**United States District Court**
**Southern District of Texas**
**Victoria Division**

STATE OF TEXAS, *et al.*,
*Plaintiffs,*

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*,
*Defendants.*

Case 6:23-cv-00007

## PLAINTIFFS' OPPOSITION TO MOTION TO INTERVENE

The proposed intervenors lack a direct and legally protectable interest at stake in this case. Even if they did, their interests are adequately represented by the Defendants, who seek the same outcome and who have every incentive to make the arguments that the proposed intervenors claim will not be made. They therefore have no right to intervene.

Nor have they shown why the court should permit intervention at its discretion. Again, they identify no arguments or legal positions they would take that are different than, much less adverse to, those advanced by Defendants. They seek the same relief as the Defendants. They have not shown special experience, insight, or expertise lacked by the Defendants.

The proposed intervenors' presence is neither mandatory nor helpful. They have no right to intervene, and the Court should deny their discretionary request to intervene.

## BACKGROUND

In October and December 2022, the Defendants announced new and sweeping programs under 8 U.S.C. § 1182(d)(5) to allow nationals of Cuba, Haiti, Nicaragua, and Venezuela to be "paroled" into the United States for up to two years. As part of these programs, the Defendants require that the parole applicants (whom the

Defendants designate as the "Beneficiaries") procure a "Supporter" within the United States who will agree to provide financial support to the Beneficiary during the two-year parole period. *See* ECF 22-2, U.S. Citizenship & Immig. Servs., *Processes for Cubans, Haitians, Nicaraguans, and Venezuelans*, https://www.uscis.gov/CHNV, at 5–6. An individual Supporter must be a U.S. citizen, national, or lawful permanent resident; hold a "lawful status" in the United States; or be a parolee or recipient of deferred action or Deferred Enforced Departure. *Id.* at 2–3. However, Supporters can be "individuals filing on behalf of a group or individuals representing an entity." *Id.* at 5. The Supporter must pass security and background vetting and show sufficient financial resources to support the Beneficiary for the two-year parole period. *Id.* at 5–6.

There are no other stated requirements for Supporters. Indeed, Supporters themselves may be parolees. There is no requirement that a Supporter and Beneficiary have any prior relationship, much less that they be family or close friends. Nothing in the Parole Programs prevents the relationship between Supporter and Beneficiary from being solely pecuniary—a financial or employment relationship.

## ARGUMENT

### I. The proposed intervenors do not qualify to intervene as of right.

A person seeking to intervene as of right under must satisfy four requirements. *See* Fed. R. Civ. P. 23(a); *Haspel & Davis Milling & Planting v. Bd. of Levee Commrs.*, 493 F.3d 570, 578 (5th Cir. 2007). The proposed intervenor must:

- Timely apply,
- Have an interest related to the subject of the case,
- Have that interest inadequately represented by the existing parties, and

- Be situated so that the disposition of the case might, as a practical matter, impair or impede its ability to protect its interest.

*Brumfield v. Dodd*, 749 F.3d 341 (5th Cir. 2014). The proposed intervenors satisfy none of those factors.

**A. The application is not timely.**

The Court has set a schedule leading to a June 13, 2023, trial. That schedule includes deadlines for requesting and serving discovery and included a deadline for asking the Court to approve extra-record discovery. *See* ECF 71, 90; *see also* ECF 126. The proposed intervenors generally—and wrongly—assert that the parties "would not have behaved differently at all, let alone in a way demonstrating prejudice," ECF 106 at 11, had they filed their motion earlier. The negotiations over the scope and deadlines for discovery were premised on the parties' discussions of what discovery they were likely to request, how quickly they believed it could be produced, and the claims to which it would be relevant. Those discussions would have been different had the proposed intervenors been involved. The parties would have needed to discuss, at a minimum, the scope of document discovery to which the proposed intervenors were prepared to respond; the extent to which those responses would cover the proposed parolees they sought to sponsor; the scope of requests for production and interrogatories to the proposed parolees; and deadlines and scheduling of oral depositions.

It is true enough that the proposed "intervenor[s] 'must accept the proceedings as [they] find them,'" *Sierra Club v. Espy*, 18 F.3d 1202, 1206 fn.3 (5th Cir. 1994) (quoting *In re Geisser*, 554 F.2d 698, 705 fn.6 (5th Cir. 1977)), but here, the proposed intervenors find a short-fuse trial setting that would have been negotiated differently had they been involved from the outset. Their motion to intervene was untimely.

**B. The proposed intervenors do not have a legally protected interest in the case.**

Because the proposed intervenors are not beneficiaries of the parole programs, they do not have the "direct, substantial, legally protectable interest in the proceeding," *see La Union del Pueblo Entero v. Abbott,* 29 F.4th 299, 306 (5th Cir. 2022) (quoting *Edwards v. City of Houston,* 78 F.3d 983, 995 (5th Cir. 1996) (en banc)), required for intervention as of right. Contrary to their argument, *see* ECF 106 at 12–13, they are not intended beneficiaries of the parole programs. They are persons without whom a potential parolee cannot participate in the programs. *See* ECF 22-2 at 3. They are, that is, two steps removed from the intended effect of the program, which is to increase the security and safety at the Southwest Border of the United States—even the parole applicants the Defendants identify as "Beneficiaries" benefit from the program only indirectly through their being diverted to ports of entry other than the Southwest Border.

A decree in this case will not affect the proposed intervenors' employment prospects, potential government benefits, or fundamental rights. *Cf. Texas v. United States* 805 F.3d 653, 658–660 (5th Cir. 2015) *(Texas DAPA)* (discussing legal interests that have allowed intervention as of right). A sincere desire that certain persons be paroled into the United States—even if those persons are relatives, friends, or co-religionists—is not a legally protectable interest. The proposed intervenors cite no cases that recognize such an interest, and Plaintiffs are aware of none.

**C. The proposed intervenors' interests are adequately represented.**

The law presumes that the proposed intervenors' interests are adequately represented when they and an existing party share the "same ultimate objective." *Texas DAPA,* 805 F.3d at 661–62. It further presumes that representation is adequate "when the putative representative is a governmental body or officer charged by law with representing the interests of the [intervenor]." *Id.* (quoting *Edwards*, 78 F.3d at

1005). Those presumptions continue to apply here; the proposed intervenors have not demonstrated that those presumptions are false—moreover, they are actually true.

The proposed intervenors and the Defendants share the same ultimate goal: they want the Parole Programs to continue. To overcome the presumption that the Defendants adequately represent their interests, then, the proposed intervenors must prove that there is "adversity of interest, collusion, or nonfeasance" on the part of Defendants. *Id*. The adversity, moreover, must be material; a "mere disagreement over litigation strategy or the individual aspects of a remedy does not, in and of itself, overcome the presumption of adequate representation." *Guenther v. BP Retirement Accum. Plan*, No. 4:16-cv-995, 2021 WL 9552995, at *1 (S.D. Tex. Dec. 7, 2021) (Hanks, J.) (citing *Jenkins v. Missouri*, 78 F. 3d 1270, 1275 (8th Cir. 1996); *Lamar v. Lynaugh*, 12 F. 3d 1099 (5th Cir. 1993); and *Bush v. Viterna*, 740 F.2d 350, 358 (5th Cir. 1984)). The proposed intervenors do not suggest even that much, limiting their argument to their "unaware[ness] of any authority charging the federal government with representing their specific interests." ECF 106 at 14.

Further, because the Defendants are government actors, the proposed intervenors must also show an actual difference in interest from Defendants. *Texas DAPA*, 805 F.3d at 661–62 (quoting *Edwards*, 78 F.3d at 1005). Here, too, the proposed intervenors fail. When presiding over the Biden Administration's 100-day pause of deportations, the Court correctly recognized that there is a difference between the institutional responsibilities of the federal government and advocacy for individuals affected by government programs. *See, e.g., Texas v. United States*, No. 6:21-cv-3, 2021 WL 411441, at *3–4.

The proposed intervenors here, however, are not such individuals. As discussed above, *see* § I.B, whatever interests the proposed intervenors have in this case are indirect and not legally protectable; the proposed intervenors, that is, are at best seeking to serve as virtual representatives of program participants—are seeking to

tie their knock-on effects to the downstream effects flowing from the direct effects of the program. Offering insight as to the effects of a potential judgment, however, is at most the interest of an amicus curiae and is more likely a tactical judgment by a party in how to furnish evidence relevant to the scope of relief that should be awarded. What it is not is a separate, adverse, legally protected interest warranting intervention.

### D. This litigation will not dispose of the proposed intervenors' interests.

Finally, this litigation will not impair or impede the proposed intervenors' ability to vindicate their interests. Each of the proposed intervenors asserts a wish to sponsor an applicant for parole into the United States under the Defendants' new program. ECF 106 at 12–13. According to the Defendants' however, their new programs do not change the standards for parole into the United States; if the applicants qualify for parole under the Defendants' new program, they qualified for parole before the new program. Curtailing the program does not dispose of the proposed intervenors' interest in bringing people to the United States; they may still support co-religionists, family members, and those in need of medical treatment for a trip to a port of entry and after they are paroled into the United States. It simply curtails their ability to do so through a particular set of procedures.

## II. The proposed intervenors do not qualify for the Court to exercise its discretion to allow intervention.

Permissive intervention, which the Court may deny wholly at its discretion, is inappropriate here. *See League of United Latin Am. Citizens v. Clements*, 884 F.2d 185, 189 & fn.2 (5th Cir. 1989) (listing factors for permissive intervention). The States have already explained why the proposed intervenors' application is untimely and their interests are adequately represented, *see* §§ I.A, I.C, and as the proposed intervenors and the Defendants seek the same outcome, there is little question that

their defenses present common questions of law. There are, however, serious questions about whether intervention would delay or prejudice the existing parties or significantly contribute to the development of the underlying facts.

First, the intervention is likely to delay or prejudice the existing parties, particularly the plaintiff States. As described above, negotiations regarding discovery, timing, and scheduling would have been different had the proposed intervenors been involved. *See* § I.A. Those same concerns affect the case going forward. Having never discussed it with the proposed intervenors, the plaintiff States have no idea what discovery the proposed intervenors will request from them or from the Defendants, or how the need to fully respond to that discovery (particularly by the Defendants) might hamper preparation for the case and lead to requests to postpone the trial. Further, the presence of the proposed intervenors themselves at trial will delay resolution. The proposed intervenors have identified no separate legal interest that requires their presence to defend; adding them and their lawyers to trial of the case only adds time—in opening statements, in closing argument, in handling objections, in witness testimony—that distracts from the question at the heart of the case: Was the federal government entitled to impose its new parole programs, much less to do so without notice and comment? No testimony from the individual proposed intervenors will shed light on that question; adding them to the proceedings is cost with no countervailing benefit.

Second, and building on that, the proposed intervenors will not significantly contribute to the development of the underlying facts. Again, their testimony cannot illuminate the central question in the case, but neither will their testimony illuminate the issue where it might even arguably be relevant—the scope of the States' relief. The proposed intervenors are, at their closest, second-derivative beneficiaries of the new parole programs. Any testimony they offer about the downstream effects of those programs will be either twice attenuated from the direct

effect of the program itself or hearsay garnered from the applicants whom the proposed intervenors seek to sponsor. Again, as discussed above, whether to offer such evidence at all, and if so whether to offer it through witnesses such as these, is a tactical decision for the trial lawyers defending the program itself. Granting intervention would make accepting that evidence mandatory by making the proposed intervenors named parties with the right to testify at trial—no matter how little that testimony benefits the case or the Court.

## CONCLUSION AND PRAYER

The Motion to Intervene should be denied.

Dated April 10, 2023.

Respectfully submitted.

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**CERTIFICATE OF SERVICE**

On April 10, 2023, this opposition was filed through the Court's CM/ECF system, which automatically serves it on all counsel of record.

/s/ Leif A. Olson