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, *et al.* *Proposed Intervenor-Defendants*.	Case No. 1:19-cv-3574 (APM)

REPLY MEMORANDUM IN SUPPORT OF THE PROPOSED INTERVENORS' MOTION TO INTERVENE

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INTRODUCTION

In seeking to prevent the Communications Workers of America ("CWA") and the United Steelworkers ("USW") from intervening, Oracle tries to cast its challenge to OFCCP's authority as a narrow one. As Oracle portrays it, this case has no overarching significance because OFCCP's ability to institute administrative hearings and award injunctive and remedial relief can be easily severed from its other oversight and enforcement efforts and because other agencies can readily take over OFCCP's enforcement role as to federal contractors. Oracle thus claims that the injuries the Proposed Intervenors have identified to support their standing and intervention will never come to pass.

Oracle's premise is wrong, and its argument falls with it. At the outset, Oracle's own actions in bringing this case belie its claim that federal enforcement through other means is as effective as OFCCP's current regime. Oracle is plainly not indifferent as to whether OFCCP's current regime stays in place, as demonstrated by its extraordinary attempt to invalidate that scheme before any determination has even been made as to its liability in the ongoing enforcement action against it. That is because there is abundant evidence that OFCCP's use of administrative hearings and injunctive and remedial relief give "teeth to the mandate" of Executive Order 11,246. *United States v. Miss. Power & Light Co.*, 638 F.2d 899, 906 (5th Cir. 1981) (quotation omitted). Pulling those teeth would prevent OFCCP from fulfilling its mission to eradicate and remedy employment discrimination, undermining the federal government's comprehensive efforts to enforce the civil rights laws. Such a result would undoubtedly affect the nearly one-in-five workers in America employed by federal contractors subject to OFCCP's jurisdiction[1]—many of whom are members of, and represented by, the Proposed Intervenors.

[1] *History of Executive Order 11246*, U.S. Dep't of Lab., OFCCP, https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history.

If Oracle succeeds in undercutting OFCCP, and thus the federal government's efforts to enforce the civil rights laws, the Proposed Intervenors will be forced to adapt their programs and operations to ensure their worker-members have sufficient protections against workplace discrimination. As explained in sworn declarations—none of which are controverted by Oracle—and in their opening brief, the unions anticipate having to hire and train new staff, alter their collective bargaining approach, hire outside counsel, and otherwise adapt in ways necessary to enable them to assume a more central role in identifying, investigating, and seeking to remedy workplace discrimination for both individual matters and more systemic complaints of discrimination. *See* van Schaick Decl. ¶ 24; Redmond Decl. ¶¶ 17-18.

That surely is sufficient to establish that the Proposed Intervenors have standing, and *a fortiori*, an interest in this lawsuit that would be impaired if Oracle were to succeed in this lawsuit. Moreover, the government's partial defense of OFCCP, analyzed in the context of this Administration's attempts to undermine OFCCP's role in federal civil rights enforcement, demonstrates that the Proposed Intervenors' interests may not be adequately represented here.

For these reasons, this Court should grant the Proposed Intervenors' Motion to Intervene and order that their Proposed Answer and Proposed Motion for Summary Judgment be entered on the docket accordingly.

ARGUMENT

I. The Proposed Intervenors have standing.

In their opening brief and accompanying declarations, the Proposed Intervenors set forth facts—"which for purposes of summary judgment will be taken as true," *Air All. Hous. v. U.S. Chem. & Safety Hazard Invest. Bd.*, 365 F. Supp. 3d 118, 123 (D.D.C. 2019) (Mehta, J.) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992))—demonstrating their standing. If Oracle succeeds in this lawsuit would strip OFCCP of its enforcement authority, including its authority

to institute administrative hearings and seek injunctive and remedial relief, and in so doing, "perceptibly impair[]" the missions and operations of both of the Proposed Intervenors. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 365 (1982). CWA will be injured for an additional reason: its members at the West Virginia Frontier facility, including Ms. Erin Poe, risk losing the benefit of the Conciliation Agreement currently in effect requiring Frontier to establish and maintain nondiscriminatory staffing procedures under the threat of an OFCCP enforcement action. *See Nat'l Mar. Union of Am. v. Commander, Mil. Sealift Command*, 824 F.2d 1228, 1231 (D.C. Cir. 1987).

Oracle's arguments to the contrary do not withstand scrutiny.

A. Oracle's lawsuit poses a grave threat to federal civil rights enforcement.

The main thrust of Oracle's challenge to the Proposed Intervenors' standing is that Intervenors purportedly "misread[] … the Complaint." Mem. Supp. Pl.'s Opp. Mot. to Intervene ("MTI Opp.") 6, ECF No. 14. Oracle asserts that it is not seeking to "effectively abolish or eliminate OFCCP," and that, even if it is successful, OFCCP could "continue to investigate and audit contractors for employment discrimination, compile data, and refer matters to DOJ and the EEOC." *Id.* at 7. Oracle contends that the consequences of its lawsuit would merely be "a simple return to all ... litigation [under Executive Order 11,246] being … in federal court." *Id.*

That could not be farther from the truth. The procedures that Oracle challenges—OFCCP's ability to institute hearings and seek injunctive and remedial relief—are integral parts of the government's longstanding and coordinated effort to enforce a multitude of federal civil rights laws. Removing those cogs will diminish the government's capacity to prosecute cases of workplace discrimination, and it will undermine OFCCP's efforts to collect important data and to achieve voluntary compliance with the Executive Order.

1. Stripping OFCCP of its enforcement authority would undermine the federal government's efforts to enforce civil rights laws.

Oracle insists time and again that the unions will not be harmed, should it succeed in this lawsuit, because the Employment Litigation Section of the Department of Justice's ("DOJ ELS") Civil Rights Division and the Equal Employment Opportunity Commission ("EEOC") can take on the cases that OFFCP otherwise would have. *See, e.g.*, MTI Opp. 7. Not so. Eliminating OFCCP's enforcement authority would severely diminish the federal government's capacity to prosecute discrimination cases against federal contractors. DOJ ELS and EEOC do not have the staff, budget, or, in the case of EEOC, authority, to subsume OFCCP's workload to enforce Executive Order 11,246. And even if they did, the resulting system would be inefficient and piecemeal—in defiance of the "the public interest … in the efficient enforcement of Executive Order 11246." *United Space All., LLC v. Solis*, 824 F. Supp. 2d 68, 99 (D.D.C. 2011).

As an initial matter, EEOC has no authority to enforce Executive Order 11,246. *See Workplace Laws Not Enforced by the EEOC*, EEOC, https://www.eeoc.gov/laws/other.cfm (last visited Apr. 7, 2020). Instead, the only federal law that EEOC can enforce against federal contractors related to race- and gender-based discrimination is Title VII. That means EEOC cannot prosecute a federal contractor (1) for failing to implement an affirmative action program, which is required under the Executive Order but not Title VII, *compare* Exec. Order No. 11,246 § 202(1), *with* 42 U.S.C. § 2000e-2(j); (2) for refusing to provide the reporting data required under OFCCP regulations, *see* 41 C.F.R. §§ 60-1.7(a), 60-2.13, but not Title VII; (3) for violating the Order's explicit prohibition of discrimination based on gender identity or sexual orientation, *compare* Exec. Order No. 13,672 (July 21, 2014), 79 Fed. Reg. 42,971 (July 23,

2014) (amending Executive Order 11,246), *with* 42 U.S.C. § 2000e-2;[2] or (4) for violating the Order's explicit prohibition of discrimination against employees or applicants who inquire about, discuss, or disclose their compensation, *see* Exec. Order. No. 13,665 (Apr. 8, 2014), 79 Fed. Reg. 20,749, 20749-50 (Apr. 11, 2014) (amending Executive Order 11,246), a prohibition which is not fully mirrored under Title VII, *see EEOC Retaliation Enforcement Guidance* § II(f), EEOC, https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#f._Inquiries. Nor can EEOC seek contract cancellation, termination, or debarment as provided for under the Executive Order but not Title VII. *Compare* Exec. Order No. 11,246 § 209, *with* 42 U.S.C. § 2000e-5(g).[3]

But even putting those stark differences in enforcement power aside, EEOC would, as a practical matter, be unable to take on all of the cases OFCCP currently prosecutes. EEOC staff size has shrunk by 42 percent since 1980, *see* Amicus Curiae Br. of States ("State Amicus") 23, ECF No. 15-1, yet it continues to receive tens of thousands of complaints of discrimination each year, *see* 2019 Civil Rights Report at 322, adding to its 70,000 case backlog, *see* Ltr. Opposing OFCCP-EEOC Merger 2-3. Given these very real capacity issues, EEOC would, in practice, be unable to fill the gap left by OFCCP, were Oracle successful in this lawsuit. Indeed, as early as 1972, Congress acknowledged that merging EEOC and OFCCP would likely result in a

[2] The EEOC has previously concluded that such discrimination constitutes discrimination on the basis of sex prohibited by Title VII. *See Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at *6 (EEOC Apr. 20, 2012); *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at *7-8 (EEOC July 15, 2015). However, the current Administration has disagreed, and the Supreme Court will decide the matter this Term. *See Altitude Express, Inc. v. Zarda*, No. 17-1623 (S. Ct. argued Oct. 8, 2019); *see also* Coalition Letter to Speaker of the House Paul Ryan et al., Opposing the Elimination of OFCCP 2 (May 26, 2017), https://www.aclu.org/sites/default/files/field_document/2017-05-26_ofccp_sign_on_letter_house.pdf [hereinafter "Ltr. Opposing OFCCP-EEOC Merger"].

[3] *See also* Are Rights a Reality? Evaluating Federal Civil Rights Enforcement 285, U.S. Comm'n on C.R. (Nov. 21, 2019), https://www.usccr.gov/pubs/2019/11-21-Are-Rights-a-Reality.pdf [hereinafter "2019 Civil Rights Report"].

"watering down" of the Executive Order. *See* 118 Cong. Rec. 1664-72, 4918 (1972) (remarks of Sen. Javits). Oracle can point to nothing in the intervening decades making that conclusion less true today.

Referring cases to DOJ ELS presents similar problems. That office, too, faces budget constraints. *See* 2019 Civil Rights Report at 80 (describing the Division's recent "budget challenges" as "critical, as they may be linked to decreases in the number of cases brought and precedents set"). And it has its own enforcement obligations to carry out, including the responsibility to enforce Title VII against state and local governments. *See* DOJ Manual § 8-2.211 (Mar. 2018), https://www.justice.gov/jm/jm-8-2000-enforcement-civil-rights-civil-statutes#8-2.100; M*emorandum of Understanding: Title VII Employment Discrimination against State and Local Governments*, EEOC & DOJ (Dec. 21, 2018), https://www.justice.gov/opa/press-release/file/1122816/download.

Moreover, DOJ ELS has enforcement priorities that, at least at present, differ from those of OFCCP: DOJ focuses on cases involving discriminatory intent, whereas OFCCP's focus is broader and includes cases of discriminatory impact, discriminatory intent, and violations of affirmative action obligations. *See* FY2019 Performance Budget Congressional Justification 25, C.R. Div., DOJ, https://www.justice.gov/file/1034196/download. Indeed, the Civil Rights Division has not even included enforcement of Executive Order 11,246 in its budget justifications for the past four fiscal years.[4] And, even if it were to prioritize such cases, there is

[4] *See generally* FY2018 Performance Budget Congressional Justification, C.R. Div., DOJ, https://www.justice.gov/file/968731/download; FY2019 Performance Budget - Congressional Justification, C.R. Div., DOJ, https://www.justice.gov/file/1034196/download; FY2020 Performance Budget Congressional Justification, C.R. Division, DOJ, https://www.justice.gov/jmd/page/file/1143936/download; FY2021 Performance Budget - Congressional Justification, C.R. Div., DOJ, https://www.justice.gov/file/1034196/download.

nothing to suggest that DOJ ELS would do so for enforcement of certain kinds of violations, like violations of OFCCP regulations requiring that contractors provide critical information relevant to assessing discrimination.

Litigating all Executive Order 11,246 cases in an Article III court would also engender significant inefficiencies—a result this Court should not take lightly, *see Solis*, 824 F. Supp. 2d at 99. That is because, after an OFCCP investigation and referral, DOJ ELS would conduct a *second* investigation before deciding to prosecute the case. *See* DOJ Manual § 8-2.110; Amicus Curiae Br. of Former Gov't Officials ("Gov't Officials Amicus") 19, ECF No. 19-1. In some instances, and to avoid expending such investigatory resources, DOJ ELS might close cases that OFCCP, having already expended the investigatory resources, would have pursued. And even for cases that made it to federal court, OFCCP would likely be asked to take them up again because there would be "no reason to burden [a court's] scarce judicial resources with the task of supervising the enforcement of the federal contract compliance program," in light of OFCCP's "expertise" in doing so. *United States v. New Orleans Pub. Serv., Inc. ("NOPSI")*, 553 F.2d 459, 474 (5th Cir. 1977), *vacated on other grounds*, 436 U.S. 942 (1978).[5] Accordingly, and as a court in this District has explained, requiring the government to go to court to enforce the Executive Order would "subvert the process of [the] Executive Order [and] turn government contract law on its head," *Uniroyal, Inc. v. Marshall*, 482 F. Supp. 364, 372 (D.D.C. 1979).

Given the above, the consequences of Oracle's lawsuit would not be, as it claims, a "simple return to all ... litigation [under Executive Order 11,246] being … in federal court." MTI Opp. 7. To the contrary, stripping OFCCP of its authority to prosecute discrimination cases

[5] Notably, the federal contractor in *NOPSI* argued that by filing a case in federal court, rather than an administrative enforcement action, "the Government ha[d] failed to afford the company a hearing mandated under the program." *NOPSI*, 553 F.2d at 472-73.

would "significantly complicate, inevitably slow, and in some cases prevent altogether efforts to address the potential discrimination OFCCP has identified." Gov't Officials Amicus 19. Indeed, just last year, the U.S. Commission on Civil Rights found that federal agencies—including DOJ ELS, EEOC, and OFCCP—"generally lack adequate resources to investigate and resolve discrimination allegations within their jurisdiction, leaving allegations of civil rights violations unredressed." 2019 Civil Rights Report at 4. Requiring two agencies to do the work of three would only exacerbate the problem, *see id.* at 285 (concluding that merging EEOC and OFCCP would lead to a "loss" in "effective civil rights enforcement")—a result that would certainly harm the Proposed Intervenors, who rely on that robust enforcement regime to provide necessary protections to their members against workplace discrimination.

2. Administrative hearings are essential to OFCCP's enforcement regime.

Stripping OFFCP of its enforcement authority under Executive Order 11,246 would also weaken OFCCP's other regulatory efforts to achieve voluntary compliance with the Order. As the former DOJ, EEOC, and OFCCP officials explain as *amici*, "the power to enforce is a necessary complement to the power to regulate." Gov't Officials Amicus 3. OFCCP's administrative enforcement authority thus gives "teeth to the mandate" of Executive Order 11,246. *Miss. Power & Light Co.*, 638 F.2d at 906 (quotation omitted). And it provides OFCCP the leverage needed to achieve voluntary compliance with the Order. *See* 79 Fed. Reg. 46,562, 46,562 (Aug. 8, 2014).

Take OFCCP's conciliation procedures. In the event OFCCP finds evidence of discrimination in violation of Executive Order 11,246, the agency will attempt to resolve the matter through a Conciliation Agreement—a written agreement in which OFCCP agrees not to institute an administrative enforcement action in exchange for the contractor agreeing to "correct the violations and/or deficiencies" and take "such remedial action as may be necessary,"

including by paying back pay. 41 C.F.R. § 60-1.33. If a contractor violates the terms of a Conciliation Agreement, OFCCP can initiate enforcement proceedings. 41 C.F.R. § 60-1.34(c). These agreements thus hinge on OFCCP's authority to initiate administrative enforcement actions. *See* Gov't Officials Amicus 18-19 ("The desire to avoid an adversarial process is often what motivates a party to come to the table and work with its regulator to reach a compromise."). Contractors would be far less inclined to engage meaningfully in the conciliation process if OFCCP did not itself have the power to institute an enforcement action. *See* Gov't Officials Amicus 19.

OFCCP's other compliance efforts likewise depend on its enforcement authority. For example, to uncover cases of likely discrimination for further investigation and enforcement, OFCCP requires contractors to compile and submit data concerning their employment practices, *see* 41 C.F.R. §§ 60-1.7(a), 60-2.13, and conducts compliance evaluations, *id.* § 60-1.20—efforts which in and of themselves encourage voluntary compliance, *see* 79 Fed. Reg. at 46,563. But, as with conciliation agreements, these efforts would be rendered less effective if OFCCP had no enforcement authority. As an initial matter, OFCCP would be unable to prosecute a federal contractor's failure to provide the agency data requested through compliance evaluations. That would eliminate a key incentive for contractors to comply with such requirements. Moreover, absent OFCCP's use of its independent enforcement authority to "focus on finding and remedying systemic workplace discrimination there would be fewer tangible incentives for contractors" to willingly alter their behavior as the result of data-gathering or compliance evaluations, including by "implement[ing] affirmative action programs to prevent workplace discrimination." *See* 71 Fed. Reg. 35,124, 35,125 (June 16, 2006); *see* Gov't Officials Amicus 3-

4 ("In a world where OFCCP wields no enforcement authority, contractors would engage less in the various initiatives the Office now undertakes to promote voluntary compliance."); *id.* at 18.

It is no answer that OFCCP could still refer cases to DOJ or EEOC. *See* State Amicus 21-23; Gov't Officials Amicus 19-20. As discussed above, EEOC has no authority to enforce Executive Order 11,246 and its implementing regulations—including OFCCP regulations requiring contractors to report data. In addition, there is no guarantee that either DOJ or EEOC would exercise their prosecutorial discretion—operating against the backdrop of limited budgets, competing enforcement obligations, and divergent enforcement priorities—to bring a case. The chances of an enforcement action are thus significantly diminished—a fact that changes the calculus for any federal contractor assessing whether to comply with OFCCP regulations and/or voluntarily alter its behavior in accordance with the Executive Order.

3. Injunctive and remedial relief are essential to OFCCP's enforcement regime.

OFCCP's efforts to enforce Executive Order 11,246 would likewise be impeded if injunctive and remedial relief are not recoverable under the Order. The only other available relief would be contract cancellation or debarment—sanctions that do not incentivize voluntary compliance to the same extent. *See* 47 Fed. Reg. 17,770, 17,773 (Apr. 23, 1982) (the threat of debarment "is only a limited deterrent to discrimination[]"); 46 Fed. Reg. 36,213, 32,615 (July 14, 1981) (identifying the compliance "incentive" provided by the availability of back pay). In fact, OFCCP rarely seeks to cancel a contract or debar a federal contractor. *See* 47 Fed. Reg. at 17,773. If those were the only remedies the government could seek through an enforcement action, there would be less incentive for a contractor to enter into conciliation agreements with OFCCP, Gov't Officials Amicus 19—thereby limiting OFCCP's ability to achieve voluntary compliance with the Executive Order.

Moreover, if injunctive and remedial relief were not recoverable under the Order, the government would be unable to seek back pay in a wide range of cases. That includes many that would directly affect the Proposed Intervenors' members, like cases involving discrimination based on an employee's compensation disclosure or those involving violations of affirmative action obligations—where a contractor therefor violates the Order but not Title VII. *See supra* 4-5. In such cases, the government would be unable to prevent the "perpetuat[ion]" of discrimination and "continuing violation[s]" of the Executive Order. 40 Fed. Reg. 13,311, 13,313 (Mar. 26, 1975).

* * *

In sum, the impact of an Oracle victory on the federal government and, in turn, on the Proposed Intervenors, would be severe. It would diminish the federal government's overall capacity to prosecute workplace discrimination claims. It would meaningfully change the way OFCCP operates and render it less effective at achieving voluntary compliance with the mandates set forth in Executive Order 11,246. And it would turn the federal government's comprehensive efforts to enforce civil rights laws against federal contractors into a patchwork quilt, in which EEOC can prosecute some types of claims, DOJ others, and any case likely returning to OFCCP at the end of it all for future compliance monitoring. When the full extent of Oracle's lawsuit becomes clear, so, too, do the Proposed Intervenors' claims of standing.

B. The Proposed Intervenors will suffer organizational injuries.

As detailed in their sworn declarations—which are "taken as true" at this stage of the litigation, *Air All. Hous.*, 365 F. Supp. 3d at 123— and opening brief, the Proposed Intervenors have shown that they will suffer organizational injuries if Oracle succeeds in its lawsuit. Both rely on OFCCP's oversight and enforcement authority to identify, remedy, and prevent federal contractors from violating their nondiscrimination obligations under Executive Order 11,246. For

example, USW does not typically bargain for a labor arbitration process that obligates employees to resolve all claims of workplace discrimination through arbitration because the arbitral process does not effectively address many cases of systemic workplace discrimination, Redmond Decl. ¶¶ 12-14. Instead, it relies on OFCCP: it educates USW-members of the remedial options available with OFCCP, *id.* ¶ 15, and it relies on OFCCP's ability to seek voluntary compliance from federal contractors through its oversight, monitoring, and conciliation efforts, *id.* ¶ 16, which lessen the likelihood that USW members will ever suffer from workplace discrimination. The same is true of CWA, *see* van Schaick Decl. ¶¶ 23-24; Perry Decl. ¶ 13, which also relies on the wealth of information that OFCCP produces as a result of its enforcement authority, van Schaick Decl. ¶¶ 13-17; Perry Decl. ¶ 11.

If Oracle succeeds in this lawsuit, the Proposed Intervenors will lose access to OFCCP as an essential forum to remedy workplace discrimination that harms their members; lose the benefit of OFCCP's efforts to recover backpay for their members; lose the benefit of OFCCP's efforts to seek voluntary compliance and deter discrimination; be unable to obtain as much data; and be forced to divert resources to altering their operations in response. Redmond Decl. ¶¶ 17-18; van Schaick Decl. ¶ 24; Perry Decl. ¶¶ 12-13. Both unions, therefore, have organizational standing to intervene in this lawsuit.

Oracle's arguments to the contrary fail.

First, Oracle specifically challenges CWA's claim that it will be injured by the loss of data produced through OFCCP enforcement efforts. That is incorrect. As discussed above, stripping OFCCP of its enforcement authority will have direct effects on OFCCP's other operations, including those that result in the publishing of data on which CWA relies. For example, CWA relies on information made public as a result of OFCCP's enforcement

investigations. van Schaick Decl. ¶ 13. But, if OFCCP cannot bring enforcement actions, the data produced by its predicate investigations will no longer be made available. *See* Gov't Officials Amicus 3-4. CWA also relies on information made public through conciliation agreements. van Schaick Decl. ¶ 13; Perry Decl. ¶ 11. But OFCCP's ability to enter such agreements hinges on its enforcement authority—without which there will be fewer agreements and thus less information made available through such agreements. *See* Gov't Officials Amicus 13-14; Perry Decl. ¶ 12. Finally, CWA relies on OFCCP's publication of the list of debarred contractors. van Schaick Decl. ¶ 13. But if the government has diminished capacity to prosecute violations of Executive Order 11,246, fewer contractors will be debarred, resulting in a corresponding reduction in data available to CWA about the state of contractor compliance with the Executive Order.

Losing this data will prevent CWA from using it to maintain up-to-date knowledge about the state of compliance with federal civil rights laws, including Executive Order 11,246, and thereby hamper the union's efforts to prevent and protect against workplace discrimination. van Schaick Dec. ¶¶ 14-21. That gives the union standing. *See Am. Anti-Vivisection Soc'y v. USDA*, 946 F.3d 615, 619 (D.C. Cir. 2020); *PETA v. USDA*, 797 F.3d 1087, 1093 (D.C. Cir. 2015); *Nat'l Women's Law Ctr. v. OMB*, 358 F. Supp. 3d 66, 79-80 (D.D.C. 2019); *Air All. Hous.*, 365 F. Supp. 3d at 123-27.

Second, Oracle describes as "speculation" USW's claims averments about how it will change its collective bargaining efforts. MTI Opp. 11-12. They are is anything but. Granting the relief sought by Oracle will disturb the stability of labor relations by upending the decades-long, settled expectations of the parties to collective bargaining agreements. Unions such as USW, along with regulated employers, have negotiated labor arbitration and civil rights clauses in collective bargaining agreements against a backdrop in which OFCCP possesses the remedial

and administrative authority here challenged. Stripping OFCCP of that authority will change the basic assumptions of collective bargaining parties and will force each to consider making or demanding concessions in order to collectively bargain substitutes for existing procedures. Redmond Decl. ¶¶ 19-20. Because labor law does not require parties to make concessions, 29 U.S.C. § 158(d), it is possible that, in many instances, the remedial gaps may remain unfilled, as parties will be unable to reach agreements to resolve by collective bargaining the procedures upon which each has relied for decades.

Third, Oracle argues that the unions will not be injured because they have other options—*i.e.*, they could turn to EEOC to attain remedies available under Title VII or hold out hope that OFCCP will refer a matter to DOJ and that DOJ will prosecute. *See* MTI Opp. 9-11. Even if that were true, an organization does not have "to prove that [it is] entirely hamstrung by challenged actions" to establish organizational standing. *O.A. v. Trump*, 404 F. Supp. 3d 109, 143 (D.D.C. 2019); *see also League of Women Voters v. Newby*, 838 F. 3d 1, 9 (D.C. Cir. 2016) ("obstacles" that made it "more difficult for the Leagues to accomplish their primary mission" constituted injury). In any event, Oracle offers no evidence for its suggestion that EEOC and DOJ could simply pick up where OFCCP leaves off in prosecuting discrimination cases. As discussed above, they 8 could not.[6]

Fourth, Oracle argues that "returning OFCCP to its investigative roots and permitting DOJ and EEOC to reassert their prosecutorial authority is not contrary to CWA and USW's … anti-discrimination mission[s]." MTI Opp. 12. Properly framed, however, the issue is whether Oracle's success in this lawsuit would diminish the government's capacity to prosecute workplace discrimination claims and undermine OFCCP's own pre-enforcement efforts to

[6] Nor could the states. *See* State Amicus 23-25.

achieve voluntary compliance with Executive Order 11,246, thus injuring the unions and their mission to protect worker-members from workplace discrimination. For the reasons discussed above, it would.

Fifth, Oracle insists that the Proposed Intervenors' claim of standing is undercut by the fact that the effects of the lawsuit would be broadly felt by other unions and workers. *See* MTI Opp. 12-13. But not all unions represent employees of government contractors, and those that do may not all depend on the OFCCP process.

More important, "[a]n injury shared by a large number of people is nonetheless an injury." *Cutler v. U.S. Dep't of Health & Human Servs.*, 797 F.3d 1173, 1180 (D.C. Cir. 2015) (quotation omitted); *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 n.7 (2016) ("The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance."); *FEC v. Akins*, 524 U.S. 11, 24 (1998) ("[W]here a harm is concrete, though widely shared, the Court has found injury in fact." (quotation omitted)). The Proposed Intervenors represent a significant proportion of the workers in America who stand to lose if OFCCP's enforcement regime is left debilitated should Oracle succeed in this matter. The Proposed Intervenors will, as a result, be left to fill the gap—or, at least, attempt to fill the gap—to ensure its members maintain sufficient protections from workplace discrimination. Whether other unions could also raise similar claims is irrelevant. What matters here is that both CWA and USW have produced a substantial factual record—one which is uncontroverted and must be taken as true at this stage of the litigation—showing how they currently rely on OFCCP to effectuate their missions, and how their operations will be impeded and their pocketbooks taxed, if Oracle were here successful. No more is needed to establish standing.

C. CWA will suffer associational injury.

CWA also has associational standing. As explained in its opening brief, CWA members at the West Virginia Frontier facility, like Ms. Poe, stand to lose the benefit of Frontier's Conciliation Agreement with OFCCP and the nondiscriminatory staffing practices required under it. That agreement is enforceable through OFCCP's authority to "initiate[] immediately" an "enforcement proceeding[]" if it determines that Frontier has "violated its commitments" under the Agreement. *See* 41 C.F.R. § 60-1.34(c). Absent that authority, however, OFCCP's only recourse for violation of the agreement would be to refer the case to DOJ.[7] But, DOJ will conduct its own investigation and make its own prosecutorial decision—a process that takes time and provides no guarantee that Frontier will ever be called to account for its violations. In the meantime, CWA members would suffer. That is not, as Oracle contends, a "generalized grievance." MTI Opp. 15. Instead, it is precisely the kind of injury that courts have recognized is sufficient to confer standing.

For this reason, Oracle's reliance, MTI Opp. 14-15, on *Hollingsworth v. Perry*, 570 U.S. 693 (2013) and *Diamond v. Charles*, 476 U.S. 54 (1986) is misplaced. In *Hollingsworth*, the Supreme Court held that the original proponents of a state law did not have standing to challenge a district court order finding that law unconstitutional because, as the Court explained, "[t]heir only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law." 570 U.S. at 705-06. Similarly, in *Diamond*, the Court held that a private citizen "whose own conduct is neither implicated nor threatened by a *criminal* statute has no judicially cognizable interest in the statute's defense." *Diamond*, 476 U.S.

[7] Oracle asserts that OFCCP could refer the case to EEOC. MTI Opp. 14. But, as discussed above, EEOC has no authority to enforce contractual violations, including any claims that Frontier has violated the terms of the Conciliation Agreement.

at 56 (emphasis added). *Hollingsworth* and *Diamond* thus stand only for the proposition that an individual does not have standing to defend the legality of generally applicable laws if they cannot show how the enforcement of such laws will injure them.

Here, however, the CWA has demonstrated the requisite nexus between its members and OFCCP's continued enforcement of Executive Order 11,246. CWA members, including Ms. Poe, currently work at the West Virginia Frontier facility; that facility is the subject of a conciliation agreement between the company and OFCCP; and under that agreement, Frontier must develop and maintain nondiscriminatory staffing procedures—procedures that will benefit CWA members any time they apply for a promotion or new position. Those members thus have a cognizable interest in ensuring that OFCCP maintains the ability to enforce an agreement to which they are beneficiaries. Because Oracle does not dispute that their interests are "germane" to CWA's purpose, or that those members is necessary, *see Nat'l Mar. Union*, 824 F.2d at 1231, CWA has associational standing.

D. The Proposed Intervenors have demonstrated causation and redressability.

The Proposed Intervenors have demonstrated that the injuries identified above will be caused by an Oracle victory in this lawsuit and would be redressed if the lawsuit were dismissed.

Oracle's only argument to the contrary is that causation and redressability are more difficult to establish when they "hinge on the response of the regulated party." MTI Opp. 15-16. But the Proposed Intervenors' standing does not turn on how federal contractors would respond. As explained above, an Oracle victory in this lawsuit would diminish the government's capacity to prosecute claims of workplace discrimination against federal contractors and limit CWA's access to important information. The Proposed Intervenors would have to adjust their operations and divert resources as a result—regardless of whether federal contractors would actually "discriminate more" or not. *Id.* 16.

In any event, it is not hard to imagine that federal contractors would feel less need to comply with the requirements imposed by Executive Order 11,246 if DOJ ELS and EEOC—with their limited resources and competing obligations—were left to pick up the slack created by OFCCP's sudden departure from the realm of civil rights enforcement. As *amici*, including former OFCCP officials, explained at length, the agency's enforcement authority is what incentivizes contractors to voluntarily cooperate with OFCCP to achieve compliance with the Executive Order, including by entering conciliation agreements and otherwise altering their conduct based on evidence revealed through OFCCP's data-gathering and compliance evaluation efforts. *See* Gov't Officials Amicus 14, 18; *see also* 71 Fed. Reg. at 35,125; 46 Fed. Reg. at 32,615; The Federal Civil Rights Enforcement Effort—1977 142, Comm'n on C.R. (Dec. 1977). "[T]here is no question that," stripped of its authority, OFCCP's relationship with the regulated community "would shift." Gov't Officials Amicus 18. Moreover, and with regard to OFCCP's authority to seek back pay, federal contractors have, in the past, acknowledged that the possibility of such awards does more to deter discrimination than the possibility of debarment. *See* 47 Fed. Reg. at 17,773. These uncontroverted facts are sufficient to support the Proposed Intervenors' standing to intervene in this case.

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

Oracle concedes that the Proposed Intervenors' motion is timely. *See* MTI Opp. 17. The Proposed Intervenors have also shown that they have an interest in protecting their operations and resources—one that would be impaired by the sweeping relief Oracle seeks, and one that the Department cannot and will not adequately represent. Mem. in Supp. Mot. to Intervene ("Mot.") 15-19, ECF No. 10-1. They are therefore entitled to intervene by right.

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

Oracle acknowledges that, if the Proposed Intervenors have standing, they "*a fortiori* [have] an interest'" within the ambit of Rule 24. *Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 320 (D.C. Cir. 2015) (quoting Fed. R. Civ. P. 24(a)(2)); *see* MTI Opp. 17. Contrary to Oracle's attempts to distort Rule 24, that is all that the Proposed Intervenors need to show to meet the interest requirement.

In particular, Oracle tries to engraft a prudential standing requirement onto Rule 24's interest requirement. To do so, it relies on the D.C. Circuit's decision in *Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189 (D.C. Cir. 2013). But subsequent "caselaw in this circuit appears to preclude [Oracle's] position," *Campaign Legal Ctr. v. FEC*, 334 F.R.D. 1, 5 (D.D.C. 2019). Just two years later, and in the wake of the Supreme Court's decision in *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), the D.C. Circuit clarified that "[w]here an intervenor-defendant establishes Article III standing and meets the dictates of Federal Civil Rule 24, there is no need for another layer of judge-made prudential considerations to deny intervention." *Crossroads*, 788 F.3d at 320. Thus, the concept of prudential standing—itself a "misnomer," *see Lexmark*, 572 U.S. at 127 (quotation omitted)—has no bearing on whether the Proposed Intervenors may intervene.

It is unclear whether and to what extent Rule 24 continues to impose a "nexus requirement" between the intervenor's interest and the underlying case. *See Deutsche Bank*, 717 F.3d at 195, MTI Opp. 18 n.9. Even if there is such a requirement, there is plainly a nexus between Oracle's sweeping challenge to OFCCP's authority and the Proposed Intervenors' significant protectable interest in defending their programs and resources, which rely on OFCCP—much more than an "abstract interest in defending government regulations," *see* MTI

Opp. 18. Indeed, courts in this Circuit and elsewhere have repeatedly allowed beneficiaries of government programs to intervene to defend them. *See, e.g.*, *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003) (allowing Mongolia to intervene because it would lose tourism revenue if rule permitting hunters to import argali trophies were overturned); *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (allowing insurer to intervene to defend policy limiting liability of tortfeasors); *Alfa Int'l Seafood v. Ross*, 2017 WL 1906586, at *1 (D.D.C. May 8, 2017) (Mehta, J.) (allowing trade association to intervene to defend program that protected its members from competition); *Assoc. Dog Clubs of N.Y. State v. Vilsack*, 44 Supp. 3d 1, 5-6 (D.D.C. 2014) ("Harm caused to an organization's programs by the invalidation of a rule is no less concrete or demonstrable than the same harm caused by an agency's failure to enforce a rule.").[8] Oracle cannot find in Rule 24 what the D.C. Circuit has declined to recognize as a matter of prudential standing.

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

The sweeping relief that Oracle seeks—whether Oracle calls it "abolition" or something else—would drastically diminish the OFCCP's enforcement authority and force the Proposed Intervenors to make precisely the operational adjustments they fear. Oracle does not dispute that 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), or that the standard presents a "minimal" burden, *Clinton*, 255 F.3d at 1253. That minimal standard is abundantly satisfied here.

[8] *Accord, e.g.*, *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1252 (10th Cir. 2001) (permitting environmental organizations to intervene to defend establishment of national monument); *N.Y. Pub. Interest Res. Grp., Inc. v. Regents of Univ. of State of N.Y.*, 516 F.2d 350, 352 (2d Cir. 1975) (allowing pharmacists to intervene to defend prohibition on pharmaceutical advertising that protected small pharmacies).

In response, Oracle largely rehashes its standing and interest arguments, which are wrong for the reasons discussed above. The relief sought by Oracle would do severe harm to OFCCP's ability to enforce civil rights laws. Moreover, intervention is not limited to parties whose "rights … [are] themselves at issue in the agency action being questioned," MTI Opp. 19, or who are "directly … regulate[d]" by the agency, *id*. at 20; it extends to parties who, as is the case here, benefit substantially from the agency's action. *See, e.g.*, *Fund For Animals*, 322 F.3d at 733; *Dimond*, 792 F.2d at 192; *Alfa Int'l Seafood*, 2017 WL 1906586, at *1.

Oracle suggests that the Proposed Intervenors fear only that OFCCP "will not advance their interests as far as they would like." MTI Opp. 20. That is a mischaracterization. The Proposed Intervenors fear that the OFCCP will lose all meaningful enforcement power, and that they will have to adjust their operations in response. For the same reason, *Massachusetts School of Law* is inapposite; while the D.C. Circuit held that a law school could not intervene to seek more aggressive remedies as part of an antitrust consent decree, it distinguished those circumstances from cases where, like here, an unfavorable ruling would prevent the agency from pursuing "policies [the intervenors] preferred" or would inflict real financial harm on the intervenors. *Mass. School of Law at Andover, Inc. v. United States*, 118 F.3d 776, 781 (D.C. Cir. 1997). Thus, the Proposed Intervenors have shown a "possibility"—in fact, far more than a possibility—that a ruling for Oracle would impair their interests.

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

Oracle does not dispute that the adequacy requirement imposes a "minimal," *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972), "not onerous," and "low" burden, *Crossroads*, 788 F.3d at 321 (quotation omitted), or that the D.C. Circuit "look[s] skeptically on government entities serving as adequate advocates for private parties," *id.* Nor does Oracle have

any response to the substantial factual record assembled by the Proposed Intervenors showing that the government is unlikely to fully defend OFCCP. *See* Mot. 18. And the government's brief Motion to Dismiss—which contains only seven pages devoted to argument and no defense on the merits, *see* Gov't's Mot. 8-15, ECF No. 12-1—certainly does not provide a basis to conclude that there will be a zealous defense on the merits to this lawsuit.

Oracle's only response is that the Proposed Intervenors and the government share "a general interest in nondiscrimination and the constitutionality of a regulatory scheme." MTI Opp. 20. Whether or not the Proposed Intervenors' interests overlap with the government in the abstract, however, the government will not mount the same full-throated defense of OFCCP that Intervenors will. In any event, Oracle again misunderstands the Proposed Intervenors' concrete and specific interests in protecting their operations and resources, which are best served by an effective OFCCP. The Proposed Intervenors' interests therefore *conflict* with the government's interests in protecting business and preserving relationships with contractors. *See* Mot. 17. That makes this case wholly unlike *Massachusetts School of Law*, where the intervenor's only divergent interest was in compelling the government to devote additional resources to the case, 118 F.3d at 781, or *Building and Construction Trades Department, AFL-CIO v. Reich*, where the intervenor "offered no argument not also pressed by [the agency]," 40 F.3d 1275, 1282 (D.C. Cir. 1994).

Oracle also asserts that the Proposed Intervenors' interests are irrelevant because "the parties are limited to arguing for or against the validity of [OFCCP] regulations." MTI Opp. 21 (quoting *Envtl. Def. Fund, Inc. v. Costle*, 79 F.R.D. 235, 243 (D.D.C. 1978)). Presumably, Oracle means that the Defendants have the same view of the merits as the Proposed Intervenors, although that remains to be seen. But the D.C. Circuit has held that intervention can be warranted

"even when the interest of a federal agency and potential intervenor can be expected to coincide" and where they "undisputedly agree[] that the agency's current rules and practices were lawful." *Crossroads*, 788 F.3d at 321. The Proposed Intervenors have therefore met the minimal adequacy threshold.

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

The Proposed Intervenors have shown that they are entitled to intervene. But if the Court disagrees, the answer is not to allow the fate of the OFCCP to be decided in a contest between a vigorous opponent of the OFCCP and an administration that has tried to undermine OFCCP at every turn and did not defend it on the merits in its opening brief. Instead, the Court should permit the Proposed Intervenors to intervene to provide the OFCCP with the complete jurisdictional and merits defense it deserves.

Although the Court need not reach the issue because the Proposed Intervenors have demonstrated their standing, even if it concludes otherwise, the Court should allow permissive intervention. The Supreme Court has stated that permissive intervention "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation." *SEC v. U.S. Realty & Imp. Co.*, 310 U.S. 434, 459 (1940). The Fourth Circuit has construed that decision as holding "that a party who lacks standing can nonetheless take part in a case as a permissive intervenor," so long as another party possesses standing. *Shaw v. Hunt*, 154 F.3d 161, 165 (4th Cir. 1998); *accord San Juan Cty. v. United States*, 420 F.3d 1197, 1206 (10th Cir. 2005), *adopted as reasoning en banc*, 503 F.3d 1163, 1172 (10th Cir. 2007), *abrogated on other grounds as recognized by W. Energy All. v. Zinke*, 877 F.3d 1157, 1165 (10th Cir. 2017); *Emp. Staffing Servs., Inc. v. Aubry*, 20 F.3d 1038, 1042 (9th Cir. 1994).

The Proposed Intervenors need not show standing to permissively intervene "for the same reason that not every plaintiff in a lawsuit is required to show standing." *Bond v. Utreras*, 585

F.3d 1061, 1070 (7th Cir. 2009) (addressing without deciding the question). "[A] proposed intervenor is permitted to intervene on the basis of an existing party's standing to assert the claim at issue, based upon what the Supreme Court has described as 'piggyback' standing." *King v. Christie*, 981 F. Supp. 2d 296, 308 (D.N.J. 2013). In contrast, "an intervenor *of right* must have Article III standing in order to pursue relief that is *different* from that which is sought by a party with standing." *Town of Chester, N.Y. v. Laroe Est., Inc.*, 137 S. Ct. 1645, 1651 (2017) (emphasis added); *cf.* Mot. 6 n.1. Nor do permissive intervenors seek to "participate[] on equal footing with the original parties," MTI Opp. at 23 (quoting *Bldg. & Const. Trades Dep't*, 40 F.3d at 1282), because permissive intervention is, by nature, discretionary. *See Safari Club Int'l v. Zinke*, 2017 WL 8222114, at *1 (D.D.C. 2017) (noting that "[m]ovants seeking to intervene as of right" wish to "participate on equal footing with the original parties to the suit").

Standing aside, permitting the Proposed Intervenors to intervene would facilitate the "just and equitable adjudication" of the issues presented by this case. *Cigar Ass'n of Am. v. FDA*, 323 F.R.D. 54, 66 (D.D.C. 2017) (Mehta, J.) (quotation omitted). As explained above, the government's treatment of OFCCP provides substantial reason—even if Oracle refuses to address it, *see* MTI Opp. 23—to doubt whether the government will mount a full defense. It is clear that the Proposed Intervenors will do so, and thereby assist the Court in adjudicating the complex issues presented by this case. Oracle also does not attempt to show that permitting intervention would "unduly delay or prejudice" the rights of the parties. Fed. R. Civ. P. 24(b)(3). The Proposed Intervenors sought to intervene before any significant proceedings in this case, and at this point, intend only to file a consolidated reply in support of their Motion for Summary Judgment and opposition to Oracle's cross-motion on the same schedule as the government. *See* Mot. 14-15. The Proposed Intervenors' participation will further show the defects in Oracle's

position and would enable them to take up the fight in the event Oracle prevails and the government does not appeal. The Court should therefore permit the Proposed Intervenors to intervene.[9]

CONCLUSION

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

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Respectfully submitted,

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[9] Participation as amici, see MTI Opp. 22, is inadequate because it would not permit the Proposed Intervenors to continue defending OFCCP before this Court or on appeal in the event the government declines to do so, or to assert arguments that the government fails to raise. However, the Proposed Intervenors request that, if the Court were to deny intervention, it nevertheless grant them leave to participate as amici and order that their Proposed Motion for Summary Judgment instead be filed as an amicus brief.