IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

PROPERTIES OF THE VILLAGES, INC.,

Plaintiff,

v.

FEDERAL TRADE COMMISSION,

Defendant.

Case No.: 5:24-cv-00316-TJC-PRL

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR STAY OF EFFECTIVE DATE AND PRELIMINARY INJUNCTION

Non-compete clauses ("non-competes") restrict competition in labor, product, and service markets by preventing workers from taking new jobs or starting new businesses. Because they undermine competition, non-competes have been scrutinized by courts for hundreds of years and are prohibited or restricted to some degree in all States. Despite this patchwork of existing oversight, non-competes continue to impair competition, suppressing wages, entrepreneurship, and economic liberty.

Congress charged the Federal Trade Commission ("the Commission") through the Federal Trade Commission Act ("the Act" or "FTC Act") with preventing unfair methods of competition in or affecting commerce. Recognizing the need to address harms caused by non-competes, the Commission conducted an extensive inquiry into the issue—a review that spanned two presidential administrations and included a robust review of the literature, the Commission's empirical analysis, and input from interested market participants.

The Commission received overwhelming evidence about the detrimental effects of non-competes. The Commission heard from doctors about rural healthcare shortages caused by non-competes, from aspiring innovators blocked from bringing to market a better product at a better price,

from scientists for whom non-competes had impeded collaboration and delayed discovery of breakthrough cancer treatments, and from businesses prevented from expanding because dominant corporations had locked up key talent. The Commission's expert analysis of the record culminated in the promulgation of a rule declaring most existing non-competes unenforceable, subject to an exception for certain senior executives, and banning the future use of most non-competes. Non-Compete Clause Rule, 89 Fed. Reg. 38,342 (May 7, 2024) ("Rule" or "Final Rule"). By increasing competition, the Rule is expected to generate a 2.7% increase in new businesses each year, raise wages, lower prices, and boost innovation.

Plaintiff Properties of the Villages, Inc. ("POV"), a company that requires its workers to sign non-competes, challenges the Commission's effort to promote fair competition, seeking a stay of the Rule's effective date and a preliminary injunction preventing the Rule's enforcement against POV. But POV has not satisfied the demanding standard for extraordinary, emergency relief.

First, POV is unlikely to succeed on the merits of its claims. POV has not meaningfully contested the Commission's authority to regulate non-competes through adjudication of unfair methods of competition. Rather, Plaintiff's arguments center on whether the Commission can prohibit the use of non-competes through rulemaking. But as a district court recently correctly concluded, Congress authorized the Commission in clear language to prevent unfair methods of competition through both adjudication and rulemaking, and the Commission's choice of rulemaking to address prophylactically the aggregate anti-competitive effects of non-competes is both logical and unremarkable. *See ATS Tree Services, LLC v. FTC*, 2024 WL 3511630 (E.D. Pa. July 23, 2024).[1] The major questions doctrine is not implicated here, as the Rule falls squarely within the Commission's

[1] Another district court reached the opposite conclusion. *See Ryan, LLC v. FTC*, 2024 WL 3297524 (N.D. Tex. July 3, 2024). For the reasons explained here and explained by the *ATS* court, the Commission respectfully disagrees with the reasoning of that opinion.

expertise and delegated authority. And the Commission properly concluded that non-competes, as a class, are unfair methods of competition; POV's contrary arguments import Sherman Act standards that do not govern the Commission's authority under Section 5 of the FTC Act, which does not merely duplicate but instead supplements and bolsters the Sherman Act. Finally, POV's assorted constitutional claims lack merit. *Second*, POV also fails to demonstrate that it will suffer any irreparable harm should the Rule go into effect, underscored by POV's delay in seeking preliminary relief. And *finally*, the balance of equities tips decidedly in favor of the Commission, which projects sizeable benefits from the Rule including new business formation, increased innovation, higher wages, and lower prices.

BACKGROUND

I. THE FEDERAL TRADE COMMISSION ACT

Congress established the Commission in 1914 as a bipartisan expert agency. Federal Trade Commission Act of 1914, Pub. L. No. 63-203, 38 Stat. 717, codified as amended at 15 U.S.C. §§ 41-58. The Commission has two core mandates, set forth in Section 5 of the Act, codified at 15 U.S.C. § 45. The Commission is "empowered and directed" "to prevent": (1) "unfair methods of competition in or affecting commerce," *id.* § 45(a)(2), and (2) "unfair or deceptive acts or practices [("UDAPs")] in or affecting commerce," *id.*

A. The Commission's Directive to Prevent Unfair Methods of Competition

Section 5's directive to prevent "unfair methods of competition" confers on the Commission "broad powers to declare trade practices unfair." *FTC v. Brown Shoe Co.*, 384 U.S. 316, 320-21 (1966). The phrase that Congress intentionally chose—"unfair methods of competition"—was then new in the law. The initial proposal used the phrase "unfair competition," which had a recognized common law definition. *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304, 310-11 (1934). But Congress found that phrase "too narrow," and substituted for it the "broader and flexible phrase 'unfair *methods of* competition.'"

Id. at 311-12 (emphasis added). The Supreme Court has recognized that "unfair methods of competition" encompasses conduct beyond that which violates the Sherman or Clayton Acts, and that the FTC Act "supplement[s] and bolster[s]" those statutes rather than merely duplicating them. *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394-95 (1953).

To fall within Section 5's ambit, conduct must first be a "method of competition" "as opposed to merely a condition of the marketplace, … such as high concentration or barriers to entry." Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act at 8, Comm'n File No. P221202 (Nov. 10, 2022), https://perma.cc/2G3F-2UW9. ("Section 5 Policy Statement") (synthesizing caselaw); *see E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984) ("*Ethyl*"). The conduct must also be "unfair," meaning it "goes beyond competition on the merits"—*i.e.*, competing by offering a better product, service, or job. Section 5 Policy Statement at 8-9. As articulated in caselaw and the Act's legislative history, whether competition goes beyond the merits requires "two key criteria": (1) the conduct is "coercive, exploitative, collusive, abusive, deceptive, predatory" or "otherwise restrictive or exclusionary;" and (2) the conduct "tend[s] to negatively affect competitive conditions," *e.g.*, by tending to "foreclose or impair the opportunities of market participants" or "reduce competition between rivals." Section 5 Policy Statement at 9 & nn.51, 52; *see also* 89 Fed. Reg. at 38,358-59. This "second prong … does not turn on whether the conduct directly caused actual harm in the specific instance at issue," and may be satisfied when conduct tends to harm competitive conditions "in the aggregate along with the conduct of others engaging in the same or similar conduct." 89 Fed. Reg. at 38,358; *see also id.* at nn.288-90.

B. The Commission's Section 5 Adjudicatory Authority

The Commission carries out its mandates—preventing unfair methods of competition and UDAPs—through mechanisms including adjudication and rulemaking. Pursuant to Section 5, enforcement actions subject to adjudication before the Commission (including to stop a violation of

a rule) are governed by formal procedures and judicially reviewable. 15 U.S.C. § 45(b), (c); 16 C.F.R. pt. 3. These adjudications are precedential and apply to future Commission action.[2] The Commission may also seek injunctive relief in court to halt activity that is unlawful under the Act. 15 U.S.C. § 53(b).

C. The Commission's Section 6 Rulemaking Authority

Section 6 of the Act, codified at 15 U.S.C. § 46, contains "additional powers" of the Commission, including significant investigative authority and rulemaking authority pertaining to any provision of the Act. *Id.* Section 6(g) empowers the Commission "to make rules and regulations for the purpose of carrying out the provisions of this Act." 38 Stat. at 722; *see also* 15 U.S.C. § 46(g). It also provides the Commission authority to "classify corporations." *Id.*

Before statutory amendments that created separate procedural requirements for UDAP rulemakings, *see infra*, the Commission used its Section 6(g) authority to promulgate twenty-six rules combatting various violations of Section 5, including both unfair methods of competition and UDAPs. *See* 89 Fed. Reg. at 38,349-50. For example, the Commission's "Octane Rule" declared it to be both an unfair method of competition and a UDAP to fail to disclose the minimum octane number on gasoline pumps. Posting of Minimum Octane Numbers on Gasoline Dispensing Pumps, 36 Fed. Reg. 23,871 (Dec. 16, 1971), *repealed by* 43 Fed. Reg. 43,022 (Sept. 22, 1978).

Some rules attracted Congressional attention and were displaced by legislation. *See, e.g.*, Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. § 1333) (displacing Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324 (July 2, 1964)). Yet Congress chose not to limit the scope of the Commission's rulemaking authority with respect to unfair methods of competition.

[2] For example, the Commission announced its "competent and reliable scientific evidence" standard in an adjudication decades ago, *Bristol Meyers Co.*, 102 F.T.C. 21, 312, 315 (1983), and has regularly invoked that standard since, *e.g.*, *In re POM Wonderful LLC*, No. 9344, Final Order (FTC Jan. 10, 2013).

Courts of appeals confirmed the Commission's statutory authority to promulgate such rules. The D.C. Circuit held that the Commission "is authorized to promulgate rules defining the meaning of the statutory standards of the illegality that the Commission is empowered to prevent," including unfair methods of competition. *Nat'l Petroleum Refiners, Ass'n v. FTC*, 482 F.2d 672, 698 (D.C. Cir. 1973) ("*National Petroleum*"). The Seventh Circuit later agreed and "incorporate[d] by reference that case's lengthy discussion of the Commission's rulemaking authority under section 6(g)." *United States v. JS&A Grp., Inc.*, 716 F.2d 451, 454 (7th Cir. 1983).

After the D.C. Circuit upheld the Commission's rulemaking authority with respect to both UDAPs and unfair methods of competition in *National Petroleum*, Congress amended the Act to add procedural requirements for UDAP rulemakings while keeping intact the Commission's authority to issue rules governing unfair methods of competition. *See* Magnuson-Moss Warranty- Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (Jan. 4, 1975) ("1975 Amendments"). The Senate rejected the House's proposal to prohibit the Commission from "prescribing rules with respect to unfair competitive practices." S. Conf. Rep. 93-1408 § 202 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7755, 7762. And the Conference report adopting the final text of the 1975 Amendments made clear that "[t]he conference substitute does not affect any authority of the FTC under existing law to prescribe rules with respect to unfair methods of competition …." *Id.*

Debate immediately before the Senate vote on the conference report further demonstrated Congress's awareness of *National Petroleum*, with a statement quoting from the decision and noting that, because the 1975 Amendments concerned consumer protection provisions, the new procedural requirements "are limited to unfair or deceptive acts or practices rules." 120 Cong. Rec. 39,579, 40,713 (1974) (statement of Sen. Hart). Debate also made clear that the amendments "are not intended to affect the Commission's authority to prescribe and enforce rules respecting unfair methods of competition" and the Commission may continue to do so "in accordance with the informal rulemaking

procedures of [the Administrative Procedure Act]." *Id.*

The 1975 Amendments, which became Section 18 of the Act, codified at 15 U.S.C. § 57a, provide:

> "The Commission shall have no authority under [the Act], other than its authority under this section, to prescribe any rule with respect to [UDAPs]…. *The preceding sentence shall not affect any authority of the Commission to prescribe rules … with respect to unfair methods of competition*…."

15 U.S.C. § 57a(a)(2) (emphasis added). Congress also amended Section 6(g) to reference Section 18, stating that the Commission may issue rules and regulations "except as provided in [Section 18(a)(2)]." *Id.* § 46(g).

In the Federal Trade Commission Improvements Act of 1980 ("1980 Amendments"), Congress again amended the Act. Pub. L. No. 96-252, 94 Stat. 374. These amendments, codified at 15 U.S.C. § 57b-3, created additional procedural steps for the Commission's UDAP and unfair method of competition rulemakings. Confirming that both Section 6(g) and Section 18(a) provide substantive rulemaking authority, Congress defined "rule" by reference to those sections and exempted from the new procedural requirements "interpretive rules, rules involving Commission management or personnel, general statements of policy, or rules relating to Commission organization, procedure, or practice." 15 U.S.C. § 57b-3(a)(1). Congress also demonstrated its awareness of the scope of rules promulgated under Sections 6(g) and 18(a) by recognizing that amendments to those rules could have "an annual effect on the national economy of" at least $100 million. *Id.* § 57b-3(a)(1)(A).

II. THE NON-COMPETES RULEMAKING

A. The Proposed Rule

Non-competes undermine economic liberty, preventing individuals from moving freely to switch jobs or start their own businesses. For centuries, courts have scrutinized non-competes, recognizing their anticompetitive nature and pernicious effects. *See* Harlan M. Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 636 (1960) (in *Dyer's Case*, the Court of Common Pleas

in 1414 declared it "illegal at common law" to condition a promise on an agreement "not [to] practice his trade for a period of six months in the plaintiff's town"); *Mitchel v. Reynolds*, 1 P. Wms. 181, 190 (Q.B. 1711) (enforcing a non-compete but recognizing that non-competes may threaten "the loss of [the worker's] livelihood, and the subsistence of his family"). Non-competes are also subject to the Sherman Act. *See United States v. Am. Tobacco Co.*, 221 U.S. 106, 181-83 (1911). All States restrict non-competes to some degree, and four States have banned them.

In recent decades, a robust body of empirical literature studying non-competes emerged because changes in state law provided natural experiments enabling economists to isolate and quantify the harms caused by (not just correlated with) non-competes. 89 Fed. Reg. at 38,382-84. It simultaneously became clear that non-competes are widespread, proliferating far beyond the boardroom. *Id.* at 38,346 (over half of workers covered by non-competes are hourly workers). Yet employers continue to use non-competes even in States where they are unlawful. *Id.* at 38,429.

Beginning in 2018, the Commission studied the extent of non-competes and their effects through public hearings and workshops, invitations for public comment, and a review of academic studies. *See* 89 Fed. Reg. at 38,343-44. In 2021, the Commission initiated several investigations into the use of non-competes, which resulted in consent decrees settling charges that those agreements were unfair methods of competition under Section 5 and requiring firms to eliminate non-competes for thousands of workers. *Id.* at 38,344. In 2023, the Commission proposed a rule that would require employers to rescind all existing non-competes and prohibit employers from entering into new ones. Non-Compete Clause Rule, 88 Fed. Reg. 3482 (Jan. 19, 2023).

B. The Commission's Findings and Public Comments

Before adopting the Final Rule, the Commission conducted an exhaustive analysis of the economic literature regarding non-competes and considered the public comments that were filed in response. In its expert judgment, the Commission found that non-competes: (1) are a method of

competition as opposed to a condition of the marketplace, 89 Fed. Reg. at 38,374; (2) are facially unfair because they are restrictive and exclusionary, *id.*; and (3) tend to negatively affect competition in labor, product, and service markets, *id.* at 38,379-402, 38,406-11. The Commission also found that non-competes with non-senior executives are exploitative and coercive because they are often imposed unilaterally, *id.* at 38,374-79, though that is not true for senior executives, who often have an opportunity to bargain for, and receive compensation for, non-competes, *id.* at 38,405-06.

For labor markets, the evidence showed that non-competes tend to reduce competition by inhibiting efficient matching between workers and employers. *Id.* at 38,379. That is, non-competes reduce labor mobility by limiting the movement of workers between firms. *Id.* at 38,380-81. This suppresses wages, even for workers *not* subject to non-competes, as well as productivity, because workers are not matched to optimal jobs given their skillsets. *Id.* at 38,382-84. For product and service markets, the evidence showed that non-competes inhibit new business formation by preventing workers from leaving their jobs to start competing firms, and by preventing existing businesses from hiring the talented workers they need to compete. *Id.* at 38,388-91. For similar reasons, non-competes inhibit innovation. *Id.* at 38,394-95. The Commission also found that "the principal harms from non-competes arise from their tendency to negatively affect competitive conditions in the aggregate." *Id.* at 38,463. Thus, the widespread use of non-competes, in the aggregate, has negative externalities that may be difficult to redress in an individual adjudication concerning a noncompete agreement but that can be addressed in a rulemaking concerning noncompete agreements as a class. *Id.* at 38,463-64.

The overwhelming public support for the proposed rule reinforced these empirical findings. *See id.* at 38,344 (over 25,000 of the 26,000 comments supported the proposed rule). Thousands of workers explained how restrictive non-competes prevent them from taking a better job or starting a competing business, which depresses wages, subjects them to poor working conditions, and reduces the quality and increases the prices of goods or services their employers offer. *Id.* at 38,340-46.

Numerous small businesses and small business associations also supported the Rule. 89 Fed. Reg. at 38,491-92. The Commission estimated that prohibiting non-competes would increase new business formation by 2.7% annually and spur innovation, leading to over 100,000 new patents over ten years. 89 Fed. Reg. at 38,433, 38,470. Worker earnings would increase by $400 to $488 billion over ten years, *id.*, and consumer prices would fall, *id.* at 38,478.

C. The Final Rule

For those reasons, the Commission adopted the Final Rule, which provides that it is an unfair method of competition under Section 5 for employers to enter into non-competes after the Rule's effective date, September 4, 2024. 89 Fed. Reg. at 38,342. The Rule also prohibits employers from enforcing existing non-competes and requires employers to provide notices that those clauses are unenforceable, except with respect to senior executives. *Id.* Existing non-competes with senior executives—which the Rule defines as any worker who makes above $151,164 annually and is in a policy-making position—may remain in effect. *Id.*; *id.* at 38,414.

PROCEDURAL HISTORY

POV filed this lawsuit on June 21, 2024, challenging the Rule on several statutory and constitutional bases under the Administrative Procedure Act (APA). Compl., ECF No. 1. On July 2, POV moved to stay the Rule's effective date and for a preliminary injunction preventing its enforcement against POV. Mot. for Stay of Eff. Date & Prelim. Inj., ECF No. 25 ("Mot.").

LEGAL STANDARD

"A preliminary injunction is an 'extraordinary remedy never awarded as of right.'" *FTC v. On Point Cap. Partners LLC*, 17 F.4th 1066, 1077 (11th Cir. 2021) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). A plaintiff must establish four elements for a preliminary injunction:

> (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.

Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc).

ARGUMENT

I. PLAINTIFF IS UNLIKELY TO PREVAIL ON THE MERITS.

Based on extensive economic analysis and using its expertise, the Commission properly determined that non-competes are, as a class, "unfair methods of competition" under Section 5 of the FTC Act because they are facially restrictive and exclusionary and because they tend to negatively affect competitive conditions in labor, product, and service markets. The Commission found that non-competes prevent efficient matching between employees and employers, reduce wages, inhibit new business formation and innovation, and may result in higher prices and lower quality products for consumers. The Commission also concluded that non-competes with workers other than senior executives are exploitative and coercive because employers often impose them unilaterally without meaningful negotiation or compensation and because they trap workers in their existing jobs.

POV does not meaningfully challenge the Commission's ability to regulate non-competes or the validity of those findings. Rather, POV primarily contends that the Commission cannot regulate non-competes through its rulemaking authority in Section 6. But the FTC Act's text and legislative history clearly demonstrate that Congress conferred rulemaking authority on the Commission. Because agencies empowered with both rulemaking and adjudicative authority have discretion to choose between the two, the Commission lawfully exercised its rulemaking authority to regulate non-competes as a class. *See NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974). POV's additional challenges to the Rule are similarly unpersuasive.

A. The Commission Has Statutory Authority to Promulgate the Final Rule.

The FTC Act declares unlawful "[u]nfair methods of competition in or affecting commerce." 15 U.S.C. § 45(a)(1). Congress "empowered and directed" the Commission "to prevent" the use of unfair methods of competition, *id.* § 45(a)(2), through both adjudication, *id.* § 45(b), and rulemaking,

id. § 46(g). Plaintiff's effort to cabin that authority to "procedural" rules fails because the Act provides the Commission with a clear grant of regulatory authority and contains no such textual limit on the types of rules the Commission may promulgate. *See* Mot. at 12. POV's invocation of the major questions doctrine is inapposite because unfair methods of competition are at the core of the Commission's expertise. *Cf. West Virginia v. EPA*, 597 U.S. 697, 721 (2022).

1. Ordinary tools of statutory interpretation make clear that Congress conferred legislative rulemaking authority on the Commission in Section 6.

The statutory text and legislative history make clear that Congress conferred on the Commission the authority to promulgate legislative rules prohibiting unfair methods of competition. Analysis "begin[s], as always, with the language of the statute." *Duncan v. Walker*, 533 U.S. 167, 172 (2001). Section 6(g) states: "The [C]ommission shall also have power ... to make rules and regulations for the purpose of carrying out the provisions of this Act." 38 Stat. at 722; *see also* 15 U.S.C. § 46(g) (substituting "subchapter" for "Act"). That provision thus permits the Commission to promulgate all "rules and regulations"—without any textual limitation—to implement Section 5(a)'s prohibition on unfair methods of competition. The Rule plainly falls within that ambit because it prohibits the use of non-competes as unfair methods of competition.

The Commission's power to prohibit practices in furtherance of Section 5(a) is further confirmed by the Act's directive to the Commission to "prevent" entities subject to its jurisdiction "from using unfair methods of competition," *id.* § 45(a)(2). That directive inherently contemplates that the Commission will use forward-looking rulemaking—rather than only backward-focused adjudications—to "prevent" unfair methods of competition. *See ATS*, 2024 WL 3511630, at *14-15. POV's reading of Section 6(g) would require the Court to "cabin the [Commission's] power as solely adjudicatory, and therefore reactionary and backward-looking, only arising once unfair methods of competition have already occurred." *Id.* at *14. Considering Congress's intent that the Commission be able "to act prophylactically to stop 'incipient' threats of unfair methods of competition," reading

"prevent" not to include rulemaking "would result in a myopic and illogical interpretation of the ordinary meaning of the statutory text." *Id.* at *15 (quoting *Ethyl*, 729 F.2d at 136).

Confirming that Section 6(g) confers legislative rulemaking authority, including the authority to define unfair methods of competition, Congress ratified this interpretation in the 1975 Amendments. *See CFTC v. Schor*, 478 U.S. 833, 846 (1986) ("[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress."). Congress enacted the 1975 Amendments against the backdrop of the then-recent decision in *National Petroleum*, which held that Section 6(g) empowers the Commission to issue rules defining unfair methods of competition.[3] 482 F.2d 672. Congress rejected a proposal to limit the Commission's rulemaking authority for unfair methods of competition, adopting instead statutory text explicitly preserving that authority consistent with the holding of *National Petroleum*. *See supra*, Background Part I.C; *see also* 15 U.S.C. § 57a(a)(2) (limits on the Commission's UDAP rulemaking authority "shall not affect any authority of the Commission to prescribe rules ... with respect to unfair methods of competition"); *Helsinn Healthcare, S.A. v. Teva Pharm. USA, Inc.*, 586 U.S. 123, 131 (2019) (applying ratification canon to statutory text left intact after judicial interpretations of that text).

Congress revisited the Commission's rulemaking authority again in the 1980 Amendments, but left unchanged Section 6(g), as well as the language in Section 18 preserving the Commission's authority to regulate unfair methods of competition, again ratifying the Commission's authority. The 1980 Amendments added procedural requirements for all Commission rulemakings, not just UDAP rulemakings, defining "rule" as one promulgated under Section 6 or 18 of the Act. 15 U.S.C. § 57b-

[3] POV argues that *National Petroleum* "rests on dubious textual analysis." Mot. at 16. Not so. But that is irrelevant to the key point here: The holding of that case provided the basis for the congressional ratification confirming that Section 6(g) extends to rules related to unfair methods of competition.

3(a)(1). While these amendments specifically included Section 6 rules, they specifically excluded non-legislative rules, which makes sense only if Congress understood rules issued under Section 6 to include legislative rules even after the 1975 Amendments moving the Commission's UDAP rulemaking authority from Section 6 to Section 18. The 1980 Amendments thus demonstrate Congress's understanding that Section 6 provides authority to promulgate legislative rules regarding unfair methods of competition. The 1980 Amendments also recognized that amendments to Commission rules could have "annual effect[s] on the national economy of $100,000,000 or more," showing that Congress contemplated that legislative rules under Section 6 regarding unfair methods of competition might have a substantial economic impact. *Id.* § 57b-3(a)(1)(A).

POV's reading of the statute is also "at odds with one of the most basic interpretive canons," because it would render language in Section 6(g) and 18(a)(2) "inoperative or superfluous." *Corley v. United States*, 556 U.S. 303, 314 (2009). Section 6(g) empowers the Commission to make rules "for the purpose of carrying out" the Act "*except* as provided in section [18(a)(2)]," which circumscribes the Commission's rulemaking authority specifically with respect to UDAPs. 15 U.S.C. § 46(g) (emphasis added). This carve-out for rules promulgated under Section 18(a)(2) would have no independent significance if Section 6(g) did not allow the Commission to make legislative rules before the 1975 Amendments. *See United States v. Hall*, 64 F.4th 1200, 1204 (11th Cir. 2023) (reading statute to avoid superfluity). The explicit reservation of rulemaking authority for unfair methods of competition in Section 18(a)(2) would also be superfluous if the Commission did not already possess that authority. POV's reading of Section 6(g) impermissibly asks the Court not to "give effect" to that reservation. *Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 699 (2022); *see also ATS*, 2024 WL 3511630, at *15.

POV's view of these amendments is incompatible with the text of the statute and the legislative history. POV characterizes the 1975 Amendments as *granting* rulemaking authority for UDAPs, but this authority already existed under Section 6(g) and, indeed, the Commission had exercised it for the

several preceding decades by promulgating over two dozen legislative rules. *See supra*, Background Part I.C. Rather, the 1975 amendments *narrowed* the Commission's pre-existing authority to issue rules regarding UDAPs by permitting only rules that "define with specificity" such acts and requiring the Commission to satisfy certain procedural requirements beyond those required by the APA. 15 U.S.C. § 57a(a)(1)(B); *see also id.* § 57a(a)(2); *id.* § 57a(b). It is thus no surprise that the 1975 Amendments did not "grant" the Commission rulemaking authority for unfair methods of competition; Congress previously granted the Commission that authority in Section 6(g) and ratified the Commission's use of that authority to promulgate legislative rules regarding unfair methods of competition in the 1975 Amendments. *Contra* Mot. at 14-15. And while POV contends that Congress did not recognize preexisting competition rulemaking authority under Section 6, *id.* at 15-16, legislative history reveals that Congress was acutely aware of the Commission's authority. *See* 120 Cong. Rec. 39,579, 40,713 (1974) (in Senate debate before vote on 1975 Amendments, discussing "dual approach" to Commission rulemaking). In short, the history of amendments to the FTC Act confirms what the statute's plain text and structure already make clear: Section 6(g) authorizes the Commission to enforce the prohibition against "unfair methods of competition" through rulemaking. *See ATS*, 2024 WL 3511630, at *15 ("The historical background demonstrates that the intent of Congress was to retain the existing authority empowering the FTC to prevent unfair methods of competition, and the discretion to determine the appropriate mechanisms to accomplish that directive, including Section 5's adjudicative authority, and Section 6's rulemaking authority.").

It is also of no import that Congress routinely directs the Commission to issue rules targeting specific practices that Congress determines violate Section 5. *E.g.*, 15 U.S.C. § 1194(c) ("direct[ing]" the Commission to issue rules regarding flammable fabrics). These provisions do not, as POV suggests, limit the Commission's rulemaking authority. Mot. at 15. Instead, they represent explicit directions from Congress to exercise the Commission's authority to prevent specific violations of

Section 5. Indeed, even after the 1975 Amendments directing specific procedures for UDAP rulemakings, Congress continued to enact statutes directing the Commission to define specific UDAPs. *E.g.*, 15 U.S.C. § 7607.

POV's remaining arguments are unpersuasive. POV gives the text of Section 6(g) short shrift, arguing that the location of Section 6(g) in the Act suggests it cannot be read to grant substantive rulemaking authority. Mot. at 13-14.[4] But there is nothing remarkable about the location of the Commission's substantive rulemaking authority. Section 6 is titled "additional powers," suggesting that Congress conferred these powers *in addition to* the Commission's adjudicatory authority. *See ATS*, 2024 WL 3511630, at *13 ("Section 6 is complementary to Section 5."). Indeed, courts have recognized the importance and breadth of other powers conferred by Section 6. *See, e.g.*, *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950) (describing scope of other Section 6 powers). As the court concluded in *ATS*, "[i]t is unnecessary to read either procedural or substantive into the text" before "rules and regulations" because, "when read together and construed in a symmetrical and coherent manner, Sections 5 and 6(g) authorize the FTC to promulgate "rules and regulations" as one of its tools to prevent unfair methods of competition. 2024 WL 3511630, at *13. Thus, while Congress does not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions," Mot. 14 (quotation omitted), that maxim has no place here. The Act is a "major piece" of antitrust legislation "written in starkly broad terms," *cf. Bostock v. Clayton Cnty.*, 590 U.S. 644, 680 (2020), notwithstanding POV's view that the rule is a "dramatic" expansion of the Act. Mot. 13.

[4] POV's view that the Commission's rulemaking authority is limited by Section 6(g)'s conferral of authority to "classify corporations" is also misplaced. *See* Mot. 13. The canon of *noscitur a sociiss*, which instructs that "a word may be known by the company it keeps," does not apply here, when the authorities to classify corporations and to issue rules are "distinct," and the connection between the two powers is not "so tight or so self-evident as to demand that [the Court] rob any one of them of its independent and ordinary significance." *Graham Cty. Soil and Water Conservation Dist. v. U.S. ex rel Wilson*, 559 U.S. 280, 288 (2010).

Finally, POV's argument that the plain text of Section 6(g) is undermined by the Rule's timing, Mot. 16-17, is inconsistent with Supreme Court precedent interpreting the FTC Act. In rejecting a similar argument regarding other powers in Section 6, the Court noted that powers "are not lost by being allowed to lie dormant" and recognized that agencies sometimes choose not to exercise their powers due to "lack of funds, motives of expediency, or the competition of more immediately important concerns." *Morton Salt Co.*, 338 U.S. at 647-48. Thus, the Court found "no basis for holding that any power ever granted to the Trade Commission has been forfeited by nonuse[]." *Id.* at 648.

2. This case does not implicate the major questions doctrine.

POV also invokes the major questions doctrine. Mot. at 23-24. But that doctrine is reserved only for "extraordinary" cases, "in which the history and breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." *West Virginia*, 597 U.S. at 721. Congress "directed" the Commission to "prevent" the use of "unfair methods of competition." 15 U.S.C. § 45(a)(2). In the more than 100 years since, the Commission has done just that, both by adjudication and rulemaking. *See supra*, Background Part I.C. Finding that the use of non-competes is an unfair method of competition thus goes to the heart of the Commission's mandate under the Act and is not a "transformative expansion [of its] regulatory authority." *West Virginia*, 597 U.S. at 724. As the court concluded in *ATS*, "because the [Commission's] Rule falls squarely within its core mandate, and it has previously used its Section 6(g) rulemaking power in similar ways, … the Major Question Doctrine [sic] is not applicable." 2024 WL 3511630, at *18.

POV does not contest that the Commission has the authority to bring a Section 5 enforcement action—or, indeed, enforcement actions against every user of non-competes subject to the Commission's jurisdiction—charging that the use of non-competes is an unfair method of competition. It defies logic to argue that an agency unquestionably has the authority to carry out its

statutory mandate using its express authority to bring enforcement actions and adjudicate, but not through its equally express authority to issue rules and regulations. Courts have applied the major questions doctrine when an agency steps outside of its area of expertise to regulate an issue beyond its core mandate, not when an agency chooses one method of regulation over another. *See, e.g.*, *West Virginia*, 597 U.S. at 729 (characterizing agency as making "a different type of policy judgment" based on "expertise … *not* traditionally needed in [the agency's] regulatory development"); *NFIB v. DOL*, 595 U.S. 109, 117-18 (2022) (applying major questions doctrine to rule setting "public health measures" that were "outside of OSHA's sphere of expertise" rather than "workplace safety standards"). Congress directed the Commission to "prevent" unfair methods of competition, and in Sections 5 and 6 of the original authorizing statute, Congress expressly granted the Commission discretion in deciding whether to carry out this mandate by way of adjudication, rulemaking, or both. And in the more than hundred years since the Act became law, through many amendments, Congress has never seen fit to revisit these core powers.

POV errs by attaching significance to state and congressional debate regarding non-competes. *See* Mot. at 24. Congress explicitly directed the Commission to prevent unfair methods of competition. And the States' differing approaches to regulation of non-competes have enabled the Commission to identify how non-competes undermine fair competition. There is likely always preexisting debate on practices the Commission determines are unlawful under Section 5, but that is no reason to question the Commission's authority to act within its expertise.

The Commission's historical use of Section 6(g) to promulgate substantive rules further distinguishes it from major questions cases. In *West Virginia*, the seminal major questions doctrine case, the Court recounted the EPA's one prior rule under the relevant section, noting that "the legality of that choice was controversial at the time and was never addressed by a court." 597 U.S. at 725. Contrary to that case, where the challenged rule had "no precedent" because it operated differently

from the sole prior rule, the Commission's Rule is consistent with its historical use of Section 6(g), including for rules defining certain unfair methods of competition. And, further distinguishing the Rule from the one at issue in *West Virginia*, the only courts to have reviewed the Commission's rulemaking authority have upheld it. *See supra*, Background Part I.C.

There is also no basis for this Court to invalidate an express grant of statutory authority on the grounds that it permits the Commission to take actions that have significant economic effect. *Cf. Biden v. Missouri*, 595 U.S. 87, 95 (2022) (not applying major questions doctrine despite agency action "go[ing] further than what the Secretary has done in the past"). Congress explicitly and deliberately created the Commission to prevent unfair methods of competition "in or affecting commerce." 15 U.S.C. § 45(a)(2). The Commission is authorized and designed to take actions affecting commerce throughout the national economy with significant economic effect. *See, e.g., id.* § 57b-3(a)(1)(A) (defining "rule" with reference to amendments that could have an "annual effect on the national economy of $100,000,000 or more"). POV does not (and cannot) reasonably dispute that the Commission could carry out its statutory mandate to prevent unfair methods of competition by bringing precedential enforcement actions against companies that use non-competes as an unfair method of competition—which would likewise have significant economic effects. POV offers no explanation for why proceeding by adjudication in the manner just described would not present a "major questions" problem, while the Commission's decision to exercise its express rulemaking authority purportedly does.

In any event, the Commission has "clear Congressional authorization" to issue rules relating to the Act, including unfair methods of competition, for all the reasons explained *supra*, Argument II.A.1. *See West Virginia*, 597 U.S. at 724.

3. The Commission properly designated non-competes as "unfair methods of competition" as a class.

The Commission properly designated non-competes, as a class, as unfair methods of

competition. *See ATS*, 2024 WL 3511630, at *16-17 (concluding that the FTC acted within its Section 5 authority in declaring non-competes unfair methods of competition). As explained, whether conduct constitutes an "unfair" method of competition encompasses two "key criteria" relevant here: (1) the conduct is "coercive, exploitative, collusive, abusive, deceptive, predatory" or "otherwise restrictive or exclusionary"; and (2) the conduct "tend[s] to negatively affect competitive conditions," for example by tending to "foreclose or impair the opportunities of market participants" or "reduce competition between rivals." Section 5 Policy Statement at 9 (collecting cases); *see also* 89 Fed. Reg. at 38,358-59. Applying its expertise and based on a thorough study of the economic literature and comment record, the Commission concluded that non-competes as a class meet these criteria because they are facially restrictive and exclusionary, and because they tend to negatively affect competitive conditions in labor, product, and service markets by locking up talent and preventing efficient matching between employers and employees. 89 Fed. Reg. at 38,374-402 (non-senior executives); *id.* at 38,406-11. The Commission also found that empirical evidence showed actual, ongoing competitive harms from the aggregate use of non-competes due to their prevalence as well as their spillover effects and negative externalities on workers who are not themselves subject to non-competes. *Id.* at 38,463-64. With respect to non-senior executives, the Commission additionally found that non-competes are exploitative and coercive. *Id.* at 38,374-79. Finally, the Commission concluded that the proffered justifications for non-competes (including purported pro-competitive justifications) did not alter its finding that they are unfair methods of competition. *Id.* at 38,421-34.

POV contends that non-competes must instead be analyzed on a case-by-case basis under the "rule of reason," *see* Mot. at 17-19, but that is a specific doctrinal framework that applies to certain claims under the Sherman Act and which "is not proper in this context." *ATS*, 2024 WL 3511630, at *17. The FTC Act was specifically enacted to supplement the Sherman Act and the rule of reason, as Congress used distinct terminology to provide a separate framework for assessing illegality. *See, e.g.*, S.

Rep. No. 62-1326, at 12 (1913) (arguing that, because it was not clear under early rule-of-reason caselaw whether the rule would reach some "practices that seriously interfere with competition," legislation was necessary "establishing a commission for the better administration of the law and to aid in its enforcement"). Indeed, the Supreme Court has repeatedly affirmed that Section 5 reaches conduct that would not itself violate the Sherman Act. *E.g.*, *Motion Picture Advert. Serv. Co.*, 344 U.S. at 394-95.[5] Citations to cases applying the rule of reason under the Sherman Act are thus inapposite. *See* Mot. at 18. Furthermore, contrary to POV's claim that the Commission needs to demonstrate actual anticompetitive harm to establish a Section 5 violation, "unfair methods of competition" includes "incipien[t] acts" and conduct with a "dangerous *tendency* ... to hinder competition," *FTC v. Cement Inst.*, 333 U.S. 683, 690 (1948) (emphasis added); *see also FTC v. Texaco, Inc.*, 393 U.S. 223, 225 (1968) (upholding application of Section 5 because of a practice's "*potential* for stifling competition" (emphasis added)); 89 Fed. Reg. at 38,358 (conduct that tends to negatively affect competition "in the aggregate" violates Section 5).[6]

Finally, POV takes a statement by the Commission in a related case grossly out of context, in erroneously asserting that the Commission conceded that "some hypothetical set of non-competes may not constitute unfair methods of competition." *See* Mot. at 20 (quoting a brief filed by the

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[5] POV acknowledges that Section 5 covers conduct "that exceeds the reach of other antitrust statutes," but argues that is only so because the Commission is restricted to case-by-case adjudication. Mot. at 19-20. For the reasons explained, the Commission is not limited to proceeding by adjudication, and the Supreme Court has repeatedly affirmed the Commission's "broad powers to declare trade practices unfair." *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 242 (1972). And here, the Commission *did* find that a "particular" practice (the use of non-competes) violated Section 5, based on "evidence" and "in the light of particular competitive conditions" consistent with *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 498, 533 (1935); the Rule is supported by a vast amount of evidence analyzing the effects of non-competes on competitive conditions in labor, product, and service markets.

[6] In *Snap-On Tools Corp. v. FTC*, the court, in dicta, and applying Sherman Act principles, noted that it was not "prepared to say" that the non-compete agreement at issue was a *per se* violation of the antitrust laws. 321 F.2d 825, 837 (7th Cir. 1963). That case says nothing about the Commission's ability to regulate non-competes through a rulemaking—supported by extensive economic analysis and a public comment record—under the FTC Act.

Commission in *Ryan, LLC v. FTC*, No. 3:24-cv-986 (N.D. Tex. May 29, 2024), ECF No. 82 ("Ryan Br."). Not so. There, the Commission argued that "*if [the] Plaintiffs were correct that the Rule sweeps too broadly because* some hypothetical set of non-competes" are not unfair methods of competition, then the Court should tailor the remedy accordingly—by carving out that "hypothetical" set. Ryan Br. at 26 n.5 (emphasis added). To be very clear: as explained, the Commission properly concluded on a category-wide basis that non-competes are unfair methods of competition within the scope of Section 5—not that some non-competes are and some are not. And whether some of POV's non-competes comport with Florida law, as this Court found in *Properties of the Villages, Inc. v. Kranz*, 2024 WL 2144178 (M.D. Fla. May 24, 2021), *see* Mot. at 20, does not answer whether those non-competes are unfair methods of competition under federal law.

4. The Rule does not intrude on a core domain of state regulation.

There is no merit to POV's argument that non-competes are a "core area of traditional" state regulation and therefore the FTC lacked authority to issue the Rule. *See* Mot. at 21-22, 24. The Rule is a valid exercise of the federal government's well-established and longstanding power in the antitrust area. And as described, non-competes have long been subject to federal antitrust laws and are therefore plainly not the exclusive or traditional domain of States. *See, e.g.*, *Am. Tobacco Co.*, 221 U.S. at 181-83 (scrutinizing non-competes under the Sherman Act over 100 years ago); *ATS*, 2024 WL 3511630, at *17 ("[T]he states and federal government have shared jurisdiction in this area."). POV points to the fact that most States have also chosen to regulate non-competes, but it is commonplace for States to address issues that the federal government subsequently or simultaneously chooses to address as well. In the context of the Commission's Section 5 authority to regulate UDAPs, for instance, courts have recognized that the federal government can regulate unfair business practices "even if the activities or industries have been the subject of legislation by a state." *Peerless Prods., Inc. v. FTC*, 284 F.2d 825, 827 (7th Cir. 1960). And antitrust law frequently involves overlapping jurisdiction between state and

federal law, as reflected by numerous States' "little FTC Acts." *See, e.g.*, Fla. Stat. § 501.204(1) (2023) (prohibiting unfair methods of competition and UDAPs); Miss. Code Ann. § 75-24-5 (same). The Rule therefore does nothing to significantly alter the balance of federal-state power.[7]

POV's federalism argument is particularly inapposite here, given that the Rule does not limit States' ability to further regulate non-competes. *See* 89 Fed. Reg. at 38,454-55 ("State laws that restrict non-competes and do not conflict with the final rule are not preempted."). In other words, the Rule is not intended to "occupy the field … or to preempt state law in the absence of requirements that are inconsistent with the rule." *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 990 (D.C. Cir. 1985) (upholding FTC UDAP rule that preempted conflicting state laws). Finally, even if the clear statement principles that POV invokes were applicable, the FTC has clear authorization to issue the Rule, as explained.

5. The Rule is not unlawfully retroactive.

A regulation operates retroactively where it "alter[s] the *past* legal consequences of past actions." *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006). By contrast, agency action "that only upsets expectations based on prior law"—"but has not rendered past actions illegal or otherwise sanctionable"—"is not retroactive." *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009) ("*National Cable*").

Under that well-established framework, the Rule is not retroactive because it does not impose "past legal consequences" for any conduct predating its effective date. Rather, it renders certain existing contractual terms prospectively unenforceable and restricts conduct in the future. Those are commonplace effects of changes in the law. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 n.24 (1994). The D.C. Circuit's analysis in *National Cable* is on all fours with this case. The regulation

[7] In contrast, POV's cited cases all concern areas of the law "at the core of traditional state authority" such as property law and land use, *Sackett v. EPA*, 598 U.S. 651, 679 (2023), and *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); landlord-tenant law, *Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758 (2021); and the regulation of the practice of law, *ABA v. FTC*, 430 F.3d 457 (D.C. Cir. 2005).

challenged there prohibited cable companies from both "enforcing existing exclusivity contracts" and "executing … new ones," finding that such contracts were unfair methods of competition. 567 F.3d at 662. The court explained that the rule was not retroactive, because while it "impaired the future value of past bargains," it did not impose any liability based on those bargains. *Id.* at 670.[8] POV's citation to *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), is inapposite. Mot. at 23. That case involved a statute that imposed "substantial and ... far reaching" financial liabilities for events decades in the past, thereby "divesting [the plaintiff] of property long after [it] believed [those] liabilities ... to have been settled." *E. Enters.*, 524 U.S. at 534. The Rule, by contrast, does not divest Plaintiff of any property, imposes no financial penalties, and has purely prospective effect.

B. The Rule Does Not Violate the Commerce Clause.

Plaintiff's Commerce Clause challenge lacks merit. The Commerce Clause permits Congress—and by extension, federal agencies—"to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005); *see also Wickard v. Filburn*, 317 U.S. 111 (1942). Under that test, the Supreme Court has held that Congress may regulate the activities of real estate brokerages. In *McLain v. Real Estate Board of New Orleans, Inc.*, the Court explained that because their activities "necessarily affect both the frequency and the terms of residential sales transactions," local real estate brokerages substantially affect interstate commerce by impacting, for example, overall demand for financing and title insurance. 444 U.S. 232, 246 (1980).[9] The Court has similarly held that the "rental of real estate … unquestionably" affects interstate commerce. *Russell v. United States*, 471 U.S. 858, 862 (1985).

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[8] The Rule preserves an employer's ability to pursue causes of action for non-compete violations that accrued before the effective date. 89 Fed. Reg. at 38,439 (29 C.F.R. § 910.3(b)).

[9] This Court has repeatedly held that intrastate real estate brokerages that advertise to and serve out-of-state clients engage in "interstate commerce." *E.g.*, *KOVA Commercial of Naples, LLC v. Sabin*, 2024 WL 2019872, at *2-3 (M.D. Fla. May 7, 2024) (collecting cases).

Applying those principles here, neither the FTC Act nor the Rule violates the Commerce Clause. The FTC Act (and the Rule) regulates core commercial and economic activity that substantially affects interstate labor, product, and services markets. The FTC's jurisdiction extends to unfair methods of competition "in or affecting commerce," which the Supreme Court has recognized is "coextensive with the constitutional power of Congress under the Commerce Clause." *United States v. Am. Bldg. Maintenance Indus.*, 422 U.S. 271, 277 n.6 (1975). And the Commission found that the regulation of non-competes has significant interstate economic effects, *see, e.g.*, 89 Fed. Reg. at 38,383 ("increases in non-compete enforceability in one State have negative impacts on workers' earnings in bordering States"), and that much of the harms from non-competes comes from their widespread use across States, *see, e.g.*, *id.* at 38,380. That ends the analysis. *See Raich*, 545 U.S. at 17 ("[W]hen a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under the statute is of no consequence.") (cleaned up).

But even if one were to analyze the effect of the Rule on POV alone, POV's commercial activities are plainly part of an "economic class of activities with a substantial effect on interstate commerce." To start, it is doubtful that POV's commercial activities are "purely local" or "intrastate." Presumably, POV's workers have out-of-state clients, given that the Villages has over 145,000 residents and is a "premier retirement community." Mot. Ex. 1, Decl. of J. Parr, ¶¶ 6, 7, 24, ECF No. 25-1. But even if marketing, managing, selling, and leasing retirement homes at that scale were "purely local," those activities substantially affect the interstate real estate market, as the Court observed in *McLain* and *Russell*, and certainly to a far greater extent than the activity at issue in *Raich*—the noncommercial cultivation and possession of marijuana by an individual for personal use.

C. The Rule Does Not Violate the Non-Delegation Doctrine.

POV asserts—without further analysis—that the Rule "raise[s] ... constitutional concerns under the separation of powers and the non-delegation doctrine." Mot. at 27. POV goes on to argue

that rather than resolving those "complex questions," the Court should issue a preliminary injunction. *Id.* That cursory argument is wrong several times over. Most fundamentally, it ignores the standard for issuing the extraordinary remedy of a preliminary injunction: POV bears the burden to clearly show a likelihood of success on the merits, which it plainly has not done for this claim.

In any event, Section 5 of the FTC Act is not an unconstitutional delegation. *See ATS*, 2024 WL 3511630, at *18-19 (non-delegation challenge to the Rule "is without merit"). The non-delegation doctrine requires that Congress simply articulate "an intelligible principle" to guide the agency. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). That standard is "not demanding." *Gundy v. United States*, 588 U.S. 128, 146 (2019) (plurality op.). The Supreme Court has only twice found a congressional delegation of power unconstitutional, and only because "Congress had failed to articulate any policy or standard" to confine the agency's discretion. *Id.* at 130 (plurality op.). Section 5's directive that the FTC prevent "unfair methods of competition in or affecting commerce," 15 U.S.C. § 45(a), easily meets the intelligible-principle test. For decades, the Supreme Court has approved of Congress's delegation of authority to the Commission to regulate "unfair methods of competition." *See, e.g.*, *Texaco,* 393 U.S. at 225; *Brown Shoe,* 384 U.S. at 320. The Court has even described the meaning of the phrase "unfair methods of competition" as "obvious." *FTC v. Raladam Co.*, 283 U.S. 643, 649 (1931); *accord Sears, Roebuck & Co. v. FTC*, 258 F. 307, 311 (7th Cir. 1919) (rejecting non-delegation challenge to the FTC Act). Moreover, the "unfair methods of competition" standard is not nearly as sweeping as delegations upheld by the Supreme Court, such as the authority to set "fair and equitable" prices, *Yakus v. United States*, 321 U.S. 414, 427 (1944); to determine "just and reasonable" rates, *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 600 (1944); to regulate as "public interest, convenience, or necessity" require, *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943); and to issue standards "requisite to protect the public health[,]" *Whitman*, 531 U.S. at 472.

II. POV FAILS TO DEMONSTRATE IRREPARABLE HARM.

While POV's failure to establish a likelihood of success on the merits is sufficient to doom its motion, *see, e.g.*, *LSSi Data Corp. v. Comcast Phone, LLC*, 696 F.3d 1114, 1124 (11th Cir. 2012), POV also fails to establish that a preliminary injunction is necessary to prevent imminent, irreparable harm.

As an initial matter, POV's unexplained two-month delay in seeking preliminary injunctive relief belies its assertion of irreparable harm. The Commission's public release of the Rule and vote to approve it on April 23, 2024, were immediately and widely publicized,[10] and the Rule was published in the Federal Register on May 7, 2024. 89 Fed. Reg. at 38,342. Yet POV did not file this lawsuit until June 21, 2024, *see* Compl., and did not move for preliminary injunctive relief until July 2, 2024, *see* Mot. By that time, preliminary injunction motions in two other cases challenging the Rule were already fully briefed. *See Ryan*, ECF Nos. 23-24, 46-47, 81-82, 146-147; *ATS*, ECF Nos. 10-11, 22, 53.

The Eleventh Circuit has held that "[a] delay in seeking a preliminary injunction of even only a few months—though not necessarily fatal—militates against a finding of irreparable harm." *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016). This Court likewise has recognized that "[d]elay, or too much of it, indicates that a suit or request for injunctive relief is more about gaining an advantage (either a commercial or litigation advantage) than protecting a party from irreparable harm." *Pippin v. Playboy Ent. Grp., Inc.*, No. 8:02-CV-2329, 2003 WL 21981990, at *2 (M.D. Fla. July 1, 2003). The reference point for assessing delay is when the plaintiff learned of the alleged violation of its rights—here, when POV became aware of the Rule. *See Menudo Int'l, LLC v. In Miami Prod.*, LLC, No. 17-CV-21559, 2017 WL 4919222, at *5 (S.D. Fla. Oct. 31, 2017).

"[C]ourts typically decline to grant preliminary injunctions in the face of unexplained delays

[10] *See, e.g.*, J. Edward Moreno, *F.T.C. Issues Ban on Worker Noncompete Clauses*, N.Y. Times (Apr. 23, 2024); Dave Michaels & Lindsay Ellis, *FTC Bans Noncompete Agreements That Restrict Job Switching*, Wall Street J. (Apr. 23, 2024); Christopher Rugaber, *New Federal Rule Would Bar "Noncompete" Agreements for Most Employees*, Orlando Sentinel (Apr. 23, 2024).

of more than two months." *Pals Grp., Inc. v. Quiskeya Trading Corp.*, No. 16-CV-23905, 2017 WL 532299, at *6 (S.D. Fla. Feb. 9, 2017) (collecting cases). Indeed, the Eleventh Circuit cited with approval in *Wreal* a decision in which the Seventh Circuit affirmed the denial of a preliminary injunction on the ground that a delay of "two months … is inconsistent with a claim of irreparable injury." *Shaffer v. Globe Prot., Inc.*, 721 F.2d 1121, 1123 (7th Cir. 1983); *see Wreal*, 840 F.3d at 1248; *see also, e.g.*, *Snider Tire, Inc. v. Chapman*, No. 2:20-CV-1775-AMM, 2021 WL 2497942, at *4 (N.D. Ala. Apr. 27, 2021) (citing "cases holding that two-to three-month delay was sufficient to defeat argument that irreparable injury would occur"). Consistent with these authorities, POV's two-month delay in seeking a preliminary injunction critically undermines its assertion of irreparable harm.

Moreover, POV fails to cite any imminent, irreparable harm that would warrant the extraordinary remedy of a preliminary injunction. POV first invokes *de minimis* compliance costs, such as the costs associated with notifying current and former workers that their non-competes are no longer enforceable, that it will incur before the Rule takes effect. Mot. at 28. The Commission estimated that the average affected firm will incur costs of $27.78 to comply with the one-time notice requirement. *See* 89 Fed. Reg. at 38,483-84. POV expressly invokes the Rule's assessment of these costs in its brief, thereby adopting the Commission's estimates. *See* Mot. at 28 (citing 89 Fed. Reg. at 38,483-84). Such *de minimis* costs do not satisfy POV's burden to demonstrate irreparable harm, as the district court correctly held in *ATS*. 2024 WL 3511630, at *9.[11]

POV also suggests that its current or former workers "likely" will join competing brokerages

[11] *See, e.g.*, *Cmty. Oncology All. v. Becerra*, No. 23-CV-2168, 2023 WL 9692027, at *5 (D.D.C. Dec. 21, 2023) ("[A] movant's failure to 'demonstrate anything more than *de minimis* economic harm, is fatal to . . . [its] motion for the extraordinary relief of a preliminary injunction.'" (citation omitted)); *accord Second Amend. Found., Inc. v. ATF*, -- F. Supp. 3d---, 2023 WL 7490149, at *14 (N.D. Tex. Nov. 13, 2023), *appeal filed*, No. 23-11157 (5th Cir. Nov. 14, 2023). In other contexts, courts have recognized that dollar amounts greater than the costs at issue here were *de minimis*. *E.g.*, *Dennis v. Dowdle*, 937 F.2d 612 (9th Cir. 1991) ($30); *Badii v. Rick's Cabaret Int'l, Inc.*, No. 3:12-CV-4541, 2014 WL 550593, at *8 (N.D. Tex. Feb. 11, 2014) ($80 to $90).

when the Rule takes effect, thereby inflicting harm to POV, but it fails to establish that such harm is imminent absent a preliminary injunction. Rather, POV asserts that "[t]his harm is not merely speculative" based solely on the fact that it previously incurred damages when workers violated their non-competes. Mot. at 29 (citing *Kranz*). But it is well established that "[p]ast exposure … does not in itself show a present case or controversy regarding injunctive relief … if unaccompanied by any continuing, present adverse effects." *City of L.A. v. Lyons*, 461 U.S. 95, 102 (1983) (citation omitted). POV offers no evidence to establish that any worker subject to a non-compete would imminently enter into competition with POV but for that agreement, much less that non-disclosure, non-solicitation, term employment agreements, or other alternatives to non-competes that the Commission evaluated cannot protect POV's legitimate (as opposed to anticompetitive) interests in retaining its workers and protecting confidential business information.

III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST DISFAVOR A PRELIMINARY INJUNCTION.

Finally, the balance of equities and public interest weigh markedly in the Commission's favor. Initially, POV mistakenly conflates its merits arguments with the distinct requirement to demonstrate that the balance of equities and public interest tip in its favor. It characterizes the Rule as "an unconstitutional ord[er]" and then argues that there is no public interest in its enforcement. Mot. at 30. Conversely, whenever the government "is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). POV's framing would collapse the merits prong of the preliminary injunction standard with the equities and public interest factors. But the Supreme Court has made clear that a likelihood of success on the merits, standing alone, is not a sufficient basis for that extraordinary remedy. *See, e.g.*, *Winter*, 555 U.S. at 26 (reversing entry of a preliminary injunction on the ground "that the balance of equities and consideration of the overall public interest" weighed in the government's favor, despite accepting the lower courts' conclusion that the agency action in

question was likely unlawful). Thus, even if POV had established a likelihood of success on the merits, the Court still should deny its preliminary injunction motion on the distinct ground that POV has failed to meaningfully address the remaining requirements or establish that they weigh in POV's favor.

Indeed, POV makes no effort to establish that any costs it may incur outweigh the Rule's expected benefits, which include increasing new business formation by 2.7%; spurring innovation, including by leading to over 100,000 new patents over the next decade and by increasing patent value; increasing wages by $524 annually for the average worker; decreasing healthcare spending by between $74 billion and $194 billion over the next decade; and protecting the fundamental freedom of workers to pursue employment of their choice. 89 Fed. Reg. at 38,433, 38,476-77, 38,506. The record is replete with stories from workers and businesses experiencing harms from non-competes, underscoring the strong public interest in the Rule taking effect as scheduled. *See supra*, Background Part I.C.

For the foregoing reasons, POV has not established any entitlement to preliminary relief. In any event, POV seeks relief only as to itself. Mot. at 30. Thus, to the extent that the Court enters any relief, it should not extend beyond POV. Additionally, POV has not advanced any grounds for entry of a stay of the Rule's effective date, which would not be proper in any event. *See, e.g.*, *Rong Ying Chen v. U.S. Atty. Gen.*, 226 F. App'x 916, 917 (11th Cir. 2007) (a party abandons a claim for relief by failing to address it in the party's brief).

CONCLUSION

POV's motion for a stay of effective date and preliminary injunction should be denied.

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Respectfully submitted,

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