UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Statement of Chair Lina M. Khan
Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya
Regarding the Non-Compete Clause Final Rule
Commission File No. P201200

December 31, 2024

On April 23, 2024, the Commission finalized a rule prohibiting noncompete clauses with workers. The vote followed an extensive process spanning both Republican and Democratic Administrations—including public workshops, careful review of empirical scholarship, enforcement experience, and notice-and-comment rulemaking. The Commission received over 26,000 public comments in response to the proposed rule, over 25,000 of which supported banning noncompetes. The final rule reflects careful study of this public input, as well as the extensive and robust economic literature documenting the harms caused by noncompetes.

The outpouring of public comments underscores a basic reality: robbing people of their economic liberty also robs them of all sorts of other freedoms, chilling speech, infringing on religious practice, and impeding people's right to organize. The American tradition has long viewed open markets and free enterprise as a key bulwark against coercion and centralized control. As the comments in the record show, noncompetes restrict this most basic freedom.

Commissioners Ferguson and Holyoak voted against the final rule. We appreciate their engagement on this matter and write to explain why we disagree with their arguments.

a. The Commission has the authority to promulgate this rule, based on the plain text of the FTC Act, case law, and statutory history.

Commissioners Ferguson and Holyoak argue that the FTC lacks the authority to promulgate this rule. But their argument is at odds with the plain text of the FTC Act, case law, and the Act's statutory history.

The FTC Act declares unlawful "unfair methods of competition in or affecting commerce."[1] Congress "empowered and directed" the Commission to prevent the use of unfair methods of competition through both adjudication and rulemaking. Specifically, Section 6(g) authorizes the Commission to "make rules and regulations for the purpose of carrying out the provisions" of the FTC Act, including Section 5(a)'s directive "to prevent" the "us[e] of unfair methods of competition." This language means what it says, which is that the FTC can make rules and regulations for the purpose of carrying out the FTC's prohibition on unfair methods of competition. Notably, the directive "to prevent" unfair methods of competition by its terms contemplates forward-looking action, not just after-the-fact adjudication.

[1] 15 U.S.C. § 45(a)(1).

The contrary view presented by our colleagues—that Section 6(g) does not authorize the FTC to issue substantive rules—has been considered and rejected by two federal circuit courts. Between 1963 and 1978, the Commission issued over two dozen rules using its Section 6(g) authority.[2] One of these rules—the Octane Rule—spurred a legal challenge that questioned this authority. Specifically, the challengers argued—in part based on a reading of the FTC Act's legislative history—that 6(g) authorized the Commission to promulgate only procedural or interpretive rules rather than substantive rules.

Considering this question on appeal, the D.C. Circuit in *National Petroleum Refiners Association v. FTC* held that the FTC Act authorizes the Commission "to promulgate rules defining the meaning of the statutory standards of the illegality that the Commission is empowered to prevent," including unfair methods of competition.[3] "[W]e are hardly at liberty to override the plain, expansive language of Section 6(g)," the court wrote, as "ambiguous legislative history cannot change the express legislative intent."[4] The challengers sought Supreme Court review of the D.C. Circuit's decision and were denied.[5]

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[2] Between 1963 and 1978, the Commission relied on Section 6(g) to promulgate the following rules: 1) a rule making it an unfair method of competition ("UMC") and an unfair or deceptive act or practice ("UDAP") to mislead consumers about the size of sleeping bags by representing that the "cut size" represents the finished size; 2) a rule making it a UMC and UDAP to use the word "automatic" or similar words to describe household electric sewing machines; 3) a rule making it a UMC and UDAP to misrepresent nonprismatic instruments as prismatic; 4) a rule making it a UMC and UDAP to advertise or market dry cell batteries as "leakproof;" 5) a rule making it a UMC and UDAP to misrepresent the "cut size" as the finished size of tablecloths and similar products; 6) A rule making it a UMC and UDAP to misrepresent that belts are made of leather if they are made of other materials; 7) a rule making it a UMC and UDAP to represent used lubricating oil as new; 8) a rule making at UDAP to failed to disclose certain health warnings in cigarette advertising and on cigarette packaging ("Cigarette Rule"); 9) a rule making it a UMC and UDAP to fail to disclose certain features of light bulbs on packaging; 10) a rule making it a UMC and UDAP to misrepresent the actual size of the viewable picture area on a TV; 11) a rule creating a presumption of a violation of Section 2(d) and (e) of the amended Clayton Act for certain advertising and promotional practices in the men's and boy's clothing industry; 12) a rule making it a UMC and UDAP to fail to make certain disclosures about the handling of glass fiber products and contact with certain products containing glass fiber; 13) a rule making it a UMC and UDAP to make certain misrepresentations about transistors in radios; 14) a rule making it a UDAP to fail to disclose certain effects about inhaling certain aerosol sprays; 15) a rule making it a UMC and UDAP to misrepresent the length or size of extension ladders; 16) a rule making it a UDAP to make certain misrepresentations, or fail to disclose certain information, about games of chance; 17) a rule making it a UMC and UDAP to mail unsolicited credit cards; 18) a rule making it a UMC and UDAP to fail to disclose the minimum octane number on gasoline pumps ("Octane Rule"); 19) a rule making it a UMC and UDAP to sell finished articles of clothing without a permanent tag or label disclosing care and maintenance instructions; 20) a rule making it a UMC and UDAP for a grocery store to offer products for sale at a stated price if those products will not be readily available to consumers ("Unavailability Rule"); 21) a rule making it a UMC and UDAP for a seller to fail to make certain disclosures in connection with a negative option plan ("Negative Options Rule"); 22) a rule making it a UDAP for door-to-door sellers to fail to furnish certain information to buyers; 23) a rule making it a UMC and UDAP to fail to make certain disclosures about sound power amplification for home entertainment products; 24) a rule making it a UDAP for sellers failing to include certain contract provisions preserving claims and defenses in consumer credit contracts ("Holder Rule"); 25) a rule making it a UMC or UDAP to solicit mail order merchandise from a buyer unless the seller can ship the merchandise within 30 days ("Mail Order Rule"); and 26) a rule making it a UDAP for a franchisor to fail to furnish a franchisee with certain information.

[3] *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 693 (D.C. Cir. 1973).

[4] *Id.* at 693.

[5] *Cert. denied*, 415 U.S. 951 (1974).

The Seventh Circuit likewise upheld the Commission's authority to issue substantive rules under Section 6(g). In *United States v. JS & A Group*, the Seventh Circuit considered a challenge to the FTC's Mail Order Rule, which was promulgated in part pursuant to the Commission's "unfair methods of competition" authority. The court, like the D.C. Circuit, held that section 6(g) authorized the Commission to issue the rule. The Seventh Circuit's opinion drew on *National Petroleum Refiners* and "incorporate[d] by reference that case's lengthy discussion of the Commission's rulemaking authority under section 6(g)."[6]

In short, the only courts to have considered whether Section 6(g) confers "unfair methods of competition" rulemaking authority have answered decisively. Commissioners Ferguson and Holyoak can point to no case law in support of their argument that section 6(g) does not authorize the Commission to issues substantive rules—and the case law that does exist says the exact opposite. Upholding the rule of law demands that we follow what the law is, not what we wish it were.

Our colleagues' arguments are also belied by the fact that Congress enacted legislation confirming this authority following the D.C. Circuit's decision.

In 1975—two years after *National Petroleum Refiners*—Congress, in the Magnuson-Moss Amendments, amended the FTC Act to create new procedural requirements for rulemakings involving unfair or deceptive acts or practices.[7] In doing so, it expressly declined to disturb the Commission's authority to issue rules regarding unfair methods of competition.[8] While a proposal in the House would have prohibited the Commission from "prescribing rules with respect to unfair competitive practices," the Senate rejected it.[9] The Conference report adopting the final text of the amendments instead made clear that "[t]he conference substitute does not affect any authority of the FTC under existing law to prescribe rules with respect to unfair methods of competition …."[10] The final statutory amendment states:

> The Commission shall have no authority under [the Act], other than its authority under this section, to prescribe any rule with respect to [UDAPs]…. *The preceding sentence shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition* in or affecting commerce.[11]

Because the D.C. Circuit had just recently held that Section 6(g) conferred substantive rulemaking authority for "unfair methods of competition," there could be no doubt what "*any*" authority here meant. Indeed, the legislative history of the Magnuson-Moss Amendments, elaborated below, makes clear that Congress was very much aware of the D.C. Circuit's decision when it enacted the Amendments.

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[6] *United States v. JS & A Group, Inc.*, 716 F.2d 451, 454 (7th Cir. 1983).
[7] Magnuson-Moss Warranty Act, Pub. L. No. 93-637, 88 Stat. 2183.
[8] The Magnuson-Moss Act stated that the changes "shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce." 15 U.S.C. 57a(a)(2).
[9] S. Conf. Rep. 93-1408 § 202 (1974)
[10] H.R. Rep. No. 1606 at 30-32
[11] 15 U.S.C. 57a(a)(2) (emphasis added).

Additional elements of this statutory text further confirm that Congress understood Section 6(g) to already authorize substantive unfair method of competition rules. Specifically, "rules (including interpretive rules)" uses the same word, "rules," as used to describe the substantive UDAP rules covered by Section 18, while the parenthetical—"including interpretive rules"—demonstrates that Congress understood "rules" as a category broader than just interpretive rules.[12]

Alongside this change, Congress also directly modified Section 6(g), adding the phrase "(except as provided in section 18(a)(2) of this Act)" before "to make rules and regulations for the purpose of carrying out the provisions of this [Act]." Here, Congress amended the very provision at issue in the immediate aftermath of a well-known case construing it. Congress did not withdraw the Commission's rulemaking authority; instead, Congress expressly left it in place. Furthermore, if Congress had the view that Section 6(g) did not grant the FTC authority to promulgate substantive rules, then there would have been no need to except rules under Section 18(a)(2) from Section 6(g). Because Section 18(a)(2) expressly permits substantive rules, the new statutory carveout would serve no purpose if Section 6(g) permitted only procedural and investigative rules. Because "a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant," this statutory change, too, confirms that Congress was affirming the Commission's substantive rulemaking authority.[13]

Congress again affirmed the FTC's authority to issue substantive unfair methods of competition rules in the FTC Improvements Act of 1980. That statute imposes procedural requirements that the FTC must follow when it issues a "rule." It defines "rule" as "any rule promulgated by the Commission under [Sections 6 *or* 18], *except* that such term does not include interpretive rules, rules involving Commission management or personnel, general statements of policy, or rules relating to Commission organization, procedure, or practice."[14] Excluding this latter category of rules further reveals that Section 6 (alongside Section 18) empowers the Commission to promulgate substantive rules. The amendment also adds procedural requirements for amendments to "rules" based on whether those amendments "have an annual effect on the national economy of $100,000,000 or more," "cause a substantial change in the cost or price of goods or services," or "have a significant impact upon" persons and consumers[15]—showing that Congress understood Section 6(g) to authorize rules that could have a sizable economic impact, not just procedural rules. Arguments that Section 6(g) confers only the authority to issue interpretive or procedural rules are thus inconsistent with the plain language of the FTC Act.

Congress has also granted many federal agencies rulemaking authority using language similar to Section 6(g), including the Environmental Protection Agency,[16] Federal

[12] *Id.*
[13] *Hibbs v. Winn*, 542 U.S. 88, 101 (2004).
[14] 15 U.S.C. 57b-3(a)(1) (emphasis added).
[15] *Id.*
[16] Clean Water Act, 86 Stat. 885, sec. 501, *codified at* 33 U.S.C. 1631(a).

Communications Commission,[17] Food and Drug Administration,[18] Federal Reserve Board,[19] Health and Human Services,[20] Department of Housing and Urban Development,[21] and National Labor Relations Board.[22] The Supreme Court and federal circuit courts have held repeatedly that these statutes authorize these agencies to issue substantive rules.[23]

Commissioner Holyoak argues that Section 6(g)'s placement in the FTC Act suggests that it does not authorize substantive unfair method of competition rules. But all the general grants of rulemaking authority listed above—including those enumerated within a long list of provisions addressing other matters, including Section 4(i) of the Communications Act of 1934 and Section 7(d) of the Housing and Urban Development Act of 1975—have been upheld as authorizing substantive rules, regardless of their location in the relevant statute.[24] Commissioner Holyoak's claim that whether 6(g) grants substantive rulemaking authority turns on where it is located in the FTC Act is unmoored from precedent and at odds with what courts have held.

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[17] Communications Act of 1934, Pub. L. 73-416, 48 Stat. 1068, sec. 4(i), *codified at* 47 U.S.C. 154(i).
[18] Federal Food, Drug, and Cosmetic Act of 1938, Pub. L. 75-717, 52 Stat. 1055, sec. 701(a), *codified at* 21 U.S.C. 371(a).
[19] Truth in Lending Act of 1968, Pub. L. 90-321, 82 Stat. 148, sec. 105(a), *codified at* 15 U.S.C. 1604(a).
[20] Social Security Act of 1935, Pub. L. 74-271, 49 Stat. 647, sec. 1102(a), *codified at* 42 U.S.C. 1302(a).
[21] Housing and Urban Development Act of 1965, Pub. L. 89-174, 79 Stat. 670, sec. 7(d), *codified at* 42 U.S.C. 3535(d).
[22] National Labor Relations Act of 1935, Pub. L. 74-198, 49 Stat. 452, sec. 6, *codified at* 29 U.S.C. 156.
[23] *See, e.g.*, *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002) ("The CWA delegates to the EPA the general rule-making authority necessary for the agency to carry out its functions under the Act. . . . So the EPA has the delegated authority to enact regulations carrying the force of law . . . .") (Clean Water Act) (internal citations omitted); *United States v. Storer Broad. Co.*, 351 U.S. 192, 201-03 (1956) (stating that sec. 4(i) grants "general rulemaking power not inconsistent with the Act or law") and *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 730-32 (2d Cir. 1973) ("The courts, however, have uniformly and consistently interpreted the Act to give the Commission broad and comprehensive rule-making authority in the new and dynamic field of electronic communication.") (Communications Act of 1934); *Nat'l Ass'n of Pharm. Mfrs. v. FDA*, 637 F.2d 877, 879-90 (2d Cir. 1981) ("[O]ne would have little difficulty in concluding that the words suffice to empower the Commissioner of the FDA . . . to issue regulations, substantive as well as procedural, having the force of law.") (Federal Food, Drug, and Cosmetic Act); *Mourning v. Fam. Publ'n Servs., Inc.*, 411 U.S. 356, 369-71 (1973) ("Where the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act,' we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'"), *quoting Thorpe v. Hous. Auth. of the City of Durham*, 393 U.S. 268, 280-81 (1969) (Truth in Lending Act); *Nat'l Welfare Rights Org. v. Mathews*, 533 F.2d 637, 640 (D.C. Cir. 1976) ("Under this broad grant of power, the Secretary may promulgate regulations binding on the states") (Social Security Act); *King v. Hous. Auth. of the City of Huntsville, Al.*, 670 F.2d 952, 954-55 (11th Cir. 1982) ("There is no question that HUD has the authority to promulgate regulations binding on all federally subsidized housing authorities") (Housing and Urban Development Act of 1965) (cleaned up); *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609-12 (1991) (holding that sec. 6 "was unquestionably sufficient to authorize" the agency's substantive rule) (National Labor Relations Act).
[24] *See, e.g.*, *Storer Broad. Co.*, 351 U.S. at 201-03 (sec. 4(i) of the Communications Act of 1934 grants the FCC "general rulemaking power not inconsistent with the Act or law"); *King*, 670 F.2d at 954-55 (sec. 7(d) of the Housing and Urban Development Act of 1965 authorizes HUD to issue substantive rules).

Lastly, Commissioner Holyoak argues that "Section 5 adjudication itself has no force of law."[25] This is plainly wrong. Under the plain text of the FTC Act, a final cease-and-desist order is legally binding and the party covered by the order "must cease and desist from the violation of the law so charged…"[26] While the Commission must commence a civil action in a federal district court to recover penalties, penalties for violating a final cease-and-desist order begin to accrue immediately after the cease-and-desist order becomes final.[27] The fact that the enforcement mechanism requires a civil action in a district court does not strip a cease-and-desist order of the force of law. Thus, final cease-and-desist orders are legally binding and carry the force of law and the Commission may enforce any Section 6(g) rule, including this one, through its cease-and-desist orders.

b. The legislative history confirms this reading.

Commissioner Holyoak argues that legislative history disproves that Section 6(g) confers substantive rulemaking authority. Because the statutory text is clear, the legislative history is less probative.[28] But to the extent legislative history is relevant, it confirms the Commission's 6(g) authority.

When reviewing the legislative history of the 1914 FTC Act, the D.C. Circuit concluded that "evidence of clear congressional rejection or approval of substantive rulemaking is scanty on both sides and not compelling,"[29] and that "the history of the pertinent 1914 debates leaves us with a few affirmative indications that Section 6(g) encompassed substantive rulemaking and a few cryptic indications that this is not so."[30] The legislative history of the 1975 and 1980 amendments, however, is more clear, showing that Congress considered—and rejected—an effort to curb the FTC's authority to promulgate substantive rules defining unfair methods of competition.

Before the D.C. Circuit issued its decision in *National Petroleum Refiners*, the Senate passed a bill by a vote of 72-2 to reverse the D.C. district court's decision holding that Section 6(g) did not authorize substantive rules. Because the bill would have also added new procedural requirements to the Commission's UDAP rulemaking authority, the Commission requested that the Senate withdraw the new provision from the proposed legislation (which it had to take up anew since the House had not passed its 1972 bill). In a letter written to the Senate and published in the record, FTC Chairman Lewis A. Engman expressed his confidence that the Commission's "rulemaking authority will be upheld by the court of appeals" and that therefore the Commission "would oppose any statutory rulemaking provision limiting the flexibility of [its] present authority."[31] The Senate then deleted the relevant provisions, noting that if not for the

[25] Dissenting Statement of Comm'r Melissa Holyoak (Apr. 23, 2024) at 6, https://www.ftc.gov/system/files/ftc_gov/pdf/2024-6-28-commissioner-holyoak-nc.pdf [hereinafter "Holyoak Dissent"].
[26] 15 U.S.C. § 45(b).
[27] 15 U.S.C. § 45(l).
[28] *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear.").
[29] *Nat'l Petroleum Refiners Ass'n.*, 482 F.2d at 70.
[30] *Id.* at 709.
[31] S. Rep. No. 93-151, at 57-58 (1973).

Commission's preference it would have "reaffirm[ed] the legislative rulemaking authority of the Commission."[32]

In the Committee report accompanying the revised bill, which also preceded the D.C. Circuit's decision, Warren Magnuson, Chairman of the Senate Committee on Commerce, "pledged . . . to reintroduce legislation granting the Commission the power to promulgate legislative rules in the event of a decision by the courts which is adverse to the Commission on this issue."[33] Senator Magnuson reiterated the point by emphasizing that "the deletion of rulemaking powers by the Committee is not to be read in any way as a reversal of the Senate's position in the 92d Congress, when it passed legislation by a vote of 72-2 which expressly conferred legislative rulemaking power upon the Commission."[34]

In 1974, in response to the D.C. Circuit's decision, several House members added language to a House bill that would have restored the district court's position and prohibited unfair competition rulemaking.[35] But the House's proposed modifications were *rejected* by the conference committee, which instead substituted language adding heightened procedural requirements for UDAP rulemaking at the same time that it expressly preserved the Commission's power to promulgate other rules preventing unfair methods of competition according to ordinary notice and comment procedures.[36]

Debate immediately preceding the Senate vote on the conference report further demonstrated that lawmakers were aware of the holding in *National Petroleum*.[37] During debate, lawmakers made clear that the amendments were "not intended to affect the Commission's authority to prescribe and enforce rules respecting unfair methods of competition" and the Commission may continue to do so "in accordance with the informal rulemaking procedures of [the Administrative Procedure Act ("APA")].[38]

In each instance, Congress chose to affirm rather than overturn or diminish the FTC's authority to issue substantive rules defining unfair methods of competition. As the Supreme Court has observed, "[t]he long time failure of Congress to alter" a statutory provision, like Section 6(g) here, "after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of

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[32] *Id.* at 32.
[33] *Id.*
[34] *Id.*
[35] The House proposal would have expressly stricken the Commission's power to make rules and regulations from Section 6(g). A new provision of the FTC Act would limit rulemaking authority to those based on UDAP theories only. H.R. 7917, 93d Cong., 2d Sess., at 55:6-8.
[36] This legislative history also undermines the claim that Congress' use of the words "any authority" suggested that it doubted that the Commission actually had that authority. In any event, it should be noted that courts interpret the word "any" expansively and not as indicative of doubt of some type. *See United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'").
[37] *See, e.g.*, 120 Cong. Rec. 39,579, 40,713 (1974) (statement of Sen. Hart).
[38] Id.

legislative recognition that the judicial construction is the correct one."[39] That is especially true when, as here, "the matter has been fully brought to the attention of the public and the Congress, [and] the latter has not seen fit to change the statute."[40]

c. This rule does not raise a "major question."

Our colleagues argue that the noncompete rule is barred by the "major questions" doctrine. But this doctrine applies only in "extraordinary" cases where "agencies assert[] highly consequential power beyond what Congress could reasonably be understood to have granted."[41] This is not such a case. Unlike other contexts in which the doctrine has been invoked, the noncompete rule fits squarely within the FTC's core mandate to prevent unfair methods of competition. The Commission found that noncompetes do precisely what the name suggests: they restrict competition. They do so by limiting a worker's ability to compete against a former employer, and by limiting employers' ability to compete to hire the best worker for the job. Based on an extensive record, including 30 empirical studies quantifying the harms caused by (not merely correlated with) noncompetes, the FTC found that noncompetes negatively affect competitive conditions in labor markets and in product and service markets—both as a matter of their tendency and their actual current, ongoing effect.[42]

To sum up, the FTC (the nation's competition regulator) prohibited noncompetes (which directly restrain competition) based on a finding that they undermine competition, a conclusion reached after close review of extensive empirical evidence and expert analysis of how noncompetes affect competition. The rule thus falls well within the scope of authority Congress granted to the FTC.

The fact that the noncompete rule will have a sizable economic impact does not intrinsically render it invalid under the major questions doctrine. Supreme Court cases do not announce any such rule.[43] Moreover, it would be strange if Congress's express directive that the FTC address unfair methods of competition across the economy allowed it to address only those methods that were so minor or uncommon that the FTC's action would not have any significant economic impact.

To the contrary, the FTC Act expressly provides that the Commission should address unfair methods of competition "in or affecting commerce,"[44] including via "rule[s]" that have an "annual effect on the national economy of $100,000,000 or more," that "will cause a substantial change in the cost or price of goods or services," or "will have a significant impact."[45]

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[39] *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488-89 (1940). *See also Commodity Futures Trading Comm'n v. Schor*, 478 U. S. 833, 846 (1986) ("[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.").

[40] *Id.*

[41] *West Virginia v. EPA*, 597 U.S. 697, 724 (2022).

[42] Non-Compete Clause Rule, 89 FR 38342, 38371-38434 (May 7, 2024) (hereinafter "Final Rule").

[43] *See, e.g., Biden v.* Missouri, 595 U.S. 87, 95 (2022) (not applying major questions doctrine despite agency action "go[ing] further than what the Secretary has done in the past").

[44] 15 U.S.C. 45(a)(2).

[45] 15 U.S.C. 57b-3(a).

Furthermore, Section 4 of the FTC Act carves specific industries out of the FTC's jurisdiction, underscoring that Congress understood that FTC rules could affect large swaths of the economy (*i.e.*, in every industry not carved out) and expressly limited the agency's jurisdiction where it wished to do so.[46]

To determine whether an assertion of power "extends beyond the agency's legitimate reach,"[47] courts must consider the relationship between the claimed authority and the statute's text and structure, the agency's expertise, established practice implementing the statute, and other contextual clues shedding light on the likely extent of Congress's intended authorization. Ultimately, the touchstone is whether the power the agency has exercised has "effected a fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation into an entirely different kind."[48] Only when that high standard is met may a court take the "extraordinary" step of eschewing "normal statutory interpretation" by applying the "major questions" doctrine.[49]

That high standard is not met here. Applying its expertise on competition matters, the FTC has addressed one specific unfair method of competition—noncompete clauses, which our colleagues do not dispute may be deemed unfair methods of competition when the FTC acts via adjudication—when used in one specific context (*i.e.*, employment relationships, and not business-to-business relationships)[50] and only in industries within the FTC's jurisdiction.

Noncompetes were one of the common-law restraints on trade that have been within the scope of the antitrust laws ever since those laws were enacted.[51] Moreover, the Commission has used its Section 6(g) authority to issue rules for more than 60 years.[52] Between 1963 and 1978, the FTC promulgated more than 25 substantive rules[53] covering a wide range of industries and issues, including some rules that garnered significant attention.[54] Furthermore, the FTC's

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[46] 15 U.S.C. 44.
[47] *Nat'l Fed'n of Indep. Bus. v. DOL*, 142 S. Ct. 661, 666 (2022).
[48] *W. Va.*, 597 U.S. at 728.
[49] *Id*. at 725 (internal quotation omitted).
[50] The rule does not, for example, regulate noncompetes in business-to-business relationships. *See* Final Rule at 38451-52 (explaining rule does not apply to franchisor-franchisee noncompetes).
[51] *See, e.g.*, Harlan Blake, *Employment Agreements Not to Compete,* 73 Harv. L. Rev. 625, 626-27 (1960). *See also United States v. American Tobacco Co.,* 221 U.S. 106, 181-83 (1911) (holding that several tobacco companies violated both Section 1 and Section 2 of the Sherman Act because of the "constantly recurring" use of noncompetes, among other practices); *Newburger, Loeb & Co., Inc.* v. *Gross,* 563 F.2d 1057, 1082 (2d Cir. 1977).
[52] Commissioner Ferguson characterizes Section 6 as an ancillary and unimportant component of the FTC Act and asserts that the Commission's reliance on it is a further reason – Section 6 – as a further reason why the major question doctrine applies. The Commission's extensive history of relying on Section 6(g) for substantive rulemaking belies this characterization of Section 6 as ancillary and unimportant. Indeed, the Supreme Court has recognized the breadth and importance of Section 6 as part of the FTC's Act's regulatory scheme. *See, e.g., Morton Salt Co.*, 338 U.S. at 642-43 (describing the Commission's "power of inquisition" as analogous to that of a grand jury and confirming the Commission's broad authority to "take steps to inform itself as to whether there is a probable violation of the law.").
[53] *See* supra note 2.
[54] Our colleagues claim that only one previous rulemaking invoked UMC authority. This is not true, as the previous footnote shows.

rulemaking authority was long ago "addressed"—and affirmed—"by a court."[55] After instances of high-profile Commission rulemaking and judicial affirmation, Congress considered—and twice reaffirmed—the Commission's authority to issue substantive rules defining unfair methods of competition under Section 6(g). This is far from a situation where Congress "conspicuously and repeatedly" declined to grant the agency the claimed power.[56]

In addition, the FTC has obtained relief involving noncompetes against many companies over the years.[57] These matters include enforcement actions in which the FTC alleged that the

[55] *W. Va.*, 597 U.S. at 725; *see supra* at 31 (discussing decisions from the D.C. Circuit and Seventh Circuit affirming the Commission's rulemaking power under Section 6(g)).

[56] *W. Va.*, 597 U.S. at 724. The dissent claims that two bills recently introduced in Congress are examples of Congress rejecting a similar policy as that adopted in the Final Rule, and somehow show that Congress did not give the Commission authority to promulgate an UMC Rule. But, one of the main sponsors of those bills, Senator Murphy, has made it clear that he "believe[s] unequivocally that the FTC has the statutory authority to ban non-compete agreements under Section 5 of the Federal Trade Commission Act of 1914 (FTC Act), which states that 'unfair methods of competition in or affecting commerce' are 'hereby declared unlawful,'" contradicting any suggestion that the sponsoring of the legislation was in any way meant to undermine the Commission's statutory authority to promulgate this Rule. Senators Murphy and Warren letter to Chair Khan, dated April 23, 2024.

[57] *In re Renown Health,* Docket No. C-4366 (Nov. 30, 2012), https://www.ftc.gov/sites/default/files/documents/cases/2012/12/121204renownhealthdo.pdf (removing noncompetes with cardiologists to allow movement to other practice); *In re Centracare Health System,* Docket No. C-4594 (Jan 6, 2017), https://www.ftc.gov/system/files/documents/cases/170109centracarefinalorder.pdf (noncompetes prevented physicians from considering a move to another practice); *In re Davita, Inc*., Docket No. C-4334 (Oct 21, 2011), https://www.ftc.gov/sites/default/files/documents/cases/2011/10/111025davitado.pdf (rescind noncompete with doctors); *In re Aarons, Inc.,* Docket No. C-4714 (May 11, 2020), https://www.ftc.gov/system/files/documents/cases/191_0074_c4714_rent_to_own_swaps_order_aarons.pdf (barring enforcement of noncompetes); *In re Rent-A-Center,* Docket No. C-4716 (May 11, 2020), https://www.ftc.gov/system/files/documents/cases/191_0074_rent_to_own_swaps_order_rentacenter.pdf (same); *In re Buddy's Newco LLC,* Docket No. C-4715 (May 11, 2020), https://www.ftc.gov/system/files/documents/cases/191_0074_c4715_rent_to_own_swaps_order_buddys.pdf (same); *In re Charlotte Pipe and Foundry Company and Randolph Holdings Company LLC,* Docket No. C-4403 (May 9, 2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/05/130515charlottepipedo.pdf (prohibited from enforcing noncompete against employees in purchase contract); *In re IFM Global Infrastructure Fund, Buckeye Partners, L.P., and Magellan Midstream Partners, L.P*., Docket No. C-4765 (Aug. 8, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2110144C4765BuckeyeFinalOrder.pdf (prohibited from enforcing noncompete against any person, including employees); *In re Global Partners LP and Richard Wiehl,* Docket No. C-4755 (Mar. 3, 2022), https://www.ftc.gov/system/files/documents/cases/final_global_wiehl_order.pdf (prohibited from enforcing noncompete against any person, including employees); I*n re Seven & i Holdings, Col, Ltd, 7-Eleven, Inc., and Marathon Petroleum Corporation,* Docket No. C-4748 (Nov. 8, 2021), https://www.ftc.gov/system/files/documents/cases/2010108c4748sevenmarathonorder.pdf (barring noncompete involving employees or any person seeking employment); *In re QEP Partners, LP, Quantum Energy Partners VI, LP, Q-TH Appalachia (VI) Investment Partners, LLC and EQT Corporation* , Docket No. C-4799 (Oct. 10, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2210121c4799eqtquantumfinalorder.pdf (business noncompete restriction); *In re ARKO Corp., GPM Investments, LLC, GPM Southeast, LLC, and GPM Petroleum, LLC,* Docket No. C-4773 (Aug. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2110087C4773ArkoExpressFinalOrder.pdf (business noncompete restriction); *In re DTE Energy Company, Enbridge Inc., and NEXUS Gas Transmission, LLC,* Docket No. C-4691 (Nov. 21, 2019), https://www.ftc.gov/system/files/documents/cases/191_0068_c-4691_dte-enbridge_decision_and_order_public_version.pdf (barring agreements that restrict competition); *In re Polypore International, Inc.,* Docket No. 9327 (Nov. 5, 2010)https://www.ftc.gov/sites/default/files/documents/cases/2010/12/101213polyporeorder.pdf (End covenants not to compete); *In re The Lubrizol Corporation and The Lockhart Company,* Docket No. C-4254 (Apr. 7, 2009),

use of noncompetes by firms was an unfair method of competition in violation of Section 5.[58] Neither Commissioner Ferguson nor Commissioner Holyoak disputes that these enforcement actions fall well within the FTC's authority, and courts have long held that the choice between adjudication and rulemaking "rest[s] within the informed discretion of the administrative agency."[59]

Here, the Commission determined that addressing the harm to competition from noncompetes would be more efficiently addressed through rulemaking than through case-by-case enforcement alone. Notice-and-comment rulemaking affords all stakeholders a more fulsome opportunity to participate in the administrative process. The Commission received over 26,000 commenters, spanning people across all walks of life, from hairdressers in Ohio and doctors in West Virginia to bartenders in Florida and journalists in Texas.[60] And as the FTC describes in

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https://www.ftc.gov/sites/default/files/documents/cases/2009/04/090410lubrizoldo.pdf (remove noncompete provision in purchase agreement on use of business); *In re American Renal Associates, Inc. and Fresenius Medical Care Holdings, Inc.,* Docket No. C-4202 (Oct. 17, 2007), https://www.ftc.gov/sites/default/files/documents/cases/2007/10/071023decision.pdf (prohibited from any agreements to close clinics, allocate markets). Moreover, to deal with problems arising from noncompetes thwarting efforts in merger challenges, the Commission routinely bars noncompetes in settlements. *See, e.g., In re DaVita,* Docket No. C-4752 (Jan 12, 2022), https://www.ftc.gov/system/files/documents/cases/211_0056_c4752_davita_utah_health_order.pdf; *In re JAB/NVA-Sage,* Docket No. C-4766 (Aug. 2, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Decision%20and%20Order.pdf; *In re JAB/Ethos,* Docket No. C-4770 (Oct. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/C-4770%20211%200174%20-%20JAB%20Consumer%20Fund-VIPW%20Final%20Order%28NoSig%29.pdf; *In re TractorSupply/Orscheln,* Docket No. C-4776 (Dec. 2, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2110083C4776TractorSupplyDecisionOrder.pdf; *In re Fresenius/Nxstage,* Docket No. C-4671 (Apr. 1, 2019), https://www.ftc.gov/system/files/documents/cases/1710227_fresenius-nxstage_decision_and_order-4919.pdf; *In re ICE/Black Knight,* Docket No. 9413 (Nov. 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/D09413ICEBKFinalOrderPublic.pdf; *In re Gallo/Constellation,* Docket No. C-4730 (Apr. 5, 2021) https://www.ftc.gov/system/files/documents/cases/gallo-cbi_decision_and_order_final_201107.pdf; *In re Sherwin-Williams/Valspar,* Docket No. C-4621 (jul. 27, 2017), https://www.ftc.gov/system/files/documents/cases/161_0116_c4621_sherwin_williams_decision_and_order.pdf; *In re Zimmer/Biomet,* Docket C-4534 (Aug. 11, 2015), ; *In re Price Chopper/Tops,* Docket No. C-4753, (Jan 20, 2022), https://www.ftc.gov/system/files/documents/cases/price_chopper_decision_and_order.pdf;*In re Ottobock,* Docket No. 9378 (Nov. 1, 2019), https://www.ftc.gov/system/files/documents/cases/d09378commissionfinalorder.pdf.

[58] Press Release, Fed. Trade Comm'n, FTC Approves Final Orders Requiring Two Glass Container Manufacturers to Drop Noncompete Restrictions That They Imposed on Workers (Feb. 23, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-approves-final-orders-requiring-two-glass-container-manufacturers-drop-noncompete-restrictions; Press Release, Fed. Trade Comm'n, FTC Approves Final Order Requiring Anchor Glass Container Corp. to Drop Noncompete Restrictions That It Imposed on Workers (June 2, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-approves-final-order-requiring-anchor-glass-container-corp-drop-noncompete-restrictions-it; Press Release, Fed. Trade Comm'n, FTC Approves Final Order Requiring Michigan-Based Security Companies to Drop Noncompete Restrictions That They Imposed on Workers (Mar. 8, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-approves-final-order-requiring-michigan-based-security-companies-drop-noncompete-restrictions.

[59] *See, e.g.*, *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

[60] Comment Submitted by Cindy Holbrook, Non-Compete Clause Rule, *Regulations.gov* (Jan. 27, 2023), https://www.regulations.gov/comment/FTC-2023-0007-5145; Comment Submitted by Jill Cochran, Non-Compete Clause Rule, *Regulations.gov* (Feb. 28, 2023), https://www.regulations.gov/comment/FTC-2023-0007-6082; Comment Submitted by Deborah Brantley, Non-Compete Clause Rule, *Regulations.gov* (Mar. 13, 2023),

the final rule, the empirical evidence shows that noncompetes impose negative externalities—*i.e.*, they harm parties (workers, consumers, and potential rivals) other than the employer and worker who enter into the noncompete.[61] Rulemaking is better suited than case-by-case litigation to address these negative externalities.

Commissioner Ferguson questions the timing of the Commission's efforts to address noncompetes, suggesting that inaction by prior Commissions reveals a lack of clear congressional authorization. These comments ignore FTC efforts during the Trump administration to scrutinize and study the effects of noncompetes.[62] More critically, an effective FTC is one that keeps pace with new market realities and new learning. On both fronts, much has changed in recent decades. Noncompetes have proliferated across the economy, migrating beyond the boardroom to middle- and low-income workers.[63] And economic research—based on natural experiments following changes in state law—has enabled the Commission to more rigorously examine and document how noncompetes affect competition.[64]

Our dissenting colleagues err by attaching significance to state and congressional debate regarding noncompetes. Congress explicitly directed the Commission to prevent unfair methods of competition, and the Congressional Review Act provides Congress a ready mechanism to disapprove the noncompetes rule should it choose to do so—a mechanism it has not used.[65] As for state debate, the Commission in the rule extensively addressed the reasons states are unable, acting alone, to address the harms of noncompetes,[66] and the states' differing approaches to regulation of noncompetes have enabled the Commission to identify and quantify how noncompetes undermine fair competition. Preexisting debate on practices the Commission determines are unlawful under Section 5 is no reason to question the Commission's exercise of clear statutory authority to address a matter within its expertise. This case is therefore distinguishable from *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006), and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000), where the court questioned "oblique" and "cryptic" grants of rulemaking authority.

In the context of the Commission's authority to address unfair and deceptive practices under Section 5, courts have upheld the federal government's ability to oversee conduct also

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https://www.regulations.gov/comment/FTC-2023-0007-8852; Comment Submitted by M. James Lozada, Non-Compete Clause Rule, *Regulations.gov* (Apr. 13, 2023), https://www.regulations.gov/comment/FTC-2023-0007-13828.

[61] *See* Final Rule, 89 Fed. Reg. at 38374-38422.

[62] Final Rule at 38343-38344; *see also*, Hearings on Competition and Consumer Protection in the 21st Century, Notice, 83 FR 38307, 38309 (Aug. 6, 2018).

[63] Final Rule at 38346-48.

[64] Final Rule at 38343.

[65] Amicus Brief of U.S. Rep. Matt Gaetz in Support of Defendant Fed. Trade Comm'n, *Ryan, LLC v. FTC*, No. 3:24-cv-0986-E (June 4, 2024) at 10-11 (describing Congressional Review Act and other mechanisms for congressional oversight of the FTC where Congress deems it warranted). *See also* Press Release, Young, Colleagues Applaud FTC Proposed Rule to Ban Non-Compete Agreements Across Economy; @ChrisMurphyCT, X (F/K/A TWITTER) (Apr 24, 2024, 12:45 PM), https://x.com/ChrisMurphyCT/status/1783175390313205826; @mattgaetz, X (F/K/A TWITTER) (Apr 24, 2024, 11:01 AM), https://x.com/mattgaetz/status/1783149296625365069 (bipartisan co-sponsors of legislation banning noncompetes applauding FTC's rulemaking); @ChrisMurphyCT, X (F/K/A TWITTER) (Apr 24, 2024, 12:45 PM).

[66] Final Rule at 38465-66.

governed by the states.[67] And it is common for antitrust enforcement to involve overlapping jurisdiction between states and the federal government. For example, many states have their own statutes prohibiting unfair methods of competition.[68] Commissioners Ferguson and Holyoak do not dispute that the Commission could regulate noncompetes through case-by-case enforcement—they take issue only with the Commission's ability to regulate "all" noncompetes through rulemaking. But it's unclear why Commission rulemaking would "alter the usual constitutional balance between the States and the Federal Government,"[69] even as Commission enforcement reaching the same conduct would not. Our dissenting colleagues do not explain this disconnect, and the clear statement principles they invoke are misplaced.

d. This rule reflects a lawful delegation by Congress.

Our dissenting colleagues argue that the noncompetes rule reflects an improper delegation of Congress's power to the Commission in violation of the "nondelegation doctrine." But the Constitution does not "prevent Congress from obtaining the assistance of its coordinate Branches" in executing federal laws.[70] Rather, Congress must articulate only "an intelligible principle" to guide the agency's actions.[71]

Here, Congress expressly instructed the FTC to "make rules and regulations for the purposes of carrying out the provisions" of the FTC Act, including the Act's prohibition on unfair methods of competition. Section 5's directive that the FTC prevent "unfair methods of competition in or affecting commerce," satisfies the intelligible principle test. For decades, the Supreme Court has approved of Congress's delegation of authority to the Commission to regulate "unfair methods of competition."[72] The Court has described the meaning of the phrase "unfair methods of competition" as "obvious," writing, "[T]he word 'competition' imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors."[73] Particularly given this backdrop, the "unfair method of competition" standard is not nearly as sweeping as other, more generalized delegations previously upheld by the Supreme Court, such as the authority to set "fair and equitable" prices;[74] to determine "just and reasonable" rates;[75] to regulate broadcast licensing as

[67] *See Peerless Prods., Inc. v. FTC*, 284 F.2d 825, 827 (7th Cir. 1960); *Spiegel, Inc. v. FTC*, 540 F.2d 287, 292-93 (7th Cir. 1976).
[68] *See, e.g.*, Fla. Stat. § 501.204(1); 815 Ill. Comp. Stat. 505/2; Mass. Gen. Laws ch. 93A, § 2(a); Neb. Rev. Stat. § 59-1602; Wash. Rev. Code § 19.86.020.
[69] *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).
[70] *Id.*
[71] *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 472 (2001).
[72] *See, e.g., FTC v. Texaco*, 393 U.S. 223, 225 (1968); *FTC v. Brown Shoe*, 384 U.S. 316, 320 (1966).
[73] *FTC v. Raladam Co.*, 283 U.S. 643, 649 (1931); *accord Sears, Roebuck & Co. v. FTC*, 258 F. 307, 311 (7th Cir. 1919) (rejecting nondelegation challenge to the Act).
[74] *Yakus v. United States,* 321 U.S. 414, 427 (1944).
[75] *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 600 (1944).

"public interest, convenience, or necessity" require;[76] to allow railroad acquisitions in the "public interest;"[77] and to issue any air quality standards "requisite to protect the public health[.]"[78]

The Supreme Court has only "found a delegation excessive" in two cases and "in each case . . . Congress had failed to articulate *any* policy or standard to confine discretion."[79] That is hardly the case here. In *A.L.A. Schechter Poultry Corp. v. United States*, one of the two cases where the Court found delegation excessive, the Court offered the FTC Act's prohibition on "unfair methods of competition" as an example of appropriate delegation.[80] That is the same intelligible principle that underpins the Commission's final rule.

Our colleagues argue that the Court there limited its holding solely to the Commission's "case by case" adjudicative enforcement actions. But this account of *Schechter* is incomplete. In distinguishing the Congressional grant of authority under the National Industrial Recovery Act ("NIRA") at issue in *Schechter* from the FTC Act, the Supreme Court did not rely only on the fact that the FTC has, as one of its enforcement procedures, the ability to bring case-by-case adjudications. Moreover, our colleagues fail to explain (and can identify no case supporting) how a statutory standard could constitute a lawful delegation for adjudication purposes and yet somehow transform into an unintelligible one in the context of rulemaking.

The *Schechter* Court also emphasized that "the difference between the code plan of the Recovery Act and the scheme of the Federal Trade Commission Act lies not only in *[enforcement] procedure* but in *subject matter*. . . . The 'fair competition' of the codes has a much *broader range* and a new significance [than the subject matter of the FTC Act].'"[81] That is, while unfair methods of competition was an intelligible principle, the much broader range of authority granted the President under the NIRA—which gave the President "unfettered" power to "make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry"—was not.[82]

In his concurrence, Justice Cardozo contrasted the legislative charge to foster "fair competition" in NIRA with those statutes, like the FTC Act, which seek to regulate "unfair or fraudulent or tricky" competition.[83] "Fair competition" is "as wide as the field of industrial regulation. If that conception shall prevail, anything that Congress may do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code. This is delegation running riot."[84] Indeed, the Supreme Court found that any restrictions in NIRA were virtually limitless: as it

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[76] *Nat'l Broad. Co. v. U.S.*, 319 U.S. 190, 225-26 (1943).
[77] *N.Y. Cent. Secs. Corp. v. U.S.*, 287 U.S. 12, 24 (1932).
[78] *Whitman*, 531 U.S. at 472. *See also Gundy* v. *United States,* 588 U.S. 128, 146 (2019) (citing *Nat'l Broadcasting Co.* v. *United States,* 319 U.S. 190, 216 (1943); *N.Y. Cent. Secs. Corp.* v. *United States,* 287 U.S. 12, 24; (1932); *Yakus* v. *United States,* 321 U.S. 414, 422 (1944); *Fed. Power Comm'n* v. *Hope Natural Gas Co.,* 320 U.S. 591 (1944).
[79] *Gundy*, 588 U.S. at 130 (internal quotation omitted); *cf. also Panama Refin. Co. v. Ryan*, 293 U.S. 388 (1935) (finding impermissible delegation).
[80] *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).
[81] *Schechter*, 295 U.S. at 534 (emphasis added).
[82] *Id. a*t 537-38.
[83] *Id.* at 553 (Cardozo, concurring).
[84] *Id.*

described the NIRA, "[any statutory] restrictions leave virtually untouched the field of policy envisaged . . . . [I]n that wide field of legislative possibilities, the proponents of a code, refraining from monopolistic designs, may roam at will and the President may approve or disapprove their proposals as he may see fit."[85]

Here, by contrast, the Commission's authority is bounded.[86] As the rule explains, "unfair method of competition" has specific legal elements laid out by the Commission and the courts, which the Commission carefully applies through the rule.[87]

The procedural scheme governing the Commission's authority to issue the noncompetes rule also differs vastly from the authority at issue in *Schechter*. Under NIRA, no findings were required and the President approved the code, recommended by trade or industry associations, through executive order at his sole discretion. The lack of process under NIRA contrasts sharply with the requirements of the Administrative Procedure Act (APA), which the Commission followed when promulgating the noncompetes rule. The Commission held workshops, issued a Notice of Proposed Rulemaking, and reviewed 26,000 comments submitted by members of the public. The Final Rule's Statement of Basis and Purpose carefully goes through these comments and the extensive evidence gathered, makes detailed findings, and is now subject to judicial review. The procedures the Commission followed under the FTC Act and the APA contrast sharply from the NIRA scheme, which permitted the President to "impose his own conditions, adding to or taking from what is proposed, as 'in his discretion' he thinks necessary 'to effectuate the policy' declared by the Act."[88]

In analyzing a nondelegation claim, courts may also consider the "purpose" of the statute at issue, its "factual background," and the "statutory context."[89] Congress enacted the FTC Act "to supplement and bolster" the Sherman and Clayton Acts.[90] Specifically, the FTC Act was intended "to stop in their incipiency those methods of competition which fall within the meaning of the word 'unfair.'"[91] The noncompete rule does precisely that.

Over the FTC's 110 year history, no court has ever held that its "unfair methods of competition" authority marks an unconstitutional delegation of authority from Congress. When Sears Roebuck & Company raised this argument early in the FTC's tenure, the Seventh Circuit

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[85] *Id.* at 538.

[86] The dissents criticize the Final Rule as overly broad and inappropriate policymaking. In fact, the Final Rule is firmly grounded in the text and history of the FTC Act and the record, and limited to appropriately delegated authority, even where the Commission may, as a matter of policy, have preferred a broader approach. For example, in the statement she made when the rule was adopted, Commissioner Slaughter pointed out that while she personally might have preferred to extend the rule to nonprofit employers and franchisees, the FTC Act and the rulemaking record did not support such an extension.

[87] Press Release, Fed. Trade Comm'n, FTC Restores Rigorous Enforcement of Law Banning Unfair Methods of Competition (Nov. 10, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-restores-rigorous-enforcement-law-banning-unfair-methods-competition.

[88] *Id.* at 538-39.

[89] *U.S. v. Cooper*, 750 F.3d 263, 270 (3d Cir. 2014) (*quoting Am. Power & Light Co. v. Sec. & Exch. Comm'n*, 329 U.S. 90, 104 (1946)).

[90] *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394-95 (1953).

[91] *Raladam Co.*, 283 U.S. at 647; *Texaco, Inc.*, 393 U.S. at 225.

decisively rejected it.[92] And twice the FTC has had its competition rulemaking authority challenged and kept intact; indeed, following a court challenge that lawmakers were closely watching, Congress took clear steps to preserve and ratify the FTC's substantive rulemaking authority under Section 6(g). Pushing for courts to overturn or depart from these settled precedents is a radical ask.

e. This rule complies with the Administrative Procedure Act.

The Administrative Procedure Act (APA) requires an agency issuing a final rule to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[93] The noncompete rule meets this standard.

The Commission began carefully examining the relevant data during the Trump administration. Beginning in 2018, the Commission convened public hearings and workshops regarding noncompetes and solicited public comment on four separate occasions.[94] In 2021, the Commission initiated several investigations into the use of noncompetes, which resulted in consent decrees settling charges that those agreements were unfair methods of competition under Section 5 and requiring firms to eliminate noncompetes for thousands of workers.[95]

Before adopting the Final Rule, the Commission conducted an exhaustive survey and analysis of the economic literature regarding noncompetes. The proposed rule also elicited over 26,000 comments, with over 25,000 commenters supporting a complete ban on noncompetes. After issuing its Notice of Proposed Rulemaking and taking comment, the Commission thoroughly analyzed the comments and provided detailed findings on how noncompete clauses constitute unfair methods of competition.[96]

The Commission has articulated a sound justification for the final rule. Commissioners Ferguson and Holyoak argue that some noncompete agreements have pro-competitive rather than anti-competitive effects, and therefore that, under the "rule of reason," noncompetes must be subject to case-by-case analysis. But our colleagues do not explain why the "rule of reason" framework—native to the Sherman Act—should govern Section 5 of the FTC Act, especially when lawmakers expressly wrote Section 5 to differ from the Sherman Act.[97] Commissioners Ferguson and Holyoak might prefer that the Commission analyze noncompetes through the prism of the Sherman Act, but faithfully administering the FTC Act requires that we honor—rather than collapse—their differences.

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[92] *Sears, Roebuck & Co. v. FTC*, 258 F. 307, 311 (7th Cir. 1919).
[93] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 45 (1983), *quoting Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).
[94] *See* 89 Fed. Reg. at 38,343-44.
[95] *Id.* at 38,344.
[96] Final Rule at 38371-38434.
[97] *See, e.g.*, *E.I. du Pont de Nemours v. FTC*, 729 F.2d 128, 136 (2d Cir. 1984) ("Congress' aim was to protect society against oppressive anti-competitive conduct and thus assure that the conduct prohibited by the Sherman and Clayton Acts would be supplemented as necessary and any interstices filled."). *See also,* FTC Restores Rigorous Enforcement of Law Banning Unfair Methods of Competition, *supra* note 86.

Indeed, the Commission found that case-by-case enforcement alone cannot sufficiently address the harms from noncompetes. Scarce enforcement budgets constrain government action and the high cost of litigation deters many workers and competing businesses from pursuing private enforcement in the first place. Case-by-case litigation is also not well-suited to redress the negative externalities that stem from noncompetes, such as the harms they impose on workers and businesses who are not subject to the noncompete, as well as the harms they pose to consumers and the economy by raising prices and reducing innovation.[98]

Accordingly, the Commission determined that a bright-line rule would best address the negative effects of noncompetes, including the harms the extendnoncompete beyond any one individual agreement.[99] Indeed, the Supreme Court has held that Section 5 empowers the Commission to consider the cumulative effects of particular practices in judging whether they constitute "unfair methods of competition."[100] Moreover, the Commission need not demonstrate actual anticompetitive harm to establish a violation—Section 5 reaches "incipien[t] acts" and those with a "dangerous tendency … to hinder competition."[101] Nevertheless, the Commission here not only determined that noncompetes tend to hinder competition, it also found that they actually undermine competition in labor, product, and service markets. An additional individualized showing of such effects for every individual noncompete the Rule covers is not required.

Commissioner Ferguson says that the Commission "waves away" evidence concerning the effects of noncompetes on worker training, capital investment, and R&D investment. To the contrary, the Commission extensively analyzed the claimed benefits of noncompetes.[102] As part of this careful assessment, the Commission notes in the final rule that there is some evidence that noncompetes are associated with increased human and physical capital investment.[103] However, pecuniary benefits to the party engaging in the unfair method of competition—in this case, the employer—are not a sufficient justification under Section 5.[104] The empirical literature does not show that investment benefits from noncompetes accrue to any party besides the employer—and to the extent empirical research does address this issue, it suggests otherwise. In theory, if increased human capital investment from noncompetes benefited workers, workers would likely

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[98] *Id.*

[99] *See, e.g.*, 89 Fed. Reg. at 38,407, 38,428.

[100] *FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. at 395 (upholding the Commission's challenge to a series of exclusive dealing arrangements between motion picture theaters and four advertisers based on the cumulative impact of the arrangements).

[101] *FTC v. Texaco, Inc.*, 393 U.S. 223, 224 (1968) (even where arrangement may not "foreclose[e] competitors," when "the anticompetitive tendencies of such a system are clear," the Commission acted properly "in halting this practice in its incipiency" before it had "totally eliminated competition").

[102] Final Rule at 38421-34.

[103] *Id.* at 38422-24.

[104] *Atl. Refin. Co.* v. *FTC,* 381 U.S. 357, 371 (1965) (considering that defendant's distribution contracts at issue "may well provide Atlantic with an economical method of assuring efficient product distribution among its dealers" and holding that the "Commission was clearly justified in refusing the participants an opportunity to offset these evils by a showing of economic benefit to themselves"); *FTC* v. *Texaco,* 393 U.S. 223, 230 (1968) (following the same reasoning as *Atlantic Refining* and finding that the "anticompetitive tendencies of such system [were] clear")*; L.G. Balfour Co. v. FTC,* 442 F.2d 1, 15 (7th Cir. 1971) (while relevant to consider the advantages of a trade practice on individual companies, this cannot excuse an otherwise illegal business practice). For provisions of the antitrust laws where courts have not accepted justifications as part of the legal analysis, the Commission will similarly not accept justifications when these claims are pursued through section 5.

see higher earnings when noncompetes are more readily available to firms (*i.e.*, when legal enforceability of noncompetes increases). However, the empirical evidence indicates that, on net, greater enforceability of noncompetes *reduces* workers' earnings.[105] Likewise, in theory, if increased human capital investment increased innovation that redounds to the benefit of the economy and society as a whole, one would expect to see legal enforceability of noncompetes yield such benefits. But the empirical evidence on innovation effects demonstrates the opposite—that noncompetes inhibit innovation.[106]

The final rule also analyzes extensively the costs and benefits of noncompetes and finds that the rule's prohibition on noncompetes has substantial benefits that clearly justify the costs.[107] The logical extension of Commissioner Ferguson's argument is that the agency cannot prohibit a practice through notice-and-comment rulemaking unless it has no costs at all—an argument for which administrative law offers no support.

Commissioner Ferguson writes that the final rule does not establish that employers have viable alternatives to noncompetes. In fact, the final rule carefully considers this question, explaining that employers have several alternative ways to protect trade secrets. These include asserting intellectual property rights under trade secret and patent law and using non-disclosure agreements (NDAs) and invention assignment agreements.[108] To protect investments in worker human capital, employers can enter into fixed-duration contracts with workers and compete on the merits to retain them by providing better pay and working conditions.[109] These alternatives are viable for protecting valuable firm investments, and, compared with noncompetes, they are much more narrowly tailored to limit impacts on competitive conditions.

Commissioner Ferguson also claims that evidence from states where noncompetes are banned is not relevant to whether these alternatives are viable, and specifically that there are too many confounding variables to account for any causation between the "less restrictive alternatives" described in the final rule and the success of Silicon Valley. But the final rule does not attribute California's economic success to its noncompete laws or to the use of less restrictive alternatives in place of noncompetes. Instead, the final rule notes that while some argue that noncompetes are necessary for protecting trade secrets and other firm investments, the experiences of California, North Dakota, and Oklahoma would suggest otherwise. Noncompetes have been unavailable to employers in those states and yet industries that depend on protecting trade secrets and training investments—such as the tech industry in California and the energy industry in North Dakota and Oklahoma—have nevertheless thrived. And as the final rule explains, noncompetes now govern millions of low-income workers in jobs that do not entail any kind of intellectual property or specialized training.[110] Commissioner Ferguson does not attempt to explain how noncompetes could ever be procompetitive with respect to these workers.

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[105] *Id.* at 38382-84.
[106] *Id.* at 38394-95.
[107] *Id.* at 38470.
[108] *Id.* at 38424-26.
[109] *Id.* at 38426.
[110] *See, e.g.*, Final Rule at 38346 (describing a study finding that 53% of workers covered by noncompetes are hourly workers, and that, for workers earning less than $40,000 per year, 13% of respondents were working under a noncompete and 33% worked under one at some point in their lives).

Relatedly, Commissioner Ferguson asserts that noncompetes are superior to the less restrictive alternatives identified in the final rule because they are structural remedies rather than behavioral ones. This ignores the underlying problem with noncompetes, which is that their overbreadth imposes substantial harms on workers, consumers, and rival firms across the nation. The relevant question is not whether structural or behavioral remedies are more effective in the abstract, but whether alternatives such as trade secret law and NDAs reasonably accomplish the same purposes as noncompetes while burdening competition to a less significant degree.

Commissioner Ferguson further contends that the final rule should have considered arguments that noncompetes may be justified in certain industries. In fact, the final rule considered and responded to every comment from every industry group that requested an exemption from the final rule on this basis.[111] For example, the Commission considered comments that noncompetes should be allowed in client- and sales-based industries, industries with apprenticeships or other required training, and specific industries such as financial services, broadcasting, construction, health care, and more.[112]

Commissioner Ferguson also asserts that the short-term effects of small legal changes in noncompete enforceability found in one economic study do not extrapolate to a nationwide, long-term ban of noncompete agreements. This criticism ignores both research that examines long-run effects and research that examines categorical bans on noncompetes cited in the Final Rule. This research continues to find that reducing noncompete enforceability increases worker earnings.[113] In any event, the Commission's cost-benefit analysis assumed that the effect of a nationwide ban would be the same as the small legal changes typically observed in the data. In theoretical models of matching between firms and workers, it is highly unlikely that larger changes in enforceability—that is, greater reductions in labor market frictions—would induce *smaller* effects on employee wage outcomes. Thus, the Commission's assumption likely substantially under-estimated the benefits of the rule.[114]

Commissioner Ferguson further criticizes the empirical evidence that the Commission relies on by arguing that the final rule is overly reliant on evidence from California, which has

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[111] Final Rule at 38442-51.
[112] *Id.*
[113] Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Non-Compete Agreements,* 68 MGMT. SCI. 143, 144 (2022); Natarajan Balasubramanian, Evan Starr, & Shotaro Yamaguchi, *Employment Restrictions on Resource Transferability and Value Appropriation from Employees* (Jan. 18, 2024), *https://papers.ssrn.com/ sol3/ papers.cfm? abstract_ id= 3814403* (finding effects that are qualitatively in line with those found examining smaller changes); Matthew S. Johnson, Kurt J. Lavetti, & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility,* Nat'l Bureau of Econ. Rsch. 2 (2023) (shows that bigger changes to noncompete enforceability lead to bigger impacts on worker earnings); Matthew Johnson, Michael Lipsitz, & Alison Pei, *Innovation and the Enforceability of Noncompete Agreements,* Nat'l Bureau of Econ. Rsch., Working Paper No. 31487 (2023) (study examines long term effects, states which reduced enforceability of noncompetes by a greater amount over a 24-year period had consistently greater levels of worker earnings at the end of that period).
[114] Regarding earnings effects, the Commission noted that "the most comprehensive study" found that "the effects of changes in noncompete enforceability are broadly linear," and thus it would be reasonable to "extrapolate" that "larger changes will lead to larger effects." Nevertheless, the Commission "follow[ed] a conservative approach" and assumed only that the Rule "will have the same effects on earnings as the incremental legal changes observed" in cited studies. Thus, "if anything," the Commission's analysis "underestimates the benefits of the [R]ule." *See* 89 Fed. Reg. at 38,385.

already banned noncompete agreements, and confuses correlation with causation. The best economic evidence available looks at changes in noncompete enforceability over time, making sure that simple differences across geographies (such as differences between California and the rest of the US) are not the reason that one finds differences in economic outcomes from differences in noncompete enforceability. When weighing the reliability of economic studies on noncompetes, the Commission properly gave more weight to studies that examined the effects of changes in enforceability over time and that examined several different changes in enforceability across multiple states.[115]

Commissioner Ferguson also criticizes the research that the Commission relies on in its Final Rule on the grounds that "most of the papers the Final Rule relies on are either unpublished or were published within the last five years" and the Final Rule's "chief evidence" for the final rule's finding that noncompetes suppress workers' earnings is one unpublished paper on worker earnings. In fact, the Commission relies on several studies to support its finding that noncompetes suppress worker earnings.[116]

The empirical research that the Commission relies on in its Final Rule is extensive, including thirty high-quality empirical studies from the last 21 years quantifying the harms caused by—not merely correlated with—noncompetes. These studies overwhelmingly point in one direction: noncompetes negatively affect competitive conditions in the American economy, suppressing earnings, inhibiting new business formation and innovation, and harming workers, consumers, and rival businesses. These studies are also remarkable in that they not only find consistent results, but also similar magnitudes of effects.[117] Setting aside the erroneous analysis in Commissioner Ferguson's statement, the Commission's Regulatory Impact Analysis finds that, even in the absence of *any* economic benefit related to worker earnings, the Final Rule is net beneficial under very reasonable assumptions.[118]

More generally, new research is not inherently flawed research. New studies often improve on prior research by using better data (such as a more granular measure of noncompete enforceability, or more enforceability changes) and more advanced econometric techniques. The Commission should and does use the most recent economic research to issue timely rules on current market conditions. It would be unwise to favor outdated studies over more recent work that uses the most modern research methods and makes use of the best data.

Finally, the effect of noncompetes on workers' earnings is just one of many justifications for the Final Rule. The Final Rule also considers effects on innovation, entrepreneurship, consumer prices, and competition. Indeed the Commission finds that, even in the absence of *any* economic benefit related to worker earnings, the Final Rule is net beneficial.[119]

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[115] Final Rule at 38373.
[116] Final Rule at 38382-84.
[117] *See, e.g.*, Final Rule at 38382-84 (describing studies finding that increased enforceability of noncompetes reduces workers' earnings, and which find a similar magnitude of effects).
[118] Final Rule at 38486-87.
[119] Final Rule, 89 Fed. Reg. at 38486-38489.

The Commission could always wait for additional evidence on the effects of noncompetes. Doing so, however, would privilege the potential future decrease in uncertainty over the actual major harms that Americans are already incurring. As public enforcers, we carry an obligation to be timely in our work. Given the already substantial evidence on the harmful effects of noncompetes, as well as the testimony from tens of thousands of commenters who have experienced such harms, it is vital we act now.

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Free and fair competition is a key pillar of our free enterprise system. Noncompetes undermine this basic premise, locking workers in place and depriving our economy of the full benefits that competition delivers. By freeing millions of Americans from noncompetes, this rule will help restore core economic liberties and ensure that a worker seeking a better opportunity, an entrepreneur with a good idea, or a business looking to grow are no longer constrained by these clogs on competition.

I am deeply grateful to the FTC team for their extraordinary work on this rulemaking and to the tens of thousands of Americans who submitted comments to share their experience and expertise.

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