

TECHFREEDOM

LAW FOR A DYNAMIC FUTURE

Comments of

TechFreedom

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In the Matter of

Non-Compete Clause Rulemaking

Matter No. P201200

Docket No. FTC-2023-0007

April 19, 2023

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INTRODUCTION

TechFreedom¹ is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible and thus unleashes the ultimate resource: human ingenuity.

TechFreedom submits three comments in response to the above-referenced docket.² Our comments address three related but distinct aspects of the proposed rulemaking, namely

- 1) Why the Commission lacks authority to make substantive rules with the force of law governing Unfair Methods of Competition under Section 6(g) of the FTC Act (cited internally as *TechFreedom I*);
- 2) How the proposed rule would affect intellectual property, if enacted (internally, *TechFreedom II*); and
- 3) A more limited rulemaking that would be consistent with the Commission's current understanding of its authority to prohibit, and enact rules with respect to, unfair or deceptive acts and practices (internally, *TechFreedom III*).

The present comment, *TechFreedom I*, addresses the first point offered above.

Two terms ago, the Federal Trade Commission tried to convince the Supreme Court that the words “permanent injunction,” in Section 13(b) of the FTC Act, empower the FTC to obtain money.³ But the Court disagreed. The justices reviewed the FTC Act's text and structure, and then applied the law as written. They ruled against the FTC by a vote of 9-0. “An ‘injunction,’” they wrote, is not “an award of equitable monetary relief.”⁴

This term, the FTC tried to convince the Court that a lawsuit attacking the agency's structure is, in effect, a challenge to “an order of the Commission.”⁵ Under Section 5(c) of the FTC Act,

¹ Our recent submissions to the Commission include Comments of TechFreedom (James E. Dunstan and Berin Szóka) on Petition for Rulemaking to Prohibit the Use on Children of Design Features that Maximize for Engagement (Jan. 18, 2023), <https://techfreedom.org/wp-content/uploads/2023/01/TechFreedom-Comment-on-CDD-Engagement-Petition.pdf>, and Comments of TechFreedom (Bilal Sayyed) on Request for Information on Merger Enforcement (Apr. 21, 2022), <https://techfreedom.org/wp-content/uploads/2022/04/TechFreedom-Comments-Merger-Guidelines-April-21-2022.docx.pdf>.

² Non-Compete Clause Rule, Notice of Proposed Rulemaking, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. 910), <https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-competite-clause-rule>.

³ *AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, 141 S. Ct. 1341, 1341 (2021).

⁴ *Id.* at 1347.

⁵ *Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. ___, at *7 (2023) (Gorsuch, J., concurring).

jurisdiction to review such “an order” is lodged in the court of appeals.⁶ The agency argued, therefore, that parties cannot bring their structural challenges in district court. Again, though, the Court disagreed. The justices found nothing in the FTC Act that “implicitly” divests district courts of jurisdiction. By a vote of 9-0, they declined to apply the so-called “*Thunder Basin* factors” in a way that would allow the FTC to evade the Act’s text.⁷ As Justice Gorsuch put it in concurrence, the Act refers to “an order of the Commission,” and “here. . . , we have nothing like that.”⁸

This is a textualist Court. Twice now, the FTC has had to learn that the hard way. And yet the agency has issued a Notice of Proposed Rulemaking in which it bulls ahead with an inveterately purposive reading of Section 6(g) of the Act. The text and structure of the FTC Act establish, beyond a shadow of a doubt, that Section 6(g) does not empower the agency to issue substantive rules, that is, rules with the force of law. If the agency proceeds to craft such rules anyway, it risks finding itself on the wrong side of yet another Supreme Court decision, perhaps a unanimous one.

The agency should not proceed with this rulemaking. It will simply find itself back before the Court. And the third time won’t be the charm.

I. The FTC Lacks Authority to Make Competition Rules with the Force of Law

“Sections 5 and 6(g)” of the FTC Act, asserts this Notice of Proposed rulemaking, “provide the Commission with the authority to issue regulations declaring practices to be unfair methods of competition” (UMC).⁹ Such rules would have the “force of law.”¹⁰ When an agency makes such rules, is exercises legislative power;¹¹ “it does something that looks very much like a legislature passing a law.”¹² The NPRM relies on a single case: *National Petroleum Refiners v. FTC* (D.C. Cir. 1973) said Section 5’s unfairness authority “cuts deeply into and, with limited exceptions, widely across virtually all of American business” and that Section 6(g) empowers

⁶ *Axon*, 598 U.S. ___, at *3.

⁷ *Id.* at *11.

⁸ *Id.* at *7 (2023) (Gorsuch, J., concurring).

⁹ Non-Compete Clause Rule, Notice of Proposed Rulemaking, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. 910) [hereinafter NPRM], <https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule>.

¹⁰ *Nat’l Petroleum Refiners Ass’n v. Fed. Trade Comm’n*, 482 F.2d 672, 680 (D.C. Cir. 1973).

¹¹ *Cf. Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 488 (2001) (Stevens, J., concurring) (“I am persuaded that it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is ‘legislative power.’”).

¹² GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 48 (7th ed. 2016).

the FTC to “promulgate binding substantive rules as well as rules of procedure.”¹³ Based on this one case, the FTC claims it has the power to act as, in effect, a second national legislature.

Not surprisingly, when the Act was brought before the Court in *Humphrey’s Executor v. United States* (1935), the justices did not read Section 6 the way the FTC does now.¹⁴ The Commission, observed the Court, “acts in part quasi-legislatively,” but this only in a limited sense: “In making investigations and reports thereon for the information of Congress under § 6, in aid of the legislative power, it acts as a legislative agency.”¹⁵ The FTC long claimed that it did not possess the authority to make legally binding rules.¹⁶ It has promulgated (but never enforced) only one such UMC rule.¹⁷ Instead, the FTC has enforced Section 5 through the adjudicatory process Congress prescribed in detail in Section 5(b). “When an agency engages in *adjudication*, it does something that looks very much like a court deciding a case.”¹⁸ Much of administrative law turns on this distinction between legislative and adjudicatory powers,¹⁹ yet *National Petroleum Refiners* skipped right past it, as does the NPRM.

The arguments that the FTC has possessed vast legislative powers all along are remarkably thin. The NPRM does not explain the theory. The majority simply asserts that *National Petroleum Refiners* settled Section 6(g)’s meaning,²⁰ as does the petition behind this rulemaking.²¹ The fullest argument comes from Lina Khan before her appointment as FTC

¹³ Nat’l Petroleum Refiners Ass’n v. Fed. Trade Comm’n, 482 F.2d 672, 684-85 (D.C. Cir. 1973).

¹⁴ 295 U.S. 602 (1935).

¹⁵ *Id.* at 628.

¹⁶ Nat’l Petroleum Refiners Ass’n v. Fed. Trade Comm’n, 340 F. Supp. 1343, 1347 (D.D.C. 1972), *rev’d*, 482 F.2d 672 (D.C. Cir. 1973) (“The FTC, for approximately 50 years from the passage of the FTCA, never asserted the authority it claims to have always possessed.”).

¹⁷ Jennifer C. Fauver, *A Chair with No Legs? Legal Constraints on the Competition Rule-Making Authority of Lina Khan’s FTC*, 14 WM. & MARY BUS. L. REV. 243, 246 (2023), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1247&context=wmlbr>.

¹⁸ LAWSON, *supra* note 12.

¹⁹ LAWSON, *supra* note 12, at 49 (“much of this course explores the different legal consequences that attach to the labels ‘rulemaking’ and ‘adjudication’”).

²⁰ NPRM, *supra* note 9, at 3538 n.12.

²¹ Open Markets Institute, et al., *Petition for Rulemaking to Prohibit Worker Non-Compete Clauses* at 4 n.5 (Mar. 20, 2019), <https://www.ftc.gov/system/files/attachments/other-applications-petitions-requests/p002501petitionrulemakingnoncompeteclauses.pdf>.

Chair and then-Commissioner Rohit Chopra in a 4-page appendix to a 2020 law review article.²² Even this does little more than summarize *National Petroleum Refiners*.²³

Khan and Chopra cite four law review articles.²⁴ One merely mentions *National Petroleum Refiners* and makes policy arguments for the advantages of rulemaking.²⁵ Another says the decision “is doubtful as an original matter,” but notes that it is “relatively settled that an ambiguous statute, such as the FTC Act, suffices to confer that authority”—with merely a sentence of explanation.²⁶ In just two sentences, a third article says the same thing without the caveat.²⁷ As Khan and Chopra note, these articles “*suggest* that the Commission engage in competition rulemaking,”²⁸ but they do not explain *why* courts would uphold such authority today. A fourth article predicts that courts will defer to the FTC’s interpretation of Section 6(g) under *Chevron*.²⁹ Only this article offers any significant analysis—though not much;³⁰ it is mostly descriptive. The majority’s sole footnote on statutory authority repeats its arguments,³¹ but without noting its caveat. There is, Professor Gus Hurwitz cautions, “important, ongoing debate among administrative law scholars over whether the holding in *National Petroleum Refiners* was correct,” a debate, he notes, that “occurs in a context much

²² See Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. CHI. L. REV. 357, 375-79 (2020), https://www.ftc.gov/system/files/documents/public_statements/1568663/rohit_chopra_and_lina_m_khan_the_case_for_unfair_methods_of_competition_rulemaking.pdf.

²³ *Id.* at 378.

²⁴ *Id.* at 366 (citing Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 TEX. L. REV. 1247, 1288–89 (2011); C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629, 673-82 (2009); Justin Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 250–52 (2014); Sandeep Vaheesan, *Resurrecting ‘A Comprehensive Charter of Economic Liberty’: The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 651–57 (2017)).

²⁵ Haw, *supra* note 24, at 1288–89 (arguing for notice-and-comment rulemaking over amicus briefs as a means of informing the evolution of antitrust law).

²⁶ Hemphill, *supra* note 24, at 678-79.

²⁷ Vaheesan, *supra* note 24, at 651–57.

²⁸ Chopra & Khan, *supra* note 22, at 366 n. 39.

²⁹ Hurwitz, *supra* note 24, at 233.

³⁰ *Id.* at 233-37 (noting that Congress had not expressly declared that the FTC did *not* have substantive rulemaking authority under Section 6(g) when it amended the FTC Act in 1975, 1980 and 1994). *See infra* Part I.G pp. 26-29.

³¹ NPRM, *supra* note 9, at 3538 n.12.

broader than that of the FTC.”³² In other words, yes, the case “represents the current state of the law,”³³ but its foundations may rest on a pile of sand.

The authors of premier administrative law treatises consider *National Petroleum Refiners* “laughable” by today’s standards; Professor Richard J. Pierce calls it “an illustration of something no modern court would do.”³⁴ Professor Gary Lawson calls the case “almost surely incorrectly” decided.³⁵ “The judges who decided *National Petroleum Refiners*,” another treatise notes, “obviously were influenced by their beliefs that the FTC should have the power to issue legislative rules.”³⁶ Khan and Chopra did not engage with these arguments in their 2020 article; neither the NPRM nor the majority’s statement does so now.

Khan and Chopra’s article, does, however, make one thing clear: just how strange this rulemaking is. “A properly conducted rulemaking,” explains one leading treatise, “results in something called a rule or a regulation, which functions in most ways like a statute. If you violate a rule, you can be heavily fined, punished in other ways, or even sent to jail under appropriate circumstances.”³⁷ That is how rulemaking normally works, but it is not the point of *this* rulemaking. The FTC Act establishes no penalties—indeed, no sanctions at all—for violating UMC rules.³⁸ Only in 1975 did Congress authorize penalties for violations of rules about unfair or deceptive acts and practices (UDAP).³⁹ If there were any textual basis for the FTC to impose penalties for violations of UMC rules, Khan and Chopra would surely have

³² Hurwitz, *supra* note 24, at 251.

³³ NPRM, *supra* note 9, at 3538 n.12.

³⁴ FED. TRADE COMM’N, TRANSCRIPT OF THE NON-COMPETE CLAUSES IN THE WORKPLACE WORKSHOP: EXAMINING ANTITRUST AND CONSUMER PROTECTION ISSUES 296 (2020), https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete-workshop-transcript-full.pdf; *See generally* KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE (3rd ed., Little, Brown 1994). In another textbook, Pierce and co-authors continue: “[The D.C. Circuit] could not decide the policy question of whether Congress actually gave [FTC] that power. A fair reading of the entire opinion suggests, however, that the court’s analysis of policy was far more important in explaining its holding than its analysis of congressional intent. . . . [T]he court concluded that, when faced with what it characterized somewhat disingenuously as ambiguous evidence of legislative intent, FTC should be held to have the power to promulgate legislative rules.” RICHARD PIERCE, SIDNEY SHAPIRO, & PAUL VERKUIL, ADMINISTRATIVE LAW AND PROCESS 289-91 (4th ed. 2004).

³⁵ LAWSON, *supra* note 12, at 334 n.17.

³⁶ KRISTEN E. HICKMAN & RICHARD J. PIERCE, JR., FEDERAL ADMINISTRATIVE LAW: CASES AND MATERIALS 422-23 (2d ed. 2014). Other scholars agree: “In most instances . . . power [to issue substantive rules] is explicit, although some courts have been relatively liberal in interpreting the power . . . even declaring in one instance that an agency had the right to issue substantive rules when, for nearly half a century, the agency took the position it did not possess that legal authority.” ANDREW F. POPPER ET AL., ADMINISTRATIVE LAW: A CONTEMPORARY APPROACH 66 (2d ed. 2010).

³⁷ LAWSON, *supra* note 12, at 48.

³⁸ *See infra* Part I.E pp. 19-22.

³⁹ *See infra* Part I.E.

focused on that, given the Supreme Court’s recent rejection of the legal theory the FTC had long used to seek monetary relief.⁴⁰

Yet the NPRM does not mention penalties. Instead, this rulemaking aims to rewrite the contracts of 30 million workers⁴¹ and to preempt any state law that allows noncompete agreements.⁴² “Federal agency action,” it is true, “may preempt inconsistent state requirements, just as a federal statute may”—but only, the FTC has noted elsewhere, if that action has “the force of law.”⁴³ Khan and Chopra claim just that, that Section 6(g) “delegated authority to the agency generally to make rules carrying the force of law”; they want to leverage that authority for a larger purpose: “agency interpretations made pursuant to that authority fall within the domain of *Chevron*.”⁴⁴ Both claims—preemption and *Chevron* deference—are a far cry from what Judge Skelly Wright had in mind; he thought 6(g) rulemakings merely “narrow the inquiry conducted in proceedings under Section 5(b).”⁴⁵ And both claims will fail because, under modern principles of statutory interpretation, no court would conclude that Section 6(g) authorizes rules with the “force of law.”

A. The Centrality of Text: The Lesson of *AMG Capital*

As now-Justice Brett Kavanaugh put it a few years back, “The text of a law is the law.”⁴⁶ This assertion is “simple but profound.”⁴⁷ Under the common law, “the line between lawmaking

⁴⁰ See *infra* Part I.A

⁴¹ Press Release, Fed. Trade Comm’n, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (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>.

⁴² NPRM at 3536 (to be codified at 16 C.F.R. pt. 910.4) (“This part 910 shall supersede any State statute, regulation, order, or interpretation to the extent that such statute, regulation, order, or interpretation is inconsistent with this part 910.”).

⁴³ Brief for the United States as Amicus Curiae Supporting Respondents at 19, *Altria Grp., Inc. v. Good*, 555 U.S. 70 (2008) (No. 07-562) (citing *Fidelity Fed. Sav. & Loan Ass’n v. De La Cuesta*, 458 U.S. 141, 153 (1982)), https://www.ftc.gov/sites/default/files/documents/amicus_briefs/altria-group-inc-et-al.v.good-et-al./080620_07-562bsacus.pdf.

⁴⁴ Chopra & Khan, *supra* note 22, at 377.

⁴⁵ *Nat’l Petroleum Refiners Ass’n v. Fed. Trade Comm’n*, 482 F.2d 672, 675 (D.C. Cir. 1973) (“The Commission’s assertion that it is empowered by Section 6(g) to issue substantive rules defining the statutory standard of illegality in advance of specific adjudications does not in any formal sense circumvent [Section 5(b)]’s method of enforcement. For after the rules are issued, their mode of enforcement remains what it has always been under Section 5: the sequence of complaint, hearing, findings, and issuance of a cease and desist order.”).

⁴⁶ Brett M. Kavanaugh, *Two Challenges for the Judge as Empire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1910 (2017), <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4733&context=ndlr>.

⁴⁷ *Id.* at 1909.

and judging” was “blurred.”⁴⁸ “In contrast with the... English common law system,” however, the “U.S. Constitution explicitly disconnects federal judges from the legislative power and, in so doing, undercuts any judicial claim to derivative lawmaking authority.”⁴⁹ “The sharp separation of legislative and judicial powers” in the United States “was designed, in large measure, to limit judicial discretion—and thus to promote governance according to known and established laws.”⁵⁰

The importance of text, in the American system, was understood from the beginning of the republic. “The duty of the court,” Chief Justice John Marshall affirmed, is “to effect the intention of the legislature.”⁵¹ And that intention, he knew, is “to be searched for in the words which the legislature has employed to convey it.”⁵²

Despite this clear logical break with the common law system, some American judges, particularly in the mid-twentieth century, incorporated loose notions of “equity” into statutory interpretation.⁵³ One place they did this was in their reading of Section 13(b) of the FTC Act. Although Section 13(b) says only that in proper cases a court may issue an “injunction,” the FTC convinced nine courts of appeals that Section 13(b) could be used to award any form of equitable relief. The agency waged this campaign by “pick[ing] up *Porter v. Warner Holding Co.*, a 1946 Supreme Court decision that reads the phrase ‘permanent or temporary injunction, restraining order, or other order’ to encompass any remedy whatsoever.”⁵⁴ “In the 1980s and 1990s, right as the Supreme Court started to resist the urge to invent statutory actions and remedies, the FTC used *Porter* to convince the lower courts to add remedies to §13(b).”⁵⁵

The dissent in *Porter* stuck up for the proper, traditional, textualist approach—and, thus, for democracy and the separation of powers. “Congress could not have been ignorant of the remedy of restitution,” wrote Justice Rutledge; “it knew how to give remedies it wished to

⁴⁸ John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 36-37 (Jan. 2001).

⁴⁹ *Id.* at 59.

⁵⁰ *Id.* at 61.

⁵¹ *Schooner Paulina’s Cargo v. United States*, II U.S. (7 Cranch) 52, 60 (1812).

⁵² *Id.*

⁵³ *See, e.g., J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

⁵⁴ *See generally* Corbin K. Barthold, *Bringing the Federal Trade Commission to Heel*, LAW & LIBERTY (Nov. 5, 2019), <https://lawliberty.org/bringing-the-federal-trade-commission-to-heel/> (quoting *Porter v. Warner Co.*, 328 U.S. 395 (1946)).

⁵⁵ *Porter v. Warner Co.*, 328 U.S. 395, 405 (1946) (Rutledge, J., dissenting).

confer.”⁵⁶ Because “the remedy . . . sought,” he continued, was “inconsistent with the remedies expressly given by the statute,” he would have withheld restitution.⁵⁷

In *AMG Capital Management v. FTC*, the Supreme Court—in a unanimous ruling—reimposed the proper, text-based reading of Section 13(b).⁵⁸ The Court explicitly rejected the “purposive” approach: “Our task here,” it wrote, “is not to decide whether” letting the FTC use Section 13(b) to obtain monetary relief “is desirable.”⁵⁹ Instead, the Court engaged in a careful analysis of the FTC Act’s text and structure. “For one thing,” the Court observed, “the language” of the statute refers “only to injunctions.”⁶⁰ (Simple but profound, as Justice Kavanaugh would say.⁶¹) For another thing, the “structure” of the statute, “taken as a whole,” confirms that “the words ‘permanent injunction’ have a limited purpose.”⁶² For instance, *other* provisions of the statute “explicitly provide[] for ‘other and further equitable relief’”—thus showing that Congress “likely did not intend for §13(b)’s more cabined ‘permanent injunction’ language to have similarly broad scope.”⁶³ Moreover, where the statute *does* allow monetary relief, it does so only subject to “important [procedural] limitations.”⁶⁴ Only a limited reading of Section 13(b), therefore, “produces a coherent enforcement scheme.”⁶⁵

Although its *holding* addresses a different part of the FTC Act, the Court’s *approach* in *AMG Capital* plainly forecloses the expansive reading of the Act that the FTC puts forth in the NPRM. As we will see, the “language” of the Act, as well as its “structure,” “taken as a whole,” show that Congress “did not intend” to grant the FTC rulemaking authority over unfair methods of competition. Indeed, given the Act’s “important [procedural] limitations,” only a more “cabined” reading of the Act “produces a coherent enforcement scheme.” And the only authority that supports the FTC—*National Petroleum Refiners*—stands on the “purposive” approach to statutory interpretation that *AMG Capital* explicitly forecloses.

⁵⁶ *Id.*

⁵⁷ *Id.* at 408.

⁵⁸ *AMG Cap. Mgmt. v. Fed. Trade Comm’n*, 141 S. Ct. 1341 (2021).

⁵⁹ *Id.* at 1347.

⁶⁰ *Id.*

⁶¹ Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1909 (2017), <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4733&context=ndlr>.

⁶² *AMG Cap. Mgmt.*, 141 S. Ct. at 1348.

⁶³ *Id.* at 1349.

⁶⁴ *Id.*

⁶⁵ *Id.*

B. *National Petroleum Refiners* Is a Fossil from Before the Textualist Revolution

National Petroleum Refiners was decided in a period in which administrative agencies engaged in a “constant and accelerating flight away from individualized, adjudicatory proceedings to generalized disposition through rulemaking.”⁶⁶ Professor Pierce explains what drove this change: “Scholars documented an impressive encyclopedia of the advantages of rules and rulemaking”⁶⁷—the same arguments made in *National Petroleum Refiners* and recapitulated by Khan and Chopra recently. “Many judges and justices joined with scholars in urging agencies to increase their reliance on rules.”⁶⁸ The year before *National Petroleum Refiners*, the Supreme Court had created that a “presumption against formal procedures in rulemakings.”⁶⁹ Meanwhile, Congress enacted a “plethora of statutes that created many new agencies with missions quite different from those assigned the New Deal agencies” in that they “did not lend themselves to adjudication.”⁷⁰

Enter the FTC.

1. The Textualist Approach: Judge Robinson Gets It Right

In 1972, a case came before Aubrey E. Robinson, Jr., a judge on the U.S. District Court for the District of Columbia, involving whether Section 6(g) gave the FTC authority to issue a substantive rule governing gasoline octane labeling. Judge Robinson concluded that the FTC lacks such substantive rulemaking authority.⁷¹ His opinion is a sound one—it comports perfectly with the textualist mode of statutory interpretation engaged in by the Supreme Court in *AMG Capital* and many other recent decisions. Given that the Supreme Court

⁶⁶ Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 376 (1978), <https://www.journals.uchicago.edu/doi/10.1086/scr.1978.3109536>.

⁶⁷ Richard J. Pierce Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L. J. 185, 188 (1996), <https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2073&context=tlr>.

⁶⁸ *Id.* at 189.

⁶⁹ Melissa M. Berry, *Beyond Chevron’s Domain: Agency Interpretations of Statutory Procedural Provisions*, 30 SEATTLE U. L. REV. 541, 551 (2007), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1899&context=sulr> (“In *United States v. Florida East Coast Railway*, the Supreme Court created a presumption against formal procedures in rulemakings by holding that the statutory phrase ‘after hearing’ did not trigger formal procedures.”).

⁷⁰ Pierce, *supra* note 67, at 189.

⁷¹ *Nat’l Petroleum Refiners Ass’n v. Fed. Trade Comm’n*, 340 F. Supp. 1343, 1345 (D.D.C. 1972), *rev’d*, 482 F.2d 672 (D.C. Cir. 1973) (“[I]t is held that the FTC lacks the requisite statutory authority to issue Trade Regulation Rules.”).

endorses Robinson’s approach—and not the purposive approach of the appellate court that reversed him—his opinion will repay close study.

Robinson kept his eye squarely on the FTC Act’s text and structure. What stood out to him, when he examined the statute, is the glaring structural distinction between Section 5 and Section 6.⁷² Section 5 enables the agency to file complaints, hold hearings, make findings of fact, and issue cease-and-desist orders.⁷³ Section 6 permits the agency to gather and publish information about corporate practices.⁷⁴ Each section is closely concerned with its assigned topic: Section 5 explains, in detail, how the FTC shall exercise quasi-judicial powers; Section 6 explains, in detail, how the FTC shall exercise investigative powers. The two sections have little to say to each other. This, concluded Robinson, was a strong signal that Section 6(g) does not enable the creation of rules that define “unfair methods of competition” under Section 5(a)(1).⁷⁵

That was just the beginning. Why would Congress pair a vague and open-ended rulemaking power with an elaborate and strictly circumscribed quasi-judicial power? If the FTC could make whole categories of conduct unlawful by diktat, why would it endure the rigmarole of Section 5 adjudication? More to the point, why would Congress bother to spell out that process, knowing that the FTC would go around it? In full, moreover, Section 6(g) gives the FTC the power “[f]rom time to time to classify corporations and to make rules and regulations for the purposes of carrying out the provisions of [the Act].”⁷⁶ What is the part about “classify[ing]” companies doing there?⁷⁷ Read as a whole, Section 6(g) seems merely to equip the FTC to conduct investigations, including, as Robinson put it, by ensuring that the agency has “the power to require reports from all corporations.”⁷⁸

Nor did the clues end there. Other statutes expressly grant the FTC the power to issue discrete consumer-protection rules, such as rules governing the labels of wool products.⁷⁹ Congress knew how to delegate legislative rulemaking power when it wanted to do so. And the limited delegations of such power, in the other statutes, would be superfluous if the FTC already possessed a general “unfair methods” rulemaking authority in Section 6(g).

⁷² *Id.* at 1345-46.

⁷³ *Id.* at 1345.

⁷⁴ *Id.*

⁷⁵ *Id.* at 1346.

⁷⁶ 15 U.S.C. § 46.

⁷⁷ *See infra* at Part I.D.1 pp. 15-18.

⁷⁸ *Nat’l Petroleum*, 340 F. Supp. at 1345.

⁷⁹ *Id.* at 1347-48.

In short, the FTC Act’s text and structure show that Section 6(g) has no intention of superseding Section 5(a)(1). And when he checked his work against the FTC Act’s legislative history, Robinson found out why that is so. Section 6(g), he discovered, was originally in a House bill “that conferred only investigative powers on the Commission.”⁸⁰ A competing bill in the Senate, meanwhile, contained quasi-judicial powers and the “unfair methods” standard but “made no provision whatever for the promulgation of rules and regulations in any context.”⁸¹ The investigations-only House bill and the no-rulemaking-power Senate bill were eventually stitched together.⁸² No wonder Section 6(g) does not seem to support the creation of legislative rules about the meaning of Section 5(a)(1); the two provisions were born into different bills.

If more support were needed, added Robinson, the FTC’s conduct would provide it. It had taken the FTC 50 years to “notice” a vast store of authority hiding in Section 6(g)—yet another revealing indication, Robinson wrote, “that the FTC knew it was not originally granted this rulemaking authority.”⁸³ Over the years, the agency had even “repeatedly admitted that it has no power to promulgate substantive rules of law.”⁸⁴

Judge Robinson’s well-crafted order is not good law. It was reversed. When, today, a court encounters Section 6(g), however, it will proceed exactly as did Judge Robinson, and not as did the court of appeals that reversed his decision.

2. The Purposive Approach: Judge Wright’s Museum Piece

Judge Robinson’s order was reversed by the U.S. Court of Appeals for the D.C. Circuit, in an opinion written by Judge J. Skelly Wright.⁸⁵

“Our duty,” wrote Judge Wright, “is not simply to make a policy judgment.”⁸⁶ The FTC, after all, “is a creation of Congress, not a creation of judges’ contemporary notions of what is wise policy.”⁸⁷ He might then have said: *We therefore adopt the careful opinion of Judge Robinson*

⁸⁰ *Id.* at 1345; *see also* S. Doc. No. 63-573, at 15 (2d Sess. 1914) (comparing the House, Senate, and Conference versions of the bill).

⁸¹ *Id.* at 1345-46.

⁸² Thomas W. Merrill & Kathryn T. Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 *Harv. L. Rev.* 467, 505 (2002).

⁸³ *Nat’l Petroleum*, 340 F. Supp. at 1347.

⁸⁴ *Id.* at 1349-50.

⁸⁵ *Nat’l Petroleum Refiners Ass’n v. Fed. Trade Comm’n*, 482 F.2d 672 (D.C. Cir. 1973).

⁸⁶ *Id.* at 674.

⁸⁷ *Id.*

as our own—affirmed. But he did not. In opening with a pious renunciation of judicial policymaking, in fact, he protested too much.

Wright’s treatment of the FTC Act’s text was brusque and general. Construing Section 6(g) to allow substantive rulemaking, Wright submitted, would “not in any formal sense circumvent” the quasi-judicial enforcement mechanism of Section 5.⁸⁸ Congress, he went on, had not explicitly told the FTC it could only proceed case-by-case.⁸⁹ He then discussed a pair of Supreme Court cases that, though concededly not on point, suggest the FTC Act should be read “broad[ly]” and as a “whole.”⁹⁰ And he recited Section 6(g) itself, as though its support for his position were self-evident.⁹¹

This casual nod to the text complete, Wright shifted to his true approach to statutory interpretation—unbounded purposivism.

“[I]t is at least arguable,” Wright conceded, that the cases concerning Section 6(g), “go no farther than to justify utilizing Section 6(g) to promulgate procedural, as opposed to substantive, rules for administration of the Section 5 adjudication and enforcement powers.”⁹² But he saw “no reason to import such a restriction on the ‘rules and regulations’ permitted by Section 6(g).”⁹³ Instead, “judicial precedents concerning rule-making by other agencies and the background and purpose of the Federal Trade Commission Act lead us liberally to construe the term ‘rules and regulations.’”⁹⁴ Allowing the FTC to make substantive rules “unquestionably implements the statutory plan.”⁹⁵ Wright purported to be vindicating Congressional intent. But over and over, he praised the “invaluable resource-saving flexibility” of rulemaking:⁹⁶

- “[U]se of substantive rule-making is increasingly felt to yield significant benefits . . . Increasingly, courts are recognizing that use of rule-making to make innovations in agency policy may actually be fairer to regulated parties than total reliance on case-by-case adjudication.”⁹⁷

⁸⁸ *Id.* at 675.

⁸⁹ *Id.*

⁹⁰ *Id.* at 677-78.

⁹¹ *Id.* at 677 n.8.

⁹² *Id.* at 678.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 681.

⁹⁷ *Id.*

- “[C]ontemporary considerations of practicality and fairness . . . certainly support the Commission’s position here.”⁹⁸
- “Such benefits are especially obvious in cases involving the initiation of rules of the sort the FTC has promulgated here.”⁹⁹
- “[T]he policy innovation involved in this case underscores the need for increased reliance on rule-making rather than adjudication alone.”¹⁰⁰
- “[The FTC] has remained hobbled in its task by the delay inherent in repetitious, lengthy litigation To the extent substantive rule-making . . . is likely to deal with these problems . . . [it] should be upheld as [allowed under the FTC Act].”¹⁰¹
- “[T]he Commission will be able to proceed more expeditiously . . . and . . . more efficiently with a mixed system of rule-making and adjudication[.]”¹⁰²
- “[C]ourts have stressed the advantages of efficiency and expedition which inhere in reliance on rule-making instead of adjudication alone.”¹⁰³

Wright repeatedly made clear that, in creating new avenues for rulemaking, he was (he believed) implementing the FTC Act’s “purpose”:¹⁰⁴

- “[R]ejecting the claim of rule-making power would run counter to the broad policies . . . that clearly motivated Congress in 1914.”¹⁰⁵
- “[T]he broad, undisputed policies which clearly motivated the framers of the [FTC] Act of 1914 would indeed be furthered by our view[.]”¹⁰⁶
- “[R]ule-making is not only consistent with the original framers’ broad purposes, but appears to be a particularly apt means of carrying them out.”¹⁰⁷
- The FTC needs rulemaking power “to do the job assigned it by Congress.”¹⁰⁸

Such breezy divination of purpose is the kind of statutory interpretation that courts have long since abandoned. A judge may not appeal to a statute’s “purpose” on the false cry that

⁹⁸ *Id.* at 683.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 684.

¹⁰¹ *Id.* at 690.

¹⁰² *Id.*

¹⁰³ *Id.* at 692.

¹⁰⁴ *Id.* at 678.

¹⁰⁵ *Id.* at 695.

¹⁰⁶ *Id.* at 686.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 697.

he is divining what the legislators “really” meant. The Supreme Court in more recent years has explained that “no legislation pursues its purposes at all costs,” and that “it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.”¹⁰⁹ The missing ingredient in Wright’s long document—what should have been the main ingredient—is obedience to the statutory text and structure.

Following just a brief glance at the text of the statute, Judge Wright did little more than point at the legislative history, divine congressional intent, and wax lyrical about the advantages of rulemaking over case-by-case adjudication. His opinion is a museum piece. It is a fossilized remnant of an extinct species of statutory interpretation. For a court trying to understand the FTC Act today, it is next to useless. Judges may not let their rulings be driven by their sense of “policy,” by their intuitions about statutory “purpose,” or by their desire for a personally satisfying result. The Supreme Court has shut the door on these factors. The judiciary possesses “no roving license,” it has said, to rewrite a statute on the assumption that “Congress ‘must have intended’ something broader.”¹¹⁰ Judges are “expounders of what the law *is*,” not “policymakers choosing what the law *should be*.”¹¹¹

C. The FTC’s Claims to Legislative Power Have Always Rested on Cherry-Picking the FTC Act’s Legislative History

“[L]egislative history is itself often murky, ambiguous, and contradictory,” the Supreme Court has warned.¹¹² “Judicial investigation of legislative history has a tendency to become . . . an exercise in ‘looking over a crowd and picking out your friends.’”¹¹³ Such cherry-picking has always underlaid arguments that Section 6(g) authorizes substantive rulemakings. The FTC first made this argument when it issued the Cigarette Rule in 1964:

The framers of the Trade Commission Act of 1914 were primarily concerned with what they felt had been the inadequacy of the federal courts’ enforcement of the Sherman Act. Both the business community, which felt that such enforcement had created a climate of legal uncertainty in which effective business planning was impossible, and those who felt that the federal judiciary had been unsympathetic to the high purposes of the Act, concurred [sic] in the

¹⁰⁹ *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987).

¹¹⁰ *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014).

¹¹¹ *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018).

¹¹² *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

¹¹³ *Id.* (quoting Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting Harold Leventhal’s description of problems with citing legislative history)).

belief that the task of maintaining competitive processes in the economy could perhaps be better performed by an expert, nonjudicial body, equipped with the distinctive and flexible powers of an independent administrative agency, along the lines of the highly successful Interstate Commerce Commission.¹¹⁴

The FTC relied upon the remarks of Senator Francis Newlands. The day after the Supreme Court first interpreted the Sherman Act to require a “Rule of Reason” [in most cases] in *Standard Oil Co. v. United States* (1911),¹¹⁵ Newlands first proposed “an administrative tribunal similar to the Interstate Commerce Commission, with powers of recommendation, with powers of condemnation, with powers of correction similar to those enjoyed by the Interstate Commerce Commission over interstate transportation.”¹¹⁶

So preoccupied was the FTC with “picking out its friends” when looking at the FTC Act’s history—which even Judge Wright found hopelessly “ambiguous” on this question¹¹⁷—that the FTC did not bother to compare the text of Section 6(g) with the text of the relevant provision of the Interstate Commerce Act. First enacted in 1887, the Interstate Commerce Act originally empowered the Interstate Commerce Commission to declare only whether current railroad rates were reasonable. In the *Queen and Crescent Case* (1897), the Supreme Court rejected arguments that the Act further empowered the ICC to set *future* rates through rulemaking.¹¹⁸ The Mann-Elkins Act of 1910 gave the ICC the power “to determine and prescribe what will be the just and reasonable individual or joint rate or rates . . .”¹¹⁹ Whatever Sen. Newlands intended hardly matters.¹²⁰ But in any event, it’s clear that the Mann-Elkins Act confers substantive authority in a way that Section 6(g) does not.

¹¹⁴ SEN. R. NO. 88-110, pt. 11, at 14836 (1964); *see also* Cigarette Rule, 29 Fed. Reg. 8323-8375 (1964), (codified at 16 C.F.R. pt. 408 (1966)).

¹¹⁵ 221 U.S. 1, 66–68 (1911).

¹¹⁶ Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, Statement of Basis and Purpose, 29 Fed. Reg. 8325, 8348 (1964) (citing Cong. Rec. 1225 (1911)); *see id.* at 1227, 2444, 2619-21; S. Rep. No. 1326, 62d Cong., 3d Sess. (1913)).

¹¹⁷ Nat’l Petroleum Refiners Ass’n v. Fed. Trade Comm’n, 482 F.2d 672, 686 (D.C. Cir. 1973) (“while the legislative history of Section 5 and Section 6(g) is ambiguous, it certainly does not compel the conclusion that the Commission was not meant to exercise the power to make substantive rules with binding effect in Section 5(a) adjudications.”).

¹¹⁸ Interstate Com. Comm’n v. Ry. Co., 167 U.S. 479, 494 (1897) (*Queen and Crescent Case*).

¹¹⁹ Mann-Elkins Act, Pub. L. No. 61-218, § 15, 36 Stat. 539, 551 (1910), <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/36/STATUTE-36-Pg539.pdf>

¹²⁰ Senator Newlands’s words should not be considered in any way authoritative on the meaning of the FTC Act. “A major source of the confusion over the scope of the FTC’s authority stems from the comments of the bill’s chief sponsor in the Senate, Senator Francis Newlands.” William Kolasky, “Unfair Methods of Competition:” *The Legislative Intent Underlying Section 5 of the FTC Act*, Wash. Legal Found., at 28-29 (Dec.

D. How Textualist Courts Will Interpret Section 6(g) Today

Judge Robinson engaged in solid textualist analysis, but a modern court would see additional reasons in the text of the FTC Act to reach the same conclusion. An analysis of the text and structure of the Act—such as in *AMG Capital*¹²¹—makes it clear: Section 6(g) confers no power to make rules with the force of law.

1. What Section 6(g)'s Power to Classify Corporations Says about the Power to Make Rules

“Unfortunately,” notes one critic of the FTC’s rulemaking, “the words that precede the phrase ‘rules and regulations’ in section 6(g) do not provide additional context, moving from the classification of corporations to a general reference to ‘rules.’”¹²² In fact, the first half of Section 6(g) offers vital context for understanding the second half. If Section 6(g) conferred the authority to make *any* rules, why would Congress have bothered including a distinct power to classify corporations? Would not the general power to make rules have sufficed?

The overall structure of the FTC Act helps explain the structure of Section 6(g). Originally, as Judge Patterson noted, the Act had two operative sections. Section 5(a) declares “unfair methods of competition in commerce” unlawful and that the Commission is “empowered and directed to prevent” them.¹²³ Section 5(b) spells out in detail how the Commission should wield that power through case-by-case adjudication. Section 6 provides that the Commission shall also have various “additional powers.” Seven of its eight subsections are plainly about investigations¹²⁴ or what to do with the products of such investigations.¹²⁵ At most, these are “quasi-legislative” powers.¹²⁶ Each operative section provides its own kind of

2014), <https://www.wlf.org/wp-content/uploads/2021/06/WLF-comment-FTC-July-1-meeting.pdf>. “When he first introduced the Senate substitute for the House bill, Senator Newlands—who had played no role in its drafting—described Section 5 in a way that made it sound as if the new commission’s job would be to police business morals.” *Id.* at 28-29. But this suggestion “triggered a wave of protests from others in the Senate.” *Id.* at 29. Most “proponents of Section 5 quickly distanced themselves from Senator Newlands’ remarks.” *Id.* at 29. In private, Louis Brandeis even called Newlands “the despair of mankind,” and attributed “his shortcomings to senility.” *Id.* at 30.

¹²¹ Not only did the “language and structure of § 13(b), taken as a whole, indicate that the words ‘permanent injunction’ have a limited purpose,” but in addition, “the structure of the Act beyond § 13(b) confirms this conclusion.” *AMG Cap. Mgmt. v. Fed. Trade Comm’n*, 141 S. Ct. 1341, 1348 (2021).

¹²² Fauver, *supra* note 17, at 275.

¹²³ Federal Trade Commission Act of 1914, Pub. L. No. 63-203, § 5, 38 Stat. 717, 719 (1914) (codified at 15 U.S.C. § 45).

¹²⁴ 15 U.S.C. §§ 46(a), (b), (c), (d), (h).

¹²⁵ 15 U.S.C. §§ 46(e), (f).

¹²⁶ *Humphrey’s Executor v. United States*, 295 U.S. 602, 628 (1935) (“In making investigations and reports thereon for the information of Congress under § 6, in aid of the legislative power, it acts as a legislative agency.”).

compulsory process: A related provision, Section 9, authorizes subpoenas for enforcement actions conducted under Section 5(b).¹²⁷ Section 6(b) authorizes the Commission to *require* companies to file “reports or answers in writing to specific questions” unrelated to any 5(b) enforcement action. This was an important innovation: the Interstate Commerce Commission had no such compulsory fact-finding authority,¹²⁸ which led President Wilson to call for an “administrative ‘sunshine’ commission to expose those practices and help prevent them.”¹²⁹ Both compulsory investigation provisions are subject to the same limitation on the Commission’s otherwise general jurisdiction.¹³⁰ “The object of the Act is to provide federal regulation of all corporations engaged in interstate commerce, except banks and common carriers, which are covered by federal regulatory laws.”¹³¹

Among its sibling subsections, Section 6(g) is unique: it alone does not mention investigations or the fruits of investigations. Yet “the authority to ‘classify corporations’” is “an essential feature of the congressional plan for the fledgling agency to study and assess business practices.”¹³² Why?

Consider how adjudications work under Section 5(b). If a company receives a cease-and-desist order from the FTC, it can challenge the order in a hearing before the Commission. If the Commission finds that “the method of competition in question is prohibited by [the] Act, it shall make a report” explaining why.¹³³ If the company resists, the FTC may ask a federal court to compel compliance.¹³⁴ If the company denies that the FTC has jurisdiction because it is a common carrier or a bank, the court will determine jurisdiction by examining the nature of its service under common law. The FTC Act does not define what constitutes

¹²⁷ 15 U.S.C. § 49. Later, Congress supplemented the FTC’s subpoena power with the power to issue civil investigative demands. 15 U.S.C. § 57b-1.

¹²⁸ See *infra* note 185 and associated text.

¹²⁹ William Kolasky, “*Unfair Methods of Competition: The Legislative Intent Underlying Section 5 of the FTC Act*,” Wash. Legal Found., at 8 (Dec. 2014), <https://www.wlf.org/wp-content/uploads/2021/06/WLF-comment-FTC-July-1-meeting.pdf>.

¹³⁰ Section 6(b) contained the same limitation (“corporations engaged in commerce, excepting banks, and common carriers subject to Act to regulate commerce . . .”) found in Section 5(b). 15 U.S.C. §§ 45(a)(2); 46(b). Section 9 incorporated that limitation by referring to “any corporation being investigated or proceeded against.” 15 U.S.C. § 49.

¹³¹ Edward S. Jouett, *The Inquisitorial Feature of the Federal Trade Commission Act Violates the Federal Constitution*, 2 VA. L. REV. 584, 584 (May 1915).

¹³² Noah Phillips, *Against Antitrust Regulation*, AEI, at 3 (Oct. 13, 2022), <https://www.aei.org/research-products/report/against-antitrust-regulation/>.

¹³³ 15 U.S.C. § 45(b).

¹³⁴ *Id.*

common carriage, nor did the Interstate Commerce Act of 1887¹³⁵—nor, indeed, has federal law since¹³⁶—but under common law, the question is highly fact-dependent¹³⁷ and specific to each service a company offers.¹³⁸ Section 5(b) says the FTC’s factual findings, including those relevant to its jurisdiction, “shall be conclusive.”¹³⁹

Section 6 is different. It makes no provision for seeking compliance with compulsory demands issued under Section 6(b). Instead, under the general provisions of Section 9, the FTC must ask the Attorney General to seek a writ of mandamus from a federal district court.¹⁴⁰ The FTC enjoys no deference in such litigation; indeed it is not even a party to it. So *of course* it was necessary for Congress to give the FTC the power to declare that a company fell within its jurisdiction by “classifying it” before the Department of Justice took over the case.

If the power to make “rules and regulations” were, as NPRM claims, broad enough to encompass *any* rules or regulations—as the APA’s definition of “rules” does today¹⁴¹—the specific power to classify corporations would be superfluous. This interpretation cannot be right. “It is ‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’”¹⁴² No provision “should needlessly be given an interpretation that causes it to duplicate another provision or to have no

¹³⁵ Fed. Trade Comm’n v. AT&T Mobility LLC, 883 F.3d 848, 854 (9th Cir. 2018) (“neither the ICA nor its 1910 amendment contained a definition of ‘common carrier.’”).

¹³⁶ *Id.* at 855 (“since passage of the FTC Act over a century ago, Congress has never defined ‘common carrier.’”).

¹³⁷ “[A] consistent line of cases demonstrates that ‘common carrier’ had a well-understood meaning by 1914. Forty years before the FTC Act, the Supreme Court observed that an entity could be considered a common carrier for some purposes but not others: ‘A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry.’ In other words, being a common carrier entity was not a unitary status for regulatory purposes. A business with common-carrier status acted in its capacity as a common carrier only when it performed activities that were ‘embraced within the scope of its chartered powers.’” *AT&T Mobility LLC*, 883 F.3d at 858 (citations omitted) (quoting *N. Y. Cent. R.R. Co. v. Lockwood*, 84 U.S. 17 Wall. 357, 377 (1873)).

¹³⁸ *Id.* at 854-55 (“Congress did not intend the FTC to regulate common-carrier business practices.”).

¹³⁹ 15 U.S.C. § 45(b).

¹⁴⁰ 15 U.S.C. § 49 (“Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.”).

¹⁴¹ 5 U.S.C. § 551(4).

¹⁴² *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

consequence.”¹⁴³ As with any statute, “each word Congress use[d]” in Section 6(g), “is there for a reason.”¹⁴⁴ Congress would not have specifically granted the power to classify corporations if the rest of the sentence “had already implicitly allowed the Commission to [exercise that power] and more”—just as the *AMG Capital* Court found it “highly unlikely that Congress would have enacted provisions expressly authorizing *conditioned* and *limited* monetary relief if the Act, via § 13(b), had already implicitly allowed the Commission to obtain that same monetary relief and more without satisfying those conditions and limitations.”¹⁴⁵

2. The Enactment History of Section 6(g) Confirms the Procedural Nature of Its Rulemaking Power

Even a textualist court would find helpful context in the enactment history of Section 6(g)—not in what individual lawmakers said about rulemaking or classification, but by comparing, as Judge Robinson did, the markedly different versions of the FTC Act passed by the House and Senate.¹⁴⁶ The House version provided only for investigations. At conference, that version was merged with the Senate version, which authorized adjudication but not rulemaking.¹⁴⁷ Section 8 of the House bill contained rulemaking language equivalent to the final Section 6(g).¹⁴⁸

As Judge Robinson noted, because Section 6(g)’s rulemaking power “originated” in a bill that “conferred only investigative powers on the Commission, . . . the rulemaking grant in Section 6(g) could only have been intended as an adjunct to the Commission’s investigative powers.”¹⁴⁹ Moreover, that Section 8 authorized only procedural “rules and regulations” is reinforced by what the House grouped together in that section. Four additional sentences conferred powers that were unmistakably procedural.¹⁵⁰ By moving these provisions to two

¹⁴³ Nielsen v. Preap, 139 S. Ct. 954, 969 (2019) (quoting A. SCALIA & B. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174 (2012)).

¹⁴⁴ *Advoc. Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017) (citing A. SCALIA & B. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174–179 (2012)).

¹⁴⁵ *AMG Cap. Mgmt. v. Fed. Trade Comm’n*, 141 S. Ct. 1341, 1349 (2021).

¹⁴⁶ *Cf. S. Austin Coal. Cmty. Council v. SBC Commc’ns Inc.*, 274 F.3 1168, 1172 (7th Cir. 2001) (Easterbrook, J.) (discussing “the legislative history—the enactment history, not the fog of words generated by legislators”).

¹⁴⁷ *See supra* note 80 and associated text.

¹⁴⁸ S. Doc. No. 63-573, at 15 (2d Sess. 1914) (“the commission may from time to time make rules and regulations and classifications of corporations for the purpose of carrying out the provisions of this Act.”).

¹⁴⁹ *Nat’l Petroleum Refiners Ass’n v. Fed. Trade Comm’n*, 340 F. Supp. 1343, 1345 (D.D.C. 1972), *rev’d*, 482 F.2d 672 (D.C. Cir. 1973).

¹⁵⁰ Section 8 of the House bill granted powers to “special attorneys and experts,” for Commissioners to “administer oaths and affirmations and sign subpoenas,” for the Commission to order depositions in “any

other sections of the final statute, the conference committee avoided any uncertainty as to whether those powers applied only to investigations conducted under Section 6 or to the Commission's operations more generally. Thus, a much longer Section 8 became the one-sentence Section 6(g), ending with the same final phrase as Section 8: "... for the purpose of carrying out the provisions of this Act."

Arguably, by not changing "carrying out the provisions of this Act" to, say, "carrying out the provisions of this Section," Congress allowed what began as a power to make procedural rules to extend beyond the investigative processes of Section 6—such that the FTC could make procedural rules for the adjudicatory process of Section 5 as well. This would have been a relatively small change. But Judge Wright read much more into this language. He assumed it meant the FTC could make substantive rules to implement Section 5(b)'s prohibition on unfairness.¹⁵¹

But how likely is it that this small inaction *fundamentally* changed the nature of the statute? How likely is it that the conference committee intended—or that the full Congress accepted—that combining the purely *investigatory* House bill's Section 8, with its provision for *procedural* rules, with the *adjudicatory* Senate bill would somehow give the FTC a *legislative* power to make binding rules—when neither bill contemplated any such legislative power? And if such a feat of alchemy—producing "legislative" gold from such baser elements—*had* occurred in conference committee, wouldn't this have been a major subject of debate before each chamber approved the conference committee's version?¹⁵²

Textualist courts do not accept such gigantic leaps in meaning based on such scant text. "Congress... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."¹⁵³

proceeding or investigation," and that federal district courts would have authority to grant writs of mandamus to order compliance "with the provisions of this Act or any order of the commission made in pursuance thereof." Section 2 of the final FTC Act addresses special experts while Section 9 addresses who may sign subpoenas and provides for depositions, and jurisdiction over writs of mandamus.

¹⁵¹ Nat'l Petroleum Refiners Ass'n v. Fed. Trade Comm'n, 482 F.2d 672, 677 (D.C. Cir. 1973) ("According to appellees, [Section 6(g)]'s rule-making power is limited to specifying the details of the Commission's nonadjudicatory, investigative and informative functions spelled out in the other provisions of Section 6. . . . We disagree for the simple reason that Section 6(g) clearly states that the Commission 'may' make rules and regulations for the purpose of carrying out the provisions of Section 5.").

¹⁵² Neither Judge Robinson nor Judge Wright noticed any such discussion. See Nat'l Petroleum Refiners Ass'n v. Fed. Trade Comm'n, 340 F. Supp. 1343, 1345-47 (D.D.C. 1972), *rev'd*, 482 F.2d 672 (D.C. Cir. 1973); Nat'l Petroleum Refiners Ass'n v. Fed. Trade Comm'n, 482 F.2d 672, 685-87 (D.C. Cir. 1973).

¹⁵³ Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001).

E. The Act Makes No Provision for Sanctions or Penalties for Violation of Rules—or Even for Violations of the Act Itself

The FTC has carefully avoided connecting the instant rulemaking with its desire to obtain monetary penalties in lieu of the restitution and disgorgement it routinely obtained under Section 13(b) prior to *AMG Capital*. The reason is simple: even assuming that Section 6(g) gave the FTC the authority to make substantive rules, the FTC could obtain no penalties for violations of such rules. Why? Because, as the FTC’s recent UMC Policy Statement acknowledges,¹⁵⁴ the only provision of the FTC Act authorizing penalties for violations of FTC rules, Section 5(m)(1)(A), is explicitly limited to rules governing unfair and deceptive acts and practices (UDAP).¹⁵⁵ This provision was not added until 1975.¹⁵⁶ Originally, only Section 10 governed penalties, but it says nothing about enforcing rules.¹⁵⁷ Indeed, the original FTC Act authorized only one remedy for violations of the Act itself: injunctive relief, with no sanctions.¹⁵⁸

Neither Judge Robinson nor Judge Wright noticed this omission—because neither compared the FTC Act to other statutes enacted in the same period. In the era when the FTC Act was passed, Congress never granted the power to make substantive rules without also specifying the price of noncompliance.¹⁵⁹ Professors Thomas Merrill and Kathryn Tongue Watts challenged Judge Wright’s analysis in a 2001 article published in the *Harvard Law Review*, (attached hereto as Appendix A). “Throughout the Progressive and New Deal eras,” Merrill and Watts wrote, “Congress followed a drafting convention that signaled to agencies whether particular rulemaking grants conferred authority to make rules with the force of law as

¹⁵⁴ FED. TRADE COMM’N, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT at 5 n.23 (Nov. 10, 2022) [hereinafter 2022 UMC POLICY STATEMENT], https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf (“Civil penalties and Section 19’s monetary remedies are limited to unfair and deceptive acts or practices.”).

¹⁵⁵ 15 U.S.C. § 45(m)(1)(A) (“The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this subchapter *respecting unfair or deceptive acts or practices*” (emphasis added)).

¹⁵⁶ Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975).

¹⁵⁷ Federal Trade Commission Act of 1914, Pub. L. No. 63-203, § 10, 38 Stat. 717, 723 (1914) (codified as amended at 15 U.S.C. § 50).

¹⁵⁸ *Id.* § 5, 38 Stat. at 719. The injunctions contemplated by the FTC Act are merely orders to “to cease and desist from the violation of the law.” 15 U.S.C. § 45(b). Not only is such an injunction not a sanction, it is not even a form of “equitable monetary relief,” as it “offers prospective relief against ongoing or future harm.” *AMG Cap. Mgmt. v. Fed. Trade Comm’n*, 141 S. Ct. 1341, 1347 (2021) (quoting *United States v. Oregon State Medical Soc.*, 343 U.S. 326, 333 (1952)).

¹⁵⁹ See Berin Szóka & Corbin Barthold, *The Constitutional Revolution that Wasn’t: Why the FTC Isn’t a Second National Legislature*, at 17 (June 2022), <https://techfreedom.org/wp-content/uploads/2022/06/FTC-UMC-Rulemaking-Authority-TF-Version.pdf>; see generally Merrill & Watts, *supra* note 82.

opposed to mere housekeeping rules.”¹⁶⁰ That convention, they explained, was simple: “If 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”—“then the grant conferred power to make rules with the force of law.”¹⁶¹ Wright’s opinion, they concluded, is “inconsistent with what Congress had intended,” for Section 6(g), “as measured by the convention.”¹⁶²

The convention didn’t merely *exist*; it *makes sense*. In *United States v. Eaton* (1892), the Court declared that a statute must speak “distinctly” to “make the neglect” of executive “regulations” a “criminal offence.”¹⁶³ This principle was gradually fleshed out as to other penalties as well, until it was clear, as Merrill and Watts explained, that “Congress can delegate authority to agencies to promulgate regulations that have a variety of legal consequences—as long as Congress itself *spells out by statute what those consequences are*.”¹⁶⁴ The convention arose, in short, from a realization that it shouldn’t be up to agencies to decide what punishments they get to mete out for violating rules not written by Congress. The question—involving, as it does, the rights and property of private citizens—is too important. It must be addressed by Congress.

And that’s exactly what we see in the FTC Act, as to Section 5 adjudications in general (the FTC can obtain cease and desist orders¹⁶⁵), UDAP adjudications (the FTC can sometimes

¹⁶⁰ Merrill & Watts, *supra* note 82, at 472.

¹⁶¹ Merrill & Watts, *supra* note 82, at 472. For example, the Communications Act contains a rulemaking provision similar to that found in Section 6(b). Compare 47 U.S.C. § 201(b) (“The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.”) with 15 U.S.C. § 46(g) (“The Commission shall also have power ... to make rules and regulations for the purpose of carrying out the provisions of this subchapter.”). Yet, unlike the FTC Act, the Communications Act authorizes sanctions for violations of FCC rules. 47 U.S.C. § 502 (civil penalties); 47 U.S.C. § 312(a)(4) (revocation of broadcast licenses). Each statute must be read “as a whole.” *AMG Capital*, 141 S. Ct. at 1350.

¹⁶² Merrill & Watts, *supra* note 82, at 473. For a fuller discussion of Merrill and Watts’s paper, the convention, and the inconsistency between the convention and Judge Wright’s opinion in *National Petroleum Refiners*, see Szóka & Barthold, *The Constitutional Revolution that Wasn’t*, *supra* note 159, at 16.

¹⁶³ *United States v. Eaton*, 44 U.S. 677, 688 (1892).

¹⁶⁴ Merrill & Watts, *supra* note 82, at 502 (emphasis added).

¹⁶⁵ For first-time violations of Section 5, the FTC may obtain cease-and-desist orders. 15 U.S.C. § 45(b).

obtain penalties¹⁶⁶), and UDAP rules (civil penalties¹⁶⁷), but not UMC rules. Indeed, the penalty provisions for the first three categories are reticulated: they spell out in painstaking detail who can be penalized, in what circumstances, for what behavior, in what ways, after being afforded what process. None of that exists for UMC rules.¹⁶⁸ The absence of penalty provisions for UMC rules runs against the convention—thus showing that, as a matter of legislative intent, such rules *were not meant* to be allowed. And to allow such rules anyway, in the absence of such provisions, would risk exposing parties to creative but highly unjust attempts by the FTC to craft penalties itself—thus showing that, as a matter both of due process and common sense, such rules *should not* be allowed.

F. The FTC Act Made No Provision for Judicial Review of FTC Rules

The lack of sanctions for violating UMC rules is not the only way in which the FTC's reading creates an incoherent enforcement scheme. Consider the FTC's 2022 UMC Policy Statement: "To balance the Commission's powers, Congress created checks to ensure that the FTC would be accountable to it and that the FTC's decisions would be reviewable by federal courts of appeal."¹⁶⁹ Yet the only "decisions" that are "reviewable by federal courts of appeal" under Section 5(b) are the adjudications authorized by Section 5(c).¹⁷⁰ If the Congress of 1914 had intended to give the FTC the power to issue substantive rules, why would it have chosen to make FTC adjudicatory orders reviewable but not FTC rules?

The reason, of course, is that the FTC had no rulemaking power to begin with. The birth of the administrative state during the Populist era was defined by what Professor Robert Rabin calls a "policing model" of government.¹⁷¹ "The policing model closely corresponded to a widely shared" belief in "the limited responsibility of government."¹⁷² Accordingly, "the substantive mandate given the newly formed FTC" was "a largely inconsequential directive

¹⁶⁶ 15 U.S.C. § 45(m)(1)(B) ("If the Commission determines in a proceeding under subsection (b) that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent order, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and (2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful"); 15 U.S.C. § 57b (the Commission must demonstrate that "a reasonable man would have known under the circumstances [that the conduct] was dishonest or fraudulent.").

¹⁶⁷ 15 U.S.C. § 45(m)(1)(A).

¹⁶⁸ At most, Section 5(a)(2) limits the FTC's enforcement jurisdiction in general. 15 U.S.C. § 45(a)(2).

¹⁶⁹ 2022 UMC POLICY STATEMENT, *supra* note 154, at 6-7.

¹⁷⁰ *Id.* at 6-7; *see also* 15 U.S.C. § 45(b)-(c).

¹⁷¹ Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1192 (May 1986).

¹⁷² *Id.*

to monitor and prohibit ‘unreasonable’ conduct.”¹⁷³ All agreed that the FTC was to “perform a limited facilitating function.”¹⁷⁴ “Mainstream advocates of regulatory reform, whatever their stripe, subscribed to the notion of a self-correcting economy that necessitated only an essentially passive, reactive governmental presence and delegated the principal decisions about market behavior to private actors.”¹⁷⁵

Only with the New Deal did intrusive regulations—and to the present point, procedures for challenging those regulations—became a topic of discussion, study, and, ultimately, statutory law. “Because the New Deal programs” ventured “into areas in which no pre-existing regulatory framework existed, procedural aspects of agency policymaking processes were often given short shrift.”¹⁷⁶ It was the “reaction against” these chaotic and disorganized “agency processes” that led to the passage of the Administrative Procedure Act in 1946.¹⁷⁷ It was the APA that created the “highly conventional lawyer’s view of how to tame potentially unruly administrators” that we know today.¹⁷⁸ The APA “was a formal articulation of agency due process in return for the newly recognized powers of wide-ranging administrative intervention in the economy.”¹⁷⁹

In sum, the picture of judicial review presented in the FTC’s 2022 UMC Policy Statement—a picture of formalized FTC rulemaking followed by an explicitly authorized court challenge—is a deeply presentist picture of administrative law. Applied back on the FTC Act as passed in 1914, it is revisionist history.¹⁸⁰

Not surprisingly, therefore, there is no sign that any machinery existed, in the U.S. Code or otherwise, for a roving judicial review of agency rulemaking. The Judiciary Act of 1789 “remained in force substantially unaltered”¹⁸¹ as the Judicial Code,¹⁸² and provided for limited avenues of appeal. Most commonly, writs of error allowed appeals by a higher court,

¹⁷³ *Id.* at 1224.

¹⁷⁴ *Id.* at 1225.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1264.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1265.

¹⁷⁹ *Id.* at 1266.

¹⁸⁰ Even as late as 1927, Felix Frankfurter was noting that “the formulation and publication of executive orders and rules and regulations” was “still in a primitive stage,” and that such “law-making authority” was “not [yet] subject to ordinary court review.” Felix Frankfurter, *The Task of Administrative Law*, 75 U. PENN. L. REV. 614 (1927).

¹⁸¹ Frank H. Sloss, *Mandamus in the Supreme Court Since the Judiciary Act of 1925*, 46 HARV. L. REV. 91, 91 (1932), <https://doi.org/10.2307/1331426>.

¹⁸² Judicial Code, Pub. L. No. 64-231, 39 Stat. 532 (1916).

but only after a federal district court had decided a case.¹⁸³ When creating a regulatory scheme, it was up to Congress to establish jurisdiction for the federal courts to review the actions of the regulatory commission being erected.¹⁸⁴

In 1913, for instance, Congress amended the Interstate Commerce Act to give the district courts “jurisdiction to compel compliance” with ICC orders by issuing a writ of mandamus to a common carrier.¹⁸⁵ The common carrier could challenge the validity of the ICC order in court, but only after the ICC sought to compel compliance with the writ of mandamus. In passing the FTC Act the following year, Congress took a slightly different approach, empowering parties subject to an FTC order to seek review, in the federal courts of appeals, *without* having to wait for an FTC enforcement action. But the fundamental point stood: judicial review depended entirely on the existence of explicit congressional authorization. It was only with the passage of the APA that the courts gained a formal, generalized jurisdiction to review final agency action.¹⁸⁶

In short, the FTC Act “specifically provides for judicial review of orders under Section [5] but makes no similar provision for review of rules (or other decisions) made pursuant to Section [6(g)].”¹⁸⁷ Yet “if Section [6(g)] provided the commission rulemaking powers, then Congress presumably would have delineated a similar procedure for judicial review of those regulations.”¹⁸⁸ Otherwise, under the law as it stood at that time, such regulations would very likely not have been subject to any judicial review at all. It is hardly likely that Congress,

¹⁸³ See *McLish v. Roff*, 141 U.S. 661, 664 (1891) (explaining that writs of error have been foundational from the creation of the judicial system in circumstances where a case had been decided in whole by a lower court and was appealed in whole). In civil cases, the writ of error system has been expressly abolished and replaced by Rule 60 of the Federal Rules of Civil Procedure, see FED. R. CIV. P. 60(b)(4)–(6), (e).

¹⁸⁴ U.S. CONST. art. III, § 1, § 2, cl. 2. (vesting the power of creating inferior courts to Congress and providing congressional control over appellate jurisdiction through the Exceptions Clause as well as for “Regulations as the Congress shall make”).

¹⁸⁵ Interstate Commerce Act, Pub. L. No. 62-400, 37 Stat. 701, 703 (1913) (“the district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the commission, alleging a failure to comply with or a violation of any of the provisions of this section by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of this section.”).

¹⁸⁶ Administrative Procedure Act § 10(a)–(c), Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 702–704).

¹⁸⁷ Eugene Scalia, *The Major Questions Doctrine, National Petroleum, and the Federal Trade Commission’s Competition Rulemaking Authority*, AEI, at 5 (Dec 1, 2022), <https://www.aei.org/research-products/report/the-major-questions-doctrine-national-petroleum-and-the-federal-trade-commissions-competition-rulemaking-authority/>.

¹⁸⁸ *Id.* at 5.

via Section 6(g), would have conferred on the FTC an *unreviewable* legislative authority to promulgate substantive rules.

G. The Post-Enactment History of the FTC Act Is Irrelevant

Chair Khan, former Commissioner Rohit Chopra, and Professor Gus Hurwitz, whose work Khan and Chopra cite, rely on congressional actions after 1914 to support their conclusion that Congress,¹⁸⁹ in 1914, intended to confer substantive rulemaking authority upon the FTC. But when “a later statute is offered as an expression of how Congress interpreted a statute passed by another Congress a half century [or more] before, such interpretation has very little, if any, significance.”¹⁹⁰ This is especially so when Congress enacts new legislation touching upon earlier legislation whose precise meaning is “still to be authoritatively determined” and remains “a subject of speculation.”¹⁹¹ This was, and remains, the case for Section 6(g)—with the Supreme Court having declined to review *National Petroleum Refiners* and with no other appellate court having ruled on the question.¹⁹²

1. The 1975 Magnuson-Moss Act Neither Presumed the FTC Had UMC Rulemaking Power Nor Confirmed That It Did

The Magnuson-Moss Act of 1975 granted the FTC explicit power to make UDAP rules subject to special procedural safeguards.¹⁹³ Prior to this, as Hurwitz notes, a House-Senate conference committee rejected a House proposal that appeared to suppose the existence of FTC rulemaking authority—and that aimed to curb it.¹⁹⁴ Such decisions to reject proposed legislative language are inherently unreliable indicators of congressional intent. As the Supreme Court observed when addressing one such instance: “Whether Congress thought the proposal unwise . . . or unnecessary, we cannot tell; accordingly, no inference can properly be drawn from the failure of the Congress to act.”¹⁹⁵ Here, that is doubly true: Congress decided (i) *not* to enact a proposal that (ii) might, or might not, have accurately reflected the actual state of the law.

¹⁸⁹ Chopra & Khan, *supra* note 22, at 378; Hurwitz, *supra* note 24.

¹⁹⁰ *Bilski v. Kappos*, 561 U.S. 593, 645 (2010) (citation and internal alterations and quotation marks omitted).

¹⁹¹ *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 348–49 (1963).

¹⁹² *Nat’l Petroleum Refiners Ass’n v. Fed. Trade Comm’n*, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

¹⁹³ Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 202, 88 Stat. 2183, 2193-95 (1975); 15 U.S.C. § 57(a).

¹⁹⁴ H.R. REP. NO. 93-1107 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7727.

¹⁹⁵ *United States v. Price*, 361 U.S. 304, 312 (1969).

Ultimately, the Magnuson-Moss Act provided that the new provision for UDAP rulemaking, Section 18, applies only to unfair or deceptive acts or practices; it does “not affect any authority of the [FTC] to prescribe rules . . . with respect to unfair methods of competition.”¹⁹⁶ Khan and Chopra emphasize this provision.¹⁹⁷ But it tells us nothing about original meaning of Section 6(g). Writing four years later, Miles Kirkpatrick—who chaired the Commission from 1970 to 1973, when *National Petroleum Refiners* was decided and when Magnuson-Moss was being formulated¹⁹⁸—“explained that it was not clear whether Congress in the Magnuson-Moss Act sought to clarify existing rulemaking authority or to grant substantive rulemaking authority to the FTC for the first time.”¹⁹⁹

That lawmakers in 1974 or 1975 *might* have thought that the FTC *might* have had UMC rulemaking authority does not actually tell us what Section 6(g) meant in 1914. “Arguments based on subsequent legislative history,” as Justice Scalia once put it, “like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote.”²⁰⁰

2. The 1980 FTC Improvements Act Did Not Validate UMC Rulemaking

Hurwitz also discusses the FTC Improvements Act of 1980.²⁰¹ If anything, this law tells us even less about whether the FTC may make UMC rules than does what happened in 1974 or 1975. As Hurwitz notes, the 1980 Act was passed in response to the FTC’s “extensive and often controversial rulemaking” following passage of the Magnuson–Moss Act of 1975.²⁰² “The FTC had become the second most powerful legislature in the country,” Hurwitz

¹⁹⁶ 15 U.S.C. § 57a(a)(2).

¹⁹⁷ Chopra & Khan, *supra* note 22, at 378.

¹⁹⁸ H.R. REP. NO. 93-1107, at 22 (1974) (“On May 17, 1973, H.R. 7917 [the Magnuson-Moss Act], the bill herein reported, was introduced by Mr. Moss.”).

¹⁹⁹ Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule, at 11 (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf (citing Miles W. Kirkpatrick, *FTC Rulemaking in Historical Perspective*, 48 ANTITRUST L.J. 1561, 1561 (1979) (“One of the most important aspects of the Magnuson-Moss Act was its granting, or confirmation, depending upon your reading of the law at that time, of the FTC’s rulemaking powers.”)).

²⁰⁰ *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., dissenting):

In some situations, of course, the expression of a legislator relating to a previously enacted statute may bear upon the meaning of a provision in a bill under consideration—which provision, if passed, may in turn affect judicial interpretation of the previously enacted statute, since statutes *in pari materia* should be interpreted harmoniously. Such an expression would be useful, if at all, not because it was subsequent legislative history of the earlier statute, but because it was plain old legislative history of the later one.

²⁰¹ Hurwitz, *supra* note 24, at 235–36.

²⁰² See Hurwitz, *supra* note 24; Szóka & Barthold, *supra* note 159, at 25.

continues, trying to “ban all advertising directed at children as unfair,”²⁰³ which “famously led *The Washington Post* to declare that the FTC had assumed the role as ‘National Nanny.’”²⁰⁴ The 1980 Act placed new restrictions on the FTC’s authority to make UDAP rules, stripped the FTC of authority to make rules for (among other things) children’s advertising, and gave Congress a temporary veto on all FTC rules.²⁰⁵

Given this background, what are the chances that the 1980 Act tacitly endorsed Section 6(g) “unfair methods” rulemaking? Did Congress pass the 1980 Act simultaneously (i) to act on its white-hot rage at the FTC’s overreaching UDAP rules and (ii) to implicitly endorse the notion that the FTC may embark on grand new adventures in the realm of “unfair methods” rulemaking without any special safeguards whatsoever? To ask the question is to answer it. It is illogical to conclude that Congress reined in the FTC’s UDAP rulemaking authority with one hand but anointed the FTC a maker of “unfair methods” rules with the other. To further conclude, as one adopting this line of thought is obliged to do, that Congress made it *easier* to pass UMC rules than UDAP rules is downright perverse.

II. Article I Problems: Major Questions and Nondelegation

The FTC must respect statutory text not simply because that is the only way it can “get it right,” in determining how should operate. More importantly, the FTC must respect statutory text because, in our constitutional system, the text is the *only legitimate source* of its authority. The Supreme Court has recently reiterated this point in its clarification of the “major questions” rule, under which an agency may not use vague statutory language to make major policy decisions. Should it defy this “major questions” principle, the FTC risks spurring the Court to go further, by reviving the “nondelegation” rule, under which Congress may not pass agencies broad grants of authority to begin with (not even, that is, in statutory language that is not vague).

²⁰³ Hurwitz, *supra* note 24, at 235. See generally J. Howard Beales III, Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present (Mar. 2, 2004), <https://www.ftc.gov/news-events/news/speeches/advertising-kids-ftc-regulatory-retrospective-advises-present>.

²⁰⁴ Hurwitz, *supra* note 24, at 235 (citing *The FTC as National Nanny*, THE WASH. POST, at A22 (Mar. 1, 1978)); see also William E. Kovacic, “Competition Policy in Its Broadest Sense:” *Michael Pertschuk’s Chairmanship of the Federal Trade Commission 1977-1981*, 60 WM. & MARY L. REV. 1269, 1317 (2019), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3800&context=wmlr>.

²⁰⁵ Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, §§ 7-12, 15, 21, 94 Stat. 374, 376-80, 388-90, 393-96.

A. In Refining the Major Questions Rule, the Supreme Court Recently Explained Exactly Why the FTC May Not Adopt a Creative Reading of Section 6(g)

In *West Virginia v. EPA*, the Supreme Court recently reminded federal agencies that they need clear statutory authority from Congress to resolve major policy questions.²⁰⁶ The FTC's plan to ban noncompete clauses plainly violates this "major questions" principle; indeed, so does the FTC's more general reinterpretation of Section 6(g) as a grant of legislative authority.

Because we expect other commenters to discuss the conflict between the FTC's proposed non-compete rule and the major questions doctrine, we will not dwell on the problem at length. It is, however, a major (as it were) obstacle to this rulemaking. The major questions doctrine will play a central role in any legal challenge to the FTC's final rule. And merely "to define [the major questions doctrine] is to describe why the FTC will lose: Clear statutory authority is needed for agency rules that have 'vast economic and political significance,' or affect a 'significant portion' of the U.S. economy."²⁰⁷ And the Supreme Court is "particularly skeptical when agencies 'discover' new powers in 'long-extant' statutes, or 'intrud[e] into an area that is the particular domain of state law."²⁰⁸

The proposed rule hits all of these tripwires. The agency wants to use a competition law, and a vague one at that, to alter (by its own proud admission) some 30 million labor contracts.²⁰⁹ It wants to override some 47 state laws.²¹⁰ And the FTC has never previously claimed the authority to regulate non-competes.²¹¹ Maybe striking most non-compete clauses is a good move; maybe it's a bad move; but it's *certainly* a major move. The FTC is flouting the Supreme Court's command to stay out of such matters absent a clear congressional mandate.

It gets worse. For the major questions principle throws into doubt *not only* the agency's authority to use Section 6(g) to enact *this* rule. Rather, it throws into doubt the agency's authority to use Section 6(g) to enact *any* UMC rule.

²⁰⁶ See *West Virginia v. EPA*, 597 U.S. ___ (2022).

²⁰⁷ Eugene Scalia, *The FTC's Breathtaking Power Grab Over Noncompete Agreements*, WALL ST. J. (Jan. 12, 2023, 6:50 PM), <https://www.wsj.com/articles/the-ftcs-breathtaking-power-grab-noncompete-agreements-rule-capital-investment-wage-gap-job-growth-compliance-11673546029> (quoting *West Virginia v. EPA*, 597 U.S. ___, at *11 (2022)).

²⁰⁸ *Id.* (quoting *West Virginia v. EPA*, 597 U.S. ___, at *20 (2022); 597 U.S. ___, at *11 (Gorsuch, J., concurring)).

²⁰⁹ Press Release, *supra* note 41.

²¹⁰ Scalia, *supra* note 207.

²¹¹ See *generally* 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.

Justice Gorsuch’s concurring opinion in *West Virginia v. EPA* shows us why. Justice Gorsuch observed that “some version” of the major questions principle—appearing in the guise of a “clear-statement rule”—“can be traced to at least 1897,” when the Supreme Court issued a landmark decision on the powers of the Interstate Commerce Commission, the “federal government’s first modern regulatory agency.”²¹² No one disputed, in that case, that the ICC had the power to declare existing railroad carriage rates unreasonable through case-by-case adjudication.²¹³ The issue, rather, was whether “Congress had endowed it with the power to set carriage prices,” on a going-forward basis, “for railroads.”²¹⁴ The issue, in other words, was whether the ICC could *set rules*. “The Court deemed that claimed authority”—the authority, to repeat, to *set rules*—“a power of supreme delicacy and importance,” and declared that it “is not to be presumed or implied from any doubtful or uncertain language” that Congress conferred it.²¹⁵ The Court would only find such power, it said, in statutory language that was “clear and direct.”²¹⁶

“Just so here—whether the commission should have legislative power to adopt rules declaring ‘methods of competition’ unfair and unlawful is a question that only Congress can answer in the affirmative and only through unequivocal language.”²¹⁷ And as we’ve seen, such language does not appear in Section 6(g) (or elsewhere).

B. Under the Nondelegation Doctrine, the FTC Could Lose More Than This Case

Were the agency to convince a court that Section 6(g) opens the door to UMC rules, the outcome might be worse for the agency than had it never gone down this path at all. For if the FTC has the power to craft rules defining “unfair methods of competition,” its possession of such power raises a nondelegation problem. As then-Commissioner Phillips put it: “I can’t think of anything more likely to draw a lot of scrutiny as to what exactly the limits of our

²¹² 597 U.S. ___, at *6 (Gorsuch, J., concurring).

²¹³ See Scalia, *The Federal Trade Commission’s Competition Rulemaking Authority*, *supra* note 187, at 8.

²¹⁴ 597 U.S. ___, at *6 (Gorsuch, J., concurring).

²¹⁵ *Id.* (quoting *Interstate Com. Comm’n v. Cincinnati, N. O. & T. P. R. Co.*, 167 U.S. 479, 505 (1897)).

²¹⁶ *Id.* It did not find the statutory language before it “clear and direct,” and, therefore, it did not bless the ICC’s attempt to set rates.

²¹⁷ See Scalia, *The Federal Trade Commission’s Competition Rulemaking Authority*, *supra* note 187, at 8. See also *Nat’l Petroleum Refiners Ass’n v. Fed. Trade Comm’n*, 340 F. Supp. 1343, 1347 (D.D.C. 1972), *rev’d*, 482 F.2d 672 (D.C. Cir. 1973) (“It is important, also, to consider the fact that the FTC, for approximately 50 years from the passage of the FTCA, never asserted the authority it claims to have always possessed.”).

statute are than us engaging in rulemaking, the total potential scope of which we view as unlimited.”²¹⁸

The Constitution grants “all legislative Powers” to Congress.²¹⁹ Agency rulemaking authority over the meaning of the term “unfair methods of competition” violates that constitutional imperative. So, for that matter, does overly broad agency authority to define “unfair methods” case by case. To understand the problem, consider the eerie parallels between the FTC’s present NPRM and *Schechter Poultry v. United States* (1935), the Supreme Court’s clearest statement of the principle that Congress may not delegate its legislative power to others.²²⁰

Much like the FTC’s 2022 UMC Policy Statement, the National Industrial Recovery Act (NIRA) of 1933 had many goals.²²¹ Among them were to “reduce and relieve unemployment,” to “improve standards of labor,” to “avoid undue restriction of production,” and “otherwise to rehabilitate industry.”²²² And much like the NPRM’s version of Section 6 of the FTC Act, Section 3 of the NIRA empowered the executive branch to set rules of competition.²²³ Much as the FTC now wants to set rules on “unfair methods of competition,” the NIRA empowered the president to adopt “codes of fair competition.”²²⁴ The president could adopt a code if he decided it would “tend to effectuate” the NIRA’s (many and conflicting) policy goals.²²⁵

“If our constitutional system is to be maintained,” *Schechter Poultry* observes, there must be *some* limit to “the authority to delegate.”²²⁶ The NIRA, the justices unanimously concluded, crossed the line. It “supplie[d] no standards” directly, and it contained no rules “to be applied to particular states of fact” found by “appropriate administrative procedure.”²²⁷ Instead, the act gave the president “virtually unfettered” discretion to enact “laws for the government of

²¹⁸ #322: *FTC Commissioner Noah Phillips*, TECH POLICY PODCAST, at 18:20 (June 2, 2022), <http://podcast.techfreedom.org/e/322-ftc-commissioner-noah-phillips/>.

²¹⁹ U.S. CONST. art. I, § 1.

²²⁰ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

²²¹ National Industrial Recovery Act (NIRA) of 1933, Pub. L. No. 73-67, 48 Stat. 195.

²²² *Id.* at 195.

²²³ *Id.* at 196–97.

²²⁴ *Id.* at 196.

²²⁵ *Id.*

²²⁶ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935).

²²⁷ *Id.* at 541.

trade and industry throughout the country.”²²⁸ This attempt “to transfer [the legislative] function to others” could not stand.²²⁹

Schechter Poultry identifies two differences between the FTC Act’s “unfair methods of competition,” on the one hand, and the NIRA’s unconstitutional “codes of fair competition,” on the other.²³⁰ First, under the FTC Act, “unfair methods” are “to be determined in particular instances, upon evidence, in light of particular competitive conditions.”²³¹ This “special procedure,” which made “provision” for “formal complaint,” “notice and hearing,” “findings of fact,” and “judicial review,” ensured that the agency’s discretion in defining “unfair methods” would remain narrow.²³² The NIRA, by contrast, “dispense[d]” with “administrative procedure.”²³³ It granted a power “to authorize new and controlling prohibitions” in “codes of laws”—*i.e.*, binding rules.²³⁴

Second, although the term “unfair methods of competition,” when introduced in the FTC Act, was “an expression new in the law,” it remained tethered to the older term “unfair competition.”²³⁵ That common-law phrase referred specifically to “acts which lie outside the ordinary course of business and are tainted by fraud, or coercion, or conduct otherwise prohibited by law.”²³⁶ The “fair competition” referred to in the NIRA, meanwhile, had “a much broader range and a new significance,” because it came attached to that statute’s “broad range of objectives.”²³⁷

These are major barriers to an expansion of FTC power. Although the FTC wants to create rules under Section 6(g), this would “dispense with [] administrative procedure” in favor of the passage of “codes of law.”²³⁸ That, in turn, would create a nondelegation problem. And although the agency wants to turn “unfair methods of competition” into an open-ended term—one that can generate measures targeted at “market structure,” “macro effects,” “root

²²⁸ *Id.* at 542.

²²⁹ *Id.* at 530.

²³⁰ *Id.* at 530–35.

²³¹ *Id.* at 533.

²³² *Id.*

²³³ *Id.* at 533.

²³⁴ *Id.* at 535.

²³⁵ *Id.* at 532.

²³⁶ *Id.*

²³⁷ *Id.* at 534.

²³⁸ *Id.* at 533, 535.

causes,” and “the distribution of power and opportunity across the economy”²³⁹—that would turn the FTC into a “virtually unfettered” lawmaker, just as the President was under the NIRA.²⁴⁰ That, again, would create a nondelegation problem.

The 2022 UMC Policy Statement is not the subject of this NPRM. Suffice it to say that it creates nondelegation issues of its own. But as then-Commissioner Phillips said, the effort to create UMC rules greatly exacerbates the problem.²⁴¹ By (among other things) flouting the teaching of *Schechter Poultry*, it greatly raises the risk that a court will find a nondelegation violation, correct it, and leave the agency with less power than when it started.

III. Without Reply Comments, the FTC Will Not Have a Comprehensive Record on Which to Base Its Decision

“[R]ulemaking,” Khan and Chopra argued in 2020, “would enable the Commission to establish rules through a transparent and participatory process, ensuring that everyone who may be affected by a new rule has the opportunity to weigh in on it, granting the rule greater legitimacy.”²⁴² They envisioned a process that would be “far more participatory than adjudication. Unlike judges, who are confined to the trial record when developing precedent-setting rules and standards, the Commission can put forth rules after considering a comprehensive set of information and analysis.”²⁴³

Khan and Chopra wanted to reshape the FTC’s understanding of unfairness in competition matters through notice-and-comment rulemaking. Yet now that she is running just such a rulemaking, Chair Khan seems determined to do only the bare minimum of what is required by the Administrative Procedure Act. A month ago, joined by veterans of the FTC and leading academics dedicated to studying the FTC, we requested that the FTC allow the opportunity to file reply comments in this proceeding (attached hereto as Appendix B).²⁴⁴ Only by doing so, we argued, could the FTC meaningfully implement what President Barack Obama called

²³⁹ See FED. TRADE COMM’N, MEMORANDUM ON VISION AND PRIORITIES FOR THE FTC 2 (Sept. 22, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf.

²⁴⁰ *Schechter Poultry*, 295 U.S. at 542.

²⁴¹ See Statement of Commissioner Noah Phillips on Non-Compete Clauses in the Workplace: Examining Antitrust and Consumer Protection Issues, at 7 (Jan. 9, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561697/phillips_-_remarks_at_ftc_nca_workshop_1-9-20.pdf.

²⁴² Chopra & Khan, *supra* note 22, at 367.

²⁴³ *Id.* at 369.

²⁴⁴ Letter from TechFreedom to Chair Khan, Commissioner Slaughter, Commissioner Wilson, & Commissioner Bedoya (Mar. 23, 2023), <https://techfreedom.org/wp-content/uploads/2023/03/FTC-Noncompetes-Reply-Comments-Letter.pdf>.

for in a 2011 Executive Order: “public participation and an open exchange of ideas.”²⁴⁵ Without the opportunity to reply in writing, the public would not have the “the opportunity to react to (and benefit from) the comments, arguments, and information of others during the rulemaking process itself.”²⁴⁶ The Administrative Conference of the United States recommends reply comments for “unusually complex” rulemakings.²⁴⁷ So far, the Commission has not responded to our request.

Allowing for reply comments would at least partially compensate for the potential absence of any dissenting commissioner when the FTC votes on this rulemaking—a very real possibility now that the FTC is a monopartisan body for the first time in its 109-year history. Reply comments would also help the Commission do what the Administrative Procedure Act requires any agency to do: engaged in “reasoned decisionmaking.”²⁴⁸ Reply comments could analyze and rebut arguments made in comments. Only by allowing for reply comments could the FTC build the “comprehensive set of information and analysis” that Khan said she wanted.²⁴⁹

We reiterate our request here and urge the Commission to allow 30 days to file reply comments after all the comments in this proceeding have been made publicly available.²⁵⁰

²⁴⁵ Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011). *See also* Office of the Press Secretary, *Executive Order 13563—Improving Regulation and Regulatory Review*, THE WHITE HOUSE (Jan. 18, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review>.

²⁴⁶ White House Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies*, 2 (Feb. 2, 2011), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/memoranda/2011/m11-10.pdf.

²⁴⁷ ADMIN. CONF. OF THE U.S., RECOMMENDATION 2011-2, RULEMAKING COMMENTS at 4 (2011) (“2011 ASUC Recommendation”), <https://www.acus.gov/sites/default/files/documents/Recommendation-2011-2-Rulemaking-Comments.pdf>.

²⁴⁸ *Allentown Mack Sales & Service, Inc. v. Nat’l Labor Relations Bd.*, 522 U.S. 359, 374 (1998) (citing *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 52 (1983)).

²⁴⁹ Chopra & Khan, *supra* note 22, at 369.

²⁵⁰ “Where appropriate, agencies should make use of reply comment periods or other opportunities for receiving public input on submitted comments, *after all comments have been posted.*” 2011 ASUC Recommendation, *supra* note 247 at 4. The Federal Communications Commission generally allows 30 days for reply comments after the comment deadline but also generally posts comments to its website within a day or two. The FTC has taken, in some cases, over a week to post comments to regulations.gov after screening them. The FTC should set a reply comment deadline of 30 days plus whatever time it expects to need to make all comments publicly available.

The need for reply comments is especially acute here because the Commission sought no public comment at all when it voted in 2021²⁵¹ to revoke the UMC Policy Statement issued by the FTC in 2015, or when it issued a new policy statement in 2022.²⁵² The old Policy Statement said that the FTC’s understanding of its UMC powers would generally conform to the antitrust laws.²⁵³ The new statement takes a startlingly broad view of UMC, a view that underpins this rulemaking.²⁵⁴

It was a mistake for the Commission not to seek public comment on the 2015 Policy Statement, but at least that statement was issued with bipartisan support and aimed to summarize the current state of the law. The new statement, by contrast, was issued on a party-line vote and aims to fundamentally change the state of the law—or, in the Commission’s telling, return to a conception of unfairness from the middle of the last century. Such a major change in policy should have been subject to public comment.

That policy statement leaves unclear major questions—which have not been answered by subsequent litigation. When the Commission has brought standalone Section 5 cases since issuing the new policy statement, it has lost on other grounds.²⁵⁵ Two questions stand out as issues that should have been central to public comment on the policy statement. A full discussion of these complex questions cannot happen without reply comments.

First, what is a method of competition? Any rule the FTC issues in this proceeding—especially a categorical ban on noncompete agreements—is likely to be challenged on grounds that the FTC is regulating acts and practices, not methods of competition. The distinction is important. The Magnuson-Moss Act of 1975 explicitly gave the FTC authority to make legislative UDAP rules—but subject to certain procedural safeguards.²⁵⁶ If a court

²⁵¹ Statement of Chair Lina M. Khan, Joined by Commissioner Rohit Copra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act, FTC File No. P210100, 7 (July 1, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under-ftc-act>.

²⁵² See 2022 UMC POLICY STATEMENT, *supra* note 154.

²⁵³ FED. TRADE COMM’N, STATEMENT OF ENFORCEMENT PRINCIPLES REGARDING “UNFAIR METHODS OF COMPETITION” UNDER SECTION 5 OF THE FTC ACT (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

²⁵⁴ See 2022 UMC POLICY STATEMENT, *supra* note 154.

²⁵⁵ See, e.g., Fed. Trade Comm’n v. Qualcomm Inc., 969 F.3d 974, 987 n.11 (9th Cir. 2020) (“Because the district court concluded that Qualcomm violated the Sherman Act and thereby violated the FTC Act—which prohibits “[u]nfair methods of competition,” including Sherman Act violations—it did not address whether Qualcom’s conduct constituted a standalone violation of the FTC Act.”) (reversing the district court for going “beyond the scope of the Sherman Act”).

²⁵⁶ Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 2301–2312 (2012) and other scattered sections of Title 15).

finds that the FTC’s rule involves “acts and practices” rather than “methods of competition,” it will void the rule for failing to comply with the procedural requirements of Magnuson-Moss.

The NPRM says nothing about this critical question, and it merits just four sentences in the FTC’s 2022 UMC Policy Statement, which defines UMC broadly as “conduct undertaken by an actor in the marketplace—as opposed to merely a condition of the marketplace.”²⁵⁷ The statement asserts that the “FTC Act’s legislative history makes it clear that Congress intended the statute to protect a broad array of market participants including workers and rival businesses.”²⁵⁸

But Congress may have intended something much narrower: conduct that “suppress[es] competition *by destroying rivals*,” as Justice Louis Brandeis, an architect of the FTC Act, wrote in a 1920 decision.²⁵⁹ Indeed, the Wheeler-Lea Act of 1938 added the term unfair and deceptive acts and practices to the FTC Act precisely because courts had construed “unfair methods of competition” narrowly.²⁶⁰ In this view, the evidence needed to support a UMC rule must focus on exclusion or foreclosure, or perhaps agreements or invitations to adopt practices that facilitate coordination, or conduct that affects price—not general effects on economic growth, labor mobility, and firm entry.

Second, by what standard should the Commission assess whether a method of competition is unfair? While Congress has spoken directly to the meaning of unfairness in the context of acts and practices,²⁶¹ it has not done so for UMC. The applicable case law, cited in the policy statement, is decades old. Likewise, the NPRM spends three short paragraphs summarizing Supreme Court cases decided between 1934 and 1968 and three barely more recent appellate decisions.²⁶² Understanding how the FTC should define unfairness in competition

²⁵⁷ 2022 UMC POLICY STATEMENT, *supra* note 154, at 8.

²⁵⁸ *Id.* at 4 n. 18.

²⁵⁹ Fed. Trade Comm’n v. Gratz, 253 U.S. 421, 422 (1920) (Brandeis, J.) (emphasis added).

²⁶⁰ See Hon. R. E. Freer, Commissioner, The Wheeler-Lea Act, Remarks before the Annual Convention of the Proprietary Association (May 17, 1938), https://www.ftc.gov/system/files/documents/public_statements/676351/19380517_freer_whe_wheeler-lea_act.pdf (explaining the history and impetus of the Wheeler-Lea Act).

²⁶¹ 47 U.S.C. § 45(n).

²⁶² NPRM, *supra* note 9, ¶¶ 403-05 (citing Atlantic Refining Co. v. Fed. Trade Comm’n, 381 U.S. 357 (1965); Fed. Trade Comm’n v. Texaco Inc., 393 U.S. 223 (1968); Shell Oil Company v. Fed. Trade Comm’n, 360 F.2d 470 (5th Cir. 1966); Fed. Trade Comm’n v. Keppel Bro., 291 U.S. 304 (1934); E.I. Du Pont De Nemours & Co. v. Fed. Trade Comm’n, 729 F.2d 128 (2d Cir. 1984); Fed. Trade Comm’n v. Motion Picture Adv. Co., 344 U.S. 392 (1953); L.G. Balfour Company v. Fed. Trade Comm’n, 442 F.2d 1 (7th Cir. 1971); Hastings Mfg. Co. v. Fed. Trade Comm’n, 153 F.2d 253 (6th Cir. 1946); United States v. American Tobacco Company, 221 U.S. 106 (1911); Newburger, Loeb Co., Inc. v. Gross, 563 F.2d 1057 (2d Cir. 1977)).

claims will require careful analysis of case law—and the opportunity to respond to the analysis submitted in comments.

CONCLUSION

The Commission should cease this rulemaking for lack of statutory authority. At most, it should address non-competes using the authority Congress has given it to make rules: its authority under the Magnuson-Moss Act to make UDAP rules.²⁶³ If it proceeds in this effort to make a UMC rule, it should at least allow opportunity to file reply comments.

Respectfully submitted,

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²⁶³ Comments of TechFreedom (Bilal Sayyed) on Non-Compete Clause Rulemaking (Apr. 19, 2023), <https://techfreedom.org/wp-content/uploads/2023/04/FTC-Non-Competes-TechFreedom-III-Sayyed.pdf>.