUPPORT OF PROPOSED INTERVENORS' MOTION TO INTERVENE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

This case involves a sweeping challenge to the authority of the Office of Federal Contract Compliance Programs ("OFCCP") to enforce civil rights laws and protect employees in the workplace. Oracle brings this case in an attempt to short-circuit the enforcement action pending against it by mounting a collateral attack on OFCCP's decades-old enforcement regime and arguing that this longstanding system to address and remedy discrimination by federal contractors lacks statutory and constitutional authority. But Oracle's challenge would have far broader implications: it would restrict a key civil rights enforcement agency and undermine employees' protections against workplace discrimination, leaving others to fill the gap.

Some of the parties that would be harmed by the relief Oracle seeks include unions like the Communications Workers of America ("CWA") and the United Steelworkers ("USW") (collectively, the "Proposed Intervenors"), which seek to intervene to defend OFCCP's enforcement authority. As an initial matter, the Proposed Intervenors have standing to intervene as Defendants. Both have organizational standing because their operations would be significantly impaired if Oracle prevails in this case. Among other things, they would be deprived of a valuable source of information regarding the pervasive problem of workplace discrimination; they would have to restructure their operations to ensure their members have a forum to appropriately remedy their workplace discrimination claims; they will lose the benefit of conciliation agreements that OFCCP presently negotiates using its enforcement powers; and they would need to retool their approach to collective bargaining. Additionally, CWA has associational standing to defend the interests of its members who benefit from OFCCP's enforcement efforts and related conciliation agreements.

The Proposed Intervenors also satisfy the standards to intervene as of right under Rule 24(a). ***First***, the motion is timely because it was filed before any significant proceedings in this

matter and because Proposed Intervenors intend to adhere to the briefing schedule agreed to by the parties and adopted by this Court. ***Second***, because the Proposed Intervenors have standing, they necessarily have a sufficient interest in these proceedings to support intervention. ***Third***, that interest will be impaired by an unfavorable ruling weakening OFCCP. And ***fourth***, the Proposed Intervenors cannot rely on Defendants to adequately represent their interests in defending their workers from discrimination and protecting their operations, given Defendants' repeated and documented attempts to undermine, and even eliminate, OFCCP. Even if this Court decides that Proposed Intervenors may not intervene as of right, they should still be permitted to intervene under Rule 24(b) because their participation will ensure that the Court is fully apprised of the critical legal issues and stakes presented by Oracle's lawsuit.

For these reasons, the Proposed Intervenors respectfully request this Court grant their motion to intervene and order that their Proposed Answer—attached here as an exhibit, *see* Fed. R. Civ. P. 24(c)—be entered on the docket.

BACKGROUND

Workplace discrimination is a pervasive and persistent problem across the United States. *See* Bloom Decl., Ex. 1. The Federal Government has undertaken numerous efforts to combat it, one of which is Executive Order 11,246. To ensure that federal dollars are not used to support discriminatory workplace practices, and in recognition of the fact that workplace discrimination at employers with federal contracts imposes collateral costs on the federal government, President Lyndon Johnson issued Executive Order 11,246 to expressly prohibit federal contractors from discriminating on the basis of race, creed, color, or national origin, *see* Exec. Order No. 11,246, 30 Fed. Reg. 12,319, § 202 (Sept. 24, 1965). He later amended it to prohibit discrimination on the basis of sex, *see* Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 13, 1967). Executive Order 11,246 requires government contracts to include a series of provisions prohibiting

discrimination and requires federal contractors to take steps to comply with these provisions, including by establishing affirmative action programs. Moreover, it delegates extensive investigative and enforcement authorities to the Secretary of Labor, permitting the Secretary to, among other things, "initiate such investigation by the appropriate contracting agency, to determine whether or not the [nondiscrimination provisions] have been violated," Exec. Order No. 11,246, § 206(a), and to "receive and investigate" employee complaints, *id.* § 206(b).

Pursuant to those authorities, the Secretary established the Office of Federal Contract Compliance Programs and delegated to it the authority to discharge the Secretary's duties under the Order. *See* Dep't of Labor Sec'y's Order No. 26-65 (Oct. 5, 1965), 31 Fed. Reg. 6,921, 6,921 (May 11, 1966). OFCCP plays an indispensable role in ensuring that federal contractors comply with federal laws regarding workplace diversity and pay equity. While the Equal Employment Opportunity Commission ("EEOC") enforces the generally applicable employment discrimination laws, OFCCP focuses exclusively on federal contractors, which are subject to heightened legal requirements specifically designed to ensure that taxpayer dollars do not support discrimination. *See* Exec. Order No. 11,246; Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. § 4212; Rehabilitation Act of 1973, § 503. OFCCP therefore has a wealth of expertise found nowhere else in the federal government—expertise it uses to assist federal contractors in voluntarily complying with federal law, conduct systemic compliance reviews, and, where necessary, bring administrative enforcement actions against contractors that violate the law. *See generally* Bloom Decl., Ex. 2.

This case is brought in the midst of one such enforcement action. In 2014, OFCCP performed a random audit of an Oracle facility in Northern California and found evidence that Oracle—which receives about $100 million a year in federal contract dollars—had

systematically discriminated against employees and applicants on the basis of race and gender. *See id.*, Ex. 3. Specifically, Oracle allegedly "shorted women and minority workers $400 million in wages by paying them less than other employees, steering them into jobs at lower-level positions and imposing an 'extreme preference' for immigrant visa holders." *Id.* OFCCP filed an administrative action against Oracle in 2017, seeking millions in back pay. *See id.* The administrative trial began on December 5, 2019. *See id.*, Ex. 4.

Five days before that trial began, however, Oracle filed this lawsuit as a collateral attack on the OFCCP proceeding—one intended to prevent OFCCP from fulfilling its mission. *See* Complaint, ECF No. 1. Notably, Oracle's Complaint never explains why the Court has jurisdiction to intercede in the middle of a pending administrative proceeding, much less one which had been pending for three years and was on the verge of trial when Oracle filed suit. Instead, Oracle mounts a broad assault on OFCCP's authority, asserting that OFCCP lacks authority "to create an administrative system to bring, prosecute, and adjudicate claims of employment discrimination and affirmative-action violations and to obtain injunctive relief, back pay, and other make-whole relief for employees of government contractors." *Id.* ¶ 5. Oracle seeks a sweeping declaration that OFCCP's enforcement regime is unlawful. *Id.* at 47. This would have severe consequences: if Oracle prevails, OFCCP could face broad restrictions on its authority to redress workplace discrimination with respect to federal contractors, making it easier for companies that do business with the federal government, like Oracle, to accept taxpayer dollars while engaging in discrimination and violating federal law.

The Proposed Intervenors, the Communications Workers of America and the United Steelworkers, seek to avert that outcome. CWA represents workers in in a broad range of industries, including telecommunications, cable, information technology, airline manufacturing,

print and broadcast news media, customer service, education, public service, and healthcare, among others. *See* van Schaick Decl. ¶ 4. CWA members include at least 150,000 employees of federal contractors that were audited by OFCCP from FY 2016 to FY 2020. *Id.* CWA is committed to eliminating employment discrimination, particularly discrimination against its members, *id.* ¶ 5, and maintains departments and committees devoted to doing so, *id.* ¶¶ 7-10.

USW represents approximately 600,000 workers, including many employees of federal contractors. Redmond Decl. ¶ 6. USW is similarly committed to working toward full equality and civil rights, *id.* ¶ 7, and maintains, among other things, a national Civil and Human Rights Department, *id.* ¶ 9, as well as district-level coordinators and committees on civil rights, *id.* ¶ 10.

As explained more fully below, if Oracle prevails in this lawsuit, both unions will have to redouble their efforts to address workplace discrimination by adapting their programs and diverting substantial resources to covering the gap left by a weakened OFCCP.

LEGAL STANDARD

Under Rule 24(a), 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." Fed. R. Civ. P. 24(a)(2). Alternatively, the Court "may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact," with due 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). The motion must also be "accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c).

Courts generally take "a liberal approach to intervention." *Wilderness Soc'y v. Babbitt*, 104 F. Supp. 2d 10, 18 (D.D.C. 2000). "Courts are to take all well-pleaded, nonconclusory

allegations in the motion to intervene, the proposed complaint or answer in intervention, and declarations supporting the motion as true absent sham, frivolity or other objections." *Parker v. John Moriarty & Assocs.*, 319 F.R.D. 18, 20 (D.D.C. 2016) (quoting *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001)); *see also, e.g., United States v. AT&T Co.*, 642 F.2d 1285, 1291 (D.C. Cir. 1980) (at intervention stage, courts assess standing on basis of proposed pleading and "must accept a party's well-pleaded allegations as valid").

ARGUMENT

I. The Proposed Intervenors have standing.

As an initial matter, the Proposed Intervenors have standing to intervene as defendants.[1] "The standing inquiry for an intervening-defendant is the same as for a plaintiff: the intervenor must show injury in fact, causation, and redressability." *Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 316 (D.C. Cir. 2015). In other words, the intervenor "must establish that it will be injured in fact by the setting aside of the government's action it seeks to defend, that this injury would have been caused by that invalidation, and the injury would be prevented if the government action is upheld." *Cayuga Nation v. Zinke*, 324 F.R.D. 277, 280 (D.D.C. 2018) (quotation omitted). If Oracle prevails in this lawsuit and obtains a ruling that severely undermines OFCCP's power to enforce Executive Order 11,246's antidiscrimination mandate, the Proposed Intervenors will suffer significant harm to their operations and programs, and their members will lose a valuable source of redress for their claims of workplace discrimination.

[1] Under the Supreme Court's decision in *Town of Chester v. Laroe Ests., Inc.*, "an intervenor must meet the requirements of Article III if the intervenor wishes to pursue relief not requested by a plaintiff." 137 S. Ct. 1645, 1648 (2017). That decision is best read to suggest that an intervenor need not show standing if, as here, it does not seek any different relief. *See, e.g., Pennsylvania v. Trump*, 888 F.3d 52, 57 (3d Cir. 2018). However, the Proposed Intervenors recognize that the D.C. Circuit has held that *Town of Chester* "does not cast doubt upon, let alone eviscerate, our settled precedent that all intervenors must demonstrate Article III standing." *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1233 n.2 (D.C. Cir. 2018).

A. Both Proposed Intervenors have organizational standing.

Unions, like other organizations, are harmed if an adverse decision would "perceptibly impair[]" their operations. *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1428 (D.C. Cir. 1996) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). The Supreme Court "has made plain that a 'concrete and demonstrable injury to [an] organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests' and thus suffices for standing." *PETA v. USDA*, 797 F.3d 1087, 1093 (D.C. Cir. 2015) (quoting *Havens*, 455 U.S. at 379). An organization must show, first, that "the agency's action or omission to act injured the organization's interest," and, second, that it "used its resources to counteract that harm." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015) (quotation omitted). Stripping OFCCP of its enforcement authority would injure the Proposed Intervenors' interests in protecting their members from workplace discrimination and would impair the operations they have designed to combat such discrimination.

1. CWA has organizational standing.

CWA relies on OFCCP's enforcement authority to remedy claims of discrimination by union members and employees at companies where CWA is engaged in organizing efforts. *See* van Schaick Decl. ¶¶ 22-23. If OFCCP could no longer serve as a viable mechanism for addressing and remedying employment discrimination, CWA would have to devote substantial additional resources to provide updated informational materials, determine new legal strategies for addressing systemic discrimination in situations where CWA or a member would have been best served by making an OFCCP complaint, provide increased representation for members, engage in efforts to broaden the type of remedial relief available to the union and its members to include the full scope of relief currently available to OFCCP, and retool its organizing efforts to

continue supporting non-unionized employees at companies where CWA hopes to unionize. *Id.* ¶ 24. *Cf. Nat'l Fair Hous. All. v. Travelers Indemnity Co.*, 261 F. Supp. 3d 20, 26 (D.D.C. 2017) (finding standing where organization "diverted its resources to provide additional training for staff and develop tracking and intake procedures to prepare for a potential increased volume of calls").

CWA also relies on the wealth of information that OFCCP publishes regarding its enforcement work, including (1) the results of its enforcement-related investigations for all contractors during the previous five years, (2) conciliation agreements negotiated by OFCCP based on its enforcement authority, and (3) a list of companies OFCCP has declared ineligible to receive federal contracts due to violations of federal antidiscrimination laws, *see* Exec. Order No. 11,246, § 209(a)(1); van Schaick Decl. ¶ 13. CWA uses this data by, among other things, relying on it in its efforts to maintain industry standards, including by reporting such information to other federal enforcement agencies, *id.* ¶ 16; cross-checking OFCCP data whenever CWA is developing an organizing campaign at a new employer, *id.* ¶ 14; consulting OFCCP data to track the practices of employers at which CWA currently represents members, *id.* ¶ 15; and using OFCCP data to develop educational materials, *id.* ¶ 17.

If OFCCP's enforcement authority is curtailed, CWA would lose access to OFCCP's enforcement-generated data. *Id.* ¶¶ 18-19. That would force the union to devote substantial additional resources to collecting this information through other means, such as through Freedom of Information Act requests, tracking EEOC and private civil rights litigation, and investigating state-level data sources. *Id.* ¶¶ 19-20. Moreover, to the extent that employers' discrimination goes undetected in the absence of OFCCP investigative and enforcement efforts, such information would not be available from any other source, even given a substantial additional

expenditure of resources. CWA thus faces injuries that the D.C. Circuit has twice held sufficient for organizational standing, including just two months ago: if Oracle prevails, it would "'perceptibly impair[]' [CWA's] organizational interests by depriving it 'of key information that it relies on' to fulfill its mission." *Am. Anti-Vivisection Soc'y v. USDA*, 946 F.3d 615, 619 (D.C. Cir. 2020) (quoting *PETA*, 797 F.3d at 1094); *see also Air All. Hous. v. U.S. Chem. & Safety Hazard Bd.*, 365 F. Supp. 3d 118, 123-27 (D.D.C. 2019) (Mehta, J.).

CWA's work through its District 2-13 unit, which covers the mid-Atlantic region, Perry Decl. ¶ 3, illustrates both categories of harm. In 2019, OFCCP entered into a conciliation agreement with a facility of Frontier Communications Corporation located in Charleston, West Virginia. *Id.* ¶ 4. In exchange for OFCCP agreeing not to bring a formal enforcement action, Frontier agreed to restructure its promotion and hiring practices and submit periodic compliance reports to OFCCP. *Id.* ¶ 6. That conciliation agreement directly benefits present and future CWA members, who are now subject to Frontier's improved hiring practices anytime they seek to change positions or apply for a promotion. *Id.* ¶¶ 16, 17. Moreover, District 2-13 intends to use the agreement in multiple ways: (1) to step up its own oversight of Frontier's practices by, in part, encouraging its members to reach out to union representatives whenever they witness workplace discrimination, (2) as evidence of Frontier's history of discrimination in ongoing and future grievance processes, and (3) as a negotiating tool to bargain for more transparent and fair hiring and promotion practices. *Id.* ¶ 11. If Oracle is successful, OFCCP will no longer have the authority to enforce this agreement because it will not be able to bring an enforcement action should Frontier fail to comply with the agreement's provisions. In addition to losing the substantial benefits of the agreement described above, District 2-13 would then have to expend still more resources to independently monitor Frontier's practices. *Id.* ¶ 13.

2. USW has organizational standing.

Similarly, if OFCCP's enforcement authority is curtailed, USW would have to adapt to handle on its own more of its members' workplace discrimination claims, rather than advising them on how to remedy their claims outside the labor grievance process, including by referring them to OFCCP. Redmond Decl. ¶ 8. While USW maintains civil rights coordinators at its District level, and while its International Constitution requires local unions to maintain civil rights committees, none of USW's existing coordinators or committees, which are populated by lay members, currently has the resources to investigate the full range of employees' claims of workplace discrimination. *Id.* ¶¶ 10-11. Moreover, the labor arbitration process established through most of USW's collective bargaining agreements is not presently equipped to adjudicate claims of discrimination, *id.* ¶¶ 12-13, which is why USW does not require members to use such processes to remedy complaints of workplace discrimination, *id.* ¶ 14. Instead, USW relies on the enforcement capacity of federal agencies like OFCCP and provides information to its members about how to raise their claims to OFCCP. *Id.* ¶ 15. USW also works with OFCCP in negotiating conciliation agreements between OFCCP and workplaces where USW has members. *Id.* ¶ 16.

Stripping OFCCP of its enforcement authority would impose other specific costs on USW as well. The union would have to, among other things, hire additional staff to investigate workplace discrimination complaints, expand the responsibilities and capacity of its coordinators and committees, provide updated training and educational materials, seek to negotiate additions to collective bargaining agreements allowing for the arbitration of discrimination claims, and, where employer counter-parties agreed to such terms, bear the added burden of representing members in labor arbitration on discrimination claims that previously would have been brought to OFCCP. *Id.* ¶ 17. USW may also have to change its collective bargaining practices to focus on expanding the grievance process to provide labor arbitrators with the authority and capacity to

more effectively investigate and address complaints of workplace discrimination, *id.* ¶ 18—which could require USW to make other concessions to employers in exchange, *id.* ¶ 19.

* * *

In sum, the Proposed Intervenors have organizational standing because the effective abolition of OFCCP as an enforcement body would represent a significant change in the landscape of antidiscrimination protections that would force them to restructure key portions of their operations at significant cost. For these reasons, Proposed Intervenors have met the test for organizational standing as elaborated by this Court in *Cigar Association of America v. FDA*, 323 F.R.D. 54 (D.D.C. 2017) (Mehta, J.). In that case, the Court denied intervention to six organizations seeking to defend several of FDA's tobacco regulations. By identifying specific expenditures that they would have to make, the Proposed Intervenors have done "more than assert that [they] will have to expend some undefined amount of additional resources if [OFCCP's enforcement regime] is vacated." *Id.* at 62-63. And by explaining how their operations rely on OFCCP's work, the Proposed Intervenors "ha[ve] come forward with evidence showing that invalidating [OFCCP's enforcement regime] would inhibit [their] daily operations." *Id.* That is all that is required to show injury—especially considering the difficulty of estimating exactly how much it would cost to revamp operations predicated on the existence of a decades-old agency. *See* van Schaick Decl. ¶ 26; Redmond Decl. ¶ 21.

For many of the same reasons, the Proposed Intervenors have also shown causation and redressability. Because the Proposed Intervenors' "injury suffices for standing purposes, then it rationally follows the injury is directly traceable to [Oracle's] challenge to the [OFCCP]," and Proposed Intervenors "can prevent the injury by defeating [Oracle's] challenge." *Crossroads*, 788 F.3d at 385. If Oracle wins a favorable ruling eliminating or significantly scaling back

OFCCP's enforcement regime, then such a ruling would cause the injuries described above. Conversely, if Oracle's challenge fails, then OFCCP will continue to operate as normal. The Proposed Intervenors thus have established organizational standing.

B. CWA has associational standing.

To show associational standing, unions "must show that: their members individually would have standing to bring the same claims; the interests the [u]nions protect by bringing the claims are germane to the [u]nions' purposes; and neither the claim nor the relief sought requires individual members to participate in the litigation." *Nat'l Mar. Union of Am. v. Commander, Mil. Sealift Command*, 824 F.2d 1228, 1231 (D.C. Cir. 1987).

CWA represents members with standing in their own right, including CWA member Erin Poe. Poe Decl. ¶ 2. CWA's members benefit from an OFCCP with robust enforcement authority: OFCCP has the power to award a broader set of remedies than other agencies and far more than CWA's members could obtain through the union grievance process, and OFCCP has considerable investigative resources and legal expertise to handle claims of workplace discrimination. *See* van Schaick Decl. ¶¶ 22-23; Poe Decl. ¶ 4. Additionally, OFCCP has the authority to enforce conciliation agreements, requiring employers to adopt nondiscriminatory practices that will benefit CWA members. In District 2-13, for example, CWA's members will benefit from the nondiscriminatory hiring and staffing practices that Frontier is required to establish by virtue of its agreement with OFCCP. Perry Decl. ¶ 15. Indeed, some of CWA's members—including Ms. Poe—intend to apply for positions covered by the agreement. *Id.* ¶ 19; Poe Decl. ¶¶ 7-10. These injuries are comparable to those at issue in *National Treasury Employees Union v. Whipple*, where a union had associational standing to challenge a regulation that "prevented [its members] from applying for … position[s] with allegedly superior benefits" and limited their "right to appeal personnel actions." 636 F. Supp. 2d 63, 72-73 (D.D.C. 2009);

see also PETA, 797 F.3d at 1095 (finding standing where organization lost "a means by which to seek redress").

CWA also easily satisfies the other associational standing factors. The interests that CWA seeks to protect—its members' interests in not being subjected to workplace discrimination—are "germane" to its purpose—advocating for its members in their workplaces. *Nat'l Mar. Union of Am.*, 824 F.2d at 1231; *cf. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 286 (1986) (finding "little question" that members' interests were germane given "the interest of organized labor in obtaining benefits for its workers"); *Hawkins v. Boone*, 786 F. Supp. 2d 328, 336 (D.D.C. 2011) ("[S]ince the [union's] main purpose is to represent the employment interests of its [members] … the association clearly seeks to protect interests 'germane to its purpose.'"). And the participation of individual members is not required because the proposed defense does not require the Court to "consider the individual circumstances of any aggrieved [union] member"; rather, it "raises a pure question of law." *Int'l Union*, 477 U.S. at 287. Thus, CWA has established associational standing as well.

II. The Proposed Intervenors are entitled to intervene as of right.

"In deciding whether a party may intervene as of right," the D.C. Circuit "employ[s] a four-factor test requiring: 1) timeliness of the application to intervene; 2) a legally protected interest; 3) that the action, as a practical matter, impairs or impedes that interest; and 4) that no party to the action can adequately represent the potential intervenor's interest." *Crossroads*, 788 F.3d at 320. The Proposed Intervenors meet each of these factors. The Court should therefore grant intervention as of right. *See Amador Cty. v. U.S. Dep't of the Interior*, 772 F.3d 901, 903 (D.C. Cir. 2014) (explaining that, if Rule 24(a)'s standards are met, "a district court must grant a motion to intervene").

A. The motion is timely.

The Proposed Intervenors' motion is timely because it was filed before any significant proceedings in this matter, and because it will not result in prejudice or delay, as the Proposed Intervenors intend to comply with the briefing schedule adopted by this Court. "[T]imeliness . . . is to be judged in consideration of all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *Karsner v. Lothian*, 532 F.3d 876, 886 (D.C. Cir. 2008). "[T]he requirement of timeliness is aimed primarily at preventing potential intervenors from unduly disrupting litigation, to the unfair detriment of the existing parties." *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014). Whether intervention will "disadvantage the existing parties" is therefore "the most important consideration." *Id.* at 152.

A glance at the docket demonstrates that the motion is timely. The Proposed Intervenors filed their motion before Defendants are due to respond to the Complaint; before either side has engaged in anything besides scheduling motions and similar filings; before the parties have taken any discovery; and before the Court has issued any substantive rulings. Courts in this district have repeatedly held that motions filed before the defendant has answered, or responded to, the complaint are timely. *See, e.g.*, *Wash. All. of Tech. Workers v. DHS*, 395 F. Supp. 3d 1, 19 (D.D.C. 2019); *Waterkeeper All., Inc. v. Wheeler*, 330 F.R.D. 1, 6 (D.D.C. 2018); *Cayuga Nation*, 324 F.R.D. at 282; *Forest Cty. Potawatomi Cmty. v. United States*, 317 F.R.D. 6, 13 (D.D.C. 2016); *Hardin v. Jackson*, 600 F. Supp. 2d 13, 14, 16 (D.D.C. 2009).

The equities also favor intervention. The Proposed Intervenors have been forced to intervene to preserve their interest in an effective OFCCP. Allowing them to do so will not result in any undue prejudice or delay: the Proposed Intervenors intend to move for summary judgment

on the same day that Defendants are due to respond and will otherwise comply with the same deadlines and requirements as Defendants. The Proposed Intervenors are also willing to consent to any reasonable extension of time or page limits for Oracle's response to this motion and/or to the Proposed Intervenors' dispositive motion. Given that the forthcoming cross-motions will likely resolve this case, allowing intervention will not result in any disruption.

B. The Proposed Intervenors have a significant interest in the subject of this action.

"[S]ince [the Proposed Intervenors have] constitutional standing, [they] *a fortiori* [have] 'an interest relating to the property or transaction which is the subject of the action.'" *Crossroads,* 788 F.3d at 320 (quoting Fed. R. Civ. P. 24(a)(2)); *see also Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) ("Our conclusion that the [proposed intervenor] has constitutional standing is alone sufficient to establish that the [it] has 'an interest relating to the property or transaction which is the subject of the action.'" (quoting Fed. R. Civ. P. 24(a)(2)). As explained above, the Proposed Intervenors and their members have an interest in preserving the authority of the OFCCP to redress workplace discrimination, without which the Proposed Intervenors would have to retool their operations.

C. Disposition of this case without the Proposed Intervenors would impair their interests.

By the same token, refusing to permit the Proposed Intervenors to intervene would put them at risk of a decision that significantly weakens the OFCCP. The impairment prong is satisfied if there is even a "possibility" that intervenors' "interests may be practically impaired or impeded by the disposition of the plaintiffs' suit." *Foster v. Gueory,* 655 F.2d 1319, 1325 (D.C. Cir. 1981); *see also Utah Ass'n of Ctys. v. Clinton,* 255 F.3d 1246, 1253 (10th Cir. 2001) ("This burden is minimal." (quoting *Grutter v. Bollinger,* 188 F.3d 394, 399 (6th Cir. 1999)). In particular, an intervenor has shown impairment if a ruling for the plaintiff "would make the task

of reestablishing the status quo more difficult or burdensome." *Crossroads*, 788 F.3d at 320 (quotation omitted).

That is certainly the case here. A ruling for Plaintiffs would eliminate essential components of OFCCP's enforcement authority and remedies, forcing the Proposed Intervenors to adapt their programs and devote additional resources to filling the gap. Yet even with the expenditure of additional resources, it is hard to imagine how the Proposed Intervenors could ever reestablish the status quo. Even speculating that the Proposed Intervenors could somehow bring a separate lawsuit to do so, "it is not enough to deny intervention … because applicants may vindicate their interests in some later, albeit more burdensome, litigation." *Nat. Res. Defense Council v. Costle*, 561 F.2d 904, 910 (D.C. Cir. 1977). Because OFCCP's enforcement regime is "favorable to [the Proposed Intervenors], and the present action is a direct attack on that [regime]," *Cayuga Nation*, 324 F.R.D. at 283, the Proposed Intervenors have demonstrated impairment.

D. The interests of the Proposed Intervenors are not adequately represented by the Department.

Finally, the Department cannot serve as an adequate representative for the Proposed Intervenors' interests. As the Supreme Court has explained, the adequacy requirement is "satisfied if the applicant shows that representation of his interest 'may be' inadequate[,] and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). The D.C. Circuit has described the adequacy-of-representation requirement as "not onerous" and "low," and has held that "a movant ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation." *Crossroads*, 788 F.3d at 321 (quotation omitted). Moreover, the D.C. Circuit "look[s] skeptically on government entities serving as adequate advocates for private parties." *Id.* That is true even

where "the federal agency and prospective intervenor undisputably agree[] that the agency's current rules and practices were lawful." *Id.*

Measured under any standard, the Proposed Intervenors have a discrete and clearly defined interest in advocating for employees who face workplace discrimination and encouraging them to use the full panoply of available rights and remedies—including having access to the expertise and enforcement powers of OFCCP as a civil rights enforcement agency. In contrast, Defendants necessarily represent a broader array of interests and stakeholders, including employers, and have their own stake in preserving the federal government's relationships with existing and prospective federal contractors. Those interests could easily diverge, and even conflict; aggressively combating workplace discrimination necessarily imposes additional burdens on industry, including federal contractors. And certainly, Defendants do not share the Proposed Intervenors' interest in preserving their own organizational resources. *See Alphapointe v. Dep't of Veterans Aff.*, 2019 WL 7290853, at *1 (D.D.C. Aug. 26, 2019) (Mehta, J.) (agreeing that "the Federal Defendants may not adequately represent PDS Consultants' divergent economic interests in defending the challenged Class Deviation"). Thus, the Proposed Intervenors' "interest is not simply a 'narrower' interest … but rather, one that is clearly defined and materially different from the Federal Defendants' interests." *Alfa Int'l Seafood v. Ross*, 2017 WL 1906586, at *4 (D.D.C. May 8, 2017) (Mehta, J.). That is all that is required.

Moreover, while Defendants might "stick up" for OFCCP in this Court, "if [they] lose[] the Solicitor General may decide that the matter lacks sufficient general importance to justify proceedings before the [appellate] court . . . or the Supreme Court." *Sierra Club, Inc. v. EPA*, 358 F.3d 516, 518 (7th Cir. 2004). Intervention is therefore necessary to ensure that the Proposed

Intervenors are placed "on equal terms" and allowed "to make their own decisions about the wisdom of carrying the battle forward" should the need arise. *Id.*; *see, e.g., Am. Petroleum Inst. v. Cooper*, 2009 WL 10688053, at *3 (E.D.N.C. Feb. 27, 2009) ("If NCPCMA were relegated to amicus status, it would have no right to seek review by appeal of any decision affecting its already identified direct and substantial interest.").

Even assuming there is some overlap—in the abstract—between Proposed Intervenors' interests and Defendants', there is substantial reason to think that Defendants will not provide a vigorous defense of OFCCP.[2] To the contrary, the Trump Administration has repeatedly attempted to weaken or dismantle OFCCP—the very result sought by Oracle in this case. Specifically, the Administration proposed in its FY 2018 budget to eliminate OFCCP altogether by merging it with EEOC, *see* Bloom Decl., Ex. 5; shifted the office's priorities from enforcement to encouraging voluntary compliance, *see id.*, Ex. 6; slashed OFCCP staffing and investigations, even as federal contracts have increased, *see id.*, Ex. 7; proactively declined to use data collected by the EEOC and available to it regarding pay discrimination to aid its enforcement and oversight efforts, *see id.*, Ex. 8; tightened its control over the Department of Labor Administrative Review Board that hears appeals involving OFCCP enforcement actions, *see id.*, Ex. 9; and proposed rules that limit OFCCP's enforcement efforts to the benefit of employers, *see, e.g.*, *id.*, Ex. 10.

All of these factors suggest that Defendants will not adequately defend the Proposed Intervenors' interests in a robust OFCCP enforcement regime. These are precisely the sort of factual averments that courts have found sufficient to demonstrate inadequacy. *See, e.g., W.*

[2] Notably, it is the political appointees at the Department of Labor and political and career officials at the Department of Justice—not the career officials at OFCCP—who will make decisions on whether, and how, to defend OFCCP's authority in this case. *See* 28 U.S.C. § 516.

Energy All. v. Zinke, 877 F.3d 1157, 1169 (10th Cir. 2017) (identifying executive orders that suggested agency's interests would diverge); *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011) (agency "reluctantly adopted the restrictions" intervenors sought to defend); *Wash. All. of Tech. Workers*, 395 F. Supp. 3d at 21 (federal government signaled it would "reconsider[]" program used by intervenors). The Proposed Intervenors "should not need to rely on a doubtful friend to represent [their] interests, when [they] can represent [themselves]." *Crossroads*, 788 F.3d at 321.

III. Alternatively, the Proposed Intervenors should be permitted to intervene.

Because the Proposed Intervenors are entitled to intervene, the Court need not "decide the permissive intervention question." *Id.* at 316 n.1. Nevertheless, permissive intervention would also be appropriate.[3] Where a party files a timely motion (as is the case here), it "may be permitted to intervene if [its] claim shares a question of law or fact in common with the underlying action and if the intervention will not unduly delay or prejudice the rights of the original parties." *Acree v. Republic of Iraq*, 370 F.3d 41, 49 (D.C. Cir. 2004), *abrogated on other grounds by Republic of Iraq v. Beatry*, 556 U.S. 848 (2009). Ultimately, intervention should be granted where the movants' participation would "significantly contribute to the just and equitable adjudication of the legal question presented." *Envtl. Integrity Project v. McCarthy*, 319 F.R.D. 8, 12 (D.D.C. 2016); *see also McDonald v. E. J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970) (explaining that intervention should be permitted "where no one would be hurt and greater justice would be attained" (quotation omitted)).

[3] "It remains ... an open question in this circuit whether Article III standing is required for permissive intervention." *Cigar Ass'n*, 323 F.R.D. at 66 (quoting *Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1327 (D.C. Cir. 2013)). Thus, even if the Center were to lack standing, that conclusion would "not automatically preclude permissive intervention." *Id.*

First, the Proposed Intervenors' defense plainly "shares a question of law or fact in common with the underlying action," *Acree*, 370 F.3d at 49, given that it concerns the same questions of law at issue in the Plaintiffs' suit—namely, whether Plaintiffs' suit is barred by any jurisdictional or other prerequisites and whether OFCCP's enforcement regime is lawful.

Second, as explained above, intervention will not unduly delay or prejudice the rights of the original parties. Quite the opposite. The Proposed Intervenors will abide by the briefing schedule this Court has set and the attendant requirements that apply to Defendants.

Third, the Proposed Intervenors will provide a valuable perspective on the issues at the heart of this case. Given their own substantial experience and expertise, the Proposed Intervenors will be able to mount a vigorous defense of OFCCP's authority and explain why a robust enforcement regime is critical to eliminating workplace discrimination at federal contractors. In contrast, the Proposed Intervenors have "given the [C]ourt sufficient reason to believe that Defendants will not defend [OFCCP's enforcement regime] to the fullest." *Cigar Ass'n*, 323 F.R.D. at 66. The Proposed Intervenors' participation would therefore "significantly contribute to the just and equitable adjudication of the legal question presented," *Envtl. Integrity Project*, 319 F.R.D. at 12, without disrupting these proceedings at all.

CONCLUSION

The Court should grant the Proposed Intervenors' Motion to Intervene and order that their Proposed Answer be entered on the docket.

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Respectfully submitted,

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