Comment Letter: Federal Trade Commission's Proposed Non-Compete Rule

The Cicero Institute

Ajay Iyer and Jonathan Wolfson[1]

I. Introduction

The Federal Trade Commission ("FTC" or "Commission") issued a notice of proposed rulemaking to, in most cases, ban employers and employees from entering into non-compete agreements.[2] The proposed rule is legally invalid and inadvisable as a matter of policy. First, as a threshold matter, the FTC does not have the power to make substantive rules under Sections 5 and 6(g) of the FTC Act, as it claims. Second, the rule would violate both the major questions and nondelegation doctrines. Lastly, the proposed rule violates longstanding principles of federalism since contract law is traditionally the domain of state law.

II. Statement of Interest

The Cicero Institute is a nonprofit think tank with a mission of identifying, developing, and advancing entrepreneurial solutions to society's toughest public policy problems. The Cicero Institute focuses its work on state policy and, as such, submits this comment to protect the ability of state legislators and executives to make contract law and employment law decisions that best meet the needs of their unique state economies. We do not have a position on whether all non-compete agreements are good or bad as a matter of policy. Rather, we believe that individual states should be able to function as laboratories of democracy to address the concerns some have raised to the use of non-compete clauses in employment.

[1] Iyer is a Law & Policy Fellow and Wolfson is Chief Legal Officer & Policy Director.
[2] Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 9, 2023) (to be codified at 16 C.F.R. 910).

III. The FTC Does Not Have the Authority to Make Rules Regarding Unfair Methods of Competition

The Commission relies on a single case from 1973 to support its proposition that it has the authority to make rules about unfair methods of competition stemming from Sections 5 and 6(g) of the FTC organic statute: *National Petroleum Refiners Association v. FTC*.[3] Judge Wright, in his opinion for the D.C. Circuit, wrote that "Section 6(g) should be construed to permit the Commission to promulgate binding substantive rules [for unfair methods of competition]."[4] While this may seem dispositive of the issue, much has changed since 1973; in fact, Congress amended the statute soon after the ruling in *National Petroleum Refiners Association* with the Magnuson-Moss Act.[5]

Under the Magnuson-Moss Act, Congress created an exhaustive set of procedures for rulemaking regarding unfair or deceptive practices or acts.[6] Notably, the Act states explicitly that the rulemaking authority and procedures do not apply to unfair methods of competition.[7] If Sections 5 and 6(g) taken together do not grant the Commission general rulemaking authority for unfair or deceptive practices or acts and unfair methods of competition, the Magnuson-Moss Act explicitly precludes substantive rulemaking regarding the latter.[8]

Since *National Petroleum Refiners Association*, the process of statutory interpretation has also changed significantly. First, the Court rejects the Negative-Implication Canon (*expressio*

[3] National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973)
[4] *Id.* at 678
[5] Magnuson-Moss Warranty Act, 1975
[6] 15 U.S.C. § 57a(a).
[7] 15 U.S.C. § 57a(a)(2).
[8] This stands even if Congress enacted 15 U.S.C. § 57a(a)(2) under the assumption that unfair methods of competition rulemaking authority exists. Magnuson-Moss did not expressly grant that authority, so if the original FTC act does not confer that authority, it cannot be implied simply because Congress made a mistake of law.

unius est exclusion alterius) off-hand by stating that the "maxim is increasingly considered unreliable."[9] Over the past 50 years, this prediction has not fared well. While courts should use the canon "with great caution,"[10] it still enjoys relatively wide usage and is essential when interpreting statutes.[11] Therefore, the Court should have, at minimum, discussed Section 5's fact-specific, adjudicative focus in more depth. In any case, the framers of the FTC Act certainly "considered and rejected" rulemaking authority in Section 5.[12] This legislative history expressly contradicts the D.C. Circuit's premise for dismissing the Negative-Implication canon: Congress squarely addressed the "possible alternative provision[]."[13]

The *National Petroleum Refiners Association* Court also posits that the FTC Act "clearly states that the Commission 'may' make [substantive] rules and regulations for the purposes of carrying out. . . Section 5."[14] This conclusion is erroneous in light of more recent Supreme Court precedent, which asks Congress to "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance," especially "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy."[15] It is difficult to believe Congress was speaking clearly by hiding sweeping and general rulemaking authority for unfair methods of competition among various investigatory in a

[9] *National Petroleum Refiners Ass'n*, 482 F.2d at 676.
[10] ANTONIN SCALIA & BRYAN GARNER, READING LAW 107 (2012).
[11] *See generally id.* at 107-111.
[12] Noah Joshua Phillips, *Against Antitrust Regulation*, AM. ENTER. INST. 3 (Oct. 13, 2022), https://www.aei.org/wp-content/uploads/2022/10/Against-Antitrust-Regulation.pdf. *See also id.* ("[T]he Senate never proposed [substantive rulemaking power], and neither the Conference Committee's report nor the final debates mentioned it."). Importantly, the rulemaking provision of Section 6(g) does not include any sanctions for violating agency rules. At the time the FTC Act was passed, Congress followed a drafting convention such that "if Congress made no provision for sanctions for rule violations, the grant authorized only procedural or interpretive rules." Thomas W. Merrill & Kathryn T. Watts, *Agency Rules with the Force of Law*, 116 HARV. L. REV. 467, 472 (2002).
[13] *National Petroleum Refiners Ass'n*, 482 F.2d at 676.
[14] *Id*. at 677.
[15] Utility Air Reg. Group v. EPA, 573 U.S. 302, 324 (2014)

vague subsection that begins with the power to "classify corporations."[16] In the words of Justice Scalia in *Whitman v. American Trucking Association*, "Congress does not hide elephants in mouseholes."[17] Given the development of statutory interpretation over the past fifty years, the statutory hook in Section 6(g) is simply not sufficient to justify unfair methods of competition rulemaking.

Additionally, the past practice of the FTC before 1962 does not support *National Petroleum Refiners Association*'s conclusion that Sections 5 and 6(g) empower the Commission to make substantive rules about unfair methods of competition. Tellingly, the D.C. Circuit dismisses the District Court's conclusion—much like the Negative-Implication Canon—without much fanfare.[18] Rather than engage with the topic, Judge Wright proceeds to discuss how the proposed rule would further the purpose of the Act, even though he concludes that the legislative history is ambiguous.[19] As discussed earlier, the Supreme Court has recently been suspicious of agencies that suddenly make an about-face about significant policy matters. In *West Virginia v. EPA* last term, the Supreme Court rebuked the Environmental Protection Agency for attempting to discover new authority that would represent "transformative expansion in its regulatory authority."[20] Current doctrine requires courts to at least "hesitate before concluding Congress meant to confer. . . authority" in the face of these abrupt changes in position.[21]

---

[16] 15 U.S.C. § 46(g).
[17] Whitman v. American Trucking Ass'n, 531 U.S. 457, 468 (2001) (cleaned up). For another folksy summarization of the principle, c.f. AMG Capital Mgmt., LLC v. FTC, 141 S. Ct. 1341 (2021) ("[T]hat reading would allow a small statutory tail to wag a very large dog.").
[18] *National Petroleum Refiners Ass'n*, 482 F.2d at 686 ("We do not find the District Court's reliance on the agency's long-standing practice, until 1962, of not utilizing rule-making or the District Court's reliance on enactment of specific grants of rule-making power in narrow areas sufficiently persuasive to override our view. . . .").
[19] *Id.* at 686-691.
[20] 142 S. Ct. 2587, 2610 (2022).
[21] *Id.* (quoting FDA v. Brown & Williamson, 529 U.S. 120, 159-60 (2000)).

The same logic applies to the current rulemaking. Since Magnuson-Moss, the FTC has not made a single rule regarding unfair methods of competition.[22] That means the FTC has not partaken in this "unheralded power" for half a century.[23] While the D.C. Circuit ratified the Commission's ability to make substantive rules about unfair methods of competition in 1973, its reticence to make rules like the proposed non-compete ban since Magnuson-Moss elide that the Commission's current interpretation of Sections 5 and 6(g) is a novel power grab.

While *National Petroleum Refiners Association* does stand for the proposition that the FTC can make substantive rules governing unfair methods of competition, the analysis is dated. Using updated methods of statutory interpretation and looking at the Magnuson-Moss Act, courts following Supreme Court precedent will likely rule that the Commission does not have the power to pass such a sweeping rule without explicit Congressional consent.

IV. The Proposed Non-Compete Rule Fails on the Merits

Even if the Commission has statutory authority to promulgate rules about unfair methods of competition, its proposed rule banning most non-compete clauses fails on the merits. First, the rule violates the major questions doctrine that the Supreme Court expounded in *West Virginia v. EPA*. Second, the rule violates the nondelegation doctrine because, if the Commission can make these sorts of regulations, Congress did not give the Commission an intelligible principle to justify a rulemaking here.

---

[22] *Comments from the Antitrust Law Section of the American Bar Association in Connection with the Federal Trade Commission Workshop on "Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues"*, 2020 A.B.A. ANTITRUST L. SEC. 58 ("There have been no antitrust rules promulgated by the Commission post-Magnuson-Moss."); *see also* Thomas W. Merrill, *Antitrust Rulemaking: The FTC's Delegation Deficit*, ADMIN. L. REV. (forthcoming 2023) (manuscript at 9) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4344807).

[23] Utility Air Reg. Group v. EPA, 573 U.S. 302, 324 (2014).

a. The Major Questions Doctrine Precludes the Commission from Adopting the Proposed Rule

The Supreme Court has recognized that in some instances, where an agency asserts the power to regulate "a significant portion of the American economy," courts may have "reason to hesitate before concluding that Congress has intended such an implicit delegation."[24] In these major questions cases, the Court has said that Congress likely did not intend to delegate such great power in "modest words, vague terms, or subtle devices."[25] The rationale is simple: "Congress intends to make major policy decisions itself, not leave those decisions to agencies."[26] This gets to the fundamental concern of separation of powers, that Congress should make laws and that the Executive, including commissions like the Federal Trade Commission, should execute those laws.

The proposed rule would ban the majority of non-compete clauses in employment contracts. The Commission itself estimates that "approximately one in five American workers—or approximately 30 million workers—is bound by a non-compete clause."[27] The Commission also estimates that the proposed rule is a "major rule" under the Congressional Review Act.[28] This rule will affect millions of people and businesses. That alone should hint that such a regulation is likely a major question requiring, at the very least, a clear statement of Congressional intent. Even more, the Commission rests its authority to promulgate this statute on a newfound, "unheralded power"[29] that it has not used for fifty years since the enactment of

[24] FDA v. Brown & Williamson, 529 U.S. 120, 159 (2000).
[25] West Virginia v. EPA, 142 S. Ct. 2587, 2609 (cleaned up) (quoting Whitman v. American Trucking Ass'n, 531 U.S. 457, 468 (2001)).
[26] *Id.* (quoting United States v. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).
[27] Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3485 (proposed Jan. 9, 2023) (to be codified at 16 C.F.R. 910).
[28] *Id.* at 3516.
[29] *Utility Air Reg. Group*, 573 U.S. at 324.

Magnuson-Moss. This proposed rule is a "transformative expansion in [the FTC's] regulatory authority,"[30] where the FTC purports to have the ability to exercise plenary power over antitrust through rulemaking.

The proposed rule, therefore, is a significant exercise of power without a clear delegation. Without a statement of intent from Congress, the Commission cannot enact such a wide-reaching rule that will regulate vast swaths of the economy.

b. The Proposed Rulemaking Raises Nondelegation Concerns

The rule has serious major questions doctrine deficiencies; however, it is also constitutionally suspect because it constitutes an unconstitutional delegation of legislative power to the FTC.

Even though the Supreme Court has not struck down a statute under the nondelegation doctrine since 1935,[31] the nondelegation doctrine is not necessarily dead. In 1935, the Court decided *A.L.A. Schechter Poultry Corp. v. United States*[32] and *Panama Refining Co. v. Ryan*.[33] In *Schechter Poultry*, Chief Justice Hughes, writing for the Court, struck down the National Industrial Recovery Act as unconstitutional.[34] NIRA authorized the promulgation of a "code of fair competition" to, in the simplest terms, stop bad things. As Justice Cardozo noted in his concurrence, Congress created "a roving commission to inquire into evils and upon discovery correct them."[35] The Court stated that "Congress is not permitted to abdicate or to transfer to

[30] *Id.*
[31] Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315 (2000); *but see* Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022) (striking down part of a statute as an unconstitutional delegation to the SEC as recently as 2022).
[32] 295 U.S. 495 (1935).
[33] 293 U.S. 388 (1935).
[34] 295 U.S. at 551.
[35] *Id.* (Cardozo, J. concurring).

other the essential legislative functions with which it is thus vested."[36]As such, Congress must "lay down by legislative act an intelligible principle" that an agency may follow when implementing the statute.[37] NIRA did not do so. Instead, it extended "the President's discretion to all varieties of laws which he may deem to be beneficial. . . ."[38] The Court held that NIRA granted "virtually unfettered" power to the Executive, which amounted to an unconstitutional delegation of authority.[39]

Notably, the *Schechter Poultry* court distinguished the FTC's power to regulate unfair methods of competition from the standardless delegation that embodied NIRA. The Court emphasized the "quasi-judicial" nature of the Commission. It stated that unfair methods of competition were "to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest."[40] The Court considered the FTC Act constitutional because it relied upon *fact-specific inquiries* rather than sweeping statements declaring certain actions illegal. An FTC with the power to make substantive rules about unfair methods of competition begins to look a lot more like the "roving commission" that worried Justice Cardozo in *Schechter Poultry* than an administrative exemplar. To put a finer point on it: if the Court held NIRA unconstitutional because of its general grant to pursue fair competition, plenary power to regulate unfair competition is undoubtedly an unconstitutional delegation.

V. The Proposed Rulemaking Raises Significant Federalism Concerns

[36] *Id.* at 529.
[37] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).
[38] *Schechter Poultry*, 295 U.S. at 539.
[39] *Id.* at 542.
[40] *Id.* at 533. This holding also casts doubt on the correctness of *National Petroleum Refiners Association* as an initial matter.

The proposed rule is legally invalid because the Commission has no statutory authority to promulgate these rules, the rule regulates a significant area of policy without explicit Congressional approval, and it would be an unconstitutional delegation of legislative power to the Executive branch. Even so, the proposed rule is also inadvisable as a matter of policy because states are better situated to regulate non-compete clauses. In fact, many states already regulate non-compete clauses. The Commission admits as much, noting that "[s]tates have been particularly active in restricting non-compete clauses in recent years."[41] Three states have even banned non-compete clauses themselves.[42]

The Commission recognizes that non-compete clauses have generally been a matter of state contract law for hundreds of years. California, for example, outlawed "covenants not to compete" in 1872.[43] The proposed rule banning virtually all non-compete clauses steps on the toes of states, which have traditionally regulated contracts for employment through statutory and common law. This regulation imposes the will of unelected technocrats on the people of the entire country. The states are undoubtedly aware of the issues regarding non-compete clauses in employment contracts. They have considered the matter, and forty-seven states have decided not to outlaw the practice outright.[44] State legislatures are in a better position to determine the needs and wants of their citizens, not least because they are democratically accountable.

The various states also have vastly different economies, making the FTC's proposed one-size-fits-all solution unwise. For example, 8.7% of Virginia's workforce works in the technology sector, the third highest share in the nation and three percentage points higher than the nation's

[41] Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3494 (proposed Jan. 9, 2023) (to be codified at 16 C.F.R. 910).
[42] *Id.*
[43] *See Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 290 (Cal. 2008); CAL. BUS. & PROF. CODE § 16600.
[44] Non-Compete Clause Rule, 88 Fed. Reg. at 3494.

average.[45] In Virginia's neighbor, West Virginia, only 2.8% of the state's workforce works in technology.[46] Tourism accounted for 13% of Florida's total employment in 2019, compared to just 5% of total national employment.[47] These are just a few of many examples that demonstrate the diversity of state economies. Each state has unique industries, employees, and interests; accordingly, individual state legislatures are best suited to regulate employment contracts.

Adopting the proposed rule to ban non-compete agreements would be a gross usurpation of power, overriding the people's will and imposing a uniform policy across the country. Assuming non-compete clauses are against public policy, the proper—if not only—way to deal with them is through the democratic process, not through bureaucratic fiat.

VI. Conclusion

The proposed rule effectively banning non-compete clauses in employment contracts will be the subject of, in the words of former Commissioner Wilson, "numerous, and meritorious, legal challenges."[48] No part of the FTC Act can sustain the weight of this rulemaking, nor can any decades-old judicial precedent. Even if the rulemaking could survive legal challenges, the Commission should think carefully about who should decide important matters of public policy: technocrats sitting on high in Washington, D.C., or their duly elected representatives in the various legislatures across the country. Based on the history and tradition of this country, the

[45] *2022 State of the Tech Workforce*, COMPTIA 64 (2022), https://www.cyberstates.org/pdf/CompTIA_Cyberstates_2022.pdf.
[46] *Id.* at 66.
[47] *Florida's Tourism Economy Experiences Another Record Year in 2019 But Shifts into a Lower Gear of Growth*, ROCKPORT ANALYTICS 23 (2021), https://www.visitflorida.org/media/30679/florida-visitor-economic-large-impact-study.pdf.
[48] Non-Compete Clause Rule, 88 Fed. Reg. at 3542 (dissenting statement of Commissioner Christine S. Wilson).

latter is the clear answer. The Federal Trade Commission should not move forward with the proposed rule.