No. 24-13102

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PROPERTIES OF THE VILLAGES, INC.,

Plaintiff-Appellee,

v.

FEDERAL TRADE COMMISSION,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

Response to Motion to Hold Appellate Proceedings in Abeyance

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for appellant certifies that, to the best of his knowledge, the following list of persons and entities have an interest in the outcome of this appeal:

American Hotel & Lodging Association

American Investment Council

Araiza, William

Associated Builders and Contractors, Inc.

Baker & Hostetler LLP

Barack, Ryan D.

Bedoya, Alvaro

Boucek, Carolyn O.

Boynton, Brian M.

Consumer Technology Association

Corrigan, Hon. Timothy J.

Covington & Burling LLP

Creed & Gowdy, P.A.

Crooks, Jamie

Democracy Forward Foundation

Epstein, Becker, & Green, P.C.

Fairmark Partners LLP

Farby, Lesley

Federal Trade Commission

Ferguson, Andrew N.

Friedman, Todd R.

Futures Industry Association

Glover, Matthew J.

Goodnature, Taisa M.

Gowdy, Bryan

Grigsby, Stacey K.

Hearn, Robert

Holyoak, Melissa

Home Care Association of America

Hudson, Brian

Independent Electrical Contractors

International Franchise Association

Janda, Sean R.

Klein, Jonathan M.

Khan, Lina M.

Kwall Barack Nadeau PLLC

Lammens, Hon. Philip R.

Liu, Wendy

Lubbers, Jeffrey

Managed Funds Association

Martin, Meagan L.

Mayer Brown LLP

Mittal, Urja

Mody, Arjun

Muldowney, Patrick M.

Nachmany, Eli

Nadeau, Michelle Erin

National Association of Wholesaler-Distributors

National Employment Lawyers Association (Florida Chapter), Inc.

National Employment Law Project

National Federation of Independent Business Small Business Legal Center, Inc.

National Retail Federation

Parr, Jennifer

Posner, Eric A.

Properties of the Villages, Inc.

Public Citizen

Public Citizen Litigation Group

Raab, Michael S.

Restaurant Law Center

Rigby, Katherine G.

Rose, Alexander

Saharsky, Nicole A.

Samburg, Mark B.

Securities Industry and Financial Markets Association

Slaughter, Rebecca Kelly

Shane, Peter M.

Small Business Majority

Starr, Evan

Todd R. Friedman, P.A.

The Holding Company of The Villages, Inc.

The Villages of Lake-Sumter, Inc.

Thurston, Robin F.

United States Council for International Business

Vernon, Emily A.

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Weibust, Erik W.

Westmoreland, Rachael L.

Zehmer, Lauren Willard

The Federal Trade Commission respectfully submits this response to plaintiff-appellee's motion to hold the Commission's appeal in abeyance pending the outcome of proceedings in a different case in a different circuit. For the reasons explained below, plaintiff's motion should be denied.

1. This appeal arises out of a challenge to a regulation issued by the Federal Trade Commission that implements Congress's prohibition on the use of "[u]nfair methods of competition in or affecting commerce." 15 U.S.C. § 45(a)(1); *see Non-Compete Clause Rule*, 89 Fed. Reg. 38,342 (May 7, 2024). The Commission has determined that most non-compete clauses, which restrict workers from leaving their employment to take a competing job or start a competing business, are "unfair methods of competition" prohibited by the FTC Act. The Non-Compete Rule therefore defines most existing non-competes as unenforceable, subject to an exception for certain senior executives, and bans the future use of most non-competes.

Plaintiff, a company that has non-compete agreements with many of its workers, challenged the Non-Compete Rule and moved for a preliminary injunction prohibiting the Rule's enforcement. Plaintiff contended that the Commission lacked statutory authority to issue legislative rules regarding unfair methods of competition, Dkt. No. 25, at 12-17; that the Non-Compete Rule is contrary to law because non-compete clauses are not categorically unfair methods of competition, Dkt. No. 25, at 17-24; and that the Non-Compete Rule raises "significant constitutional concerns"

under the Commerce Clause, "the separation of powers," and "the non-delegation doctrine," Dkt. No. 25, at 25-27.

The district court largely rejected plaintiff's arguments. First, the court concluded that a provision of the FTC Act empowering the Commission to "make rules and regulations for the purpose of carrying out the provisions of" the Act, 15 U.S.C. § 46(g), "conferred at least some form of substantive rulemaking authority to the FTC with regard to unfair methods of competition," Dkt. No. 59, at 9-13. Second, the court concluded that plaintiff had not "demonstrated a substantial likelihood of success" on its constitutional arguments. Dkt. No. 59, at 13. Third, the court concluded that plaintiff had not shown "a substantial likelihood of success" on its arguments "that not all non-competes are unfair competition." Dkt. No. 59, at 13.

Nonetheless, the district court held, relying on the major-questions doctrine, that the statute likely did not "grant the FTC the authority to issue this particular rule." Dkt. No. 59, at 15. Thus, the court concluded that plaintiff was likely to succeed on its claim that the Rule "exceeds the FTC's authority." Dkt. No. 59, at 23. And the court held that plaintiff had demonstrated the equitable factors required to secure a preliminary injunction, primarily on the basis of the costs plaintiff averred it would incur "to review its existing contracts for compliance with the rule" and "to strategize on how best to change [its] existing agreements and business models." Dkt. No. 59, at 24. The court thus entered a preliminary injunction that prohibits the Commission from enforcing the Non-Compete Rule against plaintiff. Dkt. No. 59, at 1-2.

2. The plaintiffs in two other suits also moved for relief against the Non-Compete Rule.

In one suit, a district court in the Eastern District of Pennsylvania denied the plaintiff's motion for a preliminary injunction prohibiting enforcement of the Non-Compete Rule. *See ATS Tree Servs., LLC v. FTC*, 2024 WL 3511630, No. 2:24-cv-1743 (E.D. Pa. July 23, 2024). In reaching that conclusion, the *ATS Tree* district court considered and rejected many arguments similar to those advanced by plaintiff in this case. In particular, the *ATS Tree* district court concluded that the plaintiff was unlikely to succeed on its contention "that the FTC lacks statutory authority" to promulgate binding rules like the Non-Compete Rule, explaining that the FTC Act provides the Commission with the authority "to promulgate 'rules and regulations' as one of its tools to prevent unfair methods of competition." *Id.* at *12-*16. The court concluded that the plaintiff was likely incorrect that the major-questions doctrine compelled a different result, explaining that the Non-Compete Rule "falls squarely within [the FTC's] core mandate" and thus does not implicate major-questions principles. *Id.* at *18. And the court rejected the plaintiff's claim of irreparable harm from "compliance costs" and the need to "spend unrecoverable time and money on attorneys' fees to revise its contracts," explaining that these sorts of ordinary compliance costs "are insufficient bases for injunctive relief." *Id.* at *9.

In another suit, a district court in the Northern District of Texas entered a final judgment vacating the Non-Compete Rule universally. *See Ryan, LLC v. FTC*, 2024

WL 3879954, No. 3:24-cv-986 (N.D. Tex. Aug. 20, 2024). In entering such relief, the *Ryan* district court concluded—unlike the district court in this case and the district court in *ATS Tree*—that the Commission lacks any statutory authority to promulgate binding rules designating practices as "unfair methods of competition." *Id.* at *8-*12. The court also held that the Non-Compete Rule is arbitrary and capricious. *Id.* at *12-*14. Finally, in a single paragraph, relying on Fifth Circuit precedent that the court understood to foreclose "party-specific relief" under the APA, the court held (over the Commission's objection) that the proper remedy was to enter a vacatur with "nationwide effect" that "is not party-restricted." *Id.* at *14 (quotation omitted).

After the *Ryan* district court entered its universal vacatur, the *ATS Tree* plaintiff moved to stay proceedings in its case in light of that relief. The *ATS Tree* district court denied that motion. The court explained that it "has an obligation to hear cases before it and render its determination after thoughtful deliberation based on the facts and the law, thereby providing its analysis to higher courts, litigants and the public." *See ATS Tree Servs.*, 2024 WL 4525514, at *3, No. 2:24-cv-1743 (E.D. Pa. Oct. 3, 2024); *see also id.* at *2 ("Supreme Court Justices have extolled the value of lower courts granting relief [only] 'to redress the injuries sustained by a particular plaintiff in a particular lawsuit,' in part because it allows multiple lower courts to weigh in on legal questions, thereby 'aid[ing] [the Supreme] Court's own decisionmaking process.'" (second and third alterations in original) (quoting *Department of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of a stay))). The court further

explained that granting a stay of proceedings would improperly "give Plaintiff two bites at the apple, by allowing Plaintiff to benefit from the *Ryan* injunction while preserving its ability to relitigate the issue in this case if the FTC appeals that case and is successful on appeal." *Id.* at *3 (quotation omitted). The day after the district court denied the stay motion, the *ATS Tree* plaintiff voluntarily dismissed its suit without prejudice. *See* Dkt. No. 92, *ATS Tree Servs.*, No. 2:24-cv-1743 (E.D. Pa. Oct. 4, 2024).

3. Plaintiff in this case has now filed a motion to hold the Commission's appeal in abeyance pending the final resolution of the litigation in *Ryan*. Plaintiff contends that the *Ryan* district court's universal vacatur of the Non-Compete Rule "separately and independently gives full relief to" plaintiff and that any final affirmance of that vacatur "would effectively moot this appeal." Mot. 2.

This Court should deny plaintiff's motion for two reasons. First, as multiple courts have explained, when more than one case raises the same or similar legal issues, allowing the percolation of those issues has important benefits. This Court should not allow the *Ryan* district court's improper entry of universal relief to undermine those benefits by pretermitting this Court from considering the important questions presented in this appeal. Second, plaintiff's requested relief would be particularly inequitable in this case, where plaintiff attempts to retain the benefits of the district court's preliminary injunction while foreclosing the Commission from seeking review of that injunction. Allowing that result would render meaningless the defendant's right to appeal.

a. This Court should not decline to consider the issues presented in the Commission's appeal simply because a single district court in a different circuit has improperly vacated the Non-Compete Rule universally. As explained, this appeal and *Ryan* both squarely present the question whether and to what extent the Commission is empowered to promulgate binding rules defining prohibited unfair methods of competition. That is an important legal question regarding the scope of the Commission's authority, and it is one on which the district courts in this case, in *Ryan*, and in *ATS Tree* all reached different conclusions. This Court should not allow the *Ryan* district court's entry of overbroad universal relief to pretermit this Court's analysis of that important question.

As the Commission argued in the district court in *Ryan* and will explain to the Fifth Circuit on appeal, fundamental constitutional and equitable principles establish that a court must generally limit relief to the plaintiff in the case. *See Gill v. Whitford*, 138 S. Ct. 1916, 1929-30 (2018) (Article III principles); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (equity principles). As the *ATS Tree* district court properly recognized, and as Justice Gorsuch has explained, one of the benefits of that "traditional system of lower courts issuing interlocutory relief limited to the parties at hand" is that it "encourages multiple judges and multiple circuits to weigh in only after careful deliberation, a process that permits the airing of competing views that aids th[e Supreme] Court's own decisionmaking process." *Department of Homeland Security*, 140 S. Ct. at 600 (Gorsuch, J., concurring in the grant of a stay). Conversely, one of the

practical problems caused by universal relief is that such relief may "short-circuit the decisionmaking benefits of having different courts weigh in on vexing questions of law." *Arizona v. Biden*, 40 F.4th 375, 395-98 (6th Cir. 2022) (Sutton, C.J., concurring).

The systemic benefits that could accompany providing this Court's views are only underscored by the way that other litigation challenging the Non-Compete Rule has played out. In *ATS Tree*, a district court in the Eastern District of Pennsylvania held, at the preliminary-injunction stage, that the plaintiff in that case was unlikely to succeed on its claims against the Rule and, specifically, that the Commission likely has statutory authority to issue binding rules regarding unfair methods of competition, including the Non-Compete Rule. Shortly after that decision, the *Ryan* district court entered an order vacating the Rule universally and effectively providing relief to the *ATS Tree* plaintiff that the plaintiff had failed to secure in its own suit. The *ATS Tree* plaintiff subsequently forwent any appeal of the preliminary-injunction denial and—after the district court declined to stay proceedings pending a final resolution of *Ryan*—voluntarily dismissed its suit. The district court's universal relief in *Ryan* thus has already had the effect of preventing further percolation of the legal questions presented in *ATS Tree*. This Court should not voluntarily pretermit its own consideration of this appeal, thereby leaving only the courts in *Ryan* to weigh in on the issues presented by these suits.

b. Plaintiff's request is particularly unwarranted in this case, where plaintiff seeks to continue receiving the benefits of the preliminary injunction it secured while

precluding the Commission from challenging that injunction on appeal. In moving this Court to stay proceedings, plaintiff has not suggested that this Court should vacate the preliminary injunction nor has plaintiff moved the district court to vacate that injunction.

Instead, plaintiff wishes for the preliminary injunction to remain in effect—binding the Commission on pain of potential contempt—while this appeal is in abeyance. And as a practical matter, even if the Commission were to succeed in having the *Ryan* court's universal vacatur reversed or narrowed and this appeal were then removed from abeyance, it could still take many months for this Court to ultimately determine whether the district court's preliminary injunction was in error. As the *ATS Tree* district court correctly recognized in rejecting a similar motion by the plaintiff in that case, this request is an improper attempt to get "two bites at the apple" by allowing plaintiff to benefit from the universal vacatur in *Ryan* while preserving plaintiff's ability to relitigate in this case any issues the Commission may prevail on in *Ryan*, *ATS Tree Servs.*, 2024 WL 4525514, at *3, No. 2:24-cv-1743 (E.D. Pa. Oct. 3, 2024). All the while, plaintiff also wishes to shield itself from enforcement of the rule under the preliminary injunction in this case, and to prevent the Commission from challenging that injunction.

4. Plaintiff devotes much of its motion to discussing two cases it believes demonstrate the benefits of holding this appeal in abeyance. *See* Mot. 7-9 (citing *Georgia ex. rel. Olens v. McCarthy*, 833 F.3d 1317 (11th Cir. 2016) (per curiam); and

Kroger Co. v. FTC, No. 1:24-cv-438 (S.D. Ohio Oct. 11, 2024)). But each of those cases underscores the problems with plaintiff's request to hold this appeal in abeyance pending the result in another case in which plaintiff is uninvolved. In *Georgia*, this Court held proceedings on appeal in abeyance pending the outcome of a petition for review in the Sixth Circuit filed by the exact same plaintiffs challenging the exact same agency action. *See Georgia*, 833 F.3d at 1320. And in *Kroger*, the Commission moved to adjourn proceedings in one district court involving a lawsuit between the Commission and Kroger pending the outcome of proceedings in a different district court suit also involving the Commission and Kroger. *See* Dkt. No. 24, at 2-3, *Kroger Co. v. FTC*, No. 1:24-cv-438 (S.D. Ohio Oct. 11, 2024)). Of course, when the same parties are engaged in litigation over similar or identical issues in two different fora, longstanding equitable principles generally counsel against proceeding in both fora. *Cf. Oliney v. Gardner*, 771 F.2d 856, 859 (5th Cir. 1985) (explaining that if a plaintiff files a complaint "alleging the same cause of action" as a different pending action, that second complaint "may be dismissed").

No similar longstanding principles support plaintiff's request here. To the contrary, as explained, deep-rooted equitable and constitutional principles generally confine relief in a lawsuit to the parties. Indeed, many of the practical benefits that occasion such limitations on relief would be undermined by acceding to plaintiff's view that other courts should stay pending actions when one district court enters impermissible universal relief.

CONCLUSION

For the foregoing reasons, plaintiff's motion to hold the Commission's appeal in abeyance should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(1)(E) because it contains 2379 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

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