

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

FRANK GREEN and ROBERT CONRAD,

Plaintiffs,

v.

JOSEPH R. BIDEN JR., in his official capacity
as President of the United States; GINA M.
RAIMONDO, in her official capacity as
Secretary of Commerce; DEB HAALAND, in her
official capacity as Secretary of Interior; and
RICHARD W. SPINRAD, in his official capacity
as Under Secretary of Commerce for Oceans and
Atmosphere and NOAA Administrator,

Defendants,

and

NATURAL RESOURCES DEFENSE
COUNCIL, INC.; CONSERVATION LAW
FOUNDATION; CENTER FOR BIOLOGICAL
DIVERSITY; and R. ZACK KLYVER,

Proposed Defendant-Intervenors.

No. 2:24-cv-01975-MKB-ARL

**MEMORANDUM OF LAW IN
SUPPORT OF PLAINTIFFS'
OPPOSITION TO PROPOSED
DEFENDANT-INTERVENORS'
MOTION TO INTERVENE**

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Plaintiffs Frank Green and Robert Conrad challenge Defendant President Biden's designation of the Northeast Canyons and Seamounts Marine National Monument and the commercial fishing ban within that Designation. Plaintiffs also challenge the incorporation of that commercial fishing ban by Defendant National Oceanic and Atmospheric Administration (NOAA) into the Magnuson-Stevens Act. These issues raise pure questions of law over whether Defendants violated federal statutes and the U.S. Constitution's separation of powers.

Intervenor Applicant conservation and environmentalist groups seek to inject themselves here to protect the ecosystems contained within the Monument. But that interest is adequately represented by Federal Defendants because the Monument was created and commercial fishing banned to protect that very interest: "The boundaries of the monument reflect the need to protect the canyons, seamounts, and the attendant deep-sea, pelagic, and other marine ecosystems . . . in the Canyons Unit and Seamounts Unit." Proclamation No. 10287, 86 Fed. Reg. 57,349, 57,351 (Oct. 8, 2021). For this reason, Intervenor Applicants seek the same ultimate objective as Federal Defendants and fail to overcome the presumption of adequacy required for intervention. Doubling the number of defendants and duplicating the briefing is also unnecessary. Because the issues before this Court are pure questions of law, the Intervenor Applicants' perspectives on the environmental features at issue will provide little value and their view on the legal questions can be adequately expressed as amici.

This Court should thus deny Intervenor Applicants' request to intervene. The Court can do so without prejudice so that if the Federal Defendants change their litigation position and Intervenor Applicants' interests become inadequately represented, Intervenor Applicants can re-file then. Alternatively, if intervention is allowed, this Court should limit the scope of Intervenor

Applicants' participation to curb the prejudice to the existing parties and the misuse of this Court's resources.

BACKGROUND

In September 2016, President Barak Obama issued a Proclamation designating the Northeast Canyons and Seamounts Marine National Monument. *See* Presidential Proclamation No. 9496, 81 Fed. Reg. 65,161 (Sept. 15, 2016). The Proclamation designated 5,000 square miles of the Atlantic Ocean as a National Monument and claimed that “ecosystems” were objects under the Antiquities Act. 81 Fed. Reg. at 65,161–62. The Proclamation also directed the Secretaries of Commerce and the Interior to ban commercial fishing within this vast expanse of ocean. *Id.* at 65,164–65.

In March 2017, commercial fishermen challenged the Designation, arguing that, among other things, the President lacked the authority to designate ecosystems as “objects” under the Antiquities Act. *See Massachusetts Lobstermen's Ass'n v. Ross*, 349 F. Supp. 3d 48 (D.D.C. 2018), *aff'd as modified*, 945 F.3d 535 (D.C. Cir. 2019). The Federal Government defended the Designation all the way to the Supreme Court, where the Court declined to hear the fishermen's challenge. *See* Brief for the Federal Respondents in Opposition, *Mass. Lobstermen's Ass'n v. Ross*, 141 S. Ct. 979 (2021) (No. 20-97). During this litigation, presidential administrations changed, and President Trump lifted the commercial fishing ban but left the Monument in place. Presidential Proclamation No. 10049, 85 Fed. Reg. 35,793 (June 5, 2020).

In October 2021, after another change in administration, President Biden issued a Proclamation, reinstating the fishing ban in the Designation area. 86 Fed. Reg. at 57,352. Other fishermen challenged this Proclamation, challenging both the Designation and the commercial fishing ban. *See* Complaint at 38–40, *Fehily v. Biden*, No. 3:22-cv-02120 (D.N.J. filed Apr. 12,

2022). During litigation, due to life changes, the plaintiffs voluntarily dismissed the case. Stip. For Dismissal, *Fehily v. Biden*, No. 3:22-cv-02120 (D.N.J. filed Mar. 14, 2023). In both cases, the Federal Government vigorously defended the lawfulness of the Designation. See Brief for the Federal Respondents in Opposition, *Mass. Lobstermen's*, 141 S. Ct. 979; Answer of Fed. Gov't Defendants at 24, *Fehily v. Biden*, No. 3:22-cv-02120 (D.N.J. filed Sept. 26, 2022). Intervenor Applicants intervened in both cases, and plaintiffs consented to intervention in *Fehily*. See Plaintiffs' Stmt. Resp. Mtn. Interven. at 1, *Fehily v. Biden*, No. 3:22-cv-02120 (filed July 1, 2022).

In February 2024, the National Marine Fisheries Service (under NOAA) issued a rule banning commercial fishing within the Designation under the Magnuson Stevens Act (MSA). 89 Fed. Reg. 12,282 (Feb. 16, 2024). But rather than follow the MSA's required steps to ban commercial fishing, the Service relied on President Biden's 2021 Proclamation for authority. In March 2024, Plaintiffs filed this action, challenging the Designation, President Biden's fishing ban, and the Service's fishing ban. Intervenor Applicants filed a motion to intervene, which this Court should deny, since Federal Defendants adequately represent their interests.

I. The Intervenor Applicants Are Not Entitled to Intervention as of Right Under Rule 24(a).

To establish a right to intervene under Rule 24(a), the Intervenor Applicants bear the burden to "(1) file timely, (2) demonstrate an interest in the action, (3) show an impairment of that interest arising from an unfavorable disposition, and (4) have an interest not otherwise adequately protected." *United States v. N.Y.*, 820 F.2d 554, 556 (2d Cir. 1987). An intervenor applicant must satisfy each factor. *Id.* Intervenor Applicants failed to establish that the Federal Defendants would inadequately represent their interests.

A. Intervenor Applicants failed to overcome the presumption that Federal Defendants adequately represent their interests.

A party is presumed to adequately represent an intervenor applicant's interests when the applicant "has the same ultimate objective as a party to the existing suit." *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 191 (2d Cir. 1978). Although the burden to show inadequacy is often minimal, courts "demand[] a more rigorous showing of inadequacy in cases where the putative intervenor and a named party have the same ultimate objective." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179 (2d Cir. 2001). Intervening applicants share the same "ultimate objective" when they both seek "a declaration that [a statute] was validly enacted and is constitutional." *Great Atl. & Pac. Tea Co. v. Town of E. Hampton*, 178 F.R.D. 39, 43 (E.D.N.Y. 1998).

Sharing an ultimate objective creates a presumption of adequacy that is arduous to overcome. To overcome this presumption, the intervenor applicant must prove "collusion, nonfeasance, adversity of interest, or incompetence on the part of the named party that shares the same interest." *Great Atlantic*, 178 F.R.D. at 42–43. And there is an additional heightened presumption of adequacy when the government is a party and is acting in its sovereign capacity. *See N.Y.*, 820 F.2d at 558 ("A state is presumed to represent the interests of its citizens only when it is acting in the lawsuit as a sovereign."); *United States v. Yonkers Bd. of Educ.*, 902 F.2d 213, 218 (2d Cir. 1990); *Freedom from Religion Foundation, Inc. v. Geithner*, 644 F.3d 836, 841 (9th Cir. 2011) ("This presumption of adequacy is nowhere more applicable than in a case where the Department of Justice deploys its formidable resources to defend the constitutionality of a [federal] enactment." (quotations omitted)).

Here, Intervenor Applicants and Federal Defendants share the same ultimate objective, so the presumption of adequacy applies. Both seek to defend the legality of the Northeastern Canyons

and Seamounts designation and the legality of President Biden’s and the Service’s fishing bans. *See Great Atlantic*, 178 F.R.D. at 42. Intervenor Applicants publicly advocated for Federal Defendants to designate the Northeast Seamounts and Canyons Monument and to ban fishing within it since 2015. *See* Intervenor’s Memo. in Support of Intervenor. at 7–9 (“Intervenor. Memo.”). Intervenor Applicants and Federal Defendants want the same thing—to uphold the legality of the Monument and its fishing ban—so they seek the same ultimate objective.

The following chart shows the complete overlap between the Federal Defendants’ and Intervenor Applicants’ ultimate objective.

2021 Proclamation	Intervenor Applicants
“Protection of the Northeast Canyons and Seamounts . . . preserves significant . . . marine ecosystems . . . , ensuring that the natural and scientific values of this area are maintained for the benefit of all Americans” 86 Fed. Reg. at 57,351.	“[A]ll three Organizational Proposed Intervenor are membership organizations whose missions include preserving healthy ocean ecosystems for the edification and enjoyment of their members and the general public” Intervenor. Memo. at 11.
“[T]he monument’s submarine canyons and seamounts . . . support one of the Atlantic Ocean’s most biologically productive and important marine environments and one of science’s greatest oceanic laboratories.” <i>Id.</i> at 57,349.	Intervenor Applicants interests include “protecting especially ecologically valuable marine areas as havens for scientific research and refugia where wildlife can recover and thrive.” <i>Id.</i>
“Commercial fishing activity has the potential to significantly degrade the monument’s objects of historic and scientific interest.” <i>Id.</i> at 57,351.	“Allowing commercial fishing in the Monument would alter the area’s ecology, impair its value as a scientific research and reference site, and jeopardize the Monument’s objects.” <i>Id.</i> at 14.

The Intervenor Applicants cannot overcome the presumption of adequacy that comes with having the same ultimate objective. They make no argument that the Federal Defendants engaged in collusion or nonfeasance, or are incompetent, *see Great Atlantic*, 178 F.R.D. at 42–43, and Intervenor Applicants put forth no evidence and cannot show that their interests are adverse to the Federal Defendants’. Finally, the Federal Defendants are acting in their sovereign capacity on

behalf of citizens—including Intervenor Applicants and their members—and there is no evidence the Federal Defendants will fail to adequately represent their interests. Thus, the heightened presumption that the Federal Defendants’ representation applies and cannot be overcome. *See N.Y.*, 820 F.2d at 558. Since there is no daylight between Federal Defendants’ and Intervenor Applicants’ interests, this Court should deny intervention.

B. Speculation over future adverse positions does not overcome the presumption of adequate representation.

Alleging that the Federal Government’s litigation position has changed in previous litigation or may change, without other proof, is insufficient to show inadequacy. Intervenor Applicants acknowledge that the Federal Defendants “seek the same disposition of this case.” *Interven. Memo.* at 16. But Intervenor Applicants claim that because the Federal Defendants have not always held this position, and because Intervenor Applicants sued the Federal Defendants when President Trump lifted the commercial fishing ban, the Federal Defendants may not consistently litigate to uphold the Designation and fishing bans. *Id.* at 16–17. This argument ignores the reality that the priorities of the Federal Government change from presidential administration to administration. It is a political maxim that elections have consequences. If Intervenor Applicants’ argument was valid, then intervention would be “available in every case in which the federal Government defends a rule or statute.” *New York v. United States Dep’t of Health & Hum. Servs.*, No. 19 CIV. 4676 (PAE), 2019 WL 3531960, at *6 (S.D.N.Y. Aug. 2, 2019). For this reason, in *New York v. DHHS*, the court rejected the argument that intervention was proper because the Department of Health and Human Services had changed its position before and might do so again. *Id.* *See also City of Syracuse v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 1:20-CV-06885-GHW, 2021 WL 1051625, at *7 n.2 (S.D.N.Y. Mar. 19, 2021) (“The Court is not persuaded

that a change in Administration necessarily implies that the Government will no longer adequately represent the parties shared interests.”).

Similarly, this Court rejected an intervenor applicant’s argument for intervention based on the fear that the New York Department of Education could change its position: “The contention that Local 1181’s intervention is required because [the Department] could ‘shift’ or ‘alter[]’ its position in the case appears to be unfounded speculation.” *L&M Bus Corp. v. Bd. of Educ. of City Sch. Dist. of City of New York*, No. 1:18-cv-01902-NGG-SMG, 2018 WL 1782709, at *4 (E.D.N.Y. Apr. 12, 2018). There, the Department was “zealously litigating in support” of the same position the intervenors sought to take. *Id.* Since the Department adequately represented the potential intervenors, this Court denied their motion. *Id.*

Likewise, courts from other circuits have explained that “the mere change from one presidential administration to another, a recurrent event in our system of government, should not give rise to intervention as of right in ongoing lawsuits.” *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983). *See also League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1307 (9th Cir. 1997) (“[T]he assertion that [intervenor applicant’s] interest might, . . . at some other unspecified time in the future, diverge from the interest of the [government] is purely speculative, and does not justify intervention as a full-fledged party.”).

Intervenor Applicants’ speculation that the Federal Defendants may change their position fails to overcome the presumption of adequacy. The Intervenor Applicants provide no evidence that the Federal Defendants are likely to change their position in this case and fail to defend the Designation or the commercial fishing bans under the Designation or MSA. The Biden Administration has made it a priority to protect 30% of all American lands and waters as national monuments by 2030, so the Administration is unlikely to stop trying to protect the 5,000 square

miles of Atlantic Ocean at issue.¹ Indeed, President Biden, in his October 2021 Proclamation, explained that he issued the fishing ban to protect the “significant geological features, marine biota, and deep-sea, pelagic, and other marine ecosystems that the canyons and seamounts create and support.” 86 Fed. Reg. at 57,351. *Compare id. with* Interven. Memo. at 11. *See supra*, p. 5.

When the Service issued its fishing ban, it firmly stated that “the prohibition against fishing in the Monument in the Magnuson-Stevens Act regulations is consistent with existing law.” 89 Fed. Reg. at 12,284. The Federal Government also recently issued further rules defending the Service’s fishing ban. *See* Keith Shannon, Press Release, U.S. Fish & Wildlife Serv., *Biden-Harris Administration Publishes Final Management Plan for Northeast Canyons and Seamounts Marine National Monument* (June 4, 2024).² The Federal Defendants have made it clear that they intend to defend the Designation and fishing bans—the same goal as the Intervenor Applicants.

Intervenor Applicants do not claim that Federal Defendants are failing to faithfully uphold the Designation and fishing bans. They recognize that this is the firm position of Federal Defendants and that the government is currently able and willing to litigate the Intervenor Applicants’ interests. *See* Memo. Interven. at 16. *See, e.g., SWEPI, LP v. Mora Cnty.*, No. CIV 14-0035 JB/SCY, 2014 WL 6983288, at *45 (D.N.M. Dec. 5, 2014) (“The Court would require an affirmative showing that a government entity is unable or unwilling to adequately protect an intervenor’s private interests.”); *Gaylor v. Lew*, No. 16-CV-215-BBC, 2017 WL 3530861, at *1 (W.D. Wis. Feb. 21, 2017) (“In their motion to intervene, intervenors gave no reason to believe

¹ *See* America the Beautiful, U.S. Dep’t of Interior, <https://www.doi.gov/priorities/america-the-beautiful> (last visited June 18, 2024).

² <https://www.fws.gov/press-release/2024-06/biden-harris-administration-publishes-final-management-plan-northeast-canyons>

that the government was either unable or unwilling to vigorously defend the constitutionality of 26 U.S.C. § 107(2).”).

Instead, the Intervenor Applicants’ only argument is that Federal Defendants *may* change course in the future because a prior presidential Administration took a different tack in similar litigation. This argument has been rejected and falls short of overcoming the presumption of adequacy. *See New York v. DHHS*, 2019 WL 3531960, at *6; *L&M Bus Corp.*, 2018 WL 1782709, at *4. This Court should deny Intervenor Applicants’ motion.

C. Raising additional legal arguments to achieve the same goal does not overcome the presumption of adequacy.

The presumption of adequacy is not overcome merely because Intervenor Applicants are uncertain if the Federal Defendants will raise all the claims that Intervenor Applicants would. In the Second Circuit, if the potential intervenors have the same ultimate objective as one of the parties, like Intervenor Applicants admitted they do here, the presumption of adequacy cannot be overcome merely because the potential intervenors hold “different views on the facts, the applicable law, or the likelihood of success of a particular litigation strategy.” *United States v. City of New York*, 198 F.3d 360, 367 (2d Cir. 1999). Similarly, a “disagreement over how to approach the conduct of the litigation is not enough to rebut the presumption of adequacy.” *Stuart v. Huff*, 706 F.3d 345, 353 (4th Cir. 2013).

Instead, so long as the party “has demonstrated sufficient motivation to litigate vigorously and to present all colorable contentions,” courts consider the party’s representation adequate. *NRDC, Inc. v. N.Y. State Dep’t of Env’t Conservation*, 834 F.2d 60, 62 (2d Cir. 1987). In *NRDC*, the Second Circuit explained that the “colorable contentions” analysis asks whether the defendant is willing and motivated to bring all colorable contentions, not whether the defendants and potential intervenors agree about which claims to bring. *Id.* “The fact that [the intervenor applicant]

wishes to advance contentions the existing defendants apparently believe are unavailing does not require [the intervenor applicant]’s intervention where no nexus exists between the interest asserted and the contentions sought to be put forth.” *Id.* This analysis asks whether a party *can* bring the claims—not whether a potential intervenor agrees with the party’s strategic decisions. *Id.* See also *City of New York*, 198 F.3d at 367.

Similarly, in *Brennan*, the Second Circuit rejected applicant-intervenors’ argument that representation was inadequate because the applicants sought a preliminary injunction, while the defendants did not. 579 F.2d at 191. Since the issue was whether the statute was constitutional, and the applicants did not claim that the government would not raise all appropriate arguments for constitutionality, the Court rejected this argument. *Id.*

When courts have held the presumption of adequacy was rebutted because the defendant could not make all “colorable contentions,” the defendant was barred from making these arguments because of a conflict of interest, not because the defendant chose a different strategy. For example, in *Herdman v. Town of Angelica*, 163 F.R.D. 180, 189–91 (W.D.N.Y. 1995), which Intervenor Applicants rely on heavily, see *Interven. Memo.* at 11, 14, 16, 17, the court decided that the government’s representation was not adequate in part because the government was conflicted from bringing the intervenors’ argument. The intervenors wanted to argue that the claim was not ripe, but the government defendants were arguing that the action *was* ripe in a related state case against the same plaintiffs. *Id.* The court was not concerned that the government *did* not raise the defense, but rather that, because of a conflict of interest, the government was *unwilling* to make that defense. *Id.*

Here, the Intervenor Applicants would like to bring a collateral estoppel defense, but they are concerned that the Federal Defendants will not, since the government did not raise this defense

in the earlier litigation over the Designation. Intervenor. Memo. at 17. This contention is purely speculative: Intervenor Applicants do not claim that the Federal Defendants are unmotivated to or cannot raise the collateral estoppel defense, nor are Intervenor Applicants even certain that the Federal Defendants will not raise the defense. *See Gaylor*, 2017 WL 3530861, at *1 (“In their motion to intervene, intervenors gave no reason to believe that the government was either unable or unwilling to vigorously defend the constitutionality of 26 U.S.C. § 107(2).”).

Federal Defendants may not raise the defense for strategic reasons, such as there being no basis for collateral estoppel here, and still adequately represent the interests of Intervenor Applicants. *See SurvJustice Inc. v. DeVos*, No. 18-CV-00535-JSC, 2019 WL 1427447, at *7 (N.D. Cal. Mar. 29, 2019) (“[Potential intervenors]’ argument that Plaintiffs do not adequately represent them because they fail to assert [constitutional] and Title IX claims is also unavailing because this merely reflects a difference in litigation strategy and not the ultimate objective.”). For example, the Federal Defendants may reasonably conclude that a ruling here on the merits of Plaintiffs’ claims would be better for the long-term preservation of the Monument than a dismissal of the case based on a non-merits affirmative defense. Notably, the Intervenor Applicants’ desired collateral estoppel defense is far closer to the strategic decisions in *NRDC* and *Brennan* than the conflict of interest in *Herdman*.

That Intervenor Applicants may disagree with Federal Defendants’ future strategy is irrelevant, since they both share the same ultimate objective—upholding the legality of the Monument and the fishing bans. They want the same thing, and Federal Defendants fully conveyed their intent to preserve the Monument and commercial fishing ban within it. *See Shannon, Final Management Plan*.³ It is immaterial that Intervenor Applicants believe that certain legal arguments

³ <https://www.fws.gov/press-release/2024-06/biden-harris-administration-publishes-final-management-plan-northeast-canyons>

should be raised that the Federal-Defendants do not think would be helpful. The Intervenor Applicants fail to overcome the presumption of adequacy.

D. Intervenor Applicants' other arguments that Federal Defendants' representation is inadequate are unpersuasive.

Intervenor Applicants raise two additional arguments that the Federal Government's representation is inadequate, and both are without merit. First, Intervenor Applicants argue that in prior similar cases, the Federal Defendants made justiciability arguments that the Intervenor Applicants disagreed with, including arguments for limited judicial review and the defenses of ripeness and statute of limitations. *Interven. Memo.* at 18. But the Federal Defendants are masters of their own arguments, and even if this Court grants intervention, Intervenor Applicants will not be able to control or limit the arguments that Federal Defendants make in their pleadings and briefing. *See generally, San Juan Cnty., Utah v. United States*, 503 F.3d 1163, 1173–74 (10th Cir. 2007) (explaining that intervenors cannot control the party's litigation decisions), *abrogated in part on other grounds by Hollingsworth v. Perry*, 570 U.S. 693 (2013); Fed. R. Civ. P. 24(b)(3) (stating that a court must reject permissive intervention if it would “unduly delay or prejudice the adjudication of the original parties’ rights”). Also, the concern that Intervenor Applicants disagree with some of the Federal Defendants’ arguments is irrelevant to whether the Federal Defendants adequately represent Intervenor Applicants’ interests, which they do, because they both seek the same ultimate object.

Next, Intervenor Applicants claim that their interests are not adequately represented because their views on whether the President or Congress is authorized to revoke the Designation’s protections differ with those of the Federal Defendants. *Interven. Memo.* at 18. But that is not at issue in this case. Plaintiffs seek a Declaration that President Obama’s and President Biden’s Proclamations are ultra vires and unconstitutional and an injunction enjoining Federal Defendants

from enforcing the Proclamations. Whether the President or Congress can revoke protections within the Designation is neither here nor there, because Plaintiffs contend that the Designation is unlawful to begin with.

Intervenor Applicants also allege that they may disagree with the Federal Defendants over the meaning of terms in the Antiquities Act, but do not explain why. *Interven. Memo.* at 18–19. This argument is irrelevant. Since Intervenor Applicants, like Federal Defendants, believe the Designation and fishing bans are lawful and seek to uphold them, then Intervenor Applicants would make the same arguments as Federal Defendants that the Antiquities Act permits the Designation in this case. *See NRDC*, 834 F.2d at 61–62 (Inadequacy is not met simply because “[a] putative intervenor . . . has a motive to litigate that is different from the motive of an existing party.”). Both seek the same ultimate objective, and the Intervenor Applicants still fail to show that their interests are not adequately represented.

Finally, Intervenor Applicants’ arguments are better suited for an amicus brief, and Plaintiffs are not opposed to Intervenor Applicants requesting to submit an amicus brief, if the brief complies with this Court’s rules.

E. Intervenor Applicants could seek intervention later if the Federal Defendants dramatically change their position.

Even though intervention is not appropriate now, Intervenor Applicants could always request to intervene again if the Federal Defendants’ position changed. The Intervenor Applicants fail to demonstrate that the Federal Defendants will not adequately represent their interests, since they both seek the same ultimate objective. Thus, Intervenor Applicants fail to prove that they are entitled to intervene under Rule 24(a). But if Federal Defendants change positions on the (shared) ultimate objective, or if it becomes evident that they plan to do so, then Intervenor Applicants could move to intervene at that time. *See L&M Bus Corp.*, 2018 WL 1782709, at *4 (“If the

circumstances of this case change such that . . . intervention becomes necessary, the [potential intervenor] can reapply to the court for intervention at that time.”); *United States v. City of New York*, No. 07-CV-2067 (NGG), 2007 WL 2581911, at *6 (E.D.N.Y. Sept. 5, 2007) (same). Since intervention is inappropriate now, and since Intervenor Applicants could move again if it ever was appropriate, this Court should deny Intervenor Applicants’ motion to intervene as of right under Rule 24(b).

II. This Court Should Deny Intervenor Applicants’ Motion to Intervene Under Rule 24(b).

“Permissive intervention is a matter left to the discretion of the court.” *Great Atlantic*, 178 F.R.D. at 44. Permissive intervention may be granted “if the application is timely and if the ‘applicant’s claim or defense and the main action have a question of law or fact in common.’” *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 202 (2d Cir. 2000) (quoting Fed. R. Civ. P. 24(b)(2)). “The principal consideration set forth in the Rule is ‘whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.’” *Brennan*, 579 F.2d at 191. “[R]elevant factors ‘include the nature and extent of the intervenors’ interests,’ whether their interests are ‘adequately represented by the other parties,’ and ‘whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.’” *Id.* at 191–92 (quoting *Spangler v. Pasadena City Board of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977)). Courts also consider if the movant will benefit by intervening. *Brennan*, 579 F.2d. at 191. Finally, permissive intervention should be denied if Intervenor Applicants are attempting to “inject collateral issues into an existing action.” *Great Atlantic*, 178 F.R.D. at 44.

Here, even if the baseline requirements for permissive intervention—timely application and similar question of law or fact—are satisfied, the Court should exercise its discretion to deny

permissive intervention because Intervenor Applicants fail to meet the other requirements imposed by courts, including the Second Circuit. As explained, Intervenor Applicants' interests are adequately represented by the Federal Defendants, so intervention will not benefit the Intervenor Applicants. *See Brennan*, 579 F.2d at 191; *supra*, pp. 4–9. Instead, intervention will unnecessarily delay the proceedings by doubling the number of defendants and requiring Plaintiffs to respond to unnecessary and duplicative briefing. *See* Interven. Memo. at 17. *See also Ohio Valley Env't Coal., Inc. v. McCarthy*, 313 F.R.D. 10, 31 (S.D.W. Va. 2015) (concluding that “intervention is likely [only] to result in duplicative briefing adding a layer of unwarranted procedural complexity” (quotations omitted)).

It is also unlikely that Intervenor Applicants will “significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.” *Brennan*, 579 F.2d at 191–92 (quotations omitted). Intervenor Applicants add little value because Federal Defendants have litigated similar issues before, are the ones who took the agency actions at issue, and still stand behind those actions publicly. Few can better litigate these issues than the Federal Defendants.

Finally, Intervenor Applicants indicate that they wish to litigate matters not at issue here, such as whether the President or Congress may revoke the protections within the Designation. Interven. Memo. at 17; *see supra*, pp. 12–13. But this is irrelevant to the adjudication of this case. Plaintiffs challenge the lawfulness of the Designation altogether, so whether Congress or the President could revoke the prohibitions *within* the Designation is irrelevant—and the issue is outside the scope of this litigation. *See Great Atlantic*, 178 F.R.D. at 44.

On the other side of the scale, Intervenor Applicants' involvement poses a risk of prejudice to the existing parties, undue delay, and inefficiency. Including three different organizations and

an individual as Intervenor, represented by three different sets of counsel, increases difficulties in scheduling, organizing joint filings, and agreeing on stipulations. When aggregated and extended over the length of this case, these challenges will prejudice Plaintiffs—as they seek quick relief from the fishing bans—as well as Federal Defendants. Since Intervenor Applicants’ interests are already adequately represented, these burdens on the parties and this Court strongly counsel towards denying Intervenor Applicants’ motion to intervene.

III. If Intervention Is Allowed, This Court Should Reasonably Limit Intervenor Applicants’ Participation to Minimize Prejudice to Existing Parties.

If a court allows an applicant to intervene under either Rule 24(a) or 24(b), the court has discretion to limit the scope of the intervenor’s participation to protect the existing parties from prejudice and to maintain an expeditious disposition of the case. *See* Fed. R. Civ. P. 24, Advisory Committee Note, 1966 Amendment (“An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings.”); *Bridgeport Guardians v. Delmonte*, 227 F.R.D. 32, 34 (D. Conn. 2005) (“When granting either permissive intervention or intervention of right, the district court has discretion to set such limits or conditions as are necessary to efficient conduct of the proceedings.” (simplified)); *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 383 (1987) (Brennan, J., concurring in part) (explaining how “restrictions on participation may also be placed on an intervenor of right”); *id.* at 378 (majority) (upholding conditions on permissive intervention). *See also* *Carroll v. Am. Fed’n of Musicians of U.S. & Canada*, 33 F.R.D. 353 (S.D.N.Y. 1963) (granting conditional permissive intervention with restrictions on discovery).

Here, if this Court does allow the Intervenor Applicants to intervene, the Court should restrict the Intervenor Applicants’ participation to limit duplication and prejudice to the existing parties. First, this Court should require that the Intervenor Applicants “confer with [Federal]

Defendants . . . before filing any new substantive motions or briefs and endeavor to eliminate unnecessary repetition by incorporating one another's filings by reference when possible." *See, e.g., Wilderness Soc'y v. Trump*, No. 1:17-CV-02587 (TSC), 2019 WL 11556600, at *4 (D.D.C. Jan. 11, 2019). Second, this Court should bar Intervenor Applicants from "assert[ing] any claim[s] for relief [or affirmative defenses] that had not already been requested by one of the original parties." *Stringfellow*, 480 U.S. at 373. Third, this Court should prohibit Intervenor Applicants from engaging in discovery without leave of this Court. *See Cutler v. Am. Fed'n of Musicians of U.S. & Canada*, 34 F.R.D. 253, 255 (S.D.N.Y. 1963). Requiring these conditions would limit some of the prejudice to the parties that intervention would impose.

CONCLUSION

For the above-stated reasons, this Court should deny Intervenor Applicants' motion to intervene under Rule 24(a) and Rule 24(b) without prejudice. If, however, intervention is allowed, this Court should limit the Intervenor Applicants' participation to reduce duplicative briefing, prejudice to the existing parties, and the inefficient use of this Court's resources.

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