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Federal Trade Commission
600 Pennsylvania Avenue NW
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Re: Comment by the States of Louisiana, Alabama, Arkansas, Georgia, Indiana, Kentucky, Mississippi, Montana, South Carolina, South Dakota, Tennessee, Texas and Utah on "Non-Compete Clause Rule"; Fed. Register Doc. # 2023-00414.

Dear Commissioners,

We appreciate the opportunity to comment on the Commission's proposed "Non-Compete Clause Rule." We oppose the proposed rule for the simple reason that the Commission lacks any authority to engage in substantive unfair methods of competition (UMC) rulemaking. The power that the Commission now claims represents "plenary power over virtually all US economic activity," and would likely violate the Constitution's nondelegation doctrine if the Commission possessed it. Noah Joshua Phillips, *Against Antitrust Regulation*, American Enterprise Institute Report 1 (2022), https://www.aei.org/research-products/report/against-antitrust-regulation/. But Congress has given it no such power. And in recognition of that fact, in the Commission's 109-year history it has never before meaningfully attempted to exercise this authority.

"The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). So, "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). The Commission would violate this axiom if it promulgated the proposed "Non-Compete Clause Rule" because Congress did not confer any authority on it to enact such substantive UMC rules. As our states' chief legal officers, we are committed to protecting our nation's constitutional structure, and urge the Commission to refrain from violating it by issuing this rule.

As we explain in detail, the FTC Act does not grant the Commission authority to engage in substantive UMC rulemaking. The text and structure of the FTC Act make that clear. Moreover, such "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or subtle device[s].'" *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (quoting *Whitman v. American Trucking Associations*, 531 U.S. 457, 468 (2001)). So, even where there is "a colorable textual basis" for extraordinary regulatory power an agency claims—the best the Commission could argue here—courts reject assertions of such authority when their statutory basis is not abundantly clear. *Id.* Therefore, "[i]n the absence of a *clear* mandate in the [FTC] Act, it [would be] unreasonable to assume that Congress intended to give the [Commission] the unprecedented power over American industry" that the Commission now claims. *Industrial Union Dept., AFL–CIO v. American Petroleum Institute*, 448 U.S. 607, 645 (1980) (plurality opinion) (emphasis added). The FTC Act provides no such clear mandate, so the Commission lacks the extraordinary power it now claims. This lack of power is confirmed by the FTC Act's legislative history, the Commission's prior practice, and Supreme Court caselaw.

I. There Is Not Even a "Colorable Textual Basis" for the Power the Commission Claims

The Notice of Proposed Rulemaking claims that Section 6(g) of the FTC Act confers substantive UMC rulemaking power on the Commission. Section 6(g) states "that the [C]ommission shall also have power . . . from time to time to classify corporations and . . . to make rules and regulations for the purpose of carrying out the provisions of this subchapter[,]" which include Section 5's prohibition of unfair methods of competition. Viewed in isolation, Section 6(g) might present "a colorable textual basis" for the Commission's claim to substantive UMC rulemaking authority. *West Virginia*, 142 S.Ct. at 2609. "Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . ." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

For example, "[i]mportant clues about the meaning of a rulemaking grant can sometimes be gleaned from its placement in an act." Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 504 (2002). This is such a case. Section 6(g)'s grant of rulemaking authority is not situated in Section 5 of the FTC Act, the Act's "substantive core.". Phillips, *supra*, at 2. Section 5 declares unlawful "unfair methods of competition" and "set[s] forth the [Commission's] quasi-judicial adjudicatory functions, including its power to file complaints, hold hearings, determine whether violations of the [FTC Act] ha[ve] occurred or [are] occurring, and issue cease and desist orders." Merrill & Watts, *supra*, at 504. Section 5(c) allows the recipient of such a cease and desist order to seek review of it in the United States Court of Appeals, and authorizes the reviewing court to "set[] aside" the Commission's order if appropriate. Section 5 does not say a single word about Commission authority to issue substantive UMC rules

declaring certain conduct per se unlawful. Rather, "[i]t describes case-by-case adjudication as the [Commission's] *sole* enforcement mechanism." Phillips, *supra*, at 2 (emphasis added).

Section 6, on the other hand, "set[s] forth the investigative powers of the [Commission], including its power to demand reports from corporations and to publish information deemed to be in the public interest." Merrill & Watts, *supra*, at 504. Section 6(g)—which the Commission claims gives it the authority at issue here—is located midway through the list of investigatory and publishing powers conferred upon the Commission. It authorizes the Commission to "[f]rom time to time classify corporations and . . . to make rules and regulations for the purpose of carrying out the provisions of this subchapter." Section 6(g). As many commentators have noted, the placement of the Commission's rulemaking powers midway through Section 6, rather than in Section 5, "clearly suggests that Congress intended the rulemaking grant to serve as an adjunct to the [Commission]'s investigative duties, regarding which Congress had not given the agency the authority to act with the force of law." Merrill & Watts, *supra*, at 505. Even if one were to conclude that Section 6(g) allows for rulemaking in support of the Commission's adjudicatory powers as well, "[t]he most natural reading of [it] is an authorization of interpretative rules and procedural, or 'housekeeping,' rules governing how the [Commission] conducts its affairs, not substantive rules broadly condemning certain practices as [unfair methods of competition]." Phillips, *supra*, at 3.

Section 6(g)'s lack of sanctions for the rules and regulations issued under it also indicates that it authorizes merely procedural and interpretive rules. "Throughout the Progressive and New Deal eras, Congress followed a drafting convention that signaled to agencies whether particular rulemaking grants conferred authority to make rules with the force of law as opposed to mere housekeeping rules." Merrill & Watts, *supra*, at 472. Under this convention, "[i]f Congress specified in the statute that a violation of agency rules would subject the offending party to some sanction—for example, a civil or criminal penalty; loss of a permit, license, or benefits; or other adverse legal consequences—then the grant conferred power to make rules with the force of law." *Id.* But—as is the case with Section 6(g)—"if Congress made no provision for sanctions for rule violations, the grant authorized only procedural or interpretative rules." *Id.* Congress included no sanctions for violations of rules and regulations issued under Section 6(g), indicating that it authorizes only procedural and interpretive rules, not substantive UMC rules.

Yet another indication that Section 6(g) confers no substantive UMC rulemaking authority is the fact that Congress provided no avenue for judicial review of such rules in the FTC act. This stands in stark contrast to its express provision in Section 5(c) for judicial review of Commission cease and desist orders related to specific conduct that the Commission has adjudged to be an unfair method of competition, the end-product of the Commission's adjudicatory powers. *See* Thomas Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review*

Model of Administrative Law, 111 COLUM. L. REV. 939, 969-70 (2011). Given Congress's provision for judicial review of Commission cease and desist orders, one would expect Congress to provide for judicial review of Commission substantive UMC rules if it had conferred on the Commission such rulemaking authority. Moreover, the Administrative Procedure Act, with its general provision for judicial review of final agency action, 5 U.S.C. § 702, was not enacted until 1946—32 years after the FTC act's enactment in 1914—so there was no default statutory avenue for review. Congress afforded no avenue for review of rules issued under section 6(g), indicating that section 6(g) conferred on the Commission no substantive UMC rulemaking power.

II. The Commission Lacks the "Clear Mandate" Necessary to Claim this Extraordinary—and Constitutionally Dubious—Regulatory Authority

But even if there were at least "a colorable textual basis" for the Commission's asserted substantive UMC rulemaking authority—which as the foregoing demonstrates, there is not—courts would still conclude that the Commission is not empowered to wield this extraordinary regulatory power it now claims. *West Virginia*, 142 S. Ct. at 2609. After all, Congress does not "hide elephants in mouseholes." *Whitman*, 531 U.S. at 468. Accordingly, courts and the American people alike "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Utility Air Regulatory Group v. E.P.A.*, 573 U.S. 302, 224 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). "Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or subtle device[s].'" *West Virginia*, 142 S. Ct. at 2609 (2022) (quoting *Whitman*, 531 U.S. at 468). Were Congress to provide the Commission with the immense power to engage in substantive UMC rulemaking—which would represent "plenary power over virtually all US economic activity,"—it would do so clearly and with at least a little fanfare. Phillips, *supra*, at 1. Indeed, courts reject agency "claim[s] of 'unheralded' regulatory power over 'a significant portion of the American economy[,]" and the Commission's asserted authority is far more expansive. *West Virginia*, 142 S.Ct. at 2609 (quoting *Utility Air*, 573 U.S. at 324). "In the absence of a clear mandate in the [FTC] Act, it [would be] unreasonable to assume that Congress intended to give the [Commission] the unprecedented power over American industry" that the Commission now claims. *Industrial Union Dept.*, 448 U.S. at 645.

"The question, then, is whether the [FTC] Act plainly authorizes the [Commission]'s [rulemaking]. It does not." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, S. Ct. 661, 665 (2022) (per curiam). The Commission's "mandate" to engage in substantive UMC rulemaking is—at best—far from "clear." *Industrial Union Dept.*, 448 U.S. at 645. And it is difficult to imagine a more "modest" provision than the portion of Section 6(g) which the Commission claims accomplished this "extraordinary grant[] of regulatory authority" over the

entire American economy, or a more "subtle device" through which Congress could have delegated such immense power. *West Virginia*, 142 S. Ct. at 2608. Indeed, Congress did not even deem the "rules and regulations" Section 6(g) authorizes exciting enough to merit their own subsection, instead throwing them in with the underwhelming ability to, "from time to time, classify corporations."[1] And Congress gave this classification power pride of place in Section 6(g), suggesting that it is the more interesting and significant of the Commission's powers delineated in this subsection. Moreover, Section 6(g) is positioned in the second half of a laundry list of investigatory and publishing powers. It is sandwiched immediately between subsections granting the Commission limited authority to publish information it obtains in investigations and to investigate trade conditions in foreign countries and to report its findings to Congress. In short, if Congress intended the latter half of this unassuming subsection to authorize the Commission to exercise the immense power it now claims, to say the very least, Congress buried the lede.

This would be all the more shocking given the central role the fact and context specific rule of reason—first adopted by the Supreme Court in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), just a few years before Congress enacted the FTC Act—plays in United States' antitrust law. Indeed, authorizing the Commission to "adopt per se rules for conduct that is properly considered under the rule of reason" would "clash directly with the US antitrust law it [would] purport[] to effectuate." Phillips, *supra*, at 6.[2] But Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions"—much less the essential nature of an entire body of law. *Whitman*, 531 U.S at 468. Again, "it does not, one might say, hide elephants in mouseholes." *Id.* So, courts would reject the Commission's claim of "unheralded" regulatory power over the entire American economy. *West Virginia*, 142 S. Ct. at 2609 (quoting *Utility Air*, 573 U.S. at 324).

The canon of constitutional avoidance also forecloses the authority the Commission now claims, even if there were a "colorable textual basis" for it. *West Virginia*, 142 S. Ct. at 2608. This is because "the [Commission]'s claimed authority for [substantive] UMC rulemaking" likely "runs afoul of the constitutional nondelegation doctrine." Maureen K. Ohlhausen & James F. Rill, *Pushing the Limits?*, in RULEMAKING AUTHORITY OF THE US FEDERAL TRADE COMMISSION, 155, 166

[1] This is not to say that this power is inconsequential. Rather, the authority to classify corporations was "an essential feature of the congressional plan for the fledgling agency to study and assess business practices." Phillips, *supra*, at 3. But it is considerably more modest than the gaudy authority the Commission now claims is nestled beside it. This suggested-pair of powers would make the strangest of bedfellows.

[2] It doesn't matter that the scope of prohibited conduct under the Federal Trade Commission Act and under the Sherman Act may slightly differ. "Although few would dispute that the FTC Act reaches some conduct *beyond* the Sherman Act, that is not a license to apply per se treatment to conduct within the Sherman Act's scope that courts have held to be subject to the rule of reason." Phillips, *supra*, at 6.

(Daniel A. Crane ed., 2022). The non-delegation doctrine requires that Congress provide an "intelligible principle" to guide an administrative agency's exercise of discretionary authority conferred upon it. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935). In *Schecther Poultry*, for example, the Supreme Court struck down as unconstitutional a provision of the National Industrial Recovery Act that authorized the president to promulgate "codes of fair competition." The Court explained that "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry." *Id.* at 538. So, the Court unanimously held unconstitutional an express congressional grant of power to the executive to enact "codes of fair competition" declaring certain conduct unlawful, a power eerily similar to the power the Commission now claims for itself. Although the last time the Court directly applied the nondelegation doctrine to hold legislation unconstitutional was in *Schechter Poultry*, it may be set for a renaissance, with four justices recently expressing a desire to reenergize it. *See Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring); *id.* (Gorsuch, J., dissenting).[3]

In any event, in the years since *Schechter Poultry*, the Court "has employed canons of statutory interpretation as a way to address nondelegation concerns." Jennifer Cascone Fauver, *A Chair with No Legs? Legal Constraints on the Competition Rule-Making Authority of Lina Khan's FTC*, 14 WILLIAM & MARY BUS. LAW. REV. 243, 288 (2023). For example, under the canon of constitutional avoidance, "where an otherwise acceptable construction of a statute would raise serious constitutional problems—including potential nondelegation problems—"the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see Clark v. Martinez*, 543 U.S. 371, 381 (2005). And it does so upon "a determination that [the otherwise acceptable construction] *might* be unconstitutional." Adrian Vermeule, Saving Constructions, 85 GEO. L.J. 1945, 1949 (1997). Doing so "avoids placing [the relevant statute's] constitutionality in doubt." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 247 (2012). "The canon protects the separation of powers by assuming that Congress did not intend to enact a statute that would raise constitutional questions, absent a clear statement from Congress that it so intended." Fauver, *supra*, at 288. So, as Justice Scalia explained, the canon "is thus a means of giving effect to congressional intent[.]" *Clark*, 543 U.S. at 381.

After all, when Congress accomplishes such delegations clearly and openly, though they still may pose constitutional problems, they are at least subject to public

[3] If the Supreme Court were to somehow agree with the Commission that the FTC Act "delegate[d] legislative power to the [Commission] to exercise an unfettered discretion" to declare business practices per se anticompetitive and unlawful—which amounts to "plenary power over virtually all US economic activity"—this would be a perfect and poetic vehicle for it to revitalize the nondelegation doctrine. *Schechter Poultry*, 295 U.S. at 529; Phillips, *supra*, at 1.

awareness and debate, and may even obtain the blessing of the American people. Not so if Congress crafts legislation that obscures from public view such grants of extraordinary regulatory power to administrative agencies. Indeed, it is difficult to imagine something more antithetical and deadening to democracy—and the public discourse that must undergird it—than such delegation in darkness. But that is exactly what the Commission claims that Congress did here.

Thankfully, courts presume that Congress does not operate in such a manner. Mice, not elephants, are the presumptive inhabitants of statutory mouseholes. Likewise, courts expect Congress to speak clearly if it intends to enact legislation that pushes the constitutional envelope. So, even if there were a "colorable textual basis" for the Commission's asserted substantive UMC rulemaking power, courts would conclude that it had no such power because of the lack of a clear mandate and because of the grave constitutional questions such a delegation would raise. *West Virginia*, 142 S. Ct. at 2609.

III. The Legislative History Confirms that the FTC Lacks Substantive UMC Rulemaking Power, as Do the Commission's Historical Practice and the Supreme Court's Caselaw.

The FTC Act's drafting history confirms that Section 6(g) confers no substantive UMC rulemaking authority on the Commission. Section 6(g) "originated in the House bill, which gave the Commission investigative powers and the power to make recommendations to Congress; the House bill provided no independent enforcement power to the Commission at all, including adjudicatory power." Fauver, *supra*, at 277. The Senate bill, on the other hand, "gave the [Commission] both adjudicatory and investigative authority but contained no rule-making provision of any kind." *Id.* at 278. "As a consequence, when the Conference Committee met, the only rulemaking provision under consideration was the one included in the House bill. Under established practices for reconciling bills in conference, the Committee could not have granted the [Commission] legislative rulemaking powers, because neither bill granted the agency such authority." Merrill & Watts, *supra*, at 505.

The Conference Committee floor debates confirm that Congress had no intention to confer substantive UMC rulemaking authority on the Commission. Indeed, in response to questions about the authority conferred on the Commission, committee member Rep. Covington contrasted the Commission's power with the substantive rulemaking power to set future rail rates conferred on the Interstate Commerce Commission. He explained that "the Commission will have no power to prescribe the methods of competition to be used in the future[]" and that the Commission "will not be exercising power of a legislative nature[.]" 51 Cong. Rec. 14,932 (1914).

In fact, the House of Representative had twice considered and rejected the idea of giving the Commission substantive UMC rulemaking authority. Believing the

existing proposals would give the Commission too little power, Rep. Lafferty proposed amendments to the precursor of the Section 6(g) that "empowered [the Commission] to make, alter, or repeal regulations further defining more particular unfair trade practices or unfair or oppressive competition made unlawful by this or any other Act." H.R. Rep. No. 63-533 at 7, 12, 20-21. Another amendment that would have given the Commission similar substantive UMC rulemaking power was introduced by Rep. Morgan. *See* Phillips, *supra*, at 2, n.25. The House of Representatives considered and rejected both amendments.

Meanwhile, the Senate never even considered granting the Commission substantive UMC rulemaking power. Indeed, as Senator Cummings explained of the FTC Act:

> if [Congress] were to attempt to go further in this act and to give the [C]ommission the authority to prescribe a code of rules governing the conduct of the business men of this country for the future, we would clash with the principle that we cannot confer upon the [C]ommission in that respect legislative authority; *but we have not made any such attempt as that, and no one proposes any attempt of that sort*.

51 Cong. Rec. 12916 (1914), reprinted in THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 4368 (Earl W. Kintner ed., 1982) (emphasis added). Other statements by members of both the Senate and the House reflect this understanding of the limited scope of the Commission's power. *See* Christine S. Wilson, Comm'r, Fed. Trade Comm'n Dissenting Statement Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule, 10, n.45 (Jan. 5, 2023). Simply put, "[t]his legislative history does not demonstrate congressional intent to give the [Commission] substantive [UMC] rulemaking power: The House considered and rejected it, the Senate never proposed it, and neither the Conference Committee's report nor the final debate's mentioned it." Phillips, *supra*, at 3. Rather, "[t]he legislative history of the [FTC Act] compels the conclusion that Congress had no intention to confer any [substantive UMC] rulemaking power upon the Commission." Bernie R. Burrus & Harry Teter, *Antitrust: Rulemaking v. Adjudication in the FTC*, 54 GEO. L.J. 1106, 1124 (1966).

Consistent with the text and structure of the FTC Act and the promulgating Congress' understanding of it, the Commission has never previously attempted to engage in meaningful substantive UMC rulemaking. In fact, in the years following the FTC Act's promulgation, the Commission repeatedly disavowed any such authority. *See* Merrill & Watts, *supra*, at 554-556 (collecting such Commission statements). This was a view shared by the United States Supreme Court, which in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), surveyed the powers of the Commission and concluded that it exercised only "quasi-legislative" and "quasi-judicial" functions. "The principal 'quasi-legislative' power the Court identified under section 6 was 'making investigations and reports [on unfair forms of competition] for

the information of Congress.'" Merrill & Watts, *supra*, at 506. Tellingly, "[t]he Court did not mention the rulemaking grant in section 6(g), presumably because the litigants in the case—and the Court itself—assumed that this provision did not confer any power on the [Commission] to make legislative rules." *Id.* Likewise, in *Schechter Poultry*, the Court expressly contrasted the substantive rulemaking authority the National Industrial Recovery Act conferred on the President to promulgate "codes of fair competition" with the strictly adjudicatory powers the FTC Act conferred on the Commission where specific conduct was to be declared an unfair method of competition "in particular instances, upon evidence, in the light of particular competitive conditions." 295 U.S. at 533-34

The Commission's longstanding practice reflects this lack of substantive UMC rulemaking power. "When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy, [courts] typically greet its announcement with a measure of skepticism." *Util. Air Regul. Grp.*, 573 U.S. at 324 (quoting *Brown & Williamson*, 529 U.S. at 159). In the one-hundred and nine years since its creation, the Commission "has promulgated *one* substantive [UMC] rule—a 1968 regulation . . . that involved price discrimination in the men's clothing industry, *which the agency never enforced and later repealed*." Congressional Research Service, C. Linebaugh & J. Sykes, The FTC's Proposed Non-Compete Rule 3 (2023) (emphasis added), https://crsreports.congress.gov/product/pdf/LSB/LSB10905.

As Justice Frankfurter explained on a similar occasion when the Commission claimed previously unasserted authority under Section 5 of the FTC Act, "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *Fed. Trade Comm'n v. Bunte Bros.*, 312 U.S. 349, 352 (1941). In that case, the fact "[t]hat for a quarter century the Commission ha[d] made no such claim [to the particular authority in question] [was] a powerful indication" that Congress had given the Commission no such authority. *Id.* at 351-52. If this twenty-five years of Commission inaction was so instructive as to the scope of the Commission's authority in *Bunte Bros.*, the Commission's 109 years of essential inaction here is even more illuminating. Had Congress placed such a robust weapon in the Commission's arsenal in 1914, one would have expected the Commission to use it, not to let it sit almost completely idle for more than a century. So, the Commission's failure to meaningfully assert the power it now claims for the first 109 years of its existence is yet another "powerful indication" that it lacks any such power.

IV. The Supreme Court Is "Virtually Certain" to Overrule *National Petroleum Refiners v. FTC*, and Courts Outside of the D.C. Circuit Are Not Bound by It

To be sure, the United States Court of Appeals for the D.C. Circuit concluded in *National Petroleum Refiners v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), that Section 6(g) authorized the Commission to issue a rule "declaring that failure to post octane rating numbers on gasoline pumps at service stations was an unfair method of competition and an unfair or deceptive act or practice." *Id.* at 674. But this fifty-year-old opinion "was based on a type of reasoning that no court has used in decades[.]" Richard Pierce, Unsolicited Advice for FTC Chair Khan, YALE J. ON REG., July 15, 2021, https://www.yalejreg.com/nc/unsolicited-advice-for-ftc-chair-khan-by-richard-j-pierce-jr/. Indeed, "the D.C. Circuit applied a strict purposive framework to its grant of legislative rule-making authority, ignoring almost every tool of statutory interpretation that would have compelled the D.C. Circuit to decide otherwise." *Id.* So, "[t]he Supreme Court is virtually certain to overrule the D.C. Circuit precedent if the [Commission] tries to rely on it." *Id.*; *see* Merrill & Watts, *supra*, at 554-56.

Moreover, courts outside the D.C. Circuit are not bound by *National Petroleum*, and are unlikely to follow it. So, litigants wishing to challenge the Commission's claim of substantive UMC rulemaking authority could simply file outside the D.C. Circuit to avoid *National Petroleum*. In short, *National Petroleum* provides no real defense for the Commission's claim of substantive UMC rulemaking authority.

V. The Magnuson-Moss Act Does Not Indicate that the Commission Possesses Substantive UMC Rulemaking Powers.

In the Magnuson-Moss Act of 1975, Congress authorized the Commission to engage in substantive rulemaking for *unfair or deceptive acts or practices*, provided that it go through rigorous procedural requirements. *See* 15 U.S.C. § 57a. The Commission may point to § 57a(a)(2), which states that these procedural requirements do not affect "any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition[,]" to claim that the 1975 Congress understood it to have substantive UMC rulemaking power. But a close reading of § 57a(a)(2) reveals that the 1975 Congress was decidedly agnostic as to whether the FTC possessed such power at all, as indicated by its reference to "*any* authority of the Commission to prescribe [UMC] rules . . ." rather than "*the* authority of the Commission to prescribe [UMC] rules . . . ". Moreover, the two examples of UMC rulemaking in § 57a(a)(2) are "interpretative rules" and "general statements of policy," not the substantive, legally-binding UMC rulemaking the Commission claims it can engage in now. So, § 57a(a)(2) in no way indicates that the 1975 Congress believed that the Commission possessed the substantive UMC rulemaking power it claims.

More to the point, whatever the 1975 Congress "thought" about the 1914 FTC Act and what powers it conveyed on the Commission, these thoughts could not—absent actual legislation—add something to the FTC Act that wasn't there already. And, in the Magnuson-Moss act, the 1975 Congress only conferred substantive unfair or deceptive trade practices or acts rulemaking authority on the Commission, not substantive UMC rulemaking authority. So, in short, the 1975 Magnuson-Moss Act is entirely irrelevant to the question of whether the 1914 FTC Act conferred substantive UMC rulemaking authority on the Commission. And, as the foregoing demonstrates, it did not.

* * * * *

In conclusion, we urge the Commission to refrain from promulgating the proposed "Non-Compete Clause Rule." Because the Commission lacks any authority to engage in substantive UMC rulemaking, doing so would violate "axiomatic principle[s]" of our nation's constitutional order. *Bowen,* 488 U.S. at 208.

Sincerely,

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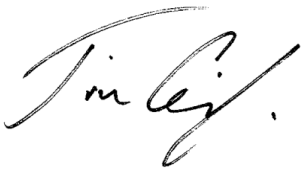

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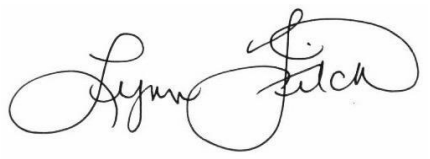

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