

ORAL ARGUMENT NOT YET SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRICK INDUSTRY ASSOCIATION,)	
)	
<i>Petitioner,</i>)	
)	No. 16-1146
v.)	(consolidated with Nos. 16-
)	1105, 1113, 1125, 1126,
SECRETARY, DEPARTMENT OF)	1131, 1137, & 1138)
LABOR, AND OCCUPATIONAL)	
SAFETY AND HEALTH)	
ADMINISTRATION,)	
)	
<i>Respondents.</i>)	
)	

**REPLY BRIEF IN SUPPORT OF
MOTION FOR LEAVE TO INTERVENE IN SUPPORT OF PETITIONER**

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and D.C. Circuit Rules 15(b) and 27, the Chamber of Commerce of the United States of America (“the U.S. Chamber”), the State Chamber of Oklahoma (“Oklahoma Chamber”), and the Greater North Dakota Chamber of Commerce (“North Dakota Chamber”) (collectively, “the Chambers”) respectfully submit this reply brief in support of their motion to intervene (“Motion”) in the above-captioned case (as well as “in all cases before this court involving the same agency action or order,” D.C. Cir. R. 15(b)).

As the Chambers explained in their Motion, they should be permitted to intervene in these consolidated cases because their Motion is timely; their members have a direct and substantial interest in this proceeding that would otherwise go unrepresented by any other party; and none of the petitioners challenging the Final Rule can adequately represent the interests of the Chambers' members. Petitioner Brick Industry Association ("BIA") consents to the Chambers' intervention and, notably, Respondents—the U.S. Department of Labor and the Occupational Safety and Health Administration—do not oppose it.

Instead, certain other petitioners—the American Federation of Labor and Congress of Industrial Organizations; the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union; the International Union; United Automobile, Aerospace and Agricultural Implement Workers of America; and North America's Building Trades Unions (collectively, the "Unions")—*partially* oppose the Chambers' Motion. The Unions do not oppose allowing the Chambers to intervene in these cases. They do not challenge the timeliness of the Chambers' motion, the interests of the Chambers' members in this proceeding, or the fact that none of the petitioners challenging the Final Rule can adequately represent the interests of the Chambers' members.

Rather, the Unions argue only that the Chambers should be denied intervention “to the extent the Motion attempts to raise issues not raised by the BIA.” Opposition at 2. The Unions assert that because the U.S. Chamber represents “more than 3 million companies and professional organizations of every size, in every industry, from every region of the country,” the Chambers *might* expand this proceeding beyond the scope of those issues presented by the BIA in Case No. 16-1146. See Opposition at 2-3 (citing *Lamprecht v. FCC*, 958 F.2d 382, 389 (D.C. Cir. 1992) (explaining that intervenors “cannot expand the proceedings”)).

The Unions’ argument should be rejected. Their speculation that an intervenor could expand the issues beyond those presented by the parties is not a proper basis for excluding the intervenor from the proceeding. As the Supreme Court explained in *Vinson v. Washington Gas Light Co.*, “an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues.” 321 U.S. 489, 498 (1944) (emphasis added). At most, then, an intervenor’s presentation of a new issue could supply a reason for the Court to disregard that issue. And even then, the Court retains discretion to consider an issue presented only by an intervenor. See, e.g., *Synovus Financial Corp. v. Board of Governors of the Federal Reserve System*, 952 F.2d 426, 434 (D.C. Cir. 1991).

Moreover, the fact that the Chambers represent the interests of different or additional entities and segments of American business and industry than do the parties to this proceeding is not a legitimate basis for concluding that the Chambers would “expand the proceedings.” Under the Unions’ theory, no membership organization could ever intervene in an action involving individual parties or entities representing the interests of smaller or otherwise different groups. By that logic, the Unions themselves could never intervene in support of their affiliated local unions or their individual members. This is wrong. *See, e.g., Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009) (intervention by the National Cable & Telecommunications Association); *National Ass’n of Mfrs. v. Occupational Safety & Health Admin.*, 485 F.3d 1201 (D.C. Cir. 2007) (intervention by the U.S. Chamber of Commerce); *Industrial Union Dep’t, AFL-CIO v. Bingham*, 570 F.2d 965 (D.C. Cir. 1977) (intervention by the United Rubber Workers, AFL-CIO); *Bernsen v. Federal Labor Relations Authority*, 203 F.3d 51 (D.C. Cir. 2009) (intervention by the National Treasury Employees Union in support of its members).

Finally, because the Chambers seek to intervene “in all cases before this court involving the same agency action or order,” D.C. Cir. R. 15(b), the relevant question would not be whether the Chambers were to “expand the issues addressed through the BIA’s petition” but whether the Chambers were to expand the issues

presented by *any* party to these consolidated cases. *See Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 37 n.4 (D.C. Cir. 1992) (“[I]ntervenors may only join issue on a matter that has been brought before the court by another party.”) (internal quotation marks omitted). The Chambers have no intention to expand the issues beyond those ultimately raised by the petitioners in these cases.

For the foregoing reasons, as well as those set out in the Motion, the Chambers’ motion to intervene should be granted.

Dated: June 27, 2016

Respectfully submitted,

By: /s/ William S. Consovoy

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June 2016, I filed the foregoing document through the Court's CM/ECF system. All parties are represented by registered CM/ECF users and will be served by the CM/ECF system.

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