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

MOTION TO INTERVENE

The National Association of Manufacturers, the Chamber of Commerce of the United States of America, and the Information Technology Industry Council respectfully move this Court for an order granting them leave to intervene as defendants in this action as of right pursuant to Rule 24(a)(2) or, alternatively, permissively pursuant to Rule 24(b)(1)(B). As we explain more fully in the attached memorandum of law, movants have an interest in the subject of this action, and the Court's disposition of the action may impair or impede movants' ability to protect their interest. What is more, movants' interest is not adequately represented by the government, which has already taken steps to reconsider the regulation being challenged in this suit.

Movants have a substantial interest in defending the legality of the Optional Practical Training (OPT) regulation at issue in Count 2 of the plaintiff's complaint. If intervention is granted, movants propose to file a dispositive motion or other appropriate pleading on whatever schedule the Court may establish.[1] They also commit to avoiding unnecessary duplication of

[1] On September 18, 2018, the Court issued an order directing the government to file a renewed motion to dismiss (on the government's statute-of-limitations argument) by October 18, 2018, and deferring the filing of any answer and summary judgment briefing. Because of the Court's scheduling order, intervenors have not appended a proposed answer or a dispositive motion on the merits of Count 2. They are prepared to make a timely filing upon the order of this Court.

briefing in areas satisfactorily addressed by the government, to the extent possible. Additionally, in light of the government's indication that it is reconsidering the OPT regulation, movants' participation in this action is not only necessary to protect their interests, but it will also aid the Court in its decision.

The proposed intervenors have conferred with counsel for the plaintiff and the defendants, and both the plaintiff and the defendants have indicated that they oppose this motion.

WHEREFORE, the National Association of Manufacturers, the Chamber of Commerce of the United States of America, and the Information Technology Industry Council respectfully request that the Court grant them leave to participate as intervenor-defendants in this case.

October 18, 2018

Respectfully submitted,

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE

October 18, 2018

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INTRODUCTION

American businesses succeed by hiring exceptional employees. Indeed, innovation depends on superlative talent. American businesses know precisely where to find the people on whom they rely—they employ the graduates of America's preeminent colleges and universities. America's economic fortunes are inextricably tied to our perch as the hub of global education.

Many top graduates are U.S. residents—and leading businesses hire them in droves. But American schools do not close their doors to foreign students. To the contrary, they benefit by drawing the best and brightest students from around the world. That is evident, perhaps most starkly, with respect to graduate students studying in the critical fields of science, technology, engineering, and mathematics (STEM). Recent data indicates, for example, that more than 75% of the Master's degree graduates in electrical engineering, electronic engineering, communication engineering, computer engineering, and microelectronics are foreign nationals. Duffy Decl. ¶ 12. Indeed, American universities confer advanced degrees on thousands of foreign students every year in diverse fields like biotechnology, engineering, computing, and a host of others that are critical to our collective future. It follows that, when American businesses seek to hire the very best graduates from leading American institutions, some of those students will have come here from abroad. Keeping those highly specialized individuals in the United States—where they work for American companies, innovate in America, and pay American taxes—is essential to the vitality of the national economy and national security.

This case presents a challenge to the Optional Practical Training (OPT) program, which is the critical pathway through which foreign students may be employed by American businesses. OPT, including the STEM OPT extension, allows students to continue their training in the work environment; after all, one's education is rarely completed the day one leaves the classroom. Likewise, OPT supplies foreign students the necessary authorization for post-graduation employment. The program establishes a crucial bridge between a foreign national's student visa

and durable immigration status. Without the OPT program and the STEM OPT extension, the great majority of these highly skilled, American-educated students would be unable to remain in the United States and would therefore leave the country, taking their know-how with them.

The Washington Alliance of Technology Workers (Washtech)—the plaintiff in this case—is a protectionist organization that seeks just that outcome. And recent evidence suggests that the Department of Homeland Security (DHS)—the principal defendant in this case—may now agree. In its latest regulatory agenda (released two days ago), DHS criticized OPT, suggesting that it may "negatively impact[]" American workers; DHS has thus announced its intent to undertake a "comprehensive reform" of the OPT program. *See Practical Training Reform, Regulation Identifier No. 1653-AA76*, Office of Mgmt. & Budget (2018), perma.cc/AX6D-2SP7.

The National Association of Manufacturers, the Chamber of Commerce of the United States of America, and the Information Technology Industry Council accordingly request leave to intervene in this action. The proposed intervenors' members include many companies—large and small—that depend on the OPT program as an essential source for the highly specialized employees that they need to compete in a global economy. If 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. They accordingly have a legally protectable interest in the subject matter of this suit, one that would be impaired if the plaintiff succeeded in its challenge. And the proposed intervenors cannot count on DHS to defend a regulatory program that it plans to reconsider. That is especially so because, even in cases where industry and governmental interests are more closely aligned, courts routinely hold

that the government will not adequately represent the interests of private industry. Intervention accordingly is warranted.[2]

BACKGROUND

A. Regulatory background

In 1992, the predecessor to DHS promulgated a regulation—in force today—that establishes the OPT program. *See Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 892 F.3d 332, 337 (D.C. Cir. 2018). OPT provides limited employment authorization to an individual admitted to the United States on an F-1 visa; in particular, the 1992 OPT regulation authorizes a one-year course of employment that is related to—and thus a completion of—the student's course of study at a U.S. college or university. *Id.*

In 2008, DHS promulgated a regulation that provided for an extension of up to 17 months for select students. *Wash. All. of Tech. Workers*, 892 F.3d at 337. The 2008 regulation authorized this extension for individuals with a degree in a STEM field. *Id.* Washtech challenged that rule, and the district court held that DHS had improperly issued that rule without proper notice and comment. *Id.*

In 2016, DHS promulgated a regulation—also in force today—that provides for an up-to-24-month extension to OPT employment authorization for students with a STEM degree. *Wash. All. of Tech. Workers*, 892 F.3d at 338. This program is often referred to as STEM OPT. The regulation contains various protections for U.S. workers, including the requirements that the employer must certify that a STEM OPT recipient "will not replace a full- or part-time, temporary or permanent U.S. worker" (8 C.F.R. § 214.2(f)(10)(ii)(C)(10)(ii)) and that the "duties, hours, and compensation" of OPT workers will "be commensurate with" those of "similarly situated U.S. workers" (*id.* § 214.2(f)(10)(ii)(C)(8)).

[2] Pursuant to Local Civil Rule 7(m), the proposed intervenors conferred with counsel for both the plaintiff and defendants regarding the relief requested here. The plaintiff and the defendants oppose the relief requested.

B. Procedural background

Following promulgation of the 2016 STEM OPT rule, Washtech filed this lawsuit. Washtech's Count 2 asserts that the OPT program exceeds DHS's statutory authority. *See* Dkt. 1, at 11. The government promptly moved to dismiss, focusing substantially on the contention that Washtech lacked constitutional and prudential standing to press its varied claims and stressing further that Washtech's allegations fell short of Rule 8 pleading requirements. *See* Dkt. 18.

This Court dismissed the Complaint. It concluded that Washtech lacked standing to press certain arguments. *See* Dkt. 32, at 8-40. It also viewed Washtech, through its failure to respond by reply, as having conceded certain of the government's arguments contained in the motion to dismiss. *See id*. at 41-44. Additionally, as for Count 2, the Court found that Washtech failed to state a plausible claim that OPT is unlawful. *Id*. at 42-43.

On June 8, 2018, the D.C. Circuit reversed this Court's decision with respect to standing, holding that Washtech has stated a sufficient injury to press its claims. *Washington All. of Tech. Workers*, 892 F.3d at 339-42. The D.C. Circuit affirmed the Court's Rule 12(b)(6) dismissal of the majority of Washtech's claims, finding them legally deficient. *Id*. at 346-48. As to Count 2, however, the Court of Appeals determined that "the complaint itself adequately states a plausible claim for relief." *Id*. at 345. The D.C. Circuit thus remanded for the Court to address the merits of Washtech's claim, which includes whether the 2016 STEM OPT rule reopened the underlying 1992 rule for statute-of-limitations purposes. *Id*. at 345-46.

The D.C. Circuit's mandate issued on August 16, 2018. Dkt. 35. On September 18, 2018, the Court held a status conference. That same day, the Court directed the government to file a renewed motion to dismiss on the issue of reopener on October 18, 2018. Dkt. 36.

ARGUMENT

"The D.C. Circuit 'has identified four prerequisites to intervention as of right: (1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected in-

terest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests.'" *Atl. Sea Island Grp. LLC v. Connaughton*, 592 F. Supp. 2d 1, 6 (D.D.C. 2008) (quoting *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008)). In addition, "the prospective intervenor must establish injury-in-fact to a legally protected interest, causation, and redressability." *Old Dominion Elec. Coop. v. Fed. Energy Regulatory Comm'n*, 892 F.3d 1223, 1233 (D.C. Cir. 2018) (citing *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 316 (D.C. Cir. 2015)). Each of those requirements is readily met in this case.

When intervention is unavailable as of right, the Court may permit intervention by anyone who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). In exercising its discretion to grant permissive intervention, the Court considers many of the same factors relevant under Rule 24(a), with a particular eye to "whether [the] parties seeking intervention will significantly contribute to [the] full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *Int'l Design Concepts, LLC v. Saks Inc.*, 486 F. Supp. 2d 229, 235 (S.D.N.Y. 2007) (quoting *H.L. Hayden Co. of N.Y., Inc. v. Siemens Med. Sys., Inc.*, 797 F.2d 85, 89 (2d Cir. 1986)); *see also 100Reporters LLC v. U.S. Dep't of Justice*, 307 F.R.D. 269, 286 (D.D.C. 2014) (permissive intervention "allow[s] all interested parties to present their arguments in a single case at the same time").

I. THE COURT SHOULD GRANT INTERVENTION AS OF RIGHT

A. The application to intervene is timely

"Whether a given application [to intervene] is timely is a context-specific inquiry" that typically depends upon "(a) the time elapsed since the inception of the action, (b) the probability of prejudice to those already party to the proceedings, (c) the purpose for which intervention is sought, and (d) the need for intervention as a means for preserving the putative intervenor's

rights." *Forest Cty. Potawatomi Cmty. v. United States*, 317 F.R.D. 6, 10 (D.D.C. 2016) (citing *Karsner*, 532 F.3d at 886).

With respect to the first prong of this analysis, when substantial 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) (permitting intervention after entry of final judgment where it became clear the government would not appeal)); *accord U.S. House of Representatives v. Price*, 2017 WL 3271445, at *2 (D.C. Cir. Aug. 1, 2017) ("Where, as here, substantial doubts about the inadequacy of representation develop after the case has begun, timeliness is measured from when the potential inadequacy of representation develops.").

That rule applies here. After the complaint was initially filed in 2016, the government moved within two months to dismiss it, arguing both that Washtech lacked Article III standing and that its complaint was otherwise implausible on its face. *See* Dkt. 18 (Aug. 26, 2016). The agency defendants had just promulgated the STEM OPT regulation, and they had expressed no reservation as to desirability of OPT. This Court entered an order dismissing the complaint on April 19, 2017. *See* Dkt. 32.

Circumstances have since changed. Earlier this year, DHS echoed plaintiff's criticism of the OPT program. *See Practical Training Reform, Regulation Identifier No. 1653-AA76*, Office of Mgmt. & Budget (2018), perma.cc/2WT7-GT8A. In fact, in its Spring 2018 Regulatory Agenda, DHS committed to propose a rule that would be a "comprehensive reform" of the OPT program "to improve protections of U.S. workers who may be negatively impacted" by the program. *Id.* DHS reiterated that commitment in its Fall 2018 Agenda, which was released on October 16, 2018. *See* perma.cc/AX6D-2SP7. Now, quite unlike in 2016, DHS has itself criticized the OPT program in ways similar to Washtech's complaint.

This is thus a circumstance where the "potential inadequacy of representation" has come "into existence" well after the early stages of the litigation. *Amadour Cty.*, 772 F.3d at 904 (quoting *Smoke*, 252 F.3d at 471 (inadequacy of representation did not emerge until significantly after the case had begun)). The potential inadequacy arose while the case was pending on appeal. This is therefore the first time that proposed intervenors have had an opportunity to intervene in this Court following DHS's apparent change of heart regarding OPT. The D.C. Circuit reversed this Court's decision as to standing, and it remanded the case on August 16, 2018 for the Court to address the merits of plaintiff's claim that OPT is unlawful. *See* Dkt. 35. The Court held its first post-remand status conference and set a briefing schedule on the government's soon-to-be-renewed motion for dismissal (on a statute-of-limitations ground) just one month ago, on September 18, 2018. *See* Dkt. 36. The proposed intervenors hardly could have moved sooner than now.

In sum, the proposed intervenors are filing now because this is the first opportunity to seek intervention following the government's equivocation on the legal merits and practical benefits of the OPT program. *See U.S. House of Representatives*, 2017 WL 3271445, at *2 ("The States have filed within a reasonable time from when their doubts about adequate representation arose due to accumulating public statements by high-level officials both about a potential change in position and the Department's joinder with the House in an effort to terminate the appeal.").

Allowing intervention at this stage would not be disruptive to the litigation or otherwise prejudice the parties. Pursuant to the Court's most recent case management order (Dkt. 36), briefing will proceed initially on the applicability of the reopener doctrine, as to which the proposed intervenors take no position and do not intend to make any filings. In the event that the case is not dismissed on statute of limitations grounds, the proposed intervenors would intend to file a timely dispositive motion (a motion for summary judgment or a motion for judgment on

the pleadings) on whatever schedule set by the Court.[3] Because "the need for intervention as a means for preserving the putative intervenor's rights" is great (*Forest Cty.*, 317 F.R.D. at 10), and because the need for intervention emerged only recently (*see Smoke*, 252 F.3d at 471), this motion is timely.[4]

B. The proposed intervenors and their members have legally protected interests that this lawsuit is threatening to impair

The second and third elements of the intervention framework dovetail with the requirement that the proposed intervenors establish standing: The proposed intervenors and their members have a legally protectable interest that is threatened by this lawsuit; they accordingly have standing to intervene as intervenor-defendants to protect their interests.

1. The proposed intervenors and their members have legally protected interests in this suit

The proposed intervenors and their members have a clear and legally protected interest in the subject matter of this lawsuit—namely, the legality of the OPT program—because they and their employees are the intended beneficiaries of the program. Indeed, the ability of the proposed

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[3] As noted in the motion, the proposed intervenors have not attached a proposed answer to the complaint in view of the Court's September 18, 2018 case management order. The proposed intervenors understand the Court as having directed the parties not to answer the complaint (or to file any other dispositive motion) until it resolves the government's renewed motion to dismiss. They are prepared to make a timely filing upon the order of this Court. In all events, the proposed intervenors have chosen to file this motion now, as it is their first opportunity to do so following DHS's indication that it will reconsider OPT.

[4] Granting intervention in circumstances like this is not unusual. In *Puget Soundkeeper Alliance v. Pruitt*, No. 15-cv-1342 (W.D. Wash.), for example, the original complaint was filed on August 20, 2015. *See id.* (Dkt. 1). The litigation initially focused on the questions of multidistrict-litigation transfer and subject matter jurisdiction, and the court stayed the action while appellate proceedings on the jurisdictional question played out in related cases. *See id.* (Dkts. 13-19). When the Supreme Court ultimately held that the district court had jurisdiction (*see Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018)), the district court lifted the stay. *Id.* (Dkt. 32) (Apr. 27, 2018). Four months after that—and nearly three years after commencement of the action—numerous parties moved to intervene to defend the regulation at issue. *Id.* (Dkt. 41) (June 28, 2018). The district court granted intervention, ruling in particular that "intervention will not unduly delay litigation or prejudice the original parties' rights." *Puget Soundkeeper All. v. Pruitt*, 2018 WL 3569862, at *2 (W.D. Wash. July 25, 2018).

intervenors' members to maintain thousands of existing employment relationships and to enter into thousands of new ones hangs in the balance of this litigation.

Many of the proposed intervenors' members depend on OPT to provide legal status to a huge number of recent graduate employees. Intel Corporation, for example, is a member of all three proposed intervenors. Duffy Decl. ¶ 21. Intel currently employs approximately 1,100 individuals who are dependent on the OPT program for employment authorization. *Id.* ¶ 18. Because those 1,100 current employees did not win the most recent H-1B lottery, they would be stripped of their work authorization if the OPT program were vacated. *Id.* Intel would have no choice but to terminate their employment, at massive cost to these individuals personally and to the company economically. Beyond that, Intel typically hires at least 1,400—and up to 1,700—*new* Master's- or doctoral-level recent graduates reliant upon OPT each year. *Id.* Intel would be unable to continue hiring most of those recent graduates. Not only is the work of these individuals an essential element of Intel's continued innovation, but the economic activity that their employment supports is an important contributor to the local, regional, and ultimately national economies. *See, e.g., id.* ¶¶ 17-20.

The proposed intervenors' interests in this case are therefore concrete and direct, and they therefore satisfy the requirements of intervention. Indeed, the proposed intervenors' interests are "of such a direct and immediate character that [its 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 *United States v. AT&T*, 642 F.2d 1285, 1292 (D.C. Cir. 1980)). This is therefore a textbook legally protected interest within the meaning of Rule 24(a). *Cf. Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 129 (2d Cir. 2001) (allowing intervention where success in a discrimination suit would have an effect on the employment status of the proposed intervenors).

2. The proposed intervenors' legally protectable interests are at risk of being impaired

"The [impairment] inquiry is not a rigid one: consistent with the Rule's reference to dispositions that may 'as a practical matter' impair the putative intervenor's interest, courts look to the 'practical consequences' of denying intervention." *Forest Cty.*, 317 F.R.D. at 10-11 (citation omitted) (quoting *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003)).

This practical inquiry is readily met because Washtech's success in this lawsuit would directly and obviously impair the proposed intervenors' and their members' interest in employing skilled postgraduates under the OPT program. That self-evident conclusion follows from the winner-takes-all nature of the merits of this litigation: Either Washtech will lose because the OPT program is judged by this Court to be lawful or Washtech will win because the program is judged to be unlawful and is vacated. As we have just explained, if the program's underlying regulations are vacated, the members of the proposed intervenors will have to terminate thousands of existing employment relationships and will be prevented from entering into thousands of new ones that would depend on the OPT program. A more straightforward impairment of interests would be difficult to imagine.

C. The proposed intervenors have Article III standing

Because the proposed intervenors have a legally protectable interest in the subject matter of the lawsuit and because their interests are at risk of being impaired, it is little surprise that they have also established standing. Of course, "[r]equiring standing of someone who seeks to intervene as a defendant runs into the [problem] that the standing inquiry is directed at" plaintiffs, not defendants. *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) (citation omitted). The D.C. Circuit nevertheless has held that "[t]he standing inquiry for an intervening-defendant is the same as for a plaintiff: the intervenor must show injury in fact, causation, and redressability." *Crossroads*, 788 F.3d at 316.

This is mostly an "academic" inquiry because any proposed intervenor-defendant who satisfies Rule 24(a)'s impairment of a protectable interest requirement "will also meet Article III's standing requirement." *Roeder*, 333 F.3d at 233. Indeed, "it rationally follows" from the risk that the litigation will impair the proposed intervenor's interests that the proposed intervenor "can prevent the injury by defeating [the plaintiff's] challenge in the district court proceedings." *Crossroads*, 788 F.3d at 316. Thus, in the mine run of cases, an intervenor-defendant who qualifies for intervention as of right will necessarily meet the requirements of standing. *See id*.

That said, the proposed intervenors here are organizations, and they seek intervention in this suit on the basis of associational standing. "An organization has associational standing to bring suit on its members' behalf when: (1) at least one of its members would have standing to sue in his or her own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Sierra Club v. Fed. Energy Regulatory Comm'n*, 827 F.3d 59, 65 (D.C. Cir. 2016) (quotation marks omitted) (quoting *WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013)). Each of these requirements is satisfied here.

First, the proposed intervenors' members have standing in their own rights. Intel, for example, has demonstrated that it has a concrete and particularized interest in defending the OPT program because around 1,100 Intel employees currently depend on the program for work authorization, and the company typically hires more than 1,400 new employees who are reliant on OPT for employment authorization each year. Duffy Decl. ¶ 18. It would be concretely injurious to Intel's economic interests if the OPT program were vacated. *See, e.g.*, *id.* ¶¶ 17-20. Because Intel "can prevent the injury by defeating [the plaintiff's] challenge in the district court proceedings," it has standing to intervene independently. *Crossroads*, 788 F.3d at 316.

Second, the interests that the proposed intervenors seek to protect in this litigation are relevant to their institutional missions. The National Association of Manufacturers—which is the

largest manufacturing association in the United States—represents small and large manufacturers in every industrial sector and in all 50 states and supports employment policies that promote efficiency and innovation in manufacturing. Tolsdorf Decl. ¶ 2. The Chamber of Commerce of the United States of America represents the interests of business all across the country, supporting both a strong education system that prepares people for good jobs and bright futures and immigration laws that promote lawful, pro-business immigration. Baselice Decl. ¶ 2, 5. For its part, the Information Technology Industry Council represents companies from the information and communications technology industry and advocates for policies that encourage innovation and the promotion of global competitiveness. Garfield Decl. ¶ 2-3.

Each of the proposed intervenors represents the interests of the high-technology sector. Tolsdorf Decl. ¶ 3; Baselice Decl. ¶ 2-3; Garfield Decl. ¶ 2. Their respective members in this area include microchip manufacturers, computer and smartphone makers, chemical producers, biotechnology companies, pharmaceutical manufacturers, automobile makers, aerospace companies, and many others. *Id.* Members of proposed intervenors also include consulting, accounting, and financial service firms, many of which rely substantially on OPT and STEM OPT to fulfill their talent needs. Baselice Decl. ¶ 4.

Each of the proposed intervenors' missions includes advocating for a policy agenda that helps these companies compete in the global economy and create jobs across the United States. Tolsdorf Decl. ¶ 6; Baselice Decl. ¶ 5, 7; Garfield Decl. ¶ 3. One way that the proposed business intervenors accomplish that mission is through litigation, including by defending regulations and policies that are important to their members' ability to maintain competitive workforces. Tolsdorf Decl. ¶ 6; Baselice Decl. ¶ 7; Garfield Decl. ¶ 8.

Third, the proposed intervenors' participation as intervenor-defendants in the action does not require the participation of their individual members in the lawsuit. This is not, in other words, a case in which an association's members are indispensable parties to the litigation. The

proposed intervenors accordingly have Article III standing to intervene as defendants in this action. There are no claimed damages at issue in this litigation or other relief that might necessitate the involvement of members. The issues to be resolved under the Administrative Procedure Act are purely legal; there is no need for factual discovery.

D. The governmental defendants will not adequately represent the proposed intervenors' interests

Finally, no existing party to the action will adequately represent the proposed intervenors' interests. "Significantly, the putative intervenor[s'] burden [on this point] is *de minimis*, and extends only to showing that there is a possibility that its interests may not be adequately represented absent intervention." *Forest Cty.*, 317 F.R.D. at 11 (citing *Fund for Animals*, 322 F.3d at 735); *accord, e.g.*, *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) ("The burden of showing inadequacy of representation is 'minimal' and satisfied if the applicant can demonstrate that representation of its interests 'may be' inadequate.").

That requirement is easily met in this case. As a general matter, the proposed intervenors and the federal government do not have the same interests. Private business is just one among many varied and often-competing constituencies represented by DHS. "[T]he government's representation of the public interest" is very often distinct from "'the individual parochial interest' of a particular group," even when that group and the government "'occupy the same posture in the litigation.'" *Citizens for Balanced Use*, 647 F.3d at 899 (quoting *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009)).

Just so here. The proposed intervenors and existing defendants "have distinct interests and objectives" (*Citizens for Balanced Use*, 647 F.3d at 899) with respect to the OPT program. Whereas the proposed intervenors wish to defend the OPT program both as good policy and as fully consistent with the statutory text, DHS has already committed to reconsidering the program, ostensibly "to improve protections of U.S. workers" at the expense of skilled recent for-

eign graduates. *Practical Training Reform, Regulation Identifier No. 1653-AA76*, Office of Mgmt. & Budget (2018), perma.cc/2WT7-GT8A. This statement of intent—which is facially hostile to the OPT program (*id.*)—is by itself sufficient to cast doubt on the government's willingness and ability to represent the proposed intervenors' interest in the OPT program. *Cf. U.S. House of Representatives*, 2017 WL 3271445, *2 ("[E]quivocation about whether the Department will . . . protect the intervenors' interests constitutes at least the requisite 'minimal' showing that the Department's representation . . . 'may be' inadequate.") (alterations and quotation marks omitted) (quoting *Smoke*, 252 F.3d at 471; *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)).

That is especially so here because, even if the government gives a full-throated defense of OPT before this Court, it may still lose the case, and "the Solicitor General may decide that the matter lacks sufficient general importance to justify" an appeal. *Sierra Club, Inc. v. EPA*, 358 F.3d 516, 518 (7th Cir. 2004); *see also Smoke*, 252 F.3d at 471 (reversing a denial of intervention so that the intervenors could pursue an appeal when the government would not). In other words, the proposed intervenors have no guarantee that the governmental defendants will exhaust their appellate remedies in the event of an unfavorable decision from this Court. Indeed, the government has declined to provide proposed intervenors their requested assurance that the government will exhaust all appellate options to preserve the legality of the OPT program. Intervention is therefore necessary to ensure that the proposed intervenors are placed "on equal terms" and allowed "to make their own decisions about the wisdom of carrying the battle forward" should the need arise. *Sierra Club, Inc.*, 358 F.3d at 518.

Against this background, there can be no dispute that the proposed intervenors have met their "*de minimis*" obligation to demonstrate that the governmental defendants' representation "may not be" adequate to protect their interest in the OPT program. *Forest Cty.*, 317 F.R.D. at 11.

II. ALTERNATIVELY, THE COURT SHOULD GRANT PERMISSIVE INTERVENTION

Because the proposed intervenors are entitled to intervene as of right, the Court "need not reach the issue of permissive intervention." *Citizens for Balanced Use*, 647 F.3d at 896. But if the Court believes otherwise, it should grant discretionary leave to intervene under Rule 24(b). That rule provides that a court may allow a party to intervene if it merely "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). That is not an exacting standard, and the proposed intervenors have met it for the same reasons that we submit make intervention proper as of right. *See McDonald v. E. J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970) (permissive intervention should be granted "where no one would be hurt and greater justice would be attained").

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.

October 18, 2018

Respectfully submitted,

/s/ Paul W. Hughes

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Counsel for All Proposed Intervenors

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

CERTIFICATE REQUIRED BY LCVR 26.1 OF THE LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

I, the undersigned, counsel of record for the proposed intervenor-defendants, certify that to the best of my knowledge and belief, the following are parent companies, subsidiaries, affiliates, or companies which own at least 10% of the stock of the National Association of Manufacturers, the Chamber of Commerce of the United States of America, and the Information Technology Industry Council which have any outstanding securities in the hands of the public.

The National Association of Manufacturers: None.

The Chamber of Commerce of the United States of America: None.

The Information Technology Industry Council: None.

These representations are made in order that judges of this Court may determine the need for recusal.

Dated: October 18, 2018

Respectfully submitted,

/s/ Paul W. Hughes
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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

DECLARATION OF PATRICK DUFFY

1. I am the Director of Global Labor Relations and Workforce Policy at Intel Corporation. I am over the age of 18 and suffer from no impairments that would prevent me from giving a declaration. The facts set forth in this declaration are based upon my personal knowledge, and if called as a live witness, I would testify competently to their truth.

2. Intel Corporation is an American engineering and technology company. We have manufacturing facilities, research and development centers, and administrative office located throughout the United State including Arizona, California, Colorado, Massachusetts, New Mexico, Oregon, South Carolina, Texas, and the District of Columbia.

3. Intel is a world leader in the design and manufacturing of essential technologies and platforms that power the cloud and an increasingly smart, connected world. Our technologies unlock the power of data so people can: ride in self-driving cars, connect with each other over lightning-fast mobile networks, have artificial intelligence improve many aspects of our lives, and experience virtual worlds.

4. Intel products span the entire computer landscape, from devices to the cloud, and combined with our accelerant technologies (memory, FPGAs), connectivity technologies (modems, 5G), and software enabling, Intel is well-positioned to be the driving force of the data revolution.

5. Our business strategy is to provide the technological foundation of the new data world. From large complex applications in the cloud to small low-power mobile devices, our customers are looking for solutions that can process, analyze, store, and transfer data across the computing continuum—turning data into actionable insights, amazing experiences, and competitive advantages.

6. Intel views the U.S. employment-based immigration system from two distinct perspectives: first, our ability to fill critical skill gaps among our U.S. workforce through sponsorship of foreign workers for permanent resident status; and second, our ability to move employees globally for temporary assignments and business visits to facilitate technology development and ramp our global factories to the high-volume manufacturing of our products.

7. We have a clear philosophy in regard to hiring foreign employees for U.S.-based positions. Although we seek U.S. workers first when we need to fill U.S positions, we also hire and sponsor foreign nationals for those positions in which we experience is a shortage of qualified U.S. workers with the advanced education, skills, and expertise that we need to compete in this global economy. These positions typically require a Master's degree or Ph.D., or equivalent experience, in a science, technology, engineering, and mathematics (STEM) or STEM-related field.

8. By way of example, among the categories of positions where we experience skills shortages are Design Engineers at the Master's and Ph.D. levels in fields such as Electrical and

Computer Engineering, particularly those who have highly specialized skills in very large-scale integrated circuit design, complementary metal oxide semiconductors, and device physics.

9. Engineers without advanced education in these areas cannot acquire it by on-the-job training, or by a short course in a vocational setting. Such skills can only be acquired in the course of a structured academic program that, in turn, relies upon the person already having the requisite academic building blocks in math and physics. Access to these highly educated engineers is critical to the development of our future generation of products and technology and to our ability to maintain our position as a global leader in our industry.

10. Any request to hire a foreign national for a U.S.-based position must go through our Foreign National Offer Justification process to confirm that the position is a skills-shortage position at Intel.

11. Approximately 80% of our foreign national hires are recent Master's- and Ph.D.-level graduates of U.S. universities in STEM fields. The remaining 20% also are typically graduates of U.S. universities, but come to Intel as an experienced hire from another employer.

12. The majority of advanced-degree graduates in STEM programs at U.S. universities are foreign nationals. For example, data from the 2016 National Center for Education Statistics Integrated Post-Secondary Education Data System notes that 75.8% of the Master's degree graduates in Electrical, Electronic, and Communication Engineering/Computer Engineering/ Microelectronics are foreign national students. At the Ph.D. level, foreign nationals comprise 68.9% of the U.S. university graduates.

13. The foreign national students we hire from these U.S. university graduate programs are nearly all on F-1 visas. The Optional Practical Training (OPT) Program allows these students to commence employment at Intel following graduation.

14. Intel begins the permanent-resident process for these foreign-national hires shortly after they are hired. We are typically able to complete the permanent-resident process for those foreign nationals who are from countries where the immigration quota priority dates are current within the 36 months of OPT allowed for STEM graduates, but not within the mere 12 months of regular OPT. For employees from India or China, where the immigration quotas are backlogged, we typically need to obtain an H-1B or O-1 visa for them so they have work authorization through the permanent residency process.

15. The three-year STEM OPT period is critical for allowing foreign-national employees additional opportunities to win the H-1B lottery. A foreign-national employee is not guaranteed to obtain an H-1B on the first try because demand for the H-1B visa exceeds the 85,000 visas available annually (65,000 general lottery, plus 20,000 set aside for advanced-degree graduates).

16. Intel's success rate for the H-1B lottery has ranged from a mere 48% to 63% over the last three years, despite the vast majority of petitions qualifying for the 20,000 set-aside.

17. Elimination of the OPT program would have a devastating impact on Intel's ability to source and hire those high-skilled, advanced-degree foreign nationals for U.S.-based positions where we experience a shortage of qualified U.S. workers.

18. Intel currently has approximately 1,100 employees in OPT status who did not win this year's H-1B lottery. Additionally, we typically average 1,400 to 1,700 Master's- and Ph.D.-level foreign-national college hires a year. All—or substantially all—of these individuals have work authorization because of OPT or STEM OPT.

19. Without the OPT program to provide initial work authorization for our foreign-national college hires, we would need to wait until we secured another work visa for the student before the person could begin work in the United States. We estimate that without OPT we would

be able to hire just 30% of the highly skilled graduates we currently hire. This would disrupt our business and impose substantial new costs on Intel's talent acquisition.

20. Moreover, rather than having foreign-national employees commence employment shortly after graduation on OPT status in May or June, we would need to wait until after October 1, the beginning of the government's fiscal year, assuming that the individual was selected for an H-1B visa in the lottery and that USCIS adjudicated the H-1B visa prior to October 1.

21. Intel is a member of the National Association of Manufacturers, the U.S. Chamber of Commerce, and the Information Technology Industry Council.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 17, 2018.

By: 
Patrick Duffy

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

DECLARATION OF PETER TOLSDORF

I, Peter Tolsdorf, declare based on personal knowledge as follows:

1. I am the Vice President of Litigation and Deputy General Counsel at the National Association of Manufacturers (NAM). I am over the age of 18 and suffer from no impairments that would prevent me from giving a declaration.

2. The NAM is the largest manufacturing association in the United States, representing approximately 14,000 small and large manufacturers in every industrial sector in all 50 states. The NAM is a leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

3. Among the NAM's many members are microchip manufactures, computer and smartphone makers, biotechnology companies, automobile manufactures, aerospace companies, and many more. These high-tech manufacturers depend on employees educated in highly specialized areas like science, technology, engineering, and math. They accordingly rely on the STEM OPT and OPT programs as a critical source of human resources talent.

4. The NAM's members would incur significant direct and indirect costs if the OPT program were invalidated. For example, they would immediately have to terminate thousands of OPT-authorized jobs for highly-specialized positions. With the OPT program shuttered, they would have access to a far smaller pool of potential qualified workers to re-fill those positions. Many of those positions could not be re-filled with workers of similar expertise, education, and qualifications. This would put many of the NAM's members at a significant competitive disadvantage to their overseas manufacturing rivals.

5. Access to talented individuals with a high-quality education and advanced skills is critical to manufacturers' capacity for innovation and long-term business success. Companies continue to report thousands of unfilled jobs and experience multiple challenges in finding qualified workers required for today's advanced manufacturing workplaces.

6. The NAM's institutional mission includes advocating for a policy agenda that helps these high-tech manufacturers compete in the global economy and create and fill jobs across the United States. The NAM pursues this mission legislatively, through the regulatory process, and in litigation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 18, 2018.

By: 
Peter Tolsdorf

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

DECLARATION OF JONATHAN BASELICE

I, Jonathan Baselice, declare based on personal knowledge as follows:

1. I am the Director of Immigration Policy at the Chamber of Commerce of the United States of America (the Chamber). I am over the age of 18 and suffer from no impairments that would prevent me from giving a declaration.

2. The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size and in every sector and geographic region of the country.

3. Among the Chamber's members are many of the nation's most innovative companies. U.S. companies spend billions of dollars each year on critical research and development in a diverse array of fields, including, to name just a few, computing, pharmaceuticals, biotechnology, transportation, aerospace, and telecommunications. These research-dependent sectors rely on employees educated in highly specialized areas like science, technology, engineering, and math (STEM). Businesses on the cutting edge of these fields depend on the Optional Practical Training (OPT) and STEM OPT programs as a critical source of human resources talent.

4. Likewise, the Chamber counts among its members consulting, accounting, and financial service firms that rely on exceptional talent to provide high quality products and solutions to their customers. These companies also depend on the OPT and STEM OPT programs as a critical aspect of their employee recruiting pipelines.

5. The Chamber supports both a strong education system that prepares people for good jobs and bright futures and immigration laws that promote lawful, pro-business immigration that enables American companies to grow and create jobs.

6. Members of the Chamber would incur significant direct and indirect costs if the OPT program were invalidated. Vacatur of the OPT program would terminate the employment authorization for thousands of employees whose lawful status to work in the United States currently depends on the OPT program. Without the OPT program, moreover, businesses would face substantially greater costs in hiring replacement workers for those positions.

7. An important function of the Chamber is to represent the interests of its members and the business community more broadly in matters before Congress, the Executive Branch, and the courts.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 18, 2018.

By: _____
Jonathan Baselice

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

DECLARATION OF DEAN C. GARFIELD

I, Dean C. Garfield, declare based on personal knowledge as follows:

1. I am the President and Chief Executive Officer of the Information Technology Industry Council (ITI). I am over the age of 18 and suffer from no impairments that would prevent me from giving a declaration.

2. ITI is the global voice of the technology sector. As an advocacy and policy organization for the world's leading innovation companies, ITI navigates the relationships between policymakers, companies, and non-governmental organizations, providing creative solutions that advance the development and use of technology around the world.

3. ITI advocates for policies that encourage innovation and the promotion of global competitiveness. To achieve these goals, ITI's members must have the ability to hire the talent they require to compete in the global economy. ITI is committed to the domestic workforce, and this commitment is dependent on the ability of businesses to recruit and retain the most qualified employees.

4. Each year tens of thousands of open jobs at technology companies go unfilled. Vacancies in science, technology, engineering, and mathematics (STEM) fields often outnumber qualified applicants by nearly two to one. That is because the U.S. economy creates technology jobs faster than Americans can currently fill them.

5. ITI thus promotes high-skilled immigration policies that supplement and augment our extraordinarily talented U.S. workforce, so as to strengthen U.S. business operations now and in the future. ITI also believes that high-skilled immigration policies must invest in effective U.S. education and training programs that will prepare future innovators and entrepreneurs to advance our nation's global leadership and success.

6. OPT and STEM OPT are important to ITI's members. ITI members often seek to hire the best recent graduates from leading U.S. colleges and universities. Because many STEM graduates from these schools have come from abroad, it is little surprise that ITI members often hire foreign students. The vast majority of these employees rely on OPT and STEM OPT for work authorization.

7. Members of ITI would incur significant direct and indirect costs if the OPT program were declared unlawful. Member companies would lose thousands of employees who depend on OPT for employment authorization. Those businesses would face significant costs in hiring new workers to fill these critical jobs.

8. ITI fulfills its mission for its members, in part, by advocating before Congress, the Executive Branch, and the courts.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 18, 2018.

By: 
Dean Garfield

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

[PROPOSED] ORDER GRANTING MOTION TO INTERVENE

The National Association of Manufacturers, the Chamber of Commerce of the United States of America, and the Information Technology Industry Council have moved to intervene in this action as defendants. Movants assert that they have an interest in the subject of this action and that their interest may not be adequately represented by the government defendants.

The Court has considered the movants' briefing, evidence, and arguments, as well as the authorities cited in support of their positions. For the reasons set forth in the accompanying Memorandum Opinion, the Court ORDERS that:

1. Movants' motion to intervene as defendants is GRANTED.

IT IS SO ORDERED.

Dated: _____

_____
Hon. Reggie B. Walton
United States District Court
District of Columbia

SERVICE LIST

Pursuant to Local Civil Rule 7(k), the undersigned certifies that these are the names and addresses of the attorneys entitled to be notified of the entry of this order.

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS
c/o Michael Meriwether Hethmon, Dale L. Wilcox, and John Michael Miano
Immigration Reform Law Institute
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Washington, DC 20001

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, and
UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT
c/o Erez Reuveni, Glenn M. Girdharry, and Joshua Samuel Press
United States Department of Justice
P.O. Box 868
Ben Franklin Station
Washington, DC 20044

October 18, 2018

/s/ Paul W. Hughes
Paul W. Hughes