No. 24-13102

In the United States Court of Appeals
for the Eleventh Circuit

PROPERTIES OF THE VILLAGES, INC.,

Plaintiff-Appellee,

v.

FEDERAL TRADE COMMISSION,

Defendant-Appellant.

BRIEF OF AMICUS CURIAE TECHFREEDOM IN SUPPORT OF APPELLEE AND AFFIRMANCE

On Appeal from the United States District Court
for the Middle District of Florida

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus Curiae TechFreedom certifies under Fed. R. App. P. 26.1 that it has no parent company, it issues no stock, and no publicly held corporation owns a ten-percent or greater interest in it.

TechFreedom states, in accord with Circuit Rule 26.1-1, that it believes the Certificate of Interested Persons in the Brief of Appellee is complete.

/s/ Corbin K. Barthold

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INTEREST OF AMICUS CURIAE*

TechFreedom 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.

TechFreedom's experts have been at the forefront of studying, understanding, and discussing the issue in this case. They have explained their position—that the Federal Trade Commission lacks the authority to issue substantive unfair-methods-of-competition rules—in comments before the agency, as well as in articles, in papers, on podcasts, and at events. See, e.g., Comments of TechFreedom, *In re Non-Compete Clause Rulemaking*, FTC Dkt. No. 2023-0007 (Apr. 19, 2023), bit.ly/4gVXvdh; Corbin K. Barthold, *Lina Khan's New Club*, City Journal (May 16, 2024), bit.ly/4gWadZG; Berin Szóka & Corbin Barthold, *The Constitutional Revolution That Wasn't: Why the FTC Isn't a Second National Legislature* (June 2022), tinyurl.com/3wnxzk4y; *FTC Commissioner Noah Phillips*, Tech Policy Podcast (June 2, 2022),

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* No party's counsel authored any part of this brief. No one, apart from TechFreedom and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the brief's being filed.

bit.ly/40x3lfr; TechFreedom, *Does the FTC Have Authority to Issue Competition Rules?*, YouTube (Oct. 21, 2021), bit.ly/4gWQgSu.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the FTC presents a burlesque of statutory interpretation. The agency latches onto half a sentence—a line allowing the agency to "make rules"—buried at Section 6(g) of its enabling statute, the FTC Act of 1914. Noting that nothing "cabins" that power *in the sentence the agency isolates* (AOB 22), the agency claims a fulsome power to "make rules" defining "unfair methods of competition"—a term that appears in Section 5, a distinct part of the statute.

There is no shortage of Supreme Court authority explaining where the FTC has gone wrong. "A word is not a crystal, transparent and unchanged." *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.). "A statute's meaning does not always turn," therefore, "on the broadest imaginable definition of its component words." *Epic Systems Corp. v. Lewis*, 584 U.S. 497, 520 (2018). Rather, to figure out their meaning, a court must "read [a statute's words] in their context and with a view to their place in the overall statutory scheme." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 320 (2014). A court "construe[s] statutes," after all, and "not isolated provisions." *Graham Cnty. Soil & Water Conservation*

Dist. v. U.S. ex rel. Wilson, 559 U.S. 280, 290 (2010). Indeed, "a fair reading of legislation demands a fair understanding of the legislative plan." *King v. Burwell*, 576 U.S. 473, 498 (2015).

Perhaps most importantly, and our focus here: A statute's words generally mean what they meant at "the time of the statute's adoption." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 655 (2020). Read with a view to the legislative plan, as informed by the circumstances that prevailed at *the time of enactment*, Section 6(g) plainly does not grant the FTC the power it claims.

Section 5 declares that "unfair methods of competition in commerce are hereby declared unlawful." It then sets forth, in excruciating detail, how the FTC shall go about prosecuting such "methods."

Section 6 provides the FTC with a series of ancillary powers for investigating, reporting, and publicizing the "unfair methods" barred by Section 5. Under Section 6, the FTC may, for instance, "gather and compile information"; demand that businesses "file" with the agency "reports or answers in writing to specific questions"; "make investigation" to ensure that adjudicatory decrees are being complied with; and "make public" "information obtained" through its investigations. As with the enforcement powers in Section 5, the investigatory powers in Section 6 are set forth in great detail.

Section 6(g) sits within Section 6's detailed explanation of the FTC's investigatory powers. Deep within this detailed section (so detailed that it clarifies how much time a business should have to file a report with the agency), sitting beside a line empowering the FTC to "classify corporations" (i.e., clarify whether the agency has jurisdiction over them), sits a few obscure words on "mak[ing] rules" for "carrying out the provisions of this Act."

As this brief description of the statute should already suggest, Section 6(g) is utterly separate from Section 5. And as we explain in this brief, what a look at the statute suggests, history thoroughly confirms:

I. To understand the FTC Act, including Section 6(g), we must understand the principles of constitutional and statutory interpretation of 1914—when the FTC Act, including Section 6(g), was enacted. As now read by the FTC, Section 6(g) flouts those principles. To get its way now, the FTC must claim that, in 1914, Congress waged an assault—secretly, no less—on the nondelegation rule of Article I; on the President's removal power under Article II; and on a longstanding convention of statutory drafting, under which Congress always tied substantive rulemaking authority to explicit penalty provisions. There is no evidence that Congress sought such a constitutional and legislative revolution.

II. For many years after the FTC Act's enactment, everyone understood Section 6(g)'s narrow scope. The Supreme Court made clear in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), that the FTC lacked substantive rulemaking power, and the FTC itself explicitly eschewed such power in (among other places) a 1922 report.

III. Only much later, in the 1960s, did the FTC "discover" a Section 6(g) substantive rulemaking power. While it is true that the D.C. Circuit upheld that "discovery" in *National Petroleum Refiners v. FTC*, 482 F.2d 672 (1973), the FTC cannot seek refuge in that decision today. *National Petroleum Refiners* is an exercise in raw judicial purposivism—in setting aside the statute's text, the better to enable the judge to declare what the statute "ought" to mean. The D.C. Circuit's decision is a relic of a discredited form of statutory interpretation. Indeed, it is the *district court*'s opinion—unjustly overturned by the D.C. Circuit—that displays the proper, textualist approach to reading Section 6(g).

IV. Congress amended the FTC Act in 1975 and 1980, and the FTC contends that these statutes "ratified" *National Petroleum Refiners*. Nothing could be further from the truth. These statutes deal not with the FTC's power over unfair methods of competition, but rather with its power over unfair or deceptive acts or practices. And the 1980 Act, in particular, was a congressional reaction to FTC *overreach*. It would be

absurd, therefore, to read that statute as a tacit *expansion* of the FTC's power to make substantive rules.

ARGUMENT

I. At the Time of Its Enactment, Section 6(g) Didn't Allow Substantive Rulemaking.

When interpreting a statute, "we orient ourselves to the time of the statute's adoption." *Bostock*, 590 U.S. at 655. A statute's terms "mean what they conveyed to reasonable people at the time they were written." Antonin Scalia & Bryan A. Garner, *The Interpretation of Legal Texts* 16 (2012). When the FTC Act, including Section 6(g), was enacted, in 1914, the Constitution's Article I nondelegation rule, as well as its Article II power of removal, were taken very seriously. Further, a rule of statutory construction at the time held that Congress did not confer substantive rulemaking authority without also specifying the penalties for noncompliance. Had it meant in 1914 what the FTC says it means today, Section 6(g) would have flouted these constitutional and statutory principles. It follows that Section 6(g) cannot bear the weight the FTC now places on it.

A. The Nondelegation Rule in 1914.

"For most of America's history, the notion that Congress could delegate the power to write laws to unelected officials in the executive branch was anathema." James R. Copland, *The Unelected* 20 (Encounter 2020). Article I of the Constitution vests all legislative power in Congress. U.S. Const. Art. I, § 1. Construing this "nondelegation" rule in *Wayman v. Southard*, 23 U.S. 1 (1825), Chief Justice Marshall declared that Congress must set policy for all "important subjects," leaving it to the executive only to "fill up the details," *id*. at 43. This principle stood strong, requiring little attention or explanation, for decades, as "nineteenth century legislators" dutifully avoided "delegat[ing] broad authority to the executive branch." Copland 24.

Although the ground began to shift with the rise of the populist movement at the end of the nineteenth century, clear boundaries remained. Established in 1887, the Interstate Commerce Commission had no independent enforcement power, and it "lacked any power to set railroad rates." *Id*. at 27. Upholding portions of the Tariff Act of 1890—which delegated to the executive certain "yes-or-no trade decisions," *id*., based on findings of fact about other nations' tariff rates—the Supreme Court remained full-throated in its defense of a robust nondelegation requirement. "That Congress cannot delegate legislative power to the

President," the Court confirmed, "is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field v. Clark*, 143 U.S. 649, 692 (1892).

In 1897, the Court remarked that a delegation of legislative power is "never to be implied" from ambiguous statutory text. *The Queen & Crescent Case*, 167 U.S. 479, 494. As it crafted the FTC Act, therefore, Congress operated in the shadow of a "nondelegation canon" that took the form of an "'express statement' rule," by which Congress had to "expressly confer the power to make legislative rules." Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 491 (2002). In short, the nondelegation rule remained far stricter than the "notoriously lax" intelligible principle test it was to become. Amy Coney Barrett, *Suspension and Delegation*, 99 Cornell L. Rev. 251, 318 (2014).

B. The Removal Power in 1914.

The Constitution vests "the executive Power" in a "President," who must "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 1, cl. 1; § 3, cl. 3. The task of executive officers is to "assist the supreme Magistrate in discharging the duties of his trust." 30 *The Writings of George Washington* 334 (John C. Fitzpatrick ed., 1939). As

Madison put it, "the lowest [executive] officers, the middle grade, and the highest" all "depend, as they ought, on the President." 1 Annals of Cong. 499 (1789).

The First Congress confirmed this understanding—that executive officers serve at the pleasure of the President—in what's known as the "Decision of 1789." Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021, 1066 (2006). It passed several bills that contained no removal clause, but that discussed who would manage the papers of a removed officer. *Id*. at 1023 & nn. 7-9. The traditional view holds that Congress thereby affirmed that the Constitution empowers the President to remove officers at will. *Id*. at 1065-66. As Madison explained in a letter to Jefferson, the legislators thus adopted the position "most consonant" to "the text of the Constitution" and "the requisite responsibility and harmony in the Executive Department." Letter from James Madison to Thomas Jefferson (June 30, 1789), https://bit.ly/36BYhZd.

That is where things still stood in 1914. *Myers v. United States*, 272 U.S. 52 (1926), the first decision in which the Court squarely considered "whether under the Constitution the President has the exclusive power of removing executive officers," *id*. at 106, was still twelve years off. The notion that Congress could create "independent" officers with for-cause

removal protections—let alone the notion that it could do so while *also* handing those officers *legislative* power—remained uncertain and untested.

C. Statutory Drafting in 1914.

"Throughout the Progressive and New Deal eras, Congress followed a drafting convention that signaled to agencies whether particular rulemaking grants conferred authority to make rules with the force of law as opposed to mere housekeeping rules." Merrill & Watts 472. That convention 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." *Id*.

This convention made sense. It shouldn't be up to an agency to decide what punishments it may mete out for violating rules not written by Congress. Hence the Supreme Court's declaration, in 1892, that a statute must speak "distinctly" to "make the neglect" of executive "regulations" a "criminal offence." *United States v. Eaton*, 144 U.S. 677, 688. This principle extended to non-criminal penalties as well, thus making it clear that "Congress can delegate authority to agencies to promulgate regulations that have a wide variety of legal consequences—

as long as Congress itself spells out by statute what those consequences are." Merrill & Watts 502 (emphasis added). See Szóka & Barthold, *The Revolution That Wasn't* 16-24.

In drafting the FTC Act, Congress followed this convention assiduously. Section 5 empowers the FTC to issue complaints, hold hearings, and then, after making findings of fact, issue a cease-and-desist order. See 38 Stat. at 719-21; 15 U.S.C. § 45(b). It further empowers the FTC to enforce these cease-and-desist orders by filing suit in federal court. See 38 Stat. at 719-20. By contrast, the Act contains no "sanction for the violation of rules adopted under section 6(g)." Merrill & Watts 504-05.

D. Implications: The Revolution That Wasn't.

Viewed in the context of when it was enacted, Section 6(g) cannot grant the FTC the power to issue substantive rules. To conclude otherwise, one would have to accept that Congress embarked on three distinct revolutions—without saying a word about its intent to do so.

1. Nondelegation Revolution?

The FTC contends that, in 1914, Congress granted it the power to issue substantive rules defining "unfair methods of competition." But the

power to define the open-ended word "unfair" is broad and legislative in nature. Cf. *E.I. Du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 137 (2d Cir. 1984) ("The term 'unfair' is an elusive concept, often dependent upon the eye of the beholder.").

As Congress considered the FTC Act, some legislators argued that the phrase "unfair methods of competition" tracked the phrase "unfair competition," which was a concept "well-fixed in law" and "easily understood by the average business man." William Kolasky, *"Unfair Methods of Competition": The Legislative Intent Underlying Section 5 of the FTC Act* 31-33, WLF Working Paper (Dec. 12, 2014) (quoting legislators' remarks), https://tinyurl.com/ha2va4td. "Unfair competition" entailed fraudulent or coercive acts that were "outside the ordinary course of business." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 531-32 (1935). But Congress did not simply assume that the FTC would limit itself to that narrow definition. Rather, Congress narrowed the FTC's discretion, requiring the agency to define "unfair methods of competition" through incremental, case-by-case adjudication subject to judicial review. See Kolasky 26 & n.85 (quoting legislators who said, e.g., "I want the courts to define ['unfair competition']. I do not want it to be left to … the commission itself.").

Congress was right to assume that the FTC could not police itself. Look no further than the rule at issue here, a sweeping ban on historically allowed, and still widely legal, noncompete agreements—a ban that attacks large swaths of conduct very much within "the ordinary course of business." *Schechter*, 295 U.S. at 532. The overambitious scope of this rule confirms Congress's wisdom in hemming the FTC in with a requirement that it proceed through case-by-case adjudication.

Indeed, soon after Congress enacted the FTC Act, the Supreme Court endorsed this approach to delegating authority to agencies. In *Schechter Poultry*, 295 U.S. 495 (1935), the Court famously declared the National Industrial Recovery Act (NIRA) unconstitutional. Much as the FTC wants to set rules on "unfair methods of competition," the NIRA let the President adopt "codes of fair competition." But Section 5 of the FTC Act requires the FTC when regulating "unfair methods of competition" to issue a "formal complaint," supply "notice and hearing," make "findings of fact supported by adequate evidence," and submit to "judicial review." 295 U.S. at 533. Because the FTC Act *contained* this procedure, it was treated as a valid statute. Because the NIRA "*dispense[d]* with this … procedure," it violated the nondelegation rule. *Id.* (emphasis added). See also *Wichita R.R. & Light Co. v. Pub. Util. Comm'n*, 260 U.S. 48, 59 (1922) (when handing "the regulatory police power" to an agency, Congress, to

avoid making "a pure delegation of legislative power, must enjoin upon [the agency] a certain course of procedure and certain rules of decision in the performance of its function").

In accord with the nondelegation rule as it existed in 1914, Congress empowered the FTC to define unfair methods of competition only in "particular instances, upon evidence, in light of particular competitive conditions and of … [a] specific and substantial public interest." 295 U.S. at 533. Had Congress instead allowed the FTC to define unfair methods of competition through substantive rules—had it let the FTC set down abstract, ex ante definitions of "unfairness" (e.g., "all noncompete agreements are unfair")—that would have been a sweeping and alarming expansion of agency discretion. Congress would have been defying the nondelegation rule as it then existed (and, quite likely, even as it exists today).

2. Removal Power Revolution?

The FTC is asserting that Congress not only tried to break the bounds of the nondelegation rule in 1914, but that the agency also, while it was at it, tried to limit the President's removal power.

The FTC Act shields FTC commissioners from being removed by the President other than for "inefficiency, neglect of duty, or malfeasance in

office." 15 U.S.C. § 41. This for-cause removal protection was a novel and risky attack on the removal power as it stood in 1914. The move happened to work out, but *only* because the Supreme Court, in *Humphrey's Executor*, 295 U.S. 602 (1935), assumed that the FTC was not *also* equipped with a novel power to issue substantive rules. Had the FTC Act bestowed for-cause removal protection, and thus independence, on executive agents who could *also* act as substantive rule-makers—as de facto *legislators*—the Court clearly would have balked at that prospect. *Humphrey's Executor* would have come out differently. See Sec. II, infra.

The FTC wants *both* its independence *and* unfettered power to issue substantive rules about unfair methods of competition. In the era when the FTC Act was enacted, the Supreme Court plainly would not have tolerated this double constitutional revolution. It's safe to assume that Congress never attempted such a revolution to begin with.

3. Statutory Drafting Revolution?

There's more. To use Section 6(g) to issue substantive rules, the FTC must claim not just that Congress attempted a double constitutional revolution, but also that Congress was content to do so without bothering to write the FTC Act in a way that would make that aspiration apparent.

Under the statutory drafting conventions of the time, "the failure to provide any sanction for the violation of rules adopted under section 6(g)" showed that "Congress intended the [Section 6] rulemaking grant to serve [only] as an adjunct to the FTC's [Section 6] investigative duties." Merrill & Watts 504-05. The FTC now assumes, in other words, that Congress expected the courts somehow to divine a silent shift in Congress's approach to statutory drafting. The FTC assumes that Congress suddenly wanted to let agencies use one-sentence grants of rulemaking authority *both* to define standards of conduct *and* to set the penalties for a violation of those standards. That is astoundingly improbable. Occam's Razor tells us to assume that Congress, in enacting Section 6(g), was doing something predictable and straightforward: empowering the FTC to create rules for carrying out its functions.

As we will see (Sec. III.A, infra), ordinary statutory interpretation, too, shows that Section 6(g) is not a grant of substantive rulemaking authority. But the absence of a penalty provision is further, clinching evidence in favor of the point. (To be clear, we ask not that the Court apply this statutory drafting convention to a statute passed *today*, but simply that it recognize the convention's existence *in 1914*, and read the FTC Act accordingly.)

* * *

Putting it all together, the FTC claims that, in 1914, Congress expected courts to read Section 6(g) as imbuing the FTC with substantive rulemaking power even though (1) that power would have been extraordinarily (and likely unconstitutionally) broad, (2) the FTC's commissioners are not accountable to the President, and (3) Congress set forth no penalties for noncompliance with any rules the FTC might issue. This is wishful thinking.

II. As Read by the Supreme Court—and the FTC—After Enactment, Section 6(g) Doesn't Allow Substantive Rulemaking.

Humphrey's Executor is rightly known as the decision that curtailed the President's removal power. But it is also important as a window on how the Supreme Court understood the FTC, as stood up by the FTC Act, two decades after that statute's enactment. That understanding is a far cry from how the FTC sees itself today. The Court referred to the FTC as an "administrative body"—a "legislative" or "judicial aid," which acts "with entire impartiality," enforcing "no policy except the policy of the law" and fulfilling "duties [that] are neither political nor executive." 295 U.S. at 624, 628. Suffice it to say that the Court would not have described an agency vested with the power to issue binding substantive rules as an impartial, apolitical aid.

Indeed, the *Humphrey's Executor* Court confirmed as much when it turned to Section 6, specifically. The Court summarized that section as granting the FTC "wide powers of investigation," along with the power to "report to Congress with recommendations." *Id.* at 621. The Court made no mention of a power to issue substantive rules—a power that would, had it existed, have been Section 6's headline feature. On the contrary, the Court wrote: "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." *Id.* at 628. The only thing about the agency that was "legislative"—indeed, what made it a so-called legislative aid—was the fact that it *reported* to the *legislature*.

What's more, the FTC long *agreed* that Section 6 did not grant it substantive rulemaking power. See Merrill & Watts 506-07. "One of the most common mistakes," wrote the agency in its 1922 annual report, "is to suppose that the commission can issue orders, rulings, or regulations unconnected with any proceeding before it." *Id.* Unpermitted to issue "broad general" rules, the FTC affirmed its commitment to "function" in accord with "its organic act, whereby complete investigation," "due process of law," and "full respect for the moral and legal rights of both parties to controversies are assured." *Id.*

It'd be beyond remarkable if both the Supreme Court and the FTC itself somehow missed a substantive rulemaking power lurking in Section 6(g). Only motivated reasoning could lead one to suggest that they did.

III. *National Petroleum Refiners v. FTC* (D.C. Cir. 1973) Misreads Section 6(g).

With text and history against it, the FTC can only reach for *National Petroleum Refiners v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), a decision that used an outmoded, highly "purposive" approach to statutory interpretation to find substantive rulemaking authority in Section 6(g). Written by Judge J. Skelly Wright, *National Petroleum Refiners* is a relic of a bygone age. If anything, it offers a lesson in how *not* to conduct statutory interpretation.

Nonetheless, there is a silver lining to the FTC's raising this museum piece of an opinion. The district court decision that the D.C. Circuit set aside, *National Petroleum Refiners v. FTC*, 340 F. Supp. 1343 (D.D.C. 1972), offers an impeccable lesson on the *right* way to understand Section 6(g). Written by Judge Aubrey E. Robinson, Jr., it repays close study.

We will closely examine the district court's work, then consider how the court of appeals went awry in overturning it.

A. The District Court's Correct, Textualist Decision.

Judge 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. 340 F. Supp. at 1345-46. Section 5 enables the agency to file complaints, hold hearings, make findings of fact, and issue cease-and-desist orders. *Id*. at 1345. Section 6 permits the agency to gather and publish information about corporate practices. *Id*. 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 Judge Robinson, is a strong signal that Section 6(g) does not leap its fence, progress to Section 5(a)(1), and enable the creation of rules that define unfair methods of competition. *Id*. at 1346.

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 the agency 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]." 15 U.S.C. § 46. What is the part about "classify[ing]" companies doing there? Read as a whole, Section 6(g) seems merely to equip the FTC to conduct investigations, including, as Judge Robinson put it, by ensuring that the agency has "the power to require reports from all corporations." 340 F. Supp. at 1345. (For more on the meaning of Section 6(g)'s "classification" clause, see Comments of TechFreedom 15-18, Dkt. No. FTC-2023-0007 (Apr. 19, 2023).)

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 on wool products. 340 F. Supp. at 1347-48. Congress knew how to grant legislative rulemaking power when it wanted to do so. The limited grants 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). (The district court did not mention

the absence of statutory penalties for violating an FTC-issued rule—a further sign of Section 6(g)'s narrow scope. See Sec. I.C, supra.)

In short, the FTC Act's text and structure show that Section 6(g) has no connection to Section 5(a)(1). And when he checked his work against the FTC Act's legislative history—"the *enactment* history, not the fog of words generated by legislators," *S. Austin Coal. Cmty. Council v. SBC Commc'ns Inc.*, 274 F.3d 1168, 1172 (7th Cir. 2001) (Easterbrook, J.)—Judge 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." 340 F. Supp. at 1345; see S. Doc. No. 63-573, at 15 (2d Sess. 1914). 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." *Id.* at 1345-46. The investigations-only House bill and the no-rulemaking-power Senate bill were eventually stitched together. See Merrill & Watts 505. No wonder Section 6(g) does not seem to support the creation of substantive rules about the meaning of Section 5(a)(1): the two provisions were born into different bills. (Recall again the convention whereby Congress used to pair substantive rulemaking authority with specific penalties. Sec. I.C., supra. The FTC Act's enactment history

confirms that pointing to penalties in *Section 5*, in a bid to satisfy the convention as to *Section 6*, would be ahistorical bootstrapping.)

If more support were needed, added the district court, the FTC's conduct would provide it. It had taken the FTC fifty years to "notice" a vast store of authority hiding in Section 6(g)—yet another revealing sign, Judge Robinson wrote, "that the FTC knew it was not originally granted this rulemaking authority." 340 F. Supp. at 1347; see also *id.* at 1349-50 (noting also that, as discussed above, the FTC repeatedly *disclaimed* Section 6(g) substantive rulemaking authority).

B. The Court of Appeals's Incorrect, Purposive Decision.

"Our duty," wrote Judge Wright, in his opinion overturning Judge Robinson's decision, "is not simply to make a policy judgment." 482 F.2d 672, 674. The FTC, after all, "is a creation of Congress, not a creation of judges' contemporary notions of what is wise policy." *Id.* Judge Wright might then have said: *We therefore adopt the careful opinion of Judge Robinson as our own—affirmed*. But he did not. In opening with a pious renunciation of judicial policymaking, in fact, he protested too much.

The D.C. Circuit's treatment of the FTC Act's text was brusque and general. Construing Section 6(g) to allow substantive rulemaking, the court submitted, would "not in any formal sense circumvent" the quasi-

judicial enforcement mechanism of Section 5. *Id.* at 675. Congress, the court went on, had not explicitly told the FTC it could only proceed case-by-case. *Id.* The court 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." *Id.* at 677-78. And the court recited Section 6(g) itself, as though its support for the court's position were self-evident. *Id.* at 677 n.8.

This casual nod to the text complete, the court shifted to policy considerations and unbounded purposivism.

Judge Wright declared that "the background and purpose of the Federal Trade Commission Act" permitted the court "liberally to construe" Section 6(g). *Id.* at 678. He then launched into repeated paeans to the "invaluable resource-saving flexibility," *id.* at 681, and other policy benefits, of rulemaking:

- "[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." *Id.*
- "[C]ontemporary considerations of practicality and fairness … certainly support the Commission's position here." *Id.* at 683.

- "Such benefits are especially obvious in cases involving the initiation of rules of the sort the FTC has promulgated here." *Id*.
- "[T]he policy innovation involved in this case underscores the need for increased reliance on rule-making rather than adjudication alone." *Id*. at 684.
- "[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]." *Id*. at 690.
- "[T]he Commission will be able to proceed more expeditiously, … and … more efficiently with a mixed system of rule-making and adjudication[.]" *Id*.
- "[C]ourts have stressed the advantages of efficiency and expedition which inhere in reliance on rule-making instead of adjudication alone." *Id*. at 692.

So much for eschewing "judges' contemporary notions of what is wise policy." Substantive rulemaking was simply *good*, the court believed, and should therefore be judicially inserted into the FTC Act. Whether the helpless text could bear such a reading was a secondary concern at best.

Judge Wright repeatedly made clear that, in creating new avenues for rulemaking, he was (in his view) implementing the FTC Act's "purpose":

- "[R]ejecting the claim of rule-making power would run counter to the broad policies … that clearly motivated Congress in 1914." *Id.* at 695.
- "[T]he broad, undisputed policies which clearly motivated the framers of the [FTC] Act of 1914 would indeed be furthered by our view[.]" *Id.* at 686.
- "[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." *Id.*
- The FTC needs rulemaking power "to do the job assigned by Congress." *Id.* at 697.

Following just a brief glance at the text of the statute, the court of appeals did little more than cherry-pick pieces of the legislative history, use them to divine congressional intent, and then wax lyrical about the advantages of rulemaking over case-by-case adjudication. This is no longer how statutory interpretation works, to say the least. Judge Wright's opinion 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." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014). Nor may a judge appeal to a statute's "purpose" on the false cry that he is divining what the legislators "really" meant. "No legislation pursues its purposes at all costs," and "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987).

The missing ingredient in the D.C. Circuit opinion is obedience to the statutory text and structure. Judges are "expounders of what the law is," not "policymakers choosing what the law *should be*." *Epic Sys. Corp.*, 584 U.S. at 511.

IV. The 1975 and 1980 Amendments to the FTC Act Have No Bearing on the Meaning of Section 6(g).

The FTC claims that Congress ratified Judge Wright's decision in *National Petroleum Refiners* via the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act ("1975 Act"), 88 Stat. 2183 (1975), and the Federal Trade Commission Improvements Act of 1980 ("1980 Act"), 94 Stat. 374. Not so.

With the 1975 Act, Congress empowered the FTC to enact rules governing not unfair methods of competition, but *unfair or deceptive acts or practices* (UDAP). In granting this power, Congress set up robust guardrails, requiring that the FTC follow extensive rulemaking procedures, and that it ensure its UDAP rules be "define[d] with specificity." 15 U.S.C. § 57a(a)(1)(B). It would be passing strange for Congress to impose these strictures for UDAP rules, while leaving the FTC's supposed power to issue unfair-methods-of-competition rules undefined and wide open. And while it's true that the 1975 Act does "not affect any authority of the Commission to prescribe rules … with respect to unfair methods of competition," *id.* § 57a(a)(2), that line does no more than uphold the status quo—*whatever* that status quo was. At most, the line is an acknowledgment, by Congress, that, "when [it] enacted the [1975 Act], the [meaning of Section 6(g)] was still to be authoritatively determined." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 349

(1963). "[A]ccordingly, no inference can properly be drawn from the failure of the Congress to act," *United States v. Price*, 361 U.S. 304, 312 (1960)—that is, its failure to opine, one way or the other, on the correctness of *National Petroleum Refiners*.

The 1980 Act, if anything, *confirms* the absence of unfair methods of competition rulemaking authority. The 1980 Act was passed in response to the FTC's "extensive and often controversial [UDAP] rulemaking" following passage of the 1975 Act. Justin Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 U. Pitt. L. Rev. 209, 235-36 (2014). The FTC had tried to "become the second most powerful legislature in the country," moving, for instance, to "ban all advertising directed at children"—an effort that "famously led *The Washington Post* to declare that the FTC had assumed the role as 'National Nanny.'" *Id.* The 1980 Act placed new restrictions on the FTC's UDAP rulemaking authority, 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. So: Did Congress pass the 1980 Act simultaneously (1) to act on its anger at the FTC's overreaching UDAP rules and (2) to implicitly endorse the notion that the FTC may embark on grand new adventures in the realm of unfair-methods-of-competition rulemaking? Obviously

not. It takes chutzpah, on the part of today's FTC, to suggest otherwise. (AOB 30.)

CONCLUSION

The order granting a motion for preliminary injunction should be affirmed.

January 22, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify:

This brief complies with the type-volume limits of Fed R. App. P. 29(a)(5) because it contains 6,064 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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/s/ Corbin K. Barthold

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2025, I electronically filed the foregoing brief with the Clerk of the United States Court of Appeals for the Eleventh Circuit through the Court's CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Corbin K. Barthold