Oral Statement of Commissioner Melissa Holyoak

In the Matter of the Non-Compete Clause Rule
Matter Number P201200
Delivered at the Open Commission Meeting
April 23, 2024

Article I of the Constitution vests "[a]ll legislative Powers" 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 the gridlock in Congress, 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 issues in mind, a threshold question must be answered for the Non-Compete Clause Rule ("Final Rule"): Does the Commission have authority to promulgate legislative rules under Section 6(g) of the FTC Act? I believe the answer is no and therefore I respectfully dissent. Further, even assuming, , the Commission has such rulemaking authority, I believe there is no clear congressional authorization under Section 5 of the FTC Act for promulgation of the Final Rule and therefore agree with Commissioner Ferguson's reasons for rejecting the Rule.

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[1] U.S. Const. Art. I.

[2] , 597 U.S. 697, 737-38 (2022) (Gorsuch, J., concurring) (quoting The Federalist No. 37, 227 (J. Madison)).

[3] , 575 U.S. 43, 61 (2015) (Alito, J., concurring).

[4] , 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 , 575 U.S. at 61 (Alito, J., concurring)).

[5] , 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] 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 ., 561 U.S. 477, 499 (2010)).

[7] ., ., 142 S. Ct. 661, 665 (2022) (per curiam) ("Administrative agencies are creatures of statute" and "accordingly possess only the authority that Congress has provided.").

[redacted]

The Commission asserts that "Section 5 and Section 6(g), , empower the Commission to promulgate rules for the purpose of preventing unfair methods of competition."[8] Turning first to Section 6(g), the original Act gave the Commission the power "[f]rom time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of the Act."[9] Based on the plain language in Section 6(g), I am persuaded that a

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while leaving undisturbed methods of competition.[16] Unless of course Congress did not believe that the FTC had competition rulemaking authority.

My dissent today should not be interpreted to mean that I endorse all noncompete agreements. To the contrary, I would support the Commission's prosecution of anti-competitive noncompete agreements, where the facts and law support such enforcement.[17] However, "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."[18] 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.[19]

For these reasons I am persuaded that Section 6(g) and Section 5 do not authorize the Commission to issue the Final Rule. Thank you.

[16] More importantly, Congress did not—contrary to the Commission's claim—ratify the