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

APPELLEE'S OPPOSITION TO SMALL BUSINESS MAJORITY, JOHN ROFFINO, AND DANIELLA EMMER'S MOTION TO INTERVENE

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for Plaintiff-Appellee Properties of the Villages, Inc., certifies that the following is a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case on appeal, including subsidiaries, conglomerates, affiliates, and parent corporations, including any publicly held corporation that owns 10% or more of a party's stock, and other identifiable legal entities related to a party.

This Certificate of Interested Persons has been amended to include new attorneys and parties that have become involved in this appeal. These new additions are indicated in bold.

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- American Hotel & Lodging Association
- American Investment Council
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- Hassel, Margaret
- Hearn, Robert
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- Hudson, Brian
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- Independent Electrical Contractors
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- Rose, Alexander
- Rosenblum, Ellen F.
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- **State of Georgia**
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- Todd R. Friedman, P.A.
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- Thurston, Robin F.
- Torrez, Raúl
- Towards Justice
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- United States Council for International Business

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- Warwick, Brian
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- Weiser, Philip J.
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* Emily A. Vernon is no longer employed at Covington & Burling LLP, and she no longer represents Plaintiff-Appellee.

- Zevin Asset Management
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January 23, 2025

/s/ Stacey K. Grigsby
Stacey K. Grigsby

Counsel for Plaintiff-Appellee
Properties of the Villages, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for Plaintiff-Appellee Properties of the Villages, Inc., files this Corporate Disclosure Statement to notify this Court that the following parent corporations own 10% or more of Plaintiff-Appellee's stock:

Holding Company of The Villages, Inc.

The Villages of Lake-Sumter, Inc.

Neither of these corporations is a publicly traded company or corporation, nor is Properties of the Villages, Inc. No publicly traded company or corporation has a 10% or greater ownership interest in Holding Company of The Villages, Inc., or The Villages of Lake-Sumter, Inc.

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INTRODUCTION

This is a case between a private party, Plaintiff-Appellee Properties of the Villages, Inc. ("POV"), and an arm of the federal government, Defendant-Appellant the Federal Trade Commission ("FTC" or "Commission"). The parties have publicly litigated this case for seven months, yet at no point did any non-party seek intervention before the district court. Now, at the eleventh hour, Proposed Intervenors come to this Court and request leave to participate.[1] The request comes too late.

At minimum, the Court should deny leave to participate in this appeal, which concerns enforcement of the FTC's Non-Compete Rule against POV only and will not affect Proposed Intervenors. The core legal question in this appeal concerns whether the district court abused its discretion in granting a narrow preliminary injunction that is enforceable *only* as to POV. Dkt. 59 at 28.[2] Proposed Intervenors, however, share no connection or relation to POV and have no interest in that legal question. A decision by this Court on the propriety of the preliminary injunction cannot bind or otherwise affect Proposed Intervenors. To the extent that Proposed Intervenors seek to assert "global" concerns about the Non-Compete Rule, Proposed

[1] *See* ECF 75.

[2] District court docket entries are cited as "Dkt. # at #," with page numbers referring to CM/ECF pagination.

Intervenor Small Business Majority ("SBM") already has done so by filing an amicus curiae brief in the instant appeal (and below), as have a number of other interested parties.

Moreover, Proposed Intervenors' arguments have no basis in law or fact, nor does their bid to intervene as of right or permissively satisfy the requirements of Federal Rule of Civil Procedure 24, let alone the heightened standard that applies to motions to intervene made for the first time on appeal. *See Hall v. Holder*, 117 F.3d 1222, 1231 (11th Cir. 1997) (noting intervention for the first time in an appeal is permitted "only in an exceptional case for imperative reasons" (quoting *McKenna v. Pan Am. Petroleum Corp.*, 303 F.2d 778, 779 (5th Cir. 1962))). At the same time, intervention so late in this case would substantially prejudice the existing parties, who have nearly completed briefing on appeal. Proposed Intervenors would also change the nature of this case, which concerns only POV and the FTC, by expanding the scope of it.

Put simply, Proposed Intervenors' motion is a misguided attempt to intervene in a case in which they have no interest. They have no place in this litigation concerning the enforceability of the Non-Compete Rule against POV, and their intervention would not be helpful in adjudicating the legal question at issue here. Instead, their intervention would only delay and prejudice the parties' resolution of

the case. As a result, this Court should deny Proposed Intervenors' motion to intervene into any aspect of this case.

STANDARD OF REVIEW

The Federal Rules of Appellate Procedure address intervention only in proceedings for direct review of agency action. *See* Fed. R. App. P. 15(d). Accordingly, appellate courts "have looked elsewhere for guidance," *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 595 U.S. 267, 277 (2022), and consider "the policies underlying intervention in the district courts," *id.* (cleaned up) (quoting *Automobile Workers v. Scofield*, 382 U.S. 205, 217, n.10 (1965)).

Under Federal Rule of Civil Procedure 24(a)(2), a party seeking to intervene as of right must show: (1) its application is timely; (2) it has "an interest relating to the property or transaction" at issue; (3) the party is "situated that disposition of the action, as a practical matter, may impede or impair [its] ability to protect that interest"; and (4) its "interest is represented inadequately by the existing parties to the suit." *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989) (citing *Athens Lumber Co. v. Fed. Election Comm'n*, 690 F.2d 1364, 1366 (11th Cir. 1982)). For permissive intervention, Rule 24 provides that on "timely motion," a court may exercise its discretion and allow permissive intervention if an entity 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, the court must consider whether

the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

When, as here, an entity did not seek to intervene in the district court, an appellate court will allow intervention only "in an exceptional case for imperative reasons." *Hall*, 117 F.3d at 1231 (quoting *McKenna*, 303 F.2d at 779); *see also, e.g.*, *E. Bay Sanctuary Covenant v. Biden*, 102 F.4th 996, 1000 (9th Cir. 2024) (intervention in an appeal is "unusual and should ordinarily be allowed only for imperative reasons." (cleaned up) (quoting *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997))), *cert. denied sub nom. Kansas v. Mayorkas*, No. 23-1353, 2024 WL 4529811 (U.S. Oct. 21, 2024).

ARGUMENT

I. Proposed Intervenors Do Not Satisfy Any Requirements for Intervention.

Federal Rule of Civil Procedure 24 provides for two pathways to intervene in a case on a timely motion: intervention of right, Fed. R. Civ. P. 24(a), and permissive intervention, Fed. R. Civ. P. 24(b). Because Proposed Intervenors cannot satisfy the requirements for either type of intervention, this Court should deny their motion.

A. Proposed Intervenors Have No Interest in This Appeal and Should Not Be Permitted to Stand in the Shoes of the Government.

This appeal concerns a narrow question: Did the district court abuse its discretion when it granted preliminary injunctive relief to POV? But none of Proposed Intervenors have asserted an interest in the existence of an injunction as to

POV, and Proposed Intervenors misconstrue the nature of the relief granted below. More fundamentally, Proposed Intervenors do not even share common claims or defenses with the FTC, which only serves to underscore Proposed Intervenors' lack of interest in this appeal and why their involvement as a party in this litigation would be wholly inappropriate.

In granting POV's motion for a preliminary injunction, the district court was careful to limit the relief to POV alone. The court explained: "The injunction only applies to the Properties of the Villages; the Court is not—*repeat not*—entering a stay of the final rule generally, nor is the Court entering an injunction of nationwide application. It is strictly limited to the party that's before the Court that brought the suit." Dkt. 59 at 28 (emphasis added). As a result of that order, the FTC cannot enforce the Non-Compete Rule against POV, but the court's order explicitly does not reach or affect other businesses.

Proposed Intervenors also have not demonstrated an interest in the application of the Non-Compete Rule to POV. Nor could they. The district court's order does not affect the rights or duties of Mr. Roffino or his former employer, Ms. Emmer or her current employer, or any members of SBM. Attempting to escape this conclusion, Mr. Roffino recounts that he had worked in the healthcare industry in Texas and desires to return to that industry, but he believes that a non-compete agreement with his former employer will prevent him from taking steps toward that

goal. Mot. Ex. B, Roffino Decl. ¶¶ 12, 25-26, ECF 75 at 44, 47. Ms. Emmer likewise states that she has agreed to a non-compete agreement with a group therapy practice in Philadelphia, Pennsylvania and is concerned about retaining her patients if she leaves her current practice. Mot. Ex. C, Emmer Decl. ¶¶ 4-5, ECF 75 at 62-63. Ms. Emmer's work has no connection to POV. SBM describes its interest as generally that of "[t]housands of small businesses in [its] network" that "are harmed by noncompetes and would benefit from the Non-Compete Clause Rule." Mot. Ex. A, Arensmeyer Decl. ¶ 11, ECF 75 at 34. SBM does not state that any business in its network is bound by or otherwise affected by POV's non-compete agreements. Thus, Proposed Intervenors' motion does not and cannot explain how a preliminary injunction that prevents the enforcement of the Non-Compete Rule against POV would prevent Mr. Roffino from working in healthcare, Ms. Emmer from keeping her clients, or any of SBM's businesses from achieving their goals. Indeed, the declarations do not state that any of the Proposed Intervenors ever contracted with POV, nor do they suggest that any of them are bound or harmed in any manner by POV's non-compete agreements. If Proposed Intervenors have enough of an interest to intervene, then so do millions of other people and businesses in the United

States—both in this appeal and in any case involving a consequential regulation that touches millions of Americans.[3]

Additionally, Proposed Intervenors do not cite any relevant authorities to support their purported interest here. Instead, they rely on three cases that involved motions to intervene in the *district* court in matters where intervenors had a personal stake. *See Tech. Training Assocs. v. Buccaneers Ltd. P'ship*, 874 F.3d 692, 694 (11th Cir. 2017); *Meek v. Metropolitan Dade Cnty.*, 985 F.2d 1471, 1476 (11th Cir. 1993); *Chiles*, 865 F.2d at 1211-12. For example, *Chiles v. Thornburgh* explained that "an intervenor's interest must be a particularized interest rather than a general grievance." 865 F.2d at 1212 (citations omitted). That case concerned the allegedly unlawful operation of a federal detention center, and intervenors were detainees at the center. *See id.* at 1200-01. *Meek v. Metropolitan Dade County* involved a vote-dilution claim against a county, and intervenors were two registered voters in the county and two organizations "comprised of registered electors in Dade County." 985 F.2d at 1475-76. And, in *Technology Training*, the proposed intervenors were "class members" who would have been "bound by the terms of [a] settlement if it

[3] Moreover, as the Government explained, because Proposed Intervenors seek to intervene to continue the case if the FTC seeks dismissal, they must demonstrate Article III standing, which they have not attempted to do. *See* ECF 96 at 9-10 (citing *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 439 (2017); *Diamond v. Charles*, 476 U.S. 54, 68 (1986); *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1232 (D.C. Cir. 2018)).

[was] approved and judgment [was] entered." *Tech. Training*, 874 F.3d at 696 (citing *Juris v. Inamed Corp.*, 685 F.3d 1294, 1312 (11th Cir. 2012)).[4]

By contrast, if intervention is granted here, this Court would be opening the floodgates to potential intervenors in cases involving challenges to significant regulations. Proposed Intervenors are two individuals who have entered into non-compete agreements with businesses that are not parties to this suit, as well as an amalgamation of small businesses that likewise have no connection to this case. In its rulemaking, the FTC acknowledged that the universe of workers who have entered into non-compete agreements, like Mr. Roffino and Ms. Emmer, numbers in the tens of millions. Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38343 & n.34 (May 7, 2024). That is to say nothing of the vast number of businesses that choose to use non-compete agreements to prevent the acute harm that would arise if competitors could poach workers.

Not only do Proposed Intervenors lack the requisite interest in this litigation to participate in this appeal, but they also rely on a description of the relief below at odds with the district court's actual ruling. Proposed Intervenors' declaration from

[4] Proposed Intervenors also cite several out-of-circuit precedents, including *Texas v. United States*, 805 F.3d 653 (5th Cir. 2015), and *California ex rel. Lockyer v. United States*, 450 F.3d 436 (9th Cir. 2006). Again, in both cases, the court of appeals reversed a *district* court's denial of a motion to intervene. *See Texas*, 805 F.3d at 655; *Lockyer*, 450 F.3d at 440.

SBM Founder and CEO John Arensmeyer characterizes the district court's order as "invalidating the Rule" and further claims that this injunction harmed the SBM network's "ability to recruit and hire new employees." Arensmeyer Decl. ¶ 15, ECF 75 at 37. That is because the declaration asserts that "the injunction reimposes labor market restraints" on the small businesses in SBM's network. *Id.* But, the injunction does no such thing. As noted above, the injunction does not impact any of the SBM members identified (or Mr. Roffino or Ms. Emmer). Nor could it—by the district court's express terms, the injunction is limited to POV, and none of the Proposed Intervenors have any connection to POV.[5]

To the extent that SBM wishes to share its views with this Court about the merits of POV's preliminary injunction, it has already filed an amicus brief in this Court. ECF 45. POV consented in good faith to that amicus brief. Indeed, SBM also made its views known to the district court by filing an amicus brief there, to

[5] Tellingly, Proposed Intervenors' declarant makes the same assertions, word for word, in a declaration in support of a parallel motion to intervene in an ongoing Fifth Circuit case involving a final determination on the merits that vacated the Non-Compete Rule on a nationwide basis. *Compare id.*, *with* Exhibit A to Motion to Intervene, Arensmeyer Decl. ¶ 15, *Ryan LLC v. FTC*, No. 24-10951 (5th Cir. Jan. 13, 2025), ECF 68 at 37. Proposed Intervenors do not quote from—or engage with—the court's far more limited status quo order that is the actual subject of this appeal. If they did, they would need to acknowledge that the preliminary injunction here, which is limited to POV, inflicts no "immediate and harmful effects on many of the businesses in SBM's network" nor does it impact the "labor market restraints" on such businesses. *See* Arensmeyer Decl. ¶ 15, ECF 75 at 37.

which POV also consented. *See* Dkt. 40 at 1. A denial of the motion to intervene does not prevent SBM (or Mr. Roffino or Ms. Emmer) from participating as amicus in this case—as SBM and many other parties have done. Instead, it simply ensures that these late-filing non-parties with no interest in this appeal cannot stall the progress of this case.

B. Proposed Intervenors Will Not Be Able to Satisfy the Requirements for Intervention by Right.

Proposed Intervenors cannot make the required showing for intervention by right, and they would not be able to do so even if the Government decided not to pursue this appeal. As this Court has explained, a party seeking to intervene as of right under Rule 24(a)(2) must show: (1) its "application to intervene is timely"; (2) it has "an interest relating to the property or transaction which is the subject of the action"; (3) the party is "so situated that disposition of the action, as a practical matter, may impede or impair [its] ability to protect that interest"; and (4) its "interest is represented inadequately by the existing parties to the suit." *Chiles*, 865 F.2d at 1213 (citing *Athens Lumber*, 690 F.2d at 1366). Proposed Intervenors' motion fails to establish they meet a single one of these requirements.

1. *Proposed Intervenors' Motion Is Not Timely.*

In considering the timeliness of a motion to intervene under Rule 24, courts consider (1) "the length of time during which the would-be intervenor knew or reasonably should have known of his interest in the case before petitioning for leave

to intervene"; (2) "the extent of the prejudice that existing parties may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest"; (3) "the extent of the prejudice that the would-be intervenor may suffer if denied the opportunity to intervene"; and (4) "the existence of unusual circumstances weighing for or against a determination of timeliness." *Comm'r. v. Advance Loc. Media, LLC*, 918 F.3d 1161, 1171 (11th Cir. 2019) (citing *Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel*, 861 F.3d 1278, 1294 (11th Cir. 2017)). The "most important consideration in determining timeliness is whether any existing party to the litigation will be harmed or prejudiced by the proposed intervenor's delay in moving to intervene." *Id.* (quoting *McDonald v. E. J. Lavino Co.*, 430 F.2d 1065, 1073 (5th Cir. 1970) (further internal citations omitted)).

Turning to the first factor, this case has been pending since June 2024, and SBM filed an amicus brief at the district court in July 2024, demonstrating its awareness that the case was ongoing. By Proposed Intervenors' own admissions, SBM submitted comments on the proposed rule during the comment period in 2023. *See* Arensmeyer Decl. ¶ 10, ECF 75 at 33-34 (citing Non-Compete Clause Rule, 89 Fed. Reg. at 38,347 n.104). Yet now, months into this litigation, Proposed Intervenors argue that their motion is timely because they filed it before it becomes certain whether the FTC will stop defending the Non-Compete Rule. But Proposed

Intervenors' purported interest in this case—defending the validity of the Non-Compete Rule—would exist regardless of whether the incoming Administration changes course. In other words, if Proposed Intervenors seek to preserve the FTC's Non-Compete Rule, they knew or should have known of that interest long before they moved to intervene on appeal. Indeed, the fact that the Proposed Intervenors knew or should have known their interest at the inception of this lawsuit underscores why intervention on appeal—as opposed to intervention early on in the district court—is generally disfavored. Proposed Intervenors have waited at least half a year to assert an interest that existed as early as June 2024.

But even if, as Proposed Intervenors suggest, their interest developed once they perceived a "risk" that the FTC would stop defending the Non-Compete Rule, they knew of that "risk" well before they filed this motion. Given that the FTC approved promulgating the Non-Compete Rule by a divided three to two vote, a change to the composition of the Commission could affect the FTC's defense of the Rule. That "risk" did not suddenly materialize following the Presidential Election. Rather, Proposed Intervenors must have known of this risk by June 2024 when the Republican FTC Commissioners—in the midst of a presidential election year—published their statements dissenting from the Non-Compete Rule. Dissenting Statement of Comm'r Ferguson, *In re Non-Compete Clause Rule* (June 28, 2024); Dissenting Statement of Comm'r Holyoak, *In re Non-Compete Clause Rule* (June

28, 2024). Yet, instead of attempting to intervene then (or during the district court proceedings), Proposed Intervenors declined to act, waiting through briefing and argument below, as well as the nearly four months this appeal has been pending, before seeking relief just two days before POV's merits brief was due.

Even accepting the incorrect argument that it was appropriate for Proposed Intervenors to wait until the Presidential Election had concluded before acting (and it was not), that election occurred on November 5, 2024, and was materially decided by November 6. Yet Proposed Intervenors *still* waited two months after the election before seeking intervention, despite full awareness that briefing on the appeal was substantially underway.

As to prejudice to the parties—the second factor and "most important consideration" in this analysis, *Advance Loc. Media, LLC*, 918 F.3d at 1171 (quoting *McDonald*, 430 F.2d at 1073)—intervention would substantially prejudice both parties, and particularly POV. At this time, briefing is nearly complete, with both the FTC and POV having filed their principal briefs. All that remains is the FTC's reply brief and any oral argument the Court grants. The introduction of Proposed Intervenors to this action at this stage of the appeal will "inevitably delay[] proceedings" and prejudice POV. *See Athens Lumber*, 690 F.2d at 1367 (citation omitted). Although Proposed Intervenors claim that they will not "make any substantive filings" and will adopt the FTC's brief as their own, ECF 75 at 17, that

only underscores their failure to comply with the requirements of the rules to begin with. Fed. R. Civ. P. 24(c) (requiring intervenors to file pleading "that sets out the claim or defense for which intervention is sought."). In any event, Proposed Intervenors cannot simply "adopt" the Government's arguments regarding the balance of the harms and public interest. Proposed Intervenors are private actors, not the Government, and so the analysis must change, especially if Proposed Intervenors choose to take a position *at odds* with the Government. And POV must have the right to respond to any new arguments in this respect, introducing substantial delay and cost. Intervention would inflict other substantial prejudice on POV as well. For instance, if the Government did dismiss this appeal, POV would have to continue litigating a case that otherwise would have come to a close. *See, e.g.*, *United States by Bell v. Allegheny-Ludlum Indus., Inc.*, 553 F.2d 451, 453 (5th Cir. 1977) (observing that belated intervention can "caus[e] substantial litigation expenses").

The third factor considers prejudice to Proposed Intervenors if they are not allowed to intervene and the "thrust of the inquiry must be the extent to which a final judgment in the case may bind the movant even though he is not adequately represented by an existing party." *United States v. Jefferson Cnty.*, 720 F.2d 1511, 1517 (11th Cir. 1983). This Court has emphasized that this third factor "has weight only in the situation where (a) the judge cannot anticipate the extent to which a final

judgment will bind the movant, or (b) the judge finds that although the movant has an identical interest with a party, he has a sufficiently greater stake . . . that the party's representation may be inadequate to protect the movant's interest." *Id.* There is simply no prejudice to Proposed Intervenors here. Although they contend that they would suffer prejudice if not allowed to intervene, they fail to explain how. The preliminary injunction does not bind Proposed Intervenors or even apply to anyone beyond POV. *See* Dkt. 59 at 28. Thus, whatever the outcome of the appeal, Proposed Intervenors' interests are entirely unaffected. Indeed, as explained above in Part I.A, Proposed Intervenors have not shown any connection or relationship to POV that would demonstrate how they, unrelated individuals and an unrelated organization, would suffer prejudice because of a preliminary injunction that is specific to POV.

Nor will this appeal determine whether the Non-Compete Rule applies more broadly. Although Proposed Intervenors worry that, beyond the four corners of the appeal, the FTC may end its defense of the Non-Compete Rule entirely, that is a concern intervention cannot solve. For example, if the Government decides not to pursue the appeal or any other aspect of the case because the FTC has decided to rescind or amend the Rule—intervention could not alter the FTC's decision to change the Rule. In other words, it would make little sense to have unrelated third

parties continue this litigation based on the possibility that the FTC itself may decide to rescind or amend the Rule.

Finally, the fourth factor considers any unusual circumstances weighing in the timeliness analysis, but Proposed Intervenors merely state in a cursory manner that, like in *Meek v. Metropolitan Dade County*, there is a "substantial public interest at stake in the case." ECF 75 at 18 (quoting 985 F.2d at 1479 (concerning voting rights)). Their failure to explain what the "substantial public interest" in this appeal is or what other "unusual circumstances" there may be defeats their claim to intervention. And as with the other factors, Proposed Intervenors cannot provide any such explanation because the crux of this appeal is a preliminary injunction that *only* bars enforcement of the Non-Compete Rule as to POV.

Critically, Proposed Intervenors fail to show why this is an "exceptional case" with "imperative reasons" for their intervention for the first time on appeal. *Hall*, 117 F.3d at 1231 (quoting *McKenna*, 303 F.2d at 779). Indeed, Proposed Intervenors are already out of time. Regardless of whether they file now or later in the district court, their motion to intervene is untimely and their failure to meet this requirement should be dispositive.

2. *Proposed Intervenors Lack an Interest Relating to the Property or Transaction Which Is the Subject of This Action.*

This appeal concerns a preliminary injunction that prevents the FTC from enforcing the Non-Compete Rule against POV and POV alone. As explained above,

Proposed Intervenors have no interest in that injunction or this appeal. *See supra* pp. 4-10.

3. *Disposition of This Appeal Will Not Impair Proposed Intervenors' Ability to Protect Their Interests.*

This Court will do one of two things in this appeal—neither of which will have a direct bearing on Proposed Intervenors' ability to protect their interests. If POV wins the appeal or if the Government dismisses the appeal, then the preliminary injunction as to POV will stay in place. If the Government wins the appeal, then this Court will dissolve the preliminary injunction. In either scenario, Proposed Intervenors are unaffected. Thus, even if there are circumstances in other cases that might justify conditional intervention, those circumstances are not present here.

Grasping to establish an impact on their interests, Proposed Intervenors assert that "the *stare decisis* effect of a judgment for the Plaintiffs would suffice to satisfy the impairment prong." Mot. 26. But that misunderstands the task before this Court. In this appeal, this Court is evaluating the district court's exercise of its discretion in granting the preliminary injunction at issue—based on a consideration of multiple factors. The *stare decisis* effect of any judgment would be limited to the specific preliminary injunction that the district court issued and would have no binding effect on other cases not involving the current parties. *See United States v. Lambert*, 695 F.2d 536, 539 (11th Cir. 1983) ("On appeal from the grant or denial of a preliminary injunction we do not review the intrinsic merits of the case."). That is because the

preliminary injunction turned on three factors: the likelihood of success on the merits, irreparable harm, and the balance of the equities/public interest. Indeed, on the likelihood of success, the question for this Court is whether POV has made a showing of "*likely* or probable, rather than *certain*, success." *Gonzalez v. Gov. of Ga.*, 978 F.3d 1266, 1271 n.12 (11th Cir. 2020) (quoting *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1232 (11th Cir. 2005)). Thus, whatever the Court's judgment in this case, it will not be an impediment to Proposed Intervenors' ability to protect their asserted interests. Moreover, if the Government does dismiss the appeal, no judgment would result from this appeal, and Proposed Intervenors would not have to contend with any adverse effects from *stare decisis*.

C. Proposed Intervenors Do Not Meet the Criteria for Permissive Intervention.

Because Proposed Intervenors have so little in common with this appeal and because their untimely intervention would prejudice POV, permissive intervention is wholly inappropriate here.

Federal Rule of Civil Procedure 24(b)(1)(B) provides that "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." That Rule also states that "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Thus, permissive intervention is only appropriate

"where a party's claim or defense and the main action have a question of law or fact in common and the intervention will not unduly prejudice or delay the adjudication of the rights of the original parties." *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1250 (11th Cir. 2002) (citing *Walker v. Jim Dandy Co.*, 747 F.2d 1360, 1365 (11th Cir. 1984)). But even if a court concludes that a movant satisfies these requirements, it "may refuse to allow intervention," as "it is wholly discretionary with the court whether to allow intervention under Rule 24(b)." *Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508, 1513 (11th Cir. 1996) (quoting *Worlds v. Dep't of Health & Rehab. Servs.*, 929 F.2d 591, 595 (11th Cir. 1991)).

As set forth in Part I.B.1, Proposed Intervenors' motion is untimely, regardless of whether they file now or later. That reason alone justifies denying their request for permissive intervention.

Assuming that this motion were timely (which it is not), Proposed Intervenors would not satisfy any of the other requirements, nor have they attempted to explain even once how this is an "exceptional" appeal with "imperative reasons" for their intervention. *See Hall*, 117 F.3d at 1231 (quoting *McKenna*, 303 F.2d at 779). Thus, Proposed Intervenors fail to meet not only the basic requirements of Rule 24(b), but also the heightened standard for intervention on appeal.

Proposed Intervenors cannot demonstrate that they have "a claim or defense that shares with the main action a common question of law or fact" under

Rule 24(b)(1)(B). They contend in only a single sentence that their "anticipated defense of the Rule shares every question of law and fact in common with the main action" because they seek to defend FTC's authority to promulgate unfair competition rules generally and the Non-Compete Rule here. ECF 75 at 15. Proposed Intervenors, however, failed to comply with the basic requirement of Rule 24(c) to attach a pleading "that sets out the claim or defense for which intervention is sought." Such a proposed pleading might have provided some explanation for why Proposed Intervenors believe that their proposed intervention shares claims or defenses in common with this appeal, but they attach no such pleading.

Even if Proposed Intervenors had complied with Rule 24's procedural requirements, they have not demonstrated that their defense shares commonality with the questions of law and fact at issue in this specific appeal. The question in this appeal is whether the district court abused its discretion in granting POV's motion for a preliminary injunction that only applies to POV. As explained above, the district court emphasized that the preliminary injunction applies only to POV. Dkt. 59 at 28. Yet, Proposed Intervenors' motion does not discuss POV even once and instead focuses on the Non-Compete Rule more generally. Because Proposed Intervenors have "so little in common" with this case, this Court should deny their motion for permissive intervention. *See Sterling v. Sellers*, 817 F. App'x 895, 898

(11th Cir. 2020) (denying permissive intervention and noting a court's discretion to deny permissive intervention even if Rule 24(b)'s requirements are met).

Indeed, Proposed Intervenors address only their views on the legality of the Non-Compete Rule. That is not only different from the likelihood-of-success inquiry, *see supra* pp. 17-18, but also incomplete. Proposed Intervenors do not attempt to discuss the irreparable harm to POV that the district court found—a key element in the grant of a preliminary injunction. Moreover, the entrance of Proposed Intervenors into this case would change the analysis because the Proposed Intervenors are not the appropriate party to assert a balance of the equities or public interest argument on behalf of the Government.

CONCLUSION

For the foregoing reasons, this Court should deny Proposed Intervenors' motion in its entirety.

January 23, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing document complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,119 words. This document also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 MSO, Version 2402, in 14-point Times New Roman font.

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