

Oral Statement of Commissioner Andrew N. Ferguson

In the Matter of the Non-Compete Clause Rule
Matter Number P201200

Delivered at the Open Commission Meeting
April 23, 2024

I am sympathetic to the policy embodied in ~~the~~ ^{Final} Rule. Anglo-American law has regarded noncompete agreements with deep suspicion for centuries. ~~They~~ ^{They} cut against the grain of our ancient common law tradition protecting every man's right to ply his trade and may in

administrative state can act with greater dispatch than Congress; but the difficulty of legislating in Congress is a feature of the Constitution's design, not a failure. The administrative state cannot legislate because Congress declines to do so.

Thus, whenever we undertake to make rules governing the private conduct of hundreds of millions of people who do not vote for us, we should not begin with determining what the right

Second, even if the Commission has statutory authority to issue legislative rules under Section 6(g), it lacks statutory authority to issue this rule. The Supreme Court has explained that when an agency claims power to regulate in an area of tremendous “economic and political significance,” the agency may not rely on “a merely plausible textual basis for the agency action.”

to constrain our rulemaking discretion—a point driven home by the fact that we have diametrically opposed views on the meaning of the phrase in just last two years.³⁷ And, at the very least, the nondelegation problem engenders in favor of reading the Act to avoid this grave constitutional concern.³⁸ I further conclude that the Final Rule is “arbitrary and capricious” under the Administrative Procedure Act³⁹ because the evidence on which the agency relies cannot