

BEYOND THE BAN: ONE MAJOR CHALLENGE FACING THE FTC NON-COMPETE RULE

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On July 9, 2021, President Biden issued Executive Order 14036 on Promoting Competition in the American Economy, a directive aimed at fostering fair competition and dismantling barriers that hinder market competition.¹ Within the Order, the President urged the Federal Trade Commission (FTC) to curtail the use of non-compete clauses that may unfairly limit worker mobility.² While the Executive Order's issuance was unsurprising, it sparked numerous questions about the future landscape of non-compete agreements.³ The FTC had a range of regulation options to fulfill the objectives laid out in the Executive Order.⁴ Yet, on January 5, 2023, nearly a year and a half later, the FTC took a significant step by submitting a notice of proposed rulemaking (NPRM) to prohibit and outright ban the use of non-compete agreements.⁵ The Non-compete Clause Rule (NCC Rule) would introduce a new subchapter in the Code of Federal Regulation (CFR) that would prevent employers from entering into non-compete clauses with workers and require the rescission of

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1. *Executive Order on Promoting Competition in the American Economy*, THE WHITE HOUSE (Jul. 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy>.

2. *Id.*

3. Clifford Atlas et al., *Takeaways from President Biden's Executive Order on Non-Competes*, NATIONAL LAW REV. (Jul. 15, 2021), <https://www.natlawreview.com/article/takeaways-president-biden-s-executive-order-non-competes>.

4. *Id.*

5. *Non-Compete Clause Rulemaking*, FEDERAL TRADE COMMISSION (Jan. 5, 2023), <https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking>.

existing non-compete agreements.⁶ The proposed rule sparked immediate backlash.⁷ Should it go into effect in its current form, the rule would significantly alter the landscape of employment and non-compete agreements.

The FTC Commission argues that there are significant benefits to enacting the NPRM. The agency estimates that the ban would increase workers' earnings between \$250 billion and \$296 billion annually and impact millions of employers and employees,⁸ as it would apply to independent contractors and anyone who works for an employer, paid or unpaid.⁹ The Commission further argues that the rule would help to double the number of companies founded by former workers in the same industry and close the racial and gender wage gaps by 3.6 to 9.1 percent.¹⁰ Finally, amidst rising inflation costs with a significant impact on consumers, the FTC Chair contends that the proposed rule would potentially decrease consumer healthcare prices by roughly \$150 billion a year.¹¹ The response to the NPRM has been divisive and extensive, with the FTC having to extend the public comment period and push back the Commission's vote on the rule until 2024 after receiving over 27,000 public comments.¹² If enacted in its proposed form, the rule would impact almost every industry in the United States.¹³

The Commission relies on Sections 5 and 6(g) of the FTC Act, along with limited case law, to establish its legal authority for implementing the NPRM.¹⁴ Section 5 of the FTC Act directs the Commission "to prevent persons, partnerships, or corporations . . . from using unfair methods of

6. *Id.*

7. Michael Molzberger & Matthew Prewitt, *FTC's Proposed Non-Compete Ban Timeline Set Back After Thousands Submit Public Comments*, NAT'L LAW REV. (Jun. 14, 2023), <https://www.natlawreview.com/article/ftc-s-proposed-non-compete-ban-timeline-set-back-after-thousands-submit-public/>.

8. *Non-Compete Clause Rulemaking*, *supra* note 5.

9. *Id.*

10. FEDERAL TRADE COMMISSION, P201200, *Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding the Notice of Proposed Rulemaking to Restrict Employers' Use of Noncompete Clauses* (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/statement-of-chair-lina-m-khan-joined-by-commrs-slaughter-and-bedoya-on-noncompete-nprm.pdf.

11. *Id.*

12. Molzberger & Prewitt, *supra* note 7.

13. Edward Dartley & Jacqueline Duval, *Emerging and Mid-Sized Managers: Preparing for the FTC's Proposal to Eliminate Non-Competes*, NAT'L LAW REV. (May 16, 2023), <https://www.natlawreview.com/article/emerging-and-mid-sized-managers-preparing-ftc-s-proposal-to-eliminate-non-competes>.

14. *Non-Compete Clause Rulemaking*, *supra* note 5.

competition in or affecting commerce.”¹⁵ Section 6(g) authorizes the Commission to “make rules and regulations for the purpose of carrying out the provisions of” the FTC Act, including the Act’s prohibition of unfair methods of competition.¹⁶ Taking Sections 5 and 6 together, the Commission argues that the two sections provide it with the authority to issue regulations declaring practices to be unfair methods of competition.¹⁷ The agency cites previous Supreme Court decisions that allow Section 5 to reach conduct that, while not prohibited by the Sherman or Clayton Acts, violates the spirit or policies underlying those statutes.¹⁸ This precedent, the FTC argues, coupled with its determination that non-compete agreements are an unfair method of competition, allows the agency to regulate and outright ban non-compete agreements.¹⁹

There are several legal challenges along the agency’s path to banning non-compete agreements.²⁰ At a time when the FTC is seeking to expand its administrative agency power under Article 5, the Supreme Court has taken a contrasting approach by actively eroding administrative agency power and delegated authority.²¹ In the 2022 landmark Supreme Court case *West Virginia v. Environmental Protection Agency* (EPA), the majority opined for the first time the major questions doctrine, holding that Congress must provide clear direction to the EPA agency rather than a broad delegation of power for the agency to regulate greenhouse gas emissions.²² The major questions doctrine asserts that courts should not defer to agencies on matters of “vast economic or political significance” unless the U.S. Congress has explicitly given the agencies the authority to act in those situations.²³ The recent opinion in *Biden v. Nebraska* further expanded the major questions doctrine. In *Nebraska*, the Court ruled against President Biden’s student loan forgiveness program, concluding

15. 15 U.S.C. 45(a)(2).

16. 15 U.S.C. 46(g).

17. Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910), <https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule>.

18. *Id.* at 3499.

19. *Id.*

20. Joseph Lavigne et al., *Legal Challenges the FTC Faces in Light of Proposed Ban*, NAT’L LAW REV. (Jan. 27, 2023), <https://www.natlawreview.com/article/legal-challenges-ftc-faces-light-proposed-ban-non-compete-agreements>.

21. Andrew Blum et al., *Supreme Court Signals Move Away from Judicial Deference to Administrative Agencies*, NAT’L LAW REV. (Jul. 20, 2022), <https://www.natlawreview.com/article/supreme-court-signals-move-away-judicial-deference-to-administrative-agencies>.

22. *West Virginia v. EPA*, 142 S. Ct. 2587, 2596-2609 (2022).

23. *Id.*

that “the basic and consequential tradeoffs inherent in a mass debt cancellation program are ones that Congress would likely have intended for itself.”²⁴ Most significant in the *Nebraska* case was Justice Barrett’s concurrence, which defended the application of the major questions doctrine and further fleshed out guidelines for its use.²⁵

Another challenge to the NPRM is the potential overturning of the *Chevron* deference. *Chevron* holds that when a court reviews an agency’s construction of the statute that it administers, it must first ask whether Congress has directly spoken to the precise question at issue.²⁶ If it has not, then courts proceed to step two and ask whether the agency’s interpretation of the statute is reasonable.²⁷ The Commission is interpreting the power to ban non-competes from Sections 5 and 6 of the FTC Act, meaning that the FTC’s interpretation would fall directly under a *Chevron* deference analysis. The Supreme Court is set to rule in the 2023 term on whether it should overrule *Chevron* deference in *Loper Bright Enterprises v. Raimondo*.²⁸ No doubt the outcome in *Loper Bright* will have a significant impact on how a court analyzes the non-compete ban.

If passed in its current form, the NPRM is likely to be challenged and reach the Supreme Court.²⁹ Various challenges can be raised against the proposed rule,³⁰ but based on recent precedent and the Court’s emphasis on placing restrictions on administrative agency power, the most likely challenge to the rule will arise through the major questions doctrine. This article is thus divided into three parts. Part I provides an overview of the proposed rule, Section 5 and Section 6(g) of the FTC Act, and the FTC’s defense of the rule. Part II examines the evolution and growing prominence of the major questions doctrine and the history of non-compete agreements. In Part III, this article applies the major questions

24. Biden v. Nebraska, 143 S. Ct. 2355, 2361 (2023).

25. *Id.* at 2367-85.

26. Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842 (1984).

27. *Id.*

28. Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted*, 143 S. Ct. 2429 (2022).

29. William Kishman, *The Non-Compete Landscape in 2023: What Employers Should Know About Changes in Non-Compete Law from the FTC, NLRB, Antitrust Claims and New State Laws (US)*, NAT’L LAW REV. (Sep. 28, 2023), <https://www.natlawreview.com/article/non-compete-landscape-2023-what-employers-should-know-about-changes-non-compete-law> (noting that “[t]here is a good chance that the U.S. Supreme Court ultimately will decide those challenges, as it has with several other recent challenges to federal agency rules.”).

30. These challenges include the right to contract, economic rights, and trade secret issues. These issues will likely be raised alongside a major question doctrine challenge but contain significant Constitutional claims that the Court could potentially address. Given the scope of the paper, these issues are relevant to the legality of the ban but are omitted as they do not fit in with a major questions doctrine analysis.

doctrine to the proposed rule in a manner consistent with recent Supreme Court decisions and ends by discussing the implications that the NPRM has on labor and employment law. If the proposed rule were to pass as currently written and subsequently face a challenge in the Supreme Court, the FTC's non-compete rule would likely not only be struck down and rejected but could also have far-reaching implications for future regulations of the FTC, the Department of Labor, and other administrative agencies. If the rule goes unchallenged, it will eliminate non-compete clauses from employment agreements. Either path would fundamentally alter not only the current landscape of labor and employment law but also how administrative agencies function and regulate our society.

I. THE PROPOSED NON-COMPETE CLAUSE RULE

The FTC's non-compete rule proposes to add a new subchapter consisting of five sections under Title 16 of the Code of Federal Regulations.³¹ The five sections set out the definitions for the subchapter, the non-compete ban, exceptions to the ban, the ban's relation to state laws, and the compliance date.³²

The non-compete ban is found under the proposed Section 910.2, and states that:

It is an unfair method of competition 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 represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable non-compete clause.

The same section also requires an employer that entered a non-compete clause with a worker to rescind the non-compete clause no later than the specified compliance date, effectively establishing a retroactive non-compete ban.³³ The employer must then provide notice to the employee that the non-compete clause is no longer in effect and that it may not be enforced against the worker.³⁴

There is, however, a limited sale-of-business exception that exists within the NPRM. Section 910.3 provides that the ban does not apply to non-competes entered between the seller and buyer of a business and is only available where the party restricted by the non-compete clause is a

31. *Non-Compete Clause Rulemaking*, *supra* note 5.

32. *Id.*

33. *Id.*

34. *Id.*

substantial owner of, or substantial member or substantial partner in, the business entity at the time the person enters into the non-compete clause.³⁵ The proposed rule is seeking public comment as to whether franchisees should be covered by the rule and whether senior executives should be exempted from the rule, or subject to a rebuttable presumption rather than a ban.³⁶ Despite the potential exemptions for senior executives and franchisees, the proposed rule's exemption remains narrow.

The fourth section, Section 910.4, includes an express preemption provision of conflicting state law. Specifically, it holds that Section 910 shall supersede any state statute, regulation, order, or interpretation to the extent that it is inconsistent with it.³⁷ But the preemption clause only preempts state laws that afford weaker protections against non-competes, not greater protections. Hence, a state law permitting non-compete agreements when the terms are tailored to a legitimate business interest and are reasonably limited would conflict and be subject to preemption. A state law that categorically prohibits all non-competes without exemptions would not conflict and would not be subject to the express preemption provision.³⁸

The final section of the proposed rule establishes both an effective date and a compliance date.³⁹ According to Section 910.5, the effective date of the rule would be 60 days after the final rule is published in the *Federal Register*, while the compliance date would be set 180 days after the final rule is published in the *Register*.⁴⁰ To adhere to the proposed rule an employer would need to revoke any non-compete clauses that it entered into before the compliance date.⁴¹ Accordingly, during the compliance period and before the compliance date, an employer would need to assess whether to implement replacements for their existing non-compete clauses, draft the replacements, and then negotiate and enter into those replacements with the relevant employees.⁴² Employers are also required during the compliance period to remove any non-compete clauses from employment contracts that they provide new workers to avoid entering into future non-compete agreements with employees.⁴³

35. *Id.*

36. *Id.*

37. *Id.*

38. Non-Compete Clause Rule, *supra* note 17.

39. *Non-Compete Clause Rulemaking*, *supra* note 5.

40. Non-Compete Clause Rule, *supra* note 17.

41. *Id.*

42. *Id.*

43. *Id.*

The FTC is basing its power to propose the non-compete rule on Sections 5 and 6(g) of the Federal Trade Commission Act of 1914 (FTC Act).⁴⁴ The FTC Act is the primary statute of the Commission and is where Congress sets out the FTC's powers, responsibilities, and limitations.⁴⁵ The FTC Act has its origins in the Sherman Antitrust Act, the Clayton Antitrust Act, and the strong anti-trust movement in the early 1900s.⁴⁶ When Congress passed the FTC Act, the focus of the Commission was to enforce both consumer protection and antitrust laws.⁴⁷ Section 5 of the Act declares “unfair methods of competition” illegal, and empowers the Commission to prevent persons, partnerships, or corporations from using unfair methods of competition in a manner that affects commerce.⁴⁸ Section 6(g) of the Act authorizes the Commission to “make rules and regulations for the purpose of carrying out the provisions of” the FTC Act, including the Act's prohibition of unfair methods of competition.⁴⁹

Section 5 of the FTC Act was heavily debated, edited, and analyzed throughout its creation and subsequent passage.⁵⁰ The FTC Act was proposed at a time when the Sherman Act was failing to limit monopolies and protect consumers and was thus enacted to fix these worsening issues.⁵¹ Section 5 became the focus of the debate on the bill and drew varying responses from Senators.⁵² Opponents of Section 5 criticized the broad discretion they understood the statute to convey and distrusted the proposed agency that the Act would create.⁵³ Supporters of Section 5 liked that it established a new agency with prosecutorial capabilities that could fill the void of addressing anticompetitive acts when the Department of Justice fell short.⁵⁴ Issues also surrounded what “unfair competition” was meant to entail, as opponents charged that Section 5 was so vague it

44. *Id.*

45. Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (2024).

46. Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L. J. 1, 2 (2003); Sherman Act, 15 U.S.C. §§ 1-38; Clayton Act, 15 U.S.C. §§ 12-27(2024).

47. *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/about-ftc/mission/enforcement-authority>.

48. 15 U.S.C. 45(a)(1)-(2).

49. 15 U.S.C. 46(g).

50. Winerman, *supra* note 46, at 93.

51. *Id.* at 2.

52. *Id.* at 69.

53. *Id.*

54. *Id.* at 3.

unconstitutionally delegated legislative authority.⁵⁵ Although not ultimately defined in the bill, the sponsors argued that “unfair competition” was a competition by which firms grew for reasons other than efficiency, and referenced a recent article at the time that stated, “fair competition in an economic sense signifies a competition of economic or productive efficiency.”⁵⁶ On August 5, 1914, the Senate passed the commission bill.⁵⁷ In regards to Section 5, the House and Senate versions of the commission bill differed little.⁵⁸ Ultimately, the FTC Act passed the Senate 43-5 and passed the House without a recorded vote, becoming law on September 26, 1914.⁵⁹

The FTC is relying on Sections 5 and 6(g) to pass the proposed rule, arguing that it is a violation of Section 5 for an employer to engage in certain actions related to non-compete clauses.⁶⁰ Extensive debate surrounds two aspects of the rule: (1) whether non-competes are unfair methods of competition, and (2) whether Congress intended for the FTC to use Sections 5 and 6(g) in such a broad and decisive manner.⁶¹ Opponents of the proposed rule contend that it should also be set aside by a court, as the rule is arbitrary and capricious under the Administrative Procedures Act (APA).⁶² For this article, the focus will primarily be on the Congressional intent of Sections 5 and 6(g) under the proposed rule, as this will be the focus under a major questions doctrine analysis.

When the FTC issued a notice of proposed rulemaking and opened it for public comment, it included materials to defend and inform the public about the proposed rule.⁶³ This included a “Legal Authority” section under the NPRM, where the FTC laid out its claims and arguments in favor of the broad scope and usage of Sections 5 and 6.⁶⁴ The FTC argues that taken together, Sections 5 and 6(g) provide the Commission with the authority to issue regulations declaring practices to be unfair methods of

55. *Id.* at 74.

56. *Id.* at 75.

57. *Id.* at 88.

58. *Id.* at 90.

59. *Id.* at 92.

60. *Non-Compete Clause Rule*, *supra* note 17.

61. *The FTC’s Noncompete Rulemaking is Blatantly Unlawful*, U.S. CHAMBER OF COMMERCE, <https://www.uschamber.com/finance/antitrust/the-ftcs-noncompete-rulemaking-is-blatantly-unlawful>.

62. Peter Steinmeyer & Erik Weibust, *Expert Q&A on the FTC’s Proposed Rule Banning Employee Non-Competes*, REUTERS (Feb. 7, 2023), <https://www.reuters.com/practical-law-the-journal/transactional/ftcs-proposed-rule-banning-employee-non-competes-2023-02-07/>.

63. *Non-Compete Clause Rulemaking*, *supra* note 5.

64. *Non-Compete Clause Rule*, *supra* note 17.

competition.⁶⁵ It goes on to argue that courts have consistently clarified that Section 5 of the FTC Act prohibits unfair methods of competition, which includes practices violating both the Sherman and Clayton Acts, and that the scope of Section 5 extends beyond the specific conduct prohibited by these acts or common law.⁶⁶ The rule encompasses incipient violations, referring to conduct that, if left unchecked, would likely develop into antitrust violations in the future.⁶⁷ Finally, the FTC argues that conduct violating the spirit or policies underlying the Sherman or Clayton Acts falls within the reach of Section 5, even if the text of the statutes does not prohibit it.⁶⁸

Following the FTC's proposed rule, the General Counsel of the National Labor Relations Board (NLRB) issued a memo discussing her view that most non-competes and non-solicitation agreements unlawfully interfere with employees' protected rights under the National Labor Relations Act (NLRA).⁶⁹ The memo also contained guidance that directs field investigators to look for and refer non-competes that may violate the NLRA to NLRB headquarters for review and possible prosecution.⁷⁰ However, the NLRB's position differs from the FTC's proposed rule in two major ways. First, the memo states that the NLRB will only focus on "overbroad non-compete provisions [that] are imposed on low-wage or middle-wage workers who lack access to trade secrets or other protectible interests."⁷¹ This is significantly different than a complete ban on non-competes. Second, the memo only contains guidance, and the NLRB has yet to issue a rule banning non-competes.⁷² Even if the NLRB issued a rule against non-competes, it is unlikely that it would go as far as the FTC and enact a rule completely banning non-compete agreements given the difference in enforcement and the NLRB's focus only on low to middle-wage non-compete agreements.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *NLRB General Counsel Issues Memo on Non-competes Violating the National Labor Relations Act*, NAT'L LABOR REL. BD. (May 30, 2023), <https://www.nlr.gov/news-outreach/news-story/nlr-general-counsel-issues-memo-on-non-competes-violating-the-national>.

70. Kishman, *supra* note 29.

71. NATIONAL LABOR RELATIONS BOARD, OFFICE OF GENERAL COUNSEL, Memorandum GC 23-08, *Non-Compete Agreements that Violate the National Labor Relations Act* (May 30, 2023).

72. Kishman, *supra* note 29.

II. HISTORY OF THE MAJOR QUESTIONS DOCTRINE AND NON-COMPETE AGREEMENTS

The major questions doctrine is a novel, expanding theory that courts are using to limit federal agency power, and is similar to the nondelegation doctrine.⁷³ Both the nondelegation and major questions doctrines are grounded in the separation of power principles, with the nondelegation doctrine protecting against Congress's intentionally broad delegation of its power, and the major questions doctrine guarding against unintentional delegation of legislative power. Under the major questions doctrine, the Supreme Court has rejected agency claims of regulatory authority when (1) the underlying claim of authority concerns an issue of "vast 'economic and political significance,'" and (2) Congress has not empowered the agency with authority over the issue. Before the emergence of the doctrine, courts gave significant deference and trust to administrative agencies under *Chevron* and similar precedents.⁷⁴ However, in recent years, both the Court's and Americans' trust in administrative agencies has rapidly diminished.⁷⁵ The eroding of society's trust is the main motivator that is prompting courts to curtail agencies' authority under the major questions doctrine. That lack of trust is now centered on administrative bans of non-compete agreements.

A. History of Non-Compete Agreements

The history of non-compete agreements can be traced back to the early fifteenth century, yet the modern framework for non-competes in both the United States and England is centered on the 1711 decision in *Mitchel v Reynolds*.⁷⁶ In *Mitchel*, Chief Justice Parker of the Queen's Bench noted that there was a presumption that all restraints of trade are invalid, but that this presumption may be overcome by demonstrating that the restraint is valuable consideration on a reasonable and useful

73. Randolph May, *NFIB v. OSHA: Nondelegation, Major Questions, and Chevron's No Show*, NOTICE & COMMENT BLOG, YALE J. REG. (Jan. 25, 2022), <https://perma.cc/A2VB-VWKP/>.

74. *Art. I, Sec. 1.5.5, Agency Discretion and Chevron Deference*, LEGAL INFORMATION INSTITUTE, <https://www.law.cornell.edu/constitution-conan/article-1/section-1/agency-discretion-and-chevron-deference/> (noting that "Congress has given considerable leeway to administrative agencies to interpret statutory ambiguities, which has been sustained by the Supreme Court under the Chevron doctrine.").

75. Jeffery Jones, *Trust in Federal Government Branches Continues to Falter*, GALLUP (Oct. 11, 2022), <https://news.gallup.com/poll/402737/trust-federal-government-branches-continues-falter.aspx>.

76. Harlan Blake, *Employee Agreements Not to Compete*, 73 HARV. L. R. 625, 631 (1960).

contract.⁷⁷ This decision fundamentally changed how the courts analyzed non-competes, and for the first time, distinguished between “contracts in restraint of trade generally,” which at the time were considered void, and those “limited as to time or place or persons,” which “have been regarded as valid and duly enforced.”⁷⁸ The *Mitchel* decision played a pivotal role in shaping and defining the nineteenth-century English and United States courts’ perspective on non-compete issues.⁷⁹

Since the early nineteenth century, non-compete agreements have fallen under the purview of state regulation, allowing each of the fifty states to craft policy decisions that align with the needs of their citizens and economies.⁸⁰ One of the first modern Supreme Court decisions on the issue, *Oregon Steam Navigation Company v. Winsor*, upheld a covenant, given in connection with the sale of a steamship, not to compete in the state of California.⁸¹ The Court noted that “[i]t is a well-settled rule of law that an agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable and there be a consideration to support it.”⁸² The *Winsor* decision solidified the reasonableness standard followed by a number of states today.

State non-compete laws have continued to evolve, but recently there has been a significant push by states to reevaluate their non-compete agreement laws.⁸³ In recent years, 37 states have reassessed their non-compete laws, with 24 of them implementing changes in their laws.⁸⁴ In 2021 alone, 66 non-compete bills were pending in 25 states.⁸⁵ Four states have now banned non-compete agreements entirely, and many other states have enacted restrictions, such as setting a compensation threshold or requiring advance notice.⁸⁶ The New York Legislature recently passed a bill that would ban non-compete agreements, but the governor has yet to sign the bill into law.⁸⁷ The varying state laws on non-compete agreements

77. *Id.* at 629.

78. *Alger v. Thacher*, 36 Mass. 51, 53 (1837).

79. *Blake*, *supra* note 76, at 638-39.

80. *A Brief History of Noncompete Regulation*, FAIR COMPETITION LAW (Oct. 11, 2021), <https://faircompetitionlaw.com/2021/10/11/a-brief-history-of-noncompete-regulation/>.

81. 87 U.S. 64, 71 (1873).

82. *Id.* at 67.

83. *A Brief History of Noncompete Regulation*, *supra* note 80.

84. *Id.*

85. *Id.*

86. Leah Shepard, *States Outlaw Noncompete Agreements*, SHRM (Jul. 10, 2023), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/states-restrict-noncompetes.aspx>.

87. *Id.*

have left employers dealing with a patchwork of state-level requirements, creating challenges for companies operating across states with different laws.

The recent storm of states reconsidering their non-compete agreement laws has led to increased federal attention on the subject. In 2015, a surge of federal legislative activity emerged around the topic of non-compete agreements.⁸⁸ The first bill to be brought forward, the MOVE Act, sought to prohibit the use of non-competes for low-wage employees.⁸⁹ That same year, two more federal bills were introduced with objectives similar to the MOVE Act, yet none of the trio managed to reach the floor.⁹⁰ A year later the Obama administration issued two reports investigating the use and impacts of non-compete agreements.⁹¹ This again set off a push for federal regulation, with both sides of the political aisle looking to pass legislation to ban or severely limit non-compete agreements.⁹² The FTC became involved after certain members of Congress publicly urged the agency to examine the appropriateness of regulating non-competes.⁹³ After the 2020 election, President Biden announced his plan to eliminate non-compete clauses and no-poaching agreements that hinder the ability of employees to seek higher wages, better benefits, and working conditions by changing employers.⁹⁴ This plan led to Executive Order 14036, the basis for which the FTC issued its non-compete ban. Although historically regulated by individual states, non-compete agreements have recently become the focus of concerted efforts by the federal government to regulate them to the greatest extent possible.

B. The History of the Major Questions Doctrine

The origins of the major questions doctrine can be traced back to the 1994 decision in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*,⁹⁵ and a decision six years later in *FDA v. Brown & Williamson*.⁹⁶ In the *MCI* decision, the Court emphasized that Congress was unlikely to intend agency discretion in determining industry

88. *A Brief History of Noncompete Regulation*, *supra* note 80.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 220 (1994).

96. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 121 (2000).

regulation, stressing that such significant determinations should be made by Congress rather than delegated to agencies.⁹⁷ In *Brown & Williamson*, the Court upheld its previous decision in *MCI* when it found that it was highly unlikely that Congress intended to delegate a decision of such economic and political importance to an administrative agency,⁹⁸ and that Congress had already previously addressed the matter.⁹⁹

After the decision in *Brown & Williamson*, the issues of delegation fell dormant until the Supreme Court decision fourteen years later in *Utility Air Regulatory Group v. Environmental Protection Agency*.¹⁰⁰ In the *Utility Air* decision, the Supreme Court ruled that agency claims of regulatory authority should be rejected when the underlying claim of authority concerns an issue of “vast ‘economic and political significance,’” and where Congress has not clearly empowered the agency with authority over the issue.¹⁰¹ The decisions in *Utility Air* helped set the groundwork for the creation of the major questions doctrine and its rise to the majority rule in agency law. A few years later, in the landmark case of *West Virginia v. EPA*, the Supreme Court for the first time opined a majority decision that embraced and referenced the major questions doctrine.¹⁰² The Court directly referenced its decision in *Utility Air*, finding that “courts expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.”¹⁰³ The agency instead must point to “clear congressional authorization” for the power it claims.¹⁰⁴ The *West Virginia* decision established the major questions doctrine as the primary tool for the Supreme Court to restrict agency power on significant political and economic issues wherever it deems necessary.

A case that is similar to the FTC non-compete rule is the *National Federation of Independent Business v. Occupational Safety and Health Administration (NFIB)*.¹⁰⁵ *NFIB* dealt with the issue of whether Congress

97. 512 U.S. at 231-34.

98. *Brown & Williamson*, 529 U.S. at 160.

99. The Court noted that Congress had directly addressed the problem of tobacco and health through legislation on six occasions since 1965. *Id.* at 137.

100. *Utility Air Reg. Group (UARG) v. EPA*, 573 U.S. 302, 307 (2014).

101. *Id.* at 324.

102. “The dissent criticizes us for announc[ing] the arrival of this major questions doctrine and argues that each of the decisions just cited simply followed our ‘ordinary method’ of ‘normal statutory interpretation’ but the bottom line—a requirement of ‘clear congressional authorization,’—confirms that the approach under the major questions doctrine is distinct.” *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

103. *Id.* at 2605.

104. *Id.* at 2605.

105. *Nat’l Fed’n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661, 662 (2022).

delegated statutory authority through the OSHA Act to the Secretary of Labor to enact a national COVID-19 vaccine mandate.¹⁰⁶ Although not mentioned directly in the majority opinion, the major questions doctrine was heavily discussed in the concurring opinion.¹⁰⁷ Justice Gorsuch concluded that the vaccine mandate represented a claim of power to address a matter of vast national significance, as it affected the vaccination status of 84 million Americans.¹⁰⁸ In his concurring opinion, Gorsuch underscored the historical practice of regulating such matters at the state level, where governmental authorities possess broader and more general powers, rather than relying on federal agencies to do so.¹⁰⁹ Gorsuch finished his opinion noting that the purpose of the major questions doctrine was to guard against the possibility of an agency seeking to assume responsibilities far beyond its initial assignment and that the doctrine is “a vital check on expansive and aggressive assertions of executive authority.”¹¹⁰

After the decision in *West Virginia*, lower courts were left struggling with how to properly apply the doctrine. The case *Biden v. Nebraska*, and Justice Barrett’s concurrence, helped to better flesh out standards for the new rule.¹¹¹ The concurring opinion discussed the ongoing debate about the doctrine’s source and status.¹¹² First, Justice Barrett worked to differentiate the major questions doctrine from substantive canons.¹¹³ The major questions doctrine, according to the Justice, is not “a strong-form substantive canon” but rather serves as “an interpretive tool reflecting common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.”¹¹⁴ Justice Barrett also stressed the significance of common sense and context throughout her opinion, specifically when applying the major questions doctrine and interpreting the scope of delegation.¹¹⁵ Finally, the concurrence highlights two important considerations relevant to the NPRM when analyzing delegation under the

106. *Id.* at 662-63.

107. *Id.* at 667.

108. *Id.*

109. *Id.* at 668.

110. *Id.* at 669.

111. *Biden v. Nebraska*, 143 S. Ct. 2355, 2361 (2023).

112. *Id.* at 2376.

113. *Id.* at 2377 (noting “[y]et for the reasons that follow, I do not see the major questions doctrine that way.”).

114. *Id.* at 2378.

115. *Id.* (noting that “clarity may come from specific words in the statute, but context can also do the trick. Surrounding circumstances, whether contained within the statutory scheme or external to it, can narrow or broaden the scope of a delegation to an agency.”).

doctrine. The first is the mismatch between broad invocations of power by agencies and relatively narrow statutes that purport to delegate that power.¹¹⁶ The second relative consideration under the doctrine is when an agency claims to discover in a statute an unheralded and innovative power to regulate “a significant portion” of the American economy.¹¹⁷ In reaching her conclusion against the student loan forgiveness in *Biden*, Justice Barrett found that “[c]ommon sense tells us that as more indicators from our previous major questions cases are present, the less likely it is that Congress would have delegated the power to the agency without saying so more clearly.”¹¹⁸

In recent years, the major questions doctrine has emerged as a significant concern for administrative agencies. Although relatively new, the doctrine has steadily gained traction and now holds a central position in the agency rulemaking process. With each passing decision, the Court has continued to expand upon the doctrine and increase its influence over agency action. Should the non-compete ban remain unchanged, it is likely to encounter several challenges under the doctrine. Based on the Court’s prior decisions, it is likely that the Court would take the opportunity to analyze the NPRM under the major questions doctrine and further build its power and scope.

III. THE MAJOR QUESTIONS DOCTRINE AND NON-COMPETE BAN

In her dissenting statement, Commissioner Wilson highlighted three legal challenges that the proposed rule would likely face and fail under.¹¹⁹ Two of the three challenges deal with the major questions doctrine and delegated authority.¹²⁰ Commissioner Wilson’s dissent, coupled with the recent trend that the Supreme Court has taken in administrative authority cases, underscores the likelihood that the Court would analyze a challenge to the ban under the major questions doctrine. It is crucial to acknowledge that the FTC retains the ability to review and amend the rule based on feedback and additional analysis before ultimately issuing a final rule. Thus, this article will focus on a major questions analysis of the current proposed rule, but its applicability could be limited depending on the final rule.

116. *Id.* at 2382.

117. *Id.* at 2383.

118. *Id.* at 2384.

119. FEDERAL TRADE COMMISSION, P201200-1, *Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule* (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf.

120. *Id.*

A. *Issue of Vast Economic and Political Significance*

Under the current proposed FTC non-compete rule, the Court would likely find that the underlying claim of authority concerns an issue of vast economic significance. The Commission has continued to market the rule as beneficial for the economy and tens of millions of Americans. Yet, the FTC's promotion and marketing of the ban as economically beneficial undermines the agency's position in a major questions doctrine analysis. Similar to the student loan forgiveness program, the proposed non-compete rule, according to the FTC, is projected to impact millions of Americans;¹²¹ create an estimated economic impact of hundreds of billions of dollars;¹²² and interfere with the laws surrounding non-compete agreements, which have historically been a particular domain of state law.¹²³ The Government's continual promotion of these facts will no doubt be used against the FTC for the first prong of the major questions doctrine should the ban be challenged, similar to how the EPA's statements were used against the agency in the *West Virginia* decision.¹²⁴

The rule likely would be found to be politically significant as well, because it would have deep impacts on an area of law that is typically an issue left to be decided by the states.¹²⁵ Justice Gorsuch's concurring opinion in *NFIB* highlights the majority's view that such particular domains of state law should be regulated at the state level, where governmental authorities possess broader and more general powers, rather than at the federal level.¹²⁶ Further, Justice Gorsuch found that "[t]he agency claims the power to force 84 million Americans to receive a vaccine or undergo regular testing. By any measure, that is a claim of power to resolve a question of vast national significance."¹²⁷ It is likely the Justices would find the same here; that the proposed non-compete ban is a question of vast national significance and thus is a claim of authority that concerns an issue of vast economic and political significance.

121. The FTC estimates that the rule would impact approximately 30 million people. *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, FEDERAL TRADE COMMISSION (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>.

122. *Non-compete Clause Rulemaking*, *supra* note 5.

123. Atlas et al., *supra* note 3.

124. In the *West Virginia* decision, Justice Roberts noted that "[i]ts generation-shifting scheme was projected to have billions of dollars of impact." *West Virginia v. EPA*, 142 S. Ct. 2587, 2605 (2022).

125. Atlas et al., *supra* note 3.

126. *Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661, 668 (2022).

127. *Id.*

As the proposed rule sits, it is likely to be found as a claim of authority that concerns an issue of vast economic and political significance. Further twisting the FTC's arm is the fact that it proclaimed and marketed the proposed rule as such.¹²⁸ To avoid this classification, the only path forward for the agency would be to scale back the ban in the final rule to lessen its impact on the economy. This could be achieved by broadening the exceptions, limiting applicability to certain professions, and excluding the retroactive clause against non-competes. If the agency continued with the proposed rule in its current form, it would be important to see how the Court would analyze the ban's impact on the economy. The Supreme Court found that the EPA rule¹²⁹ and the national moratorium on evictions in *Alabama Association of Realtors v. Department of Health and Human Services*¹³⁰ were both considered negatives to the economy. Although disputed,¹³¹ the argued positive economic impact of the FTC's proposed rule could potentially be used by the FTC to separate the proposed ban from the Court's decisions in *West Virginia* and *Alabama Association*.

B. Clear Congressional Authorization

If the Court determines that the underlying issue meets the criteria of the first prong of the major questions doctrine, it then proceeds to the second and final prong. This second prong assesses whether Congress has clearly empowered the agency with authority over the issue.¹³² Because the Court would likely find the proposed rule in its current form as a vast issue of economic and political significance, the FTC "must point to 'clear congressional authorization' for the power it claims."¹³³

To enact the proposed rule, the FTC relies on its power under Sections 5 and 6(g) of the Federal Trade Commission Act of 1914.¹³⁴ Section 5 of the Act declares "unfair methods of competition" to be considered unlawful, and allows the Commission to prevent persons, partnerships, or corporations from using unfair methods of competition with or affecting commerce.¹³⁵ Section 6(g) of the Act authorizes the

128. *Non-Compete Clause Rulemaking*, *supra* note 5.

129. *West Virginia*, 142 S. Ct. at 2605.

130. *Ala. Ass'n of Realtors v. Dept' of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021).

131. Sarah Lam et al., *Economist Comments in the Matter of the FTC's Proposed Non-Compete Clause Rule* (Apr. 19, 2023), <http://dx.doi.org/10.2139/ssm.4425577>.

132. *Utility Air Reg. Group (UARG) v. EPA*, 573 U.S. 302, 324 (2014).

133. *West Virginia v. EPA*, 142 S. Ct. 2587, 2605 (2022).

134. *Non-Compete Clause Rule*, *supra* note 17.

135. 15 U.S.C. 45(a)(1)-(2).

Commission to “make rules and regulations for the purpose of carrying out the provisions of” the FTC Act, including the Act’s prohibition of unfair methods of competition.¹³⁶ The question for the Court, then, is whether Congress empowered the FTC with the authority over the issue of non-compete clauses, and whether non-compete clauses are considered “unfair methods of competition.” Like in *West Virginia*¹³⁷ and *NFIB*,¹³⁸ the Court would start the second prong of its analysis of the proposed rule by examining the Act under which the agency is claiming powers for its actions. The FTC is claiming its power to ban non-competes under Section 5, arguing that non-competes are “unfair methods of competition.”¹³⁹ Unfortunately, however, there are several factors weighing against the Court finding in favor of the FTC and its proposed rule.

The first is the legislative history and intent surrounding Section 5 of the FTC Act. The support for the bill predominantly focused on the fact that it bolstered antitrust laws. Supporters of Section 5 of the Act liked that it created a new agency that would prosecute if the Department of Justice failed to, and liked that it enforced a flexible new standard that could reach where the Sherman Act did not.¹⁴⁰ However, The FTC Act did not include a definition for what classifies as “unfair competition” which led bill opponents to challenge the section as “so vague [that] it unconstitutionally delegated legislative authority.”¹⁴¹ This issue became the focus of the subsequent debates on the commission bill.¹⁴² The sponsors of the FTC Act relied on a memo written by lawyer and advisor George Rublee to President Woodrow Wilson, now a significant part of the FTC Act’s legislative history, to articulate the meaning of unfair competition.¹⁴³ Rublee wrote: “Competition is unfair when it resorts to methods which shut out competitors who, because of their efficiency, might otherwise be able to continue in business and prosper.”¹⁴⁴

Considering this provided definition of unfair competition and the lack of clear authorization given to the agency, it is unlikely that the Court would find that Congress has clearly empowered the FTC with authority over non-compete agreements. The FTC failed in its proposed rule to provide a viable argument for how non-competes shut out competitors or

136. 15 U.S.C. 46(g).

137. *West Virginia*, 142 S. Ct. at 2605.

138. *Nat’l Fed’n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661, 663 (2022).

139. *Non-Compete Clause Rule*, *supra* note 17.

140. Winerman, *supra* note 46, at 3.

141. *Id.* at 74.

142. *Id.* at 68.

143. *Id.* at 67.

144. *Id.*

how non-competes inhibit prospering businesses.¹⁴⁵ Moreover, there is no explicit mention in the bill, legislative history, or discussions surrounding the bill that demonstrates Congress's endorsement or explicit authorization for the FTC to restrict non-competes or similar contractual agreements.¹⁴⁶

“Surrounding circumstances,” Justice Barrett notes in her concurring opinion in *Biden v. Nebraska*, “can narrow or broaden the scope of the delegation to an agency.”¹⁴⁷ The circumstances that both Barrett and the majority focused on most in their opinions in *Biden v. Nebraska* was how sweeping the proposed rule was and the fact that the agency had never “previously claimed powers of this magnitude.”¹⁴⁸ In *NFIB*, the Court noted that “it [was] telling that OSHA, in its half-century of existence, has never before adopted a broad public health regulation of this kind.”¹⁴⁹ In *West Virginia*, the Court found that the “EPA had never regulated in that manner, despite having issued many prior rules governing power plants under Section 111.”¹⁵⁰ As the FTC has never before defined the term “unfair competition” in such a broad and sweeping manner and does so now with little legislative history to support its move, the Court would likely find that Congress did not clearly empower the FTC with the authority to ban non-compete agreements.

The final, and most telling factor, is that Congress has already considered and rejected bills proposing to ban non-compete clauses.¹⁵¹ The Court has taken a strong position against agency action where Congress has already previously addressed the matter.¹⁵² According to Justice Gorsuch's concurring opinion in *West Virginia*, “[the] Court has found it telling when Congress has ‘considered and rejected’ bills authorizing something akin to the agency’s proposed course of action.”¹⁵³

145. *Non-Compete Clause Rule*, *supra* note 17.

146. FTCA, 15 U.S.C. §§ 41-58

147. *Biden v. Nebraska*, 143 S. Ct. 2355, 2381 (2023).

148. *Id.* at 2373.

149. *Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661, 666 (2022).

150. *West Virginia v. EPA*, 142 S. Ct. 2587, 2613 (2022).

151. *Dissenting Statement of Commissioner Christine S. Wilson*, *supra* note 119.

152. “Congress has directly addressed the problem of tobacco and health through legislation on six occasions since 1965. . . . A ban of tobacco products by the FDA would therefore plainly contradict congressional policy.” *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 138-39 (2000). “Nor can the Court ignore that the regulatory writ EPA newly uncovered in Section 111(d) conveniently enabled it to enact a program, namely, cap-and-trade for carbon, that Congress had already considered and rejected numerous times.” *West Virginia*, 142 S. Ct. at 2596. “[A]lthough Congress has enacted significant legislation addressing the COVID-19 pandemic, it has declined to enact any measure similar to what OSHA has promulgated here.” *NFIB*, 142 S. Ct. at 662.

153. *West Virginia*, 142 S. Ct. at 2621.

While individual members of Congress have indeed voiced their support for legislation prohibiting non-competes, Congress as a whole has consistently declined to pass such measures on multiple occasions. Because Congress has already rejected bills proposing to ban non-compete laws, the proposed rule could be viewed as the Commission trying to “work around” the legislative process to resolve a question of political significance.¹⁵⁴ The Court would likely not only find that Congress has not delegated the power to the FTC to pass the proposed rule, but that the rule is the agency’s attempt at a workaround past the legislative process.

C. Fallout and Potential Implications

Non-compete agreements have played a substantial role in U.S. employment law for decades. When appropriately regulated, non-compete agreements provide various pro-competitive advantages, such as improved training and compensation for employees, decreased inflation and turnover rates, and safeguarding employers’ trade secrets. However, employers can exploit non-compete agreements to suppress competition and hinder innovation at the expense of their employees. It is important, therefore, to find a healthy balance between the two. As proposed, the NPRM would not only ban future non-compete agreements but would also retroactively ban non-competes as well. A complete ban would place a substantial cost burden on employers and courts. The ban would also pose various challenges for courts, including logistical concerns, protection of trade secrets, state police powers, potential conflicts with federal laws, and the right of employers to freely contract.

The Commission has three potential paths it could take to strike a balance between the procompetitive and anticompetitive aspects of non-competes. The first, although improbable, would involve the FTC terminating the NPRM process, maintaining the current status quo in federal law on non-competes. The second, more feasible approach, entails the FTC modifying the proposed rule to incorporate additional exemptions. This would allow for broader exemptions concerning trade secrets, prevent conflicts with federal laws, and mitigate the risk of the rule facing legal challenges. The third and most promising option would involve the agency publishing a supplemental proposed rule similar to the NLRB’s issued guidance on non-competes. This rule would specifically target a stronger regulation of future non-competes for low and middle-

154. *Dissenting Statement of Commissioner Christine S. Wilson, supra* note 119.

wage workers while adopting a case-by-case assessment approach instead of implementing a blanket nationwide ban. This option has the best chance of not only achieving procompetitive federal regulation of non-competes but also surviving a major questions doctrine challenge.

The proposed non-compete rule comes at a time when agency law is drastically changing. Should the FTC decide to finalize the proposed ban as it is now, it would likely face immediate legal challenges once it goes into effect. Under the major questions doctrine, a court would find that the FTC's claim of authority over non-competes concerns an issue of "vast economic and political significance," and that Congress has not clearly empowered the agency with authority over the issue. However, the FTC could implement the discussed changes in this article, decreasing its chances of being challenged and rejected by a court under the major questions doctrine. Should the Supreme Court pick up the issue, it would further limit future agency rulemaking and enforcement powers. This could substantially impact not only the FTC, but administrative agencies like the EEOC, DOL, EBSA, and others. Further limitations on federal administrative agency powers and regulations will fundamentally alter labor and employment law. The proposed rule, as it currently stands, is more likely to result in a ban on the FTC's rulemaking powers and regulating abilities rather than a ban on non-compete agreements.