UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, STATE OF CALIFORNIA, STATE OF COLORADO, DISTRICT OF COLUMBIA, STATE OF ILLINOIS, COMMONWEALTH OF MASSACHUSETTS, DANA NESSELL on behalf of the PEOPLE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEVADA, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF NORTH CAROLINA, COMMONWEALTH OF PENNSYLVANIA, and STATE OF VERMONT, Plaintiffs, v. UNITED STATES DEPARTMENT OF LABOR; AL STEWART, in his official capacity as Acting Secretary of Labor, Defendants.	Civil Action No. 1:21-CV-00536-SHS

MEMORANDUM OF LAW OF PROPOSED DEFENDANT-INTERVENORS STATES OF ALABAMA, ARKANSAS, GEORGIA, KENTUCKY, LOUISIANA, INDIANA, MISSISSIPPI, MONTANA, NEBRASKA, SOUTH CAROLINA, TEXAS, AND WEST VIRGINIA IN SUPPORT OF MOTION TO INTERVENE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Executive Orders

Rules

Federal Regulations

Secondary Sources

INTRODUCTION

The States of Alabama, Arkansas, Georgia, Kentucky, Louisiana, Indiana, Mississippi, Montana, Nebraska, South Carolina, Texas, and West Virginia move to intervene to defend a federal regulation that benefits the States and their residents, but which the Federal Defendants have declined to defend. Without intervention, there will be *no party* in this litigation to defend the challenged regulation—even though the regulation provides needed clarity to federal contractors and potential contractors in the Proposed Defendant-Intervenor States, protects their religious liberties, encourages participation in the pool of federal contractors, and brings economic benefits to the States. And though the case is currently stayed—because the Federal Defendants intend to rescind the regulation—there is a risk that the parties, now aligned in their disapproval of the challenged regulation, could enter a settlement agreement that would significantly prejudice the Proposed Defendant-Intervenors. Under Federal Rule of Civil Procedure 24, the States deserve a seat at the table.[1]

BACKGROUND

A. Executive Order 11246

One year after signing the Civil Rights Act of 1964, President Lyndon B. Johnson issued Executive Order 11246, requiring government contractors and subcontractors to abide by certain nondiscrimination provisions in their employment decisions. *See* Exec. Order No. 11246, 30 Fed. Reg. 12,319 (Sept. 24, 1965). With a handful of amendments by later Presidents, the Order still governs federal contractors and subcontractors today. There are three primary provisions of the Order relevant to this lawsuit.

[1] Plaintiffs have indicated that they do not take a position on the motion to intervene at this time and that they reserve the right to oppose the motion upon review of the papers. The Federal Defendants have likewise indicated that they intend to review the intervention papers before deciding whether to take a position.

First, Section 201 requires the Secretary of Labor to enforce the Executive Order and to "adopt such rules and regulations and issue such orders as are deemed necessary and appropriate to achieve the purposes" of the Order. *See* Consolidation of Contract Compliance Functions for Equal Employment Opportunity, Exec. Order No. 12086, 43 Fed. Reg. 46,501 (Oct. 5, 1978) (amending Exec. Order No. 11246).

Second, Section 202 governs contractors' agreements. Under this section, all federal government contracting agencies must include in every government contract an "equal opportunity clause" stating that the contractor agrees—among other things—"not [to] discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin," and to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin." *See* Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity, 79 Fed. Reg. 42,971 (Jul. 21, 2014).

Third, Section 204(c) exempts certain contractors from the general nondiscrimination requirements. This provision was added by President George W. Bush in 2002 "to further the strong Federal interest in ensuring that the cost and progress of Federal procurement contracts are not adversely affected by an artificial restriction of the labor pool caused by the unwarranted exclusion of faith-based organizations from such contracts." Equal Protection of the Laws for Faith-Based and Community Organizations, Exec. Order No. 13279, 67 Fed. Reg. 77,141, 77,143 (Dec. 12, 2002) (amending Exec. Order No. 11246). Section 204(c) of Executive Order 11246 thus reads:

> Section 202 of this Order shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational

> institution, or society of its activities. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order.

Id.

Before promulgating the current Rule, the Department of Labor implemented the religious exemption by largely mirroring the language of Section 204 itself. *See* 41 C.F.R. § 60-1.5(a)(5).

B. The Department's Rule

On December 9, 2020, following notice of proposed rulemaking and a 30-day comment period, the Department of Labor's Office of Federal Contract Compliance Programs published a final rule "to clarify the scope and application of the religious exemption" in Section 204 of Executive Order 11246. *See* Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 85 Fed. Reg. 79,324 (Dec. 9, 2020). The Department explained that the Rule was needed to "help organizations with federal government contracts and subcontracts and federally assisted construction contracts and subcontracts better understand their obligations." *Id.* at 79,324.

The Rule makes two primary changes. First, it adds an interpretation clause and a severability clause to the "exemptions" regulations in 41 C.F.R. § 60-1.5:

> (e) Broad interpretation. This subpart shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the U.S. Constitution and law, including the Religious Freedom Restoration Act of 1993, as amended, 42 U.S.C. 2000bb et seq.
>
> (f) Severability. Should a court of competent jurisdiction hold any provision(s) of this section to be invalid, such action will not affect any other provision of this section.

41 C.F.R. § 60-1.5

Second, it provides definitions of the terms used in the Executive Order's religious exemption clause. To do this, the Department of Labor took as its starting point the idea that, "[b]ecause

the exemption … springs directly from the Title VII exemption, it should be given a parallel interpretation." 85 Fed. Reg. at 79,324. The Department "thus generally interpret[ed] the nondiscrimination provisions of E.O. 11246 consistent with the principles of Title VII." *Id.* Accordingly, some of the new definitions—like "religion"—come directly from the Title VII statutory text. But others—such as "religious corporation, association, educational institution, or society"—draw from Title VII caselaw and recent Supreme Court decisions interpreting the relationship between religious freedom and antidiscrimination protections. *Id.* at 79,325. Citing the Supreme Court's declaration in *Bostock v. Clayton County*, for instance, that "the promise of the free exercise of religious … lies at the heart of our pluralistic society," 85 Fed. Reg. at 79,325 (quoting 140 S. Ct. 1731, 1754 (2020) (alteration omitted)), the Department declared: "This rule is intended to correct any misperception that religious organizations are disfavored in government contracting by setting forth appropriate protections for their autonomy to hire employees who will further their religious missions, thereby providing clarity that may expand the eligible pool of federal contractors and subcontractors." *Id.*

Here are the definitions the Department added:

> Particular religion means the religion of a particular individual, corporation, association, educational institution, society, school, college, university, or institution of learning, including acceptance of or adherence to sincere religious tenets as understood by the employer as a condition of employment, whether or not the particular religion of an individual employee or applicant is the same as the particular religion of his or her employer or prospective employer.…
>
> Religion includes all aspects of religious observance and practice, as well as belief.
>
> Religious corporation, association, educational institution, or society.
>
> (1) Religious corporation, association, educational institution, or society means a corporation, association, educational institution, society, school, college, university, or institution of learning that:
>
> (i) Is organized for a religious purpose;

> (ii) Holds itself out to the public as carrying out a religious purpose;
>
> (iii) Engages in activity consistent with, and in furtherance of, that religious purpose; and
>
> (iv)(A) Operates on a not-for-profit basis; or
>
> (B) Presents other strong evidence that its purpose is substantially religious.
>
> (2) Whether an organization's engagement in activity is consistent with, and in furtherance of, its religious purpose is determined by reference to the organization's own sincere understanding of its religious tenets.
>
> (3) To qualify as religious a corporation, association, educational institution, society, school, college, university, or institution of learning may, or may not: Have a mosque, church, synagogue, temple, or other house of worship; or be supported by, be affiliated with, identify with, or be composed of individuals sharing, any single religion, sect, denomination, or other religious tradition.…
>
> Sincere means sincere under the law applied by the courts of the United States when ascertaining the sincerity of a party's religious exercise or belief.

41 C.F.R. § 60-1.3 (emphasis added).

As part of these definitions, the Department also included four examples under the definition and test for "religious corporation, association, educational institute, or society." For instance, one of the examples considered whether a closely held for-profit manufacturer of metal candlesticks and other decorative items qualified as a religious entity under the regulation. *See id.* It did not. Although the manufacturer regularly consulted with ministers and rabbis when designing new candlesticks, a majority of its customers were churches and synagogues, and the manufacturer advertised in religious publications and donated a portion of each sale to religious charities, the Department explained that the manufacturer likely did not qualify as a religious organization under Executive Order 11246 because the manufacturer's "fundamental purpose" was "secular and pecuniary, not religious." *Id.* As a result, the Department reasoned, "given that the manufacturer is a for-profit entity, it would need to make a strong evidentiary showing that it is a religious organization, which it has not." *Id.*

The Department did provide one example of a for-profit entity that could be considered a religious organization under Executive Order 11246:

> (4)(iii)(A) Example. A small catering company provides kosher meals primarily to synagogues and for various events in the Jewish community, but other customers, including federal agencies, sometimes hire the caterer to provide meals for conferences and other events. The company's two owners are Hasidic Jews and its six employees, while not exclusively Jewish, receive instruction in kosher food preparation to ensure such preparation comports with Jewish laws and customs. This additional work raises the company's operating costs higher than were it to provide non-kosher meals. The company's mission statement, which has remained substantially the same since the company was organized, describes its purpose as fulfilling a religious mandate to strengthen the Jewish community and ensure Jewish persons can participate fully in public life by providing kosher meals. The company's "about us" page on its website states that above all else, the company seeks to "honor G–d" and maintain the strength of the Jewish religion through its kosher meal services. The company also donates a portion of its proceeds to charitable projects sponsored by local Jewish congregations. In its advertising and on its website, the company prominently includes religious symbols and text.
>
> (B) Application. The company likely qualifies as a religious organization. The company's mission statement and other materials show a religious purpose. Its predominant business activity of providing kosher meals directly furthers and is wholly consistent with that self-identified religious purpose, as are its hiring and training practices. Through its advertising and website, the company holds itself out as a religious organization. Finally, although the company operates on a for-profit basis, the other facts here show strong evidence that the company operates as a religious organization.

Id.

C. Plaintiffs' Challenge

On January 21, 2021, a group of 14 States and the District of Columbia filed suit in this Court against the Department of Labor and the Secretary of Labor—together "the Department." *See* Complaint, ECF No. 1. They alleged that the Department's Final Rule "produces a sea change in labor law," will "prompt[] an increase in employment discrimination and its attendant effects," and will "injure Plaintiffs' sovereign, quasi-sovereign, economic, and proprietary interests." *Id.* at ¶¶ 1, 9. They ask the Court to vacate the Rule as arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under the Administrative Procedure Act, and as contrary to

the statutory jurisdiction, authority, and limitations of the Department under the APA. *Id.* ¶¶ 9, 127-34.

On February 9, 2021, the Department informed the Court "that it intends to propose rescission of the rule at issue in this case in the near future, a process that is expected to take several months, as it will entail notice-and-comment rulemaking." ECF No. 24. Accordingly, with the consent of Plaintiffs, the Department requested a stay of 90 days, which the Court granted. ECF No. 26. On March 26, 2021, the Department filed a status report in which it stated that it had sent a notice of proposed rescission to the Office of Information and Regulatory Affairs on March 22, 2021, and that it anticipates publishing the proposed rule in the Federal Register once OIRA completes its review. ECF No. 33. The Department's responsive pleading is due June 18, 2021, unless the stay is extended. ECF No. 26.

D. The Proposed Defendant-Intervenors

The Proposed Defendant-Intervenors are a coalition of 12 States: Alabama, Arkansas, Georgia, Kentucky, Louisiana, Indiana, Mississippi, Montana, Nebraska, South Carolina, Texas, and West Virginia. Whereas Plaintiff States allege that they will be harmed by the new Rule, the Proposed Defendant-Intervenors think the Rule will provide needed clarity for federal contractors and potential federal contractors within their States, thus benefiting both the States and their residents. Each of the Proposed Defendant-Intervenors is home to many federal contractors and subcontractors protected by the new Rule who benefit from the clarity it provides. Each State is also home to potential federal contractors who may decide to enter "the eligible pool of federal contractors and subcontractors" now that it is clear that religious organizations are not "disfavored in government contracting" and they need not decide between following their religion and contracting with the federal government. 85 Fed. Reg. at 79,325. Under the Department's Final Rule, they can do both.

Take Alabama, for instance. In Fiscal Year 2020, contractors based in Alabama were awarded 98,147 contracts or subcontracts with the federal government, for a total "federal action obligation" of approximately $12 billion.[2] Similarly, for that same time frame, the federal government awarded over 87,000 contracts for work performed in Alabama, for a federal obligation of approximately $12.9 billion.[3] There is, of course, much overlap in these two numbers—many of the federal contractors hired to perform work in Alabama are themselves based there—but the point is that federal contracting is a big deal in Alabama. Residents find work that way. Communities benefit from the influx of federal dollars. And the State's pocketbook is helped, too, as it collects tax revenues and avoids expenditures on unemployment and other programs that would likely arise if federal contracts were not available to a wide array of business entities.

Other States share similar stories. In Fiscal Year 2020, the federal government awarded nearly $4 billion across nearly 33,000 contracts for work done in Louisiana.[4] Indiana had almost 28,000 contracts for $4.4 billion in that same period.[5] Arkansas: roughly 16,500 contracts for $1.5 billion.[6] Georgia: 140,671 contracts for $14.3 billion.[7] Kentucky: 32,074 contracts for $10.4 billion.[8] Mississippi: 30,457 contracts for $6.7 billion.[9] Montana: 13,021 contracts for $709.3 million.[10] Nebraska: 15,047 contracts for $1.3 billion.[11] South Carolina: 43,909 contracts for $6.5

[2] This number is based on the total "federal action obligation" and includes contracts, indefinite delivery contracts, and subcontracts between October 1, 2019, and September 30, 2020 with federal contractors and subcontractors located in Alabama. *See* USASpending.gov, https://www.usaspending.gov/download_center/custom_award_data (dataset downloaded Mar. 16, 2021).
[3] *See* USASpending.gov, Alabama snapshot FY2020, https://perma.cc/A3Q2-U4K9.
[4] *See* USASpending.gov, Louisiana snapshot FY2020, https://perma.cc/A9EY-3QP4.
[5] *See* USASpending.gov, Indiana snapshot FY2020, https://perma.cc/6YCC-53YS.
[6] *See* USASpending.gov, Arkansas snapshot FY2020, https://perma.cc/7MZN-3G5D.
[7] *See* USASpending.gov, Georgia snapshot FY2020, https://perma.cc/XX4Y-H6DN.
[8] *See* USA Spending.gov, Kentucky snapshot FY2020, https://perma.cc/26PV-MJ3U.
[9] *See* USASpending.gov, Mississippi snapshot FY2020, https://perma.cc/P89R-HEFR.
[10] *See* USASpending.gov, Montana snapshot FY2020, https://perma.cc/B8QW-4QD7.
[11] *See* USASpending.gov, Nebraska snapshot FY2020, https://perma.cc/H2RL-NLXR.

billion.[12] Texas: nearly 250,000 contracts for $80.5 billion.[13] And West Virginia: 8,108 contracts for $1.8 billion.[14]

The Proposed Defendant-Intervenors will thus be harmed if Plaintiffs are successful in invalidating or enjoining the Final Rule. It is likely that contractors and potential contractors will leave the contracting pool if they cannot both follow their religious beliefs and contract with the federal government. That, in turn, will likely cost the States in decreased revenues and increased expenditures. And it will harm the States' quasi-sovereign and *parens patriae* interests in the welfare of their residents, many of whom have benefitted from the added clarity the Rule provides.

ARGUMENT

I. Proposed Defendant-Intervenors Are Entitled To Intervene As A Matter Of Right.

"Intervention as of right under Rule 24(a)(2) is granted when all four of the following conditions are met: (1) the motion is timely; (2) the applicant asserts an interest relating to the property or transaction that is the subject of the action; (3) the applicant is so situated that without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the other parties." *MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n*, 471 F.3d 377, 389 (2d Cir. 2006).

Such is the case here. The motion is timely because it comes well before the Department's responsive pleading is due and just two months after the lawsuit was filed. The Proposed Defendant-Intervenors have an interest in the subject of the action because—just the same as Plaintiffs—many of their residents contract to work with the federal government and are governed by the Final Rule. But unlike Plaintiffs, the Proposed Defendant-Intervenors believe that the Rule *benefits* the

[12] *See* USASpending.gov, South Carolina snapshot FY2020, https://perma.cc/E9U7-P5NT.
[13] *See* USASpending.gov, Texas snapshot FY2020, https://perma.cc/693U-JQL2.
[14] *See* USASpending.gov, West Virginia snapshot, FY2020 https://perma.cc/3M4G-NXCP.

States, and that their economic, quasi-sovereign, and *parens patriae* interests will thus be harmed if the Rule is held invalid. Finally, because the Department has indicated that it intends to rescind the Rule instead of defending it, there will be no one to represent the interests of the Proposed Defendant-Intervenors if intervention is not granted.

A. The Motion is Timely.

"Among the factors to be taken into account to determine whether a motion to intervene is timely are: (a) the length of time the applicant knew or should have known of his interest before making the motion; (b) prejudice to existing parties resulting from the applicant's delay; (c) prejudice to [the] applicant if the motion is denied; and (d) presence of unusual circumstances militating for or against a finding of timeliness." *United States v. New York*, 820 F.2d 554, 557 (2d Cir. 1987).

All these factors point to timeliness in this case. Plaintiffs filed their complaint approximately two months ago, on January 21, 2021; the Proposed Defendant-Intervenors have not "slept on [their] rights before making th[is] motion." *Miller v. Silbermann*, 832 F. Supp. 663, 669 (S.D.N.Y. 1993) (quotation marks and citation omitted). Nor will intervention cause "prejudice [to] any of the existing parties." *Id.* at 670. Roughly two weeks after the case was filed, the Department requested a stay because it intends to rescind the Rule. ECF No. 24. The Court granted the stay and ordered a status report to be filed on March 26 and the Department's initial responsive pleading to be due by June 18—if the case is not furthered stayed. ECF No. 26. As a result, the Department has not yet filed a responsive pleading, and the Court has not had any substantive matters to decide. There has been no delay by the Proposed Defendant-Intervenors in seeking intervention, and no prejudice would result if intervention is granted because it will not cause any delay in the resolution of this case. The motion to intervene is timely.

B. Proposed Defendant-Intervenors Have Legally Protectable Interests in This Action.

The Proposed Defendant-Intervenors also have a "sufficient interest in the outcome of this case" to warrant intervention. *New York v. Scalia*, No. 1:20-CV-1689-GHW, 2020 WL 3498755, at *2 (S.D.N.Y. June 29, 2020) ("Scalia I"). Rule 24(a)(2) requires the movant to assert an interest that is "direct, substantial, and legally protectable." *New York News, Inc. v. Kheel*, 972 F.2d 482, 486 (2d Cir. 1992) (citations omitted). The Proposed Defendant-Intervenors have done so here.

At minimum, the Proposed Defendant-Intervenors' interests in this action are equal to Plaintiffs'. If the Plaintiff States have standing to challenge the Final Rule because of the effects the Rule may have on federal contractors or subcontractors in their States, then the Proposed Defendant-Intervenor States have standing to defend the Final Rule because of the beneficial effects the Rule may have on federal contractors or subcontractors in their States. *Cf.* Complaint, ECF No. 1, ¶¶88-126 (projecting harms to Plaintiffs' workforce, employers, and economic interests). The main difference is that the Plaintiff States fear the effects will be negative, while the Proposed Defendant-Intervenor States expect the Rule to provide added clarity, which will benefit federal contractors and encourage religious entities to enter the federal contracting pool, thereby providing additional jobs, supporting local economies, and increasing States' tax revenues.

In fact, the Proposed Defendant-Intervenor States have a significant interest in this litigation that Plaintiff States may not have: "a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents" as *parens patriae*. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982). "Under the traditional rule, the so-called '*Mellon* bar,' States lack standing as *parens patriae* to bring an action against the federal government" because the federal government acts as *parens patriae* in those instances. *New York v.*

Scalia, 464 F. Supp. 3d 528, 545 (S.D.N.Y. 2020) ("Scalia II") (cleaned up) (citing *Gov't of Manitoba v. Mernhardt*, 923 F.3d 173, 178 (D.C. Cir. 2019)); *see also Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923) ("It cannot be conceded that a state, as parens patriae, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the state, under some circumstances, may sue in that capacity for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the federal government." (citation omitted)).[15] But "there is a critical difference between allowing a State 'to protect her citizens from the operation of federal statutes' (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do)." *Massachusetts v. EPA*, 549 U.S. 497, 521 n.17 (2007). The Proposed Defendant-Intervenor States do not seek to challenge federal law, but to defend the law against a challenge by other States. There is thus no conflict in the quasi-sovereign interests of the Proposed Intervenor States and those of the federal sovereign. And though the Department has indicated that it intends to rescind the Rule, the Proposed Defendant-Intervenors do not seek relief from the federal government. As a result, the Proposed Defendant-Intervenor States have an interest as *parens patriae* to defend the economic well-being of their residents against challenge by Plaintiffs.

[15] It is unclear whether the *Mellon* bar would prevent Plaintiff States from claiming a quasi-sovereign interest in its challenge to the federal government's actions. *See Scalia II*, 464 F. Supp. 3d at 546 ("declin[ing] to wade into th[e] doctrinal morass" and "opine on an unsettled issue of law" in the Second Circuit); *compare Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (recognizing that "the State of New York has standing in its capacity as *parens patriae*" to challenge actions by the U.S. Census Bureau), *with Connecticut v. U.S. Dep't of Commerce*, 204 F.3d 413, 414 n.2 (2d Cir 2000) (declining to consider whether Connecticut had standing to sue the federal government as *parens patriae*).

C. Plaintiffs' Challenge Threatens to Impair the Interests of the Proposed Defendant-Intervenors.

Next, the Proposed Defendant-Intervenors are "so situated that the disposition of the action *may* as a practical matter impair or impede their ability to protect their interests." *N.Y. Pub. Int. Research. Grp., Inc. v. Regents of Univ. of State of N.Y.*, 516 F.2d 350, 352 (2d Cir. 1975) (emphasis added). This is so for at least two reasons.

First, Plaintiffs' requested relief—an order setting aside the Final Rule—would directly harm the residents of the Proposed Defendant-Intervenor States. The Rule provides clarity to federal contractors, emphasizes that religious entities are not disfavored in federal contracting, and requires an interpretation of Executive Order 11246 that provides a broad protection of religious exercise. In other words, it protects the religious liberties of the residents of the Proposed Defendant-Intervenor States. The potential loss of those protections is harm enough to warrant intervention. But in addition, the States themselves benefit from the Final Rule. The Rule encourages the "expan[sion] [of] the eligible pool of federal contractors and subcontractors" by removing potential obstacles to religious organizations' contracting with the federal government. 85 Fed. Reg. at 79,325. That, in turn, increases employment, increases taxes revenue, and decreases State expenditures. Those benefits, too, will disappear if Plaintiffs succeed in invalidating the Rule.

Second, the unique circumstances of this case raise particular concerns that disposition of the action may impede the ability of the Proposed Defendant-Intervenors to protect their interests. Namely, now that the Department has indicated that it will not defend its Rule, *see* ECF No. 24, there is a risk of settlement between the existing parties that would impair the interests of other States. To be sure, the Department has attested that it intends to rescind the Rule through notice-and-comment rulemaking, *id.*, in which the Proposed Defendant-Intervenor States would be able to participate. But the Department has not yet promulgated notice of its proposed rulemaking in

the Federal Register, and there still exists the possibility that the parties may settle before a new rule is finalized. If that happens, absent intervention, the Proposed Defendant-Intervenors would not have a seat at the table to object to the settlement; their interests would be impaired, and they would "have no alternative forum where they c[ould] mount a robust defense of the [Final Rule]." *California ex rel. Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006). This danger warrants intervention. *See Brumfield v. Dodd*, 749 F.3d 339, 344-45 (5th Cir. 2014) (emphasizing that Rule 24(a) requires "only that the disposition of the action 'may' impair or impede [movants'] ability to protect their interests" because "[t]he very purpose of intervention is to allow interested parties to air their views so that a court may consider them *before* making potentially adverse decisions" (emphasis added)).

D. The Department Will Not Adequately Represent the Interests of the Proposed Defendant-Intervenors.

Finally, absent intervention, "representation of [the Proposed Defendant-Intervenors'] interest 'may be' inadequate." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (citation omitted). The burden of making this showing "should be treated as minimal," *id.*, and "the weight of the responsibility for demonstrating adequate representation fall[s] on the opposing party," *Miller*, 832 F. Supp. at 672.

The Department does not adequately represent the interests of the Proposed Defendant-Intervenors because the Department has expressed its intention to rescind—not defend—the challenged Rule. ECF No. 24. As a result, the Department is more closely aligned with Plaintiffs' interests than it is with those of the Proposed Defendant-Intervenors. Because the Department has not "demonstrated sufficient motivation to litigate vigorously and to present all colorable conten-

tions" in defense of its Final Rule, no party in this litigation will defend the interests of the Proposed Defendant-Intervenors unless intervention is granted. *Nat. Res. Def. Council, Inc. v. N.Y. Dep't of Env't Conservation*, 834 F.2d 60, 62 (2d Cir. 1987).

Moreover, while a greater showing of inadequacy is ordinarily required when a government entity is a party, *see United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 984-85 (2d Cir. 1984), courts have routinely recognized that the federal government is often an inadequate party to represent the interests of separate sovereigns like the Proposed Defendant-Intervenors. *See, e.g.*, *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003); *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995), *abrogated on other grounds by Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011); *Nuesse v. Camp*, 385 F.2d 694, 703-04 (D.C. Cir. 1967). That is certainly the case here, where the interests of the Department and those of the Proposed Defendant-Intervenors have diverged so dramatically given the Department's refusal to defend the Rule. The Proposed Defendant-Intervenors "should not need to rely on a doubtful friend to represent [their] interests, when [they] can represent [themselves]" as defendant-intervenors. *Crossroads Grassroots Pol'y Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 321 (D.C. Cir. 2015).

II. In The Alternative, The Court Should Grant The Proposed Defendant-Intervenors Permission To Intervene.

Even if the Proposed Defendant-Intervenors are not entitled to intervention as of right, this Court should grant them permissive intervention under Rule 24(b). Exercising broad judicial discretion, courts grant permissive intervention when movants make a "timely motion" and have "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

"Additional relevant factors 'include the nature and extent of the intervenors' interests,' the degree to which those interests are 'adequately represented by other parties,' and 'whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.'" *H.L. Hayden Co. of New York v. Siemens Med. Sys., Inc.*, 797 F.2d 85, 89 (2d Cir. 1986) (quoting *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977)).

The requirements of Rule 24(b) are all met here. As explained above, this motion is timely and intervention will not delay or prejudice the adjudication of the original parties' rights because the case is stayed and the Department's responsive pleading is not due for several months. And intervention will contribute to "the just and equitable adjudication of the legal questions presented," *id.*, because without the Proposed Defendant-Intervenors there will be no party present to defend the Final Rule. Certainly such a defense "shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). Intervention is both proper and necessary.

CONCLUSION

For the foregoing reasons, the Proposed Defendant-Intervenors respectfully request that the Court grant their motion to intervene.

Dated: March 29, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Southern District of New York by using the CM/ECF system, which will send notification of such to the attorneys of record.

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