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

Office of Commissioner
Melissa Holyoak

Dissenting Statement of Commissioner Melissa Holyoak

Joined by Commissioner Andrew N. Ferguson

In the Matter of the Non-Compete Clause Rule
Matter Number P201200
June 28, 2024

Article I of the Constitution vests "[a]ll legislative Powers herein granted" in Congress.[1] "[B]y vesting the lawmaking power in the people's elected representatives, the Constitution sought to ensure 'not only that all power [w]ould be derived from the people,' but also 'that those [e]ntrusted with it should be kept in dependence on the people.'"[2] While many lament Congressional gridlock, the lawmaking process was designed to be difficult and to include "many accountability checkpoints."[3] Allowing Congress to divest its legislative power to the Executive Branch bypasses those checkpoints and compromises the integrity of the Constitution's separation of powers.[4] Yet courts tolerate legislative delegations to agencies only to "fill in statutory gaps," and apply various doctrines to keep such limited delegations in check.[5]

The modern administrative state may be accustomed to the ease and breadth of legislative rulemaking,[6] but an agency should not lose sight of these constitutional proscriptions and should, therefore, approach legislative rulemaking with circumspection—lawmaking is an extraordinary power and agency lawmaking tests the delicate balance of separation of powers.[7]

With these important constitutional principles in mind, a threshold question must be answered for the Non-Compete Clause Rule ("Final Rule"): Does the Commission have authority to promulgate

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[1] U.S. Const. Art. I.
[2] *W. Virginia v. EPA*, 597 U.S. 697, 737-38 (2022) (Gorsuch, J., concurring) (quoting The Federalist No. 37, 227 (J. Madison)).
[3] *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 61 (2015) (Alito, J., concurring).
[4] *See W. Virginia*, 597 U.S. at 739 (Gorsuch, J., concurring) ("Permitting Congress to divest its legislative power to the Executive Branch would 'dash [this] whole scheme.'") (quoting *Dep't of Transp.*, 575 U.S. at 61 (Alito, J., concurring)).
[5] *Gundy v. United States*, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting) (explaining that in "policing improper legislative delegations[,]" "hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines").
[6] *See City of Arlington, Tex. v. Fed. Comm. Comm'n.*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting) ("The administrative state 'wields vast power and touches almost every aspect of daily life.'") (quoting *Free Enter.*

legislative rules for unfair methods of competition? I believe the answer is no and therefore I respectfully dissent.

My dissent should not, however, be interpreted to mean that I endorse all non-compete agreements. To the contrary, I would support the Commission's prosecution of anti-competitive non-compete agreements, where the facts and law support such enforcement.[8] That is why I am particularly disappointed that the Commission dedicated the Commission's limited resources to a broad rulemaking that exceeds congressional authorization and will likely not survive legal challenge. Those resources would be better used to identify and prosecute—including in collaboration with States' attorneys general—anticompetitive non-compete agreements using broadly accepted theories of antitrust harm.[9]

Non-compete agreements present complex policy questions. And I am sympathetic to those who feel stuck in a job because a noncompete prevents them from seeking other opportunities. But I am equally sympathetic to the small business owner who invests in her new employees, just to watch the employee walk away to her biggest competitor w,0k2 4(w)2 (yo)2.403 ( )]7)1(que)4 ((nt)-2 (i)x(J0.004 T

Setting aside the policy issues that undermine the case for the rulemaking, as a creature of Congress, the Commission only has the powers granted to it by Congress.[14] While it may fervently wish to resolve the policy debate, "no matter how important, conspicuous, and controversial the issue, … an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."[15] Here, the Commission's power is wanting.

The Commission asserts that Section 5's authority regarding unfair methods of competition *works together* with Section 6(g) to permit the Commission to promulgate competition rules.[16] But, as further explained below, based on the text and structure of the FTC Act, I am persuaded that a reviewing court would interpret Section 6(g) to authorize only *procedural* or internal operating rules, not substantive legal rules.[17] The Commission thus cannot rely on 6(g) to promulgate competition legislative rules. Further, even assuming, *arguendo*, the Commission has such

FTC Act for promulgation of the Final Rule and therefore agree with Commissioner Ferguson's reasons for rejecting the Rule.

I. I.

Other than these additions, the unfair methods of competition enforcement powers set forth in Section 5 have remained relatively unchanged since 1914.[24] Section 5, codified at 15 U.S.C. § 45, sets forth a comprehensive adjudication structure where the Commission may: issue and serve a complaint; provide notice and hold a hearing where it receives testimony; permit intervention in the proceedings; provide transcripts of hearings; prepare a report with findings of fact; issue a cease-and-desist order; and modify or set aside such reports or orders.[25] Importantly, however, where a defendant objects to a Section 5 cease and desist order, a reviewing court of appeals must first determine that the order is valid before the FTC can enforce it.[26] The FTC Act's sole discussion of the FTC's "unfair methods of competition" authority is found in Section 5—and nowhere in Section 5 does it mention rulemaking.[27]

Because Section 5's comprehensive adjudication scheme does not address rulemaking, the Commission pulls from another provision of the FTC Act—Section 6(g)—for its source of authority for legislative rulemaking. Section 6(g) in the original Act provides that the Commission may "[f]rom time to time classify corporations and to make rules and regulations for the purpose of carrying out the provisions of the Act."[28]

Section 6(g) thus authorizes rules, but the question is what type of rule? Under the Administrative Procedure Act, there are different kinds of "rules," including legislative rules (implementing statutes with full force and effect of law), interpretative rules (advising the public on how an agency interprets its statutes and rules), guidance or policy documents, or procedural rules (agency processes).[29]

The Commission asserts that Section 6(g) authorizes the FTC to issue legislative rules—but an agency does not have legislative rulemaking authority without "some *clear expression* of congressional intent to confer power to act with the force of law."[30] The Supreme Court instructs that whether Congress delegated to an agency such authority—to promulgate rules carrying the "force of law"—can be demonstrated in a manner of ways, including by "an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent."[31] Section 6, however, does not mention notice-and-comment

[24] Merrill, *supra* note 17 at 297.
[25] 15 U.S.C. § 45(b).
[26] *Id.* § 45(c) ("To the extent that the order of the Comm exte e1

Section 5 authority to bring cases "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 further contrasted the Commission's adjudication process (acting as a quasi-judicial body, taking evidence, and making findings of fact in particular circumstances) with the regulatory codes of fair competition ("unfettered"

promulgated under a particular rulemaking grant."[48]

Telecommunications Corp. v. American Telephone & Telegraph Co., the Court rejected the FCC's rate regulation, which it argued was authorized by an ancillary provision in its authorizing statute allowing the agency to "modify" rate-filing requirements.[53] The Court found that it was "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a *subtle device* as permission to 'modify' rate-filing requirements."[54]

The Court in *MCI Telecommunications* dismissed the notion that the FCC's authority to "modify" rate-filings included a wholesale ability to reset rate-filings generally. The Final Rule's interpretation of Section 5 is likely to get dismissed on similar grounds. Section 5 adjudication authorizes complaints against a *specific* person, partnership, or corporation.[55] Competition legislative rulemaking, on the other hand, would allow wholesale regulation of entire industries, giving "the FTC control over the U.S. Gross Domestic Product—worth $18.4 trillion in 2020."[56] In fact, the Final Rule estimates it will cost employers $400-$488 billion over the next ten years.[57]

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powers of Section 5 with an ancillary provision in a separate section covering investigatory powers. The

After *National Petroleum*, and in response to the Commission's perceived overreach, Congress passed the Magnuson-Moss Warranty Act in 1975, which imposed strict requirements for

rulemaking.[94] This is particularly peculiar because antitrust matters are factually intensive: "Given that Congress was enamored of hybrid rulemaking procedures in 1975, on the ground that they

competition rulemaking.[102] The Final Rule's implausible theory is that Congress, five years later in 1980, reversed course and sought to affirmatively answer that question in Section 22 without actually mentioning unfair methods of competition. In *AMG Capital Management, LLC v. FTC*, the Supreme Court rejected similar arguments by the Commission.[103] There, the Supreme Cou

Section 6(g) quite differently than a court would approach the issue today, reasoning that courts must interpret statutes "liberally" to construe "broad grants of rule-making authority."[111] But as scholars note, *National Petroleum*'s framing, approach to statutory interpretation, and delegation questions were never adopted by the Supreme Court and fell out of favor decades ago.[112]

Indeed, the D.C. Circuit in *National Petroleum* spent most of its opinion not analyzing the text and structure of Section 6(g) but instead itemizing the salutary benefits of the rulemaking process.[113] And rather than finding a clear expression from Congress authorizing legislative rulemaking, the D.C. Circuit's approach really boils down to—*well, Congress never said the Commission could not make competition rules*.[114] The Final Rule gives short shrift to the text and structure of the FTC Act and blindly follows the D.C. Circuit's holding.[115] Chair Khan criticizes my repudiation of *National Petroleum* and argues that "the rule of law demands that we follow what the law is."[116] But *National Petroleum* is not binding on the other courts of appeals—the *statute* is the law, not a nonbinding judicial opinion. And of particular relevance here, *National Petroleum* is not binding where challenges to the Final Rule are now pending,[117] nor does it reflect how the Supreme Court would likely rule.

Indeed, the same arguments that worked for the Commission in *National Petroleum* went nowhere with the Supreme Court recently in *AMG Capital*.[118] Rejecting the FTC's argument that Section 13(b) provided it authority to recover monetary relief, the Court instead focused on the Act's language and structure.[119]

The Court observed that Section 13(b)'s language refers only to injunctions and does not mention monetary relief; and it further observed that the Section 13(b) injunctive authority was "buried in

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[111] *Id.* at 680. Indeed, rather than requiring affirmative evidence of a conferral of legislative rulemaking authority, "the court framed the question as whether there was affirmative evidence *not* to confer power to make legislative rules." Merrill, *supra* note 17, at 303 (citing *Nat'l Petroleum Refiners Ass'n*, 482 F.2d. at 673, 691) (emphasis in

employees, non-compete provisions may also raise the costs of rivals trying to enter or expand within the relevant market.[128]

Noncomplete clauses—like vertical restraints more broadly[129]—can also have procompetitive or

> states and low-enforceability ones. The more credible empirical studies tend to be narrow in scope, focusing on a limited number of specific occupations (e.g., executives) or potentially idiosyncratic policy changes with uncertain and hard-to-quantify generalizability (e.g., banning non-competes for technology workers in Hawaii). There is little evidence on the likely effects of broad prohibitions of non-compete agreements. Further research, perhaps exploiting more recent law changes or new sources of data, is necessary to establish the causal impact such agreements have on market participants.[137]

At a minimum, the empirical evidence suggests that the effects of non-compete clauses are highly context specific. Anticipating the various effects reflected in the literature, existing antitrust law allows for *ex post* review of non-compete agreements on a case-by-case basis.

As a vertical restraint with varied and context-specific effects, the rule of reason would likely apply.[138] Under the rule of reason, "courts . . . conduct a fact-specific assessment of market power and market structure to assess the restraint's actual effect on competition. The goal is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest."[139] Based upon the mixed effects from both the theory and the empirics, continued enforcement under the rule of reason seems more appropriate than a wide-sweeping rule that fails to grapple with the economics or the specific context of individual non-compete clauses.

[137] *Id.* at 13 (quoting John M. McAdams, *Non-Compete Agreements: A Review of the Literature* at 4 (December 31, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3513639).

[138] *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886–87 (2007) ("[T]he per se rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason." (citations omitted)).

[139] *Ohio v. American Express Co.*, 585 U.S. 529, 541 (2018) (citations, ellipses, and internal quotation marks omitted).