IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants.

Civil Action No.: 1:16-cv-1170-RBW

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE

November 8, 2018

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INTRODUCTION

The proposed intervenors have a clear, protectable interest at stake, and they cannot count on the government to defend it. Neither Washtech nor the government offers any persuasive reason to deny intervention.

First, the motion complies with Rule 24(c). That rule requires an intervenor to make the Court and parties aware of the intervenors' interests, often by attaching a pleading to the intervention motion. But, as the D.C. Circuit has held, it is not essential to submit a pleading if the motion itself puts the Court and parties on notice of the intervenors' interests. That is especially so where, as here, attaching a pleading would be inconsistent with the Court's scheduling order.

Second, the motion is timely. On this point, Washtech and the government offer opposing positions: in the government's view, our motion "is entirely premature" (Gov't Opp. 1, ECF 42), whereas Washtech says our motion is "doom[ed]" because it is too late (Washtech Opp. 3, ECF 41). It obviously cannot be both—and, in fact, it is neither. Our motion is timely because it follows immediately from the government's change in policy position and, separately, because there is no prejudice to any party since there has been no litigation over the merits.

Third, the proposed intervenors assert a protectable legal interest and have standing—a conclusion the government does not deny. Washtech's argument to the contrary has no merit. At stake is whether the members of the proposed intervenors may continue to employ the tens of thousands of recent graduates that rely upon optional practical training for employment authorization. That is a direct, concrete, and legally protectable interest.

Fourth, the government's representation is not adequate to defend the proposed intervenors' interests. The D.C. Circuit has repeatedly held that this is a minimal hurdle to clear when private entities intervene in actions regarding rulemakings that impact their interests. The reasoning is straightforward: while the government is obligated to serve multiple, oft-competing constituencies, intervenors represent a distinct and discrete set of interests. That is reason enough to

grant intervention. Here, however, there is far more: the government has changed its policy position regarding optional practical training, and it has failed to offer any assurance as to what position it will take on the merits in this Court or on appeal. In view of these equivocations, intervention is necessary now so that the proposed intervenors may defend their interests.

All requirements for intervention having been satisfied, the motion should be granted.

I. RULE 24'S REQUIREMENTS ARE SATISFIED

The proposed intervenors stated in their opening memorandum (at 8 n.3, ECF 37-1) that they did not attach a proposed answer to their motion because doing so would be inconsistent with the Court's scheduling order.[1] That memorandum further explained how and why the proposed intervenors and their members have a legally protectable interest in the subject matter of this suit. *See* Opening Mem. 8-10 (ECF 37-1). Washtech responds by insisting that an attached pleading "is not optional" and "is required." Washtech Opp. 9 (ECF 41). The government asserts that it cannot be sure of the proposed intervenors' "particular interest in this case" and that it is therefore "nearly impossible for the [g]overnment to assess whether the [m]ovants truly do have Article III standing in this case." Gov't Opp. 3 (ECF 42). Neither contention is correct.

Civil Rule 24(c), which provides that a motion to intervene should be "accompanied by a pleading that sets out the claim or defense for which intervention is sought," gives the Court and parties notice of the intervenors' interests. *See Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1236 n.19 (D.C. Cir. 2004).[2] "Where, however, the position of the movant is apparent from other filings and where the opposing party will not be prejudiced, Rule 24(c) permits a degree of flexibility with [this] technical requirement[]." *Windsor v. United States*, 797 F. Supp. 2d 320, 325 (S.D.N.Y. 2011). Thus, when "the movant describes [in its motion] the basis for intervention

[1] As also noted in the opening memorandum (at 8 n.3, ECF 37-1), the proposed intervenors are prepared to make a timely filing upon an order of this Court.

[2] The government misquotes the text of Rule 24(c) on page 3 of its opposition; the rule does not use the term "shall."

with sufficient specificity to allow the district court to rule, its failure to submit a pleading is not grounds" to deny intervention. *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 474-75 (9th Cir. 1992). Or, as the Eighth Circuit has put it, a motion to intervene "satisfies Rule 24(c)" if "it provides sufficient notice to the court and the parties of [the intervenor's] interests," even in the absence of an attached pleading. *United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 834 (8th Cir. 2009). *See also WaterLegacy v. EPA*, 300 F.R.D. 332, 340 (D. Minn. 2014) ("[The] brief in support of [the] motion to intervene provides sufficient notice to the Court and the parties of its interests and the basis for its motion to satisfy Rule 24(c).").

The D.C. Circuit has adopted precisely this flexible approach: where the parties to the litigation are given "[]adequate notice of the [proposed] intervenors' [interest]" by the motion to intervene itself, the omission of an attached pleading "should generally be excused." *Microsoft Corp.*, 373 F.3d at 1236 n.19 (quoting *McCarthy v. Kleindienst*, 741 F.2d 1406, 1416 (D.C. Cir. 1984)). Excusal makes sense in such circumstances because the mere omission of an attached pleading "does not mean that [the proposed intervenor] does not have an interest in [the] case" and because when a proposed intervenor's interest is "explicitly identified in [the] motion to intervene," any such omission is necessarily non-prejudicial. *Westchester Fire Ins. Co. v. Mendez*, 585 F.3d 1183, 1188 (9th Cir. 2009).

Expressly agreeing with the D.C. Circuit's decision in *Massachusetts v. Microsoft Corp.*, both the First and Sixth Circuits have found that district courts abused their discretion by denying intervention based on the failure to attach a pleading. According to the First Circuit, "denial of a motion to intervene based solely on the movant's failure to attach a pleading, absent prejudice to any party, constitutes an abuse of discretion." *Peaje Invs. LLC v. García-Padilla*, 845

F.3d 505, 515 (1st Cir. 2017).[3] Per the Eighth Circuit, where the parties were "clearly on notice as to [the intervenor's] position and arguments," the district court "abused its discretion in rejecting [the] motion to intervene on the basis that it failed to attach a pleading." *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 314 (6th Cir. 2005).

The D.C. Circuit's approach to this issue—broadly adopted by courts across the country—forecloses Washtech's and the government's arguments regarding Rule 24(c). *First*, the proposed intervenors did not attach a proposed pleading regarding the legality of OPT because the Court's scheduling order deferred this issue. Opening Mem. 8 n.3 (ECF 37-1). As a result, it is not clear "what type of pleading the would-be intervenors could have filed" that would have been consistent with the scheduling order. *Microsoft Corp.*, 373 F.3d at 1236 n.19.

Second, the proposed intervenors provided explicit notice of their interest in this matter: "[i]f the OPT program were invalidated—the relief requested by the plaintiff—the proposed intervenors' members would lose thousands of employees, and their pipelines for new talent would be choked off." Opening Mem. 2 (ECF 37-1). And to substantiate these asserted interests, there are four declarations, three detailing each of the proposed intervenor's institutional interests and one from a major technology company that is a member of all three. *See Metro. St. Louis Sewer Dist.*, 569 F.3d at 834 (holding that the proposed intervenor need not attach a pleading, in part because the proposed intervenor "submitted affidavits from representatives of four member companies explaining their concerns about the impact of this lawsuit on their operations"). The opposition papers from both the government and Washtech make apparent that they understand intervenors' interest in this case. *See* Gov't Opp. 4 (ECF 42) ("assuming that the [m]ovants wish to defend against the Washington Alliance of Technology Workers' ('Washtech's') sole remaining claim in its Complaint"); Washtech Opp. 4-5 (ECF 41). Rule 24(c) requires nothing more.

[3] The principal authority on which the government relies—*Brown v. Colegio de Abogados de Puerto Rico*, 277 F.R.D. 73, 76 (D.P.R. 2011), cited on page three of its opposition—is not good law after *Peaje Investments*.

II. THE MOVANTS ARE ENTITLED TO INTERVE AS OF RIGHT

A. The application to intervene is neither too late nor too early

The opening memorandum demonstrates (at 5-8, ECF 37-1) that the motion is timely because, where doubts about the adequacy of representation develop after the case has begun, "courts measure elapsed time from when the 'potential inadequacy of representation [comes] into existence.'" *Amadour Cty. v. U.S. Dep't of Interior*, 772 F.3d 901, 904 (D.C. Cir. 2014) (quoting *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001)). As we noted, the proposed intervenors filed the motion at the first opportunity following the government's change in policy position.

In response, Washtech (at 3-4, ECF 41) asserts that this motion is too late; the government (at 3-4, ECF 42) claims it is too early. Neither is correct.

1. Insisting the motion is too late, Washtech focuses almost exclusively on the passage of time since the filing of the complaint.[4] Setting aside *Amadour County*, and assuming for the sake of argument that the inception of the suit were the right starting point for measuring the passage of time, it remains the case that "measuring the length of time passed is not in itself the determinative test, because [courts] do not require timeliness for its own sake." *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014) (quotation and citation omitted). "Instead, the requirement of timeliness is aimed primarily at preventing potential intervenors from unduly disrupting litigation." *Id*. Because "[t]he most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case," "even where a would-be intervenor could have intervened sooner, in assessing timeliness a court must weigh whether any delay in seeking intervention unfairly disadvantage[d] the original parties." *Id*. (quotation and citation omitted).

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[4] Washtech appears to suggest (Opp. 3, ECF 41) that timeliness should be measured from the filing of its complaint in a *different* lawsuit. There is no support for that boot-strapping approach. *See United States v. AT&T*, 642 F.2d 1285, 1295 (D.C. Cir. 1980) ("time elapsed" is measured, at most, from the "inception of the suit" in which the motion is filed).

Washtech does not assert that granting intervention now would be disruptive or cause it prejudice. Nor could it. The Court has not yet addressed the merits of Washtech's claims. If the Court grants intervention, the proposed intervenors will participate in every stage of the litigation relating to the merits. Thus, "[w]ithout any indication of potential prejudice," "intervention by the movants [is] timely." *WildEarth Guardians v. Jewell*, 320 F.R.D. 1, 3 (D.D.C. 2017). *See also Roane*, 741 F.3d at 152 ("In focusing on the amount of time that had elapsed between the filing of the lawsuit and [the] motion to intervene, the district court overlooked what the relevant caselaw says is the most important consideration: the fact that granting [the motion] was highly unlikely to disadvantage the existing parties.").

Washtech responds by citing *United States v. British American Tobacco Australia Services, Ltd.*, 437 F.3d 1235, 1238 (D.C. Cir. 2006). There, the district court "found that a late intervention 'would further delay and complicate the massive trial'" that was "scheduled to begin only weeks after" the intervenor's motion. *Id*. Intervention at the current stage of this case presents no delay or complication.

2. The government takes the exact opposite approach. In its view, this motion is "entirely premature" because the Court has bifurcated the reopener issue and the merits. Gov't Opp. 1, 3-4 (ECF 42). Because the proposed intervenors do not propose to participate in the briefing on the reopener doctrine, the Court could, in theory, reserve this motion until the reopener issue is resolved. Having said that, Washtech has argued the merits notwithstanding the Court's instruction to stick to the statute-of-limitations issue. *See* Washtech Opp. to Mot. to Dismiss 16-22 (ECF 43). The proposed intervenors thus submit that resolution of this motion to intervene is warranted now. Either way, the proposed intervenors could not have waited to move until after the reopener briefing is complete, or we would have been accused of moving too late. This motion to intervene is timely, and there is no reason to delay resolution of the motion.

B. The proposed intervenors and their members have legally protected interests that confer standing to intervene

The government does not deny that the proposed intervenors have a legally protected interest in the subject matter of this suit or that they have standing to intervene. Washtech, however, insists that the movants have no "*legally protected interest* in this case" because they have no right "recognized at common law or by Congress" to hire recent college graduates. Washtech Opp. 4-5 (ECF 41). Washtech also contends that the proposed intervenors lack standing. Neither contention has merit.

The proposed intervenors' protectable legal interest (and the basis for their standing) is straightforward:[5] they have an interest in preserving the employer-employee relationships between their members and those recent university graduates whose work authorization depends on the OPT and STEM OPT programs. Washtech brushes this aside as merely an "indirect economic interest." Washtech Opp. 5 (ECF 41). But it is nothing of the sort. Indeed, if Washtech were correct, it would itself lack Article III standing to challenge OPT; after all, it has no right "recognized at common law or by Congress" to participate in a labor market free of individuals whose work authorization depends upon the OPT program. *See Sargeant v. Dixon*, 130 F.3d 1067, 1069 (D.C. Cir. 1997). But the rules for standing are not that narrow. *See, e.g.*, *Texas v. United States*, 328 F. Supp. 3d 662 (S.D. Tex. 2018) (holding that Texas had standing to challenge "work authorizations conferred by the [DACA] program" because of the program's impact on the labor market in Texas). If Washtech and its members have a legally cognizable interest in *challenging* OPT because of OPT's effect on the labor market, then the proposed intervenors and their members have a legally cognizable interest in *defending* OPT because of OPT's effect on the labor market.

[5] Rule 24(a)(2)'s requirement of a protectable interest is broadly coextensive with the standing analysis. *See Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998).

Having said that, the interests here are stronger than just the interest in OPT's effect on the labor market. The core purpose of the OPT program and the STEM OPT extension is to provide work authorization to recent university graduates. *Washtech v. DHS*, 892 F.3d 332, 337 (D.C. Cir. 2018). To be sure, employment "confers a benefit upon eligible students." 57 Fed. Reg. 31,954, 31,955 (July 20, 1992). But the employer-employee relationship is necessarily bilateral and symbiotic: by virtue of vesting the employ***ee*** with legal duties and entitlements, it vests the employ***er*** with complementary legal duties and entitlements.[6] There cannot be one without the other. Thus, the beneficiaries of employment authorization under the immigration laws are *both* the employees *and* their employers.

Indeed, the STEM OPT rule expressly identifies U.S. businesses as an intended beneficiary of the program. In justifying the 24-month STEM extension, the Department of Homeland Security explained that "U.S. employers will benefit from the increased ability to rely on skilled U.S.-educated STEM OPT students, as well as their knowledge of markets in their home countries." 81 Fed. Reg. 13,040, 13,043 (Mar. 11, 2016) (emphasis added). The proposed intervenors, on behalf of their members and the broader community, have a cognizable (and direct) economic interest in preserving this benefit.

Accordingly, both parties to the employer-employee relationship have a legal interest in defending the statutes and implementing regulations that make the relationship possible. And all of this is supported by the evidence. As explained in the opening memorandum (at 9, ECF 37-1), many of the proposed intervenors' members depend on OPT to provide legal status to a great many employees. Intel, for example, furnished a declaration demonstrating that its employer-

[6] Washtech makes the bizarre suggestion (Opp. 4-5, ECF 41) that legal work authorization and the employer-employee relationship are not legally protected interests under the common law or federal statute. That is incorrect. *See, e.g., Texas*, 328 F. Supp. 3d 662; *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (1947) (in a Fair Labor Standards Act case, noting the many sources of employer-employee obligations, including "common law" and "statutes"); *Matthews v. Comm'r of Internal Rev.*, 907 F.2d 1173, 1175 & n.1 (D.C. Cir. 1990) (recognizing and discussing "the common law employer-employee relationship" for purposes of tax law).

employee relationship with approximately 1,100 individuals depends on the OPT program. Duffy Decl. ¶ 18 (ECF 37-3). If the OPT program were vacated, Intel—and hundreds of other companies just like it—would have to terminate those employees, depriving it of the benefits of its current legal relationship with those employees and costing it an immeasurable amount of productivity in the process. *Id.* at ¶¶ 17-20. The injury could hardly be more direct, but Washtech disregards these facts.[7]

Against this backdrop, the proposed intervenors' interests in defending the OPT and STEM OPT programs are "of such a direct and immediate character that [their members] will either gain or lose by the direct legal operation and effect of the judgment." *Convertino v. U.S. Dep't of Justice*, 674 F. Supp. 2d 97, 108 (D.D.C. 2009) (quoting *AT&T*, 642 F.2d at 1292). "That causal linkage" between a "grant of the [plaintiff's] requested relief" and the devastating disruption of thousands of employer-employee relationships "is plausible, directly foreseeable, [and would be] imminent upon" entry of judgement for plaintiff; it is also "adequately supported by the affidavits and supporting documents the [proposed intervenors] have filed." *U.S. House of Representatives v. Price*, 2017 WL 3271445, at *1 (D.C. Cir. 2017) (granting intervention).

To the extent that Washtech makes a broader argument—that no third party has standing to intervene to defend regulations adopted by virtue of agency discretion (Washtech Opp. 6-8, ECF 41)—its contention is without merit. In this Circuit, it is now well established that third parties may intervene to defend agency regulations or decisions where vacatur of those actions

[7] *Curry v. Regents of University of Minnesota*, 167 F.3d 420 (8th Cir. 1999), is thus easily distinguishable. In that case, the proposed intervenors—students who asserted that their First Amendment right to expression would be inhibited if certain "Student Services Fees" were no longer collected for student-group funding—had not shown that they would lose funding (as opposed to obtaining it from alternate sources) if the fees were not collected; thus, their interest was "too speculative." *Id.* at 422-23. On top of that, the court stressed that "[t]he [m]ovants also ha[d] not met their 'minimal burden' of showing that the University will inadequately represent their interests" (*id.* at 423) and that the students' participation in the case as intervenors "would interject collateral issues" into the litigation (*id.*). The same cannot be said here.

would cause injury, even though the agency was under no statutory obligation to take the action in the first place. *See, e.g.*, *Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 315 (D.C. Cir. 2015); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728 (D.C. Cir. 2003).

C. The proposed intervenors have made the required "de minimis" showing that the government may not adequately protect their interests

The government's defense in this litigation to date is no reason to deny intervention. The government describes the proposed intervenors' concern about the current administration's stated intent to reconsider the OPT program as mere "speculation." Gov't Opp. 4-5 (ECF 42). Its view, apparently, is that the American business community must wait for the government to actually abandon the OPT program before it can be sure that the government's representation will be inadequate. Washtech takes a similar position, asserting that the government's consideration of potential regulatory changes to the OPT program is insufficient to warrant intervention. Washtech Opp. 8-9 (ECF 41).

The government and Washtech both disregard the fact that the inadequacy requirement imposes only a "minimal burden" that is "not onerous" in application. *Crossroads*, 788 F.3d at 321. To establish inadequacy of representation, we must make only a "de minimis" showing that "there is a *possibility* that [the proposed intervenors'] interests *may* not be adequately represented absent intervention." *Forest Cty. Potawatomi Cmty. v. United States*, 317 F.R.D. 6, 11 (D.D.C. 2016) (emphasis added) (citing *Fund for Animals*, 322 F.3d at 735).

The government's recent change in policy position—a position change that the government does not deny in its brief—creates, at the very least, a "possibility" that the government will no longer adequately defend the proposed intervenors' interests. *Forest Cty.*, 317 F.R.D. at 11. The proposed intervenors do not have to wait until the administration flatly abandons defense

of the regulation (or declines to appeal), at which point Washtech would no doubt renew its objection to intervention on timeliness grounds.

And while the government attacks our reliance on its public statements, it declines to make any affirmative commitment to a full defense of this litigation moving forward. It does not promise to defend OPT on the merits. Nor does it commit to appealing an adverse decision, despite our request for it to do so. *See* Opening Mem. 14 (ECF 37-1). The government's "silence" on these points "is deafening." *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1256 (10th Cir. 2001); *Conservation Law Found. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992) (same). As the D.C. Circuit has said, "[s]uch equivocation about whether the Department will continue to . . . protect the intervenors' interests constitutes at least the requisite 'minimal' showing that the Department's representation of [the proposed intervenors'] interest '*may* be' inadequate." *U.S. House of Representatives*, 2017 WL 3271445, at *1 (alterations incorporated) (quotations and citation omitted) (quoting *Smoke*, 252 F.3d at 471; *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)).

Setting all that aside, the government offers no response to our demonstration that, *even if* the proposed intervenors' interests were generally aligned with those of the government, intervention would still be warranted. Opening Mem. 13-14 (ECF 37-1). Even where a proposed intervenor and the government "agree[] that the agency's current rules and practices were lawful," "that does not necessarily mean [that] adequacy of representation is ensured for purpose of Rule 24(a)(2)." *Crossroads*, 788 F.3d at 321 (quoting *NRDC v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977)). That is especially so in cases like this, given that the D.C. Circuit "look[s] skeptically on government entities serving as adequate advocates for private parties" (*id.*), and it has "often concluded that governmental entities do not adequately represent the interests of aspiring intervenors" (*Fund for Animals*, 322 F.3d at 736). As the D.C. Circuit has repeatedly explained—and neither Washtech nor the government denies—the government's interests necessarily reflect a

balancing of several competing constituencies and will often conflict with the interests of entities focused on a more discrete segment of the regulated public. *See id.* at 736 & n.9 (describing examples).

Such divergence is already clear. The government has taken the public position that the OPT program, as currently configured, does not provide sufficient "protections of U.S. workers." Opening Mem. 6 (ECF 37-1). The proposed intervenors fundamentally disagree with that assertion—and thus they will defend the agency's prior rulemaking based on the agency's earlier policy determinations that the OPT program does *not* have negative consequences for U.S. workers.

The adequacy prong is a "de minimis" barrier to intervention where an entity seeks to intervene in litigation regarding rulemaking that directly affects it—precisely the circumstances at issue here. Because the government has changed its policy position, the government has failed to state affirmatively that it will defend the program either in this Court or on appeal, and the parties already have divergent interests, intervention is warranted.

III. ALTERNATIVELY, THE COURT SHOULD GRANT PERMISSIVE INTERVENTION

In the alternative, the Court should allow permissive intervention. The government's only answer on this score is to say that our involvement would "delay, or at least complicate, resolution of the matter." Gov't Opp. 6 (ECF 42). Not so: the proposed intervenors will comply with the Court's scheduling orders and will not otherwise delay resolution of the case. And, by ensuring a full-throated defense of the OPT program notwithstanding the government's recent equivocations, the proposed intervenors' participation will aid this Court's adjudication of the matter.

Washtech opposes permissive intervention solely on the basis of its Rule 24(c) argument. Washtech Opp. 9-10 (ECF 41). As we have explained, this argument disregards the governing precedents. *See supra* at 2-5. Indeed, multiple courts of appeals have held that resting on such a

technical basis to deny a motion to intervene is itself an abuse of discretion. *E.g.*, *Peaje Invs.*, 845 F.3d at 515; *Providence Baptist Church*, 425 F.3d at 314.

CONCLUSION

The Court should grant leave for the National Association of Manufacturers, the Chamber of Commerce of the United States of America, and the Information Technology Industry Council to intervene as defendants in this action.

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Respectfully submitted,

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