THE FEDERAL TRADE COMMISSION CAN'T COMPETE: WHY THE FTC IS LIKELY TO FALL TO CHALLENGES TO THE PROPOSED RULE NATIONALLY BANNING NON-COMPETE AGREEMENTS

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I. INTRODUCTION

On January 5, 2023, the Federal Trade Commission (the "FTC") proposed a rule that would ban non-compete agreements nationally.[1] This

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rule would ban virtually all non-competes, with a few "negligible exceptions."[2] Additionally, it would nullify any existing non-compete agreements and require employers to inform their employees subject to non-competes of the nullification.[3] The FTC took public comments through March of 2023 and will soon publish a final version of the rule.[4] It will begin enforcement of the final rule 180 days after publication.[5] It is highly likely that legal challenges will follow publication of the rule, and when that happens, courts could strike down or limit the rule.[6] Conversely, courts could uphold the rule, but we will not know in which direction the chips will fall for some time.

Non-compete clauses are typically found in employment agreements and forbid employees from working for competitors of their employer within a specific geographic region for a limited time period after leaving their current employer.[7] They are often used as a preventative measure, protecting the employer from an employee's potential use of the employer's assets for a competitor's benefit.[8] Assets that employers frequently seek to protect through the use of non-competes include unreleased products, customer lists detailing customer preferences, software, engineering plans, and more.[9] Non-competes are also often used to protect "customer relationships, investment in training, and goodwill" and thus are a regarded as a powerful tool to protect the investments of businesses.[10]

Non-competes are subject to close scrutiny in courts since they have been classified as "restraints of trade," but most United States jurisdictions

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[1] Maxwell Goss, *How Employers Can Prepare for a Possible Non-compete Ban*, 35 N.C. LAWS. WKLY. 2, 25 (Feb. 2023), https://issuu.com/scbiz/docs/nclw_february_23_web.

[2] *Id.* at 26.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* at 25.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 25–26.

have held that they are acceptable and enforceable under certain conditions, which vary depending on the jurisdiction.[11] A recurring theme throughout varying jurisdictional requirements is reasonableness.[12] States permitting non-competes require them to "be reasonable in scope and protect a legitimate business interest."[13]

This Note proceeds in four parts. The remainder of Section I discusses (A) common arguments that have been launched for and against the Proposed Non-Compete Ban (the "Proposed Rule") and (B) background regarding the FTC's possible authority to pass the Proposed Rule. Section II introduces the Sections of the Federal Trade Commission Act (the "FTC Act") from which the FTC is claiming authority to pass the Proposed Rule and considers case authority that the FTC claims supports its Proposed Rule. Section III discusses challenges that may be brought against the Rule, including (A) that the language of the Sections of the FTC Act that the FTC cites for its authority is not an explicit delegation of rule-making power, (B) that the Proposed Rule may interfere with the right to contract, (C) that the major questions doctrine disallows this Proposed Rule, and (D) that the non-delegation doctrine could disallow the Proposed Rule if the Supreme Court ultimately changes its interpretation of the doctrine, as some Justices have recently discussed their interest in doing.

A. Common Arguments for and Against the Proposed Non-Compete Ban

While proponents and opponents of the FTC's Proposed Rule have presented numerous arguments for their respective positions, some arguments are more prevalent and more likely to have an influence on the ultimate determination of the Proposed Rule's validity. This section will outline frequent arguments for and against the ban to demonstrate why this dialogue around non-competes is happening in the first place.

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[11] *Id.* at 26.

[12] *Id.*

[13] *See id.*; *see also* Alan J. Meese, *Don't Abolish Employee Non-Compete Agreements*, 57 WAKE FOREST L. REV. 631, 635 (2022).

Some main arguments advanced in support of banning non-competes are nicely outlined in a Petition for Rulemaking by the Open Markets Institute.[14] These include: (1) employees usually involuntarily sign non-competes because employers have superior bargaining power and the employees feel like they have no choice but to sign;[15] (2) even when the employee and employer have virtually equal bargaining positions, it is difficult to have meaningful negotiations because employees focus on things such as salary/wages, hours, and benefits and not on the seemingly unlikely outcome that they will leave the company;[16] (3) non-compete clauses detrimentally affect competition in labor markets, reducing earnings for all workers whether or not they are subject to non-compete clauses;[17] (4) non-competes generally do not effectively protect the intangibles they seek to protect while significantly restraining the workers' freedom in the market, as opposed, for example, to copyrights and patents that protect a specific "creative work, invention, or process;"[18] and (5) though non-competes generate benefits for the employer,[19] there are three, if not more, less restrictive alternatives to achieving the same benefits, including entering nondisclosure agreements, awarding more generous salaries and benefits to retain good employees, and entering long-term employment contracts.[20]

Conversely, there are several arguments often offered against the ban of non-competes, including: (1) since many small firms and businesses rely more heavily on training and other labor-intensive processes than their larger competitors, banning non-competes would have a disproportionately detrimental impact on smaller firms and companies;[21]

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[14] Open Mkts. Inst. et al., *Petition for Rulemaking to Prohibit Worker Non-Compete Clauses* 13–14 (Mar. 20, 2019), https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5eaa04862ff52116d1dd04c1/1588200595775/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf [hereinafter *Petition*].

[15] *See id.* at 13–18.

[16] *See id.* at 18–21.

[17] *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3488 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910); *see also Petition*, *supra* note 14, at 26.

[18] *See Petition*, *supra* note 14, at 44.

[19] *See id.* at 17.

[20] *See id.* at 47–48.

[21] *See* Meese, *supra* note 13, at 639–40.

(2) although there may be less restrictive means of protecting employers' assets that non-competes purport to protect, such as trade secret law and nondisclosure agreements, the protections of these alternatives are less effective and more costly than non-competes;[22] and (3) the benefits to the competitive marketplace resulting from the use of non-competes outweigh the alleged harm they cause for employees.[23]

These arguments both in support of and against the Proposed Rule deal with the substantive impact of eliminating non-competes. This Note, however, will focus on the FTC's authority to enact the Proposed Rule.

B. The Authority of the Federal Trade Commission to Propose and Pass Rules

To understand whether the FTC is authorized to enact the Proposed Rule, it is necessary to examine the source of their authority to propose and pass rules at all. The FTC is a federal administrative agency,[24] meaning that it possesses rule-making power and the rules that it creates have the force of law.[25] The FTC is "responsible for the administration of a variety of statutes, which, in general, are designed to promote competition and to protect the public from unfair and deceptive acts and practices in the advertising and marketing of goods and services."[26] Though the Constitution does not expressly mention federal administrative agencies, over time, Congress has delegated broad rule-making authority to administrative agencies.[27] Congress recognized that there was a need for complex regulations to be handled by more specialized agencies that were more familiar with the intricacies of specific areas that Congress did not necessarily have expertise in.[28] Since the Interstate Commerce Commission's creation in 1887, a "vast array" of

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[22] *See id.* at 688, 695.

[23] *See id.* at 699.

[24] 3 WEST'S FEDERAL ADMINISTRATIVE PRACTICE § 3301 (2022) [hereinafter WEST'S FEDERAL].

[25] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 352 (6th ed. 2019).

[26] WEST'S FEDERAL, *supra* note 24.

[27] CHEMERINSKY, *supra* note 25, at 352.

[28] *Id.*

federal agencies have been created.[29] In addition to their rule-making power, administrative agencies possess some executive power because not only can they pass regulations, they may also enforce them.[30] The combination of these powers in a single agency may "seem[ ] in conflict with elemental concepts of separation of powers."[31] However, since the demise of the non-delegation doctrine, not a single federal law has been declared an impermissible delegation of legislative power.[32]

For purposes of this Note, it will be generally assumed that, consistent with the Court's approach to the non-delegation doctrine in recent years, Congress's creation of the FTC and delegation of legislative power to it is constitutional. However, the Note will address a potential challenge regarding the non-delegation doctrine since some Supreme Court Justices have expressed interest in revisiting the Court's approach.[33] In large part though, this Note seeks to analyze whether the language in Sections 5 and 6(g) of the FTC Act grants authority to the FTC to pass the Proposed Rule and whether a challenge under the major questions doctrine could be successful. These potential challenges have more support in modern case law compared to a non-delegation doctrine challenge.[34]

II. THE FTC'S CLAIM OF AUTHORITY TO PASS THE RULE

The FTC claims their authority to pass the rule banning future non-competes and invalidating existing non-competes under Sections 5 and 6(g) of the FTC Act.[35] Section 5 of the FTC Act declares "unfair methods of competition" to be unlawful and directs the FTC to "prevent persons, partnerships, or corporations...from using unfair methods of competition in or affecting commerce."[36] Section 6(g) authorizes the FTC to "make

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[29] *Id.*

[30] *Id.* at 353.

[31] *Id.*

[32] *Id.* at 354 ("In the 80 years since *Panama Oil* and *Schechter*, not a single federal law has been declared an impermissible delegation of legislative power."). *See* discussion *infra* Section III.D.

[33] *See* discussion *infra* Section III.D.

[34] *See* discussion *infra* Section II.

[35] Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

[36] *See* 15 U.S.C. § 45(a)(1)–(2).

rules and regulations for the purpose of carrying out the provisions of" the Act, including the Act's "prohibition of unfair methods of competition."[37] The FTC asserts that Sections 5 and 6(g) together provide the FTC the authority to issue regulations that declare certain practices unfair methods of competition.[38]

The Proposed Rule would provide that it is a violation of Section 5 for an employer to "enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or, under certain circumstances, represent to a worker that the worker is subject to a non-compete clause" because it is an "unfair method of competition."[39]

The prohibition of unfair methods of competition under Section 5 includes all practices that violate either the Sherman Act or Clayton Act,[40] but courts have held that Section 5's reach is not limited to conduct prohibited under the Sherman Act, Clayton Act, or common law.[41] The FTC contends that Section 5 even "reaches conduct that, while not prohibited by the Sherman or Clayton Acts, violates the spirit or policies underlying those statutes."[42] To justify this conclusion, it cites cases like *Fashion Originators' Guild of America, Inc. v. Federal Trade Commission* and *E.I. du Pont de Nemours & Co. v. Federal Trade Commission*.[43]

Fashion Originators' held that "[i]f the purpose and practice of the combination of garment manufacturers and their affiliates runs counter to

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[37] Non-Compete Clause Rule, 88 Fed. Reg. at 3482; *see also* 15 U.S.C. § 46(g).

[38] Non-Compete Clause Rule, 88 Fed. Reg. at 3499 (citing Nat'l Petroleum Refiners Ass'n v. Fed. Trade Comm'n, 482 F.2d 672, 697–98 (D.C. Cir. 1973)).

[39] *Id.*

[40] *See, e.g.*, Fed. Trade Comm'n v. Cement Inst., 333 U.S. 683, 693 (1948) (practices violating the Sherman Act are unfair methods of competition); *see* Fashion Originators' Guild of Am. v. Fed. Trade Comm'n, 312 U.S. 457, 464 (1941) (practices violating the Clayton Act are unfair methods of competition).

[41] *See, e.g.*, Fed. Trade Comm'n v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 394–95 (1953) (explaining that unfair methods of competition under Section 5 "are not confined to those that were illegal at common law or that were condemned by the Sherman Act" and that Congress left the concept "flexible to be defined with particularity by the myriad of cases from the field of business.").

[42] Non-Compete Clause Rule, 88 Fed. Reg. at 3499.

[43] *Id.* at 3499 n.230.

the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition."[44] In *Fashion Originators'*, the Fashion Originators' Guild of America (hereinafter, the "Guild"), through manufacturers and designers that were members of the organization, claimed to create original designs mainly for women's clothing, which were copied by other manufacturers once they entered the "channels of trade."[45] These other manufacturers would sell the copycat garments at a lower price than the Guild's original garments.[46] The Guild named this scheme "style piracy," although they admitted that there was no copyright or patent to protect their "original creations" and no legislation to protect them from "copyists."[47] They nevertheless claimed that this "style piracy" was an "unfair trade practice and a tortious invasion of their rights."[48]

To combat this, the Guild "boycotted and declined to sell their products to retailers who follow[ed] a policy of selling garments copied by other manufacturers from designs put out by Guild members."[49] Consequently, approximately 12,000 retailers signed agreements to cooperate with the boycotting program, but more than half only signed because of the threat that Guild members would not sell to retailers who "failed to yield to their demands."[50] There were 176 manufacturer members of the Guild, and they occupied a "commanding position" in the business, selling 38% of women's garments in the United States in 1936.[51] Competition and public demand made it a necessity to carry at least some of the products of these manufacturers as a retailer.[52] In addition to their efforts to combat the "style piracy," the Guild also made efforts independent of the boycotting scheme to control competition, such as prohibiting members from participating in retail advertising, regulating the discounts they may allow, prohibiting members from selling women's

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[44] 312 U.S. at 463.

[45] *Id.* at 461.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.* at 461–62.

[51] *Id.* at 462.

[52] *Id.*

garments to persons who conduct businesses in residences, residential quarters, hotels or apartments, and more.[53]

The FTC found that these practices of the Guild "had prevented sales in interstate commerce, had 'substantially lessened, hindered, and suppressed' competition, and had tended 'to create in themselves a monopoly.'"[54] The Court held that the practices of the Guild violated the Clayton Act because of Section 14, which states:

> It shall be unlawful for any person engaged in commerce,...to...make a sale or contract for sale of goods,...on the condition, agreement, or understanding that the...purchaser thereof shall not use or deal in the goods, ...of a competitor or competitors of the...seller, where the effect of such...sale, or contract for sale...may be to substantially lessen competition or tend to create a monopoly in any line of commerce.[55]

The Court agreed with the FTC's findings that the Guild's actions tended to create a monopoly and therefore held these actions to be an "unfair method of competition."[56]

The Court went on to hold that the Guild's practices also violated the Sherman Act.[57] Section 1 of the Act prohibits "every contract, combination or conspiracy in restraint of trade or commerce among the several states" and Section 2 prohibits "every combination or conspiracy which monopolizes or attempts to monopolize any part of that trade or commerce."[58] The Court found that the Guild's restrictions on which garment and textile manufacturers could sell their products and the sources from which retailers could buy, the subjection of those retailers who declined to participate in the program to an organized boycott, the requirement of Guild members to reveal "intimate details of their individual affairs," and the Guild's purpose and effect to directly suppress competition from the "sale of unregistered textiles and copied designs" to

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[53] *Id.* at 463.

[54] *Id.* at 464.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 465.

[58] *Id.*

be only some of the Guild's actions that violated the aforementioned sections of the Sherman Act.[59]

The FTC's reliance on the holding of this case in justifying their Proposed Rule seems somewhat misplaced. In the Notice of Proposed Rulemaking, they quote the holding that "[i]f the purpose and practice of the combination of garment manufacturers and their affiliates runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition."[60] However, the context in which the Court stated this was not as a response to the creation of a Rule declaring the actions of the Guild as an "unfair method of competition"—it was a response to the FTC's findings in this particular case that their actions tended to create a monopoly,[61] which was explicitly prohibited by the Clayton and Sherman Acts.[62] Further, this holding related to the actions of one organization, the Guild, in the business of the manufacture and sale of women's garments.[63] In contrast, the Proposed Rule would affect a much larger population than the members of one organization in one specific sector of the economy—it would affect all kinds of employers and employees in a myriad of businesses nationwide, as stated by the FTC itself when it estimated that around thirty million Americans would be affected.[64]

Additionally, it seems that this holding would more closely apply to the FTC's Proposed Rule if the Court used broader language to address conduct affecting markets more generally, rather than the conduct of one particular market participant. The specific reference by the Court to "the practice of the combination of garment manufacturers and their affiliates" in the case indicated that the Court was not looking to address an economy-wide issue.[65] If it had sought to address an issue in the broader economy, the Court could have said that it was striking down "a certain

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[59] *Id.*

[60] *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3499 n.230 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910) (quoting *Fashion Originators'*, 312 U.S. at 463).

[61] *Fashion Originators'*, 312 U.S. at 464.

[62] *Id.* at 464–65.

[63] *Id.* at 461.

[64] *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482, at 3501.

[65] *Fashion Originators'*, 312 U.S. at 463.

practice performed by varying commercial organizations," or something similar. The specific reference to the Guild in this holding makes clear that the Court was deciding this case in reference to the specific facts and actions taken by the Guild—it was not an outright declaration that a broad range of actions could be declared unfair methods of competition if the FTC deemed them to run afoul of the public policy of the Sherman and Clayton Acts. The FTC historically has been able to suppress certain commercial actions taken by a specific party.[66] When made aware of case-specific facts the FTC finds to be unfair methods of competition, it files an action against that party, but the FTC has not previously been able to outright prevent a certain action they deem an "unfair method of competition" by banning it nationwide through a regulation.[67]

In *E.I. du Pont De Nemours & Co. v. Federal Trade Commission*, the Court held that the FTC may bar "conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit."[68] Here, the nation's two largest lead antiknock gasoline additives manufacturers, E.I. Du Pont De Nemours and Company (hereinafter, "Du Pont") and Ethyl Corporation (hereinafter, "Ethyl"), petitioned the Court "to review and set aside a final order of the Federal Trade Commission ('FTC') entered with an accompanying opinion on April 1, 1983."[69] These manufacturers had, at different times, adopted some or all of the business practices ultimately challenged by the FTC.[70] These included: (1) selling the products at "a delivered price which included transportation costs," (2) giving "extra and advance notice of price increases, over and above the 30 days provided by contract," and (3) using "a 'most favored nation' clause under which the manufacturer promised that no customer would be charged a higher price than other

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[66] *About the FTC*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc (last visited Dec. 6, 2023).

[67] *What the FTC Does*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/media-resources/what-ftc-does (last visited Dec. 6, 2023); Christine S. Wilson, Fed. Trade Comm'n, Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule 10 (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf.

[68] 729 F.2d 128, 136–37 (2d Cir. 1984).

[69] *Id.* at 130.

[70] *Id.*

customers."[71] The FTC held in an order that the antiknock compound manufacturers "had engaged in unfair methods of competition in violation of § 5(a)(1) [of the FTC Act] when each firm independently and unilaterally adopted at different times some or all of these business practices that were neither restrictive, predatory, nor adopted for the purpose of restraining competition."[72] Though the practices were apparently "non-collusive," the FTC reasoned that "they collectively had the effect, by removing some of the uncertainties about price determination, of substantially lessening the competition by facilitating price parallelism at non-competitive levels higher than might have otherwise existed."[73]

The FTC's complaint against these companies "did not claim that the practices were the result of any agreement, express or tacit, among the manufacturers or that the practices had been undertaken for other than legitimate business purposes."[74] Rather, it alleged that "the practices 'individually and in combination had the effect of reducing uncertainty about competitors' prices of lead-based antiknock compounds' and that such reduced uncertainty 'unfairly facilitated the maintenance of substantial, uniform price levels and the reduction or elimination of price competition in the lead-based antiknock market.'"[75]

In setting aside the order of the FTC, the Court considered the fact that Ethyl alone had initiated these practices prior to 1948, when said practices were not seen as methods of unfair competition at that time;[76] that the other manufacturers simply adopted practices such as the delivered pricing as they entered the market because they were under the impression that it was industry practice;[77] and that customers demanded that pricing mechanism because of its economic advantages.[78] The other business practices the FTC challenged were similarly originally performed

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[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.* at 133.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.* at 133.

solely by Ethyl and later adopted by the other manufacturers for legitimate business purposes, not as a product of any sort of collusion.[79] Although the Court did hold that conduct that does not necessarily violate antitrust laws but "is close to a violation or is contrary to their spirit" can be barred by the FTC,[80] importantly, it also noted that "[i]n prosecuting violations of the spirit of the antitrust laws, the Commission has, with one or two exceptions, confined itself to attacking collusive, predatory, restrictive, or deceitful conduct that substantially lessens competition."[81] In this case, the FTC was asking the Court to hold that the unfair methods of competition provision of Section 5 "can be violated by non-collusive, non-predatory and independent conduct of a non-artificial nature, at least when it results in a substantial lessening of competition."[82]

The one section of the case that the FTC cites in support of the Proposed Rule, taken out of context, could indeed be interpreted as providing the FTC with authority to enact the Proposed Rule. However, when considered in the context of what the Court goes on to discuss after that statement, it becomes clear that the case provides very little support to the FTC's position. There is a strong argument to be made that noncompetition agreements are non-collusive, non-deceitful, and independent conduct like the conduct at issue in *E.I. Du Pont*. Certainly, all employers that use non-compete agreements are not colluding with each other to make employees sign non-compete agreements nationwide—they are acting independently of one another, which does not necessarily fare well for the FTC in light of *E.I. Du Pont*, especially since non-compete agreements are not confined to one industry like the conduct involved in the case.[83] On the other hand, the FTC can argue, and has argued, that non-compete agreements are of a predatory nature since there is often a power imbalance between employer and employee when negotiating.[84]

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[79] *Id.* at 134–35.

[80] *Id.* at 136–37.

[81] *Id.* at 137.

[82] *Id.*

[83] *See* J.J. Prescott et al., *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, 2016 MICH. ST. L. REV. 369, 395.

[84] *See* 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); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. g (AM. LAW INST. 1981)

They also have a strong argument that the conduct is restrictive—it is indeed a type of restrictive covenant.[85]

However, *E.I. Du Pont*, like *Fashion Originators'*, considered conduct occurring in one specific industry, not a nationwide ban of specific conduct, going back to the issue that historically, the FTC has been able to suppress specific conduct performed on a case-specific basis, but has not been allowed to prevent certain conduct from occurring or continuing through a nationwide ban of that conduct.[86] Indeed, the Court in *E.I. Du Pont* goes on to say that when a business practice that does not violate antitrust laws or other laws is challenged by the FTC and is not "collusive, predatory, or exclusionary in character," unless there is a formulated standard for determining what is "unfair" under Section 5, "the door would be open to arbitrary or capricious administration of § 5[.]"[87] Thus, "the FTC could, whenever it believed that an industry was not achieving its maximum potential, ban certain practices in the hope that its action would increase competition."[88]

The Court specifically noted the potential for this arbitrary administration regarding "an *industry* [that] was not achieving its maximum [] potential"[89]—it only contemplated the possibility of a ban on a specific practice in a certain industry, not a ban on a specific practice that extends to all industries in the national economy. The Court's statement that "[i]n short, the absence of proof of a violation of the antitrust laws or evidence of collusive, coercive, predatory, or exclusionary conduct, business practices are not 'unfair' in violation of § 5 unless those practices either have an anticompetitive purpose or cannot be supported

("Postemployment restraints are scrutinized with particular care because they are often the product of unequal bargaining power and because the employee is likely to give scant attention to the hardship he may later suffer through loss of his livelihood.").

[85] *See generally* C. T. Drechsler, Annotation, *Enforceability of Restrictive Covenant, Ancillary to Employment Contract, as Affected by Territorial Extent of Restriction, Part 1 of 2*, 43 A.L.R.2d § 94 (1955).

[86] Robert McAvoy, Comment, *How Can Federal Actors Compete on Noncompetes? Examining the Need for and Possibility of Federal Action on Noncompetition Agreements*, 126 DICK. L. REV. 651, 675 (2022) (discussing the Court's opinion in *A.L.A. Schechter Poultry Corp. v. United States* praising the FTC's § 5 authority).

[87] *E.I. Du Pont*, 729 F.2d at 138.

[88] *Id.* at 138–39.

[89] *Id.*

by an independent legitimate reason"[90] does not bode well for the Proposed Rule. Courts have consistently held that non-compete agreements often have legitimate business purposes and not merely just an anticompetitive purpose.[91] Opponents of the Proposed Rule may try to distinguish *E.I. Du Pont* from the conduct at bar in the Proposed Rule by emphasizing the alleged anticompetitive purpose of non-competes, but that purpose would be hard to prove as a justification for a ban across the nation. *E.I. Du Pont*, like *Fashion Originators'*, does not seem to provide strong support for the Proposed Rule when the quotations the FTC cited to for support for the Rule are contextualized.

III. LIKELY LEGAL CHALLENGES TO THE FTC'S CLAIMED AUTHORITY

The FTC's citations to the same few cases to support the conclusion that non-competes are an unfair method of competition under Sections 5 and 6(g) of the FTC Act is revealing. Truth be told, there is not much current support in the law for this stance, and if the Proposed Rule is ultimately passed, it will face a vast array of legal challenges.

A. Language of Sections 5 and 6(g) of the FTC Act Challenge

In her dissenting statement regarding the proposal of the rule, Commissioner Christine Wilson disputes the claim that these sections provide the FTC substantive rulemaking authority.[92] She writes that "section 6(g) was believed to provide authority only for the Commission to adopt the Commission's procedural rules. For decades, consistent with the statements in the FTC Act's legislative history, Commission leadership testified before Congress that the Commission lacked substantive competition rulemaking authority."[93] Indeed, the legislative history tends to show a strong aversion to conferring legislative rulemaking power to the FTC and a preference for the FTC to act in more of a judicial role,

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[90] *Id.*

[91] *See generally* 1 PRACTITIONER'S GUIDE TO N.C. EMPLOYMENT LAW § 5.1 (2019).

[92] Wilson, *supra* note 67, at 1.

[93] *Id.* at 10.

enforcing the discontinuation of certain unfair methods of competition.[94] The Commission nonetheless tried to make substantive rules in the 1960s and 1970s.[95]

Although it was held in *National Petroleum Refiners* that the Commission did have substantive rulemaking authority,[96] that case arose from a rule regarding both competition and consumer protection principles.[97] However, the one instance in which the FTC issued a substantive rule regarding only competition principles, the rule was not enforced and was eventually withdrawn.[98] Therefore, there has never been an enforced rule based solely on preventing unfair methods of competition.[99] In that realm, the FTC has historically only acted in a judicial role, challenging particular methods as unfair methods of competition rather than defining a widely used practice as an unfair method and banning it.

Indeed, following the *National Petroleum Refiners* ruling, Congress adopted the Magnuson-Moss Act,[100] "which required substantive consumer protection rules to be promulgated with heightened procedural

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[94] *Id.*; *see* 51 Cong. Rec. 14932 (1914), reprinted in THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 4732 (Earl W. Kintner ed., 1982) (statement of Rep. Covington):

> The Federal trade commission will have no power to prescribe the methods of competition to be used in the future. In issuing orders it will not be exercising power of a legislative nature . . . The function of the Federal trade commission will be to determine whether an existing method of competition is unfair, and, it is finds it to be unfair, to order the discontinuance of its use. In doing this it will exercise power of a judicial nature.

Id. See also id. at 13317, reprinted in THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 4675 (Earl W. Kintner ed., 1982) (statement of Sen. Walsh):

> We are not going to give to the trade commission the general power to regulate and prescribe rules under which the business of this country shall in the future be conducted; we propose simply to give it the power to denounce as unlawful a particular practice that is pursued by that business.

Id.

[95] Wilson, *supra* note 67, at 11.

[96] Nat'l Petroleum Refiners Ass'n v. Fed. Trade Comm'n, 482 F.2d 672, 698 (D.C. Cir. 1973).

[97] Wilson, *supra* note 67, at 11.

[98] *Id.* at 11 nn. 47–48.

[99] *Id.* at 11.

[100] 15 U.S.C. §§ 2301–2312.

safeguards under a new Section 18 of the FTC Act."[101] The inclusion of rulemaking authority in this Act for consumer protection issues with no mention of rulemaking authority for competition issues undercuts the claim that Congress intended for the FTC to have substantive rulemaking authority regarding unfair methods of competition.[102] If Congress intended for the FTC to have substantive competition rulemaking authority, they would have prescribed the means by which they could implement substantive rules like they did for consumer protection. Proponents of the Proposed Rule may assert that the Magnuson-Moss Act was intended to clarify existing rulemaking authority, not grant substantive rulemaking authority for the first time.[103] However, considering that the Commission has never invoked these sections for substantive rulemaking authority before[104] and there is little existing caselaw to buttress that authority, it will be an uphill battle for proponents of the Proposed Rule.

B. Fundamental Right to Contract Challenge

One's first thought when considering potential challenges to the Proposed Rule may be that the Proposed Rule would violate the Contract Clause of the United States Constitution.[105] The Contracts Clause prohibits States from "impairing the Obligation of Contracts."[106] "Freedom of contract is the general rule; 'restraint the exception.'"[107] However, the Contract Clause does not apply to the federal government, therefore it does not apply to the FTC.[108] The Proposed Rule cannot be successfully challenged under the Contract Clause.

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[101] Wilson, *supra* note 67, at 11.

[102] *Id.* at 1, 11.

[103] *Id.* at 11.

[104] *See* JAY SYKES, CONG. RSCH. SERV., LSB10635, THE FTC'S COMPETITION RULEMAKING AUTHORITY 1–2 (2023).

[105] U.S. CONST. art. I, § 10 cl. 1.

[106] *Id.*

[107] John M. Masslon II & Cory L. Andrews, *Comment of the Washington Legal Foundation to the Federal Trade Commission Concerning Non-Compete Clause Rule in Response to the Public Notice Published at 88 Fed. Reg. 3,482 (Jan. 19, 2022),* WASH. LEGAL FOUND. 3 (Mar. 17, 2023), https://www.wlf.org/wp-content/uploads/2023/03/WLF-Comment-Noncompete-Rule.pdf (quoting Chas. Wolff Packing Co. v. Ct. of Indus. Rels. State of Kansas, 262 U.S. 522, 534 (1923)).

[108] *Id.* (citing Peick v. Pension Benefit Guar. Corp., 724 F.2d 1247, 1263 (7th Cir. 1983)).

However, the Washington Legal Foundation argues that the FTC should not "ignore the fundamental right to contract when deciding whether to ban most non-competes nationwide"[109] because "there are things the government legally may do that still violate individuals' fundamental rights" like using eminent domain for private development.[110] It is legal, but "does not comply with fundamental principles of justice."[111] The Washington Legal Foundation argues that just because the federal government ultimately may have the power to ban non-competes, that does not mean they should, because the right to contract is fundamental.[112] This is not the strongest argument against banning non-compete agreements, but it could provide supplementary support for some of the other challenges that may hold more weight in the Court's eyes.

C. Major Questions Doctrine Challenge

The Proposed Rule will certainly be challenged under the major questions doctrine. In several recent cases, the Supreme Court has invoked the major questions doctrine to reject "agencies' efforts to squeeze round regulations into square statutes"[113] when agencies scavenge for old legislation to solve current national problems despite the lack of clear congressional authorization to use the legislation in that way.[114] To prevent agencies from cherry-picking convenient language in existing legislation for regulatory authority, the court "expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and

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[109] *Id.*

[110] *Id.*; *see* Kelo v. City of New London, 545 U.S. 469 (2005).

[111] Masslon & Andrews, *supra* note 107, at 3.

[112] *Id.*

[113] Jordan T. Smith, *The Mechanics of the Major Questions Doctrine*, 31 NEV. LAW. 8, 9 (Jan. 2023).

[114] *See id.* at 8; *see also* Food & Drug Admin. v. Brown & Williams Tobacco Corp., 529 U.S. 120 (2000) (rejecting FDA's attempt to use statutes mentioning "drug" and "devices" to assert regulatory authority over the tobacco industry when Congress did not grant it that authority); Gonzales v. Oregon, 546 U.S. 243 (2006) (rejecting the Attorney General's attempt to construe the phrase "legitimate medical purpose" in the Controlled Substance Act in conjunction with a rule to bar certain substances from state-assisted suicide); Alabama Ass'n of Realtors v. Dep't of Health and Hum. Servs., 141 S. Ct. 2485 (2021) (rejecting the CDC's attempt to invoke a rarely-used statute about communicable diseases to impose a nationwide eviction moratorium when congressional authorization had expired).

political significance."[115] The importance of the major-questions doctrine was recently reiterated when in *West Virginia v. Environmental Protection Agency*, the Supreme Court held that the Court "presume[s] that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'"[116] This is especially true when those decisions "exert unprecedented authority over large sectors of the economy and cost millions or billions of dollars."[117]

In *West Virginia*, the Supreme Court "explained that an agency's exercise of statutory authority involved a major question where the 'history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority.'"[118] At issue in that case was the Environmental Protection Agency's (EPA) attempt to claim authority to "balanc[e] the many vital considerations of national policy implicated in the basic regulation of how Americans get their energy."[119] Prior to 2015, the EPA established certain emission limits under Section 111 of the Clean Air Act based on application measures that would "reduce pollution by causing the regulated [individual] source to operate more cleanly."[120] But now they were attempting to "improve the overall power system...by forcing a shift throughout the power grid from one type of energy source to another" rather than regulating to improve the "emissions performance of individual sources."[121]

The Court found that Congress would not have intended to delegate an issue of such political and economic significance to the EPA, especially considering this unprecedented view of its authority based on the language of the statute.[122] The Court stated that the "EPA claimed to discover an

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[115] Smith, *supra* note 113, at 9 (quoting Alabama Ass'n of Realtors, 141 S. Ct. at 2489).

[116] 142 S. Ct. 2587, 2609 (2022) (quoting U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 855 F.3d 381, 419 (D.C. Cir. 2019)).

[117] Smith, *supra* note 113, at 9.

[118] *West Virginia*, 142 S. Ct. at 2608.

[119] *Id.* at 2612.

[120] *Id.* at 2610.

[121] *Id.* at 2611–12.

[122] *Id.* at 2612.

unheralded power representing a transformative expansion of its regulatory authority in the vague language of a long-extant, but rarely used, statute designed as a gap filler."[123] Opponents of the Proposed Rule will almost certainly compare this language from *West Virginia*[124] to the "vague language" in Sections 5 and 6(g) of the FTC Act[125] the FTC is using to justify its substantive competition rulemaking authority. They likely will also analogize the unprecedented nature of the EPA's action in *West Virginia* to the unprecedented nature of the FTC's Proposed Rule.[126] Opponents will assert that the political or economic shift regarding the ban of non-competes is of comparative significance to that of the proposed nationwide energy shift in *West Virginia*[127] since they each would affect millions across the country.

Congress's grants of regulatory authority to agencies are "rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'"[128] In other words, if the language an agency relies on seems vague or difficult to understand in the context of the authority it tries to assert, Congress may not have intended for the agency to exercise that kind of power. The major questions doctrine is often a relevant consideration when an agency asserts regulatory authority beyond what reasonably could be understood to have been granted to it by Congress.[129] This was displayed in *West Virginia* where the Court, after considering the unprecedented nature of the EPA's claimed authority, concluded that in order to take such action, "the Government must point to 'clear congressional authorization' to regulate in that manner,'" and found that it was unable to do so.[130]

Considering the recent *West Virginia* ruling[131] and the historical application of the major questions doctrine, opponents of the FTC's

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[123] *Id.* at 2610.

[124] *Id.*

[125] *Id.*; 15 U.S.C. § 45(a)(1)–(2); 15 U.S.C. § 46(g).

[126] *West Virginia*, 142 S. Ct. at 2610.

[127] *Id.* at 2613.

[128] *Id.* at 2609 (quoting Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 468 (2001)).

[129] Masslon & Andrews, *supra* note 107, at 4.

[130] 142 S. Ct. at 2596.

[131] *Id.*

proposed rule will claim that the ban of all existing and future non-competes is a major question that would require clear, explicit authorization from Congress. That authorization is not accomplished by Sections 5 and 6(g) of the FTC Act.[132] If it is held that the language of these sections does not amount to an express authorization from Congress to ban non-competes, the Court's analysis will turn to whether banning non-competes is a major question. The FTC, in its Proposed Rule, estimates that the rule's implementation will affect "approximately one in five American workers—or approximately 30 million workers."[133] This does not fare well for the FTC in light of another recent Supreme Court decision, *Alabama Association of Realtors v. Department of Health & Human Services*,[134] which held that a rule affecting sixteen million Americans was a major question that was reserved for Congress.[135]

In *Alabama Association of Realtors*, the Center for Disease Control ("CDC") sought to enforce a moratorium that would affect "[a]t least 80% of the country, including between 6 and 17 million tenants at risk of eviction."[136] Congress had previously enforced an eviction moratorium but did not extend it when it expired, though it had done so previously.[137] The CDC supported their own enforcement of the moratorium when Congress declined to extend it again by claiming that Section 361(a) of the Public Health Service Act provided the requisite authority.[138] In deciding that this Act did not provide the requisite authority for the moratorium, the Court emphasized that the Act was originally passed in 1944 and had never before been invoked to justify an eviction moratorium.[139] Regulations under that section had "generally been limited to quarantining

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[132] *See* Masslon & Andrews, *supra* note 107, at 5–6.

[133] Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3485 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910) (citing Natarajan Balasubramanian et al., *Employment Restrictions on Resource Transferability and Value Appropriation from Employees* 35 (Jan. 31, 2023) (unpublished manuscript) (on file at https://ssrn.com/abstract=3814403). Please note that the Non-Compete Clause Rule in the Federal Register references this article by its original title, "Bundling Employment Restrictions and Value Appropriation from Employees."

[134] 141 S. Ct. 2485 (2021).

[135] *Id.* at 2489–90.

[136] *Id.*

[137] *Id.* at 2486–87.

[138] *Id.* at 2487.

[139] *Id.* at 2487, 2489–90.

infected individuals and prohibiting the import or sale of animals known to transmit disease."[140] The Court further held that the connection between "eviction and the interstate spread of disease" was too attenuated from measures that were specifically identified in the statute, thus it was a "stretch" to say that the CDC possessed the authority for the moratorium.[141]

The Court did not expressly state that it was conducting a major questions doctrine analysis regarding this claimed authority, but it became clear that was the direction the Court was heading when it stated that "[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast "economic and political significance."'"[142] The Court then honed in on the fact that between six and seventeen million Americans would be affected by the moratorium, and that Congress had already provided nearly $50 billion in emergency rental assistance, to find that this issue was a major question that would require Congress "to enact exceedingly clear language" to "significantly alter the balance between federal and state power," since the landlord-tenant relationship is typically state-governed.[143]

If six to seventeen million affected people is enough for an issue to be deemed subject to the major questions doctrine, then it is hard to imagine that the Court would find that the FTC has the authority to pass the Proposed Rule under Sections 5 and 6(g). If the FTC's estimate that the non-compete ban would affect thirty million Americans is correct, under *Alabama Association of Realtors*, it seems that it would be subject to the major questions doctrine and there would have to be exceedingly clear language from Congress authorizing this sort of regulation. Considering the vague language of Sections 5 and 6(g),[144] that would be a difficult argument to make.

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[140] *Id.* at 2487.

[141] *Id.* at 2488.

[142] *See id.* at 2489.

[143] *Id.* at 2489 (quoting U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1849 (2020)). Note that non-competition agreements are also typically state-governed. *See* discussion *supra* Section I.

[144] Masslon & Andrews, *supra* note 107, at 5–6.

One opponent of the proposed rule, the Washington Legal Foundation, finds it "trivial" to examine whether the FTC has express authority to regulate non-compete agreements because "[n]othing in the Federal Trade Commission Act suggests that the FTC's power to ban unfair methods of competition includes the power to ban noncompete agreements," and Section 6(g) only allows the FTC to "issue regulations."[145] Just because an agency has power to issue regulations does not mean that its power is unlimited.[146] This is exemplified by cases like *West Virginia* and *Alabama Association of Realtors.*[147] The agencies in each of these cases admittedly had general authority to issue regulations, yet the Supreme Court found that those general grants of authority did not expand to regulating major questions because of the lack of a clear statement from Congress.[148]

The U.S. Chamber of Commerce (the "Chamber") asserts that "[g]iven the expansive scope of Section 5, the Commission's enforcement authority under that statute extends to a wide range of nationwide economic activity, including mergers and acquisitions, exclusive dealing contracts, and even patent suits."[149] The Chamber then reasons that if the Commission has the authority to make regulations categorically defining "unfair methods of competition," then all of these areas to which Section 5 extends unrelated to non-competes could be affected eventually as well.[150] But, according to the Chamber, when Congress gave the FTC broad authority to bring enforcement actions regarding unfair methods of competition, it nonetheless required the FTC to prove that specific conduct harmed competition which allowed each enforcement action to turn on the specific facts of the case at hand.[151] Interpreting Section 5 to allow regulatory action regarding unfair methods of competition could outlaw "a

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[145] *Id.*

[146] *Id.* at 6.

[147] *Id.*; 142 S. Ct. 2587 (2022); 141 S. Ct. 2485 (2021).

[148] *Id.*

[149] Sean Heather, U.S. Chamber of Commerce, *Re: Notice of Proposed Rulemaking, Federal Trade Commission; Non-Compete Clause Rule (88 Fed. Reg. 3,482–3,546, January 19, 2023)*, U.S. CHAMBER OF COMMERCE 16 (Apr. 17, 2023), https://www.uschamber.com/assets/documents/FTC-Noncompete-Comment-Letter_FINAL_04.17.23.pdf.

[150] *Id.*

[151] *Id.*

massive number of private agreements or business activities without regard to whether each one actually harms competition and upend[] decades of antitrust jurisprudence on which the business community relies."[152] The Chamber contends that if Congress intended for the Commission to make decisions of such economic and political significance, it surely would have said so explicitly.[153]

This is bolstered by the fact that several amendments to the FTC Act regarding rulemaking authority were proposed and rejected by Congress.[154] Not only did a federal court reject the Commission's attempt to issue a substantive rule in 1972, but Congress rejected "legislation that would confer legislative rulemaking authority on the FTC."[155]

On balance, considering the Supreme Court's recent jurisprudence on the major questions doctrine, a major questions doctrine challenge would likely be successful in striking down the rule. That is, if the Court were to find that the FTC did not have express authority from Congress to enact the Proposed Rule under Sections 5 and 6(g), it would be difficult to argue that the Proposed Rule did not affect a major question and to prevail against a major questions doctrine challenge.

D. Non-Delegation Doctrine Challenge

An additional challenge that the Proposed Rule may face in litigation is a challenge under the non-delegation doctrine. The non-delegation doctrine "is based on the principle that Congress cannot delegate its legislative power to another branch of government, including independent agencies."[156] The non-delegation doctrine is no longer often invoked as a challenge to Congressional delegation of rulemaking power to agencies because the Supreme Court has not found that Congress has made an improper delegation of legislative power since the 1920's, so long as it has set "an intelligible principle to which the person or body authorized to fix

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[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.* at 16–17 (quoting Thomas W. Merrill & Kathryn T. Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 493 (2002)).

[156] Wilson, *supra* note 67, at 12.

rules is directed to conform."[157] However, five Supreme Court Justices have recently expressed their desire to revisit the approach the Court has taken to the non-delegation doctrine "for the past 84 years."[158] So, even though a non-delegation doctrine challenge to the Proposed Rule may not seem the most successful route to take, if the Justices do revisit the Court's approach to the doctrine, a challenge could very well be successful, so it is worth acknowledging.

In *A.L.A. Schechter Poultry Corp. v. United States*,[159] Congress's authorization for the FTC to prohibit unfair methods of competition was approved by the Supreme Court because it directed the FTC to act as a "quasi-judicial body" in the administrative enforcement proceedings the FTC would hold to do so.[160] Because it set out a process for a "formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review," there was an "intelligible principle" with which the FTC was to conform in prohibiting unfair methods of competition.[161] Conversely, the Court found that provisions of the National Industrial Recovery Act to issue "codes of fair competition" were "*improper* delegations of legislative power, distinguishing the impermissibly broad fair competition codes from the FTC Act's approach to address unfair methods of competition that are 'determined in particular instances, upon evidence, in light of particular competitive conditions.'"[162]

The language stating that the FTC's approach to address unfair methods of competition should be determined in particular instances would be specifically hurtful to the FTC's position regarding the Proposed Rule under a non-delegation challenge. They are not trying to prohibit a certain party or even a particular industry from entering non-compete agreements—they are trying to prohibit the whole nation from doing so. The combination of this language and the seeming lack of express authorization from Congress for the FTC to pass regulations of this nature

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[157] *Id.* at 13 (citing J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928)).

[158] *Id.* at 12 n.61.

[159] 295 U.S. 495 (1935).

[160] Wilson, *supra* note 67, at 13 (citing *Schecter*, 295 U.S. at 533).

[161] *Id.*

[162] *Id.* (quoting *Schechter*, 295 U.S. at 533) (emphasis in original).

creates a strong argument for opponents of the Proposed Rule to invoke when arguing against the FTC's authority.

IV. CONCLUSION

In sum, whether it be a challenge asserting that the language of Sections 5 and 6(g) of the FTC Act do not grant FTC the requisite authority, a right to contract challenge, a major questions doctrine challenge, or a non-delegation doctrine challenge, the Proposed Rule is destined to be attacked. The FTC will especially need to get creative in their use of case law if they are forced to defend themselves against a major questions doctrine challenge, as at least the case law addressed herein is not on their side. There are many reasons to call into question the ethics of non-competition agreements, especially when they are used to exploit low-income workers. The FTC's efforts are well-intended, but at the moment, seem a bit fantastical. An actual nationwide ban of non-compete agreements does not seem to be in the near future, unless there are some major changes in the law.