Comments

When Market Competition Becomes Fair Game: The FTC's Non-Compete Ban and Its Legal Challenges

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ABSTRACT

Non-compete agreements between employees and employers are pervasive across industries and demographic groups. Over half of workers bound to a non-compete are hourly workers. Large companies like Amazon and Jimmy John's garnered national attention for their use of non-competes in low-wage jobs where the traditional rationales for non-competes are unlikely to apply. Non-competes create significant economic and social impacts, raising public policy concerns that non-competes exploit workers and threaten their ability to practice a trade and earn a living. Due to these policy concerns, the common law has limited an employer's ability to enforce non-competes. In May 2024, the Federal Trade Commission (FTC) banned almost all of these agreements. Various businesses across the country challenged the ban, claiming the FTC lacked authority to ban non-competes.

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This Comment examines the non-compete ban and its legal challenges. These legal challenges focus on whether the FTC Act authorizes the FTC to issue the non-compete ban. This Comment will provide an overview of the Act, arguing it authorizes the FTC to regulate unfair methods of competition through substantive rulemaking. Additionally, this Comment will provide an overview of administrative law as the legal challenges to the non-compete ban contest the rulemaking authority of the FTC, an administrative agency. Administrative law is undergoing significant development following the Supreme Court's decision to end *Chevron* deference, which potentially threatens the non-compete ban by restricting courts from deferring to the FTC's statutory interpretation. Despite this major legal shift, this Comment argues that the FTC has rulemaking authority to ban non-competes under current administrative law principles.

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I. INTRODUCTION

On May 7, 2024, the Federal Trade Commission (FTC) banned non-compete agreements between employers and employees.[1] Businesses across the country challenged the ban in federal court, claiming the FTC lacked authority to ban non-compete agreements.[2] After a Texas judge's order, the non-compete ban, initially set to take effect on September 4, 2024, now faces uncertainty.[3]

A non-compete agreement ("non-compete") prohibits an employee from competing with an employer after the employment period ends, typically for a specified duration within a designated geographical area.[4] Courts have acknowledged a legitimate business interest in non-competes for a variety of reasons.[5] Non-competes safeguard the time and resources an employer invested in training its employees; an employee's special skills; customer goodwill; and confidential business information, including processes, trade secrets, and inventions.[6]

The law historically has limited an employer's ability to enforce non-competes because of public policy concerns.[7] For centuries, courts have recognized the need for judicial review over excessive and unreasonable non-competes due to their tendency to exploit workers and threaten a worker's ability to earn a living in a given trade.[8] Courts acknowledge that, in many instances, an employer with bargaining power can induce an employee to agree to a non-compete purely for the non-legitimate reason of shielding the employee from competition.[9] This bargaining power

1. *See* Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38342 (May 7, 2024) (to be codified at 16 C.F.R. pt. 910).

2. *See* Ryan LLC v. Fed. Trade Comm'n, 739 F. Supp. 3d 496, 507 (N.D. Tex. July 3, 2024); *see also* Ryan LLC v. Fed. Trade Comm'n, 746 F. Supp. 3d 369, 374–75 (N.D. Tex. Aug. 20, 2024); *see also* ATS Tree Servs., LLC v. Fed. Trade Comm'n, No. CV 24-1743, 2024 WL 3511630, at *12 (E.D. Pa. July 23, 2024); *see also* Props. of the Vills., Inc. v. Fed. Trade Comm'n, No. 5:24-CV-316-TJC-PRL, 2024 WL 3870380, at *1 (M.D. Fla. Aug. 15, 2024).

3. *See* Ryan LLC v. Fed. Trade Comm'n, 746 F. Supp. 3d at 374–75.

4. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38346, 38373.

5. *See* Socko v. Mid-Atl. Sys. of CPA, Inc., 633 Pa. 555, 567 (2015).

6. *See id.*

7. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38343; *see also* Mitchel v. Reynolds, 1 P. Wms. 181, 190 (Q.B. 1711); *see also* RESTATEMENT (SECOND) OF CONTS. § 188 cmt. g (A.L.I. 1981) (asserting "post-employment restraints are scrutinized with particular care" and especially so when imposed by the employer's standardized printed form).

8. *See Mitchel*, 1 P. Wms. at 190 (reasoning non-competes threaten the loss of the worker's livelihood and ability to provide for his family); *see also* Non-Compete Clause Rule, 89 Fed. Reg. at 38343, 38346.

9. *See Mitchel*, 1 P. Wms. at 190; *see also* RESTATEMENT (SECOND) OF CONTS. § 188 cmt. g (A.L.I. 1981).

allows an employer to effectively require an employee to sign a non-compete, diminishing the employee's agency to deny or negotiate these agreements.[10]

Non-competes are "pervasive" across American industries and demographic groups.[11] Approximately one in five American workers are bound to a non-compete.[12] Over half of workers bound to a non-compete are hourly workers,[13] indicating a large share of non-competes involve low-wage workers.[14] For example, low-wage workers at large companies like Jimmy John's and Amazon have entered non-competes.[15] These companies garnered national attention for their use of non-competes in low-wage jobs where the traditional rationales for non-competes are unlikely to apply.[16] The rising costs of litigating against large franchisors have likely contributed to the prevalence of non-competes that restrict low-wage workers.[17] Further, the recent practice of imposing arbitration agreements to settle any challenge by a single party has likely facilitated this trend.[18]

This Comment examines the FTC's effort to ban non-competes and the legal challenges to the FTC's regulation based largely on whether the

10. *See* Stephen Fox, *Breaking the Non-Compete Cycle: A Legal and Economic Analysis of the FTC's Power Move*, 92 U. CIN. L. REV. 607, 607–08 (2023); *see also* RESTATEMENT (SECOND) OF CONTS. § 188 cmt. g (A.L.I. 1981) (explaining "the employee is likely to give scant attention to the hardship he may later suffer through loss of his livelihood"); *see also* Non-Compete Clause Rule, 89 Fed. Reg. at 38375.

11. Non-Compete Clause Rule, 89 Fed. Reg. at 38346.

12. *See id.* (formulating this estimate based on the FTC's data analysis, studies published by economists, and the public comments record); *see also* ALEXANDER J.S. COLVIN & HEIDI SHIERHOLZ, NONCOMPETE AGREEMENTS 3 (2019).

13. *See* Colvin & Shierholz, *supra* note 12, at 3 (measuring the percentage of American business using non-competes based on establishment size, state, industry, average wage level, and typical education level and concluding 53% of workers bound to a non-compete are hourly workers).

14. *See* Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, 68 Mgmt. Sci. 143, 144 (2022) (citing Evan P. Starr, J.J. Prescott & Norman D. Bishara, *Noncompete Agreements in the US Labor Force*, 64 J. L. & ECON. 53, 53 (2021)) (using nationally representative survey data on 11,505 labor force participants to examine non-compete use and outcomes).

15. *See* Dave Jamieson, *Jimmy John's Makes Low-Wage Workers Sign 'Oppressive' Noncompete Agreements*, HUFFPOST (Apr. 23, 2024), https://perma.cc/EWN3-NLZ6; *see also* Spencer Woodman, *Exclusive: Amazon Makes Even Temporary Warehouse Workers Sign 18-Month Non-Competes*, THE VERGE (Mar. 26, 2015), https://perma.cc/YD5Q-YD53.

16. *See* Lipsitz & Starr, *supra* note 14, at 1.

17. *See* Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38343 (May 7, 2024) (to be codified at 16 C.F.R. pt. 910). The FTC explained the pervasiveness of non-competes suggests that workers can no longer enforce their rights through litigation. *See id.* Employers have subjected these workers to threats and litigation, which have "destroyed their finances, and upended their lives." *Id.*

18. *See id.* at 38375.

FTC Act ("the Act") authorizes the FTC to issue the non-compete ban.[19] This discussion provides an overview of the Act, focusing on its major provisions, §§ 5 and 6.[20] This Comment argues that the Act authorizes the FTC to regulate unfair methods of competition by making substantive rules like the Non-Compete Rule.[21]

Additionally, this Comment includes a brief summary of U.S. administrative law because the legal challenges to the ban contest the rulemaking authority of the FTC, an administrative agency.[22] Administrative law is undergoing significant development following the Supreme Court's recent decision to overturn *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[23] The Court's decision in *Loper Bright Enterprises v. Raimondo* ended forty years of precedent that upheld judicial deference to an agency's statutory interpretation.[24] Despite this major legal shift,[25] this Comment will argue that the FTC has rulemaking authority to ban non-competes under current administrative law principles.[26]

II. BACKGROUND

In a well-functioning labor market,[27] employers compete for labor services and workers compete for job opportunities.[28] Workers compete for job opportunities by offering their labor services to employers.[29] Employers compete for labor services by offering workers better pay, benefits, or working conditions than competitors.[30] The ability of workers and employers to search the market for better employment opportunities

19. *See id.* at 38342; *see also* Ryan LLC v. Fed. Trade Comm'n, 739 F. Supp. 3d 496, 507 (N.D. Tex. July 3, 2024); *see also* Ryan LLC v. Fed. Trade Comm'n, 746 F. Supp. 3d 369, 375 (N.D. Tex. Aug. 20, 2024); *see also* ATS Tree Servs., LLC v. Fed. Trade Comm'n, No. CV 24-1743, 2024 WL 3511630, at *13 (E.D. Pa. July 23, 2024); *see also* Props. of the Vills., Inc. v. Fed. Trade Comm'n, No. 5:24-CV-316-TJC-PRL, 2024 WL 3870380, at *1 (M.D. Fla. Aug. 15, 2024).

20. *See infra* Section II.B.

21. *See infra* Section III.A.

22. *See infra* Section II.C.

23. *See* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843 (1984); *see also* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024); *see also infra* Section II.C.2.

24. *See Loper Bright Enters.*, 144 S. Ct. at 2273; *see also Chevron, U.S.A., Inc.*, 467 U.S. at 843; *see also infra* Section II.C.2.

25. *See Loper Bright Enters.*, 144 S. Ct. at 2244.

26. *See infra* Section III.B.

27. This Comment addresses non-unionized labor markets only.

28. *See* Fox, *supra* note 10, at 607.

29. *See* Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38380 (May 7, 2024) (to be codified at 16 C.F.R. pt. 910).

30. *See id*.

and labor services, respectively, creates a competitive market.[31] Competitive market conditions generate positive economic outcomes, including higher earnings for workers and more productivity for employers.[32]

Non-competes disrupt competitive market conditions.[33] In prohibiting workers from competing with employers after the original employment period ends, non-competes suppress labor mobility and reduce the labor pool available to employers.[34] Consequently, non-competes prevent workers from accepting better jobs and employers from hiring better talent.[35] Alternatively stated, non-competes impede "efficient matching" between employers and workers.[36]

A. The Non-Compete Rule

The FTC addressed the adverse effects of non-competes by promulgating the Non-Compete Clause Rule ("Non-Compete Rule"), banning nearly all non-competes.[37] On January 19, 2023, the FTC proposed the Non-Compete Rule pursuant to its authority under the Act.[38] On May 7, 2024, the FTC issued its final Non-Compete Rule which provides that, effective September 4, 2024, entering non-competes with

31. *See* Fox, *supra* note 10, at 607; *see also* Non-Compete Clause Rule, 89 Fed. Reg. at 38380.

32. *See* Matthew S. Johnson, Kurt Lavetti & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility*, SSRN 2, 21 (2020), https://perma.cc/UC5T-3GUQ (finding that decreasing non-compete enforceability from the level of the fifth-strictest state to that of the fifth-most-lax state would increase workers' earnings by 3–4%, and that a nationwide non-compete ban would increase average earnings by 3.3–13.9%); *see also* Non-Compete Clause Rule, 89 Fed. Reg. at 38380.

33. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38379-38380.

34. *See* Johnson, Lavetti & Lipsitz, *supra* note 32, at 21 (examining how changes to state law governing non-compete agreements impacted labor mobility, as measured by job separations, hiring rates, job-to-job mobility, within-industry mobility, between-industry mobility, and implicit mobility defined by job tenure).

35. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38379; *see also* Johnson, Lavetti & Lipsitz, *supra* note 32, at 21.

36. Non-Compete Clause Rule, 89 Fed. Reg. at 38379; *see also* Fox, *supra* note 10, at 607–08 (explaining that non-competes prevent workers and employers from "finding their optimal matches" which lowers economic productivity and reduces wages).

37. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38343 (explaining concerns about non-competes have "increased substantially" in recent decades because of emerging research showing non-competes tend to impede competition in labor markets and suppress wages for workers across the country); *see also* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

38. *See* Non-Compete Clause Rule, 88 Fed. Reg. at 3482; *see also* Federal Trade Commission Act, 15 U.S.C. §§ 41–58.

workers is an unfair method of competition in violation of § 5 of the Act.[39] The Rule also requires employers to rescind existing non-competes.[40]

The FTC's rulemaking record contains an extensive study of non-competes showing their harmful economic effects.[41] The FTC cited research and data analysis indicating that non-competes suppress earnings for workers across the labor force, including for workers not bound to non-competes.[42] In addition, the FTC's rulemaking record contains thousands of comments from workers describing how non-competes stopped them from taking better jobs or starting competing businesses.[43] The record also includes complaints from small business owners who struggled to hire talented workers because of non-competes.[44]

The FTC deemed a comprehensive non-compete ban necessary because the existing approach in which states regulate non-competes on a case-by-case basis fails to adequately address harms caused by non-competes.[45] As the FTC explained, the prevalence of non-competes indicates that employers often use non-competes that are unenforceable under state law.[46] The FTC concluded that the legal uncertainty surrounding non-competes and variation in state non-compete law have become "extremely burdensome" for employers and workers alike.[47]

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39. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38342 (defining non-compete as a term or condition of employment that prevents a worker from (a) seeking or accepting work with a different person after the conclusion of the original employment; or (b) operating a business after the conclusion of the original employment); *see also* 15 U.S.C. § 45.

40. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38342.

41. *See id.* at 38343 (explaining changes to state non-compete law in recent decades have enabled economists to isolate the effects of non-competes and produce the body of research contained in the rulemaking record).

42. *See* Non-Compete Clause Rule, 88 Fed. Reg. at 3486; *see also* Johnson, Lavetti & Lipsitz, *supra* note 32, at 21.

43. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38344 (compiling worker comments explaining how non-competes have "suppressed their wages, harmed working conditions, negatively affected their quality of life, reduced the quality of the product or service their company provided, prevented their business from growing and thriving, and created a climate of fear that deters competitive activity").

44. *See id.* (citing Individual Commenter, Public Comment FTC-2023-0007-6142 on Proposed Non-Compete Clause Rule (May 7, 2024), https://perma.cc/86H4-5BSG (explaining "aggressive" non-competes of large freight brokerages force skilled workers out of the logistics market for an entire year or even a lifetime when workers have little choice but to switch career paths)).

45. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38343 (explaining the prevalence of non-competes suggests workers struggle to enforce their legal rights through litigation, in part because workers may lack knowledge of their rights, which employers may use to their advantage).

46. *See id.* (explaining employers' use of choice-of-law provisions, variation in the way courts apply of choice-of-law rules in non-compete disputes, and "the increasingly interstate nature of work" limit the ability of states to regulate non-competes).

47. *Id.*

B. The Federal Trade Commission Act

Under long-standing precedents, federal courts would likely uphold the FTC's issuance of a rule declaring a particular practice an unlawful "unfair method of competition" given the substantial evidence the FTC compiled in support of its final rule.[48] However, a detailed review of the Act is important because the main legal challenge to the Non-Compete Rule re-opens the question surrounding the FTC's power to issue a substantive trade regulation rule.[49] Thus, discerning the nature and scope of the FTC's authority under the Act is crucial for determining whether the FTC exceeded its authority in issuing the Rule.[50]

At the height of the antitrust movement,[51] Congress passed the Act establishing a bipartisan agency charged with preventing unfair methods of competition in commerce.[52] Supplementing the Sherman and Clayton Acts, the Act vests the FTC with the power to prohibit trade practices that restrain competition or would result in such restraint if not stopped in their early stages.[53]

Congress passed the Act in response to the "judicial monopolization" of cases involving unfair business practices.[54] When first deciding

48. *See* Nat'l Petroleum Refiners, Ass'n v. FTC, 482 F.2d 672, 673 (D.C. Cir. 1973); *see also* U.S. v. JS & A Grp., Inc., 716 F.2d 451, 454 (7th Cir. 1983); *see also* 15 U.S.C. §§ 45; *see also* Non-Compete Clause Rule, 89 Fed. Reg. at 38343.

49. *See* Ryan LLC v. Fed. Trade Comm'n, 739 F. Supp. 3d 496, 507 (N.D. Tex. July 3, 2024); *see also* Ryan LLC v. Fed. Trade Comm'n, 746 F. Supp. 3d 369, 375 (N.D. Tex. Aug. 20, 2024); *see also* ATS Tree Servs., LLC v. Fed. Trade Comm'n, No. CV 24-1743, 2024 WL 3511630, at *12 (E.D. Pa. July 23, 2024); *see also* Props. of the Vills., Inc. v. Fed. Trade Comm'n, No. 5:24-CV-316-TJC-PRL, 2024 WL 3870380, at *1 (M.D. Fla. Aug. 15, 2024).

50. *See infra* Section III.A.

51. *See generally* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 2 (2003). The antitrust movement began when Congress passed the Sherman Act and culminated when Congress passed the Act and the Clayton Act in an effort to control corporate growth while protecting corporate profitability and opportunity. *See id.*

52. *See* 15 U.S.C. §§ 41–58.

53. *See* Fashion Originators' Guild, Inc. v. FTC, 312 U.S. 457, 466 (1941) (holding the FTC may suppress, as an unfair method of competition, combinations opposed to the public policy declared in the Sherman and Clayton Acts, since the Act sought to reach "not merely in their fruition but also in their incipiency combinations which could lead to these and other trade restraints and practices deemed undesirable"); *see also* FTC v. Cement Inst., 333 U.S. 683, 693 (1948) (holding the Act sought not only to continue Sherman Act enforcement by the Department of Justice and the federal courts, but also to supplement that enforcement through the FTC's administrative process); *see generally* Sherman Anti-Trust Act, 15 U.S.C. §§ 1–7 (prohibiting contracts in restraint of trade and monopolization); *see generally* Clayton Act, 15 U.S.C.A. §§ 12–27 (outlawing monopolistic conduct such as price discrimination against competing companies, conditioning sales on exclusive dealing, and mergers and acquisitions when they may substantially reduce competition).

54. Nat'l Petroleum Refiners, Ass'n v. FTC, 482 F.2d 672, 687 (D.C. Cir. 1973).

Sherman Act claims, the Supreme Court attempted to balance antitrust protections with freedom of contract principles through the "rule of reason."[55] In the landmark case *Standard Oil Co. of New Jersey v. United States*, the rule of reason established that only unreasonable restraints on trade violate the Sherman Act.[56] A restraint on trade was unreasonable only when the restraint caused a monopolized product to increase in price, decrease in output, or lower in quality.[57] Congress feared the rule of reason delivered unpredictable results and allowed corporate-sympathetic judges to interpret the rule in ways contrary to legislative preferences.[58] Legislators believed an administrative body could prevent unfair competition more effectively than courts.[59] In passing the Act, Congress intended for administrators to apply the Act to specific business situations "so as to eradicate evils with the least risk of interfering with legitimate business operations."[60]

1. Section 5 of the Federal Trade Commission Act

Section 5 of the Act empowers the FTC to prevent the use of "unfair methods of competition" and "unfair or deceptive acts or practices" in commerce.[61] Section 5 further empowers the FTC to adjudicate administrative proceedings when the FTC suspects a party has engaged in prohibited conduct.[62] After determining a party has violated § 5, the FTC may issue a cease and desist order.[63]

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55. Standard Oil Co. of New Jersey v. U.S., 221 U.S. 1, 62 (1911) (explaining Sherman Act disputes require courts to adhere to "the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the [Sherman Act] and thus the public policy which its restrictions were obviously enacted to subserve"); *see also* ATS Tree Servs., LLC v. Fed. Trade Comm'n, No. CV 24-1743, 2024 WL 3511630, at *3 (E.D. Pa. July 23, 2024).

56. *See Standard Oil Co. of New Jersey*, 221 U.S. at 87. The Court did not accept the plain meaning of the Sherman Act but rather interpreted it as prohibiting "any such contract which is in unreasonable restraint of trade, while leaving all others unaffected by the provisions of the act." *Id.*

57. *See id.* at 52 (explaining the evils of monopolies stem from the following harms to the public: (1) the power of monopoly owners to fix prices; (2) the power of monopoly owners to limit production; and (3) the inevitable danger that monopolistic control of a certain product will cause the deterioration of its quality).

58. *See* S. REP. NO. 62-1326, at 10 (1913) (explaining the rule of reason "substitutes the court in the place of Congress"). Congress enacted the Act in 1914 during the *Lochner* era in which judges disfavored limitations on the freedom to contract. *See* Winerman, *supra* note 52, at 2–3, 30–32, 37. President Theodore Roosevelt played a crucial role in developing antitrust policy that increased government intervention to stop unfair trade practices and gave rise to the FTC. *See id*. at 2–3, 30–32.

59. *See* H.R. REP. NO. 63–1142, at 19 (1914) (Conf. Rep.).

60. *Id.*

61. 15 U.S.C. § 45(a).

62. *See* 15 U.S.C. § 45(b).

63. *See id*.

Section 5 policy statements define "unfair" conduct as that which "goes beyond competition on the merits."[64] The policy statements set forth two criteria for determining whether conduct goes beyond competition on the merits.[65] The first criterion evaluates whether the conduct is coercive, exploitative, collusive, deceptive, or predatory.[66] The second criterion assesses whether the conduct negatively affects competitive conditions.[67] Conduct that negatively affects competitive conditions includes conduct that (a) limits the choices and opportunities of market participants; or (b) decreases competition between rivals.[68] The FTC weighs the two criteria on a sliding scale.[69] Given the FTC's authority to prevent unfair conduct,[70] the § 5 inquiry concentrates on whether the conduct tends to produce negative consequences when assessed in the aggregate with the same or similar conduct of others.[71] The § 5 analysis does not focus on whether certain conduct caused actual harm in a particular instance.[72]

Further, legislative history indicates that Congress designed the phrase "unfair methods of competition" as a flexible and evolving concept for the FTC to develop.[73] Congress considered enumerating the particular practices that constituted unfair methods of competition, but ultimately

64. *See* FEDERAL TRADE COMMISSION, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT 8 (2022), https://perma.cc/J535-82JP (explaining § 5 conduct constitutes more than a mere condition of the marketplace but it may implicate competition indirectly); *see also* U.S. v. Microsoft Corp., 253 F.3d 34, 56–59 (D.C. Cir. 2001) (holding Microsoft's licensing agreement constituted conduct that went beyond competition on the merits because the agreement reduced usage share of a competitor's browser, preserving Microsoft's operating system monopoly).

65. *See* FEDERAL TRADE COMMISSION, *supra* note 64, at 9.

66. *See id.* (citing Fed. Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233, 243 (1972); Atlantic Refining Co. v. Fed. Trade Comm'n, 381 U.S. 357, 369 (1965); *see also* Fed. Trade Comm'n v. Gratz, 253 U.S. 421, 427 (1920) (describing unfair methods of competition as "opposed to good morals," characterized by "deception, bad faith, fraud or oppression," and contrary to public policy in tending to suppress competition or produce monopoly)); *see also* Fed. Trade Comm'n v. Washington Data Res., 856 F. Supp. 2d 1247, 1275 (M.D. Fla. 2012), *aff'd sub nom.*, F.T.C. v. Washington Data Res., Inc., 704 F.3d 1323 (11th Cir. 2013) (holding corporations violated § 5 by deceptively overstating the likelihood consumers would receive an affordable home loan).

67. *See* FEDERAL TRADE COMMISSION, *supra* note 64, at 9 (citing S. REP. No. 62-1326, at 3–4 (1913) (stating that "every possible effort to create and preserve competitive conditions should be made")).

68. *See* FEDERAL TRADE COMMISSION, *supra* note 64, at 9–10.

69. *See id.* at 9 (explaining that when "the indicia of unfairness are clear, less may be necessary to show a tendency to negatively affect competitive conditions").

70. *See* 15 U.S.C. § 45(a).

71. *See* FEDERAL TRADE COMMISSION, *supra* note 64, at 9–10 (citing Fed. Trade Comm'n v. Motion Picture Advertising Serv. Co., 344 U.S. 392, 395 (1953)).

72. *See* FEDERAL TRADE COMMISSION, *supra* note 64, at 9–10.

73. 15 U.S.C. § 45(a); *see also* S. REP. NO. 63-597, at 13 (1914).

rejected this approach.[74] Instead, Congress adopted a broad term, providing leeway for the FTC to determine the practices that violate § 5 under changing market conditions.[75]

2. Section 6 of the Federal Trade Commission Act

While § 5 of the Act provides the FTC's authority to prevent unfair competition,[76] § 6 of the Act lays out the FTC's enforcement powers.[77] Section 6, entitled "Additional Powers," grants the FTC mechanisms for administering § 5, including investigatory, regulatory, and rulemaking powers.[78] Specifically, § 6(g) empowers the FTC "to make rules and regulations to carry out the provisions of this Act."[79]

In the decades following the Act's 1914 enactment, the FTC asserted its § 6 authority only with respect to procedural rules, but it delivered speeches and wrote articles advocating for the use of substantive rulemaking.[80] In 1962, the FTC amended its General Procedures and Rules of Practice to allow the promulgation of trade regulation rules, and began asserting its § 6 power to issue substantive rules that affirmatively defined unfair methods of competition.[81] One of these early rules required the disclosure of minimum octane numbers on gasoline pumps ("Octane Rule").[82]

In *National Petroleum Refiners Association v. FTC*, gasoline companies challenged the Octane Rule, arguing § 6 authorizes the FTC to issue only procedural, rather than substantive, rules.[83] Deciding this issue

74. *See* S. REP. NO. 63-597, at 13 (1914) (explaining the committee concluded "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").

75. *See* S. REP. NO. 63-597, at 13 (1914); *see also* H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.); see also FEDERAL TRADE COMMISSION, *supra* note 64, at 3.

76. *See* 15 U.S.C. § 45; *see also* ATS Tree Servs., LLC v. Fed. Trade Comm'n, No. CV 24-1743, 2024 WL 3511630, at *4 (E.D. Pa. July 23, 2024).

77. *See* 15 U.S.C. § 46; *see also ATS Tree Servs.*, 2024 WL 3511630, at *13.

78. 15 U.S.C. § 46.

79. 15 U.S.C. § 46(g).

80. *See* Burrus & Teter, *Antitrust: Rulemaking v. Adjudication in the FTC*, 54 Geo. L.J. 1106, 1109–18 (1966); *see also Substantive Rulemaking and the FTC*, 42 Fordham L. Rev. 178, 179 (1973).

81. *See Substantive Rulemaking and the FTC*, 42 Fordham L. Rev. 178, 179 (1973). The FTC declared it an unfair or deceptive act or practice to fail to disclose certain health warnings on cigarette packaging and in cigarette advertisements. *See* Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324 (July 2, 1964) (to be codified at 16 C.F.R. pt. 1.61).

82. *See* Posting of Minimum Octane Numbers of Gasoline Dispensing Pumps, 36 Fed. Reg. 23871 (Dec. 16, 1971), *repealed by*, 43 Fed. Reg. 43022 (Sep. 22, 1978).

83. *See* Nat'l Petroleum Refiners Ass'n v. FTC, 340 F. Supp. 1343, 1344 (D.D.C. 1972). Shortly before this decision, Congress began legislation to grant the FTC an express rulemaking power in at least the area of unfair and deceptive practices. *Substantive*

of first impression, the D.C. District Court held the FTC lacked statutory authority to issue substantive trade regulation rules like the Octane Rule.[84] The court reasoned that the Act's legislative history shows Congress intended § 6(g) as authority to issue only "internal rules of organization, practice, and procedure" such as rules demanding reports from corporations.[85] As the court explained, the early versions of the House and Senate Bills lacked the adjudicatory power provision, and only granted the FTC investigative power.[86] Thus, Congress must have intended § 6(g) rulemaking as a supplement to the FTC's investigative power, rather than an extension of its adjudicatory power to prescribe unfair practices.[87] The court noted that Congress never indicated otherwise despite amending the Act several times, and Congress twice refused to amend proposals to expressly grant the FTC substantive rulemaking power.[88]

However, the D.C. Circuit reversed, holding that § 6 authorizes the FTC to issue "rules defining the meaning of the statutory standards of the illegality the Commission is empowered to prevent."[89] Writing for the majority, Judge Skelly Wright reasoned that the Supreme Court has repeatedly upheld the agency practice of promulgating substantive rules, showing an "obvious judicial willingness" to allow rulemaking over adjudication.[90] Courts have adopted the general rule that an agency may use rulemaking to define standards of illegality when its authorizing statute contains a broad rulemaking provision like § 6(g).[91] General rulemaking provisions demonstrate the legislative intent to equip agencies to address unforeseen problems in regulating large industries.[92] Since the Act's framers could not specify every unfair method of competition, they created the FTC to address problems using the industry expertise that legislators lacked.[93] Therefore, the scope of the FTC's power extends beyond the explicit language of the Act; although the FTC must follow the statutory language, but it may use methods not detailed.[94]

Rulemaking and the FTC, 42 Fordham L. Rev. 178, 195–96 (1973); *see also* S. 356, 93d Cong., 1st Sess. § 109 (1973); *see also* H.R. 20, 93d Cong., 1st Sess. § 203 (1973).

84. *See Nat'l Petroleum Refiners Ass'n*, 340 F. Supp. at 1344–45.

85. *Id.* at 1345.

86. *See id.*

87. *See id.* at 1345–46.

88. *See id.* at 1346.

89. Nat'l Petroleum Refiners, Ass'n v. FTC, 482 F.2d 672, 698 (D.C. Cir. 1973).

90. *Id*. at 679 (citing Nat'l Broadcasting Co. v. U.S., 319 U.S. 190 (1943); U.S. v. Storer Broadcasting Co., 351 U.S. 192 (1956); FPC v. Texaco, Inc., 377 U.S. 33, 39–41 (1964)).

91. *See id.* at 680 (citing Pub. Serv. Comm'n of State of New York v. FPC, 327 F.2d 893, 897 (1964)).

92. *See Nat'l Petroleum Refiners, Ass'n*, 482 F.2d at 680.

93. *Id.* at 681 (citing American Trucking Ass'ns v. U.S., 344 U.S. 298, 310 (1953)).

94. *Nat'l Petroleum Refiners, Ass'n*, 482 F.2d at 680–81 (citing *American Trucking Ass'ns*, 344 U.S. at 310) (rejecting Plaintiffs' argument that the Act authorizes rulemaking

The court explained that although the framers' *specific* intent cannot be known, the court should resolve any statutory ambiguity in favor of the FTC because rulemaking aligns with the broad policy purposes behind the Act's 1914 passage: reducing judicial delay, inefficiency, and uncertainty stemming from courts' lack of economic expertise and resources.[95] Rulemaking accomplishes this purpose more effectively than case-by-case adjudication, as rulemaking provides clear guidance to planners of complex business transactions, enhances agency efficiency, and promotes policy development.[96] Rules specify their scope in detail and clarify the law before violations occur, encouraging greater industry compliance.[97] Rulemaking also reduces lengthy individualized hearings and other burdens related to adjudication.[98] As a result, rules prevent violators from using pointless litigation to postpone a rule's effect on their current practice.[99] Rules also protect compliant companies from the unfair conduct of violators who benefit from delayed enforcement against them.[100]

The court further reasoned that the use of rulemaking to develop agency policy creates a fairer process for regulated parties than adjudication, as the Supreme Court has noted.[101] The Administrative Procedure Act (APA) governs the rulemaking process, requiring advance notice and public participation.[102] By requiring an agency to alert an industry that regulation is forthcoming, the rulemaking process protects regulated parties exposed to new liability and promotes public certainty.[103] Notice also minimizes the unfairness related to imposing costly litigation on a single defendant while allowing its competitors to continue similar conduct.[104] The public participation requirement gives regulated parties an opportunity to be heard and exposes the agency to a broad range of criticism, thereby encouraging the agency to learn from the public and improve a proposed rule.[105]

The court explained that the FTC, in formulating the Octane Rule, properly considered ample data and weighed the conflicting policies of informed consumer decision-making against rising costs to gasoline

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with reference to § 6 only, and that § 5 adjudications are the only means by which the FTC may enforce the § 5 standard of illegality)).

95. *See Nat'l Petroleum Refiners, Ass'n*, 482 F.2d at 686–89, 691.

96. *See id*. at 681, 689, 691.

97. *See id.* at 679, 690–91 (citing Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 962 (1965)).

98. *See Nat'l Petroleum Refiners, Ass'n*, 482 F.2d at 679, 692.

99. *See id.* at 691.

100. *See id.* at 684.

101. *See id.* at 682 (citing NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969)).

102. *See Nat'l Petroleum Refiners, Ass'n*, 482 F.2d at 682 (citing 5 U.S.C. § 553).

103. *See Nat'l Petroleum Refiners, Ass'n*, 482 F.2d at 682–83, 690.

104. *See id.* at 683.

105. *See id.* at 682.

companies and possibly consumers.[106] Although the FTC could have reached the same rule through adjudications, bright line adjudicatory holdings evolve slowly and lack the benefit of data analysis and argument from affected parties.[107]

The court also noted that the FTC, like other administrative agencies, may scrutinize regulated parties by defining standards of illegality because antitrust laws affect all American business.[108] Businesses generally comply with an FTC adjudicatory holding, rather than await prosecution.[109] The Act's language and legislative history do not suggest limiting the FTC's regulatory power to prosecution or stopping the FTC from using rulemaking to prosecute more effectively.[110]

Finally, the court noted, just because the FTC did not assert its rulemaking power until 1962 does not mean the power did not exist.[111] Sometimes an agency does not exercise its powers because it lacks funds or must confront more urgent concerns.[112]

The *Refiners* decision faced criticism for appearing less concerned with interpreting the Act's language and more focused on examining rulemaking and adjudication processes based on contemporary administrative realities.[113] However, in *United States v. JS & A Group, Inc.*, the Seventh Circuit agreed with the D.C. Circuit that § 6(g) grants the FTC substantive rulemaking authority.[114] *Refiners* and *JS & A Group* were not reviewed by the Supreme Court or relitigated for decades; however, the Northern District of Texas reopened the question of the FTC's rulemaking authority in 2024 by setting aside the Non-Compete Rule.[115] In *Ryan LLC v. FTC*, the district court held that § 6(g) is merely a "housekeeping statute" that authorizes the FTC to promulgate procedural

106. *See id.* at 683.

107. *See id*.

108. *See id.* at 683–85 ("While the boundaries of what is deemed unfair are not easily defined, they are indeed expansive").

109. *See id.*

110. *See id.* at 686.

111. *See id.* at 693–94 (quoting U.S. v. Morton Salt Co., 338 U.S. 632, 647–48 (1950) ("[I]f granted, [powers] are not lost by being allowed to lie dormant[.]").

112. *See Nat'l Petroleum Refiners, Ass'n*, 482 F.2d at 694 (citing *U.S. v. Morton Salt Co*., 338 U.S. at 647–48).

113. *See Substantive Rulemaking and the FTC*, 42 FORDHAM L. REV. 178, 182 (1973).

114. *See* U.S. v. JS & A Grp., Inc., 716 F.2d 451, 454 (7th Cir. 1983). The Seventh Circuit incorporated the *Refiners* decision's "lengthy discussion" of the FTC's § 6(g) rulemaking power into its analysis of the FTC's trade regulation rule regarding mail order merchandise. *Id*. *See also* Mail or Telephone Order Merchandise Rule, 79 Fed. Reg. 55615, 55615 (Sept. 17, 2014) (to be codified at 16 C.F.R. pt. 435).

115. *See* Ryan LLC v. Fed. Trade Comm'n, 746 F. Supp. 3d 369, 374–75 (N.D. Tex. Aug. 20, 2024).

rules only.[116] Whether § 6 authorizes the FTC to issue substantive rules remains disputed.[117]

C. Overview of Administrative Law

The legal challenges to the Non-Compete Rule claim the FTC lacks rulemaking authority to issue the Rule.[118] Because the legal challenges dispute the rulemaking authority of an administrative agency, an overview of administrative law principles is useful for assessing the validity of the legal challenges.[119]

1. The Administrative Procedure Act

In 1946, Congress enacted the APA to establish how federal agencies make rules and adjudicate administrative litigation.[120] Section 551 defines "rule making" as the process by which an agency formulates, amends, or repeals a rule.[121] Section 551 defines "rule" as a "statement . . . designed to implement, interpret, or prescribe law or policy" or a "statement describing the organization, procedure, or practice requirements of an agency."[122]

The APA authorizes the judiciary to review agency action, like rulemaking, and determine the action's meaning or applicability.[123] Section 706 grants reviewing courts the power to "decide all relevant questions of law" related to the agency action.[124] Further, § 706 authorizes reviewing courts to set aside certain agency actions and findings, including those that are arbitrary and capricious.[125]

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116. *Ryan LLC*, 746 F. Supp. 3d at 384. The Supreme Court labeled a certain statutory provision a "housekeeping statute" when it determined § 301 of FOIA only authorized rules of agency procedure in accordance with administrate law. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 310 (1979).

117. *See* ATS Tree Servs., LLC v. Fed. Trade Comm'n, No. CV 24-1743, 2024 WL 3511630, at *12 (E.D. Pa. July 23, 2024); *see also* Ryan LLC v. Fed. Trade Comm'n, 739 F. Supp. 3d 496, 503 (N.D. Tex. July 3, 2024); *see also Ryan LLC*, 746 F. Supp. 3d at 384; *see also* Props. of the Vills., Inc. v. Fed. Trade Comm'n, No. 5:24-CV-316-TJC-PRL, 2024 WL 3870380, at *1 (M.D. Fla. Aug. 15, 2024); *see* Nat'l Petroleum Refiners, Ass'n v. FTC, 482 F.2d 672, 673 (D.C. Cir. 1973).

118. *See* Ryan LLC v. Fed. Trade Comm'n, 739 F. Supp. 3d 496, 507 (N.D. Tex. July 3, 2024); *see also* Ryan LLC v. Fed. Trade Comm'n, 746 F. Supp. 3d 369, 374–75 (N.D. Tex. Aug. 20, 2024); *see also* ATS Tree Servs., LLC v. Fed. Trade Comm'n, No. CV 24-1743, 2024 WL 3511630, at *12 (E.D. Pa. July 23, 2024); *see also* Props. of the Vills., Inc. v. Fed. Trade Comm'n, No. 5:24-CV-316-TJC-PRL, 2024 WL 3870380, at *1 (M.D. Fla. Aug. 15, 2024).

119. *See infra* Section III.B.

120. *See* Administrative Procedure Act, 5 U.S.C. §§ 551–59.

121. 5 U.S.C. § 551(5).

122. *Id.*

123. *See* 5 U.S.C. § 706(2).

124. *Id.*

125. *See id.*

The Supreme Court has explained that agency action is arbitrary and capricious when the agency has relied on considerations that Congress did not intend for the agency to consider or when the agency has failed to fully examine a problem.[126] Additionally, agency action is arbitrary and capricious when the agency's explanation for the action is either unsupported by evidence or "so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[127] Thus, the arbitrary-and-capricious standard requires the agency to reasonably consider all relevant issues and reasonably explain its action.[128] Under this standard, a reviewing court may not impose its own policy judgment; rather, the court must defer to the judgment of the agency, merely ensuring the action falls "within a zone of reasonableness."[129]

Despite the court's authority under the APA to review and set aside agency action,[130] the tradition of deference to an agency's statutory interpretation has limited the scope of judicial review.[131]

2. The Rise and Fall of *Chevron* Deference

Reviewing courts have long deferred to an agency's statutory interpretation when the statute is ambiguous, as established in the landmark case of *Chevron, U.S.A., Inc. v. NRDC, Inc*.[132] The *Chevron* inquiry first determines whether the statute clearly expresses the intent of Congress.[133] If so, the inquiry ends, because the court and agency alike must adhere to the unambiguous intent of Congress.[134] However, if the statute does not clearly express legislative intent, the court must defer to an agency's statutory interpretation instead of imposing its own.[135] *Chevron* deference to agency interpretation became the cornerstone of administrative law for nearly 40 years.[136]

Chevron's primary work was to reject judicial interpretation of a statute based on its asserted purpose.[137] However, the *Chevron* decision

126. *See* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

127. *Id.*

128. *See* FCC v. Prometheus Radio Project, 592 U.S. 414, 423 (2021); *see also* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513–14 (2009).

129. *Prometheus Radio Project*, 592 U.S. at 423.

130. *See* 5 U.S.C. § 706(2).

131. *See* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842–44 (1984).

132. *See id.*

133. *See id.* at 842.

134. *See id.* at 843.

135. *See id.* at 844.

136. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

137. *See* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 841–44 (1984) (determining that when Congress has not directly addressed the precise issue, the court cannot merely impose its own statutory interpretation based on a perceived statutory purpose, as it would without the agency's interpretation).

coincided with the rise of textualism, which also diminished the practice of purposive interpretation.[138] Textualism focused on the ordinary meaning of the statutory language at the time of enactment, rather than the intentions of the legislators.[139] Textualist courts thus found fewer instances of statutory ambiguity,[140] allowing judges to interpret a statute as they wished even within the *Chevron* framework.[141]

On June 28, 2024, the Supreme Court overturned *Chevron*.[142] In *Loper Bright,* the Court held that the APA requires courts to exercise independent judgment in deciding whether an agency has acted within its statutory authority.[143] Alternatively stated, the APA does not permit courts to defer to an agency's statutory interpretation.[144] The Court reasoned that *Chevron* improperly required reviewing courts to violate the APA by relinquishing to agencies the judicial responsibility to interpret statutes and "decide all relevant questions of law."[145] In overturning *Chevron*, *Loper Bright* establishes that the APA outlines the proper scope of judicial review over agency actions.[146]

3. The Major Questions Doctrine

The Major Questions Doctrine (MQD) is a principle governing the interpretation of a statute that grants power to an administrative agency.[147] Under the MQD, an agency must point to a clear statement from Congress authorizing the manner in which the agency regulates.[148] The MQD prohibits the delegation of legislative authority, which preserves the separation of powers, allowing Congress to make major policy decisions itself, rather than leave such decisions to agencies.[149]

Courts apply the MQD in "extraordinary" circumstances when an agency has asserted "extravagant statutory power" of "vast economic and

138. *See* Thomas Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U.L.Q. 351, 353 (1994). Textualism rejected considerations of legislative history and intent in judicial statutory interpretation. *See id.*

139. *See id.* at 352.

140. *See id.* at 362–63. When interpreting a statute, textualist courts often exercised independent judgment in finding that the statutory meaning was unambiguous and then indicated in a footnote that considering deference to agency interpretation was unnecessary. *See id.* at 362.

141. *See id.* at 352–53. Textualism embraces the role of courts as "autonomous interpreters" of statutory meaning. *Id.* at 353.

142. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

143. *See id.* at 2263–68.

144. *See id.*

145. *Id.* at 2270 (quoting 5 U.S.C. § 706(2)).

146. *See Loper Bright Enters.*, 144 S. Ct. at 2273; *see also* 5 U.S.C. § 706.

147. *See* W. Va. v. EPA, 597 U.S. 697, 699 (2022); *see also* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).

148. *See W. Va.*, 597 U.S. at 699.

149. *See id.*

political significance."[150] The MQD does not forbid Congress from granting agencies such power but rather requires Congress to clearly state its intention to grant the power.[151] In determining whether an agency action implicates a major question, the Supreme Court considers several non-exhaustive factors, including whether the challenged action impacts a substantial portion of the economy and whether the action aligns with the agency's congressionally assigned purpose and expertise.[152]

To illustrate, the Supreme Court determined a rule issued by the Environmental Protection Agency (EPA) addressing carbon dioxide emissions from power plants ("Clean Power Plan Rule") implicated a major question in *West Virginia v. EPA*.[153] The Court reasoned that the Clean Power Plan Rule had "no precedent" as it did not operate like the EPA's sole existing rule ("Mercury Rule"), the legality of which was "controversial" and never reviewed by a court.[154] The Court concluded the Clean Air Act did not clearly authorize the Clean Power Plan Rule.[155]

D. Legal Challenges to the Non-Compete Ban

Throughout summer 2024, several businesses challenged the Non-Compete Rule in federal courts, arguing the FTC lacks substantive rulemaking authority to issue the Rule under the Act and administrative law principles.[156]

The Eastern District of Pennsylvania upheld the Non-Compete Rule in *ATS Tree Services, LLC v. FTC*, brought by a tree care company ("ATS").[157] The court found that the Act authorizes the FTC to make substantive rules to regulate unfair methods of competition including non-competes.[158] The court explained that Congress did not limit the FTC's enforcement mechanisms to adjudications but rather explicitly authorized the FTC to issue rules.[159] Sections 5 and 6 do not expressly limit this power

150. *Util. Air Regul. Grp.*, 573 U.S. at 324, 344.

151. *See W. Va.*, 597 U.S. at 699.

152. *See id.* at 722–23; *see also Util. Air Regul. Grp.*, 573 U.S. at 324, 342.

153. *See W. Va.*, 597 U.S. at 735.

154. *Id.* at 725–26. The Mercury Rule established standards of mercury and others hazardous air pollutants from coal- and oil-fired power plants. *See* Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28616 (May 18, 2005) (to be codified at 40 C.F.R. pt. 60).

155. *See W. Va.*, 597 U.S. at 725–26.

156. *See* Ryan LLC v. Fed. Trade Comm'n, 739 F. Supp. 3d 496, 507 (N.D. Tex. July 3, 2024); *see also* Ryan LLC v. Fed. Trade Comm'n, 746 F. Supp. 3d 369, 375 (N.D. Tex. Aug. 20, 2024); *see also* ATS Tree Servs., LLC v. Fed. Trade Comm'n, No. CV 24-1743, 2024 WL 3511630, at *12 (E.D. Pa. July 23, 2024); *see also* Props. of the Vills., Inc. v. Fed. Trade Comm'n, No. 5:24-CV-316-TJC-PRL, 2024 WL 3870380, at *1 (M.D. Fla. Aug. 15, 2024).

157. *See ATS Tree Servs.*, *LLC*, 2024 WL 3511630, at *1, *19.

158. *See id.* at *12.

159. *See id.*

to the promulgation of procedural rules.[160] Further, the Act authorizes the FTC to *prevent* unfair methods of competition—not to merely respond to past harm through adjudication—and the Non-Compete Rule serves that exact goal of prevention.[161]

The court also found that the Non-Compete Rule does not implicate the MQD, contrary to ATS's claims.[162] The court reasoned that the Rule falls squarely within the FTC's fundamental mandate to prevent unfair methods of competition, and the FTC has previously exercised its § 6(g) power to make substantive rules with significant economic impact.[163]

The Middle District of Florida agreed with the *ATS* court that the Act authorizes the FTC to make substantive rules in *Properties of the Villages, Inc. v. FTC* brought by a real estate broker ("POV").[164] The court explained that no language in § 6 limits the FTC's rulemaking to procedural rules, as supported by circuit court decisions upholding the FTC's substantive rulemaking power.[165] The court also relied on the *ATS* court's reasoning that § 6(g) authorizes the FTC to prevent unfair methods of competition, not just prosecute past conduct.[166]

However, the court agreed with POV that the Non-Compete Rule fails under the MQD, granting POV's motion for a preliminary injunction and enjoining the Non-Compete Rule from taking effect against POV only.[167] The court explained that the MQD allows the court to assume that § 6(g) plausibly grants the FTC some level of substantive rulemaking authority, but "requires more" given the Rule's vast economic and political consequences.[168] The court examined multiple factors in determining the Rule presents a major question.[169] First, the court found that the Rule impacts a significant portion of the economy, as the FTC estimates non-competes restrict one in five American workers, and the Rule will require employers to pay up to $488 billion more in wages over ten years.[170] Next, the court found that state common law has traditionally regulated non-

160. *See id.* at *12–13.
161. *See id.* at *14–15.
162. *See id.* at *18.
163. *See id.*
164. *See* Props. of the Vills., Inc. v. Fed. Trade Comm'n, No. 5:24-CV-316-TJC-PRL, 2024 WL 3870380, at *5 (M.D. Fla. Aug. 15, 2024).
165. *See id.* (citing Nat'l Petroleum Refiners, Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973); U.S. v. JS & A Grp., Inc., 716 F.2d 451, 454 (7th Cir. 1983)).
166. *See Props. of the Vills., Inc.*, 2024 WL 3870380, at *5.
167. *See id.* at *5–8.
168. *Id.* at *6 (citing Biden v. Neb., 143 S.Ct. 2355 (2023); W. Va. v. EPA, 597 U.S. 697 (2022); Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, 595 U.S. 109 (2022); Ala. Ass'n of Realtors v. Dep't of Health and Hum. Servs., 594 U.S. 758 (2021); Util. Air Regul. Grp v. EPA, 573 U.S. 302 (2014)).
169. *See Props. of the Vills., Inc.*, 2024 WL 3870380, at *7–9.
170. *See id.* at *7 (reasoning that while the Rule may benefit employees, it nonetheless creates a significant economic impact).

competes, so the Rule would preempt any state laws permitting non-competes under certain circumstances.[171] The court then found that the Rule "is a hugely consequential expansion of regulatory authority."[172] One factor favored the FTC, specifically that the Non-Compete Rule is within the "wheelhouse" of the FTC under § 5, as the Act contemplates rulemaking that involves large amounts of money.[173] Balancing the factors, the court determined that POV succeeded in showing the Rule presents a major question.[174] The court then concluded that §§ 5 and 6(g) did not express clear legislative intent, as required by the MQD.[175] The court explained that although § 5 broadly grants authority to prevent unfair methods of competition, it does not address rulemaking at all, only adjudication.[176] Further, the court explained, § 6(g) occupies a statutory section that primarily involves ministerial functions.[177]

In a third legal challenge brought by a tax services firm ("Ryan LLC"), the Northern District of Texas struck down the Rule, ordering a preliminary injunction,[178] and later a permanent injunction against the FTC, preventing the Rule from taking effect generally.[179] In *Ryan LLC v. FTC*, the court held that the Act does not authorize the FTC to issue substantive rules preventing unfair competition.[180] The court reasoned that § 6(g) is merely a "housekeeping statute" that allows the FTC to make procedural rules only, as the plain language of § 6(g) does not explicitly grant the FTC substantive rulemaking power.[181] The court further explained that the absence of a statutory sanction for violating § 6(g) rules and the placement of § 6(g) rulemaking as seventh in a list of 12 mostly investigative powers shows this lack of authority.[182] The court affirmed its final authority over an agency on issues of statutory interpretation.[183]

The court also held that the Non-Compete Rule is arbitrary and capricious.[184] The court explained the Rule is overbroad and lacking

171. *See id.*
172. *Id.* at *8 (noting the FTC has never before issued a rule "of this magnitude").
173. *Id.*
174. *See id.*
175. *See id.*
176. *See id.*
177. *See id.*
178. *See* Ryan LLC v. Fed. Trade Comm'n, 739 F. Supp. 3d 496, 503 (N.D. Tex. July 3, 2024).
179. *See* Ryan LLC v. Fed. Trade Comm'n, 746 F. Supp. 3d 369, 374–75 (N.D. Tex. Aug. 20, 2024).
180. See *id.* at 387.
181. *Id.* at 384 (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 310 (1979).
182. *See Ryan LLC*, 746 F. Supp. 3d at 385.
183. *See id.* at 383 (citing Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 968 (D.C. Cir. 1985) (explaining the judiciary must reject agency actions which exceed the agency's statutory authority or impede congressional intent)).
184. *See Ryan LLC*, 746 F. Supp. 3d at 388.

reasonable explanation because it "imposes a one-size-fits-all approach with no end date" that does not establish a rational link between the evidence compiled and the action taken.[185] The court reasoned that the rulemaking record did not support the FTC's choice to categorically ban non-competes rather than target specific non-competes.[186] The court explained that the FTC's research on various state non-compete laws relies on particular facts which are irrelevant to a categorical ban and shows that no state has enacted laws as sweeping as the Rule.[187] The court further explained that the FTC failed to consider "less disruptive alternatives" to a categorical ban and failed to weigh reliance interests against public policy concerns in reaching its conclusion.[188]

This district-level split across circuits presented an opportunity for appellate review.[189] Although ATS voluntarily dismissed its case,[190] precluding an appeal to the Third Circuit, the FTC appealed the *Ryan LLC* and *POV* decisions to the Fifth and Eleventh Circuits, respectively.[191] However, on September 5, 2025, the FTC took steps to dismiss these appeals, citing opposition from President Trump's recently appointed Chairman.[192]

III. ANALYSIS

The legal challenges to the Non-Compete Rule center on whether the FTC has authority to issue the Rule.[193] The FTC has substantive rulemaking authority to issue the Non-Compete Rule under the Act and administrative law principles.[194]

185. *Id.*
186. *See id*.
187. *See id*.
188. *Id*. at 388–89.
189. *See* Benjamin C. Parker, *Contract Law-FTC's Non-Compete Ban: The Uncertain Road Ahead for Employers and Employees Amidst A Circuit Split*, 48 AM. J. TRIAL ADVOC. 507, 509 (2025).
190. Nalee Xiong & Brian D. Pedrow, *ATS Withdraws Challenges to the FTC's Final Non-Compete Rule After the Eastern District of Pennsylvania Denies its Motion to Stay Proceedings*, BALLARD SPAHR LLP (Oct. 8, 2024), https://perma.cc/NGH4-H8SE.
191. *See* Joseph S. Adams et al., *FTC Asks Appeals Courts to Revive Ban on Worker Non-Compete Agreements after Nationwide Block*, WINSTON & STRAWN LLP (Nov. 8, 2024), https://perma.cc/U59R-HRUN.
192. *See Federal Trade Commission Files to Accede to Vacatur of Non-Compete Clause Rule*, FED. TRADE COMM'N (Sept. 5, 2025), https://perma.cc/4X33-LNA2.
193. *See* Ryan LLC v. Fed. Trade Comm'n, 739 F. Supp. 3d 496, 507 (N.D. Tex. July 3, 2024); *see also* Ryan LLC v. Fed. Trade Comm'n, 746 F. Supp. 3d 369, 375 (N.D. Tex. Aug. 20, 2024); *see also* ATS Tree Servs., LLC v. Fed. Trade Comm'n, No. CV 24-1743, 2024 WL 3511630, at *13 (E.D. Pa. July 23, 2024).
194. *See infra* Section III.

A. The FTC Has Authority to Ban Non-Competes under the Federal Trade Commission Act

Whether the FTC has authority to issue the Non-Compete Rule depends on whether the Act permits the FTC to issue the Rule.[195] This question requires an analysis of whether the Act authorizes the FTC to prevent the use of non-competes through rulemaking.[196] The analysis concludes that the Act grants the FTC authority to ban non-competes.[197] Section 5 of the Act empowers the FTC to regulate non-competes as unfair methods of competition, consistent with legislative history and § 5 policy statements.[198] Section 6 of the Act authorizes the FTC to regulate non-competes through substantive rulemaking, as supported by the plain language of § 6, judicial precedent, and the Act's main purpose.[199]

1. Authority Under § 5 of the Federal Trade Commission Act

Section 5 of the Act authorizes the FTC to regulate non-competes because non-competes qualify as unfair methods of competition.[200] Non-competes fall well within this broad statutory term, as Congress intended, and satisfy the criteria for unfair conduct as outlined in § 5 policy statements.[201] Additionally, a categorical ban on non-competes is not only appropriate, but necessary under the § 5 inquiry.[202]

Legislative history shows that Congress gave the FTC significant discretion to determine that non-competes are unfair methods of competition.[203] Congress intended the term unfair methods of competition as an open-ended and evolving concept, allowing the FTC flexibility to decide what conduct violates § 5 as market conditions change.[204] The rulemaking record establishes that non-competes are unfair methods of competition based on an extensive study of non-competes and their impact on competitive conditions, which concerned the FTC.[205] Congress

195. *See infra* Section III.A.

196. *See id*.

197. *See id.*

198. *See infra* Section III.A.1; *see also* 15 U.S.C. § 45; *see also* FEDERAL TRADE COMMISSION, *supra* note 64, at 1, 8–9.

199. *See infra* Section III.A.2; *see also* 15 U.S.C. § 46; *see also* Nat'l Petroleum Refiners, Ass'n v. FTC, 482 F.2d 672, 673 (D.C. Cir. 1973).

200. *See* 15 U.S.C. § 45.

201. *See* FEDERAL TRADE COMMISSION, *supra* note 64, at 8–9; *see also* S. REP. NO. 63–597, at 13 (1914); *see also* 15 U.S.C. § 45.

202. *See* FEDERAL TRADE COMMISSION, *supra* note 64, at 8–10.

203. *See* S. REP. NO. 63-597, at 13 (1914); *see also* 15 U.S.C. § 45; *see also* Non-Compete Clause Rule, 89 Fed. Reg. at 38343.

204. *See* S. REP. NO. 63-597, at 13 (1914); *see also* 15 U.S.C. § 45.

205. *See* Non-Compete Clause Rule, 89 Fed. Reg. 38343 (May 7, 2024) (to be codified at 16 C.F.R. pt. 910) (estimating approximately one in five American workers are bound to a non-compete); *see also* Johnson, Lavetti & Lipsitz, *supra* note 32, at 21.

intentionally authorized the FTC to respond to its concern as the harmful effects of non-competes became more evident over time.[206] Thus, the FTC's determination that non-competes are an unfair method of competition was appropriate under § 5 and responsive to legislative intent.[207]

Further, non-competes satisfy the following criteria for "unfair" conduct which "goes beyond competition on the merits" as outlined in § 5 policy statements: (1) the conduct is coercive, exploitative, collusive, deceptive, or predatory; and (2) the conduct negatively affects competitive conditions.[208] First, non-competes are exploitative, coercive, and predatory, as courts have recognized for centuries.[209] At both the procedural and substantive level, non-competes exploit workers.[210]

Procedurally, non-competes exploit workers during the negotiation process because employers have more bargaining power than workers.[211] This power imbalance imposes undue pressure on the worker to enter the non-compete, thereby diminishing the level of agency and meaningful choice in the worker's decision.[212] This undue pressure also causes the worker to ignore the possibility of future hardship from loss of employment. [213]

The substantive terms of non-competes are also exploitative.[214] In limiting a worker's ability to find better employment, non-compete restrictions exploit workers by suppressing their potential to accept jobs with better pay, benefits, and working conditions.[215] The restrictions especially exploit workers searching for new work after losing employment, as such restrictions threaten the basic ability to earn a living.[216] Many states have not definitively ruled on whether non-competes are enforceable if the employer dismisses the worker.[217] Thus, if a worker

206. *See* S. REP. NO. 63-597, at 13 (1914); *see also* Johnson, Lavetti & Lipsitz, *supra* note 32, at 21.

207. *See* 15 U.S.C. § 45; *see also* S. REP. NO. 63-597, at 13 (1914).

208. *See* FEDERAL TRADE COMMISSION, *supra* note 64, at 8–10.

209. *See* Mitchel v. Reynolds, 1 P. Wms. 181, 190 (Q.B. 1711); *see also* Non-Compete Clause Rule, 89 Fed. Reg. at 38343; *see also* RESTATEMENT (SECOND) OF CONTS. § 188 cmt. g (A.L.I. 1981); *see also* Fox, *supra* note 10, at 607–08.

210. *See* Mitchel v. Reynolds, 1 P. Wms. 181, 190 (Q.B. 1711); *see also* Non-Compete Clause Rule, 89 Fed. Reg. at 38343; *see also* RESTATEMENT (SECOND) OF CONTS. § 188 cmt. g (A.L.I. 1981); *see also* Fox, *supra* note 10, at 607–08.

211. *See* Fox, *supra* note 10, at 607–08.

212. *See id.*

213. *See* RESTATEMENT (SECOND) OF CONTS. § 188 cmt. g (A.L.I. 1981).

214. *See Mitchel*, 1 P. Wms. at 190; *see also* Non-Compete Clause Rule, 89 Fed. Reg. at 38343.

215. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38343.

216. *See id.*; *see also Mitchel*, 1 P. Wms. at 190.

217. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38343; *see also* 11 West's Pa. Forms, Employment Law § 9.15.

gets fired, he may lose his livelihood and "the subsistence of his family."[218]

Non-competes are even more exploitative when considering hourly workers comprise the majority of workers bound to a non-compete.[219] Non-competes exploit hourly workers at higher levels procedurally because of the starker imbalance in the employer-employee power dynamic.[220] Often less educated and lower-paid than salaried employees, hourly workers face a greater risk of entering non-competes without exercising agency and meaningful choice in the decision.[221] For the same socioeconomic reasons, the substantive terms of non-competes also exploit hourly workers more severely, as hourly workers likely struggle more to pay their bills and remain financially secure in general.[222] As a result, hourly workers bound to non-competes face increased risk that post-employment restrictions on finding work will destroy the worker's livelihood.[223]

Next, non-competes satisfy the second criteria for unfair conduct in that non-competes negatively affect competitive conditions.[224] Conduct negatively affects competitive conditions when it limits the choice and opportunities of market participants or decreases competition between rivals.[225] Research on changes to state non-compete law shows that non-competes limit the opportunities of both workers and employers.[226] By suppressing labor mobility, non-competes restrict a worker's opportunity

218. *Mitchel*, 1 P. Wms. at 190.

219. *See* Colvin & Shierholz, *supra* note 12, at 3 (estimating 53% of workers bound to a non-compete are hourly workers); *see also* Lipsitz & Starr, *supra* note 14, at 144; s*ee also* Jamieson, *supra* note 15; *see also* Woodman, *supra* note 15.

220. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38343; *see also* Colvin & Shierholz, *supra* note 12, at 3; *see also* Lipsitz & Starr, *supra* note 14, at 144; *see also* RESTATEMENT (SECOND) OF CONTS. § 188 cmt. g (A.L.I. 1981).

221. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38343; *see also* Colvin & Shierholz, *supra* note 12, at 3; *see also* Lipsitz & Starr, *supra* note 14, at 144; *see also* RESTATEMENT (SECOND) OF CONTS. § 188 cmt. g (A.L.I. 1981).

222. *See* Jamieson, *supra* note 15; *see also* Woodman, *supra* note 15; *see also* Non-Compete Clause Rule, 89 Fed. Reg. at 38343; *see also* Colvin & Shierholz, *supra* note 12, at 3; *see also* Lipsitz & Starr, *supra* note 14, at 144; *see also* RESTATEMENT (SECOND) OF CONTS. § 188 cmt. g (A.L.I. 1981).

223. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38343; *see also* Colvin & Shierholz, *supra* note 12, at 3; *see also* Lipsitz & Starr, *supra* note 14, at 144; *see also* RESTATEMENT (SECOND) OF CONTS. § 188 cmt. g (A.L.I. 1981).

224. *See* FEDERAL TRADE COMMISSION, *supra* note 64, at 9; *see also* Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38379 (May 7, 2024) (to be codified at 16 C.F.R. pt. 910).

225. *See* FEDERAL TRADE COMMISSION, *supra* note 64, at 9.

226. *See* Johnson, Lavetti & Lipsitz, *supra* note 32, at 21; *see also* Non-Compete Clause Rule, 89 Fed. Reg. at 38379.

to search for and accept a better job.[227] By reducing the available labor pool, non-competes limit an employer's opportunity to hire better talent.[228]

Section 5 empowers the FTC to prevent the use of unfair methods of competition.[229] In determining whether conduct violated § 5, the key question is whether the conduct tends to produce negative consequences when assessed in the aggregate with the same or similar conduct of others.[230] Thus, whether non-competes are unfair methods of competition hinges on whether *all* non-competes tend to produce negative consequences.[231] The legal challenges to the ban argue that even if the FTC has statutory authority to regulate non-competes, the FTC exceeded its authority by deeming all non-competes unfair methods of competition.[232] This argument fails to consider the key § 5 inquiry for determining what constitutes an unfair method of competition.[233] In issuing a categorical ban on non-competes, the FTC properly examined the aggregate harm of non-competes rather than an individual instance of harm caused by a particular non-compete.[234] The FTC's non-compete study shows that the use of non-competes in the aggregate produces large-scale harm, including the suppression of earnings for workers across the labor force, including workers not bound to non-competes.[235] The FTC's rulemaking record, which contains thousands of worker grievances over non-competes,[236] further demonstrates this aggregate harm.[237] The FTC deemed a categorical ban on non-competes necessary because litigating non-competes on a case-by-case basis has proven insufficient for addressing the negative consequences of non-competes.[238]

227. *See* Johnson, Lavetti & Lipsitz, *supra* note 32, at 21; *see also* Non-Compete Clause Rule, 89 Fed. Reg. at 38379.

228. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38379; *see also* Johnson, Lavetti & Lipsitz, *supra* note 32, at 21.

229. *See* 15 U.S.C. § 45.

230. *See* FEDERAL TRADE COMMISSION, *supra* note 64, at 9–10 (citing Fed. Trade Comm'n v. Motion Picture Advertising Serv. Co., 344 U.S. 392, 395 (1953)).

231. *See* FEDERAL TRADE COMMISSION, *supra* note 64, at 9–10; *see also* Non-Compete Clause Rule, 89 Fed. Reg. at 38346.

232. *See* ATS Tree Servs., LLC v. Fed. Trade Comm'n, No. CV 24-1743, 2024 WL 3511630, at *12 (E.D. Pa. July 23, 2024); *see also* Ryan LLC v. Fed. Trade Comm'n, 746 F. Supp. 3d 369, 382 (N.D. Tex. Aug. 20, 2024).

233. *See* FEDERAL TRADE COMMISSION, *supra* note 64, at 9–10.

234. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38346; *see also* FEDERAL TRADE COMMISSION, *supra* note 64, at 9–10.

235. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38346; s*ee also* Johnson, Lavetti & Lipsitz, *supra* note 32, at 21; *see also* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3486 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

236. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38344.

237. *See* FEDERAL TRADE COMMISSION, *supra* note 64, at 9–10.

238. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38344.

2. Authority Under § 6 of the Federal Trade Commission Act

Section 6 of the Act empowers the FTC to prevent the use of non-competes through substantive rulemaking.[239] The plain meaning of § 6, judicial precedent, and the Act's central purpose support the FTC's § 6 authority to issue substantive rules like the Non-Compete Rule.[240]

The plain language of § 6 authorizes the FTC to "make rules" to carry out the Act's provisions, explicitly empowering the FTC to make rules to carry out § 5.[241] The language of § 6 does not restrict the FTC's rulemaking authority to procedural rules, but rather expressly authorizes the FTC to prevent unfair methods of competition through rulemaking, among other enforcement mechanisms.[242] Regarding enforcement, § 5 permits adjudication, and § 6 grants additional powers including rulemaking and investigation.[243] Since §§ 5 and 6 do not require the use of certain enforcement mechanisms over others, the FTC may address the problem of non-competes through a rule.[244]

In fact, the choice to enforce § 5 through rulemaking most aligns with the FTC's main directive to *prevent* unfair methods of competition, as *ATS* and *POV* explain.[245] Rulemaking prevents unfair competition by clarifying the law before § 5 violations occur, creating legal certainty and promoting industry compliance, unlike adjudicative, investigative, or prosecutorial mechanisms which address prior harm.[246] Thus, the FTC can most effectively accomplish its core mandate of preventing unfair methods of competition through § 6 rulemaking.[247]

Further, the only circuit courts that have examined the precise issue of whether § 6 grants the FTC substantive rulemaking power have affirmed this power.[248] In *Refiners*, the D.C. Circuit held that § 6

239. *See* 15 U.S.C. § 46; *see also* ATS Tree Servs., LLC v. Fed. Trade Comm'n, No. CV 24-1743, 2024 WL 3511630, at *13 (E.D. Pa. July 23, 2024).

240. *See* 15 U.S.C. § 46; *see also* Nat'l Petroleum Refiners, Ass'n v. FTC, 482 F.2d 672, 698 (D.C. Cir. 1973); *see also* U.S. v. JS & A Grp., Inc., 716 F.2d 451, 454 (7th Cir. 1983).

241. 15 U.S.C. § 46(g); *see also ATS Tree Servs., LLC*, 2024 WL 3511630, at *13.

242. *See* 15 U.S.C. § 46; *see also ATS Tree Servs., LLC*, 2024 WL 3511630, at *13; *see also* Props. of the Vills., Inc. v. Fed. Trade Comm'n, No. 5:24-CV-316-TJC-PRL, 2024 WL 3870380, at *5 (M.D. Fla. Aug. 15, 2024).

243. *See* 15 U.S.C. §§ 45–46.

244. *See id.*; *see also* Ryan LLC v. Fed. Trade Comm'n, 746 F. Supp. 3d 369, 382 (N.D. Tex. Aug. 20, 2024).

245. *See* 15 U.S.C. §§ 45–46; *see also ATS Tree Servs., LLC*, 2024 WL 3511630, at *14–15; *see also Props. of the Vills.*, 2024 WL 3870380, at *5.

246. *See* Nat'l Petroleum Refiners, Ass'n v. FTC, 482 F.2d 672, 679 (D.C. Cir. 1973); *see also ATS Tree Servs., LLC*, 2024 WL 3511630, at *14–15; *see also Props. of the Vills.*, 2024 WL 3870380, at *5.

247. *See* 15 U.S.C. §§ 45–46.

248. *See* Nat'l Petroleum Refiners, Ass'n v. FTC, 482 F.2d 672, 698 (D.C. Cir. 1973); *see also* U.S. v. JS & A Grp., Inc., 716 F.2d 451, 454 (7th Cir. 1983).

empowers the FTC to issue rules defining the standards of illegality that the FTC is empowered to prevent, and the Seventh Circuit agreed, based on the many reasons Judge Wright outlined.[249] Just as the FTC properly asserted its § 6 power to outlaw a certain trade practice in issuing the Octane Rule, the FTC properly asserted its § 6 power in promulgating the Non-Compete Rule.[250]

The D.C. Circuit correctly decided *Refiners*, as the Supreme Court has repeatedly upheld the substantive rulemaking power of an agency when its authorizing statute contains a general rulemaking provision like § 6(g).[251] As Judge Wright explains, a broad rulemaking provision demonstrates the legislative intent to equip an agency to address unanticipated problems in regulating a complex industry.[252] Legislative history shows that Congress created the FTC to reduce judicial delay, inefficiency, and uncertainty arising from courts' lack of industry expertise and resources.[253] Substantive rulemaking power equips the FTC to achieve this central legislative objective by allowing the FTC to produce clear legal guidance based on its economic expertise.[254] In reducing the delays and burdens associated with the adjudicative process, rulemaking increases agency efficiency and preserves agency resources, allowing the FTC to effectively carry out the duty assigned to it by Congress.[255] Thus, the Act's broad policy purpose supports interpreting § 6(g) to allow substantive rulemaking, just as the Supreme Court has interpreted similar rulemaking provisions.[256]

Finally, rulemaking involves a fairer process than other regulatory mechanisms, as the Supreme Court and the *Refiners* court have explained.[257] Under the APA requirements of notice and public participation, the rulemaking process empowers regulated parties to make

249. *See Nat'l Petroleum Refiners, Ass'n*, 482 F.2d at 673–98; *see also JS & A Grp., Inc.*, 716 F.2d at 454.

250. *See Nat'l Petroleum Refiners, Ass'n*, 482 F.2d at 698; *see also* Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38342 (May 7, 2024) (to be codified at 16 C.F.R. pt. 910).

251. *See Nat'l Petroleum Refiners, Ass'n*, 482 F.2d at 679 (citing Nat'l Broadcasting Co. v. U.S., 319 U.S. 190 (1943); U.S. v. Storer Broadcasting Co., 351 U.S. 192 (1956); FPC v. Texaco, Inc., 377 U.S. 33, 39–41 (1964)).

252. *See Nat'l Petroleum Refiners, Ass'n*, 482 F.2d at 680.

253. *See* H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.); *see also* S. REP. NO. 62-1326, at 10 (1913); *see also Nat'l Petroleum Refiners, Ass'n*, 482 F.2d at 686–91.

254. *See Nat'l Petroleum Refiners, Ass'n*, 482 F.2d at 679–80, 691; *see also* H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.).

255. *See Nat'l Petroleum Refiners, Ass'n*, 482 F.2d at 686–91, 697.

256. *See id.* at 679, 686–91 (citing Nat'l Broadcasting Co. v. U.S., 319 U.S. 190 (1943); U.S. v. Storer Broadcasting Co., 351 U.S. 192 (1956); FPC v. Texaco, Inc., 377 U.S. 33, 39–41 (1964)).

257. *See Nat'l Petroleum Refiners, Ass'n*, 482 F.2d at 682 (citing NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969)).

informed decisions and to engage in the process by offering feedback on a proposed rule.[258] The FTC's Non-Compete Rule, which incorporated and responded to thousands of public comments from workers and employers harmed by non-competes, demonstrates the procedural benefit of agency rulemaking.[259]

B. The FTC Has Authority to Ban Non-Competes Under Administrative Law Principles

The FTC also has substantive rulemaking authority to ban non-competes under administrative law principles.[260] The plain meaning of the APA empowers the FTC to promulgate substantive rules, and the Non-Compete Rule satisfies the APA's arbitrary-and-capricious standard.[261] Further, recent developments in administrative law should not threaten the FTC's substantive rulemaking authority.[262] Finally, the Non-Compete Rule does not implicate the MQD.[263]

1. Authority under the Administrative Procedure Act

First, the APA supports the substantive rulemaking authority of the FTC.[264] Section 551 defines "rule making" as an agency process for formulating a "rule," which is an agency statement that implements or interprets the law.[265] The plain meaning of these statutory definitions supports an agency's substantive rulemaking authority because formulating a statement that interprets and implements the law constitutes substantive action.[266] In formulating the Non-Compete Rule, the FTC interpreted and implemented the Act.[267] On a basic level, the plain

258. *See Nat'l Petroleum Refiners, Ass'n*, 482 F.2d at 682–83 (citing 5 U.S.C. § 553).

259. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38344.

260. *See* 5 U.S.C. §§ 551–59; *see also* FCC v. Prometheus Radio Project, 592 U.S. 414, 423 (2021); *see also* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513–14 (2009); *see also* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024); *see also* W. Va. v. EPA, 597 U.S. 697, 699, 726, 735 (2022).

261. *See* 5 U.S.C. §§ 551–59; *see also* FCC v. Prometheus Radio Project, 592 U.S. 414, 423 (2021); *see also* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513–14 (2009).

262. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024); *see also* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842–44 (1984); *see also* Non-Compete Clause Rule, 89 Fed. Reg. at 38343.

263. *See* ATS Tree Servs., LLC v. Fed. Trade Comm'n, No. CV 24-1743, 2024 WL 3511630, at *18 (E.D. Pa. July 23, 2024); *see also* W. Va. v. EPA, 597 U.S. 697, 699, 726, 735 (2022).

264. *See* 5 U.S.C. §§ 551–59.

265. 5 U.S.C. § 551.

266. *See id.*

267. *See* 5 U.S.C. § 551; *see also* Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38343 (May 7, 2024) (to be codified at 16 C.F.R. pt. 910); *see also* Federal Trade Commission Act, 15 U.S.C. §§ 41–58.

language of the APA authorizes the FTC to make substantive rules such as the Non-Compete Rule.[268]

Additionally, the Non-Compete Rule is not arbitrary or capricious under the APA.[269] The arbitrary-and-capricious standard requires agency action to be reasonable, in that the agency has considered the relevant issues associated with a policy problem.[270] In determining whether agency action is reasonable, courts assess whether the action falls "within a zone of reasonableness."[271] The Non-Compete Rule falls well within the zone of reasonableness.[272] In support of its conclusion that non-competes are unfair methods of competition, the FTC considered all relevant economic, legal, and policy issues through its exhaustive non-compete study.[273] This study included extensive research, data analysis, and collection of public feedback.[274] The FTC considered the current legal landscape in which non-competes are state-regulated and litigated on a case-by-case basis.[275] The agency concluded that a categorical ban was necessary because states' patchwork approach to regulating non-competes insufficiently addresses their adverse effects and burdens both employees and employers.[276] Far from implausible, the FTC's conclusion that non-competes are unfair methods of competition and the FTC's choice to issue a categorical ban rather than take alternative action are both highly reasonable.[277]

The arbitrary-and-capricious standard also requires agency action to be reasonably explained.[278] As described above, the FTC provides a reasonable explanation for the Rule in its 162-page rulemaking record detailing the adverse effects of non-competes and justifying a categorical non-compete ban.[279]

Further, the Non-Compete Rule is reasonable under deferential judicial review required by the arbitrary-and-capricious standard.[280] In

268. *See* 5 U.S.C. § 551; *see also* Non-Compete Clause Rule, 89 Fed. Reg. at 38343.

269. *See* 5 U.S.C. § 706(2); *see also* Non-Compete Clause Rule, 89 Fed. Reg. at 38343.

270. *See* FCC v. Prometheus Radio Project, 592 U.S. 414, 423 (2021); *see also* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513–14 (2009).

271. *Prometheus Radio Project*, 592 U.S. at 423; *see also Fox Television Stations, Inc.*, 556 U.S. at 513–14.

272. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38343.

273. *See* Ryan LLC v. Fed. Trade Comm'n, 746 F. Supp. 3d 369, 382 (N.D. Tex. Aug. 20, 2024); *see also* Non-Compete Clause Rule, 89 Fed. Reg. at 38343.

274. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38343.

275. *See id.*

276. *See id.*

277. *See id.*

278. *See* FCC v. Prometheus Radio Project, 592 U.S. 414, 423 (2021); *see also* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513–14 (2009).

279. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38342–43, 38504.

280. *See Prometheus Radio Project*, 592 U.S. at 423; *see also Fox Television Stations*, *Inc.*, 556 U.S. at 513–14.

determining whether agency action is arbitrary or capricious, a court cannot substitute its own policy judgment for that of the agency, but rather must defer to the agency's judgments.[281] The Northern District of Texas erred in failing to apply this deferential standard to the FTC's Rule.[282] For these reasons, the FTC easily satisfies the arbitrary-and-capricious standard.[283]

2. Authority under Recent Judicial Developments

The Supreme Court's overturning of *Chevron* deference potentially threatens the Non-Compete Rule by making courts less likely to defer to the FTC's interpretation of the Act as authorizing the Rule.[284] Since *Loper Bright* prevents courts from deferring to an agency's statutory interpretation when the statute is ambiguous, *Loper Bright* could jeopardize the Rule if a court determines the Act is ambiguous.[285] However, *Loper Bright* agrees with *Chevron* that judicial review of agency interpretation is unnecessary when legislative intent is clear.[286]

Legislative history shows that Congress passed the Act in response to a judicial standard legislators feared would deliver unpredictable results and substitute the court's judgment for that of Congress.[287] Congress wanted an administrative agency, rather than a court, to make determinations about unfair competition.[288] With this goal in mind, the drafters gave the FTC significant discretion and flexibility in defining unfair methods of competition under changing market conditions.[289] The FTC's decision to ban non-competes as an unfair method of competition

281. *See Prometheus Radio Project*, 592 U.S. at 423; *see also Fox Television Stations*, *Inc.*, 556 U.S. at 513–14.

282. *See* Ryan LLC v. Fed. Trade Comm'n, 746 F. Supp. 3d 369, 387–89 (N.D. Tex. Aug. 20, 2024); *see also Prometheus Radio Project*, 592 U.S. at 423; *see also Fox Television Stations*, *Inc.*, 556 U.S. at 513–14.

283. *See* Ryan LLC v. Fed. Trade Comm'n, 746 F. Supp. 3d 369, 382 (N.D. Tex. Aug. 20, 2024).

284. *See Chevron, U.S.A., Inc.*, 467 U.S. at 843; *see also Loper Bright Enters.*, 144 S. Ct. at 2273.

285. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024); Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842–44 (1984); Federal Trade Commission Act, 15 U.S.C. §§ 41–58; Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38343 (May 7, 2024) (to be codified at 16 C.F.R. pt. 910).

286. *See Chevron, U.S.A., Inc.*, 467 U.S. at 842–44; *see also Loper Bright Enters.*, 144 S. Ct. at 2273.

287. *See* S. REP. NO. 62-1326, at 10 (1913); *see also* H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.).

288. *See* H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.); *see also* S. REP. NO. 62-1326, at 10 (1913).

289. *See* S. REP. NO. 63-597, at 13 (1914); *see* H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.); *see also* 15 U.S.C. § 45.

falls well within the bounds of the FTC's broad discretion and flexibility as intended by Congress.[290]

Thus, Congress intended to grant the FTC broad statutory authority to decide what conduct it must prevent.[291] Because the legislative intent behind the Act is evident, judicial review of the Non-Compete Rule remains unnecessary under *Loper Bright*.[292] Therefore, *Loper Bright* should not threaten the Non-Compete Rule.[293]

3. Authority under the Major Questions Doctrine

Finally, the Non-Compete Rule does not implicate the MQD, which courts apply only in "extraordinary" instances.[294] Admittedly, the Rule impacts a substantial portion of the economy because it affects 20% of American workers and their employers.[295] However, the Rule squarely aligns with the FTC's congressionally assigned purpose and core mandate of preventing unfair methods of competition.[296] Further, the FTC has previously exercised its § 6(g) power to make substantive trade regulation rules with significant economic impact, which courts have upheld.[297] The Non-Compete Rule is therefore distinguishable from the challenged rule in *West Virginia v. EPA*, which had "no precedent" because it did not function like the EPA's only prior rule, which was never reviewed.[298] The FTC does not assert "extravagant statutory power" by issuing the Non-Compete Rule, so the MQD does not apply.[299]

290. *See* H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.); *see also* S. REP. NO. 63-597, at 13 (1914); *see also* 15 U.S.C. § 45; *see also* Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38343 (May 7, 2024) (to be codified at 16 C.F.R. pt. 910).

291. *See* S. REP. NO. 63-597, at 13 (1914); *see also* H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.); *see also* FEDERAL TRADE COMMISSION, *supra* note 64, at 8–9; *see also* 15 U.S.C. § 45.

292. *See* FEDERAL TRADE COMMISSION, *supra* note 64, at 9–10; *see also* S. REP. NO. 63-597, at 13 (1914); *see also* 15 U.S.C. § 45; *see also* 5 U.S.C. § 706.

293. *See* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842–44 (1984); *see also* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

294. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 344 (2014).

295. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38343 (estimating approximately one in five American workers are bound to a non-compete); *see also* Props. of the Vills., Inc. v. Fed. Trade Comm'n, No. 5:24-CV-316-TJC-PRL, 2024 WL 3870380, at *5–8 (M.D. Fla. Aug. 15, 2024).

296. *See* ATS Tree Servs., LLC v. Fed. Trade Comm'n, No. CV 24-1743, 2024 WL 3511630, at *18 (E.D. Pa. July 23, 2024).

297. *See* Nat'l Petroleum Refiners, Ass'n v. FTC, 482 F.2d 672, 698 (D.C. Cir. 1973); *see also* U.S. v. JS & A Grp., Inc., 716 F.2d 451, 454 (7th Cir. 1983).

298. W. Va. v. EPA, 597 U.S. 697, 726 (2022); *see also* ATS Tree Servs., LLC v. Fed. Trade Comm'n, No. CV 24-1743, 2024 WL 3511630, at *18 (E.D. Pa. July 23, 2024).

299. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).

IV. CONCLUSION

The Act allows the FTC to issue the Non-Compete Rule because § 5 authorizes the FTC to regulate non-competes as an unfair method of competition, and § 6 empowers the FTC to regulate non-competes through substantive rulemaking.[300] The FTC also has authority to issue the Rule under administrative law principles because the Rule complies with the APA and does not implicate the MQD.[301] Moreover, the Supreme Court's overturning of *Chevron* deference ultimately should not defeat the Rule because the broad legislative intent behind the Act heavily supports the Rule.[302] For these reasons, the FTC has authority to promulgate the Non-Compete Rule.[303]

300. *See infra* Section III.A.

301. *See infra* Section III.B. It remains uncertain whether the FTC, to better navigate future MQD challenges, might revive a Rule more limited in scope which targets low-wage, hourly workers most at risk from exploitative non-compete practices.

302. *See infra* Section III.B.

303. *See infra* Section III.