IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SERVICE EMPLOYEES INTERNATIONAL UNION, Plaintiff, v. NATIONAL LABOR RELATIONS BOARD, *et al.*, Defendants, and CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, and INTERNATIONAL FRANCHISE ASSOCIATION, Proposed Defendant-Intervenors.	Civil Action No. 21-2443 (RC)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE INTERNATIONAL FRANCHISE ASSOCIATION

Pursuant to Federal Rule of Civil Procedure 24, the Chamber of Commerce of the United States of America ("the Chamber") and the International Franchise Association ("IFA") seek to intervene as a matter of right, or alternatively to intervene with the Court's permission, as defendants in the above-captioned lawsuit.

This case concerns a rule adopted by the National Labor Relations Board ("NLRB" or "Board") that addresses an extremely important question affecting innumerable types of relationships in the business community generally and franchisors and franchisees in particular:

when should two or more entities be deemed to be "joint employers" under the National Labor Relations Act ("NLRA")? *Joint Employer Status Under the National Labor Relations Act*, 85 Fed. Reg. 11184 (Feb. 26, 2020) (codified at 29 C.F.R. § 103.40) ("Joint Employer Rule"). This area of law was thrown into disarray by the controversial decision of a divided NLRB in *Browning-Ferris Industries of California, Inc.*, 362 N.L.R.B. 1599 (2015) ("*BFI*"), *remanded*, 911 F.3d 1195 (D.C. Cir. 2018) ("*BFI* Appeal"). In *BFI*, a three-member majority of the Board imposed a novel, complex, and vague standard for determining joint employer status. As the two dissenting Board members observed in *BFI*, the Board's reformulated joint-employer standard imposed "unprecedented" obligations on "multiple entities in a wide variety of business relationships," which "fundamentally alter[ed] the law applicable to user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer business relationships . . . ." 362 N.L.R.B. at 1620-21 (Miscimarra & Johnson, Members, dissenting).

The Rule addresses the harmful impact of *BFI* by returning to the Board's traditional approach, while incorporating refinements based on public comments and the D.C. Circuit decision which reviewed the Board's *BFI* ruling. As both Proposed Intervenors explained in their comments during the rulemaking process, this change strongly benefits their members (and the economy more generally).

The Plaintiff here—Service Employees International Union ("SEIU")—seeks to invalidate the Rule and return to a far more onerous standard. Should Plaintiff succeed, the Proposed Intervenors' members would have a wide variety of business relationships dramatically affected by the expanded *BFI* joint employer standard. To protect the interests of their members, it is crucial for the Chamber and the IFA to participate in the case. In light of these significant interests,

the timeliness of the motion, and the difference in perspective between the Proposed Intervenors and the NLRB, the Chamber and the IFA are entitled to intervene as of right under Rule 24(a)(2). Alternatively, this Court should permit the Chamber and the IFA to intervene under Rule 24(b)(1)(B).

I. FACTUAL BACKGROUND

A. The Proposed Intervenors

The Chamber is the world's largest business federation. The Chamber represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly participates in cases that raise issues of concern to the Nation's business community.

IFA is the oldest and largest trade association in the world devoted to representing the interests of franchisors, franchisees, and franchise suppliers. IFA's membership currently spans more than 300 different industries, including more than 11,000 franchisee, 1,100 franchisor, and 575 supplier members nationwide. IFA works through its government relations and public policy, media relations, and educational programs to protect, enhance, and promote franchising on behalf of more than 733,000 franchise establishments, which support nearly 8.4 million jobs and $787.5 billion of economic output for the U.S. economy.

B. The Board's Joint Employer Rule

The Rule sets out the standard for determining joint employer status under the NLRA. 85 Fed. Reg. 11184. It provides that an entity can be considered a joint employer of another employer's employees "only if the two employers share or codetermine the employees' essential

terms and conditions of employment." *Id*. at 11235. This test, in turn, is met only if the entity possesses a sufficient degree of "substantial direct and immediate control over one or more essential terms or conditions of their employment." *Id*. Further, the Rule provides an exclusive list of essential terms and conditions of employment, and defines what "direct and immediate control" means with respect to each of them. *Id*. at 11235-36.

The Joint Employer Rule provides valuable clarity in the wake of the divided Board's controversial ruling in *BFI*. The standard adopted by the *BFI* Board majority departed from decades of Board precedent, imposed an expansive test governing joint employer status that was largely devoid of meaningful boundaries, and left employers, employees, and unions with little guidance as to who would be deemed a joint employer. *See* Chamber of Commerce of the United States, Comment Letter on the National Labor Relations Board Proposed Rulemaking, "The Standard For Determining Joint-Employer Status" 2-5 (Jan. 28, 2019) (attached as Ex. A). Indeed, a study conducted by a senior economist for the Chamber found that the uncertainty and instability caused by *BFI* imposed annual costs of $33.3 billion on the franchising industry alone. *Id*. at 48-55.

Although the Board has usually relied on adjudication to develop its policies, it chose to articulate this standard through rulemaking. The Board unquestionably has the authority to engage in rulemaking: NLRA Section 6 states that the Board may make, "in the manner prescribed by [the APA], such rules and regulations as may be necessary to carry out the provisions of this [Act]." 29 U.S.C. § 156. The rulemaking process "enable[d] the Board to gather information from a wide variety of interested parties and to provide greater clarity to the joint-employer analysis." 85 Fed. Reg. at 11188. The Board considered nearly 29,000 comments and utilized those comments "to revise and clarify the [joint-employer] standard." *Id*. The Board also noted that proceeding via

rulemaking would "enable employers, unions, and employees to plan their affairs free of the uncertainty that significant changes to the joint-employer doctrine could be made, and retroactively applied, via case adjudication." *Id*.

By issuing the Rule, the Board hoped "to return, with clarifying guidance, to the carefully balanced law as it existed before [*BFI*]." *Id*. at 11224. Significantly, the Rule also reflected refinements taken from public comments and ensured consistency with the D.C. Circuit decision that rejected part of the *BFI* Board majority standard. *BFI* Appeal, 911 F.3d at 1216-23. Among other things, the Rule indicates—consistent with the *BFI* Board majority and the D.C. Circuit decision—that "indirect control" and "contractually reserved but never exercised authority" over essential employment terms and conditions are "probative of joint-employer status . . . ." 85 Fed. Reg. at 11235.

The Rule clarifies that these two factors—along with evidence of an entity's control over mandatory bargaining subjects "other than the essential terms and conditions of employment"—*will* be given consideration, but only to the extent that this "supplements and reinforces evidence of the entity's possession or exercise of direct and immediate control over a particular essential term and condition of employment." *Id*. Thus, the Rule provides substantially greater guidance than existed in the standard adopted by the *BFI* Board majority, which was one of the D.C. Circuit's criticisms in its remand of the *BFI* Board decision. *See, e.g.*, *BFI* Appeal, 911 F.3d at 1220 (noting that "[t]he Board's analysis . . . failed to differentiate between those aspects of indirect control relevant to status as an employer, and those quotidian aspects of common-law third-party contract relationships" which "cast no meaningful light on joint-employer status," and that "the Board provided no blueprint for what counts as 'indirect' control").

The Rule went into effect over a year and a half ago, on April 27, 2020, and remains in force today.[1]

C. The Pending Litigation Challenging the Joint Employer Rule

On September 17, 2021, the SEIU filed suit in this Court, challenging the Rule under the APA. *See* Compl. ¶ 3. SEIU asserts that the Rule (1) improperly cabins the role of reserved control in the joint employer inquiry and (2) "arbitrarily and capriciously excludes health and safety matters from the set of employment conditions over which an entity that exercises control must bargain." *Id*. ¶ 2. The Board has not yet taken any action in the case beyond filing notices of appearance and obtaining an extension of time for filing its Answer. Dkt. Nos. 21-25.

II. ARGUMENT

A. The Proposed Intervenors Are Entitled to Intervene as a Matter of Right

In assessing whether a party is entitled to intervene as of right, courts in this Circuit apply a four-factor test that tracks the language of Rule 24(a)(2).[2] The four factors are: "1) timeliness of

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[1] The Board could, of course, modify, rescind, or replace the Rule in the future, as the Department of Labor ("DOL") recently did with its own joint employer rule. *Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule*, 86 Fed. Reg. 40939 (July 30, 2021). Indeed, the new chairman of the Board opined earlier this year that the standard underlying the Joint Employer Rule "was always living on borrowed time." *Browning-Ferris Indus. of Cal., Inc.*, 370 N.L.R.B. No. 86, at 4 (2021) (McFerran, Chairman, dissenting); *see also, e.g.*, Daniel Wiessner, *SEIU Mounts Challenge to NLRB's Trump-era Joint Employer Rule*, Reuters (Sept. 17, 2021), https://reut.rs/3Da6zY9 (noting that "the Biden-era NLRB is widely expected to undo [the Rule]").

But in order to modify, rescind, or replace the Rule, the Board would need to comply with the applicable requirements of the Administrative Procedure Act ("APA")—a time-consuming process. As a result, the Rule will continue to govern the conduct of employers for the indefinite future, subject, of course, to the resolution of the issues presented in this case. Furthermore, any future rulemaking by the Board would have no impact on disputes arising prior to such rulemaking, because any new rule would apply prospectively.

[2] The rule provides that, "[o]n timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the

the application to intervene; 2) a legally protected interest; 3) that the action, as a practical matter, impairs or impedes that interest; and 4) that no party to the action can adequately represent the potential intervenor's interest." *Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 320 (D.C. Cir. 2015); *see also Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). In addition, the D.C. Circuit requires applicants seeking to intervene as a matter of right to establish Article III standing.[3] *E.g.*, *Fund for Animals*, 322 F.3d at 732. All these requirements are comfortably satisfied here.

1. The Proposed Intervenors Have Article III Standing

"To establish standing under Article III, a prospective intervenor—like any party—must show: (1) injury-in-fact, (2) causation, and (3) redressability." *Id*. at 732-33. As to injury in fact, the D.C. Circuit has "generally found a sufficient injury in fact where a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party's benefit." *Crossroads*, 788 F.3d at 317. For example, an association of chemical manufacturers had standing to intervene in a challenge to an EPA rule because "some of its members produced military munitions, and those members benefited from the EPA's rule, such that they 'would suffer concrete injury if the court grant[ed] the relief the petitioners [sought].'" *Id*. (quoting *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998)); *see also, e.g.*, *Fund for Animals*, 322 F.3d at 733.

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movant's ability to protect its interest, unless existing parties adequately represent that interest. Fed. R. Civ. P. 24(a)(2).

[3] Recent Supreme Court decisions make clear that parties like the Proposed Intervenors, who seek to intervene as defendants and do not seek additional relief beyond that sought by the other parties, are not required to demonstrate independent Article III standing. *See, e.g.*, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379 n.6 (2020) (citing *Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1651 (2017)); *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951-52 (2019). But the continued viability of circuit precedent is beside the point here because Proposed Intervenors have standing, as explained below.

It is just the same here. As detailed below, the Proposed Intervenors' members benefit immensely from the Joint Employer Rule. The SEIU is challenging that rule and threatening that benefit. Accordingly, the Proposed Intervenors' members "would suffer concrete injury if the court grants the relief [plaintiff] seek[s]." *Military Toxics*, 146 F.3d at 954. "[T]hey would therefore have standing to intervene in their own right," and the Chamber and the IFA "ha[ve] standing to intervene on their behalf." *Id.*; *see also, e.g.*, *Cnty. of San Miguel v. MacDonald*, 244 F.R.D. 36, 44 (D.D.C. 2007) (holding that proposed intervenors satisfied the injury requirement by pointing to harms such as an "expected increase in regulatory restrictions on their members' use of . . . land" and "a reduction in the profitability of their members' business concerns").[4]

As both Proposed Intervenors explained in comments submitted during the rulemaking process, the Joint Employer Rule confers significant benefits on their members. The Rule displaced the open-ended joint employer standard announced in *BFI*, and an unfavorable ruling here would mean a return to the amorphous and unpredictable regime that predated the Rule. This would cause "significant operational and economic harm" to a wide range of businesses. *See* International Franchise Association, *The Economic Impact of an Expanded Joint Employer Standard* 1 (Jan. 28, 2019) (attached as Ex. B). An economic study submitted by the Chamber and based on interviews with 77 IFA members estimated that *BFI* had cost the franchising sector $33.3 billion annually and had resulted in 376,000 lost job opportunities. Ex. A at 48-55; Ex. B at 13.

The Chamber's comments highlighted the uncertainty facing businesses under the Board's *BFI* standard. "As it was written and as it was perceived, [*BFI*] marked a departure from the

[4] Associational standing also requires that the interests at issue be "germane to the organization's purpose" and that "neither the claim asserted nor the relief requested requires the participation of individual members." *Military Toxics*, 146 F.3d at 954. Here, both Proposed Intervenors are concerned with protecting the economic interests of their members, and the participation of individual members is not necessary to address the legal validity of the Rule.

Board's historic policy trend and suggested a risky, costly and uncharted course for the future. Defensive reactions by those subject to the new risk were predictable and reasonable." Ex. A at 41. Accordingly, concern over the ramifications of *BFI* "impede[d] the willingness of employers to contract with one another thereby burdening the free flow of commerce and reducing employment opportunity." *Id*. at 16-17. The Chamber encouraged the Board to promulgate this current Rule to head off the "years of litigation and untold cost to all stakeholders and taxpayers" that would likely be necessary "to determine the proper application of the *BFI* standard to a vast array of existing and future business relationships." *Id*. at 5. The Chamber's members, therefore, benefit greatly from the clarity provided by the Rule. By contrast, a return to *BFI* would have a "depressive effect on the formation of . . . business associations," which in turn would impose "large economic losses . . . on the entire economy." *Id*. at 32, 39.

IFA's comments likewise detailed the dramatic impact of *BFI*'s expansive standard on its members in the franchising industry. "Given the breadth of [*BFI*], franchisors [were] forced to distance themselves from their franchisees—at the risk of jeopardizing their brands and creating unnecessary risks to the consuming public." Ex. B at 14. For example, franchisors who received reports that franchisee employees had used offensive language in front of customers, or had mistreated a customer's pet, were put to a Hobson's choice. *Id*. at 15. They could either do nothing (risking damage to the brand) or they could communicate with the franchisee about a strategy for addressing the issue (risking a joint employer finding). *Id*.

BFI also disrupted franchisor training efforts. Despite the understanding "that providing less training places their brand at risk," many franchisors "drastically altered their training practices for franchisees following the expansion of the joint employer doctrine." *Id*. at 16. "The consequence of this cessation of training is that it increases the risk that franchisees or their

employees engage in some activity that damages the brand." *Id*. Some franchisors attempted to minimize these effects by "offer[ing] training through third parties, which provide such training without any input or direction from the franchisors." *Id*. These trainings, however, came at a much higher cost, with one franchisor estimating that "its training costs increased 300-400% due to its decision to outsource the training because of joint employer concerns." *Id*.

Franchisees suffered as well. *See id*. at 20-23. The Chamber's study estimates that defensive distancing by franchisors "resulted in franchisees experiencing lost sales or increased costs equivalent to yearly lost potential output between 2.55% and 4.93%." *Id*. at 21 (internal quotation marks and alterations omitted). This translated into an estimated loss of $142,000 per franchisee. *Id*. By displacing the *BFI* standard and replacing it with a clearer one, the Rule alleviated the grave difficulties that *BFI* had imposed on both franchisors and franchisees.[5]

In short, both Proposed Intervenors would be injured by an adverse decision in this case. From that, it "rationally follows" that "the injury is directly traceable to [SEIU's] challenge to the [Rule]" and that the Proposed Intervenors "can prevent the injury by defeating [SEIU's] challenge in [these] proceedings." *Crossroads*, 788 F.3d at 316. In other words, establishing injury also necessarily "establish[es] causation and redressability." *Id*. Accordingly, both the IFA and the Chamber have standing to intervene.[6]

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[5] The Rule also advances the interests of additional parties including employees, unions, and the general public. *See, e.g.*, 85 Fed. Reg. at 11194 (indicating the Rule advances considerations such as safety, anti-harassment, and legal compliance generally because "social responsibility provisions, such as contractual provisions requiring workplace safety practices, sexual harassment policies, morality clauses, wage floors, or other measures to encourage compliance with the law or to promote desired business practices generally will not make joint-employer status more likely under the Act").

[6] Only one Proposed Intervenor need have standing. *E.g.*, *Military Toxics*, 146 F.3d at 954 ("Because the CMA has standing, we need not determine whether the other intervenor-applicants listed on the CMA's brief also have standing.")

2. The Proposed Intervenors' Motion to Intervene is Timely

There is no bright-line rule or deadline for a motion to intervene; rather, the timeliness of an intervention motion "is to be judged in consideration of all the circumstances." *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014); *see also Amador Cnty. v. U.S. Dep't of Interior*, 772 F.3d 901, 903 (D.C. Cir. 2014). The point of the requirement is not "timeliness for its own sake." *Roane*, 741 F.3d at 151. Instead, the requirement "is aimed primarily at preventing potential intervenors from unduly disrupting litigation, to the unfair detriment of the existing parties." *Id*. Under these principles, this motion is timely.

First, it was filed promptly—less than three months after the start of the lawsuit, and before Defendants have even answered the complaint. *See Fund for Animals*, 322 F.3d at 735 (finding an intervention motion timely in part because it was submitted "before the defendants filed an answer"); *MGM Glob. Resorts Dev., LLC v. U.S. Dep't of Interior*, No. 19-2377, 2020 WL 5545496, at *4 (D.D.C. Sept. 16, 2020) (Contreras, J.) (finding an intervention motion timely where it was filed "about two weeks after the Government Defendants filed their motion to dismiss").

Moreover, there is no plausible argument that intervention would unduly disrupt the litigation or prejudice the existing parties. As noted, Defendants have yet to file their answer, and no substantive briefing has taken place. As such, Proposed Intervenors could participate in this case from the outset, with no meaningful delay or prejudice to the parties. *See Virginia v. Ferriero*, 466 F. Supp. 3d 253, 256 (D.D.C. 2020) (Contreras, J.) (finding an intervention motion filed "prior to any meaningful developments in the case" was "timely under any reasonable measure"); *100Reporters LLC v. U.S. Dep't of Just.*, 307 F.R.D. 269, 275 (D.D.C. 2014) (Contreras, J.) (explaining that "this Court routinely has held that intervention applications are timely" when filed before any "substantive progress has occurred" in a case).

3. The Proposed Intervenors Have an Interest in the Joint Employer Rule

This factor in the Rule 24(a) analysis is straightforwardly satisfied. As the D.C. Circuit and this Court have made clear, if a would-be intervenor "has constitutional standing, it *a fortiori* has 'an interest relating to the property or transaction which is the subject of the action.'" *Crossroads*, 788 F.3d at 320 (quoting *Fund for Animals*, 322 F.3d at 735); *MGM*, 2020 WL 5545496, at *4. As shown above, the Chamber and the IFA have standing, so they necessarily have the requisite legal interest.

4. The Proposed Intervenors' Ability to Protect Their Interests Will Be Impaired Without Intervention

The next factor concerns whether the disposition of the action may impair the Proposed Intervenors' interest. This factor also supports intervention. As shown above, the Proposed Intervenors are keenly interested in the clarity and stability provided by the Joint Employer Rule. If the Rule were vacated by this Court or on appeal, the Chamber and the IFA (and their members) would be deprived of those benefits and would have no practical means of recovering them.[7] *See Fund for Animals*, 322 F.3d at 735 (explaining that the inquiry is a practical one).

The D.C. Circuit has made clear that even lesser burdens satisfy this prong of the test. For example, it has found sufficient impairment in cases where the "task of reestablishing the status quo" would be "difficult and burdensome," *Crossroads*, 788 F.3d at 320 (citation omitted); where the "loss[es] of revenues during any interim period would be substantial and likely irreparable," *Fund for Animals*, 322 F.3d at 735; and where an unfavorable decision "could establish

[7] In other words, the Chamber and the IFA can satisfy this requirement for the same reasons that they are able to satisfy the causation component of standing. *See MGM*, 2020 WL 5545496, at *4 (noting that the two inquiries are closely related).

unfavorable precedent that would make it more difficult" for the intervenors to prevail in the future. *Roane*, 741 F.3d at 151. Accordingly, the impairment test is met here.

5. The Board Will Not Adequately Represent the Interests of the Proposed Intervenors

The final Rule 24(a)(2) factor is whether the Proposed Intervenors' interests are adequately represented by an existing party. The Supreme Court has explained that this requirement "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). Accordingly, the D.C. Circuit has repeatedly noted that the requirement is "not onerous" and that "a petitioner 'ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee.'" *Fund for Animals*, 322 F.3d at 735 (citation omitted); *see also Crossroads*, 788 F.3d at 321.

In particular, the D.C. Circuit "look[s] skeptically on government entities serving as adequate advocates for private parties." *Crossroads*, 788 F.3d at 321; *see also Fund for Animals* at 736 ("[W]e have often concluded that governmental entities do not adequately represent the interests of aspiring intervenors."). This case illustrates why such skepticism is warranted.

The Chamber and the IFA represent a specific set of interests: namely, the interests of the business community and the interests of the franchising industry, respectively. As explained above, those interests are severely imperiled here. Moreover, it appears that Plaintiff intends to make its case specifically by attacking employers. The complaint repeatedly derides well-established business practices that are fundamental to the success of the American economy. *E.g.*, Compl. ¶ 8 (asserting that "certain large employers often attempt to use the franchise model to evade their responsibilities to workers"); *id.* ¶ 14 (referring derisively to practice of subcontracting as "fissuring"); *id.* ¶ 53 (accusing large employers of "extract[ing] the maximum amount of profit

from [workers'] labor while unilaterally opting out of the legal duty to negotiate with their designated union representatives"). The Proposed Intervenors have both the motivation and the expertise to rebut such unfounded attacks.

By contrast, the NLRB is a public entity which is charged with protecting the public interest more broadly. *E.g.*, *Fund for Animals*, 322 F.3d at 737. Indeed, it would be "shirking its duty" by focusing on any specific interest rather than "the general public interest." *Dimond v. District of Columbia*, 792 F.2d 179, 193 (D.C. Cir. 1986). Unsurprisingly, the Rule goes out of its way to emphasize that the Board considered not only the interests of employers, but also those of employees and unions. *E.g.*, 85 Fed. Reg. at 11186, 11188. In short, the Board will not focus specifically on the interests of the business community and the franchise industry, because doing so would be inconsistent with its duty to balance competing interests that exist among the multiple constituencies that are affected by its actions and decisions. Accordingly, it is "not hard to imagine how the interests" of the NLRB and the Proposed Intervenors "might diverge during the course of litigation." *Fund for Animals*, 322 F.3d at 736.

This is especially true because, as discussed above, opinions differ on the issues addressed by the Rule. The *BFI* standard was adopted by a split Board, with three members in the majority and two members dissenting. The traditional joint employer standard (which the Rule partly reestablishes) has been forcefully criticized by the Board's current chairman. *Browning-Ferris Indus. of Cal., Inc.*, 370 N.L.R.B. No. 86, at 4 (2021) (McFerran, Chairman, dissenting). And the Board's membership has changed since the Rule's promulgation. Indeed, in its recent motion seeking an extension of time to file its answer, the Board expressly noted that its "new Members are considering the complex issues presented in the Complaint for the first time" and need "additional time to fully consider the issues" implicated by this case. *See* Mot. to Ext. Time ¶ 5,

Dkt. No. 25. In other words, by its own account, the Board has yet to decide how it will litigate this case.[8] In light of that, it cannot possibly be "clear" that the Board will adequately represent the Proposed Intervenors' interests. *Fund for Animals*, 322 F.3d at 735; *see also Ferriero*, 466 F. Supp. 3d at 259 (finding inadequate representation in part because the agency "remain[ed] free to change its strategy as the case proceeds" (internal quotation marks omitted)).[9]

To sum up, there is no reason to believe that the Board will consistently defend business interests, let alone that it would do so with the same focus, emphasis, and expertise as the Proposed Intervenors. *E.g.*, *Am. Great Lakes Ports Ass'n v. Zukunft*, No. 16-1019, 2016 WL 8608457, at *4 (D.D.C. Aug. 26, 2016) (Contreras, J.) (finding that a trade organization "may not be so willing to compromise their member[s']" interests as a government agency seeking "to preserve the public fisc and to avoid further litigation"). In short, the Chamber and the IFA "should not need to rely on a doubtful friend to represent [their] interests." *Crossroads*, 788 F.3d at 321.

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[8] The Chamber and the IFA reserve arguments that, without additional rulemaking, the Board must defend the Rule and that Board members must consider recusal obligations concerning the instant action and/or new rulemaking or cases regarding joint employer status. *See, e.g.*, 5 C.F.R. § 2635.502(a) (addressing recusal when "circumstances would cause a reasonable person with knowledge of the relevant facts to question . . . impartiality in the matter").

[9] Moreover, the Board is represented in the courts by the Board's General Counsel, who is charged with reflecting the policies of the President, as demonstrated by the President's removal of General Counsel Peter B. Robb. Ian Kullgren & Josh Eidelson, *Biden Fires NLRB General Counsel After He Refuses to Resign*, Bloomberg Law (Jan. 20, 2021), https://bit.ly/3nu5IMq. Section 3(d) of the NLRA provides that the Board's General Counsel shall serve a four-year term, 29 U.S.C. § 153(d), and the four-year term of former NLRB General Counsel Peter B. Robb did not expire until November 16, 2021. *See* NLRB, *General Counsels Since 1935*, https://bit.ly/3nu5QLU (last visited Nov. 30, 2021). However, President Biden removed General Counsel Robb on January 20, 2021—his first day in office. General Counsel Robb was replaced by Acting General Counsel Peter Sung Ohr (who was designated by President Biden on January 25, 2021), and General Counsel Jennifer Abruzzo (who was nominated by President Biden, and was sworn in on July 22, 2021). *See* NLRB, *Peter Sung Ohr Named Acting General Counsel* (Jan. 25, 2021), https://bit.ly/30AeRuB; NLRB, *The NLRB Welcomes Jennifer Abruzzo as General Counsel* (July 22, 2021), https://bit.ly/30wh2id.

B. Alternatively, this Court Should Permit the Proposed Intervenors to Intervene under Rule 24(b)(1).

Rule 24(b) sets out the standard for permissive intervention.[10] "An applicant for permissive intervention must establish the threshold requirements of: (1) an independent ground for subject matter jurisdiction; (2) a timely motion; and, (3) a claim or defense that has a question of law or fact in common with the main action." *Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 9 (D.D.C. 2007).[11] In addition, courts must "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3); *see Sierra Club*, 523 F. Supp. at 9. Permissive intervention, at minimum, is amply warranted here.

First, there is an independent ground for subject matter jurisdiction because this Court has federal question jurisdiction over the case. *E.g.*, *Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, 331 F.R.D. 5, 14 (D.D.C. 2019) (explaining that "because the Court has federal question jurisdiction over this case, it has independent jurisdiction over the movants' answers and future motions"); *Sierra Club*, 523 F. Supp. 2d at 10. *Second*, as described above, the motion is timely, and it will cause no undue delay or prejudice. *Finally*, the requirement of a claim or defense that shares a common question of law or fact with the main action is also satisfied. Proposed Intervenors "seek to defend the [NLRB's rule]." *Sault Ste. Marie Tribe*, 331 F.R.D. at 14. "That they share this defense in common with [the NLRB] is sufficient under Rule 24(b)(1)(B)." *Id*.

[10] Rule 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."

[11] The D.C. Circuit has yet to resolve whether permissive intervention requires standing. *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 31 (D.C. Cir. 2000) (noting "uncertainty over whether standing is necessary for permissive intervention"). In any event, as shown above, the Chamber and the IFA have standing.

The Southern District of New York recently permitted the Chamber and the IFA (along with four peer trade organizations) to intervene in a similar lawsuit challenging the DOL's Joint Employer Rule. *New York v. Scalia*, No. 20-cv-1689, 2020 WL 3498755, at *5 (S.D.N.Y. June 29, 2020). The court reasoned that "no palpable harm" would result from "permitting this participation" because intervention would not cause any prejudice or delay, or impose any other "appreciable burden" on the parties. *Id*. (internal quotation marks omitted). The same conclusion holds here.

In sum, all the factors favor permissive intervention.

III. CONCLUSION

This Court should grant the Chamber and the IFA intervention as a matter of right, or alternatively permit the Chamber and the IFA to intervene.

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Respectfully submitted,

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