IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INSTITUTIONAL SHAREHOLDER SERVICES, INC., Plaintiff, v. SECURITIES AND EXCHANGE COMMISSION AND WALTER CLAYTON III in his official capacity as Chairman of the Securities and Exchange Commission, Defendants.	Case No. 1:19-cv-3275-APM

REPLY IN SUPPORT OF MOTION OF THE NATIONAL ASSOCIATION OF MANUFACTURERS TO INTERVENE IN SUPPORT OF DEFENDANTS

Helgi C. Walker (D.C. Bar No. 454300)
Lucas C. Townsend (D.C. Bar No. 1000024)
Jeremy M. Christiansen (D.C. Bar No. 1044816)
Brian A. Richman* (D.C. Bar No. 230071)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
(202) 887-3599

Counsel for Intervenor
the National Association of Manufacturers

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* Application for admission pending.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Other Authorities

ARGUMENT

In opposing the National Association of Manufacturers' ("NAM") motion to intervene in this case, Institutional Shareholder Services ("ISS") has struck a familiar chord: resistance to others having the opportunity to provide a different point of view for interested parties to consider. That is not the right approach for the proxy advice voting market, which is why the Final Rules at the heart of this case are a necessary correction. And it is not the right approach for this litigation either. The Federal Rules of Civil Procedure allow privates parties such as the NAM to intervene in defense of agency action that prevents harm to them.

The NAM meets all of the criteria for intervention as of right. It identified multiple specific members that have experienced firsthand the many problems with ISS's existing approach to proxy voting advice that the Final Rules are designed to fix. The NAM's members issue publicly traded shares, which are voted in proxy contests to resolve important issues of corporate governance concerning the NAM's members' operations. But those votes are influenced—and often automatically entered—by proxy voting advice businesses such as ISS that labor under undisclosed conflicts of interest and offer recommendations plagued by errors and misleading statements. The NAM's members are harmed when shareholders are moved to act without all relevant information, and they suffer further harm when they are forced to expend resources to correct and respond to ISS's advice. The Final Rules fix these problems, and ISS admits that the NAM's members and other issuers are among the intended beneficiaries of this fix. The NAM has a right to defend the Final Rules under well-settled case law.

The NAM's motion is timely and will not prejudice ISS in any way. The NAM has acted responsibly and courteously by submitting its papers on the pre-existing schedule. In particular, the NAM has already lodged its brief in support of the Final Rules—within the time the Court set for the Securities and Exchange Commission to respond to ISS's motion for summary judgment.

And with this expedited reply, the parties have now completed all briefing on the question of intervention. The Court's schedule will therefore move ahead as planned, without disruption to the parties or the Court.

The NAM, moreover, cannot count on the Commission to defend its interests. While the Commission is statutorily obligated to consider the views of the American public—including ISS itself—the NAM has a distinct focus: the interests of its private-sector members. ISS itself put that distinct interest front-and-center though the framing of its First Amended Complaint, repeatedly alleging that the Final Rules conferred unwarranted benefits on issuers; it cannot now claim that issuers have no concrete interest in defending the Final Rules. The NAM may therefore press arguments and refuse compromises that the Commission, with its broader constituency, may forego and accept, or present a unique point of view on legal issues. Although ISS would prefer to relegate the NAM to mere amicus, that non-party status is not sufficient to actively protect the NAM's interests in this litigation. As a representative of the very entities whose shareholder voting and corporate governance is ultimately at issue, the NAM deserves a seat at the litigation table.

For these and other reasons detailed below, and in the NAM's motion, the Court should grant the NAM an opportunity intervene, as of right or permissively, to defends its strong interests in affirmance of the Final Rules.

I. The NAM Is Entitled To Intervene As Of Right Under Rule 24(a).

As established in the NAM's motion and supporting declaration, *see* Dkt. 27-1, 27-2, the NAM is entitled to intervene as of right under Rule 24(a). ISS's arguments to the contrary are meritless and represent a hollow attempt to keep the NAM's members' voices out of this litigation.

A. The NAM Has Article III Standing And A Legally Protected Interest Relating To The Final Rule.

ISS agrees that "satisfying constitutional standing requirements demonstrates the existence of a legally protected interest for purposes of Rule 24(a)." *Jones v. Prince George's Cty.*, 348 F.3d 1014, 1019 (D.C. Cir. 2003); *see* Opp. 9. But ISS asserts that the NAM has not established standing to defend, and relatedly, that it does not have a legally cognizable interest in, upholding the Final Rules. *See* Opp. 8–12. ISS is wrong.

As an initial matter, as the NAM argued in its opening motion, a showing of Article III standing is not necessary to establish that the NAM qualifies for intervention as of right here. Dkt. 27-1 at 8–9 n.2 (citing *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2379 n.6 (2020); *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019); *Town of Chester v. Laroe Estates*, 137 S. Ct. 1645, 1651 (2017)). ISS cites *Old Dominion Electric Coop. v. FERC*, 892 F.3d 1223, 1233 & n.2 (D.C. Cir. 2018), for the proposition that all intervenors must show Article III standing. But that 2018 decision has been superseded by the Supreme Court as the NAM already established. In *Little Sisters of the Poor*, the Little Sisters had intervened in the district court to defend a religious exemption. 140 S. Ct. at 2379. After the district court enjoined that exemption, the federal government appealed, as did the Little Sisters. *Id*. The Third Circuit held that the Little Sisters lacked standing, and thus could not intervene in defense of the challenged rule. *Id*. at 2379 n.6.

The Supreme Court reversed. The Court explained that an "intervenor of right must independently demonstrate Article III standing it if pursues relief that is broader than or different from the party invoking a court's jurisdiction." 140 S. Ct. at 2379 n.6. Because both the federal government and the Little Sisters "asked the court to dissolve the injunction against the religious exemption," the Third Circuit "erred by inquiring into the Little Sisters' independent Article III

standing." *Id.* So too here. Because both the NAM and the SEC ask the Court to uphold the Final Rules, the Court need not—and should not—"inquir[e] into" the NAM's "independent Article III standing." *Id.*; *accord Virginia House of Delegates*, 139 S. Ct. at 1951 (party did not have "to demonstrate standing" to "interven[e] in support of the State Defendants); *Town of Chester*, 137 S. Ct. at 1651 (party must establish standing only for relief broader than that sought by parties).

In any event, the NAM has made that showing. In the motion to intervene, the NAM explained that its members are subject to a regulatory regime in which they must submit important corporate governance matters to a shareholder vote, which is generally executed via proxies. Those members "have routinely experienced the negative consequences associated with the out-sized and under-regulated impact that proxy advisory firms such as ISS have on" such votes. Mot. 9. Accordingly, the NAM's members must "divert resources" to respond to proxy voting advice that is, among other things, tainted by "undisclosed conflicts of interest" and "misleading or inaccurate information." *Id.* at 9–10.

ISS argues that this interest is not sufficient, on the grounds that the NAM "has failed to identify an individual member" who could assert that interest. Mot. 10. That is a mischaracterization. The NAM specifically identified *six* NAM members by name that would be "adversely affected if the Final Rule were set aside." Dkt. 27-2, ¶ 3. In addition, each of these individual members filed comments to the rulemaking docket describing their interests in the then-proposed rule, and the NAM cited to those comment letters. *Id*. Exxon Mobil Corporation, for example, explained that it has "repeatedly observed errors made by proxy advisory firms," "mistakes that have been compounded by automatic voting practices" that immediately translate ISS's flawed recommendations into proxy votes in elections held by Exxon. AR558 at 3. This is not a "generic" harm voiced by some "[un]identif[ied]" actor, Mot. 10, but a concrete injury suffered by a specific

company (and many other member companies that issue publicly traded shares) that makes clear that the harm would be alleviated if the Final Rules were allowed to stand. That is the exact type of regulatory "benefit" that a private litigant is allowed to defend. *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 317 (D.C. Cir. 2015).

Therefore, even if the NAM were required to show how its members suffered injury through ISS's actions—and it is *not* required to make that showing—the NAM has amply done so. ISS cannot credibly claim to be confused about the issuer harms at stake in this case.

B. The NAM's Motion Is Timely.

Without citing a single affirmative case in support, ISS argues that the NAM's motion is untimely, claiming that the NAM "could have filed it is motion … at several previous junctures of this case" and that ISS will be prejudiced by intervention. *See* Opp. 6-8. ISS's arguments are unfounded. The motion is clearly timely, and ISS will suffer no prejudice here.

First, ISS claims one principal source of alleged prejudice: "[e]xtending the briefing schedule" to accommodate the NAM. Opp. 7. But the NAM expressly stated that it would *comply* with the existing briefing schedule, Dkt. 27-1 at 8, 13–14, and has in fact now done so by today filing its summary judgment papers and this expedited reply on the motion to intervene. ISS even recognizes that the NAM committed to "file its summary judgment briefs in accordance with the existing briefing schedule set by the Court," Opp. 7, so the assertion of a delayed briefing schedule is doubly odd. The NAM has acted responsibly and courteously by submitting its papers on the pre-existing schedule. Thus, no schedule adjustment is needed and there is no prejudice here, making intervention completely appropriate. *See Fitisemanu v. United States*, 2018 WL 10016086, at *5 (D. Utah Sept. 13, 2018) (granting intervention in the midst of summary judgment and rejecting plaintiffs' argument that intervention would upset "negotiated briefing schedule"

when intervenors moved "only 73 days after Plaintiffs filed their Complaint" and intervenors committed to "whatever schedule" the "court deem[ed] appropriate"); *see also id.* Dkt. 57, 58 (setting dispositive briefing schedule prior to intervention); Dkt. 61 (motion to intervene filed the day the government defendants cross-motion for summary judgment was due).[1]

ISS attempts to bolster its wobbly claim of prejudice by arguing that extending the briefing schedule will cause it "uncertainty about whether ISS will need to begin taking steps to comply" with the Final Rules. Opp. 7. As explained, the NAM has already complied with the schedule. But this argument makes no sense on its face. ISS *concedes* that "most provisions of the Final Rules will go into force next week, on November 2, 2020," *long* before ISS files its next set of papers (with briefing scheduled into early December 2020). *Id.* And ISS acknowledges that the "compliance date" for the challenged provisions of the Final Rules is "December 1, 2021," more than a year from now. *Id.* ISS no doubt hopes that the litigation it chose to bring is resolved by then, but ISS has no cognizable right in that outcome; the "uncertainty" of which ISS complains is a product of its own decision to challenge the Final Rules in court rather than comply with their sensible provisions. Moreover, ISS does not dispute that this case involves only "*legal challenges* to the federal government's" regulations and involves no "discovery" or need for any "additional factual development." *Roane v. Leonhart*, 741 F.3d 147, 152 (D.C. Cir. 2014) (emphasis added) (intervention is "highly unlikely to disadvantage the existing parties" under such circumstances). And ISS never explains how the NAM's intervention would result in this litigation being extended

[1] Indeed, it is ISS's position on the NAM's motion for leave to conditionally file a summary judgment motion pending resolution of the intervention motion—that nothing should even be *lodged* unless and until intervention is granted—that would cause delay, not anything ISS has done.

(something ISS has no right against anyway). ISS is a sophisticated entity that will be able to determine its compliance obligations notwithstanding the NAM's participation in the litigation.

Second, the NAM's motion is plainly timely. ISS filed its original complaint challenging the Commission's Proxy Guidance "[o]n October 31, 2019," and only a month later, "the Commission published a notice of proposed rulemaking" effectively mooting ISS's claim. Dkt. 20-1 at 12–13. The Commission sought abeyance of the proceedings without objection from ISS, *see* Dkt. 13, and this Court granted the motion, *see* Dkt. 14. This case was then *stayed* for nearly a year. It made no sense to intervene during that time, especially with the outcome of the rulemaking uncertain, so ISS's argument that the NAM "did not seek to intervene" "nearly a year ago," Opp. 6, lands wide of the mark.

The window for measuring timeliness began when ISS filed its First Amended Complaint, not a year ago. "[I]t is hornbook law that an amended complaint supersedes the prior complaint and renders it of no legal effect." *TargetSmart Holdings, LLC v. GHP Advisors, LLC*, 2019 WL 4540543, at *12 (D.D.C. Sept. 19, 2019). Only then could the NAM properly assess whether to intervene to defend the Final Rules. The NAM's cited cases clearly permit intervention within even longer periods of time after the filing of the operative pleading than has occurred here. *See* Dkt. 27-1 at 13 (*e.g.*, permitting intervention when motion filed three months after the complaint). ISS tries to distinguish those cases, arguing that none permitted intervention "in the middle of dispositive briefing, months after the court had entered a scheduling order." Opp. 7. But courts have granted intervention in this *exact* posture. *See Fitisemanu*, 2018 WL 10016086, at *5; *see also id.* Dkt. 57; Dkt. 61. And ultimately, the "amount of time which has elapsed since the litiga-

tion began is not in itself the determinative test of timeliness," particularly when there is an "improbability of prejudice to those already in the case." *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 907 (D.C. Cir. 1977). The NAM's motion is timely and ISS will suffer no prejudice.

C. The Denial Of The NAM's Right To Intervene Will Impair Its Members' Ability To Defend Their Interests In This Litigation.

ISS argues that denying the NAM's right to intervene will not impair its members' ability to defend their interests in this litigation, because the NAM allegedly cannot defend the Final Rules on grounds "*not* advanced by the Commission." Opp. 13. ISS is wrong, and its argument proves too much.

Courts frequently allow private litigants—including the NAM—to intervene to defend a rule despite the background principle that an agency's action "must be judged" on the grounds "upon which . . . [the] action was based." *SEC v. Chenery*, 318 U.S. 80, 87 (1943); *see, e.g.*, *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 737–38 (D.C. Cir. 2003); *Washington Alliance of Tech. Workers*, 395 F. Supp. 3d at 21; *In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig.*, 818 F. Supp. 2d 214, 224–25 (D.D.C. 2011) (permitting "several parties," including the NAM, "to intervene on behalf of the federal defendants in support of the Special Rule."). ISS does not even attempt to explain how *Chenery* is supposedly an insurmountable obstacle to the NAM's intervention in this case, and its sweeping assertion is belied by the countless cases in this Circuit—indeed, around this country—in which a private litigant has been permitted to intervene in defense of a federal agency's rule. *See, e.g.*, *Little Sisters of the Poor*, 140 S. Ct. at 2379 n.6 (reversing order denying intervention). It happens all the time.

Even under the *Chenery* doctrine, a private litigant cannot fully defend its interest in preserving a federal agency's action without being granted party status. Although ISS would like to

relegate the NAM to amicus status, that is insufficient. Opp. 13. Courts frequently will not consider an amicus's argument if it is not presented by a party. *Eldred v. Ashcroft*, 255 F.3d 849, 850–52 (D.C. Cir. 2001). And, here, the Commission is under no obligation to defend the Final Rules on the same terms that the NAM might. The Commission, for example, might for strategic or other reasons forego procedural objections that the NAM would otherwise preserve. *See*, *e.g.*, *Masias v. EPA*, 906 F.3d 1069, 1075–76 (D.C. Cir. 2018) ("We note that EPA did not assert this bar . . . [b]ut Respondent-Intervenors . . . properly preserved the argument."); *Collective Concrete, Inc. v. NLRB*, 786 F. App'x 266, 267 (D.C. Cir. 2019) (per curiam) ("Although the Board did not object that this challenge is forfeited, the union did object on that ground, . . . and intervenors can preserve such an argument."). Or the Commission might defend its lawful actions "for the wrong reason[s]." *United Video, Inc. v. FCC*, 890 F.2d 1173, 1190 (D.C. Cir. 1989). As a representative of the very entities whose shareholder voting and corporate governance is ultimately at issue, the NAM deserves a seat at the litigation table.

D. The NAM's Interests Will Not Be Adequately Represented By Existing Parties.

Contrary to ISS's assertion (at 13), the Commission does not adequately represent the NAM's interests. As the NAM explained in its motion to intervene—and as ISS does not, and cannot, reasonably dispute—the Commission "represent[s] the interests of the American people" as a whole, *including the interests of ISS itself*, while the NAM's "concern" is more distinctly focused on the interests of its members. *Fund for Animals*, 322 F.3d at 736. It is for that reason that courts "have often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Id.* Judge Wilkins held exactly that in *Alec L v. Jackson*, No. 1:11-cv-2235 (D.D.C. May 10, 2012), permitting the NAM to intervene in that case because "govern-

ment agencies often cannot adequately protect or adequately represent all relevant business interests," Tr. 60:18–19, Dkt. 169 (citing *Fund for Animals*, 322 F.3d at 736). Judge Wilkins was right then, and his reasoning is right now.

ISS tries to distinguish *Fund for Animals*, claiming that the D.C. Circuit had special reason to believe that the Mongolian government's interests would diverge from those of the U.S. Fish & Wildlife Service. *See* Opp. 14–15. But the court of appeals had no more reason to suspect a divergence of interests there than this Court has reason to suspect one here. Like the Government of Mongolia in *Fund for Animals*, the NAM "agree[s]" with the federal government that the challenged rules "are lawful." 322 F.3d at 736. The reason that the NAM's interests "might diverge during the course of the litigation" from the government's is that the government, unlike the NAM, "is charged by law with representing the public interest of [all] its citizens," and thus may compromise in ways that groups representing narrower interests may not. *Id.* at 737.

The different interests of the federal government and private litigants is precisely the same reason that the Government of Mongolia could not rely on the Fish and Wildlife Service to give the same "kind of primacy" to the views of Mongolia in *Fund for Animals*. 322 F.3d at 736. And it is precisely the same reason that private litigants typically cannot count on the federal government to adequately defend their interests in litigation—a commonsense fact-of-life reflected in the cases on which the *Fund for Animals* court relies, *see id.* at 736 n.9. *See, e.g.*, *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 539 (1972) (allowing union member to participate in claim brought by Secretary of Labor because "the Secretary has an obligation to protect the vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member" (quotation marks omitted)); *NRDC v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977) (allowing chemical and rubber companies to intervene in support of EPA because

their interest "is more narrow and focused than EPA's"). Simply put, the NAM and the Commission represent different constituencies, with different interests. Just as this Court would not regard the Commission's interests as adequately represented by the NAM, the Court cannot regard the NAM's interests as adequately represented by the Commission.

II. The Court Should Alternatively Grant Permissive Intervention Under Rule 24(b).

In the alternative, this Court should grant the NAM permission to intervene under Rule 24(b). ISS does not contest that "Rule 24(b) . . . provides basically that anyone may be permitted to intervene if his claim and the main action have a common question of law or fact," *Nuesse v. Camp*, 385 F.2d 694, 704 (D.C. Cir. 1967), so long as intervention would not "unduly delay or prejudice the rights of the original parties," *Acree v. Republic of Iraq*, 370 F.3d 41, 49 (D.C. Cir. 2004), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848 (2009). Instead, ISS rehashes the same flawed objections described above, but they cannot overcome the clear fact that the NAM has easily met the standard for permissive intervention.

There is no doubt that NAM's arguments present common questions of law or fact with the "main action." *Nuesse*, 285 F.2d at 704. And despite ISS's unpersuasive claims to the contrary, it is clear that the NAM's motion to intervene is timely. Far from "delay[ing]" this action, the NAM has *already* lodged its proposed brief in intervention with the Court, and with this reply, has fully briefed the question of intervention—all within the briefing schedule that this Court set for the opposition to ISS's arguments.

While ISS institutionally may oppose the availability of additional interested parties' views in this litigation, as in proxy votes, that is not reason to deny the NAM an opportunity to defend the clear interests of its members here.

III. The NAM's Motion To Intervene Is Procedurally Proper.

ISS latches onto the lack of a "pleading attached" to the NAM's motion to intervene, citing Federal Rule of Civil Procedure 24(c) and Local Rule 7(j). *See* Opp. 5-6. That argument can be easily dismissed.

The D.C. Circuit has squarely rejected ISS's "hypertechnical" reading of the Rules, noting that such a "technical defect, if defect it be" is not grounds for denial of otherwise proper intervention. *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1236 n.19 (D.C. Cir. 2004); *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 313–14 (6th Cir. 2005) (collecting cases and holding that courts consistently "favor[] a permissive interpretation" of Rule 24(c) and hold it is satisfied where the motion states the "legal grounds[,] reasons[,] and arguments contending that intervention was appropriate" (quotation marks omitted)). This Court, too, has rejected the very argument ISS advances here in permitting the NAM to intervene in a case much like this one, holding that when a motion to intervene has made clear that the movant "seek[s] to intervene to 'defend[ ] the legality of the … regulation at issue," the purposes of Rule 24(c) are satisfied. *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 395 F. Supp. 3d 1, 21 n.4 (D.D.C. 2019). ISS's own case law rejects its position. *See Friends of the Earth v. EPA*, 2012 WL 13054264, at *2 (D.D.C. Apr. 11, 2012) (ignoring missing pleading and "instead proceed[ed] to evaluate movant's motion on the merits based on the content of her motion").

As noted in the NAM's motion to intervene, the parties agreed that the Commission would defer filing an answer, *see* Dkt. 17 at 3, because this case presents only *legal* questions about the lawfulness of the Final Rules. The filing of an answer here by the NAM makes little sense, and ISS never "explains what type of pleading the [NAM should] have filed in a case such as this." *Microsoft*, 373 F.3d at 1236 n.19.

Moreover, the NAM's motion to intervene sets forth its position with sufficient specificity to meet the purposes of the Rules, which are to "enable the court to determine whether the applicant has the right to intervene" and to "place the other parties on notice of the claimant's position" and "relief sought." *SEC v. Am. Pension Servs. Inc.*, 2015 WL 248575, at *2 (D. Utah Jan. 20, 2015) (quotation marks omitted). As made abundantly clear in the motion, the Final Rules are lawful under the Administrative Procedure Act and the First Amendment and the NAM's members will be injured if the Final Rules are vacated or otherwise set aside. *See* Dkt. 27-1 at 2–11, 17. It is thus hard to see why ISS "cannot decipher" the NAM's position here, Opp. 5, especially given that the Commission cited and relied on the NAM's rulemaking comment more than 30 times in the Commission's release adopting the Final Rules. *See generally Exemptions from the Proxy Rules for Proxy Voting Advice*, 85 Fed. Reg. 55,082 (Sept. 3, 2020).

ISS knows exactly what perspective the NAM brings to this case, which is why ISS is fighting to exclude it. The NAM's motion is plainly sufficient under this Court's precedents, all of which ISS fails to acknowledge. *See Washington All. of Tech. Workers*, 395 F. Supp. 3d at 21 n.4 (NAM's position sufficiently "apparent" from motion to intervene because it indicated that the NAM sought "to intervene to 'defend[ ] the legality of the … regulation at issue."); *New England Anti-Vivisection Soc'y v. U.S. Fish & Wildlife Serv.*, 2016 WL 10839560, at *1 (D.D.C. Apr. 29, 2016) (permitting intervention in the same circumstances).

CONCLUSION

For the foregoing reasons, and the reasons in the NAM's motion, the NAM respectfully requests that the Court grant the NAM's Motion to Intervene to allow the NAM to defend its members' interests in affirmance of the Final Rules.

Dated: October 30, 2020

Respectfully submitted,

/s/ *Helgi C. Walker*
Helgi C. Walker (D.C. Bar No. 454300)
Lucas C. Townsend (D.C. Bar No. 1000024)
Jeremy M. Christiansen (D.C. Bar No. 1044816)
Brian A. Richman* (D.C. Bar No. 230071)
GIBSON DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
Telephone: (202) 887-3599
Facsimile: (202) 530-9595
HWalker@gibsondunn.com
LTownsend@gibsondunn.com
JChristiansen@gibsondunn.com
BRichman@gibsondunn.com

Counsel for Intervenor
the National Association of Manufacturers

* Application for admission pending.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2020, I caused a copy of the foregoing document to be served on all parties through the Court's CM/ECF system.

/s/ Helgi C. Walker

Helgi C. Walker (D.C. Bar No. 454300)