Open Commission Meeting | April 23, 2024

Chair Lina Khan:

Good afternoon, everybody. I'm going to call this meeting to order. We are meeting an open session today to consider the commission's final rule to ban non-competes. I want to start just by extending a very warm welcome to our two new colleagues, Commissioner Melissa Holyoak and Commissioner Andrew Ferguson. They both joined the commission earlier this month and this marks their first open commission meeting. Each of them brings just a tremendous wealth of experience and talent to their roles at the FTC, and I've already really gotten to enjoy working with them and I'm really looking forward to the commission continuing to benefit from their views and expertise. The FTC was designed by Congress to be a five-member board, and it's just so terrific that we are now back at full strength. 16 months ago, the FTC proposed a rule to ban businesses from using non-compete clauses in the vast majority of employment contracts. In response to that proposal, we've received over 26,000 public comments, and our team has spent the last year carefully reviewing the public input and feedback.

The requirement that agencies must seek out and review public comments on proposed rules is a central part of the rulemaking process, and I'm just so extraordinarily grateful to every person who took the time to write up and submit your views. Our team reviewed each and every comment we received as we determine what next steps to take on the proposal to ban non-competes. Today the commission is meeting to decide whether to issue a proposed final rule that would prevent most employers from entering or enforcing non-competes against workers. It's been a priority for me to make more of the commission's proceedings public where we can, and so we are doing today's meeting in open session to provide the public with greater visibility into the thinking and decision-making of each commissioner on this proposal. The decisions that our agency makes materially shape and impact the lives of Americans in countless ways, and this rule in particular could affect workers' livelihoods and the viability of small businesses and startups. And so it was especially important to me that we'd be able to provide some additional visibility and public accountability.

Our first order of business is going to be a procedural vote on making public the proposed final rule on non-compete clauses. Voting to make the proposal public will allow the FTC team to present the substance of the rule. Then following the staff presentation, each commissioner will have an opportunity to offer remarks on the substance of the pending final rule. And when everybody is done sharing their public remarks and their views, I will then move on to call for a vote on whether to issue the final rule. So with that, I will now move that the commission publicly disclose the draft federal register notice regarding the final rule on non-compete clauses in matter member P201200 as circulated to the commission on April 23rd, 2024. Is there a second?

Commissioner Rebecca Slaughter:

I second.

Chair Lina Khan:

Thanks, Commissioner Slaughter. The motion having been seconded, I'll now call for a vote. Commissioner Slaughter?

Commissioner Rebecca Slaughter:

Yes.

Chair Lina Khan:

Commissioner Bedoya?

Commissioner Alvaro Bedoya:

Yes.

Chair Lina Khan:

Commissioner Holyoak? Commissioner Ferguson?

Commissioner Andrew Ferguson:

Yes.

Chair Lina Khan:

And I vote yes. So the motion having passed, I will now introduce Ben Cady, who is an attorney in the FTC's Office of Policy Planning who will give a brief overview of the proposed final rule. Ben, over to you.

Ben Cady:

Thank you, Chair Khan, and good afternoon, everyone. Next slide please. Non-competes as their name implies directly restrict competition. Because of this, courts have always held that they are proper subjects for scrutiny under the antitrust laws. Research that's been conducted over the past decade has shown that non-competes are being imposed on workers on a widespread basis. We estimate that about one in five American workers, or about 30 million workers, is subject to a non-compete. The evidence of harm from non-competes has also increased substantially. Changes in state non-compete laws have allowed researchers to study the effects of non-competes. There is now a large body of empirical research showing that non-competes are negatively affecting competitive conditions in labor markets and in product and service markets. This research shows that non-competes are suppressing wages for workers across the labor force, including even workers who are not subject to non-competes. This research also shows that non-competes are inhibiting new business formation and innovation, thereby harming consumers.

Based on this record, in January of 2023, the FTC released a proposed rule that would've prohibited non-competes for all workers in response where we received over 26,000 comments, including over 25,000 who supported the proposed comprehensive ban on non-competes. Next slide, please. These comments were compelling. Workers told us that they want to compete. They want to be able to take better jobs and make the most of their abilities. They want to strike out on their own and start new businesses, but non-competes prevent them from doing so. Workers other than senior executives also explained that they had no real choice about whether to enter into non-competes and no practical ability to negotiate. This is backed up by empirical evidence showing that for workers other than senior executives, non-competes are imposed through standard form contracts and that workers very rarely negotiate that or

receive assistance from counsel. Workers also recounted how non-competes forced them to stay in jobs with poor working conditions or forced them to leave their field, exit the workforce, uproot their families, or commute very long distances.

Many workers described how they faced threats and expensive and protracted litigation simply for competing. And importantly, many, many workers told us that they refrained from competing even when they believed their non-compete was unenforceable. Because having to defend a non-compete lawsuit for any length of time would devastate their finances. We also heard from many small business owners who explained how non-competes prevent them from hiring the talented workers they need to grow and thrive to the advantage of larger and more established firms in their industry who have locked up their workers through non-competes. The findings in the final rule that we recommend today are principally based on the economic research related to non-competes, which I'll describe further in a moment, but these comments provide strong qualitative evidence that supports these findings. On the screen here are just a few examples of comments we received. Many more are excerpted in the final rule. Next slide, please. Based on this rule-making record, including the economic research on non-competes in the public comments, we have developed a final rule that we recommend to you today.

This final rule would provide that it is an unfair method of competition and therefore a violation of Section 5 of the FTC Act for employers to enter into non-competes with respect to all workers. The final rule would therefore prohibit employers from entering into new non-competes with all workers after the effective date. With respect to existing non-competes, non-competes entered into before the effective date, the final rule would adopt a different approach for senior executives than for other workers. Under the final rule, existing non-competes with senior executives would remain in effect. These non-competes are far more likely to be negotiated and compensated and thus senior executives are less likely to be experiencing acute ongoing harm from non-competes, but existing non-competes with all other workers will be unenforceable as of the effective date.

To ensure workers know they can now compete the final rule would require employers to provide notice to workers that they will not be enforcing any non-competes after the effective date. The rule would make compliance as easy as possible by providing model language that employers could use for this notice, and by now requiring employers to formally rescind non-competes. All employers would need to do to comply with the rule is to stop enforcing existing non-competes with workers other than senior executives, provide notice to such workers, and stop entering into non-competes with all workers going forward. In addition, the final rule would take effect 120 days after it's published in the federal register. Next slide, please. Now I'm going to take a moment to discuss the findings the final rule makes based on the evidence and the effects the final rule would have on competition. I'll start by describing the findings for the over 99% of workers who are not senior executives. The first set of findings relates to competition and labor markets.

Non-competes inhibit efficient matching between workers and employers through the competitive process because they prevent people from taking jobs that would be a better fit and they prevent employers from hiring the best workers for the job. As a result the evidence shows that when non-competes are more enforceable, labor mobility and worker earnings decline, including for workers who are not subject to non-competes. The benefits of the final rule in this regard would be significant. Our Bureau of Economics estimates that the final rule would increase worker earnings by over $400 billion over 10 years, or an average of $524 per year for every worker in America, including workers who are not subject to non-competes. The final rule also finds that non-competes tend to negatively affect competitive conditions in product and service markets by inhibiting new business formation and innovation. Non-competes directly block people from starting new businesses. They also deter people from starting new businesses and firms from entering markets by locking up skilled workers and they suppress innovation by preventing companies from hiring the most productive workers.

As a result, the evidence shows that when non-competes become more enforceable, new business formation and innovation decline. These effects are significant as well. Our Bureau of Economics estimates the final rule would increase new business formation by 2.7%, representing over 8,500 additional new companies started every year, and the increased innovation from banning non-competes would lead to 17,000 to 29,000 new patents every year, an increase of 11% to 19% over a ten-year period. Importantly, we found no evidence that when non-competes are made less enforceable, increased wages paid to workers are passed on to consumers. In fact, there is evidence that non-competes increased consumer prices and physician and clinical care markets. As a result, our Bureau of Economics estimates that the final rule would reduce healthcare costs by up to $194 billion over 10 years. Finally, we find that for workers other than senior executives, non-competes are exploitative and coercive for two reasons. First, we find that employers almost always impose non-competes on workers other than senior executives unilaterally exploiting their superior bargaining power to significantly restrict a worker's ability to compete without meaningful negotiation or compensation.

Second, we find that non-competes with workers other than senior executives force workers to either stay in a job they want to leave or bear other significant harms and costs, such as leaving the workforce or their field for a period of time, relocating out of the area, taking their employer to escape the non-compete or violating the non-compete and facing the risk of litigation. These workers are coerced into staying in jobs they want to leave because they have no other options that don't harm them in some way. For these reasons, the final rule finds that non-competes with workers other than senior executives are an unfair method of competition under Section 5. Next slide, please. The final rule also makes separate findings for senior executives. The final rule does not find that non-competes with senior executives are exploitative or coercive. The evidence shows that senior executives are much more likely than other workers to negotiate and receive compensation for their non-competes. However, the final rule does find that non-competes with senior executives are unfair methods of competition. These non-competes

Ben Cady:

Suppress competition in product and service markets can harm consumers at least as much and likely to a greater extent than non-competes with other workers. This is because non-competes with senior executives have an outsized effect on inhibiting new business formation because senior executives are uniquely positioned to start new firms and because they frustrate the ability of startup founders to form executive teams. Non-competes with senior executives also have an outsized effect on inhibiting innovation, because senior executives play such an important role in setting the strategic direction of firms with respect to innovation. Overall, we find that non-competes with senior executives are not unfair methods of competition because they're unfair to the executive, but because they harm consumers through the new companies that are never formed and the innovations that never take place. For these reasons, the final rule bans new non-competes with senior executives. But because these non-competes are less likely to be exploitative and coercive and due to practical considerations with unwinding non-competes for senior executives, the final rule allows existing non-competes with senior executives to remain in effect. Next slide, please.

Finally, we consider the business justifications for non-competes. The primary argument for non-competes is that without them, firms will be unable to protect their trade secrets, retain their skilled workers, or protect other investments they have made. As a result, there would be less likely to make such investments. We considered this argument seriously, but we find little to no evidence to support it. Firms have less restrictive alternatives for protecting trade secrets and other investments. For example, to protect trade secrets, firms can use confidentiality agreements and trade secret law, a body of law designed specifically for this purpose. To protect trading investments, firms can enter into contracts

with workers or compete on the merits to retain workers by improving their pay and working conditions. The key question we examine is are non-competes necessary for protecting firm investments? We find that the answer is no.

Among other reasons, we have case studies of what happens when employers cannot enforce non-competes. These case studies are California, North Dakota, and Oklahoma, where non-competes have been unenforceable since the 1800s. Non-competes have not been available in these states, but that has not prevented industries that depend on protecting trade secrets and retaining skilled workers from thriving. The technology sector, for example, is particularly dependent at protecting proprietary information and retaining skilled workers, and it is flourished in California even though employers cannot enforce non-competes. Less restrictive alternatives like confidentiality agreements and trade secret law may not sweep as broadly as some employers might like, but in these three states, they have proven to be viable for protecting trade secrets and other investments while burdening competition to a much less significant degree.

In addition, the final rule finds that the business justifications for non-competes do not justify the harms from non-competes because the evidence indicates that increasing enforceability of non-competes has a net negative impact along a variety of measures. Overall, the final rule finds, based on an extensive empirical record, that non-competes with all workers tend to negatively affect competitive conditions in labor markets and product and service markets, and that, for workers other than senior executives, non-competes are exploitative and coercive. For these, recent staff recommend that the commission vote to issue this final rule. Thank you.

Chair Lina Khan:

Great. Thanks so much, Ben, both for the presentation and for all of your fantastic work on the rulemaking from start to end. As anyone who has worked on a rulemaking can attest, this just requires an enormous amount of work that goes into these rules, and the team here has done just an absolutely outstanding job. This is really challenging work requiring not just perseverance and diligence, but real legal skill, policy chops, and economic sophistication. On all of these fronts, the team has been extraordinary. My deep gratitude to you, Ben, and to everyone who's been part of the team spanning our Office of Policy Planning, Bureau of Competition, Bureau of Economics, and Office of General Counsel. This has been a true cross- agency effort, and I'm so grateful to everyone who's contributed. I'll now yield the floor to each of my colleagues going in order of seniority, starting with Commissioner Slaughter, then Commissioner Bedoya, then Commissioner Holyoak, and Commissioner Ferguson to share any thoughts on this proposal.

Commissioner Slaughter:

Thank you so much, madam chair. I am so pleased and proud to support the final rule against non-compete agreements and employment contracts. I have always believed that effective competition policy is an important way to improve the everyday lives of real Americans, but for too long, discourse about antitrust was relegated to an inaccessible ivory tower. It's hard to conceive of a topic that brings competition down to earth more than their efforts to tackle non-compete clauses. Anticompetitive conduct against workers is so pernicious, because work is such an important component of our lives and identities. Reading the stories in the record from so many commenters who have been harmed by non-competes, it's clear that the freedom to leave your job and take another job is fundamental to a free and fair economy. It's so profoundly unfree and unfair for people to be stuck in jobs they want to leave, not because they lack better alternatives, but because non-competes would preclude another firm from

fairly competing for their labor, requiring workers instead to leave their industries or their homes to make ends meet.

Non-compete agreements find about one in five American workers. That's astounding, and this is not limited to one sector of the economy or category of workers. Low and high wage workers, skilled and unskilled workers, this problem affects so many. In fact, it really affects all of us, even if no one in your family is subject to a non-compete for their own employment. The record in our rulemaking proceeding makes clear non-competes prevent new business formation, slow innovation, and deprive consumers of the better products and prices we expect from competitive markets. I want to echo the chair's compliments to Ben and the entire team and highlight the incredible work of our staff on this rule. An immense amount of labor went into reviewing the more than 26,000 comments and incorporating that feedback into the final rule.

I also really appreciate the participation in this process of so many workers, labor organizations, nonprofits, and businesses. Your perspective has helped us make the rule stronger and informed policymakers in and outside of the FTC. At the same time that we celebrate this huge step forward for American workers, I am mindful of the work left to do. The FTC Act and our rulemaking process have limitations. We don't have the authority or ability to effectuate all of our policy preferences through rulemaking. We must be mindful of the boundaries of our authority, and today's final action is consistent with those boundaries, but I want to mention two areas in particular that weren't further focused. First, this rulemaking proceeding has focused on non-compete agreements in the employment setting, but we received numerous comments about ways to expand the rule, but we ultimately did not expand the rules to cover franchisee-franchisor relationships.

I do want to note that this is an area of continued interest for me, and I believe it's appropriate for the FTC to continue enforcement against anticompetitive conduct by franchisors against franchisees including through noncompete. Similarly, no post agreements among franchisees are an appropriate subject of heavy scrutiny as we laid out in our amicus brief over a year ago against McDonald's. Of course, employees of franchisees are protected by the rule and will not be subject to non-compete agreements in their employment contracts. Second, due to limitations on the FTC's jurisdiction, there are still some workers who will not be able to take advantage of the critical benefits of this rule, specifically employees of certain not-for-profit corporations. Our rulemaking record includes powerful stories from healthcare workers who are employed by nonprofits about how non-competes hurt patients and providers. As a matter of policy, I do not think there's a good justification for them to be excluded from this rule.

As a matter of law, I am mindful of the fact that Congress has limited our jurisdiction entities organized for profit. I want to be transparent about the limitations of that jurisdiction and recognize that there are workers, especially healthcare workers who are bound by anticompetitive and unfair non-compute clauses, that our rule will struggle to reach. To be clear, as the rule stresses, both judicial decisions and commission precedent recognize that not all entities claiming tax-exempt status as nonprofits fall outside the commission's jurisdiction. If you claim nonprofit tax status but are really organized for the profit of your members, you are within our jurisdiction and covered by the rule but true nonprofits are not, but that is also why I'm glad that this rulemaking effort is only one angle of attack on non-compete clauses. I'm hopeful that other agencies with different jurisdictions, especially over the healthcare industry, can also take up this charge and identify ways that non-competes may violate their authorizing statutes.

I also support efforts in Congress to ban non-competes by legislation. Bipartisan legislation has already been introduced such as the Workforce Mobility Act from Senators Murphy, Young, Kaine, and Cramer, and Congress members Scott Peters, Gallagher, and Eshoo, as well as the Narrower Freedom to

Compete Act from Senators Rubio and Hassan. Finally, I want to echo the chair's welcome to our newest colleagues. Just like Chair Khan, I have already benefited from the ability to engage with and learn from Commissioners Holyoak and Ferguson. We've had several strong unanimous votes on issues since they got here, and I know our work has been improved by their input. I think that that will be true even if we don't come to unanimous agreement on things. I welcome their perspective. I'm glad to have them here and I am going to be very glad to vote yes on this rule today. Thank you, madam chair.

Chair Lina Khan:

Thanks so much, Commissioner Slaughter. Commissioner Bedoya, over to you.

Commissioner Bedoya:

Thank you, Chair Khan. Like you, Chair Khan, and like Commissioner Slaughter, I want to welcome Commissioner Ferguson, Commissioner Holyoak to the commission formally in our first open meeting since they joined. Like you, I'm really excited to have them here. I also want to associate myself with Commissioner Slaughter's remarks in particular around franchisors and franchisees and my continuing interest in making sure the law has followed in those areas. I'll be brief here. When staff first presented me with this proposal, I saw right away the need and the importance of doing this for low-income and middle-income workers. Banning people from working is coercive. It's exploitative. It is all of the things that the case law says we have the authority to stop. But honestly, at first, I had doubts about how appropriate this was for high-income earners. I had questions about our ability to enact this ban through a rule rather than through individual enforcement actions, and I had questions about our ability to override weaker standards in the states, so I started reading the case law.

I saw that there is binding case law in the second-highest court in the land saying that we have the authority to issue rules like this, saying that it was better to make these changes through an open door public rulemaking process open to everyone rather than through a one-off closed door adjudicative process, then I saw that there was a number of instances in which the commission had stepped in to enact protections through rules when state protections were not enough, then I started reading the record and the comments of physicians who had their lives up ended by non-competes. These are doctors who had to move their families or move out of the state just so they could practice medicine. A pandemic killed a million people in this country, and there are doctors who

Commissioner Bedoya:

You cannot work because of a non-compete. Then, I started reading the economic evidence in the record, and there's a lot of it. And that shows that for the highest income earners, for those senior executives, you know, the folks that you really can't say have been coerced, those are precisely the people who are most likely to open new businesses and create new jobs for other people, and to thus create more competition. And so, non-compete doesn't just stop them individually from competing. It eliminates competition in the economy as a whole. It stops competition for everyone. And so this is how I went from being a skeptic about some aspects of this proposal to a supporter, and a strong supporter at that. I'm proud to soon be able to vote for it. In closing, I want to join all of you in thanking all the staff that made this possible. This is a gargantuan amount of work. The attorneys, the economists, the paralegals, the administrative staff, have really done a terrific job here, and I want to thank them for it. Back to you, Chair Khan.

Lina Khan:

Great, thanks so much, Commissioner Bedoya. Commissioner Holyoak.

Melissa Holyoak:

Thank you so much, and thank you, Chair, and thank you, Commissioner Slaughter, Commissioner Bedoya, for your welcome remarks, and for being welcoming. I have really enjoyed working with all of you these past few weeks, and look forward to working with you more on so many issues coming up. And thank you to the staff for working so hard to try and get us caught up in such a short time period on this particular rulemaking.

Article I of The Constitution vests all legislative powers in Congress, and by vesting the lawmaking power in the people's elected representatives, The Constitution sought to ensure not only that the power would be derived from the people, but also that those entrusted with it should be kept independence on the people. While many lament the gridlock in Congress today, the lawmaking process was designed to be difficult, and to include many accountability checkpoints, so allowing Congress to divest its legislative power to the executive branch bypasses those checkpoints and compromises the integrity of The Constitution's separation of powers. Yet, courts tolerate legislative delegations to agencies, only to fill in statutory gaps and apply various doctrines to keep such limited delegations in check. The modern administrative state may be accustomed to the ease and breadth of legislative rulemaking, but an agency should not lose sight of those constitutional prescriptions, and should, therefore, approach legislative rulemaking with circumspection. Lawmaking is an extraordinary power, and agency lawmaking tests the delicate balance of separation of powers.

With these important constitutional issues in mind, a threshold question must be answered for the non-compete clause rule. Does the commission have authority to promulgate legislative rules under Section 6G of the FTC Act? I believe the answer is no, and therefore, I respectfully dissent. Further, even assuming, arguendo, that the commission had such rulemaking authority, I believe there's no clear Congressional authorization under Section 5 of the FTC Act for promulgation of the final rule, and therefore, I agree with Commissioner Ferguson's reasons for rejecting the rule. The commission asserts that Section 5 and Section 6G, taken together, empower the commission to promulgate rules for the purpose of preventing unfair methods of competition.

Turning first to Section 6G, the original act gave the commission the power, from time to time, to classify corporations and to make rules and regulations for the purposes of carrying out the provisions of the act. Based on the plain language in Section 6G, I'm persuaded that a review in court would interpret 6G, as supported by the text and structure of the FTC Act, to authorize only procedural or internal operating rules, not substantive legal rules. To support this argument that the FTC Act confers competition rulemaking authority to the commission, the majority relies heavily on the reasoning found in National Petroleum Refiners Association versus FTC, and that reliance is misplaced. The court there approached its interpretation of Section 6G quite differently than a court would approach the issue today, reasoning there that courts must interpret statutes liberally to construe broad grants of rulemaking authority. But National Petroleum's framing and approach to statutory interpretation and delegation questions fell out of favor decades ago.

Further, the commission's Congressional action in the decades after the passing of the FTC Act persuade me that the original understanding of Section 6G cannot be reconciled with the commission's present course of action. Contrary to the commission's various claims in the final rule, for decades after the enactment of the FTC Act in 1914, the FTC interpreted this statute as conferring only the power to conduct adjudications and investigations, and not as conferring any power to issue legislative rules. And after National Petroleum, Congress passed the Magnuson-Moss Warranty Act, which imposed strict requirements for legislative rulemaking regarding unfair deceptive acts or practices. The commission claims these provisions left undisturbed the FTC's authority to issue legislative rules governing unfair methods of competition, but provides no explanation why Congress would impose heightened

requirements for unfair excerpt practices while leaving undisturbed unfair methods of competition. Unless, of course, Congress did not believe that the FTC had competition rulemaking authority.

Now, let me be clear. My dissent today should not be interpreted to mean that I endorse all non-compete agreements. To the contrary, I would support the commission's prosecution of anticompetitive non-compete agreements, where the facts and law support such enforcement. However, no matter how important, conspicuous, and controversial the issue, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. That is why I'm particularly disappointed that the commission dedicated the commission's limited resources to a broad rulemaking that exceeds Congressional authorization and will likely not survive legal challenge. Those resources would be better used to identify and prosecute, including in collaboration with states attorneys general, anticompetitive non-compete agreements using broadly accepted theories of antitrust arm. For these reasons, I am persuaded that Section 6G and Section 5 do not authorize the commission to issue the final rule. Thank you.

Lina Khan:

Thanks so much, Commissioner Holyoak. Commissioner Ferguson, over to you.

Andrew N. Ferguson:

Thank you, Madam Chair, and my gratitude to Commissioner Slaughter and to Commissioner Bedoya for their warm welcome, and my particular gratitude to the staff who worked on this rule and who've managed to get me up-to-speed in very little time by applying a lot of labor and hours to explaining the rule to me and answering a lot of questions for me. I'm really grateful for their work.

I am sympathetic to the policy embodied in the final rule. Anglo-American law has regarded non-compete agreements with deep suspicion for centuries. They cut against the grain of our ancient common law tradition, protecting every man's right to ply his trade and may, in some circumstances, undermine competition and innovation. But beginning with policy puts the cart before the horse. Lawmaking by the administrative state sits uncomfortably in a democracy. Our constitution assigns Congress the legislative power because Congress answers to the people for its choices. We are not a legislature. We are an administrative agency wielding only the power lawfully conferred on us by Congress. Americans can't vote us out when we get it wrong, and Congress has tried to insulate us from the one person in the executive branch whom the people can vote out, separating us even further from those whose lives we claim to govern.

To be sure, the administrative state can act with greater dispatch than Congress, but the difficulty of legislating in Congress is a feature of The Constitution's design, not a fault. The administrative state cannot legislate because Congress declines to do so. Thus, whenever we undertake to make rules governing the private conduct of hundred of millions of people who do not vote for us, we should not begin with determining what the right answer to the policy question is. Rather, we should first assure ourselves of the power to answer the question at all. I do not believe we have the power to nullify tens of millions of existing contracts, to preempt the laws of 46 states, to declare categorically unlawful a species of contract that was lawful when the FTC Act was adopted, and to declare those contracts unlawful across the whole country, irrespective of their terms, conditions, historical contexts, and competitive effects. Accordingly, I respectfully dissent.

First, Commissioner Holyoak is correct that Section 6G of the FTC Act does not confer on us the power to make legislative rules. Section 6G was understood to confer the power to make procedural rules only, and the D.C. Circuit's contrary decision in National Petroleum Refiners deploys a mode of statutory interpretation, inferring regulatory power from silence, that has been roundly rejected in the

intervening decades. But even if the commission has statutory authority to issue legislative rules under Section 6G, it lacks authority to issue this rule. The Supreme Court has explained that when an agency claims power to regulate in an area of tremendous economic and political significance, the agency may not rely on a merely plausible textual basis for the agency action. It must instead point to clear Congressional authorization for the power it claims. This major questions doctrine implements the simple truism that Congress presumably reserves major policy questions to itself, in the absence of unambiguously clear delegations of power to the executive branch.

There is no doubt that the final rule the commission proposes to adopt today presents a major policy question. For one thing, the final rule regulates a significant portion of the American economy. Indeed, nearly the entire economy. The rule nullifies more than 30 million existing contracts and forecloses countless tens of millions of future contracts. The commission estimates that the rule would cost employers between $400 and $488 billion in additional wages and benefits over the next 10 years, and does not even hazard a guess at the value of the 30 million contracts it nullifies.

Moreover, the final rule regulates the subject of earnest and profound debate across the country and seeks to intrude into an area that is the particular domain of state law. The regulation of contracts, including employment contracts, is a core exercise of the state's police power, and the commission acknowledges that there's been a robust debate within the states on the best way to regulate non-competes. Our constitutional structure requires Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power, and Congress recently considered and rejected legislation that would have imposed the same policy the final rule imposes. The commission's termination of this debate and preemption of the laws of 46 states makes clear that the final rule presents a major question. The statutory text on which the commission relies comes nowhere close to the clear Congressional authorization to regulate that the major questions doctrine requires.

The commission claims to derive its power from the Act's general grant of authority to prevent persons from using unfair methods of competition, together with a subsection providing the commission power to, from time to time, classify corporations and to make rules and regulations for the purposes of carrying out the provisions of the Act. The commission has deployed this bank shot statutory theory, combining a general statement of our competition authority with a provision addressed primarily at the classification of corporations, only once in its history. Extraordinary grants of regulatory authority are rarely accomplished through modest words, vague

Andrew N. Ferguson:

... vague terms or subtle devices, as the Supreme Court recently explained. The statutory text on which the commission today relies is precisely the sort of oblique or elliptical language that cannot justify the redistribution of nearly half a trillion dollars of wealth within the general economy by regulatory fiat.

As I will explain in a forthcoming written dissent to be published later, I conclude that the rule is unlawful for additional reasons. First, if Congress has, in fact, conferred on the commission the power it today asserts, that conferral is an unconstitutional delegation of legislative power. Unfair methods of competition is not an intelligible principle sufficient to constrain our rule-making decision, a point driven home by the fact that we have taken diametrically opposed views on the meaning of that phrase in just the last two years. And at the very least, the non-delegation problem augurs in favor of reading the act to avoid this grave constitutional concern. I further conclude that the rule is arbitrary and capricious under the Administrative Procedure Act, because the evidence on which the agency relies cannot justify a nationwide ban of all non-competes irrespective of their terms, conditions and particular effects.

There are sound arguments in favor of legislation regulating non-competes, but no matter how important, conspicuous and controversial the issue, and no matter how wise the administrative solution,

an administrative agency's power to regulate must always be grounded in a valid grant of authority from Congress. Because we lack that authority, the final rule is unlawful. I respectfully dissent.

Thank you, Madam Chair.

Chair Lina Khan:

Great. Thanks so much, Commissioner Ferguson. Really appreciate hearing each of your views.

I'll just share a few things on my end. First of all, I just really want to underscore the thanks to the thousands of people who shared their stories with us. This rulemaking is premised on a robust and thorough empirical record. But I do want to mention, just in particular, a few of the comments, because I think they really illustrate just the many dimensions in which non-competes can constitute unfair methods of competition.

We heard from employees who, because of non-competes, were stuck in abusive workplaces. We heard from physicians who served underserved areas of the country who explained how non-competes restricted their ability to continue serving their patients.

Strikingly for me, several of the comments also explained how non-competes infringed on core constitutional rights. One person noted that after their employer merged with an organization whose religious principles conflicted with their own, a non-compete kept the worker locked in place and unable to freely switch to a job that didn't conflict with their religious practice. Another person shared how, after an employer denied their religious exemptions and ultimately laid them off, his non-compete put him out of work for months and forced him to take a job that paid a fraction of his previous salary.

I note these accounts because, to my mind, they really point to the basic reality of how robbing people of their economic liberty also robs them of all sorts of other freedoms, chilling people's speech, infringing on their religious practice and impeding people's right to organize. In our American system, we have long viewed open markets and free enterprise as a key bulwark against coercion and centralized control. It's been striking, as we go through the record and all of these stories, that they show, in a very clear and concrete way, how non-competes restrict this most basic freedom.

Many of the comments also noted how these non-competes are not just thwarting workers, but they're also thwarting fair competition by depriving people of the opportunity to start and grow thriving businesses of their own. We also heard from startups and entrepreneurs about how non-competes have been stifling innovation by preventing the free flow of ideas and talent. We heard from several founders and entrepreneurs who specifically spoke to the way that their ability to bring a new breakthrough idea to market was directly impeded by non-competes.

I know we've heard from both Ben and my colleagues about the ways that non-competes have directly harmed workers. I would just like to point to the fact that the record is also replete with stories of how non-competes are directly undermining competition in product and service markets.

My colleagues offered a few arguments against the rule, questioning the commission's authority to promulgate it. The final rule itself extensively engages with these arguments, but I'll just offer a few comments in that vein.

At first, in my mind, the plain text of the FTC Act clearly gives the agency the authority to promulgate rules addressing unfair methods of competition. Section 6(g) of the FTC Act plainly lays this out, and when read alongside other provisions of the FTC Act, this authority becomes even clearer. To my mind, arguing that the FTC lacks this authority requires ignoring the most straightforward reading of the text.

Courts have also endorsed this plain reading of section 6(g). In National Petroleum Refiners, the DC Circuit rejected the view that section 6(g) authorized the FTC to promulgate only procedural or

interpretive rules. The Seventh Circuit later agreed with the DC Circuit's decision and incorporated it by reference.

I understand Commissioner Holyoak and Commissioner Ferguson call into question whether a court today would take the same approach, but to my mind, we really need to be honoring what courts have said over what courts in the future might say in ways that will conflict with clear precedent already on the books.

Lastly, I'll just say the commission has used its section 6(g) authority for more than 60 years. Between 1968 and 1978 in particular, the commission promulgated more than 25 legislative rules covering a wide range of industries and issues, including some rules that garnered significant attention. Against this backdrop, Congress repeatedly chose to affirm the FTC's unfair methods of competition rulemaking. The text of the final rule carefully goes through the legislative history here, including a critical period in the '70s. I recommend that discussion to anybody who's interested in this issue.

Lastly, I just want to thank the many scholars, the many researchers whose work helped get us here. Non-competes have been around for some time, but it was really the fact that, over the last couple of decades, different states decided to go in different directions, and that ended up creating more of a natural experiment that then created opportunity for scholars and researchers to isolate the effects of non-compete. The enormous scholarship and research that they've been able to produce was absolutely critical to driving forward this process for us and for us to be able to get to this point today. So I'm just very grateful for the many people who've contributed to getting us here today.

With that, I will now move to calling for a vote. Thank you again to all my colleagues for sharing their thoughts. After consideration of all relevant matters of fact, law, policy and discretion, including all relevant matters presented by interested persons in the proceeding, I move that the commission authorize publication in the federal register of the notice promulgating the final non-compete clause rule that was circulated to the commission on April 15th, 2024 in matter number P201200 together with all supplemental information thereto.

April Tabor:

Excuse me, Madam Chair. Sorry.

Chair Lina Khan:

[inaudible 00:47:30]

April Tabor:

This is Secretary Tabor.

Chair Lina Khan:

Yes.

April Tabor:

I noticed that your motion referenced April 15th. However, it was updated effective today. I would ask that you modify the motion accordingly.

Chair Lina Khan:

Okay. Thank you, Madam Secretary. I will reread that.

After consideration of all relevant matters of fact, law, policy and discretion, including all relevant matters presented by interested persons in the proceeding, I move that the commission authorize publication in the federal register of the notice promulgating the final non-compete clause rule that was circulated to the commission on April 23rd, 2024 in matter number P201200 together with all supplemental information thereto.

Is there a second?

Commissioner Bedoya:

Yes.

Speaker 1:

I'll second. Sorry.

Commissioner Bedoya:

Go ahead.

Chair Lina Khan:

Thanks to you both.

Speaker 1:

You can second. Go ahead, Commissioner Bedoya.

Chair Lina Khan:

Thanks to you both for seconding. I'll now go through the votes.

Commissioner Slaughter?

Commissioner Slaughter:

Yes.

Chair Lina Khan:

Commissioner Bedoya?

Commissioner Bedoya:

Yes.

Chair Lina Khan:

Commissioner Holyoak.

Commissioner Holyoak:

[inaudible 00:48:35]

Chair Lina Khan:

Commissioner Ferguson.

Andrew N. Ferguson:

[inaudible 00:48:39]

Chair Lina Khan:

And I vote yes, so the motion passes three to two. Again, just really grateful to all of my colleagues for sharing their thinking and where they're landing here, as well as a big thanks to Ben and the full team for all of their work getting us to this point today. Thanks so much, everybody. Great to see you all.