UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

GROCERY MANUFACTURERS ASSOCIATION, *et al.*,	)	
Plaintiffs,	)	
v.	)	
	)	Case No. 5:14-cv-00117-CR
WILLIAM H. SORRELL, in his official capacity as the Attorney General of Vermont, *et al.*,	)	
Defendants,	)	
and	)	
VERMONT PUBLIC INTEREST RESEARCH GROUP and CENTER FOR FOOD SAFETY,	)	
Proposed Intervenor-Defendants.	)	

VERMONT PUBLIC INTEREST RESEARCH GROUP AND CENTER FOR FOOD SAFETY'S REPLY IN SUPPORT OF THEIR MOTION TO INTERVENE AS DEFENDANTS

This Court should grant intervention to the Vermont Public Interest Research Group (VPIRG) and the Center for Food Safety (CFS) (collectively, "Applicants") because, as explained in Applicants' opening Memorandum (Doc. 18-1), Applicants meet the criteria for intervention under Rule 24(a) and Rule 24(b). Plaintiffs' Response—which boils down to four points regarding the scope of Applicants' interest and involvement in this case—does not change this. First, under Rule 24(a), Applicants have cognizable interests that the State may not adequately represent. Second, under Rule 24(b), Applicants' defense shares a common question of law or fact with the action and Applicants' participation will not unduly delay its resolution.

Further, the State expressly supports Applicants' limited participation in this case as permissive intervenors under Rule 24(b) and does not oppose broader permissive intervention. Defs.' Resp. (Doc. 21) at 3 ("the State supports limited permissive intervention under Rule

24(b)" and "takes no position with respect to whether any broader permissive intervention . . . should be authorized"). The State also does not oppose intervention as of right. *Id.* at 1 ("the State does not oppose Applicants' motion to intervene").

I. APPLICANTS HAVE COGNIZABLE INTERESTS UNDER RULE 24(A) THAT THE STATE MAY NOT ADEQUATELY REPRESENT.

A. Applicants satisfy the "interest" requirement of Rule 24(a).

Plaintiffs correctly note that Rule 24(a) requires a "direct, substantial, and legally protectable" interest. *Wash. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 96-97 (2d Cir. 1990); Pls.' Resp. (Doc. 22) at 4. They also accurately admit that proposed intervenors should show they "would be substantially affected in a practical sense" by the determination of the action. Fed. R. Civ. P. 24, Advisory Committee Notes; Doc. 22 at 4. However, Plaintiffs' accurate depiction of Rule 24(a)'s interest requirement stops there.

First, the 1966 Amendments to Rule 24 abandoned any requirement that a proposed intervenor have a property interest or face the possibility of being bound by a judgment. *See* Rule 24 Advisory Notes. The pre-1966 Rule had proved too restrictive in "accommodating the conflicting interests of parties and intervenors," so the Amendments "focused on abandoning formalistic restrictions in favor of practical considerations." *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 982-83 (2d Cir. 1984) (internal quotations omitted). Reflecting this shift, the Second Circuit has expressly rejected arguments "that the intervenor prove a property right, whether in the constitutional or any other sense." *Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 130 (2d Cir. 2001) (internal quotations omitted). Further, a proposed intervenor need not establish an independent cause of action to satisfy this prong of the test. *United States v. Palermino*, 238 F.R.D. 118, 121 (D. Conn. 2006). Rather, this requirement is meant to be a

"practical, threshold inquiry. No specific legal or equitable interest need be established." *Id.* (internal quotations omitted).

In this case, Applicants have identified numerous concrete and practical interests—to both organizations and their specific members—that are more than sufficient as 24(a) interests. In fact, this case is similar to *Herdman v. Town of Angelica*, where the district court permitted Concerned Citizens of Allegany County (CCAC) to intervene as a defendant in an action regarding a local law that restricted the operation of solid waste facilities within the Town. 163 F.R.D. 180, 191 (W.D.N.Y. 1995). The court relied on the personal interests of CCAC's individual members, CCAC's past work in opposing the solid waste facility project, and CCAC's active role in encouraging the town to draft and adopt the local law at issue. *Id.* at 187. The court found support in the Second Circuit as well as other Circuit decisions permitting intervention for organizations, and concluded that CCAC had asserted "far more than a general, academic, or peripheral interest in the validity of Local Law No. 1." *Id.* at 187-88 (citing numerous cases).

The same is true here: Applicants' members have strong personal interests in upholding Act 120; Applicants have worked for years to secure labeling on genetically engineered (GE) foods, a goal central to their core missions; and Applicants were instrumental in the adoption of the labeling law here in Vermont. *See* Mem. (Doc. 18-1) at 2-7. Further, if the Court strikes down Act 120, Applicants will not be in the same position as today. Among other things, Vermont members of VPIRG and CFS will not be able to rely on the State's forthcoming labeling scheme to obtain information that they need to make informed purchasing decisions, and the members of CFS in other states will suffer a significant defeat in their efforts to achieve

labeling. *See Herdman*, 163 F.R.D. at 189 ("[CCAC's] interest would unquestionably be impaired by a ruling in this court that Local Law No. 1 is unconstitutional").

Second, Plaintiffs' reliance on *Hollingsworth v. Perry* is misplaced. *Hollingsworth* did not discuss or decide when intervention was proper. Rather, it decided whether a party who had already intervened in a case had independent standing to appeal a judgment when the original defendant had decided not to appeal. 133 S. Ct. 2652, 2659-68 (2013). Plaintiffs' reliance on the non-controlling *Floyd* case is similarly misplaced. In that case, the court considered whether certain police unions could intervene in a case for the purposes of appealing orders issued by the district court or participating in remedial phases of the case. *Floyd v. City of New York*, Nos. 08-civ-1034-AT, 12-civ-2274-AT, 2014 WL 3765729, at *8 (S.D.N.Y. July 30, 2014). The unions did not attempt to intervene until after the district court had issued liability and remedial orders. The court decided, among other things, that the unions' motion was untimely, spending eighteen pages discussing the timeliness issue; that the unions' reputational interest was insufficient as presented; and that "a would-be intervenor seeking to pursue an appeal that the originally aggrieved party has disclaimed must show that it has Article III standing to maintain the appeal." *Id.* at *10-28, 31, 57. In contrast, Applicants in this case have timely filed, have alleged much more than a reputational interest, and are not intervening for the sole purpose of participating in post-judgment proceedings.

In addition, Plaintiffs are incorrect that Rule 24(a)'s interest requirement is co-extensive with standing. Doc 22 at 4. The Second Circuit does not require standing for intervention. *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978); *Herdman*, 163 F.R.D. 186-87; *Floyd*, 2014 WL 3765729, at *48. However, to the extent that standing might be required—e.g., where an intervenor seeks to intervene for the purpose of pursuing an appeal, *see Schulz v. Williams*, 44

F.3d 48, 52 (2d Cir. 1994)—it is not an issue here because Applicants have standing. Consistent with *Lujan v. Defenders of Wildlife*, Applicants have submitted member declarations that attest to their members' concrete and particularized interests in GE labeling, and to the direct, imminent injuries they and the Applicant organizations will suffer if Act 120 is not upheld. *See* 504 U.S. 555, 562-64 (1992); Weinstein Decl. (Doc. 18-3) ¶¶ 4-11; Allen Decl. (Doc. 18-6) ¶¶ 10-23; Burns Decl. (Doc. 18-2) ¶¶ 4-16; Kimbrell Decl. (Doc. 18-5) ¶¶ 4-29.

Third, though Plaintiffs vigorously attempt to create new law that would require proposed intervenors to brief Rule 19 in addition to Rule 24 in intervention papers, Plaintiffs point to no authority establishing such a requirement. There is no such requirement. Rather, Plaintiffs rely upon a case that made the unremarkable observation that Rule 19(a)(1)(B)(i) and Rule 24(a) "contain overlapping language [and] are intended to mirror each other." *Mastercard Int'l, Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 389-90 (2d Cir. 2006); Doc. 22 at 3-4, 12-13.[1] Regardless, because Applicants qualify for intervention as of right under Rule 24(a), Applicants would also qualify as necessary parties under Rule 19(a)(1)(B)(i).

B. The State may not adequately represent Applicants' interests.

To meet this prong, Applicants need only show that the State's representation "may be" inadequate. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *N.Y.C. Bd. of Educ.*, 260 F.3d at 132-33 ("test" is whether "adequacy of representation was assured"); *see Hooker Chems.*, 749 F.2d at 983 ("The various components of the Rule are not bright lines, but ranges . . . representation by existing parties may be more or less adequate, and there is no litmus paper test for timeliness."). Act 120's Food Fight Fund illustrates that the Vermont legislature had significant concerns about the costs of implementing and defending Act 120. This is an

[1] In the *Mastercard* case, the court had already conducted an analysis under Rule 19, and then relied on that analysis to similarly conclude that the proposed intervenor did not meet Rule 24(a). 471 F.3d at 389.

important factor favoring intervention because courts apply intervention criteria "in the context of the statutory scheme under which the underlying litigation is being pursued." *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 72 (2d Cir. 1994). That the State now has a concrete obligation to pay outside counsel per a $1.465 million contract does not mean that $1.465 million has magically dropped into the Fund. *See* Doc. 22 at 9. Further, the State is now wrestling with budget cuts after a recent downgrade in revenue projections. Peter Hirschfeld, *Budget Cuts Loom After Revenue Downgrade*, http://digital.vpr.net/post/budget-cuts-loom-after-revenue-downgrade (July 24, 2014). Plaintiffs greatly respect and appreciate the State's assurances, but the statute says what it says; nothing more is needed. *See* Vt. Acts No. 120, § 4 (2014).

Additionally, the interests of out-of-state CFS members are not "remote," as Plaintiffs contend. Doc. 22 at 11. In particular, in Connecticut and Maine—which have already passed GE labeling laws with multi-state trigger clauses—CFS members are depending on the vitality of Vermont's law in order for labeling laws to go into effect in their own states. *See* Doc. 18-1 at 2; Kimbrell Decl. (Doc. 18-5) ¶ 21. Hence, unlike *Washington Electric*, where the court found that the would-be intervenor sought to create a "whole new" suit and to "inject collateral issues into an existing action," out-of-state CFS members have a direct interest in the outcome of this precise litigation with its precise legal questions. *See* 922 F.2d at 97.

II. APPLICANTS SHARE A COMMON QUESTION OF LAW OR FACT UNDER RULE 24(B) AND APPLICANTS' PARTICIPATION WILL NOT UNDULY DELAY THIS CASE.

Though Applicants meet the criteria for intervention under Rule 24(a), this Court need not decide that issue in order to grant permissive intervention under Rule 24(b). As this Court and other district courts have recognized, permissive intervention may be granted regardless of an applicant's intervention-as-of-right status. *Brown v. City of Barre*, No. 5:10-cv-81, 2010 WL

5141783, at *11 (D. Vt. Dec. 13, 2010); *Dorsett v. Cnty. of Nassau*, 283 F.R.D. 85, 90, 93 (E.D.N.Y. 2012) (listing cases). Therefore, for the reasons explained below and in our original Memorandum (Doc. 18-1), the Court should grant permissive intervention to VPIRG and CFS.

A. Applicants have a claim or defense that shares with the main action a common question of law or fact.

There can be no question that Applicants' defense(s) in this case will share a "common question of law or fact" with the main action; Plaintiffs' argument to the contrary is nonsensical. The Complaint challenges the constitutionality of Act 120 on First Amendment, Fifth Amendment, Commerce Clause, and Supremacy Clause grounds. Compl. (Doc. 1) ¶¶ 41-86. Applicants intend to defend the constitutionality of Act 120 on First Amendment, Fifth Amendment, Commerce Clause, and Supremacy Clause grounds. Proposed Answer (Doc. 18-9).

A 2010 case from this Court found that a proposed intervenor shared common questions of law with the proposed class in a class action lawsuit, and thus granted intervention. *See Brown*, 2010 WL 5141783, at *11. The Court noted, in discussing the commonality requirement for class certification, that there were "common legal questions regarding the constitutionality of a state statute." *Id.* at *7. The Court explained that Mr. Brooks (the proposed intervenor and proposed class representative) and Ms. Brown (the original plaintiff and class representative) alleged "violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment" as well as violations of state law arising from the City of Barre's disconnecting certain water supplies. *Id.* at *3. So also here. Applicants' defenses will share the same questions of law as the main action—the constitutionality of a state statute—arising from the same transaction—the enactment of Act 120.

B. Applicants will not unduly delay or prejudice the adjudication of this case.

Plaintiffs have presented only speculation that Applicants will delay this case if Applicants are allowed to intervene. To the contrary, Applicants' actions thus far demonstrate an intent to contribute to this case in a helpful—not dilatory or prejudicial—manner. Applicants timely filed the Motion to Intervene, which Plaintiffs acknowledge. Doc. 22 at 4 (noting that Applicants "arguably satisfy" Rule 24(a)'s timeliness requirement). Applicants have expressed intent to coordinate with the State in order to avoid unnecessary duplication. Doc. 18-1 at 13-14. Applicants have agreed to confine participation to issues raised by the parties, consistent with actual limits that courts have imposed on intervention. *Id.* at 14; *see New York v. Abraham*, 204 F.R.D. 62, 66-67 (S.D.N.Y. 2001) (granting permissive intervention and finding no undue delay where applicants agreed to limit their defense "to the issues framed by the existing parties"); *see also Fowler v. U.S. Envtl. Prot. Agency*, No. 09-005-CKK, 2009 WL 8634683, at *4 (D.D.C. Sept. 29, 2009) ("To ensure that this lawsuit does not become unnecessarily sidetracked, the Court shall grant Movant's Motion to Intervene but shall also prohibit the Movants from raising claims outside the scope of those raised by the original parties or from raising collateral issues."). Applicants also intend to comply with any briefing schedule(s) set by this Court. For these reasons, this situation is distinguishable from the non-controlling *Entergy* case. *See Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, No. 1:11-cv-99-jgm, 2011 WL 2173785, at *5 (D. Vt. June 2, 2011) (stating without clarification that proposed intervenors had not "explained how their defense of Vermont's scheme would avoid duplicating . . . arguments and evidence"). Additionally, the court in that case was concerned about a recently ordered expedited schedule, *see id.*, which is not a factor in this case.

Under the circumstances here, the Court should find that Applicants' participation as intervenors will not unduly delay or prejudice this case. *See State of New York v. Reilly*, 143

F.R.D. 487, 490 (N.D.N.Y. 1992) ("Given that this litigation is still in its infancy, the court can envision no circumstances in which its decision to allow [Applicants] to intervene would cause undue delay or prejudice to the original parties in this action. When this conclusion is coupled with the fact that these applications are timely, the court sees no reason to deny these requests."). *Contrast with Pitney Bowes*, 25 F.3d at 72 (finding prejudice where applicant attempted to intervene fifteen months after consent decree had been lodged).

Rather, Applicants' longstanding work, core interests, and significant expertise—*see, e.g.*, Mem. (Doc. 18-1) at 2-7, 14-15; Burns Decl. (Doc. 18-2); Kimbrell Decl. (Doc. 18-5); Mot. to Dismiss Ex. B (Doc 24-3) at 2, 7, 16, 19, 24, 26-49 (of PDF)—will greatly "contribute to a full development of the issues." *Sackman v. Liggett Grp.*, 167 F.R.D. 6, 23 (E.D.N.Y. 1996) (granting permissive intervention); *see Allco Fin. Ltd. v. Etsy*, No. 3:13cv1874, 2014 WL 2993781, at *4 (D. Conn. July 2, 2014) (granting permissive intervention and stating: "Given the involvement of [Applicants] in the process being challenged and their specialized knowledge of the legal issues presented, their addition to this case will assist the Court in reaching a just and speedy adjudication of this matter."). Finally, the State's affirmative support for Applicants' participation in this case as permissive intervenors is strong evidence that Applicants will contribute to the efficient and effective resolution of this case.

III. APPLICANTS SHOULD HAVE FULL INTERVENOR STATUS.

Applicants respectfully request that this Court grant intervenor status to Applicants under Rule 24(a), Rule 24(b), or both. Applicants appreciate the State's affirmative support for limited permissive intervention but, as explained above, Applicants fulfill the criteria for full intervention—which the State does not oppose. Applicants also appreciate Plaintiffs' willingness to support participation as *amici curiae*. Doc. 22 at 1. However, *amicus curiae*

status would not guarantee Applicants the ability to fully represent their interests in this case. *See Miller v. Silberman*, 832 F. Supp. 663, 673-74 (S.D.N.Y. 1993) (granting permissive intervention though opposition maintained that applicants' interest could be represented through *amicus* status). For example, *amicus* status typically allows a party to file "a brief." *See* 16AA Charles A. Wright et al., *Federal Practice and Procedure* § 3975.1 (4th ed. 2014). *Amicus* status would not necessarily ensure that Applicants could brief every filing, as proposed by the State, or participate in oral argument; it would not ensure that the Court would consider Applicants' briefing. Nor would it allow Applicants to participate in other stages of the case if necessary—e.g., motion practice, any settlement negotiations, and any appellate stages of this case. Further, the State supports actual intervention for Applicants—not *amicus* status.

CONCLUSION

For these reasons, Applicants respectfully request that the Court grant Applicants' Motion to Intervene. If the Court wishes, Applicants are happy to participate in a hearing, as Plaintiffs suggest (Doc. 22 at 15). However, in the interest of efficiency and because the issue has been fully briefed, Applicants do not believe a hearing is necessary.

DATED: August 25, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2014, I electronically filed with the Clerk of Court the following document:

Vermont Public Interest Research Group and Center for Food Safety's Reply in Support of Their Motion to Intervene as Defendants

using the CM/ECF system. The CM/ECF system will provide service of such filing via Notice of Electronic Filing (NEF) to the following NEF parties:

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