Oral Statement of Commissioner Andrew N. Ferguson

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

I am sympathetic to the policy embodied in the Final Rule. Anglo-American law has regarded noncompete agreements with deep suspicion for centuries.[1] They cut against the grain of our ancient common-law tradition protecting every man's right to ply his trade,[2] and may in some circumstances undermine competition and innovation.

But beginning with policy puts the cart before the horse. Lawmaking by the administrative state sits uncomfortably in a democracy. Our Constitution assigns Congress the legislative power because Congress answers to the people for its choices.[3] We are not a legislature; we are an administrative agency wielding only the power lawfully conferred on us by Congress.[4] Americans cannot vote us out when we get it wrong.[5] And Congress has tried to insulate us from the one person in the Executive Branch whom the people can vote out,[6] separating us even further from those whose lives we claim to govern.[7] To be sure, the

[1] Charles E. Carpenter, *Validity of Contracts Not to Compete*, 76 U. Pa. L. Rev. 244, 244–45 (1928) (describing early common-law objections to noncompete agreements).

[2] See 1 William Blackstone, Commentaries *427 ("At common law, every man might use what trade he pleased."); *Darcy v. Allein*, 77 Eng. Rep. 1260, 1263 (K.B. 1603) ("[E]very man's trade maintains his life, and therefore he ought not to be deprived or dispossessed of it, no more than of his life."); *The Case of Tailors*, 77 Eng. Rep. 1218, 1219 (K.B. 1615) ("[A]t the common law, no man could be prohibited from working in any lawful trade, for the law abhors idleness …."); *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (Washington, J., riding circuit); *Golden Glow Tanning Salon, Inc. v. City of Columbus*, 52 F.4th 974, 982–83 (5th Cir. 2022) (Jones, J.) (expounding history of Anglo-American protections of the right to ply one's trade).

[3] U.S. Const. art I, § 1, cl. 1; see The Federalist No. 52, p. 325 (C. Rossiter ed. 1961) (J. Madison) (The body wielding the legislative power "should have an immediate dependence on, and frequent sympathy with, the people," and "[f]requent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured."); see also The Federalist No. 37, p. 223 (J. Madison) ("The genius of republican liberty seems to demand on one side not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people….").

[4] *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 301 (2022) ("An agency, after all, 'literally has no power to act' … unless and until Congress authorizes it to do so by statute." (quoting *La. Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n*, 476 U.S. 355, 374 (1986)); *Nat'l Fed'n of Indep. Business v. Dep't of Labor*, 595 U.S. 109, 117 (2022) (per curiam) ("Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided.").

[5] See *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497–98 (2010) ("The people do not vote for the 'Officers of the United States.'" (quoting U.S. Const. art. II, § 2, cl. 2)).

[6] 15 U.S.C. § 41 ("Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."); see *Humphrey's Executor v. United States*, 295 U.S. 602, 629–30 (1935) (holding that the Section 1's limitations on the President's power to remove commissioners were constitutional); but see *Seila Law LLC v. Consumer Fin. Protection Bureau*, 140 S. Ct. 2183, 2211–12, 2218–19 (2020) (Thomas, J., concurring in part and dissenting in part) (The "independence" guaranteed by *Humphrey's Executor* "poses a direct threat to our constitutional structure and, as a result, to the liberty of the American people," and "the Court has repudiated almost every aspect of *Humphrey's Executor*.")

[7] *Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2021) ("The removal power helps the President maintain a degree of control over the subordinates he needs to carry out his duties as the head of the Executive Branch, and it works to

administrative state can act with greater dispatch than Congress; but the difficulty of legislating in Congress is a feature of the Constitution's design, not a fault.[8] The administrative state cannot legislate because Congress declines to do so.[9]

Thus, whenever we undertake to make rules governing the private conduct of hundreds of millions of people who do not vote for us, we should not begin with determining what the right answer to the policy question is. Rather, we must first assure ourselves of the power to answer the question at all.

I do not believe we have the power to nullify tens of millions of existing contracts; to preempt the laws of forty-six States; to declare categorically unlawful a species of contract that was lawful when the Federal Trade Commission Act (FCT Act) was adopted in 1914; and to declare those contracts unlawful across the whole country irrespective of their terms, conditions, historical contexts, and competitive effects. Accordingly, I respectfully dissent.

First, Commissioner Holyoak is correct that Section 6(g) of the FTC Act[10] does not confer on us the power to make legislative rules. Section 6(g) in 1914 was understood to confer the power to make procedural rules only.[11] The D.C. Circuit's contrary decision in *National Petroleum Refiners Association v. FTC*[12] deploys a mode of statutory interpretation—inferring regulatory power from silence—that has been roundly rejected in the intervening decades.[13]

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ensure that these subordinates serve the people effectively and in accordance with the policies that the people presumably elected the President to promote."); *Seila Law*, 140 S. Ct. at 2202–03 (discussing the President's removal power as a key to ensuring the executive branch is accountable to the people through the President—"the most democratic and politically accountable official in Government"); *Free Enterprise Fund*, 561 U.S. at 498 (Executive officers "instead look to the President to guide the assistants or deputies subject to his superintendence. Without a clear chain of command, the public cannot determine on whom the blame or the punishment of a pernicious measure, or series of measures ought really to fall." (cleaned up)); *Myers v. United States*, 272 U.S. 52, 131 (1926) (discussing First Congress's concern that restricting President's removal power would undermine "the great principle of unity and responsibility in the executive department, which was intended for the security of liberty and the public good").

[8] *Dep't of Transp. v. Ass'n of Am. R.R.* (*Amtrak*), 575 U.S. 43, 61 (2015) (Alito, J., concurring) ("The Constitution's deliberative process was viewed by the Framers as a valuable feature, not something to be lamented and evaded." (citations omitted)); *West Virginia v. Env't Prot. Agency*, 597 U.S. 697, 738 (2022) (Gorsuch, J., concurring) ("[T]he framers deliberately sought to make lawmaking difficult by insisting the two houses of Congress agree to any new law and the President must concur or a legislative supermajority must override his veto.").

[9] The Federalist No. 73, p. 442 (A. Hamilton) ("The injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.").

[10] 15 U.S.C. § 46(g).

[11] Thomas W. Merrill, *Antitrust Rulemaking: The FTC's Delegation Deficit*, 75 Admin. L. Rev. 277, 298 (2023) ("What was the original meaning of the rulemaking grant found in § 6(g)? The best answer would seem to be that it was understood to empower the FTC to adopt 'procedural' or internal housekeeping rules."); see also Thomas W. Merrill & Kathryn T. Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 506 (2002) (After the Act's passage, "the courts, Congress, the agency, and knowledgeable commentators all shared the understanding that section 6(g) did not confer legislative rulemaking power on the FTC.").

[12] 482 F.2d 672 (D.C. Cir. 1973).

[13] William E. Kovacic, *The Durability of the Biden Administration's Competition Policy Reforms*, 29 Geo. Mason L. Rev. 945, 948 (2022); Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U.L. Rev. 1023, 1071 (1998).

Second, even if the Commission has statutory authority to issue legislative rules under Section 6(g), it lacks statutory authority to issue *this* rule. The Supreme Court has explained that when an agency claims power to regulate in an area of tremendous "'economic and political significance,'" the agency may not rely on "a merely plausible textual basis for the agency action."[14] "The agency must instead point to 'clear congressional authorization' for the power it claims."[15] This "major questions doctrine" implements the simple truism that Congress presumably reserves major policy questions for itself in the absence of unambiguously clear delegations of power to the Executive Branch.[16]

There is no doubt that the Final Rule presents a major question. For one thing, the Final Rule regulates "a significant portion of the American economy"—indeed, nearly the entire economy.[17] The rule nullifies more than thirty million existing contracts, and forecloses countless tens of millions of future contracts.[18] The Commission estimates that the rule could cost employers between $400 billion and $488 billion in additional wages and benefits over the next ten years[19]—and does not even hazard a guess at the value of the 30 million contracts it nullifies.[20]

Moreover, the Final Rule regulates "'the subject of earnest and profound debate across the country,'"[21] and "seeks to 'intrud[e] into an area that is the particular domain of state law.'"[22] The regulation of contracts, including employment contracts, is a core exercise of the States' police power.[23] And the Commission acknowledges that there has been a robust debate within the States on the best way to regulate noncompete agreements.[24] Our constitutional structure

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[14] *West Virginia*, 597 U.S. at 721, 723 (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000)).

[15] *Id.* at 723 (quoting *Utility Air Reg. Grp. v. Env't Prot. Agency*, 573 U.S. 302, 324 (2014)).

[16] *Id.* at 721–22; see also *id.* at 737 (Gorsuch, J., concurring) ("As Chief Justice Marshall put it, … 'important subjects ... must be entirely regulated by the legislature itself,' even if Congress may leave the Executive 'to act under such general provisions to fill up the details.'" (quoting *Wayman v. Southard*, 10 Wheat. (23 U.S.) 1, 42-43 (1825))).

[17] *Id.* at 722; accord *id.* at 739 (Gorsuch, J., concurring).

[18] Non-Compete Clause Rule, 89 Fed. Reg. ____ (May __, 2024) ("Final Rule"), pre-publication version at 432.

[19] Whatever the merits of this transfer of wealth from employers to employees, the vastness of the transfer is sufficient to qualify this rule for the major-questions doctrine. See *West Virginia*, 597 U.S. at 730 ("The basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself.").

[20] Final Rule at 321; see also *id.* at 452, 464.

[21] *West Virginia*, 597 U.S. at 732 (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006)); see also *id.* at 743 (Gorsuch, J., concurring).

[22] *Id.* at 744 (Gorsuch, J., concurring) (quoting *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 594 U.S. 758, 764 (2021) (per curiam)).

[23] See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397–98 (1937); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434–35 (1934); *Manigault v. Springs*, 199 U.S. 473, 480 (1905).

[24] Final Rule at 439 ("States have been experimenting with non-compete regulation for more than a century, with laws ranging from full bans to notice requirements, compensation thresholds, bans for specific professions, notice requirements, reasonableness tests, and more."); *id.* at 460 n.1098; Non-Compete Clause Rule ("NPRM"), 88 Fed. Reg. 3482, 3494 (proposed Jan. 19, 2023) ("States have been particularly active in restricting non-compete clauses in recent years."); see also Comment by West Virginia and 17 other States, FTC-2023-0007-20892, at 13 ("Since 2011, 29 States and the District of Columbia have passed bills changing their noncompete laws."); *id.* at 13–14 (noting that some States have recently loosened restrictions on noncompete agreements, while other States have rejected proposals to tighten restrictions).

"require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power."[25] Moreover, Congress recently considered and rejected legislation that would have imposed the same policy the Final Rule imposes.[26] The Commission's termination of this debate and preemption of the laws of forty-six States makes clear that the Final Rule presents a major question.[27]

The statutory text on which the Commission relies comes nowhere close to the "'clear congressional authorization' to regulate" that the major-questions doctrine requires.[28] The Commission claims to derive its power from the Act's general grant of authority to "prevent persons … from using unfair methods of competition,"[29] together with a subsection providing the Commission power to "[f]rom time to time classify corporations and … to make rules and regulations for the purpose of carrying out the provisions of" the FTC Act.[30] The Commission has deployed this bank-shot statutory theory—combining a general statement of the Commission's competition authority with a provision addressed primarily at the classification of corporations—only once in its history.[31] "Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or subtle device[s].'"[32] The statutory text

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[25] *U.S. Forest Serv. v. Cowpasture River Preservation Ass'n*, 590 U.S. 604, 621–22 (2020). This principle is grounded in longstanding "background principles of construction" that preserve "the relationship between the Federal Government and the States under our Constitution." *Bond v. United States*, 572 U.S. 844, 857–58 (2014). "Federal statutes impinging upon important state interests 'cannot ... be construed without regard to the implications of our dual system of government.... [W]hen the Federal Government takes over ... local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit.'" *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (quoting Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 539–40 (1947)). Thus, the Supreme Court does not recognize abrogations of sovereign immunity or the preemption of state law absent clear statements of congressional intent. *Bond*, 572 U.S. at 857–58. "Th[ese] plain statement rule[s are] nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

[26] See, *e.g.*, Workforce Mobility Act of 2021, S. 483, 117th Cong. (2021); Workforce Mobility Act, H.R. 1367, 117th Cong. (2021).

[27] See *West Virginia*, 597 U.S. at 732 ("'The importance of the issue,' along with the fact that the same basic scheme EPA adopted 'has been the subject of an earnest and profound debate across the country, ... makes the oblique form of the claimed delegation all the more suspect.'" (quoting *Gonzales*, 546 U.S. at 267–68))).
The Final Rule qualifies as a major question for other reasons. For example, the power the Commission claims has been rarely used, and never to regulate an issue of this magnitude.

[28] *West Virginia*, 597 U.S. at 732 (quoting *Utility Air*, 573 U.S. at 324)).

[29] 15 U.S.C. § 45(a)(2).

[30] 15 U.S.C. § 46(g).

[31] See *West Virginia*, 597 U.S. at 724–25 (use of "vague language of an ancillary provision" (cleaned up) to promulgate only one previous rule insufficient to justify new rules of vast economic import). The Commission has relied on its competition-rulemaking authority alone only once to promulgate a rule that it never enforced, and which it subsequently withdrew. See Discriminatory Practices in Men's and Boys' Tailored Clothing Industry, 32 Fed. Reg. 15584 (Nov. 9, 1967), *repealed by* 59 Fed. Reg. 8527 (Feb. 23, 1994); Jay B. Sykes, Cong. Res. Serv., The FTC's Competition Rulemaking Authority at 2 (Jan. 11, 1968), available at LSB10635 (congress.gov) ("The FTC has promulgated one substantive antitrust rule—a 1968 regulation (preceding Magnuson-Moss) that involved price discrimination in the men's clothing industry, which the agency never enforced and later repealed."); see also Final Rule at 24–27 (noting that every other rule promulgated under Section 6(g) before the Magnuson-Moss Warranty—Federal Trade Commission Improvements Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975), invoked the power to regulate unfair or deceptive acts or practices).

[32] *West Virginia*, 597 U.S. at 723 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

on which the Commission relies is the sort of "oblique or elliptical language"[33] that cannot justify the redistribution of nearly half a trillion dollars of wealth within the general economy by regulatory fiat.[34]

As I will explain in a forthcoming written dissent to be published later, I conclude that the rule is unlawful for additional reasons. First, if Congress has in fact conferred on the Commission the power it today asserts, that conferral is an unconstitutional delegation of legislative power.[35] "Unfair methods of competition" is not an "intelligible principle"[36] sufficient

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[33] *Ibid*.

[34] See, *e.g.*, *NFIB*, 595 U.S. at 117–18 (holding that statutory authority to promulgate rules to "regulat[e] occupational hazards and the safety and health of employees" was insufficient to justify nationwide employee vaccine mandate); *Brown & Williamson*, 529 U.S. at 126, 156, 160 (holding that statutory power to regulate "drugs" and "devices" was insufficient to impose nationwide regulations on cigarettes); see generally *West Virginia*, 597 U.S. at 746 (Gorsuch, J., concurring) (cataloguing examples).

[35] See generally *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) ("Article I of the Constitution provides that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.' Accompanying that assignment of power to Congress is a bar on its further delegation. Congress, this Court explained early on, may not transfer to another branch 'powers which are strictly and exclusively legislative.'" (quoting U.S. Const. art. I, § 1, cl. 1, and *Wayman v. Southard*, 10 Wheat. (23 U.S.) 1, 42–43 (1825)); see *Amtrak*, 575 U.S. at 68 (Thomas, J., concurring in the judgment) ("Congress improperly 'delegates' legislative power when it authorizes an entity other than itself to make a determination that requires an exercise of legislative power.").

[36] See generally *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."); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 429–32 (1935); *Mistretta v. United States*, 488 U.S. 361, 371–74 (1989); but see *Amtrak*, 575 U.S. at 77–87 (Thomas, J., concurring in the judgment) (arguing persuasively that the "intelligible principle" test is inconsistent with the original meaning of the Vesting Clause and has failed to impose meaningful restraints on legislative delegation); *Gundy*, 139 S. Ct. at 2138–41 (Gorsuch, J., dissenting) (same).

The Commission argues that "unfair methods of competition" satisfies the intelligible-principle test because in striking down the National Industrial Recovery Act (NIRA) as an unconstitutional delegation in *A.L.A. Schechter Poultry v. United States*, 295 U.S. 495 (1935), the Supreme Court "offered the FTC Act … as a counterexample of proper Congressional delegation," Final Rule at 43. The Commission concedes that the Supreme Court addressed only the Commission's adjudicatory power, but argues this distinction makes no difference. Final Rule at 43–44. It makes all the difference. Case-by-case application of generally applicable rules of private conduct—contrasted with the power to issue those rules in the first instance—is an exercise of *executive* power, rather than *legislative* power. *Amtrak*, 575 U.S. at 70, 80 (Thomas, J., concurring in the judgment).

Schechter Poultry drives the point home. There, the Court concluded that, under the FTC Act, "unfair methods of competition" are "to be determined in particular instances, upon evidence, in the light of particular conditions and of what is found to be a specific and substantial public interest." 295 U.S. at 533. It further noted that, in order to conduct this case-by-case inquiry, "a quasi judicial body, was created. Provision was made for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the commission is taken within its statutory authority." *Ibid*. The "codes" of fair competition in NIRA, by contrast, "dispense[d] with this administrative procedure and with any administrative procedure of an analogous character." *Ibid*. NIRA conferred the power to issue generally applicable rules of private conduct, while the FTC Act did not. That was the distinction the *Schechter Poultry* Court drew.

The Commission's rule is uncomfortably similar to what the Court condemned in *Schechter Poultry*. Rather than adjudicating the fairness and competitive effects of the particular terms and conditions of a particular noncompete agreement on a particular employee in a particular market—as we have *always* done in the past, see Final Rule at 9–10 & nn.42–44, 283 n. 741—we announce a national rule of private conduct on the basis of a handful of empirical studies and unverifiable, often anonymous comments purporting to describe particular noncompete agreements and

to constrain our rulemaking discretion—a point driven home by the fact that we have taken diametrically opposed views on the meaning of the phrase in just the last two years.[37] And, at the very least, the nondelegation problem augurs in favor of reading the Act to avoid this grave constitutional concern.[38] I further conclude that the Final Rule is "arbitrary and capricious" under the Administrative Procedure Act[39] because the evidence on which the agency relies cannot justify a nationwide ban on all noncompete agreements irrespective of their terms, conditions, and particular effects.[40]

There are sound arguments in favor of legislation regulating noncompete agreements. But "[n]o matter how important, conspicuous, and controversial the issue," and no matter how wise the administrative solution, "an administrative agency's power to regulate … must always be grounded in a valid grant of authority from Congress."[41] Because we lack that authority, the Final Rule is unlawful.

I respectfully dissent.

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their effects. This is exactly the sort of "code-making" that the Court condemned as "an unconstitutional delegation of legislative power" in *Schechter Poultry*. *Id.* at 542.

[37] Compare Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), with Fed. Trade Comm'n, Policy Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015).

[38] *Jennings v. Rodriguez*, 583 U.S. 281, 296 (2018) ("When 'a serious doubt' is raised about the constitutionality of an Act of Congress, 'it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

[39] 5 U.S.C. § 706(2)(A).

[40] *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (A regulation is arbitrary and capricious if the agency fails to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made." (quotation marks omitted)).

[41] *Brown & Williamson*, 529 U.S. at 161 (cleaned up).