

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Ave NW
Washington, DC 20580

RE: Non-Compete Clause Rule (RIN 3084-AB74)

Chair Khan and Members of the Commission,

We appreciate the opportunity to comment on the Federal Trade Commission’s (“FTC” or “Commission”) proposed rule on non-compete clauses. We are law professors specializing in administrative and constitutional law. Peter Shane is the Jacob E. Davis and Jacob E. Davis II Chair in Law Emeritus at the Ohio State University’s Moritz College of Law. Bill Araiza is the Stanley A. August Professor of Law at Brooklyn School of Law. Jeffrey Lubbers is Professor of Practice in Administrative Law at American University Washington College of Law. As law professors, we have both expertise and interest in questions of statutory interpretation and agency authority regarding the rule.¹

We applaud the Commission’s decision to address the anticompetitive effect of non-compete clauses in employment contracts. Worker non-compete clauses limit the mobility of our labor force and suppress wages. They concentrate labor markets and reduce competition² by preventing workers from seeking other employment, and reduce incentives for employees to offer competitive wages, costing nearly \$300 billion per year in lost wages.³ Thirty million American workers are subject to non-compete clauses, and 37 percent of Americans have been constrained by non-competes at some point in their careers.⁴

We write to explain both that the proposed rule is within the traditional scope of authority granted to the FTC and that Congress articulated intelligible principles to guide the FTC in the exercise of that authority. As such, contrary to the complaints of the rule’s critics,⁵ the proposed rule neither triggers the major questions doctrine, announced last

¹ This comment was prepared with the assistance of Orlando Economos and Robin Thurston, Democracy Forward Foundation; and Will Dobbs-Allsopp and Reed Shaw, Governing for Impact.

² Richard J. Pierce, *The U.S. Federal Trade Commission Workshop on Non-Compete Clauses*, PUB. UTILS. REV., at 1 (Jan. 2020), available at <https://ssrn.com/abstract=3520009> (“[Non-compete clauses] allow firms to avoid matching the salaries and working conditions offered by their competitors and allow firms to lock in employees for long periods of time.”); *id.* at 3 (“Dominant firms use the clauses to preclude their employees from switching to other firms, to exercise their market power to depress wages, and to avoid sharing their profits with employees to the extent that a competitive market would require.”).

³ Press Release, Fed. Trade Comm’n, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition, (Jan. 5, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition>.

⁴ U.S. Dep’t of Treasury, Off. of Econ. Pol’y, *Non-compete Contracts: Economic Effects and Policy Implications* 6 (2016), [https://home.treasury.gov/system/files/226/Non Compete Contracts Economic Effects and Policy Implications MAR2016.pdf](https://home.treasury.gov/system/files/226/Non%20Compete%20Contracts%20Economic%20Effects%20and%20Policy%20Implications%20MAR2016.pdf).

⁵ Commissioner Christine Wilson, in her dissenting statement regarding the proposed rule, asserted that it would “be challenged under the major questions doctrine” and “the nondelegation doctrine.” Dissenting

year in the Supreme Court’s decision in *West Virginia v. EPA*,⁶ nor fails the requirements of the nondelegation doctrine.

Taking the two issues in turn, this comment offers a framework for applying the major questions and nondelegation doctrines to the proposed rule, and then explains why each does not apply here.

Agency action triggers the major questions doctrine only in the “extraordinary” case of an “unheralded” and “transformative” exercise of novel authority⁷; actions firmly grounded in the agency’s traditional scope of authority do not implicate the doctrine. The proposed rule is not such an extraordinary case. The FTC has taken action on non-competes before, and the rule is well within the historic scope of the FTC’s authority to identify and regulate unfair methods of competition (“UMC”) under Section Five of the Federal Trade Commission Act (“FTCA”), and specifically its responsibility to prohibit anticompetitive behavior.

Similarly, agency action presents no problem under the non-delegation doctrine when the agency can point to an “intelligible principle” expressed or referenced by Congress in the statute, legislative history, common law antecedents, or other contemporaneous related statutes that guides the instant action.⁸ Here, the FTC took action to vindicate its responsibility to combat unfair methods of competition that have anticompetitive effects. The FTC can point to those principles in the text and legislative history of the FTCA and explain how they are advanced by the proposed rule. Even if the non-delegation doctrine were significantly changed, as Commissioner Wilson speculated a future court might, the agency could still satisfy that hypothetical new doctrine by showing how it is merely “filling up details”⁹ in Congress’s grant of authority, and exercising a valid delegation of rulemaking authority that is within its discretion to select as a method of regulation.

I. The major questions doctrine does not apply to the proposed rule on non-compete clauses.

The major questions doctrine stands generally for the proposition that Congress does not delegate extraordinary powers without speaking clearly.¹⁰ In the rare case in

Statement of Commissioner Christine S. Wilson Concerning the Notice of Proposed Rulemaking for the Non-Compete Clause Rule, Comm’n File No. P201200-1, at 11–13 (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf [hereinafter “Wilson Dissent”].

⁶ 142 S. Ct. 2587 (2022).

⁷ *Id.* at 2610.

⁸ *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).

⁹ *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting).

¹⁰ *West Virginia*, 142 S. Ct. at 2609 (“Extraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms, or subtle devices. Nor does Congress typically use oblique or elliptical

which an agency claims such extraordinary authority, the doctrine requires Congress to have clearly authorized the power at issue.¹¹

The major questions doctrine applies only when agencies assert unheralded and transformative authority, and the FTC has not done so here. Rather, the FTC has promulgated a rule on a topic it has previously regulated, and thus acted firmly within its delegated authority on a topic clearly within its expertise on anticompetitive practices. The major questions doctrine should play no role in reviewing the proposed rule.

A. The major questions doctrine applies only where agencies claim unheralded and transformative authority in the context of agency precedents.

The major questions doctrine subjects agency action to a heightened standard of review in “extraordinary” cases where the agency has worked an “unheralded” and “transformative expansion in [its] regulatory authority.”¹² To determine whether an agency action is a substantively novel transformation of authority, the action is compared to relevant precedents, including prior agency actions.

A review of the “extraordinary” cases recently cited by the Court in *West Virginia* demonstrates that what makes each “extraordinary” is the fact that the agency purported to regulate a subject far beyond what Congress expected.¹³ The court has applied the doctrine in cases involving previously disclaimed authority over tobacco products,¹⁴ emissions standards for millions of never-before regulated sources of pollutants,¹⁵ reformulation of the landlord-tenant relationship on the basis of public health,¹⁶ federal rescission of state-issued medical licenses,¹⁷ assertion of vaccine mandates as workplace

language to empower an agency to make a radical or fundamental change to a statutory scheme.”) (cleaned up).

¹¹ *Id.* (“[I]n certain extraordinary cases . . . [t]he agency . . . must point to ‘clear congressional authorization’ for the power it claims.” (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014))).

¹² *West Virginia*, 142 S. Ct. at 2609, 2610; *see also* *Arizona v. Walsh*, No. CV-22-00213-PHX-JJT, 2023 WL 120966, at *7-8 (D. Ariz. Jan. 6, 2023) (explaining the major questions doctrine asks whether an agency purports to “exercise novel regulatory powers, relying on *West Virginia*’s discussion of “unheralded power’ . . . represent[ing] a ‘transformative expansion [of] regulatory authority’”).

¹³ The “major questions doctrine” label was not used in the cases presented below, but they were cited by the Court in *West Virginia* as earlier instances of application of the then-yet-to-be-named doctrine. 142 S. Ct. at 2633 (Kagan, J., dissenting) (“The majority labels [its approach] the ‘major questions doctrine,’ and claims to find support for it in our caselaw. But the relevant decisions do normal statutory interpretation[.]”) (citations omitted); *id.* at 2609 (“As for the major questions doctrine ‘label,’ it took hold because it refers to an identifiable body of law that has developed over a series of significant cases[.]”) (cleaned up).

¹⁴ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 127, 137 (2000).

¹⁵ *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014).

¹⁶ *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (per curiam).

¹⁷ *Gonzalez v. Oregon*, 546 U.S. 243 (2006).

safety regulations,¹⁸ and conversion of energy production efficiency regulations into the authority to “cease making power altogether.”¹⁹

In *Brown & Williamson* the FDA used its authority under the Food, Drug, and Cosmetic Act (FDCA) to “regulate combination products as drugs, as devices, or as both” to promulgate a rule intended to reduce tobacco use among young people.²⁰ But the Court faulted the FDA for asserting authority in spite of the FDA’s “long-held position that it lacks jurisdiction under the FDCA to regulate tobacco products,” a position Congress “effectively ratified” by passing six separate pieces of legislation on exactly that topic.²¹

In *Utility Air*, the EPA attempted to classify greenhouse-gas emissions (a combination of six distinct greenhouse gases including carbon dioxide) as an air pollutant under its stationary source permitting program.²² The effect of that regulation would have been that any stationary source emitting more than 100 tons of such gases would be required to undergo what the EPA itself acknowledged was a “‘complicated, resource-intensive, time-consuming, and sometimes contentious process’ suitable for ‘hundreds of larger sources,’ not ‘tens of thousands of smaller sources.’”²³ Because greenhouse-gas emissions, as collectively defined, are released at rates orders of magnitude greater than the pollutants historically regulated under the program, the effect would have been to expand the permitting requirements previously applicable only to large industrial plants or similar sources to “residential buildings, hotels, [and] large retail establishments.”²⁴ The Court held that “it would be patently unreasonable—not to say outrageous—for EPA to insist on seizing expansive power that it admits the statute is not designed to grant.”²⁵ As such, it was the EPA’s assertion of a previously disclaimed broad authority over thousands of small-source entities unlike the large power plants it had regulated before that triggered the major questions doctrine.

In *Alabama Association of Realtors v. HHS*, the Center for Disease Control (“CDC”) sought to impose a nationwide eviction moratorium after Congress decided not to extend the moratorium it had previously imposed.²⁶ The Court took issue with the fact that the program would “intrud[e] into . . . the landlord-tenant relationship” and “significantly alter . . . the power of the Government over private property.”²⁷ In particular, the Court saw no limiting principle: “It is hard to see what measures this interpretation would place outside the CDC’s reach.”²⁸ Thus, as the Court understood the facts, what doomed the agency’s action was the CDC’s intrusion into an area of law beyond

¹⁸ Nat’l Fed’n of Indep. Bus. v. Dep’t of Labor, 142 S. Ct. 661, 665 (2022) (“NFIB v. OSHA”).

¹⁹ *West Virginia*, 142 S. Ct. at 2612.

²⁰ 529 U.S. at 126.

²¹ *Id.* at 144.

²² 573 U.S. at 302.

²³ *Id.* at 323.

²⁴ *Id.* at 310.

²⁵ *Id.* at 324.

²⁶ 141 S. Ct. at 2486.

²⁷ *Id.* at 2489.

²⁸ *Id.*

its substantive remit, under a theory that would imply boundless discretionary regulatory authority.

In *Gonzales v. Oregon*, the Attorney General tried to use his authority under the Controlled Substances Act to threaten doctors with revocation of their medical licenses if they used controlled substances in physician-assisted suicide—which had been legalized by referendum in Oregon.²⁹ The Court found this claim of power “inconsistent with the design of the statute in . . . fundamental respects” because the Attorney General “does not have the sole delegated authority under the CSA” but “must instead share it with, and . . . defer to, the Secretary [of Health and Human Services] . . . so that medical judgments . . . are placed in the hands of the Secretary.”³⁰ The Court found that such an assertion would alter the balance of authority over medical licensure and would threaten to “include the greater power to criminalize even the actions of registered physicians, whenever they engage in conduct he deems illegitimate.”³¹ It was the Attorney General’s substantive assertion of medical expertise he did not have in a manner that implied new discretionary authority over related matters that required the Court to overrule him.

In *NFIB v. OSHA*, the Department of Labor issued an emergency rule requiring all employers with 100 employees or more to design and implement either a vaccination or test-and-mask policy to limit the spread of COVID-19 in the workplace.³² The Court issued a stay of the rule because the Occupational Safety and Health Act “empowers the Secretary [of Labor] to set *workplace* safety standards, not broad public health measures.”³³ It found that “COVID–19 . . . is not an *occupational* hazard in most [workplaces]” and that “[p]ermitting OSHA to regulate the hazards of daily life . . . would significantly expand OSHA’s regulatory authority.”³⁴ In particular, it would expand OSHA’s regulatory authority beyond the workplace because “[a] vaccine, after all, ‘cannot be undone at the end of the workday.’”³⁵ In the Court’s view, allowing such a rule would have radically altered the Department’s authority because the rule sought to control a substantively new category of risk beyond the boundaries of the segment of American life it was designed to deal with.

Finally, in *West Virginia v. EPA* itself, the Court faulted the EPA’s reliance on an “ancillary provision” of a statute to transform its authority to ensure the efficiency of individual power plants into the power to regulate entire sectors of the American energy market out of existence.³⁶ The Court explained that the plan was “unprecedented” and “effected a ‘fundamental revision of the statute’”³⁷ that was beyond any authority Congress had otherwise granted to EPA, let alone the “previously little-used backwater” it faulted the agency for relying on.³⁸ Thus, in the context of the limited scope and prior

²⁹ 546 U.S. at 254.

³⁰ *Id.* at 265.

³¹ *Id.* at 262.

³² 142 S. Ct. at 663–64.

³³ *Id.* at 665 (emphasis in original).

³⁴ *Id.*

³⁵ *Id.*

³⁶ 142 S. Ct. at 2610–12.

³⁷ *Id.* at 2612 (citing *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994)).

³⁸ *Id.* at 2613.

use of the provision relied upon, the breadth of EPA’s plan to reorder the national power grid was beyond the bounds of Congress’s authorization.

Contrast these cases with *Biden v. Missouri*, in which, despite the dissent’s invocation of the major questions doctrine, the Court upheld a rule issued by the Centers for Medicare and Medicaid imposing a COVID-19 vaccination mandate on the staff of healthcare facilities participating in Medicare and Medicaid.³⁹ The Court cited broad language in the statute authorizing the Secretary of HHS to impose conditions on the receipt of Medicaid and Medicare funds that “the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services.”⁴⁰ The Court noted that “COVID–19 is a highly contagious, dangerous, and—especially for Medicare and Medicaid patients—deadly disease” and credited the Secretary’s determination that a vaccine mandate would reduce the risk of transmission in CMS-funded facilities.⁴¹ The Court concluded that “[t]he rule thus fits neatly within the language of the statute,” that “the Secretary routinely imposes conditions of participation that relate to the qualifications and duties of healthcare workers themselves,” and that thus “there can be no doubt that addressing infection problems in Medicare and Medicaid facilities is what [the Secretary] does.”⁴²

These cases yield a clear principle: the major questions doctrine focuses on the subject of the agency action, and on whether it lies within the historic ambit of the subject matter Congress authorized the agency to regulate. An agency’s decision to take a new approach to a problem long within its substantive purview is thus neither “unheralded” nor “transformative.” Rather, it is only when agency action implicates a substantively new claim of authority that it is “unheralded,” and only when it radically alters and expands the agency’s authority that it is “transformative,” and the major questions doctrine is triggered.

B. Non-compete clauses are not a substantively new area for the FTC.

Whether agency action is so substantively new that it is unheralded or transformative is determined by comparison to the historical scope of the agency’s authority. In making that comparison, courts consider i) whether the instant action looks like its regulatory antecedents or is instead unheralded, and ii) whether the instant action transforms the agency’s jurisdiction over a sector of the American economy. Based on those factors, the FTC’s rule is neither unheralded nor transformative: the FTC has taken action on non-competes before, and that practice accords with how the courts and Congress have understood the FTC’s UMC authority under Section Five of the FTCA.

When determining whether an agency action involves a substantively new assertion of authority that rises to the level of “unheralded” or “transformative,” it is

³⁹ *Biden v. Missouri*, 142 S. Ct. 647 (2022).

⁴⁰ *Id.* at 652.

⁴¹ *Id.*

⁴² *Id.* at 652–53.

relevant to consider both specific regulatory precedents,⁴³ and the general scope of an agency’s statutory authority.⁴⁴ Courts use these precedents to determine whether the agency has any “‘comparative expertise’ in making certain policy judgments,”⁴⁵ or whether there is some “mismatch between [the] agency’s challenged action and its congressionally assigned mission and expertise.”⁴⁶ The authorities invoked are considered “in their context and with a view to their place in the overall statutory scheme.”⁴⁷

In some cases, common law precedents may also inform the authority entrusted to an agency where that authority was intended to bring with it common law principles and definitions.⁴⁸ This is such a case. Congress explicitly used the phrase “unfair methods of competition” to expand upon the common law notion of “unfair competition.” “Debate apparently convinced the sponsors of [the FTCA] that the words ‘unfair competition,’ in the light of their meaning at common law, were too narrow.”⁴⁹ “Undoubtedly,” then, “the substituted phrase has a broader meaning.”⁵⁰ As such, the common law understanding of unfair competition and anti-competitive behavior are valuable for demonstrating the subsequent breadth of the FTC’s historic purview regarding competition.

i. Regulatory precedents show that the FTC has long regulated non-compete agreements, so the rule is not unheralded.

The FTC has taken action on non-compete clauses before, so the rule is not “unheralded.” This is confirmed by the fact that non-competes have long been considered anti-competitive under the common law.

The FTC has repeatedly found non-compete clauses to have anticompetitive effects in the context of labor markets. In 2012, the FTC ordered Renown Health to suspend the imposition of non-compete clauses on physicians in their network to allow the physicians “to explore all employment and professional opportunities” available to

⁴³ See, e.g., *NFIB v. OSHA*, 142 S. Ct. at 665 (comparing vaccine mandate to “fire or sanitation regulation[s]” as examples of “the workplace regulations that OSHA has typically imposed”).

⁴⁴ See, e.g., *Util. Air*, 573 U.S. at 302 (considering the rigor of the regulatory scheme EPA was administering and whether it made sense to apply it to “tens of thousands of smaller sources”); *Gonzalez v. Oregon*, 546 U.S. at 265 (considering how the Attorney General’s actions conflicted with “the design of the statute”).

⁴⁵ *West Virginia*, 142 S. Ct. at 2613; see also *Arizona v. Walsh*, 2023 WL 120966, at *7–8 (explaining the major questions doctrine as asking whether an agency purports to “exercise novel regulatory powers,” relying on *West Virginia*’s discussion of “‘unheralded power’ . . . represent[ing] a ‘transformative expansion [of] regulatory authority’”).

⁴⁶ *West Virginia*, 142 S. Ct. at 2623 (Gorsuch, J., concurring); see *NFIB v. OSHA*, 142 S. Ct. at 665 (reviewing history of OSHA workplace regulations to see whether a vaccine requirement that affected workers outside work hours was in line with past practice).

⁴⁷ *West Virginia*, 142 S. Ct. at 2607 (quoting *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 809 (1989)).

⁴⁸ See *Pasquantino v. United States*, 544 U.S. 349, 359 (2005) (“[S]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.”) (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)); see also Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947) (“If a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.”).

⁴⁹ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 532 (1935).

⁵⁰ *F.T.C. v. Raladam Co.*, 283 U.S. 643, 648 (1931).

them, because such clauses would otherwise concentrate labor market power and reduce competition.⁵¹ Likewise, in 2017, the FTC ordered CentraCare Health, a healthcare provider in St. Cloud, Minnesota, to release physicians from “non-compete” contract clauses, allowing them to join competing practices, because of the likely anticompetitive effects of such clauses in the context of a proposed merger.⁵²

The FTC has resolved dozens of such cases across multiple industries.⁵³ In 2000, the FTC prohibited a producer of medical devices from enforcing non-compete restrictions against employees that worked on a line of products it sought to monopolize after the FTC ordered the producer to divest itself of the attempted monopoly, because otherwise the producer could have stymied competition despite divestiture.⁵⁴ Likewise, in 2003, the FTC ordered a chemical company to divest itself of a pigment business it had acquired, and to “remove any impediments” to employee mobility, “including, but not limited to, any non-compete provision,” because otherwise the acquisition would have eliminated competition and consolidated a concentrated market.⁵⁵

In 2014, the FTC ordered two ski manufacturers to end a non-compete agreement obliging each not to poach the employees of the other.⁵⁶ The FTC found that the agreement had the “purpose . . . and likely effect” of “restraining competition . . . [and] harming the economic interests of the affected employees[.]”⁵⁷ The FTC labeled the clauses at issue “Anticompetitive Agreements.”⁵⁸ Just this year, the FTC continued its efforts to address non-competes by resolving multiple enforcement actions through consent agreements prohibiting the use of non-compete clauses.⁵⁹ The FTC has thus long understood and exercised its authority to include the anticompetitive effects of non-compete agreements on labor markets.⁶⁰

⁵¹ Renown Health, 2012 WL 6188550 (F.T.C. Dec. 4, 2012); *see also* Press Release, Fed. Trade Comm’n, FTC Approves Final Order Restoring Competition for Adult Cardiology Services in Reno, Nevada (Dec. 4, 2012), 2012 WL 6016825.

⁵² Fed. Trade Comm’n, *CentraCare Health System, In the Matter of*, <https://www.ftc.gov/legal-library/browse/cases-proceedings/161-0096-centracare-health-system-matter> (last updated Jan. 9, 2017).

⁵³ *See, e.g.*, Tyco Int’l Ltd., 2000 WL 1779005 (F.T.C. Dec. 1, 2000) (endotracheal tube market); Dainippon Ink & Chems., Inc., 135 F.T.C. 263 (Mar. 13, 2003) (organic pigments); Gen. Elec. Co., 138 F.T.C. 782 (Oct. 25, 2004) (technology and explosive detection systems); Whole Foods Mkt., Inc., 2009 WL 1557334 (F.T.C. May 29, 2009) (grocery markets); Pilot Corp., 150 F.T.C. 717 (Nov. 10, 2010); Solera Holdings, Inc., 156 F.T.C. 294 (Oct. 22, 2013) (auto recycling); Eldorado Resorts, Inc., 2020 WL 5234929 (F.T.C. Aug. 25, 2020) (casinos).

⁵⁴ *Tyco*, 2000 WL 1779005, at *7.

⁵⁵ *Dainippon*, 135 F.T.C. at 280.

⁵⁶ Compl., Tecnica Grp., SpA, FTC Docket No. C-4475, 2014 WL 3543218 (July 3, 2014); Marker Volkl Int’l GmbH, 2014 WL 3543223 (F.T.C. July 3, 2014).

⁵⁷ Compl. at ¶ 23, *Tecnica Grp., SpA*, 2014 WL 3543218.

⁵⁸ *Tecnica Grp., SpA*, 2014 WL 3543218 at *3.

⁵⁹ O-I Glass Inc., 2023 WL 2263326 (F.T.C. Feb. 21, 2023); Ardagh Grp. S.A., 2023 WL 2263324 (F.T.C. Feb. 21, 2023); Proposed Decision & Order, Prudential Sec., Inc., FTC Docket No. C-4787 (Jan. 4, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2210026prudentialsecurityproposedorder.pdf.

⁶⁰ For a fuller discussion of the FTC’s regulation of the physician labor market and non-competes therein, see Robert W. McCann & Kenneth M. Vorrasi, *Antitrust Treatment of Physician-Hospital Integration Post-FTC v. St. Lukes*, 28 ANTITRUST 75 (2014).

More generally, the FTC and the courts have long held that exclusive contract clauses constrain competition. In *Federal Trade Commission v. Motion Picture Advertising Service Co.*, the Supreme Court affirmed the FTC’s power to ban anticompetitive contract clauses through adjudication under Section Five by upholding the Commission’s broadly applicable order that exclusive screening contracts for movie theaters could not exceed one year.⁶¹ It held that such “exclusive contracts unreasonably restrain competition and tend to monopoly” and thus their use fell “within the prohibitions of the Sherman Act and is therefore an unfair method of competition within the meaning of s 5(a).”⁶² In so holding, the Court implied that the FTC might have banned such contracts entirely, but that “[t]he precise impact of a particular practice on the trade is for the Commission, not the courts, to determine.”⁶³ In *Polk Bros. v. Forest City Enterprises*, the Seventh Circuit, per Judge Easterbrook, explained that a “covenant not to compete following employment does not operate any differently from a horizontal market division among competitors.”⁶⁴

Non-compete clauses, and their historical antecedents, have likewise long been considered anti-competitive under the common law. As two scholars have explained:

Restrictive covenants, including employee covenants not to compete, have a long history in the common law with the first known agreements of this kind dating back to the 1400s in England. From that time on, they have been recognized as anticompetitive by design because of the effect of their enforcement on curtailing what would otherwise be unfettered worker mobility. Employee CNCs are often found with other restrictive covenants, such as nondisclosure and confidentiality agreements, nonsolicitation-of-client clauses, and nonsolicitation-of-former-fellow-employee provisions. The typical noncompete will also restrict a worker from leaving to start a competing business.⁶⁵

As mentioned above, the FTCA was meant to expand upon the common law notion of “unfair competition.” Therefore, the FTC’s decision to issue a rule banning this historically anti-competitive practice accords with a long history of finding non-compete clauses to diminish market competition and with the FTC’s responsibility for addressing unfair methods of competition.

Importantly as well, this is precisely the FTC’s area of expertise. Unlike *Brown & Williamson* or *Utility Air*, where the agencies had explicitly disclaimed the substantive authority they subsequently attempted to exercise, here the FTC has long understood that it has the authority and expertise necessary to regulate non-compete agreements.

⁶¹ 344 U.S. 392 (1953).

⁶² *Id.* at 394–95 (cleaned up); *see also* *Carter Carburetor Corp. v. F.T.C.*, 112 F.2d 722, 735 (8th Cir. 1940) (invalidating exclusive dealing arrangements between a carburetor producing company and service stations because it foreclosed a competing carburetor company from accessing the market of service stations, thereby preventing competition from new and existing market entrants); *Butterick Co. v. F.T.C.*, 4 F.2d 910, 911 (2d Cir. 1925) (invalidating a clothing manufacturer’s arrangement with distributors that required both exclusive dealing).

⁶³ 344 U.S. at 396.

⁶⁴ 776 F.2d 185, 189 (7th Cir. 1985).

⁶⁵ Norman D. Bishara & Evan Starr, *The Incomplete Noncompete Picture*, 20 LEWIS & CLARK L. REV. 497, 504 (2016).

ii. *Statutory structure shows the rule requires no change to the FTC's authority, so the rule is not transformative.*

The proposed rule regulates the type of anti-competitive behavior that Congress intended the FTC to address in the way it was intended to address it, so the rule is not “transformative.” In assessing whether an agency action is transformative, courts may consider whether it falls within the expected regulatory power of the agency, or if it instead radically alters it.⁶⁶ In other words, the question is whether the rule, if approved, would transform the agency’s statutory mandate. Here, the proposed rule does not make a “radical or fundamental change’ to a statutory scheme,”⁶⁷ nor effect a “transformative expansion in [its] regulatory authority.”⁶⁸

The FTC is statutorily responsible under the FTCA for identifying and regulating unfair methods of competition, whether those practices violate other antitrust laws or not.⁶⁹ The FTCA vested the FTC with broad statutory responsibility. “Unfair methods of competition” under Section Five traditionally encompasses practices that violate either the “letter or . . . spirit of the antitrust laws.”⁷⁰ This includes parallel practices that cause aggregate harm,⁷¹ practices that facilitate tacit coordination between market participants,⁷² and practices that represent potential future violations of the Sherman Act

⁶⁶ *West Virginia*, 142 S. Ct. at 2610–12 (reviewing the history and structure of the Clean Air Act and asking whether it represented a “fundamental revision of the statute”) (citing *MCI*, 512 U.S. at 231)).

⁶⁷ *West Virginia*, 142 S. Ct. at 2609–10 (quoting *MCI*, 512 U.S. at 229).

⁶⁸ *Id.* (quoting *Util. Air*, 573 U.S. at 324).

⁶⁹ *F.T.C. v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986) (holding that Section Five covers “not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons” (citations omitted)); *F.T.C. v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966) (holding that Section Five reaches “practices which conflict with the basic policies” underlying antitrust law, as well as incipient violations of antitrust law).

⁷⁰ *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) (holding that in determining what unfair methods of competition are, the FTC may consider “public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws”). *See also* *Grand Union Co. v. F.T.C.*, 300 F.2d 92 (2d Cir. 1962) (interpreting “unfair methods of competition and unfair acts and practices” under Section Five of the FTCA to include practices outside the scope of amendments to the Clayton Act); *E.I. du Pont de Nemours & Co. v. F.T.C.*, 729 F.2d 128, 136–37 (2d Cir. 1984) (“Although the Commission may under § 5 enforce the antitrust laws, including the Sherman and Clayton Acts, it is not confined to their letter. It may bar incipient violations of those statutes, and conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit.”) (cleaned up); Neil W. Averitt, *The Meaning of “Unfair Methods of Competition” In Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 228, 251 (1980) (“In addition to overt violations [of other antitrust laws] . . . Section 5 would reach closely similar conduct that violates the policy or ‘spirit’ of the antitrust laws, even though it may not come technically within its terms.”).

⁷¹ *See* *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 309, 314 (1949) (taking into account extent of industry use of similar practices in assessing an antitrust violation); *see also* C. Scott Hemphill & Tim Wu, *Parallel Exclusion*, 122 YALE L.J. 1182, 1243–45 (2012) (“parallel exclusion is a suitable subject for FTC enforcement under Section 5 of the FTC Act.”). The FTC has previously acted to enforce the antitrust laws collectively against distinct entities acting in parallel, for example to commit bribery. *See* *McDonnell Douglas Corp.*, 92 F.T.C. 976 (1978); *Boeing Co.*, 92 F.T.C. 972 (1978); *Lockheed*, 92 F.T.C. 968 (1978).

⁷² *BMG Music et. al*, 65 Fed. Reg. 31,319 (F.T.C. May 17, 2000) (analysis to aid public comment), (distributors of pre-recorded music, acting in parallel but without agreement, impose identical coercive limits on retailer advertising of discounts).

in their “incipiency.”⁷³ Relying on that authority to ban noncompete clauses is consistent with this longstanding understanding, because non-compete clauses are adopted by employers in parallel,⁷⁴ pervade the American economy across industry lines, and have the effect of reducing competition. It is thus not “a transformative expansion of its regulatory authority” for the FTC to regulate non-compete agreements.⁷⁵

Congress explicitly intended the FTC’s UMC authority to have the capacity to respond to new unfair practices, new research on existing practices, and practices that restrain competition, but would otherwise be left unregulated—regardless of whether they are undertaken by explicit horizontal agreement or by a monopolist.⁷⁶ To the extent the instant rule is broader than the FTC’s previous approach to non-competes, that scope is anticipated by the FTCA’s breadth relative to the other antitrust statutes for which the FTC is responsible.

Some might argue that the claim of rulemaking authority is itself a change to the statutory scheme authorized by Congress. In the first instance, the major questions doctrine is not the proper framework for analyzing that question—it is properly analyzed as a matter of ordinary statutory interpretation (on which we agree with the FTC that it has rulemaking authority under section five).⁷⁷ That is because the choice to regulate “by general rule or by individual, ad hoc litigation is one that lies first in the informed discretion of the administrative agency.”⁷⁸ The value of two-pronged authority to regulate through either adjudication or rulemaking lies in the capacity of one to inform the other, and the flexibility to choose between the tradeoffs each brings.⁷⁹ *Chenery* tells us it is up to the discretion of the agency to balance those considerations.

⁷³ *Raladam Co.*, 283 U.S. at 647 (“The object of the Trade Commission Act was to stop in their incipiency those methods of competition which fall within the meaning of the word ‘unfair.’”); 51 Cong. Rec. 13118 (1914) (statement of Sen. Reed) (explaining that in section five “we propose to strike those acts in their incipiency instead of after they have been actually worked out into a complete system of monopoly or restraint of trade”). The FTC has adjudicated several cases regarding mere invitations to collude under its Section Five authority as conduct likely to develop into a full-blown violation of the antitrust laws. See Consent Order, Quality Trailer Products Corp., 115 F.T.C. 944 (Nov. 5, 1992) (consent order); Decision & Order, Valassis Commc’ns. Inc., FTC Docket No. C-4160 (Apr. 19, 2006) (consent order); Consent Order, AE Clevite Inc., 116 F.T.C. 389 (June 8, 1993) (consent order); YKK (USA) Inc., 116 F.T.C. 628 (July 1, 1993) (consent order); Consent Order, Precision Moulding Co., Inc., 122 F.T.C. 104 (Sept. 3, 1996) (consent order); , Consent Order, Stone Container Corp., 125 F.T.C. 853 (May 18, 1998) (consent order); Decision & Order, U-Haul Int’l, Inc., FTC Docket No. C-4294 (July 20, 2010) (consent order); In re Delta/AirTran Baggage Fee Antitrust Litig., 245 F. Supp. 3d 1343, 1369-70 (N.D. Ga. 2017), *aff’d sub. nom.*, Siegel v. Delta Air Lines, Inc., 714 F. App’x 986 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 827 (2019); Luria Bros. v. F.T.C., 389 F.2d 847, 864 (3d Cir. 1968), *cert. denied*, 393 U.S. 829 (1968).

⁷⁴ Orly Lobel, *Boilerplate Collusion: Clause Aggregation, Antitrust Law & Contract Governance*, 106 MINN. L. REV. 877, 909 (2021)

⁷⁵ 142 S. Ct. at 2610 (quoting *Utili. Air*, 573 U.S. at 324).

⁷⁶ See 15 U.S.C. § 1 (requiring evidence of a horizontal agreement to find liability for restraining trade); see *id.* § 2 (requiring evidence of monopoly or conspiracy to monopolize to find liability).

⁷⁷ See *supra* Part I.B.ii.

⁷⁸ *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

⁷⁹ See generally Robert L. Glicksman & David L. Markell, *Unraveling the Administrative State: Mechanism Choice, Key Actors, and Regulatory Tools*, 36 VA. ENVTL. L. J. 318 (2018); Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 EMORY L. J. 1469 (2015).

Rulemaking, moreover, is an appropriate way to halt widespread anticompetitive behavior, while adjudications allow the agency to target particularly egregious conduct. Case-by-case adjudication allows for more nuance in any given case, but is slow and costly, and can cause regulators to lose the forest for the trees.⁸⁰ Adjudication and rulemaking complement each other; the ability to proceed via both rulemaking and adjudication enhances the utility of both. Adjudication over time can help to build a record on which subsequent rulemakings can rely to more appropriately address a problem. Rules promulgated in advance, moreover, can put regulated entities on notice as to what policy goals the regulator is prioritizing for enforcement, and provides clarity on the law they are likely to face in hypothetical future adjudications.⁸¹ Indeed, many commentators stress that using rulemaking as its main policy making tool has distinct advantages to the agency as well as the public.⁸²

Here, as discussed above, the FTC has decades of experience adjudicating non-compete agreements and other exclusive dealing contracts. It is in no way unheralded or transformative for the FTC to use that experience to inform its decision to promulgate a rule. None of the major question doctrine cases reviewed above faulted an agency for using a new mode of decisionmaking. Rather, each involved an agency assuming regulatory power over a substantively new field.⁸³ Even if the major questions doctrine were the correct framework for assessing the use of rulemaking, it would not find a transformative change here. The FTCA’s claim of substantive rulemaking authority to implement Section Five under section 6(g) has been around—and been confirmed by the courts—since the Supreme Court’s decision upholding the FTC’s octane-ratings rule, promulgated under its UMC authority, in *National Petroleum Refiners* fifty years ago.⁸⁴ The fact that the FTC now exercises that authority, in precisely the way it has long argued it may, when Congress could have (and did, in another context) acted to constrain that authority, cannot mean that the authority does not exist.⁸⁵

⁸⁰ Case-by-case policymaking “may blind an agency to broader policy implications and pose the risk that atypical details raised by a single case, or emotional reactions to individual litigants’ circumstances, may inappropriately influence decisional outcomes.” Robert L. Glicksman and David L. Markell, *Unraveling the Administrative State: Mechanism Choice, Key Actors, and Regulatory Tools*, 36 VA. ENVTL. L. J. 318 (2018).

⁸¹ Adoption of Recommendations, 84 Fed. Reg. 2139, 2142 (Admin. Conf. of the U.S. Feb. 6, 2019) (discussing the difficulty of finding rules created over time through adjudication).

⁸² See JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 141–43 (6th ed. 2018) (citing Richard K. Berg, *Re-examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 ADMIN. L. REV. 149, 163 (1986)).

⁸³ In *Brown & Williamson*, for example, it was not the FDA’s use of rulemaking that was the problem; it was the topic on which it attempted to regulate, which had been foreclosed by both the FDA and Congress. 529 U.S. at 120.

⁸⁴ *Nat’l Petroleum Refiners Ass’n v. F.T.C.*, 482 F.2d 672, 673 (D.C. Cir. 1973) (considering the FTC’s octane-ratings rule, promulgated under both its UMC authority and its unfair or deceptive acts and practices (“UDAP”) authority under Section Five of the FTCA, and holding “the Federal Trade Commission is authorized to promulgate rules defining the meaning of the statutory standards of the illegality the Commission is empowered to prevent”).

⁸⁵ Contrary to what some critics suggest, see Wilson Dissent, *supra* note 5, at 11, the subsequent limitation on the FTC’s UDAP authority imposed by the Magnuson-Moss Act changed nothing about the FTC’s UMC authority. The passage of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*; 15 U.S.C. § 57a, imposed procedures requiring more than conventional informal rulemaking does under the Administrative Procedure Act. See Jeffrey Lubbers, *It’s Time to Remove the ‘Mossified’ Procedures for FTC Rulemaking*,

Recognizing the FTC’s authority here would not radically alter its regulatory remit. This is not like the Department of Health and Human Services regulating landlords and other entities never before subject to its authority in *Alabama Association of Realtors*, or like the Attorney General’s attempt to make medical policy beyond his expertise that would imply vast changes to his criminal authority in *Gonzales v. Oregon*. Unlike the EPA in *Utility Air*, the entities that would be regulated have long been subject to the FTC’s authority. And in contrast to OSHA’s vaccine-or-test mandate, the non-compete rule would not imply sweeping authority to regulate “hazards of daily life” beyond the workplace—it simply recognizes that the FTC has authority to regulate trade practices that affect competition. Rather, this case is more like CMS’s vaccine mandate for CMS-funded facilities in *Biden v. Missouri*: the FTC’s action “fits neatly within the language of the statute” because addressing unfair methods of competition is “what [the Commission] does.”⁸⁶ Thus, the instant rule is firmly within the authority given to the FTC by Congress and does not represent a “fundamental change to a statutory scheme.”

II. The authority to issue the proposed rule is constitutionally delegated.

Under the nondelegation doctrine, Congress may delegate authority only if it provides an intelligible principle by which to exercise it. The doctrine “is rooted in the principle of separation of powers,” and provides “that Congress generally cannot delegate its legislative power.”⁸⁷ However, “in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”⁸⁸ “So long as Congress ‘shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.’”⁸⁹ Since articulating that test, the Supreme Court has struck down only two congressional delegations of authority.⁹⁰

Commissioner Wilson suggests that “[f]ive Supreme Court justices have expressed interest in reconsidering the Court’s prior thinking on the doctrine,” and cites *Schechter Poultry* for the proposition that the proposed rule goes beyond the adjudicative scheme

83 GEO. WASH. L. REV. (2015). But Congress made no such change to the FTC’s UMC authority. The Act is explicit that what it requires under UDAP “shall not affect any authority of the Commission to prescribe rules . . . with respect to unfair methods of competition.” 15 U.S.C. § 57a(a)(2); *see also* JAY B. SYKES, CONG. RSCH. SERV., LSB10635, THE FTC’S COMPETITION RULEMAKING AUTHORITY 2, (Jan. 11, 2023) <https://crsreports.congress.gov/product/pdf/LSB/LSB10635> (“Magnuson-Moss did not by its terms affect the FTC’s UMC rulemaking authority.”). Congress thus intended for FTC to prescribe rules respecting unfair methods of competition, and for that authority to be free of the tighter strictures of its UDAP authority.

⁸⁶ 142 S. Ct. at 652-53.

⁸⁷ *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989).

⁸⁸ *Id.* at 372.

⁸⁹ *Id.*

⁹⁰ *Id.* at 373 (“Until 1935, this Court never struck down a challenged statute on delegation grounds. After invalidating in 1935 two statutes as excessive delegations, we have upheld, again without deviation, Congress’ ability to delegate power under broad standards.” (cleaned up)).

approved in that case.⁹¹ But this non-delegation analysis assumes a change to the doctrine that has not occurred and that the Commission should not assume.⁹²

Regardless, whether one applies the intelligible principle test that has governed the constitutionality of Congressional delegation of authority for the last ninety-five years,⁹³ or some other, hypothetical test espoused only in dissent, the non-delegation doctrine is satisfied here. The FTC has ample guidance from Congress to regulate unfair methods of competition. Thus, the proposed rule does not implicate the nondelegation doctrine in either its extant or hypothetical forms.

1. Section Five’s delegation of authority to combat “unfair methods of competition” provides an intelligible principle to guide FTC regulation.

The Supreme Court has articulated the nondelegation doctrine as a prohibition against a congressional grant of “blank check” authority to the executive branch to exercise unconstrained discretion in the making of policy. As the Court has explained, the nondelegation doctrine demands only that, “[w]hen conferring decisionmaking authority upon agencies, Congress must lay down an intelligible principle to which the person or body authorized to act is directed to conform.”⁹⁴ However, the “intelligible principle” need not eliminate all room for an agency’s judgment or render that judgment trivial: “It is no objection [to a congressional grant of authority] that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework.”⁹⁵

“Unfair methods of competition” provides an intelligible principle channeling the FTC’s authority within constitutional bounds.⁹⁶ The Supreme Court has repeatedly affirmed⁹⁷ that Section 5 authorizes the FTC to target not only anticompetitive practices

⁹¹ Wilson Dissent, at 12 n. 61, 12–13.

⁹² *Cherokee Nation of Oklahoma v. Norton*, 389 F.3d 1074, 1087 (10th Cir. 2004), *as amended on denial of reh’g* (Feb. 16, 2005) (“Agencies, like courts, must follow Supreme Court decisions.”)

⁹³ *J. W. Hampton, Jr. & Co.*, 276 U.S. at 409 (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).

⁹⁴ *Whitman v. Am. Trucking Ass’ns.*, 531 U.S. 457, 458 (2001).

⁹⁵ *Yakus v. United States*, 321 U.S. 414, 425 (1944).

⁹⁶ The Supreme Court has repeatedly validated delegations of power to determine whether practices are “unfair.” *See Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946) (upholding the SEC’s authority to modify the structure of corporations to ensure they do not “unfairly or inequitably distribute voting power among security holders”); *Yakus*, 321 U.S. at 423–426 (upholding the Office of Price Administration’s authority to set commodity prices at a level that is “generally fair and equitable”). It has also upheld delegations that instruct agencies to act in the public interest. *See Whitman*, 531 U.S. at 474 (“[W]e have found an ‘intelligible principle’ in various statutes authorizing regulation in the ‘public interest.’”) (citing *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 225–226 (1943); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24–25 (1932)).

⁹⁷ See cases cited in FTC, Comm’n File No. P221202, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, at 1 n.3 (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf [hereinafter “FTC Section 5 Policy Statement”].

that would violate the Sherman and Clayton Acts, but also other practices by actors in the marketplace that, although not outlawed by those statutes, the FTC finds to be unfair and to cause injuries to competitive conditions that are similar to harms induced by violations of the antitrust laws.⁹⁸ As the Commission noted in its 2022 policy statement regarding its “unfair methods of competition” authority, the FTCA’s legislative history is replete with guidance that the agency can use to draw analogies to the practices it is investigating, which thus help to mark the boundaries of its authority.⁹⁹

Congress enacted the FTCA with explicit reference to the policies embodied by the other antitrust acts, namely the Clayton and Sherman Acts. It passed the FTCA to augment the existing statutory landscape and to provide a method of addressing future anti-competitive practices; and the FTCA has been interpreted to build on, and expand, the common law concept of unfair competition.¹⁰⁰

The FTC may therefore look to the legislative history of the FTCA; the statutory prohibitions, structure, and history of the Sherman and Clayton acts; and the common law that preceded them all to inform its understanding of “unfair methods of competition.” Therefore, the FTCA (along with the existing law it was intended to

⁹⁸ Isaac Kirschner, *The New Antitrust Rules: The FTC's § 5 Rulemaking Authority*, 78 N.Y.U. ANN. SURV. AM. L. 359, 364–65 (2022) (“[T]he Supreme Court has come to recognize § 5's broad scope and grant of discretion to the FTC. In early cases, the Court constrained the FTC's authority to determine whether conduct was an ‘unfair method of competition’ and stipulated that this power was limited to conduct already found to be anticompetitive. The Court has since confirmed that § 5 covers conduct within the Sherman and Clayton Acts. In *Federal Trade Commission v. R.F. Keppel & Brother, Inc.*, the Court adopted an expanded scope, however, finding that § 5 was not limited to “fixed and unyielding categories” or conduct forbidden at common law or by the Sherman Act. In *Federal Trade Commission v. Sperry & Hutchinson Co.*, the Court . . . concluded that the FTC ‘does not arrogate excessive power to itself if . . . [it] considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.’ Additional cases confirm the FTC's discretion to bring ‘unfair methods of competition’ cases over conduct outside of the existing antitrust laws.”)

⁹⁹ *Id.* at 4 n. 16. (“For instance, a Senate report referenced practices ‘such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition.’ S. REP. NO. 63-597, at 13. In considering what conduct should be prohibited, the House distinguished between ‘artificial bases’ of monopolistic power and ‘natural bases.’ See H.R. REP. NO. 63-533, at 23–25. The House viewed artificial bases of monopolistic power to include, for instance, the acceptance of rates or terms of service from common carriers not granted to other shippers; price discrimination not justified by differences in cost or distribution; procuring the secrets of competitors by bribery or any illegal means; procuring conduct on the part of employees of competitors inconsistent with their duties to their employers; making oppressive exclusive contracts; the maintenance of secret subsidiaries or secretly controlled agencies held out as independent; the destruction or material lessening of competition through the use of interlocking directorates; and the charging of exorbitant prices where the seller has a substantial monopoly. *Id.* Natural bases included control of natural resources, transportation facilities, financial resources, or any other economic condition inherent in the character of the industry, such as patent rights. *Id.* See also 51 CONG. REC. 11084–86 (1914) (statement of Sen. Newlands) (discussing jurisprudence on unfair competition); *id.* at 14928-14931 (statement of Rep. Covington) (discussing jurisprudence on unfair competition); *id.* at 11108 (statement of Sen. Newlands) (providing specific examples of unfair competition, such as local price cutting and organizing ‘bogus independent concerns . . . for the purpose of entering the field of the adversary and cutting prices with a view to his destruction[.]’ among other things); *id.* at 11230 (statement of Sen. Robinson) (providing examples of unfair competition).”); see also *id.* 3 at n. 15.

¹⁰⁰ See *supra* n. 67–73.

augment) provides a sufficiently intelligible principle to guide the FTC's regulation, and the non-delegation doctrine is satisfied.

2. Section five does no more than give the FTC room to “fill up the details.”

Notwithstanding the adequacy of Section 5 under the Court's intelligible-principle standard, Commissioner Wilson suggests that the proposed rule remains vulnerable on non-delegation grounds because “[f]ive Supreme Court justices have expressed interest in reconsidering the Court's prior thinking on the doctrine.”¹⁰¹

Even if the Court were to go down that path, the result would not change. The clearest sense of what a reconsidered nondelegation doctrine might look like presumably comes from Justice Gorsuch's dissent in *Gundy v. United States*.¹⁰² Even if the Court were to adopt Justice Gorsuch's reasoning the proposed rule would meet the threshold he attempts to set. There, Justice Gorsuch describes three categories of congressional delegations to administrative agencies that, in his judgment, raise no nondelegation problem: (1) statutes that “make[] the policy decisions when regulating private conduct” but authorize agencies to “fill up the details”; (2) statutes that “prescribe the rule governing private conduct,” but that make the application of that rule contingent on some form of executive fact-finding; and (3) when Congress accords the Executive branch broad discretion over “matters already within the scope of executive power.”¹⁰³

The proposed rule on noncompete clauses clearly qualifies under the first of these headings. Congress has made the relevant policy decision: that an expert agency ought to root out of the economy unfair methods of competition that harm free markets, including practices that violate the policy underlying other antitrust laws.¹⁰⁴ In identifying what such practices might be, the FCC is “filling up the details.”

The “fill up the details” formulation was first used by Chief Justice Marshall in *Wayman v. Southard*.¹⁰⁵ In enacting the Process Act of 1789, Congress had adopted state laws in force in September of that year as regulating the modes of proceeding in suits at common law in federal court, but with a proviso. The state-prescribed modes of proceeding would be “subject . . . to such alterations and additions as the said Courts respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States shall think proper from time to time, by rule to prescribe to any Circuit or District Court concerning the same.”¹⁰⁶ The Court found no constitutional infirmity in allowing courts to make such “alterations,” “additions,” and “regulations,” even though there was no specific textual limitation on their discretion.

¹⁰¹ Wilson Dissent, *supra* n. 5, at 12 n. 61.

¹⁰² *Gundy*, 139 S. Ct. at 2136.

¹⁰³ *Id.* at 2136–37.

¹⁰⁴ *See supra* Part I.C.ii.

¹⁰⁵ 23 U.S. 1, 43 (1825).

¹⁰⁶ *Id.* at 31.

The Court has been clear that “filling up the details” may entail value judgments or interest balancing beyond specific fact-finding or addressing merely technical administrative issues. For example, in *United States v. Grimaud*, the Court upheld the Secretary of Agriculture’s decision to require, and to charge for, permits for the grazing of sheep on federal forest reserves.¹⁰⁷ The relevant statute authorized the Secretary to “make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations”¹⁰⁸ The statute further provided that the Secretary “may make such rules and regulations and establish such service as will insure the objects of such reservations; namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction.”¹⁰⁹ Although the statute made no mention of requiring permits for the private use of public lands, the Court concluded that the delegation, as implemented, was permissible: “The Secretary of Agriculture could not make rules and regulations for any and every purpose. . . . As to those here involved, they all relate to matters clearly indicated and authorized by Congress.”¹¹⁰

In *United States v. Shreveport Grain & Elevator Co.*, the Court upheld authority delegated under the Food and Drugs Act of June 30, 1906 to prescribe by rule “reasonable variations . . . , and tolerances” with regard to the statutory prohibition against shipping adulterated or misbranded food or drugs in interstate commerce. The Court explained that while Congress may not give away its legislative power, it may:

declare its will, and, after fixing a primary standard, devolve upon administrative officers the ‘power to fill up the details’ by prescribing administrative rules and regulations. . . . The effect of the provision assailed is to define an offense, but with directions to those charged with the administration of the act to make supplementary rules and regulations allowing reasonable variations, tolerances, and exemptions, which, because of their variety and need of detailed statement, it was impracticable for Congress to prescribe.¹¹¹

Three years later, even as it rejected part of the National Industrial Recovery Act as a standardless delegation, the Court said: “Congress may not only give . . . authorizations to determine specific facts, but may establish primary standards, devolving upon others the duty to carry out the declared legislative policy; that is, as Chief Justice Marshall expressed it, ‘to fill up the details’ under the general provisions made by the Legislature.”¹¹²

The same may be said of the proposed rule on noncompete clauses. Congress has not authorized the FTC to regulate with regard to “any and every purpose,” but rather to prohibit “unfair methods of competition,” a term which drew upon the common law and upon existing antitrust statutes. Like the prohibition on “adulterated” food in *Shreveport*,

¹⁰⁷ 220 U.S. 506, 522 (1911).

¹⁰⁸ *Id.* at 509.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 522. Indeed, the Court upheld the delegation in *Grimaud*, even though Congress had provided that violation of the Secretary’s regulations would be punishable as a criminal act. *See also* *United States v. Brown*, 364 F.3d 1266, 1275 (11th Cir. 2004).

¹¹¹ *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932)

¹¹² *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 426 (1935)

Congress fixed the “primary standard” of “unfair methods of competition,” and left the details to the FTC because “it was impracticable for Congress to prescribe” rules as to every unfair practice possible.¹¹³ As the Court explained in *FTC v. Sperry & Hutchinson*, Congress carefully considered “whether it would attempt to define the many and variable unfair practices” or instead by “general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair.”¹¹⁴ “It concluded that the latter course would be the better” because “there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.”¹¹⁵ The Court recognized that if Congress were to try, “it would undertake an endless task.”¹¹⁶ And like the grazing permit system in *Grimaud*, the proposed rule “relate[s] to matters clearly indicated and authorized by Congress.”¹¹⁷ As explained above, non-compete clauses clearly relate to competition and free markets, the matters Congress indicated and authorized for the FTC to regulate.¹¹⁸

The FTC is thus simply “fill[ing] up the details” of what methods of competition are “unfair” within the meaning of the statute, as explained in precedent applying the standard.

3. Rulemaking authority is permissibly delegated under section five.

The final argument offered as to why the proposed rule might violate the non-delegation doctrine is that Congress lacks the ability to properly delegate rulemaking authority to the FTC to combat unfair methods of competition.

Commissioner Wilson argues that the FTC was delegated authority under Section 5 only to adjudicate anticompetitive acts, not to promulgate regulations, because the notion of “unfairness” is inherently too broad to offer an intelligible principle.¹¹⁹ To this end, the Commissioner cites *Schechter Poultry’s* dicta regarding the value of the FTC’s adjudicative procedures for the proposition that the FTC may *only* exercise its UMC authority through adjudication. Although the Commissioner does not explain why this should mean that rulemaking is nondelegable, it is apparently because she believes the notion of “unfairness” can only be elucidated through adjudication, and not through rulemaking.¹²⁰ Under that view, Congress could never intelligibly delegate rulemaking authority over unfair methods of competition. But that is incorrect, because *Schechter Poultry’s* approval of UMC adjudications did not disapprove UMC rulemaking.

The Court’s *Schechter Poultry* dicta did not state that enforcing the UMC standard would represent a constitutional grant of authority *only* if implemented through

¹¹³ 287 U.S. at 85.

¹¹⁴ 405 U.S. at 240 (quoting S. Rep. No. 63-597, at 13 (1914)).

¹¹⁵ *Id.*

¹¹⁶ *Id.* (quoting H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess., 19 (1914)).

¹¹⁷ *Grimaud*, 220 U.S. at 522.

¹¹⁸ *See supra* Part I.B.ii.

¹¹⁹ Wilson Dissent, *supra* n. 5, at 13.

¹²⁰ *Id.*

administrative adjudication.¹²¹ Indeed, such a conclusion would be in tension with the Supreme Court’s insistence that agency action cannot make constitutional an otherwise impermissible abdication of congressional power:

[W]e repeatedly have said that when Congress confers decisionmaking authority upon agencies Congress must ‘lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.’ We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.¹²²

If an agency cannot cure an unconstitutionally broad delegation by voluntarily narrowing its scope, it follows that an agency could not cure the constitutional defect by limiting its choice of regulatory vehicle to adjudications only.¹²³ Thus it cannot be the case that the FTC must confine itself to adjudication to avoid a non-delegation challenge.

Moreover, the conclusion that a grant of decisional authority to an agency depends on its implementing procedures would run afoul of canonical Supreme Court precedent that agencies may freely choose between rulemaking and adjudication. In *SEC v. Chenery Corp.*,¹²⁴ the Court rebuffed a challenge to the agency’s decision to disapprove a proposed amendment to a corporation’s reorganization plan that allowed preferred stock purchased by management during reorganization of the company to be treated on a parity with other preferred stock. The SEC determined that such an amended reorganization would fail the relevant statutory “fair and equitable” standard, even though no prior rule had dealt with the problem at all. The Court held: “The choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”¹²⁵ This principle has been followed on innumerable occasions by the federal judiciary, including by the Supreme Court itself.¹²⁶

Nor is there a nondelegation problem because the FTCA does not itself specify criteria as to when to proceed via rulemaking or adjudication. The choice among the

¹²¹ The Court concluded two years earlier that Congress had not acted unconstitutionally in authorizing the Federal Radio Commission to grant licenses “as public convenience, interest, or necessity requires.” Because Congress’s purposes in conferring such authority were clear from the Federal Radio Act, the statutory standard “[wa]s not . . . so indefinite as to confer an unlimited power.” *Fed. Radio Comm’n v. Nelson Bros Co.*, 289 U.S. 266, 285 (1933). The Court did not mention enforcement through adjudication as necessary to render the statutory standard “intelligible.”

¹²² *Whitman*, 537 U.S. at 472 (citations omitted).

¹²³ Commissioner Wilson also makes the puzzling argument that, “to the extent that the Commission’s Section 5 Policy Statement (which provides the basis for determining that non-compete clauses are an unfair method of competition) abandons the consumer welfare standard to pursue multiple goals, including protecting labor, the Commission’s action more closely resembles the National Industrial Recovery Act codes that also sought to implement multiple goals under the guise of codes of fair competition.” Wilson Dissent, *supra* n. 5, at 13. The Commission’s statement, however, states its target goal clearly, namely, “stopping unfair methods of competition . . . based on their tendency to harm competitive conditions.” FTC Section 5 Policy Statement, *supra* n. 97, at 10. That such efforts may provide a variety of subsidiary benefits, such as entrepreneurship, labor mobility, and consumer welfare does not alter the fact that the rule effectuates Congress’s singular goal under § 5(a).

¹²⁴ 332 U.S. 194.

¹²⁵ *Id.* at 203.

¹²⁶ See e.g., *N.L.R.B. v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 294 (1974).

enforcement mechanisms with which Congress has equipped an agency is a quintessentially administrative decision, reflecting the “balancing of a number of factors which are peculiarly within [agency] expertise.”¹²⁷ As discussed, the rulemaking on non-competes was preceded by individual adjudications that deepened the agency’s understanding of the issues involved and the advantages or disadvantages of proceeding on a categorical or case-by-case basis thereafter.

* * *

For the reasons explained above, the proposed rule on non-compete clauses does not trigger the major questions doctrine and satisfies the non-delegation doctrine. The rule is firmly grounded in the agency’s authority to regulate unfair methods of competition, and the significant work the Commission has done to explain the effects of non-compete agreements on competition demonstrates that. Thank you for the opportunity to comment on this important rulemaking. We look forward to the publication of the final rule.

Respectfully submitted,

Bill Araiza
Stanley A. August Professor of Law
Brooklyn School of Law

Jeffrey Lubbers
Professor of Practice in Administrative Law
American University Washington College of Law

Peter Shane
Jacob E. Davis and Jacob E. Davis II Chair in Law Emeritus
Ohio State University Moritz College of Law

¹²⁷ See *Chenery*, 332 U.S. at 202–03 (“[P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards.”); cf. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).