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A "RULE MAKING" CLASS: THE FEDERAL TRADE COMMISSION'S EXPANSIVE *PER SE* BAN ON NON-COMPETE CLAUSES: AUTHORITY, ENFORCEABILITY, AND THE NEED FOR CONGRESSIONAL ACTION

Nolan Johnson[*]

I. INTRODUCTION

A non-compete clause is "an agreement or contract not to interfere or compete with a former employer (as by working with a competitor)."[1] The Federal Trade Commission ("FTC") has proposed a *per se* ban on non-compete provisions in employment contracts.[2] This would arguably be the FTC's second substantive rule under the FTC Act.[3] This substantive rule making departs from the traditional common law style rule-making process in which the courts create antitrust jurisprudence standards.[4] In this way, the FTC has challenged the practice by exploring a new avenue of power under Section 5 of the FTC Act.[5]

Suppose Zander, an engineer, has signed on to a new startup company to create parts and patent intellectual property. Zander signs a non-compete agreement agreeing not to work in the industry, within that state, for two years. In exchange, the company pays him $100,000. This agreement was reached after two weeks of negotiation between Zander and the company. Now suppose Luke, a factory line worker, signs a non-compete agreement for the same company because of the knowledge Luke will have access to on the assembly line. The company, in exchange, offers a gym fitness voucher for one year in a standard form contract; this

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1. *Noncompete*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/noncompete (last visited Dec. 17, 2023).

2. A worker who is a part owner is not considered a worker per the proposed rule. *FACT SHEET: FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, FED. TRADE COMM'N (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

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

4. Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 378 (2020).

5. FEDERAL TRADE COMMISSION, *supra* note 2.

is signed by all factory line workers under the same justification. Both agreements will be banned by the FTC's proposed rule even though one is meaningfully negotiated for and one is not.[6]

Non-compete clauses are used in the ordinary course of business,[7] and have been for centuries.[8] The justification for such provisions range from protecting employer trade secrets to keeping customers with the company.[9] Employers use these types of contractual provisions in concert with other contractual provisions such as choice of forum, choice of law, and arbitration agreements.[10] These provisions can be found in handbooks, employee contracts, and separate provisions.[11] The use of non-compete provisions are sometimes seen as abusive; this has caused all state courts to limit non-compete provisions (i.e., their enforceability) to some degree with three states banning the provisions outright.[12]

The FTC's proposed rule addressing these concerns has sparked passionate debate among scholars. Professor Thomas Lambert, an antitrust law scholar,[13] equated the proposed rule to chemotherapy: "Chemotherapy is poison. It kills fast-growing cells, including those in the mouth and intestines. For most people, it is terribly harmful. We should therefore ban chemotherapy. This is the logic underlying [] FTC's proposed noncompete ban."[14] Professor Lambert is not alone. The National Association of Manufacturing argues, "'a one-size-fits-all proposal is unworkable and has the power to allow for trade secrets and other trade secret information to be given away to competitors and foreign adversaries by employees.'"[15] Others have praised the proposed rule.[16] One author described it as a "constitutional mandate[]" to uphold the promise of the 13th Amendment to not enslave workers.[17] Others have

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6. *Id.*

7. *See* Steven E. Harbour, *Restrictions on Post-Employment Competition by an Executive Under Georgia Law,* 54 MERCER L. REV. 1133, 1138 (2003) (noting noncompete provisions may be used for sales of businesses or partnership agreements, however the FTC rule is focused specifically on employee and employer relationships).

8. Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes,* 80 OR. L. REV. 1163, 1165 n.6 (2001) [hereinafter Arnow-Richman, *Bargaining for Loyalty*] ("[T]he use of employee noncompetition agreements date to fifteenth and sixteenth century England…").

9. *See, e.g.*, Harbour, *supra* note 7, at 1135–36.

10. *See* Sarath Sanga, *A New Strategy for Regulating Arbitration*, 113 NW. U. L. REV. 1121, 1123–1124 (2019) (discussing Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17 (2012)).

11. Rachel Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 B.C. L. REV. 427, 434 (2016) [hereinafter Arnow-Richman, *Modifying At-Will*].

12. Non-Compete Clause Rulemaking, 88 Fed. Reg. 3482, 3494 n.148 (Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

13. *Thom Lambert,* UNIV. OF MO. SCH. OF L., https://law.missouri.edu/person/thom-lambert/ (last visited Dec. 17, 2023).

14. Thom Lambert (@profthomlambert), X (Jan. 17, 2023, 11:12 AM), https://twitter.com/profthomlambert/status/1615396583562182657.

15. Leah Nylen, *FTC Non-Compete Ban Slammed by Business Groups as 'Unworkable'*, BLOOMBERG L. (Feb. 16, 2023, 3:50 PM), https://news.bloomberglaw.com/antitrust/ftc-non-compete-ban-slammed-by-business-groups-as-unworkable.

16. Authors have advocated for such rulemaking authority for years. Chopra & Khan, *supra* note 4, at 357.

17. Rebecca Zietlow, *Non-Compete Clauses and the 13th Amendment: Why the New FTC Rule Is Not Only Good Policy but Constitutionally Mandated*, JURIST (Feb. 16, 2023, 9:00 AM), https://www.jurist.org/commentary/2023/02/rebecca-zietlow-13th-amendment-non-compete-clauses-ftc/.

described the end of this "restrictive covenant" as a win for workers.[18] Everyone does agree on one thing; there will be legal challenges to this rule.[19]

This Note analyzes the FTC's proposed *per se* ban of employment non-compete clauses. The Note first discusses how non-compete clauses are used in the context of negotiated and adhesion contracts. The Note then turns to the FTC's ban, and its claimed authority under Section 5 of the FTC Act. The claimed authority is then analyzed in light of *West Virginia v. Environmental Protection Agency*,[20] to understand whether the ban will survive. This Note ends by suggesting Congress act for three reasons: (1) to avoid Major Question Doctrine and Non-Delegation issues related to the FTC, (2) to craft a more targeted rule which allows negotiated non-compete contracts, and (3) address the underlying issues with state unconscionability standards rampant in adhesion contracts. Throughout this Note, Zander and Luke will be illustrative in how this policy will only cause unnecessary whiplash to workers.

II. NEGOTIATION AND ADHESION: THE PEPPERCORN DILEMMA FOR NON-COMPETE CLAUSES

A. Adhesion Contracts for Employment Contracts

Negotiation is a type of alternative dispute resolution ("ADR") concerning two or more parties who look to solve opposing goals amongst themselves.[21] This includes parties understanding the "zone of possible agreement" ("ZOPA") among the parties in which they can use to find a common goal.[22] Parties will also compare their ZOPA with the "best alternative to a negotiated agreement" ("BATNA") should negotiation fail.[23] However, these principles of ADR are reduced or eliminated when placed in contracts of adhesion.

"Contracts of adhesion"[24] are a combination of a standard form contract and a demand the signer "take-it-or-leave-it."[25] Together, unwavering terms and uneven bargaining power to negotiate create issues that neither type of clause independently causes. [26] For instance, standard form contracts are those contracts which have been

18. Tom Spiggle, *Why The FTC's Proposed Rule Banning Non-Competes Is Good For Workers*, FORBES (Feb. 14, 2023, 5:15 AM), https://www.forbes.com/sites/tomspiggle/2023/02/14/why-the-ftcs-proposed-rule-banning-non-competes-is-good-for-workers/?sh=4c11c7f85fca.

19. *Id.* (citing the impact of the recent landmark decision West Virginia v. EPA, 597 U.S. 142 S. Ct. 2587 (2022) by suggesting this is a major question doctrine issue for the Court to decide); Thom Lambert (@profthomlambert), X (Jan. 25, 2023, 9:28 AM), https://twitter.com/profthomlambert/status/1618269483105140737 ("[This rule puts] the power to control the economy in the hands of three unelected bureaucrats who cannot be removed by the political branches.").

20. 142 S. Ct. 2587 (2022).

21. *Negotiation,* BOUVIER L. DICTIONARY (2012) ("Negotiation is a process of communication between parties with opposing goals related to some matter, with the intent to resolve their conflict through agreement, compromise, or surrender of some of the goals of each party.").

22. Marcela Merino, *Understanding ZOPA: The Zone of Possible Agreement,* HARV. BUS. ONLINE (Sept. 14, 2017), https://online.hbs.edu/blog/post/understanding-zopa.

23. *Id.*

24. Within the law of contracts, treatises and restatements have created full sections to this black letter subset of contracts law. *See* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1174 (1983).

25. *Id.* at 1176–77.

26. *Id.*

pre drafted by a user to handle a particular business scenario (for example, employment contracts, vendor contracts, etc.).[27] Generally, these contracts between parties of equal power are negotiated to enter into agreeable terms.[28] Likewise, "take-it-or-leave-it" prices alone would include a fixed price by a seller.[29] This is controlled by market competition which forces vendor prices to be as low as possible for the consumer.[30] However, the combined force of these provisions create a "putative contract" causing a "monopoly power" by the wielder.[31]

In the employment context, courts scrutinize the bargaining power of an employee and employer to determine a contract's enforceability.[32] To analyze the enforceability, a court will look to the doctrine of unconscionability.[33] For procedural unconscionability, the court will look to whether there was meaningful choice possible in a particular case.[34] When analyzed under substantive unconscionability, the court will evaluate whether a contract itself is "unfairly one-sided" thereby favoring the drafter.[35] To defeat the enforceability, most courts require a showing of both procedural and substantive unconscionability.[36]

To reduce the burden this place on an employee, state courts have created a presumption about conscionability. State courts draw this distinctions by whether the employee was a "professional"[37] or not.[38] This distinction is then used to create presumptions about conscionability.[39] Courts have found liberally for non-professionals not having bargaining power.[40] In these cases, the court rests its judgment on whether the language is substantively unconscionable.[41] In contrast when the employee is a professional, courts presume the employee has bargaining power or the court applies a lower standard of scrutiny.[42] In either case, the bar is stacked against the employee to show they did not actually assent to the contract. This dichotomy can also be seen in the policy considerations of employment non-compete clauses.

B. POLICY CONSIDERATIONS OF NON-COMPETE CLAUSES

Noncompete clauses are a type of private injunction.[43] Negotiation can allow both employers and employees to benefit from these injunctions. The clause incentivizes an employer to invest in their employees by training the employee on

27. *See id.* at 1177–78.
28. *Id.* at 1177.
29. *Id.*
30. *See* Rakoff, *supra* note 24, at 1179.
31. *Id.* at 1178.
32. Allison E. McClure, *The Professional Presumption: Do Professional Employees Really Have Equal Bargaining Power When They Enter into Employment-Related Adhesion Contracts?*, 74 U. CIN. L. REV. 1497, 1501–02 (2006).
33. There are two types of unconscionability: procedural and substantive. *Id.* at 1501–06.
34. *Id.* at 1502.
35. *Id.* at 1503–04.
36. *Id*. at 1505.
37. Courts have been less than clear what "professional" means. *Id.*
38. McClure, *supra* note 32, at 1505. This is substantively different than the FTC's rule which analyzes employee ownership. FEDERAL TRADE COMMISSION, *supra* note 2.
39. McClure, *supra* note 32, at 1506.
40. *Id.* at 1506–09.
41. *Id.* at 1509.
42. *Id.* at 1509–10.
43. Arnow-Richman, *Bargaining for Loyalty*, *supra* note 8, at 1166.

intimate parts of the business.[44] It also creates a bargaining chip for employment which employees can negotiate with.[45] Additionally, non-compete provisions protect business interest in their customers by preventing "its customers [from being] pirated away by unfaithful employees."[46] The clause also protects the business interests in its confidential and secret information that employees are privy to by virtue of their employment.[47] This "secrets" justification separates the clause's usefulness from non-disclosure agreements (NDA)s because of the burden of proof.[48] Non-compete clause violations must simply show the employee worked for a competitor; whereas a NDA enforcement must show an actual disclosure.[49]

Adhesion contracts detract from these policy considerations and discourage the use of non-compete clauses.[50] One such issue is "rank and file" employees will sign form language and "not appreciate precisely how non-competes limit their future employment."[51] Others may not recognize this is a substantial right to "earn a living" after employment at their current job.[52] If an employee does not understand this, they cannot effectively negotiate for the substantive right they are giving up.[53] These concerns with non-compete have traditionally been handled at the state level by restricting the enforceability in terms of "reasonableness" or banning the provision completely.[54]

There has been a recent issue with the state courts controlling the enforceability of non-compete clauses. The Supreme Court's interpretation of the Federal Arbitration Act ("FAA") has allowed companies to use choice of law provision inside of an arbitration setting to circumvent the non-compete policies of the state judiciary.[55] This combination of ADR tools available to employers has allowed employment contracts to exceed their judicial limits in a way that harms workers.[56] This has caused the kind of concern for workers' rights which may have caught the FTC's attention.[57]

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44. Sanga, *supra* note 10, at 1155.

45. *See* Harbour, *supra* note 7, at 1166 (noting this is generally within the context of executive employees, "...the executive had considerable bargaining power. [T]he executive may have entered into the noncompete agreement either as the result of the sale of his former employer or in contemplation of the sale of his current employer."); Arnow-Richman, *Modifying At-Will, supra* note 11, at 427 n.305.

46. *See* Harbour, *supra* note 7, at 1135.

47. *See id.* (citing Georgia law that does not recognize this interest but still enforces it); Arnow-Richman, *Bargaining for Loyalty*, *supra* note 8, at 1166–67.

48. Tyler Cowen, *Noncompete Contracts Can Help Workers and Firms*, BLOOMBERG L. (Jan. 10, 2023, 8:00 AM), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/XNDUSN8000000?bc=.

49. Consider a family physician's clinic who recently hired an established doctor from the local family practice; NDAs will not stop customer loss. It will also be hard to prove the new firm used the doctor's knowledge of the established practice's policies. *See id.*

50. *See* Arnow-Richman, *Bargaining for Loyalty*, *supra* note 8, at 1165–66.

51. Sanga, *supra* note 10, at 1155.

52. Arnow-Richman, *Modifying At-Will, supra* note 11, at 432.

53. *See id.*

54. Reasonableness is typically measured by looking to the duration and geographical scope of the noncompete. Sanga, *supra* note 10, at 1154–55.

55. *Id.* at 1154–55 (discussing the Court's views in Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17 (2012)).

56. *Id.* at 1155-56.

57. Non-Compete Clause Rulemaking, 88 Fed. Reg. 3482, 3493–94 (Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

C. Contrast FTC's Rule for Zander and Luke

Zander has been promoted to chief engineer for the research and development office for the last five years.[58] As mentioned earlier in this Note, Zander received $100,000 in exchange for agreeing to the non-compete clause. Zander "cannot help but use or rely upon the confidential information learned" in avoiding discarded experiments or failed hypotheses.[59] A new firm is impressed with Zander's work and wants them to come work for the company.[60] Because of the ban by the FTC, the company who invested in Zander's failed experiences would have prepped the competitor's company to cash in on Zander's individual experiences.[61] Presumably, the only remedy for the employer would be a court requiring Zander to pay back the $100,000 in reliance costs. [62]

Luke has been working for the same company and is making $18 an hour.[63] Recall he received a gym membership for his non-compete agreement. However, Luke's one year old has required extra care; this has caused Luke to resign.[64] Two months later, Luke takes a job at a plant, which builds components, for $22 an hour.[65] The new employer received a letter from the former employer informing the employer of Luke's two year non-compete clause.[66] However, the competitor moves forward with Luke's employment by citing the FTC's new promulgated rule.

III. THE FTC AND SUBSTANTIVE RULEMAKING

A. Introduction

The FTC announced a proposed rule to ban non-compete clauses for employees in January of 2023 [67] However, to do so, the Commission had to set up the process in July 2021 by issuing a new interpretation of its power within the authorizing statute.[68] After doing so, the Biden administration responded by "encourag[ing]" the FTC to use this new found power to "curtail" non-compete clauses for the

58. *See* Edet D. Nsemo & Gregory P. Abrams, *Proposed rule banning noncompetes: taking stock as comments flood the FTC,* REUTERS, https://www.reuters.com/legal/legalindustry/proposed-rule-banning-noncompetes-taking-stock-comments-flood-ftc-2023-03-17/ (Mar. 17, 2023, 10:26 AM).
59. *See id.*
60. *See id.*
61. *See id.*
62. *See* RESTATEMENT (SECOND) OF CONTRACTS § 349 (AM. L. INST. 1979).
63. *See* FEDERAL TRADE COMMISSION, *supra* note 2.
64. *See id.*
65. *See id.*
66. *See id.*
67. *Id.*
68. William T. Mcenroe et al., *Federal Trade Commission Announces Expanded Enforcement Authority Under Section 5 of the FTC Act,* MORGAN LEWIS (Nov. 11, 2022), https://www.morganlewis.com/pubs/2022/11/federal-trade-commission-announces-expanded-enforcement-authority-under-section-5-of-the-ftc-act.

common worker.[69] The impact was the proposed rule announced on January 19, 2023.[70] In a shocking display of authority, the FTC has declared this ban in spite of its history.[71]

B. Rulemaking Authority of Section 5

The proposed rule cites Section 5 of the FTC Act as it authorized authority.[72] In November of 2022, the Commission rewrote the scope of its power under the Act.[73] Previously, Section 5 was controlled by the Court's "Rule of Reason" framework used in interpreting antitrust statutes such as the Sherman and Clayton Acts.[74] Traditionally, the FTC's power has been tied to either anti-competitive practices or consumer harm.[75] The Court created the "Rule of Reason"[76] doctrine, which assesses whether there is a prohibition or "unreasonable" restraint of trade, to decide whether a practice violates competition in antitrust cases.[77] This includes contracts or agreements which prejudice the public by unduly restricting competition or trade.[78] However, the Court has struck down antitrust practices which have a focus of protecting consumers.[79] Instead, the Court has held antitrust laws could be focused on competitors or the competition itself.[80] Regardless, the Court has never endorsed the current approach taken by the Commission.

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69. "Encouraged to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority. . . to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility." Exec. Order No. 14306, 86 Fed. Reg. 36987 (Jul. 9, 2021); *see also* Spiggle, *supra* note 18 (describing the proposed rule as a fulfilled campaign promise for the President).

70. Non-Compete Clause Rulemaking, 88 Fed. Reg. 3482 (Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

71. *See id.*

72. *Id.* Another potential avenue would be Section 6, however that is not its citing authority and has traditionally been for administrative "housekeeping" rules. Thomas W. Merrill, *Antitrust Rulemaking: The FTC's Delegation Deficit*, 75 ADMIN. L. REV 277, 298 (2023).

73. *Policy Statement Regarding the Scope of Unfair Methods of Competition under Section 5 of the FTC Act,* FED. TRADE COMM'N (Nov. 10, 2022) https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf; *see also* Rachel Brass et al., *FTC Announces Broader Vision of its Section 5 Authority to Address Unfair Methods of Competition*, GIBSON DUNN (Nov. 14, 2022), https://www.gibsondunn.com/ftc-announces-broader-vision-of-its-section-5-authority-to-address-unfair-methods-of-competition/#_ftnref1 (noting that the vote of the Commission was 3-1).

74. Brass et al., *supra* note 73 (noting the FTC had endorsed the "rule of reason" framework in 2015, but they rescinded it in a leadership regime change); *contra* FEDERAL TRADE COMMISSION, *supra* note 73.

75. R. Hewitt Pate, Former Assistant Attorney General, Speech at the British Institute of International and Comparative Law Conference: Antitrust Law in the U.S. Supreme Court (May 11, 2004), https://www.justice.gov/atr/speech/antitrust-law-us-supreme-court.

76. The Court has also developed the doctrine of per se illegality and the quick look doctrine. United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940); *see also* Edward Brunet, *Antitrust Summary Judgment and the Quick Look Approach*, 62 SMU L. REV. 493, 499 (2009). However, these doctrines, while popular in the 1920s and 40s, have been reverted to the Rule of Reason in recent jurisprudence. *See* Pate, *supra* note 75.

77. *See* Pate, *supra* note 75.

78. United States v. Am. Tobacco Co., 221 U.S. 106, 179 (1911).

79. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1978).

80. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

"One of the most common mistakes is to suppose that the Commission can issue orders, rulings, or regulations ***unconnected*** with any proceedings before it."[81] The FTC Act has been in effect since 1914,[82] and was used to protect consumers from unfair practices in the past.[83] However, the FTC has been very reluctant to exercise rule-making authority under prior Commissioners to further the statute's goal.[84] The FTC's new commission has analyzed its power under Section 5 as not requiring "a separate showing of market power or market definition."[85] This would make the statute and authority, "unlike virtually all other antitrust statutes."[86] "In short, the FTC has unilaterally decided that it has almost complete discretion to declare illegal any competitive behavior that it disfavors."[87] In support of its stance, the commission cites the only time it has ever had a substantive rule stand.

The FTC has only ever promulgated one substantive competition rule under this statute; the rule required labeling.[88] This sparked the only circuit court case to address this scenario: a fifty-year-old case named *National Petroleum Refiners Association v. FTC,*[89] in which three judge panel D.C. Circuit upheld the rule by reversing the trial court.[90] In response, Congress restricted the FTC's authority by placing procedural rules to restrict, if not stop, the FTC's ability to create rules.[91] The Congressional Act accepted the labeling rule as one it agreed with, but created an exclusive statute to control the legislative rules the FTC may create.[92] The new commissioner has reasoned that these restrictions, in lieu of denial of such power, endorses the FTC's authority, but the Congressional language can also be read to bar such a reading.[93] Other laws, such as the HSR Act, have shown Congress' disapproval of granting broad rule-making authority to this agency.[94] In its legislative history, Congress was hesitant in granting such broad authority over an entire industry or allowing the FTC to prescribe rules.[95] The implication is that FTC control

81. Jennifer C. Fauver, *A Chair with No Legs? Legal Constraints on the Competition Rule-Making Authority of Lina Khan's FTC*, 14 WM. & MARY BUS. L. REV. 243, 253–54 (2023) (emphasis added) (citing Annual Report of the Federal Trade Commission 36 (1922)). Even after Congressional expansion in later years, the rule making language and resulting authority did not change. *Id.* at 254.

82. It was amended in 1938 to include "unfair or deceptive acts or practices." Erik Allison, *The High Cost of Free-To-Play Games: Consumer Protection in the New Digital Playground*, 70 SMU L. REV. 449, 455 (2017).

83. *Id.*

84. Fauver, *supra* note 81, at 246–47.

85. FEDERAL TRADE COMMISSION, *supra* note 73.

86. Brass et al., *supra* note 73.

87. *The FTC's New Section 5 Guidance: What You Need to Know*, U.S. CHAMBER OF COM. (Dec. 12, 2022), https://www.uschamber.com/finance/antitrust/the-ftcs-new-section-5-guidance-what-you-need-to-know.

88. Fauver, *supra* note 81, at 246.

89. 482 F.2d 672 (1973).

90. *Id.*

91. Randolph J. May & Andrew K. Magloughlin, *The Major Questions Doctrine Slams the Door Shut on UMC Rulemaking*, TRUTH ON THE MKT. (Apr. 28, 2022), https://truthonthemarket.com/2022/04/28/the-major-questions-doctrine-slams-the-door-shut-on-umc-rulemaking/.

92. Merrill, *supra* note 72, at 305–07 (discussing the Federal Trade Commission Improvements Act of 1975).

93. May & Magloughlin, *supra* note 91.

94. Tyler Leverington, *Hart-Scott-Rodino & Chevron Step Zero: Can the FTC Target the Pharmaceutical Industry?,* 19 MARQ. INTELL. PROP. L. REV. 309, 323–324 (2015).

95. *Id.* at 324.

over all industry or rules across all industries would be against Congressional intent.[96]

Through action and inaction, Congress has continued to show a distrust or flat refusal of FTC having broad and substantive rule-making authority.[97] Compare Congress refusing to allow the FTC to regulate advertising to children through "sweeping reform,"[98] and Congressional silence on the FTC's requirement to have a password for in-app purchases.[99] Some have argued the FTC has used the deference of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[100] as a way of seizing authority and asking for approval from Congress after the fact.[101] Even still, allowing such a rule like this to stand would have consequences.

If the proposed rule holds, the FTC could seek remedies for violations of its ban.[102] A substantive rule which creates a violation of Section 5 would allow the FTC to be financially independent from Congressional budgetary controls; it could also be used to focus on competitors rather than the practice itself.[103] Under the statute, the FTC may collect up to $43,792 per violation "where a defendant violates an order or knowingly violates an existing rule."[104] Additionally, section 19 allows additional monetary fines and penalties where "a reasonable man would have known under the circumstances [a practice] was dishonest or fraudulent."[105] Alternatively, the FTC may seek to impose a permanent injunction,[106] or force a monetary settlement for negotiated consent orders.[107]

IV. SECTION 910: THE PROPOSED RULE AND JUSTIFICATION

The FTC has announced a bold rule; non-compete clauses are a form of monopolization as an unfair practice.[108] The rule defines a non-compete clause as, "a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer."[109] The FTC describes the non-compete clause as virtually all restrictive covenants employers use to

96. *Id.*

97. Congress has passed laws in response to substantive rules, required legislative vetoes, and even defunded the agency in response to FTC's attempts to expand power. Fauver, *supra* note 81, at 260–61; s*ee also* Merrill, *supra* note 72, at 301.

98. Fauver, *supra* note 81, at 260–61.

99. Allison, *supra* note 82, at 455, 457–58.

100. 467 U.S. 837, 843–44 (1984).

101. *See* Tyler Becker, *When Congress Makes No Policy Choice: The Case of FTC Data Security Enforcement*, 120 COLUM. L. REV. 134, 149 (2020); *see also* Fauver, *supra* note 81, at 260–261.

102. *See* UNITED STATES CHAMBER OF COMMERCE, *supra* note 87.

103. In other words, this will lead to the FTC to target companies or business practices that do not conform to the FTC's policy agenda regardless of its impact on consumers. *Id.* Applying this to non-compete clauses, will the FTC simply select business who choose to resist other administrative policies? After all, 30 million are bound by this proposed rule. Non-Compete Clause Rulemaking, 88 Fed. Reg. 3482, 3485 (Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

104. *Section 5 of the FTC Act, Unfair or Deceptive Practices*, CASEGUARD (Aug. 30, 2021), https://caseguard.com/articles/federal-trade-commission-act-section-5-unfair-or-deceptive/.

105. *Id.* (citing 15 U.S.C. § 57(b)).

106. One could argue this rule is cutting out the court by forcing a permanent injunction without the judiciary. *Id.*

107. *Id.*

108. Non-Compete Clause Rulemaking, 88 Fed. Reg. at 3482–83.

109. *Id.*; *but see* FEDERAL TRADE COMMISSION, *supra* note 73 (noting that part owners are excluded).

restrict employee rights.[110] These *de facto* clauses include non-disclosure agreements (NDAs),[111] client or customer non-solicitation agreements, no-business agreements, no-recruit agreements, liquidated damages provisions, training-repayment agreements (TRAs), and no-poach agreements.[112] However, the FTC has separated no-poach agreements from the others; presumably because two businesses agreeing to not steal employees from each other or fixing wages is easier to characterize as an "unfair practice" if the other types of provisions are held outside of its scope.[113]

By the FTC's estimates, 1 in 5 workers are bound by non-compete clauses.[114] The FTC also cites evidence that the number is growing.[115] The FTC's research found three major measures of the non-compete clause: enforceability, use, and earnings.[116] However, the FTC found enforceability as the most probative measure on the effects of non-compete clause to an employee's earnings.[117] Research suggests employees do not know whether they have signed these clauses or if they are enforceable, and the FTC argues employers take advantage of this knowledge to use non-compete clauses as leverage even when unenforceable.[118]

The FTC has declared the rationale weighs heavily against allowing non-compete clauses. The FTC concluded non-compete clauses negatively impact competition in the labor market by restraining employees from their "optimal matches."[119] Further, this impact disproportionately impacts the wages of women and non-white workers.[120] The FTC also found policy considerations in support of non-compete clauses, like job creation, were "inconclusive."[121] For example, the agency used two studies to argue the positive effects of large firms are to the detriment of smaller firms making it a wash as an alternative to the study's conclusions.[122] Further, the FTC concluded it is unaware of any evidence to support other policy considerations supporting the clauses.[123]

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110. *See* Non-Compete Clause Rulemaking, 88 Fed. Reg. at 3484 ("[T]hey serve as de facto non-compete clauses."). Wisely, the FTC has excluded arbitration agreements from their inclusive list of de facto non-compete clauses in light of the Federal Arbitration Act. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018).

111. Recently, Congress has restricted more of these form contract "negotiated" provisions by outlawing them; one prominent example being NDAs. Sharon Perley Masling et al., *Speak Out act Curbs Confidentiality Agreements for Sexual Harassment and Sexual Assault*, MORGAN LEWIS (Dec. 14, 2022), https://www.morganlewis.com/pubs/2022/12/speak-out-act-curbs-confidentiality-agreements-for-sexual-harassment-and-sexual-assault.

112. Non-Compete Clause Rulemaking, 88 Fed. Reg. at 3484.

113. *See id.*

114. *Id.* at 3485.

115. *Id.* at 3485–86.

116. *Id.*

117. *Id.* at 3487.

118. Often contractual provisions are placed within materials an employee does not know are contract, therefore they do not realize what they are giving away. Arnow-Richman, *Modifying At-Will, supra* note 11, at 434; *see also* Non-Compete Clause Rulemaking, 88 Fed. Reg. at 3485 (noting the common factor is non-competes are utilized even though they are unenforceable).

119. "Whether a worker is a senior executive or a security guard, non-compete clauses block the worker from switching to a job in which they would be better paid and more productive—restricting that worker's opportunities as well as the opportunities of other workers in the relevant labor market." Non-Compete Clause Rulemaking, 88 Fed. Reg. at 3501.

120. *Id.* at 3531–32.

121. *Id.* at 3488.

122. *Id.* at 3488–89.

123. *Id.* at 3505–06.

The FTC also claims this authority is a logical conclusion based on its historic authority.[124] The FTC cites its original authority of the Sherman Act (which was grounded in Supreme Court precedent) as evidence of recognizing non-compete clauses as a type of antitrust-covered principle.[125] To supplement this argument, the FTC then proceeds to explain the research between the Department of Justice (DOJ) and FTC fostered a large data set corroborating non-compete clauses as a negative source of the labor market by suppressing wages and productivity.[126] In all, the FTC cites 17 cases to challenge non-compete clauses on antitrust grounds.[127] However, the FTC also recognizes non-compete clauses have been a long-standing principle of the common law practices of the states.[128]

All fifty states have restricted non-compete clauses in one form or another.[129] Three of these states have rendered non-compete clauses as unenforceable *per se*.[130] The remaining states have either passed laws or have a common law "disfavored" approach which restricts the ability of employers to enforce non-compete clauses.[131] Those states use a "reasonableness inquiry" to determine the enforceability of a given non-compete clause if outside statutory protection.[132] Courts use one of two tests to determine a non-compete clause's enforceability.[133] The first test consists of a two-stage analysis of the non-compete clause's purpose. First, an employer showing a legitimate interest requiring a non-compete; second, the employer showing the non-compete is tailored to that interest.[134] The second test is to analyze whether the benefit of the non-compete clause is outweighed by the harm to the worker and the public.[135] Essentially, a weighing of equities as a public policy matter. Most courts utilize a combination of these two tests.[136] However, these measures can be thwarted by the choice of law provisions used in conjunction with the

124. *Id.* at 3499–500.

125. Non-Compete Clause Rulemaking, 88 Fed. Reg. at 3496 n.183 (citing United States v. Am. Tobacco Co., 221 U.S. 106 (1911)); *see also id*. at 3496 n.182 (citing Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057, 1082 (2d Cir. 1977)).

126. *Id.* at 3482 nn.3–4.

127. *Id*. at 3496 n.183 (citing United States v. Am. Tobacco Co., 221 U.S. 106 (1911); Alders v. AFA Corp. of Fla., 353 F. Supp. 654 (S.D. Fla. 1973); Bradford v. N.Y. Times Co., 501 F.2d 51 (2d Cir. 1974); Golden v. Kentile Floors, Inc., 512 F.2d 838 (5th Cir. 1975); United States v. Empire Gas Corp., 537 F.2d 296 (8th Cir. 1976); Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057 (2d Cir. 1977); Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255 (7th Cir. 1981); Aydin Corp. v. Loral Corp., 718 F.2d 897 (9th Cir. 1983); Consultants & Designers, Inc. v. Butler Serv. Grp., Inc., 720 F.2d 1553 (11th Cir. 1983); Caremark Homecare, Inc. v. New England Critical Care, Inc., 700 F. Supp. 1033 (D. Minn. 1988); GTE Data Servs., Inc. v. Elec. Data Sys. Corp., 717 F. Supp. 1487 (M.D. Fla. 1989); DeSantis v. Wackenhut Corp., 793 S.W.2d 670 (Tex. 1990); Borg-Warner Prot. Servs. Corp. v. Guardsmark, Inc., 946 F. Supp. 495 (E.D. Ky. 1996); Caudill v. Lancaster Bingo Co., Inc., 2005 WL 2738930 (S.D. Ohio Oct. 24, 2005); Dallas South Mill, Inc. v. Kaolin Mushroom Farms, Inc., 2007 WL 9712116 (N.D. Tex. Feb. 23, 2007); Cole v. Champion Enters., Inc., 496 F. Supp. 2d 613 (M.D.N.C. 2007); Signature MD, Inc. v. MDVIP, Inc., 2015 WL 3988959 (C.D. Cal. Apr. 21, 2015)).

128. *Id.* at 3482 n.2; *see also id.* at 3493–94.

129. *Id.* at 3494 (citing Cynthia Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 391 (2006)).

130. *Id.* at 3494 n.148.

131. Non-Compete Clause Rulemaking, 88 Fed. Reg. at 3493–94.

132. *Id.* at 3494.

133. *Id.* at 3494–95.

134. *Id.* at 3495.

135. *Id.*

136. *Id.* at 3495–96.

arbitration clauses in the contract.[137] This circumvention is in part the reason the FTC feels federal intervention is needed.

To counter concerns of entering the province of the states, the FTC stresses its rule is focused on any contractual provisions which "restrict[s] competition in labor markets."[138] The FTC argues multiple contractual provisions work together to subvert state law prompting federal action. The FTC argues that an employer will do the following: an employer will place a choice of law provision inside the contract to allow them to identify what state law the suit will use to handle the dispute;[139] the employer will then add an arbitration clause to maximize potential profitability of the contractual provisions;[140] then an employer will add a non-compete or quasi non-compete clause which is now enforceable.[141] This totality approach is argued to be an unfair practice which the FTC claims as a violation of the Sherman and FTC Act.[142] However, this is not what the proposed language of the regulation does.[143]

The FTC requested comment on its proposed rule.[144] The FTC then extended the period of comment from March 20th to April 19th.[145] In a concurring statement by Commissioner Christine Wilson, she recognized the proposed rule, "is a departure from hundreds of years of precedent and would prohibit conduct that 47 states allow."[146] She also recommended comments for an alternative rule.[147] A rule which would be the second substantively promulgated rule under Section 5 of the FTC Act.

V. THE MAJOR QUESTIONS DOCTRINE

A. Introduction: Company Sues Zander, Luke, and Their New Employers

The company sues to enforce the non-compete clauses Zander and Luke signed. The company argues both contractual provisions were negotiated for, arbitration and choice of law provisions require this be evaluated on law favorable to the

137. Non-Compete Clause Rulemaking, 88 Fed. Reg. at 3496.
138. *Id.* at 3497.
139. Of course, technically the parties stipulate this provision. It is not one party telling another what the law to be is. However, form contracts surely make the FTC's concern valid. *Id.* at 3495–96.
140. *Id.* at 3485.
141. *Id.* at 3496.
142. *See id.*
143. *See* Non-Compete Clause Rulemaking, 88 Fed. Reg. at 3482–83.
144. *Id.* at 3493.
145. *FTC Extends Public Comment Period on its Proposed Rule to Ban Noncompete Clauses Until April 19,* FED. TRADE COMM'N (March 6, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-extends-public-comment-period-its-proposed-rule-ban-noncompete-clauses-until-april-19.
146. Christine S. Wilson, *Regarding the Extension of the Public Comment Period for the Notice of Proposed Rulemaking for the Non-Compete Clause Rule*, FED. TRADE COMM'N, https://www.ftc.gov/system/files/ftc_gov/pdf/noncompeteclauseextensionwilsonstatement.pdf (last visited Dec. 17, 2023).
147. *Id.*

employer, and the FTC has exceeded their authority under the FTC Act citing *West Virginia v. EPA*.[148]

B. Statutory Interpretation, Chevron, and the Origin of the Major Questions Doctrine

It is a constitutional principle that all federal "legislative powers" are vested "in Congress."[149] By extension, the Court has required a minimum of Congress giving an "intelligible principle" when delegating to agencies.[150] However, courts have used *Chevron* deference to defer to the administrative agency in areas of ambiguity to promulgate rules consistent with their legislative mandate.[151] Recently, this deference has been reduced. In *West Virginia v. EPA*,[152] the Court held the Major Questions Doctrine requires a court to refute administrative deference when statutory ambiguity affected significant "economic and political" questions.[153]

The Major Questions Doctrine found its roots in *MCI Telecommunications Corp v. AT&T*.[154] Justice Scalia wrote for the Court that the Federal Communications Commission (FCC) could not "modify any requirement" of the Communications Act, because the FCC did not have that authority prescribed to them by Congress.[155] This was a major shift.[156] The Court had historically deferred to the "experts" within an agency when language was ambiguous in a statute.[157] The *Chevron* rationale analogized Congress' ambiguity as a license for agency interpretive authority or legislative power when in the agency's accepted sphere of expertise or influence.[158] However, recent developments in the Major Questions Doctrine have rebuked such assertions.[159] One author has even argued that there is a current moratorium on using *Chevron* deference.[160]

Though this moratorium has not been expressly recognized, *Chevron* deference is abandoned for the Major Questions Doctrine when an agency chooses to (1) exercise authority, (2) under ambiguous statutory language, (3) and the policy has

148. Presumably the employer would also challenge the FTC's constitutionality, however the Court applying the constitutional avoidance doctrine would not meet a constitutional challenge under nondelegation or separation of powers. *See* Andrew Nolan*, The Doctrine of Constitutional Avoidance: A Legal Overview*, CONG. RSCH. SERV. (Sept. 2, 2014), https://crsreports.congress.gov/product/pdf/R/R43706; *see also* Ashwander v. Tenn. Valley Auth.*,* 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring).

149. U.S. CONST. art. I, § 1.

150. Gundy v. United States, 139 S. Ct. 2116, 2123 (2019).

151. Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation and Divination: Justice Breyer and the Future of the Major Questions Doctrine,* 132 YALE L.J. 693, 694–96 (2022) (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984)).

152. 142 S. Ct. 2587 (2022).

153. *Id.* at 2613–16.

154. 512 U.S. 218 (1994); *see also* Griffith & Proctor, *supra* note 151, at 694.

155. *MCI Telecomms. Corp*., 512 U.S. at 231–32.

156. *See* Merrill, *supra* note 72, at 281.

157. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

158. Griffith & Proctor, *supra* note 151, at 703.

159. Merrill, *supra* note 72, at 282 ("The root idea of the Court's opinion, however, is that a major question is one in which an agency advances a novel interpretation of its statutory authority that has the effect of significantly changing the scope of its authority."); *see also* West Virginia v. EPA, 142 S. Ct. 2587, 2608–10 (2022).

160. Merrill, *supra* note 72, at 292.

major "economic and political significance" through its impact.[161] The Court must then determine whether the agency has clear authority in accordance with "clear congressional authorization to regulate in that manner."[162]

The Major Question Doctrine is based on the separation of powers principle.[163] The purpose of the separations principle is to ensure laws are enacted democratically instead of "a ruling class of largely unaccountable 'ministers.'"[164] The fear being an executive which creates legislation unaccountable to the will of the People.[165] The separation of powers question has only become more prevalent in recent years. There has been an ever-increasing rise to the plenary of agencies and their power pursuant to various Congressional acts.[166]

C. The Current Standard

There is no set standard yet for what makes a question a Major Question under the Major Questions Doctrine.[167] In *FDA v. Brown & Williamson*,[168] the Court relied on the tobacco industry's culture and Congress's willingness to enact tobacco specific legislation to determine tobacco was not within the FDA's jurisdiction.[169] In *Brown & Williamson*, the Court established four factors for the Major Questions Doctrine: (1) economic importance, (2) political importance, (3) a major shift in regulatory scope, and (4) a strained statutory basis for its regulations.[170] However, in *Utility Air Regulatory Group v. EPA*,[171] the Court declared a clear statement by Congress could give a major shift in regulatory scope and explain away a strained statutory basis for an agency's regulation if there was a challenge of the ambiguity and the agency exceeding its authority.[172] Lastly, the concurrence in *West Virginia* has now added that a question which falls within the Major Question Doctrine must be analyzed for its proportion to the regulatory scheme, history of the statute, and the agency's historical interpretation of its authority.[173]

In *West Virginia v. EPA*,[174] Justice Gorsuch's concurrence provides a helpful analysis of the cumulative factors for what makes a question presented economically and politically significant.[175] The first factor leans towards legislative authority if a proposed rule by an agency is politically significant (i.e., if it is fiercely debated in the country), or if Congress has tried to pass legislation similar to the

161. *See West Virginia,* 142 S. Ct. at 2608, 2620–21; *see also* Griffith & Proctor, *supra* note 151, at 703.
162. *West Virginia,* 142 S. Ct. at 2609 (citing Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).
163. *Id*. at 2617 (Gorsuch, J., concurring). Its principle has a similar origin to the nondelegation doctrine proffered in *Gundy*. Gundy v. United States, 139 S. Ct. 2116, 2121 (2019). In fact, Justice Gorsuch cites the dissent's view in that case. *West Virgina*, 142 S. Ct. at 2619 (Gorsuch, J., concurring).
164. *West Virginia*, 142 S. Ct. at 2617 (citing THE FEDERALIST NO. 11 (Alexander Hamilton)).
165. *See id.* at 2618.
166. *Id*. at 2619 n.2 (noting that because Congress adopts two to four hundred laws every year, federal agencies adopt three to five thousand rules).
167. Griffith & Proctor, *supra* note 151, at 717.
168. 529 U.S. 120 (2000).
169. *Id.* at 143–61.
170. *Id.*
171. 573 U.S. 302 (2014).
172. *See id.* at 326–27.
173. West Virginia v. EPA, 142 S. Ct. 2587, 2609–12, 2622–24 (2022) (Gorsuch, J., concurring).
174. *Id.*
175. *Id.* at 2620–22.

proposed rule.[176] The second factor is the amount of labor and money a proposed rule would require on the American economy or private entities and persons.[177] The third factor is whether an agency claims a "domain of state law" through its proposed rule.[178]

Once triggered, an agency must point to a "clear congressional authorization" for the power they claim.[179] Again, Justice Gorsuch layers a step-by-step analysis into his concurrence. The court *must* start by analyzing how to view the section the agency relies on for its place within the statutory scheme.[180] A court *may* then use a variety of factors to understand whether the agency has the authority it has claimed.[181] The first factor is whether the provision relied upon is an "'extraordinary grant of regulatory authority'" through "'a long-extant statute.'"[182] The second is to analyze whether the agency believes they have the authority by analyzing its past interpretations of the relevant statute.[183] The last factor is to determine whether the agency's proposed rule matches the "congressionally assigned mission and expertise."[184]

The result of this two-layered balancing test is a combination of both objective and relative approaches to decide whether a power claimed by an agency is outside its authority.[185] What is unclear is who this layered factor test applies to. Both the concurrence and dissent spend time on the question of executive branch's power and its limits.[186] Therefore it is necessary to discern if independent agencies should have different rules applied to them when analyzing the Major Questions Doctrine.

VI. CHANGING BUSINESS PRACTICE WITH THE SWIPE OF A PEN: APPLICATION OF THE MAJOR QUESTIONS DOCTRINE

The Supreme Court in *West Virginia v. EPA* ruled executive agencies could not be given deference, and create rules, without clear direction from Congress regarding major economic and political significance questions.[187] The Court stressed this was the "extraordinary case" analysis, not the ordinary case.[188] The current question is whether the proposed rule is outside the FTC Act's grant of authority for 30 million non-compete clause provisions to be invalidated (affecting 1 in 5 workers).[189] The answer is yes under the Major Questions Doctrine.

176. *Id.* at 2620–21.
177. *Id.* at 2621.
178. Justice Gorsuch also recognizes this principle as a clear factor driven from the federalism canon. *Id.*
179. *West Virginia,* 142 S. Ct. at 2620.
180. *Id.* at 2622.
181. The use of the word "may" in Justice Gorsuch's concurring opinion suggests he believed these factors are non-exhaustive or optional. *Id.* at 2622–24.
182. *Id.* at 2632 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).
183. *Id.* (citing NLRB v. OSHA, 595 U.S. 109, 122–23 (2022)) (analyzing whether the Congressional mandate was within the agency's power).
184. *Id.*
185. Griffith & Proctor, *supra* note 151, at 698.
186. *West Virginia*, 142 S. Ct. at 2622, 2624 (Gorsuch, J., concurring); *id.* at 2642–43 (Kagan, J., dissenting).
187. *Id.* at 2608 (majority opinion).
188. *Id.* at 2607–08.
189. Jeffrey Westling, *Major Questions Doctrine and the Impact on Biden's Technology Priorities*, AM. ACTION F. (July 14, 2022), https://www.americanactionforum.org/print/?url=https://www.americanactionforum.org/insight/major-questions-doctrine-and-the-impact-on-bidens-technology-priorities/;

A. Is it a Major Question?

The FTC's proposed rule implicates a Major Question.[190] The first factor of fierce debate or Congressional attempts at legislation is met.[191] In recent years, Congress has attempted to pass multiple bills to address the issues related to non-compete clauses.[192] The second factor requiring the American economy or business entities to pivot in a substantial way is also met.[193] 30 million workers or 1 in 5 workers are subject to a non-compete clause.[194] Additionally, non-compete clauses allow companies to protect their company's intellectual property and trade secrets in ways other types of provisions do not.[195] If non-compete provisions are illegalized, the hope of increased worker movement, and the fear trade secrets and intellectual property are unprotected, will be realized. The third factor is whether this is the domain of state law.[196] Three states have banned non-compete clauses in their entirety; all 47 other states use a type of reasonableness test to determine their validity.[197] Clearly all three factors cut in favor of being a Major Question.

B. Clear Congressional Authorization

Once the Major Question Doctrine is triggered, the FTC must point to a "clear congressional authorization for the power they claim to possess.[198] The FTC invokes Section 5 of the FTC Act as an "unfair method[] of competition."[199] A court must start by analyzing how this section fits within the statutory scheme.[200] 15 U.S.C. §45(a)(1) is the main focus of the statute making it an essential part of the FTC's power for antitrust enforcement. This in connection with Section 6 could be what the Court relies on to avoid invalidating this proposed rule.[201] However, the Court will probably look to the statute's previous uses, and antitrust jurisprudence.[202]

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see also Non-Compete Clause Rulemaking, 88 Fed. Reg. 3482 (Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

190. Professor Merrill and this author diverge on the approach as to how to invalidate the proposed rule, but this analytical divergence is due to the current vagueness within the new doctrine as described in §VI.A. Merrill, supra note 72, at 290.

191. *West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring).

192. David J. Clark, *Another Bill in Congress Seeks to Limit Non-Competes – Will This One Go Anywhere?*, NAT'L L. REV. (Mar. 1, 2021), https://www.natlawreview.com/article/another-bill-congress-seeks-to-limit-non-competes-will-one-go-anywhere.

193. *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring).

194. Jackie Salwa, *The Impact that the FTC's Proposed Ban on Non-Compete Agreements will have on Trade Secrets*, JD SUPRA (Mar. 21, 2023), https://www.jdsupra.com/legalnews/the-impact-that-the-ftc-s-proposed-ban-6254474/. Even if the FTC were to limit its rule to non-negotiated contract provisions, the majority of these provisions would be abolished. *See also* Non-Compete Clause Rulemaking, 88 Fed. Reg. at 3482.

195. Salwa, *supra* note 194.

196. *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring).

197. Non-Compete Clause Rulemaking, 88 Fed. Reg. at 3494 n.148.

198. *West Virginia*, 142 S. Ct. at 2609 (citing Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

199. Non-Compete Clause Rulemaking, 88 Fed. Reg. at 3482.

200. *West Virginia*, 142 S. Ct. at 2622 (Gorsuch, J., concurring).

201. Merrill, *supra* note 72, at 290.

202. *See* Thomas Andrew Lambert & Tate Cooper, *Neo-Brandeisianism's Democracy Paradox,* 49 J. OF CORP. L. (forthcoming 2023) (discussing the diverging approaches to antitrust law).

This historical approach makes more sense. The FTC has declared authority to shape all industries that use non-compete clauses.[203] In *West Virginia*, the Court looked to whether an agency's action was an (1) "'extraordinary grant of regulatory authority'" through "'a long-extant statute;'" (2) the consistency with which the agency has applied this statute in the past; and (3) whether the rule matches the "congressionally assigned mission and expertise."[204] Antitrust law has not changed in the last century,[205] yet in November of 2022, the FTC changed the scope of its power under the Act by rescinding its previous policy statement in a 3-1 decision.[206] Under the new policy, the FTC is no longer required to make "a separate showing of market power or market definition."[207] Because of the proposed rule's scope, the FTC will not be able to enforce the rule against all companies; instead, the FTC will have the ability to choose which businesses to prosecute.[208] This is congressionally assigned expertise, but Congress has never authorized this type of authority in depth or breadth.[209]

"Admittedly, lawmaking under our Constitution can be difficult. But that is nothing particular to our time nor any accident."[210] The current proposed rule invites challenges to exactly how far *Chevron* extends this clear congressional mandate to the FTC. [211] Further, it invites questions about delegation that Congress has given the FTC under the delegation doctrine.[212] The rule implicates a major question of political importance that Congress has yet to solve. Yet Congress has not granted the authority to the FTC in clear unambiguous language to effect individual contracts in such a broad way. Despite this, the FTC views its role as the law maker.[213] This action violates both *Chevron* and delegation principles.

VII. POLICY AND CONGRESS

A. FTC's Proposed Rule Will Lead to Problems, Not Solutions

Zander and Luke want different things, and this rule does not help them. Zander presumably wants to keep the $100,000 he negotiated in exchange for the non-compete. Luke cannot find work which complies with the non-compete provision without leaving the geographical location with the one-year-old or by changing industry. Worse, both Zander and Luke would be forced to arbitrate these provisions by their

203. *See supra* Section V.A.

204. Justice Kavanaugh recently made this point during oral argument. Oral Argument at 46:00-47:00, Biden v. Nebraska, 143 S. Ct. 2355 (2023) (No. 22-506), https://www.supremecourt.gov/oral_arguments/audio/2022/22-506 (highlighting a trend by agencies using an old statute, general language, and lack of congressional consensus on the *current* issue to pass "a massive new program"); *see West Virginia*, 142 S. Ct. at 2623 (Gorsuch, J., concurring).

205. Pate, *supra* note 75.

206. FEDERAL TRADE COMMISSION, *supra* note 73.

207. *Id.*

208. *See* UNITED STATES CHAMBER OF COMMERCE, *supra* note 87. This author recognizes that there is such thing as prosecutorial discretion, but 1 in 5 employees effected means that the FTC will have virtually arbitrary power to choose if and when to enforce their own rule.

209. *See supra* Section III.B (discussing Congressional rejection of such authority).

210. West Virginia v. EPA, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring).

211. Samuel E. Milner, *Defining Unfair Methods of Competition in the Federal Trade Commission Act*, 2023 WIS. L. REV. 109, 115 (2023).

212. *Id.*

213. *Id.* at 158–62.

employer if they found out they broke the non-compete.[214] This only shifts under the FTC rule. Instead of arbitration, both they and their new companies would be dragged into a lawsuit while the old employer challenges the FTC's regulatory scope.[215]

The law is unsettled. It is unclear whether the FTC can enact its proposed rule under its current authority and the current precedent.[216] The Major Questions Doctrine is a dizzying set of factors to challenge when regulation becomes a law.[217] The Court in *dicta*, advocates in front of the Court, and some commentators have recognized the Court's disposition essentially makes this an alternative analysis to *Chevron*, but the majority in *West Virginia* at least cites *Chevron* as a prerequisite.[218] More than confusing, the Major Question Doctrine has been criticized as offensive to both textualism and purposivism by trying to craft an arbitrary (and non-exclusive) set of factors the lower courts must then apply.[219] Even applying it to a rule as clearly outside of the FTC's authority as this blanket ban can be argued within the "clear congressional authorization" of the FTC's power because of the all-inclusive statutory language of "unfair practices" and its congressional expertise.[220] But a reading such as the FTC's would frustrate the very foundation of the Constitution.[221] "No one, not even Congress, [has] the right to alter [the] arrangement [of who has authority to legislate]."[222] Ultimately, a *per se* ban would not be allowed under the FTC's claimed authority.[223]

The true irony of the FTC's rule will be its weaponization of unenforceable non-compete clauses to use against employees like Zander and Luke.[224] The new employers will be unlikely to hire Zander or Luke regardless of the enforceability

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214. *See supra* Section III.C (discussing contractual provisions to side step state law).

215. Axon Enter. v. FTC, 143 S. Ct. 890, 905 (2023) (deciding structural challenges as being ill suited for administrative adjudication).

216. There's also a question if the FTC will survive. *See id.* at 897. However, the doctrine of constitutional avoidance makes such an argument unlikely under this proposed rule. *See* Nolan, *supra* note 148; *see also* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring).

217. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2605 (2022). By this author's analysis, there are 8 factors used by the *West Virginia* concurrence spread between two prongs. *See supra* Section IV.C.

218. May & Magloughlin, *supra* note 91; *but see West Virginia,* 142 S. Ct. at 2607–08 (the majority argues it is only extreme cases). Take oral arguments from Biden v. Nebraska, et. al., a student loan forgiveness case recently before the Supreme Court. Only eight minutes into the oral arguments, Justice Sotomayor, the dissenting author in *West Virginia v. EPA*, looked to the amount of money as a measure for the Major Questions Doctrine while Justice Alito inquired and the government agreed that "in a colloquial sense…this is a major policy." Oral Argument at 7:52-8:20, 9:41-13:50, Biden v. Nebraska, 143 S. Ct. 2355 (2023) (No. 22-506), https://www.supremecourt.gov/oral_arguments/audio/2022/22-506. In response, the government argued this case did not have a "trade off [of] individual liberty interests" to distinguish from a cases involving the EPA, OSHA, and FTC. *Id.* at 10:45-11:11.

219. Doug Dolan, *Purposivism for Me, Textualism for Thee: West Virginia v. Environmental Protection Agency,* 88 MO. L. REV. (forthcoming Dec. 2023) (manuscript at 552–53) (on file with authors).

220. *See* Nat'l Petroleum Refiners Ass'n v. FTC*.,* 482 F.2d. 672, 674 (D.C. Cir. 1973); *but see supra* Section II.D.

221. Gundy v. United States*,* 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J. dissenting) ("The framers understood…if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals.").

222. *Id.*

223. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022).

224. Recall state courts have already solved this issue in their states to a varying degree of success. Although ineffective against choice of law provisions, certain provisions are still scrutinized. In comparison, the FTC's rule will allow companies to threaten suit based on the FTC's inability to enforce such a ban. This could allow a company to force settlement in an otherwise unreasonable or unenforceable non-compete provision.

under state law. Any employer with a non-compete clause provision will still assert their contractual provisions including the non-compete clause are enforceable. If a worker or company tries to resist, not only will the company continue to assert the power of the non-compete, but the old company will deny the FTC's authority. The company or worker will then be forced to settle if they do not want to go to the Supreme Court. Even if the Supreme Court hears the case, the result will likely be an agency rebuffed for overstepping, and the company and worker being punished for disobeying the non-compete clause.

B. Congressional Call to Action

The issue is with non-compete clauses which are placed within adhesion employee contracts, and the underlying substantive right given up due to a lack of bargaining power.[225] ADR is then used to circumvent state law protections which state law has set in place through the choice of law and arbitration agreements.[226] Even without circumvention, state courts seem unwilling to evaluate procedural unconscionability in "professional" employee contracts.[227]

Congress must rebuff the FTC's power grab by creating a more functional rule.[228] The FTC's rule includes a litany of contractual provisions as non-compete *de facto* clauses.[229] This type of broad interpretation of its authority is similar other times the FTC has tried to extend its power, and Congress rejected such authority.[230] However, this power grab is dissimilar to past grabs because 1) it is a substantive rule unattached to any litigation before the agency, and 2) it crosses all industries and all types of workers.[231] Congressional silence will only embolden the FTC, and other agencies, to push wider and deeper;[232] meanwhile the silence will force Zander and Luke to wait for the litigation to end.

More than rebuking the FTC, Congress should pass legislation to uphold non-compete clauses which honor workers like Zander while protecting workers like Luke.[233] This is not a new precedent. Congress has stepped in when ADR and

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225. That is, to protect intellectual property, trade secrets, or prevent customer stealing in exchange for not working in the industry after employment has ended. *See* Salwa, *supra* note 194; *see also* Harbour, *supra* note 7, at 1135.

226. Sanga, *supra* note 10, at 1123–24, 1155.

227. McClure, *supra* note 32, at 1505.

228. The FTC was criticized as being the nation's nanny for trying to lead a campaign of controlling what kids were able to watch. *The FTC as National Nanny*, WASH. POST. (Mar. 1, 1978), https://www.washingtonpost.com/archive/politics/1978/03/01/the-ftc-as-national-nanny/69f778f5-8407-4df0-b0e9-7f1f8e826b3b/ [https://perma.cc/CF6P-AY2H]. Analogously, the FTC cannot be the nanny for employees by protecting them simply because they are frustrated Congress (the parents) has not acted.

229. Non-Compete Clause Rulemaking, 88 Fed. Reg. 3482, 3484 (Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

230. Other times the FTC has tried to do so, Congress has summarily rejected its authority. *See* Fauver, *supra* note 81, at 260–61; *see also* Leverington, *supra* note 94, at 324.

231. *Compare* Fauver, *supra* note 81, at 253, *with* Non-Compete Clause Rulemaking, 88 Fed. Reg. at 3482–83.

232. *See supra* Section III.B (discussing other times the FTC has been rebuked by Congress).

233. ADR has been used for nefarious purposes such as silencing claims of sexual harassment. *See* Hirsh M. Joshi, *You Have Got to be Keating Me: Why the Ending Forced Arbitration Act for Sexual Assault and Sexual Harassment Act is a Good Start*, 2023 J. DISP. RESOL. 131, 113–114 (2023) (discussing Congress's legislative solution to the problem of using ADR to silence sexual assault and harassment survivors).

contract law has been abused in a variety of contexts.[234] Congress should propose the FTC's ban with a safe harbor for substantive negotiated employment contracts. It will limit the "chemotherapy" to fighting cancer while not poisoning healthy people.[235] Doing so allows Zander to keep the $100,000 he knowingly bartered for while allowing Luke to provide for his daughter.

The safe harbor for substantive negotiated employment contracts is an exercise in unconscionability. The underlying issue the FTC is trying to fix is an unconscionability doctrine deficiency in contract law.[236] Each state court has their own test for unconscionability which they enforce with varying degrees of success.[237] This varying degree of success is concerning since this doctrine continues to be the leading defense in how to argue unenforceability for adhesion contracts.[238] Fixing these deficiencies of state law with federal protections would allow Congress to address the FTC's concerns about non-compete clauses not being bargained for.[239] The safe harbor could also be used as an experiment for a larger federal standard of contractual unenforceability.[240] The safe harbor would create massive controversy and fierce debate. However, anything less than Congressional law with this safe harbor will harm the interest of the employee or the business.

234. For example, Congress has stepped in when contractual provisions were used to avoid paying medical costs. *See* Sarah Jolley, *Home Run or Strike Out: Can Baseball Arbitration Solve America's Medical Debt Crisis?*, 2022 J. DISP. RESOL. 169 (2022).

235. Lambert, *supra* note 14.

236. *See supra* Section III.A. Adhesion contracts have been a constant frustration in other contexts such as arbitration agreements. *See e.g.*, Ronald G. Aronovsky, *Starting Over: Letting States Regulate Adhesion Arbitration Agreements*, 71 SYRACUSE L. REV. 1019 (2021).

237. McClure, *supra* note 32, at 1505.

238. *Id.* at 1501; *see also* Aronovsky, *supra* note 236, at 1029–35.

239. Should Congress choose to act by preempting state law, it should do so unambiguously to avoid ambiguity issues. Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 283 (1995).

240. This could potentially even fix the issues of arbitration agreements. *See* Aronovsky, *supra* note 236, at 1019.