No. 24-13102

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PROPERTIES OF THE VILLAGES, INC.,

Plaintiff-Appellee,

v.

FEDERAL TRADE COMMISSION,

Defendant-Appellant.

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

BRIEF FOR APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for appellant certifies that, to the best of her knowledge, the following list of persons and entities have an interest in the outcome of this appeal:

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American Investment Council

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Associated Builders and Contractors, Inc.

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National Employment Law Project

National Federation of Independent Business Small Business Legal Center, Inc.

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Slaughter, Rebecca Kelly

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Small Business Majority

Starr, Evan

Todd R. Friedman, P.A.

The Holding Company of The Villages, Inc.

The Villages of Lake-Sumter, Inc.

Thurston, Robin F.

United States Council for International Business

Vernon, Emily A.

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STATEMENT REGARDING ORAL ARGUMENT

The district court entered a preliminary injunction that prohibits enforcement against plaintiff of a regulation issued by the Federal Trade Commission. The regulation reflects the Commission's determination that employment non-compete clauses are generally "unfair methods of competition" prohibited by the FTC Act. 15 U.S.C. § 45(a)(1). Given the interests of the Commission and the public in full enforcement of the challenged regulation, the government respectfully requests that the Court hold oral argument in this appeal.

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INTRODUCTION

More than a century ago, Congress provided that "[u]nfair methods of competition in or affecting commerce" are "unlawful." 15 U.S.C. § 45(a)(1). Congress also established the Federal Trade Commission, a bipartisan expert agency that Congress "empowered and directed to prevent" entities "from using unfair methods of competition." *Id.* § 45(a)(2). Congress provided the Commission with a variety of powers to carry out that directive, including the power "to make rules and regulations." *Id.* § 46(g).

Non-compete clauses undermine competition by restricting workers from leaving their employment to take a competing job or start a competing business. Today, employers across industries use such clauses beyond the boardroom to restrict the job mobility not only of executives or highly skilled workers but also of low-wage and entry-level workers. And in recent years, a robust body of economic research has confirmed the concerns that courts and legislatures have long expressed about non-competes: By restricting competition, non-compete clauses have negative effects throughout the economy, including by suppressing wages, inhibiting new business formation, and decreasing the quality of products and services.

Accordingly, in 2018, the Commission began evaluating whether non-compete clauses are unfair methods of competition and therefore unlawful. The Commission conducted an extensive inquiry into non-compete clauses that included soliciting and reviewing public comments, analyzing the economic literature, and engaging in the

Commission's own expert analysis. Through that process, the Commission reviewed extensive evidence from economic research regarding the detrimental effects of non-competes and received and reviewed tens of thousands of public comments—which were overwhelmingly in support of categorically prohibiting non-competes—that detailed concrete examples of the harm that non-competes wreak.

Based on that evidence, the Commission determined that non-compete clauses, as a class, are unfair methods of competition prohibited by the FTC Act. The Commission thus promulgated the Non-Compete Rule, a regulation that defines most existing non-competes as unenforceable unfair methods of competition (subject to an exception for certain senior executives) and bans the future use of most non-competes. Non-Compete Clause Rule, 89 Fed. Reg. 38,342 (May 7, 2024).

The district court did not take issue with most of the Commission's factual or legal conclusions. The court correctly concluded that the FTC Act's provision empowering the Commission to "make rules and regulations" confers authority on the Commission to issue binding rules regarding unfair methods of competition. Dkt. No. 59, at 11-15.[1] The court did not identify any flaws in the Commission's exhaustive economic analysis detailing the deleterious effects of non-compete clauses. The court rejected on the merits plaintiff's argument that the use of non-competes is not an unfair method of competition. *See id.* at 15. And the court correctly recognized

[1] District court docket entries are cited as "Dkt. No. #, at #," where the page number refers to the CM/ECF pagination in district court.

that the Non-Compete Rule's regulation of non-compete clauses as unfair methods of competition "operates within the FTC's 'core mandate'" and is "in the 'wheelhouse' of the FTC." *Id.* at 21, 24.

Nonetheless, the district court preliminarily enjoined the Commission from enforcing the Non-Compete Rule against plaintiff. In reaching that conclusion, the court stated that the Rule has "significant economic" and "political" effects and that, in light of major-questions principles, the statutory provision authorizing the Commission to issue rules and regulations likely should not be interpreted to authorize "substantive rulemaking of this magnitude." Dkt. No. 59, at 19-20, 22.

The district court concluded that Congress authorized the Commission to issue binding regulations defining unfair methods of competition—but only so long as those unfair methods are not sufficiently pervasive or anti-competitive such that prohibiting them would have "significant" economic and political effects. That cramped view of the Commission's authority is not supported by the statutory text, by any principle of statutory construction, or by the major-questions doctrine.

The text of the FTC Act clearly authorizes the Commission to issue binding rules defining prohibited unfair methods of competition, with no statutory carve-out for "significant" rules. That understanding of the statute is confirmed by the relevant statutory history and context, both of which underscore that Congress delegated to the Commission the authority to promulgate binding regulations—including regulations with significant economic effects. And because the statutory text is clear

and the Non-Compete Rule is squarely within the heartland of the Commission's authority to prevent unfair methods of competition, the major-questions doctrine does not dictate a different result. This Court should reverse.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this suit under 28 U.S.C. § 1331. The district court granted plaintiff's motion for a preliminary injunction in an oral ruling from the bench on August 14, 2024, and entered an order granting the motion the following day. *See* Dkt. No. 59, at 1-3. The government filed a timely notice of appeal on September 24, 2024. *See* Dkt. No. 64. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

The FTC Act provides that "[u]nfair methods of competition in or affecting commerce" are "unlawful" and directs the Federal Trade Commission to "prevent" such unfair methods. 15 U.S.C. § 45(a)(1)-(2). The Act also empowers the Commission to "make rules and regulations" to carry out the statute's substantive provisions. *Id.* § 46(g).

Pursuant to that authority, the Commission issued a regulation determining that most non-compete clauses are unfair methods of competition that are prohibited by the FTC Act. Non-Compete Clause Rule, 89 Fed. Reg. 38,342 (May 7, 2024). In this suit, brought by a company that requires some of its workers to sign non-compete clauses, the district court relied on the major-questions doctrine to conclude that the

Commission likely lacks authority to issue the Non-Compete Rule. The court thus entered a preliminary injunction prohibiting the Rule's enforcement against the plaintiff. The questions presented are:

1. Whether the district court erred in relying on the major-questions doctrine to conclude that the Commission lacks rulemaking authority to issue the Non-Compete Rule; and

2. Whether the district court erred in concluding that the equitable factors supported a preliminary injunction.

STATEMENT OF THE CASE

A. Legal Background

1. The Federal Trade Commission Act, originally enacted in 1914 and since amended on a variety of occasions, "declared unlawful" all "[u]nfair methods of competition in or affecting commerce." 15 U.S.C. § 45(a)(1). The Act also declared unlawful "unfair or deceptive acts or practices in or affecting commerce." *Id.*

In addition, the FTC Act established the Commission as a bipartisan expert agency with authority to enforce the Act's prohibitions. The Act "empowered and directed" the Commission "to prevent persons" and other entities subject to the Commission's jurisdiction "from using unfair methods of competition in or affecting commerce." 15 U.S.C. § 45(a)(2).

Congress endowed the Commission with a variety of powers to help it carry out its mandate to implement and enforce the FTC Act's prohibitions, two of which

are particularly relevant here. First, in Section 5(b),[2] Congress empowered the Commission to initiate administrative enforcement actions when it determines an entity "has been or is using any unfair method of competition." 15 U.S.C. § 45(b). Second, in Section 6, titled "[a]dditional powers of Commission," Congress provided that the "Commission shall also have power" to "make rules and regulations for the purpose of carrying out the provisions of" the FTC Act. *Id.* § 46(g).

2. At the time that Congress enacted the FTC Act, the phrase "unfair methods of competition" was a new statutory phrase, and the Act does not define it. The FTC Act was enacted after the Sherman Act and almost contemporaneously with the Clayton Act, two antitrust statutes that the Commission also enforces. The Supreme Court has recognized that the FTC Act's prohibition on "unfair methods of competition" was intended to "supplement and bolster"—rather than merely duplicate—those statutes and specifically was designed "to stop in their incipiency acts and practices which, when full blown, would violate those Acts." *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394-95 (1953).

As explained in a recent Commission policy statement synthesizing the relevant case law, conduct rises to the level of an "unfair method of competition" if it is characterized by two features. *See* FTC, *Policy Statement Regarding the Scope of Unfair*

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[2] Consistent with the nomenclature used in the challenged Non-Compete Rule and the district court's opinion, this brief refers to 15 U.S.C. §§ 45 and 46 as Sections 5 and 6 (of the FTC Act), respectively.

Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://perma.cc/2G3F-2UW9 (Section 5 Policy Statement). First, the conduct must be a "method of competition" rather than "merely a condition of the marketplace," such as "high concentration or barriers to entry." *Id.* at 8.

Second, to be prohibited, the conduct must be "unfair," which means that it "goes beyond competition on the merits"—that is, beyond competition in the form of a better product or service. Section 5 Policy Statement 8-9. Determining whether a particular practice goes beyond competition on the merits requires analyzing "two key criteria": (1) whether the conduct is "coercive, exploitative, collusive, abusive, deceptive, predatory," or "otherwise restrictive or exclusionary"; and (2) whether the conduct "tend[s] to negatively affect competitive conditions," such as by tending to "foreclose or impair the opportunities of market participants" or "reduce competition between rivals." *Id.* at 8-9, 9 nn.51-52; *see also* 89 Fed. Reg. at 38,358-59. The second prong of this analysis 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 (citing cases).

3. The Commission did not initially invoke its Section 6(g) rulemaking authority to issue rules with the force and effect of law; instead, the Commission exclusively used its enforcement authority to implement its statutory mandate to prevent unfair

methods of competition. But starting in 1963, the Commission routinely promulgated legislative rules aimed at preventing unfair methods of competition and unfair or deceptive acts or practices. *See* 89 Fed. Reg. at 38,349-50 (describing this history and cataloguing Section 6(g) rules); *see also* FTC, *Annual Report of the Federal Trade Commission* 35-36 (1962), https://perma.cc/PT38-T4RR. In 1973, the D.C. Circuit upheld the Commission's statutory authority to issue legislative rules designating practices as prohibited unfair methods of competition or unfair or deceptive acts or practices. *See National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 674 (D.C. Cir. 1973).

Two years later, Congress amended the FTC Act through the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975). The amendments restricted the Commission from relying on its preexisting Section 6(g) rulemaking authority to promulgate rules regarding unfair or deceptive acts or practices. 15 U.S.C. § 57a(a)(2). Instead, the amendments codified in a new statutory section the Commission's authority to promulgate "rules which define with specificity acts or practices which are unfair or deceptive acts or practices" and adopted procedural requirements for such rules in addition to the Administrative Procedure Act's default requirements. *Id.* § 57a(a)-(b). At the same time, the Magnuson-Moss Act stated that its new provisions "shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general

statements of policy, with respect to unfair methods of competition in or affecting commerce." *Id.*

B. Factual and Procedural Background

1. Non-compete clauses undermine economic liberty by preventing workers from freely switching employers or launching their own business. Concern about these clauses "dates back centuries," and their enforceability has long been restricted "based on public policy concerns." 89 Fed. Reg. at 38,343. Today, non-compete clauses "are generally subject to greater scrutiny" under state law "than other employment terms," and they have also long been subject to scrutiny under federal antitrust law. *See id.*

In recent years, "[c]oncerns about non-competes have increased substantially." 89 Fed. Reg. at 38,343. It has become clear that non-compete clauses are widespread, proliferating far beyond senior executives and highly compensated employees. *See id.* at 38,346 (more than half of workers covered by non-competes are hourly workers). In addition, recent "[c]hanges in State laws governing non-competes" have permitted "researchers to better isolate the effects of non-competes, giving rise to a body of empirical research" documenting the harms caused by non-compete clauses. *Id.* For example, this research demonstrates that "the use of non-competes by employers tends to negatively affect competition in labor markets, suppressing earnings for workers across the labor force," and "to negatively affect competition in product and service markets, suppressing new business formation and innovation." *Id.*

Thus, in 2018, the Commission began to evaluate whether non-compete clauses were unfair methods of competition prohibited by Section 5(a) and how to address their use. At first, in 2018 and 2019, the Commission invited public comment on non-competes as part of a set of hearings on competition and consumer protection issues. *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3497 (Jan. 19, 2023). Then, in 2020, the Commission "held a public workshop on non-compete clauses" that involved speakers and panelists addressing various issues related to non-competes; in connection with the workshop, the Commission also received hundreds of public comments addressing topics related to a potential non-compete rulemaking. *Id.* In 2021, the Commission initiated investigations into several companies' use of non-competes; those investigations resulted in consent decrees settling the Commission's charges that the non-competes in question constituted unfair methods of competition and prohibiting the employers from enforcing non-competes with respect to thousands of workers. 89 Fed. Reg. at 38,344; *see also* FTC, *FTC Cracks Down on Companies that Impose Harmful Noncompete Restrictions on Thousands of Workers* (Jan. 4, 2023), https://perma.cc/NFB2-3NJR.

Eventually, the Commission determined that the problem of non-competes, which are extremely widespread, would be more efficiently and effectively addressed through rulemaking rather than individual adjudications. The Commission thus issued a Notice of Proposed Rulemaking in 2023, which proposed enacting a rule that would have classified all non-competes as unfair methods of competition and required

employers subject to the Commission's jurisdiction to rescind all existing non-competes and forgo entering into new ones. *See* 88 Fed. Reg. 3482.

2. The Commission sought and received public comment and conducted an exhaustive analysis of both the comments received and the economic literature regarding non-competes. That analysis led the Commission to conclude 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 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 workers other than senior executives are exploitative and coercive because they are often imposed unilaterally, *id.* at 38,374-79, though that is less often true for senior executives, who are more likely to bargain over, and receive compensation for, non-competes, *id.* at 38,405-06.

In particular, in the Commission's expert judgment, the economic literature and the Commission's own economic analysis demonstrate that non-competes (unsurprisingly) reduce competition and mobility in labor markets, limiting the movement of workers between firms, reducing productivity, and suppressing wages for workers—both those workers who are subject to non-competes and those who are not. 89 Fed. Reg. at 38,379-84. The Commission also determined that the literature and its own analysis demonstrate that non-competes reduce competition between competing businesses, because they inhibit new business formation and cut

off access to the skilled workforce competitors need to start and expand. This in turn reduces innovation and can raise prices. *Id.* at 38,388-91, 38,394-95. And the Commission concluded that the overwhelming public support for the proposal reflected in the comments underscored the competitive harms that non-competes inflict. *See id.* at 38,344 (approximately 25,000 of the 26,000 comments supported the proposal). Many of those comments provided specific examples of workers who had been prevented through restrictive non-competes from starting a competing business or taking a better job and detailed the harms that the workers experienced as a result, such as lower wages and poor working conditions. *See id.* at 38,340-46. Similarly, the Small Business Majority, a "network of more than 85,000 small businesses," was joined by hundreds of small businesses to provide comments explaining the negative effects that non-competes can have on the ability of entrepreneurs to start businesses and hire the most qualified talent. *See* Small Business Majority, Comment Letter on Proposed Rule (Apr. 19, 2023), https://perma.cc/E6EJ-E789; Small Business Majority *et al.*, Comment Letter on Proposed Rule (Apr. 19, 2023), https://perma.cc/ZTW2-KCL9.

Finally, the Commission found that "the principal harms from non-competes arise from their tendency to negatively affect competitive conditions in the aggregate." 89 Fed. Reg. at 38,463. Thus, the widespread use of non-competes, in the aggregate, has negative externalities that may be difficult to ameliorate in an individual

adjudication but that are better addressed in a rulemaking concerning non-compete agreements as a class. *Id.* at 38,463-64.

For those reasons, the Commission adopted the Non-Compete Rule. The Rule provides that it is generally an unfair method of competition under Section 5(a) for employers to enter into non-competes after the Rule's effective date, September 4, 2024. 89 Fed. Reg. at 38,342. In addition, the Non-Compete Rule prohibits employers from enforcing existing non-competes except with respect to senior executives, and the Rule requires employers to notify current and former employees subject to such unenforceable non-compete clauses that the clauses are unenforceable. *Id.* The Commission estimated that prohibiting non-competes would increase new business formation by 2.7% annually and spur innovation, including by leading to over 100,000 new patents over 10 years. *Id.* at 38,433, 38,470. Worker earnings would increase by $400 to $488 billion over 10 years, *id.*, and consumer prices would fall, *id.* at 38,478.

3. Plaintiff Properties of the Villages, Inc.—a company that "sells real estate and residential housing" and that requires its "Sales Associates" to "sign and abide by" non-compete agreements—challenged the Non-Compete Rule and moved for a preliminary injunction against its enforcement. Dkt. No. 1, at 10, 18; Dkt. No. 25. In its preliminary injunction motion, plaintiff contended that the Commission lacked statutory authority to issue any legislative rules regarding unfair methods of competition, Dkt. No. 25, at 12-17; that the Non-Compete Rule is contrary to law because non-compete clauses are not categorically unfair methods of competition, *id.*

at 17-24; and that the Non-Compete Rule raises "significant constitutional concerns" under the Commerce Clause, "the separation of powers," and "the non-delegation doctrine," *id.* at 25-27.

The district court largely rejected these contentions. First, the court concluded that Section 6(g)'s "operative language" to "make rules and regulations for the purpose of carrying out" the FTC Act, when read in the context of the statute, "conferred at least some form of substantive rulemaking authority to the FTC with regard to unfair methods of competition." Dkt. No. 59, at 11-15. Second, the court concluded that plaintiff had not "demonstrated a substantial likelihood of success" on its constitutional arguments. *Id.* at 15. Third, the court concluded that plaintiff had not shown "a substantial likelihood of success" on its arguments "that not all non-competes are unfair competition." *Id.*

In other words, the district court determined that the Commission was likely correct that non-competes are unfair methods of competition, that the Commission likely has legislative rulemaking authority with respect to unfair methods of competition, and that the Commission's exercise of that authority in the Non-Compete Rule likely does not raise any constitutional concerns.

Nonetheless, the district court held, relying on the major-questions doctrine, that Section 6(g) likely did not "grant the FTC the authority to issue this particular rule." Dkt. No. 59, at 17. Although the court recognized that the Non-Compete Rule "operates within the FTC's 'core mandate'" and is "in the 'wheelhouse' of the FTC,"

id. at 21, 24, the court believed that the Rule has "significant economic" and "political" effects and that Section 6(g) does not clearly authorize "substantive rulemaking of this magnitude," *id.* at 19-20, 22. Thus, the court concluded that plaintiff was likely to succeed on its claim that the Rule "exceeds the FTC's authority." *Id.* at 25.

Finally, the district court held that plaintiff had demonstrated the equitable factors required to secure a preliminary injunction, primarily on the basis of the costs it averred it would incur "to review its existing contracts for compliance with the rule" and "to strategize on how best to change [its] existing agreements and business models." Dkt. No. 59, at 26. The court thus entered a preliminary injunction prohibiting the Commission from enforcing the Non-Compete Rule against plaintiff. *Id.* at 1-2.

C. Standard of Review

The district court's grant of a preliminary injunction is reviewed for abuse of discretion. *Forsyth County v. U.S. Army Corps of Eng'rs*, 633 F.3d 1032, 1039 (11th Cir. 2011). The court's factual findings are reviewed for clear error, and its legal conclusions are reviewed de novo. *Id.*

SUMMARY OF ARGUMENT

The district court's analysis fundamentally misunderstood the major-questions principles that the court referenced. The court improperly employed those principles to reach a result that cannot be squared with any plausible reading of the statutory text

and that impermissibly divests the Commission of the core statutory authority that Congress has given it to prevent the use of unfair methods of competition. Beyond the merits, the court also erred in accepting plaintiff's argument that the ordinary compliance costs plaintiff identified were sufficient to support the extraordinary equitable remedy of a preliminary injunction.

I. The district court erred in relying on major-questions principles to conclude that the Commission likely does not have authority to issue the Non-Compete Rule.

A. The FTC Act authorizes the Commission to issue regulations defining prohibited unfair methods of competition, including the Non-Compete Rule. That conclusion is evident from the plain text of the statute, which declares unfair methods of competition unlawful and empowers the Commission to "make rules and regulations for the purpose of carrying out" the Act. 15 U.S.C. § 46(g). The natural reading of that plain language is confirmed by the Act's directive to the Commission to "prevent" the use of unfair methods of competition, *id.* § 45(a)(2)—a directive that inherently contemplates forward-looking rulemaking.

That proper understanding of the statute is further confirmed by every other relevant indicator of statutory meaning. The rulemaking language employed by Congress in the FTC Act is nearly identical to the language Congress employed in other statutes that confer legislative rulemaking authority on all manner of agencies, from the Federal Reserve Board to the Federal Communications Commission to the Department of Housing and Urban Development. If there were any doubt that

Congress meant what it said when it authorized the Commission to make rules governing unfair methods of competition, that doubt was resolved decades ago when, following a D.C. Circuit decision interpreting Section 6(g) to confer legislative rulemaking authority, Congress revisited the Commission's powers and preserved the Commission's competition rulemaking authority. And various other provisions of the statute reinforce Congress's intent to authorize, in Section 6(g), the promulgation of binding rules.

B. The district court barely disputed that statutory analysis. The court concluded that the plain text of Section 6(g) conferred some substantive rulemaking authority on the Commission to regulate unfair methods of competition, that other features of the FTC Act supported such an interpretation of Section 6(g), and that the Act reflected Congress's understanding that the Commission's regulations might properly have large economic effects. The court also rejected plaintiff's challenge to the Commission's conclusion that non-compete clauses are in fact generally unfair methods of competition.

Nonetheless, the district court relied on the major-questions doctrine to conclude that the Commission was likely not empowered to issue the Non-Compete Rule. That conclusion was erroneous. The major-questions doctrine is nothing more than a principle of statutory construction; it is not a free-floating substantive doctrine that compels or empowers a court to depart from the best reading of the statutory text. As the district court initially concluded, the best reading of the FTC Act is that it

authorizes the Commission to issue binding rules declaring specific practices to be unfair methods of competition. The district court particularly erred in engrafting a big-effects limit on the Commission's authority because the statutory text cannot plausibly be read to confer authority on the Commission to promulgate only trivial, but not significant, rules.

Regardless, major-questions principles are not applicable to the Non-Compete Rule. The Supreme Court has generally applied those principles in extraordinary cases where it believed that an agency was relying on a narrow statutory provision as the basis for asserting exceptionally broad authority. But here, the authority to issue the Non-Compete Rule is rooted in the Commission's core statutory mandate to prevent the use of unfair methods of competition. Thus, as the district court repeatedly recognized, the Rule falls within the heartland of the Commission's regulatory power. There is nothing extraordinary about the Commission's exercise of its power to issue the Rule.

II. Even setting aside the merits, plaintiff is not entitled to a preliminary injunction based on the equitable factors governing such relief.

A. Plaintiff has not demonstrated any irreparable harm from the Non-Compete Rule. In finding such harm, the district court concluded that plaintiff would incur unrecoverable compliance costs if the Rule took effect. But the only compliance activity that the Rule requires of plaintiff is that it provide a notification, such as through email or text message, to its current and former employees subject to non-

compete clauses. Plaintiff has failed to demonstrate that the costs of that activity are anything more than de minimis, much less the extraordinary costs that could support a preliminary injunction. And plaintiff's assertion that it will spend money on legal costs to review and strategize about its business practices if it can no longer employ non-compete clauses fares no better. Allowing a plaintiff to generate its own irreparable harm by choosing to spend money strategizing about how to respond to a regulation would eviscerate the usual principle—applicable even in the context of Article III standing—that a plaintiff may not spend its way into court or otherwise base its claim to standing on self-inflicted injury.

B. In addition, the balance of the equities and the public interest weigh against a preliminary injunction. As the Non-Compete Rule explains, the use of non-compete clauses has substantial negative effects for workers and small businesses, for the economy, and for the public. By permitting plaintiff to continue entering into and enforcing non-compete clauses and prohibiting the Commission from enforcing its Rule, the district court's preliminary injunction causes substantial harm to the Commission and the public. That harm is exacerbated by the district court's own recognition that the Commission likely correctly concluded that non-compete clauses are in fact prohibited unfair methods of competition. That harm outweighs any minor compliance costs that plaintiff may experience as a result of the Non-Compete Rule's taking effect.

ARGUMENT

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To justify that relief, a plaintiff must show that: (1) "it has a substantial likelihood of success on the merits"; (2) it will suffer "irreparable injury" unless an "injunction issues"; (3) this "threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party"; and (4) "the injunction would not be adverse to the public interest." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc) (per curiam). Where an injunction is sought against the government, "its interest and harm—the third and fourth elements—merge with the public interest." *Florida v. Department of Health & Human Servs.*, 19 F.4th 1271, 1293 (11th Cir. 2021).

The district court erred in granting plaintiff a preliminary injunction on the claim that the FTC Act does not authorize the Commission to issue the Non-Compete Rule. Plaintiff is unlikely to succeed on that claim, because the plain text of the statute—supported by every relevant tool of construction—confers the required authority on the Commission. And in any event, plaintiff neither made the requisite showing that the Non-Compete Rule will cause it irreparable harm nor established that any harm it might suffer outweighs the government's and the public's countervailing interest in enforcement of the Rule.

I. Plaintiff is unlikely to succeed on the merits of its statutory authority claim.

A. Congress authorized the Commission to promulgate rules preventing unfair methods of competition.

The FTC Act confers authority on the Commission to issue legislative rules that define a practice as a prohibited unfair method of competition, including the Non-Compete Rule. That conclusion flows directly from the Act's plain text. It is further supported by Supreme Court precedent consistently construing similar statutory language to confer similar authority. And it is confirmed by statutory history and context. Indeed, the district court recognized as much, concluding that "[r]ead together, the various components of the statute show Congress conferred at least some form of substantive rulemaking authority to the FTC with regard to unfair methods of competition." Dkt. No. 59, at 14.

1. When construing statutory provisions, courts "must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (quotation omitted). The FTC Act's plain text confers authority on the Commission to issue legislative rules defining and proscribing unfair methods of competition, including the Non-Compete Rule.

Section 5(a) of the FTC Act declares that "[u]nfair methods of competition in or affecting commerce" are unlawful, 15 U.S.C. § 45(a)(1), and "empower[s] and direct[s]" the Commission "to prevent" the use of unfair methods of competition, *id.*

§ 45(a)(2). Section 6(g) of the Act then authorizes the Commission "to make rules and regulations for the purpose of carrying out the provisions of this Act." FTC Act, Pub. L. No. 63-203, § 6(g), 38 Stat. 717, 722 (1914); *see also* 15 U.S.C. § 46(g) (substituting "subchapter" for "Act"). The plain meaning of that express grant of rulemaking authority is clear: The Commission is authorized to issue "rules and regulations" to "carry[] out" Section 5(a)'s directive—that is, to "prevent" the use of "[u]nfair methods of competition in or affecting commerce." Nothing about the statutory text cabins the Commission's authority to issuing only some such rules.

The Commission's power to define and prohibit unfair methods of competition through rulemaking is further confirmed by Section 5(a)'s directive to the Commission to "prevent" entities "from using unfair methods of competition." 15 U.S.C. § 45(a)(2). This statutory directive to "prevent" unfair methods of competition necessarily contemplates forward-looking, prophylactic rulemaking to address unfair methods of competition. *See Prevent*, The Century Dictionary and Cyclopedia (1911) (defining "prevent" at the time of the FTC Act's enactment as "[t]o take previous measures against" or "[t]o keep from existing or occurring"); *accord Prevent*, Webster's New International Dictionary of the English Language (2d ed. 1942) ("To keep from happening, existing, succeeding, etc., esp. by precautionary measures; . . . to render impossible by advance provisions."). Any interpretation of the FTC Act as foreclosing the Commission from exercising its rulemaking authority would therefore undermine

the Act's overall design and inhibit the Commission from carrying out its directive of "prevent[ing]" the use of unfair methods of competition.

Thus, the plain text of the FTC Act provides the Commission with the authority to promulgate regulations that implement the statutory prohibition on the use of unfair methods of competition. That authority to issue binding rules necessarily carries with it the authority for the Commission to make a judgment that a particular class of conduct has such pernicious anticompetitive effects that it constitutes an unfair method of competition, without the need to consider evidence specific to each individual use of the practice. In other words, the Commission may properly exercise the rulemaking authority conferred by Section 6(g)'s plain text to promulgate prophylactic rules to enforce the FTC Act's substantive prohibition on a categorical basis.

2. That proper construction of the plain text of the FTC Act is further supported by the settled understanding, including in Supreme Court precedent stretching back decades, that nearly identical statutory language in other contexts confers legislative rulemaking authority.

For example, in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973), the Supreme Court held valid a Federal Reserve Board regulation issued pursuant to the Board's authority to "prescribe regulations to carry out the purposes of" the Truth in Lending Act. *Id.* at 361 (quotation omitted). As the Court explained, when a statute "states simply that the agency may 'make . . . such rules and regulations as may be

necessary to carry out the provisions of this Act,'" the statute is best understood as conferring on the agency broad rulemaking authority to implement the Act's substantive provisions. *Id.* at 369 (alteration in original). Indeed, the "validity of a regulation promulgated" pursuant to such statutory language "will be sustained so long as it is reasonably related to the purposes of the enabling legislation." *Id.* (quotation omitted); *see also id.* at 370 (explaining, in the context of such statutory language, that "[w]hen [a] command is so explicit . . . nothing short of express limitation or abuse of discretion . . . should undermine the action taken to execute it" (quotation omitted)).

Similarly, in *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268 (1969), the Supreme Court held valid a Department of Housing and Urban Development regulation issued pursuant to the Department's statutory authority to "make" "rules and regulations as may be necessary to carry out the provisions of" the agency's enabling statute. *Id.* at 277 (quotation omitted). The Court described that authority as a "general rulemaking power" and confirmed that it authorized the agency to promulgate a "mandatory" rule. *Id.* at 274, 277. As in *Mourning*, the Court additionally confirmed that such a broad grant of rulemaking authority permits the agency generally to promulgate regulations so long as they have a "reasonable relationship" to the substantive provisions of the enabling statute. *Id.* at 281.

These cases are not outliers. To the contrary, it has long been understood that language in an enabling statute identical or nearly identical to Section 6(g) reflects a

grant of authority to promulgate legislative rules with binding effect. *See, e.g.*, *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609-10 (1991) (stating that the provision of the National Labor Relations Act authorizing the National Labor Relations Board to "make" "such rules and regulations as may be necessary to carry out the provisions" of the statute conferred "unquestionably sufficient" authority to issue legislative rules (quotation omitted)); *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 779, 793-94 (1978) (holding that the provision of the Communications Act authorizing the Federal Communications Commission to "[m]ake such rules and regulations . . . as may be necessary to carry out the provisions of" the statute "supplies a statutory basis for the [FCC] to issue regulations" and confers "general rule-making authority" (first alteration in original) (quotation omitted)); *Brackeen v. Haaland*, 994 F.3d 249, 354 (5th Cir. 2021) (en banc) (per curiam) (holding that a provision of the Indian Child Welfare Act authorizing the Secretary of the Interior to "promulgate such rules and regulations as may be necessary to carry out the provisions" of the statute "clearly grants" authority "to promulgate standards that are binding upon all parties" (quotation omitted)), *aff'd in part and rev'd in part on other grounds*, 599 U.S. 255 (2023).

3. To the extent that the FTC Act's plain text left any doubt about the Commission's rulemaking authority regarding unfair methods of competition, Congress ratified the Commission's legislative rulemaking authority when it amended the Act in 1975.

Between 1963 and 1978, the Commission exercised its Section 6(g) authority to promulgate dozens of legislative rules aimed at preventing unfair methods of competition and unfair or deceptive acts or practices. *See* 89 Fed. Reg. at 38,349-50. In 1973, the D.C. Circuit addressed a challenge to one of these regulations, in which the plaintiffs argued that "the Commission lacks authority under its governing statute to issue" "substantive rules defining the statutory standard of illegality." *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 673-75 (D.C. Cir. 1973).

The court of appeals rejected that argument, explaining that "the face of the statute" "specifically provides for rule-making by the Commission." *National Petroleum*, 482 F.2d at 676; *see also id.* at 677 ("Section 6(g) clearly states that the Commission may make rules and regulations for the purpose of carrying out the provisions of Section 5[.]" (quotation omitted)). The court further explained that its construction of the statute "to permit the Commission to promulgate binding substantive rules" accorded with "the construction courts have given similar provisions in the authorizing statutes of other administrative agencies." *Id.* at 678-81 (collecting statutes and cases). To find otherwise, the court explained, "would render the Commission ineffective to do the job assigned it by Congress." *Id.* at 697-98; *see also United States v. JS & A Grp., Inc.*, 716 F.2d 451, 454 (7th Cir. 1983) (agreeing with, and "incorporat[ing] by reference," *National Petroleum*'s "lengthy discussion of the Commission's rulemaking authority under section 6(g)").

Two years after the D.C. Circuit's decision—and following a decade in which the Commission had routinely promulgated legislative rules pursuant to Section 6(g), including many rules invoking the Commission's authority to regulate unfair methods of competition—Congress revisited the Commission's rulemaking authority. In 1975, Congress enacted amendments to the FTC Act, which were codified as Section 18 of the Act. *See* Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183. Those amendments addressed the Commission's authority to prescribe rules "with respect to unfair or deceptive acts or practices"—including "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce"—by imposing additional procedural constraints on the Commission's exercise of that rulemaking authority. *See* 15 U.S.C. § 57a. In addition, Congress prohibited the Commission from exercising its Section 6(g) authority to promulgate rules governing unfair or deceptive acts or practices without complying with Section 18's procedural requirements. Thus, Congress 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). And Congress included a provision in Section 18 providing that the "Commission shall have no authority under" the Act—"other than its authority" under Section 18—"to prescribe any rule with respect to unfair or deceptive acts or practices." *Id.* § 57a(a)(2).

At the same time, Congress preserved the Commission's authority to promulgate rules under Section 6(g) relating to unfair methods of competition. Thus, Congress left intact Section 6(g)'s grant of rulemaking authority, subject to the carveout provided for rules relating to unfair or deceptive acts or practices. And in Section 18, Congress specifically provided that the restriction on using other sections of the FTC Act to prescribe rules relating to unfair or deceptive acts or practices "shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition." 15 U.S.C. § 57a(a)(2).

This preservation of rulemaking authority was no accident. Instead, Congress was specifically aware of the Commission's and D.C. Circuit's understanding of the scope of Section 6(g) and intentionally declined to disturb that authority with respect to rules regarding unfair methods of competition. In enacting the amendments, Congress considered and rejected a proposal that would have prohibited the Commission from "prescribing rules with respect to unfair competitive practices." S. Rep. No. 93-1408, at 30 (1974) (Conf. Rep.). Moreover, the conference report adopting the final text of the amendments reiterated Congress's understanding that the 1975 amendments "do[] not affect any authority of the FTC under existing law to prescribe rules with respect to unfair methods of competition." *Id.* at 32. Confirming the point, the Senate debate immediately before the vote on the conference report explicitly discussed *National Petroleum* and the Commission's competition rulemaking

authority. *See* 120 Cong. Rec. 40,173 (1974) (statement of Sen. Hart) (quoting *National Petroleum* and explaining that the new procedural requirements established in the 1975 amendments "are limited to unfair or deceptive acts or practices rules").

In short, throughout the 1960s and early 1970s, the Commission routinely exercised its Section 6(g) authority to promulgate binding legislative rules regarding both unfair methods of competition and unfair or deceptive acts or practices, and that exercise of authority was upheld by the D.C. Circuit. Shortly thereafter, Congress revisited the Commission's authority, imposing additional procedural requirements on the Commission's exercise of its rulemaking authority to define and prohibit unfair or deceptive acts or practices but expressly declining to curtail the Commission's Section 6(g) authority with respect to rules regarding unfair methods of competition. Congress thus ratified the Commission's competition rulemaking authority. *See Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc.*, 586 U.S. 123, 131 (2019) ("[W]e presume that when Congress reenact[s]" the same language, it "adopt[s an] earlier judicial construction of that phrase."); *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." (quotation omitted)); *see also* Dkt. No. 59, at 14 (recognizing correctly the import of the 1975 amendments and noting that they "specifically say[] the FTC's rulemaking with regard to unfair methods of competition is undisturbed").

4. Multiple other provisions of the FTC Act further confirm that Section 6(g) empowers the Commission to promulgate legislative rules with binding effect.

First, a different provision of the Act, enacted in 1980, establishes procedural requirements for all Commission rulemakings and defines a "rule" as a regulation promulgated under Section 6 or 18 of the Act. 15 U.S.C. § 57b-3(a)(1). But the provision exempts from those requirements all "interpretive rules, rules involving Commission management or personnel, general statements of policy, or rules relating to Commission organization, procedure or practice." *Id.* That provision thus confirms that the Commission's Section 6(g) rulemaking authority must encompass more than interpretive rules, procedural rules, and general statements of policy—that is, it must encompass legislative rules; otherwise, the provision's reference to Section 6 would be superfluous.

Second, a different part of the same 1980 amendments includes language recognizing that the Commission's exercise of its Section 6(g) rulemaking authority may properly have substantial national effects. Specifically, the provision states that the procedural requirements apply to an amendment to a rule if the Commission "estimates that such amendment will have an annual effect on the national economy of $100,000,000 or more." 15 U.S.C. § 57b-3(a)(1)(A). That provision confirms Congress's understanding that the Commission may properly promulgate rules, including under Section 6(g), that have large, national economic effects. And although interpretive rules or statements of policy may sometimes have such large effects, the

provision bolsters the conclusion that Congress understood that the Commission may properly promulgate legislative rules because those rules are more likely to have economic effects of this size.

5. In district court, plaintiff argued that the Commission's authority to implement its statutory directive to prevent unfair methods of competition is limited to enforcement through case-by-case actions and that the Commission may not promulgate legislative rules. *See, e.g.*, Dkt. No. 25, at 19-20. But that argument, too, is inconsistent with the statutory text and settled precedent.

Section 6(g) confers upon the Commission broad authority to make rules and regulations to carry out the FTC Act's substantive mandates, including its directive to the Commission to prevent unfair methods of competition. And as explained, *see supra* pp. 23-25, the language Congress used in Section 6(g) to authorize the Commission to promulgate binding rules is substantially identical to language used in statutes that the Supreme Court has routinely and repeatedly interpreted to confer broad legislative rulemaking authority.

In addition, the Supreme Court has confirmed that such a rulemaking provision authorizes an agency to engage in legislative rulemaking to carry out its substantive mandate even when the enabling statute also allows the agency to carry out the same substantive mandate through adjudication, as the FTC Act does. Thus, the Court has explained, citing a long line of cases, that if Congress has conferred rulemaking authority on the agency, then "even if a statutory scheme requires individualized

determinations, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority." *American Hosp. Ass'n*, 499 U.S. at 612; *see also*, *e.g.*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378-80 (1999); *Mobil Oil Expl. & Producing Se. Inc. v. United Distribution Cos.*, 498 U.S. 211, 223-24 (1991); *Edwards v. Dewalt*, 681 F.3d 780, 786 (6th Cir. 2012). "A contrary holding would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding." *Heckler v. Campbell*, 461 U.S. 458, 467 (1983).

Similarly, in *Lopez v. Davis*, 531 U.S. 230 (2001), the Supreme Court held that an agency has the authority to issue a rule that categorically resolves issues that can be applied to individual determinations contemplated by the statute. The statute at issue in *Lopez* provided that the Bureau of Prisons could reduce the prison term of an inmate convicted of a nonviolent felony in certain cases. The agency issued a rule that categorically denied early release to prisoners who possessed firearms in certain circumstances. *See id.* at 235-36. A prisoner challenged the rule, asserting that the statute required the Bureau to decide eligibility on a case-by-case basis. *See id.* at 236-37. The Court disagreed, "reject[ing]" the argument "the agency must not make categorical exclusions, but may rely only on case-by-case assessments." *Id.* at 243. The Court held that " '[e]ven if a statutory scheme requires individualized determinations,' which this scheme does not, 'the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly

expresses an intent to withhold that authority.'" *Id.* at 243-44 (quoting *American Hosp. Ass'n*, 499 U.S. at 612). The Court explained that "[t]he Bureau is not required continually to revisit issues that may be established fairly and efficiently in a single rulemaking proceeding." *Id.* (quotation omitted).

In large part, this is exactly what the Non-Compete Rule does. No party disputes that the Commission may properly initiate individual enforcement actions against employers who use non-competes. But such individual enforcement actions will present recurring questions regarding the anti-competitive effects of non-competes. Through the Non-Compete Rule, the Commission has resolved those issues of general applicability, evaluating the relevant evidence and determining on a class-wide basis that non-competes are restrictive and exclusionary, that they tend to negatively affect competitive conditions, and that non-competes for workers other than senior executives carry additional indicia of unfairness. By resolving those general issues through rulemaking rather than adjudications, the Commission has permitted substantial public input, provided clear notice to affected parties, and ensured even-handed application of the FTC Act's prohibitions.

B. The major-questions doctrine does not alter that conclusion.

Although the district court recognized that the FTC Act authorizes the Commission to issue binding legislative rules to prevent unfair methods of competition, the district court applied the major-questions doctrine and concluded that plaintiff is likely correct that the Commission lacks authority to engage in

"substantive rulemaking of th[e] magnitude" of the Non-Compete Rule. Dkt. No. 59, at 22. That conclusion was erroneous. Section 6(g) makes clear that the Commission has authority to promulgate legislative rules regarding unfair methods of competition—and the statutory text is not, in any event, susceptible of the district court's construction permitting the Commission to promulgate legislative rules that carry trivial, but not significant, effects. Regardless, nothing about the statutory context supports the notion that the Non-Compete Rule is the sort of extraordinary agency action that might trigger major-questions concerns.

1. In certain "extraordinary cases," the Supreme Court has held that "separation of powers principles and a practical understanding of legislative intent" counsel caution before "read[ing] into ambiguous statutory text the delegation claimed to be lurking there." *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (quotation omitted). In such cases, the agency "must point to clear congressional authorization" for its action. *Id.* (quotation omitted).

Those extraordinary cases cannot support any conclusion that the Commission lacks legislative rulemaking authority and do not support the district court's construction of the statute. The major-questions doctrine is a particular application of the principle that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *West Virginia*, 597 U.S. at 721 (quotation omitted). The doctrine is an "interpretive tool" for "discerning—not

departing from—the text's most natural interpretation." *Biden v. Nebraska*, 600 U.S. 477, 508, 511 (2023) (Barrett, J., concurring).

As explained, "in any case of statutory construction," the court's analysis "begins with the language of the statute" and, "where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (quotation omitted). As the district court correctly concluded, the text of Section 6(g) makes clear—especially when considered in context—that the Commission has authority to promulgate binding rules regarding unfair methods of competition. *See* Dkt. No. 59, at 14; *see also supra* pp. 21-30. Given that the statutory text, history, and context all reinforce that same conclusion, the major-questions doctrine cannot demand a contrary result. After all, the doctrine "does not mean that courts have an obligation (or even permission) to choose an inferior-but-tenable alternative that curbs the agency's authority." *Nebraska*, 600 U.S. at 516 (Barrett, J., concurring).

The major-questions doctrine does not support the district court's conclusion that, although the Commission has authority to promulgate some legislative rules, it may not promulgate rules of "this magnitude." Dkt. No. 59, at 22. Section 6(g) confers authority on the Commission "to make rules and regulations for the purpose of carrying out the provisions of" the FTC Act. 15 U.S.C. § 46(g). Nothing in the statutory text could plausibly be interpreted to say that the Commission may promulgate binding rules if—but only if—they are of a small magnitude.

2. Regardless, the major-questions doctrine is not implicated here, where the Commission's assertion of authority—to promulgate a rule defining and prohibiting an unfair method of competition—falls squarely within the Commission's core expertise and mandate.

As the Supreme Court has described the major-questions doctrine, it applies in those "extraordinary" circumstances where an agency has asserted authority of such unusual "history" and "breadth" and "significance" that there is "a reason to hesitate before concluding that Congress meant to confer such authority." *West Virginia*, 597 U.S. at 721 (quotation omitted). Thus, the Court's application of the doctrine has generally reflected the Court's conclusion that the agency was attempting to find "elephants in mouseholes" by relying on "relatively narrow statutes" to ground "broad invocations of power" or was attempting to "regulate[] outside its wheelhouse." *Nebraska*, 600 U.S. at 517-18 (Barrett, J., concurring) (quotation omitted).

For example, in *West Virginia*, the Court perceived the Environmental Protection Agency to be relying on a "little-used backwater" provision of the Clean Air Act "that was designed to function as a gap filler" to support the agency's authority to issue the Clean Power Plan, which would have "restructur[ed] the Nation's overall mix of electricity generation." 597 U.S. at 720, 724, 730. Similarly, in *Alabama Ass'n of Realtors v. Department of Health & Human Services*, the Centers for Disease Control and Prevention relied on its general authority to "prevent the

introduction, transmission, or spread of communicable diseases" as a basis for a nationwide "eviction moratorium." 594 U.S. 758, 760-61 (2021) (per curiam) (quotation omitted). The Court perceived that general authority to be a "wafer-thin reed on which to rest such sweeping power." *Id.* at 765.

The Commission's assertion of authority here does not implicate these same concerns. The Commission maintains—and the district court agreed in part—that it has statutory authority to promulgate rules to carry out the FTC Act's substantive prohibition on unfair methods of competition. But the simple assertion of such legislative rulemaking authority cannot be sufficient to trigger major-questions concerns. Indeed, Congress routinely grants agencies across the Executive Branch the authority to issue binding regulations—and all parties agree that Congress has specifically empowered the Commission to issue at least some such regulations in the unfair or deceptive acts or practices context. It is thus hard to imagine—and the district court did not cite any authority supporting the proposition—that the simple assertion of rulemaking authority to regulate unfair methods of competition could be the sort of extraordinary assertion that might raise major-questions concerns.

Moreover, as the district court recognized, the Non-Compete Rule falls squarely within the Commission's "core mandate" to prevent unfair methods of competition, Dkt. No. 59, at 24 (quotation omitted), as set forth in Section 5(a)—the substantive centerpiece of the FTC Act. Considered against the scope of Congress's directive to prevent unfair methods of competition, the Non-Compete Rule is a

targeted regulatory effort to prohibit one specific unfair business practice based on years of study, reams of empirical evidence, and extensive engagement with the public and regulated entities. *See supra* pp. 9-13. And neither plaintiff nor the district court has disputed that the Commission may initiate individual enforcement actions against the use of non-compete clauses to enforce Section 5(a)'s prohibition. Given that context, the Non-Compete Rule rests comfortably within the agency's core regulatory authority.

Indeed, in many respects, the Non-Compete Rule is similar to the vaccination mandate for health care workers that this Court upheld in *Florida v. Department of Health & Human Services*. As this Court explained in rejecting a major-questions argument in that case, the Secretary of Health and Human Services may issue regulations "for the 'administration' of Medicare and Medicaid and the 'health and safety' of recipients." *Florida*, 19 F.4th at 1287. And a vaccination mandate for healthcare workers fit well within that "broad grant of authority" because the possibility of unvaccinated workers' transmitting disease to patients would be "the very opposite of efficient and effective administration" and would undermine the health and safety of patients. *Id.* at 1287-88. Thus, this Court held, "when it comes to vaccination mandates, there was no reason for Congress to be more specific than authorizing the Secretary to make regulations for the 'health and safety' of Medicare and Medicaid recipients." *Id.*

So too here. Congress directed the Commission to prevent unfair methods of competition. To properly carry out that direction, the Commission is required to use its expertise to determine whether specific practices fall within the broad and flexible statutory prohibition. Sometimes, the Commission may do so through individual adjudications. But the statute also expressly authorizes the Commission to issue rules and regulations, and that authorization plainly encompasses the authority to issue a binding rule defining a practice as a prohibited unfair method of competition. Nothing about the exercise of that rulemaking authority reflected in the Non-Compete Rule—a Rule that is, as the district court put it, "in the 'wheelhouse' of the FTC under Section 5," Dkt. No. 59, at 21—implicates the concerns underpinning the major-questions doctrine.

3. In nonetheless concluding that the Commission's assertion of authority to promulgate the Non-Compete Rule implicated major-questions principles, the district court focused on the relatively large economic effects of the Rule and the past regulation of non-compete clauses by States. Dkt. No. 59, at 19-21. But in the specific context of the FTC Act, neither the economic significance of the Commission's rulemaking authority nor the regulatory overlap with States provides any "reason to hesitate." *West Virginia*, 597 U.S. at 721 (quotation omitted).

First, the fact that Commission regulations—including the Non-Compete Rule—may have relatively large economic effects is an inherent feature of the statutory scheme and was clearly contemplated by Congress. As explained, Congress

expressly directed the Commission to "make rules and regulations for the purpose of carrying out" its substantive mandate to "prevent" "unfair methods of competition in or affecting commerce." 15 U.S.C. §§ 45(a)(2), 46(g). In so providing, Congress envisioned that the Commission's actions would affect commerce on a nationwide scale. It is unsurprising that any such nationwide regulation of commercial practices may have relatively large economic effects. Congress itself expressly recognized that the Commission may undertake economically significant rulemaking, as reflected in the statutory provision applying certain requirements to any regulatory amendment with "an annual effect on the national economy of $100,000,000 or more." 15 U.S.C. § 57b-3(a)(1)(A). Thus, as the district court properly recognized, "the FTC Act does contemplate that large sums of money can be implicated by FTC rulemaking." Dkt. No. 59, at 21. It would be strange for Congress to have granted the Commission broad and significant authority but have limited its use to small and trivial ends.

Second, it is of no moment that some States have previously regulated non-compete clauses more comprehensively than has the federal government. Of course, States will often regulate commercial activity, including unfair conduct, occurring within the State. But the FTC Act reflects Congress's determination that such State-by-State regulation of commercial activity alone may be insufficient. Congress thus established the Commission to regulate unfair methods of competition and unfair or deceptive acts or practices when such activities affect interstate commerce, and for

more than a century, the Commission has exercised its authority to protect the public from the sorts of commercial practices that States may also independently regulate.

Moreover, Congress and many federal agencies routinely directly regulate commercial activity. Even in the specific context of non-compete clauses, the Supreme Court recognized more than a century ago that the federal antitrust laws could validly be applied to regulate commercial activity including the "recurring" use of non-competes. *See United States v. American Tobacco Co.*, 221 U.S. 106, 183 (1911). The regulation of commercial activity generally—and even non-compete clauses specifically—is therefore not "the particular domain of state law," *Alabama Ass'n of Realtors*, 594 U.S. at 764, and the Commission's assertion of authority to regulate that activity does not implicate major-questions principles.

II. The equitable factors do not support preliminary relief.

A. Plaintiff does not face any irreparable harm.

Even setting aside the merits, plaintiff has not demonstrated that it will suffer irreparable harm absent an injunction. To make that showing, plaintiff must establish a "substantial likelihood" of an "actual and imminent"—and irreparable—injury from the challenged conduct. *Siegel*, 234 F.3d at 1176 (quotation omitted). The harm must also be so "certain and great and of such imminence that there is a clear and present need for equitable relief." *Morehouse Enters., LLC v. ATF*, 78 F.4th 1011, 1017 (8th Cir. 2023) (quotation omitted). Plaintiff has not demonstrated such harm.

1. In concluding that plaintiff had made the required showing, the district court determined that plaintiff would face irrecoverable "compliance costs" from the Non-Compete Rule. Dkt. No. 59, at 27. But the only compliance-related activity that the Rule requires plaintiff to engage in is to notify current and former employees subject to existing non-compete clauses that those clauses cannot be legally enforced. *See* 89 Fed. Reg. at 38,503. That notification may be done by email, text message, mail, or hand-delivered paper. *See id.* And the Commission provided model notices that employers may copy and paste, and which are phrased to allow employers to send mass notifications without needing to identify which employees have non-competes. *See id.* at 38,346.

Plaintiff stated in district court that, in addition to its current employees, it has 45 former employees who remain subject to non-compete clauses. Dkt. No. 57-1, at 2. To comply with the Rule's notification requirement, plaintiff could send a single office-wide email to its current employees along with an email (or text messages or letters) to its 45 former employees. In district court, plaintiff averred that complying with this requirement would "require a significant amount of time." Dkt. No. 25-1, at 12. But nowhere did plaintiff attempt to quantify, or provide any additional details about, the employee time required—or the cost associated with that time—to prepare and send a small handful of standardized notifications. Thus, plaintiff failed to demonstrate that the costs of complying with the Rule's notification requirement are "more than de minimis," as would be required at a minimum to support a preliminary

injunction. *Restaurant Law Ctr. v. U.S. Dep't of Labor*, 66 F.4th 593, 600 (5th Cir. 2023) (quotation omitted).

Regardless, even if plaintiff could clear the de minimis threshold, plaintiff certainly cannot demonstrate that the cost of sending notifications is anything extraordinary—and "ordinary compliance costs are typically insufficient to constitute irreparable harm." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005). Plaintiff proffered no evidence in district court to quantify its asserted costs or to support the conclusion that they are great and imminent burdens such as could justify equitable relief. *See Morehouse*, 78 F.4th at 1017; *cf. Siegel*, 234 F.3d at 1177 (burden must be "serious" to constitute irreparable harm).

Finally, even if plaintiff had demonstrated some irreparable harm from the notification requirement, any such harm would not support the preliminary injunction against the entire Non-Compete Rule that plaintiff received from the district court. Fundamental constitutional and equitable principles require that courts grant relief only as necessary to remedy "the inadequacy that produced the plaintiff's injury." *Gill v. Whitford*, 585 U.S. 48, 65-66 (2018) (quotation omitted) (Article III); *see also Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (similar for equity). Any harm generated by the need to comply with the notification requirement would be alleviated by an injunction prohibiting the Commission from enforcing that requirement against plaintiff, so any injunction based on that harm must be limited to that requirement. *Cf.* 89 Fed. Reg. at 38,505 (severability clause).

2. In addition to the costs required to comply with the Non-Compete Rule, plaintiff also asserted in district court that it would suffer irreparable injury if the Rule were to take effect because it would choose to spend additional funds to determine how to react to the Rule. In particular, plaintiff averred that it would "spend between $20,000 and $50,000 in outside legal costs"—along with "45 additional hours of attention from" plaintiff's in-house "legal team"—to "review the structure of its existing agreements, strategize on necessary changes to [plaintiff's] existing agreements and business model, and ensure compliance with the" Rule. Dkt. No. 57-1, at 2-3. The district court believed that these costs also supported plaintiff's assertion of irreparable injury. Dkt. No. 59, at 26.

That is incorrect. Even in the context of standing, a plaintiff cannot spend its way into court. Thus, if an agency action would not otherwise injure a party, the party may not choose to spend money in response to the action and thereby generate standing; instead, any such harm would be "self-inflicted" injury that is not "legally cognizable." *Colorado v. U.S. EPA*, 989 F.3d 874, 888 (10th Cir. 2021); *see also Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020) (explaining that the plaintiff "'severely undermines' its claim" where "harm is largely self-inflicted"). Similarly, it is well-settled—again, even in the standing context—that the costs of litigation to challenge a defendant's action cannot themselves constitute a cognizable injury giving rise to Article III standing. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107

(1998) ("Obviously, . . . a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit.").

So too here. As explained, the Non-Compete Rule itself does not irreparably harm plaintiff; the only compliance obligation it imposes at all is that plaintiff must provide a notice to its current and former employees currently subject to non-competes. Plaintiff thus cannot choose to expend funds on legal fees related to business or legal strategy regarding the Rule and thereby generate an injury sufficient to support a preliminary injunction. Indeed, if such expenses were sufficient, any plaintiff could claim irreparable harm from any agency action so long as the plaintiff determined it wished to strategize with outside counsel about how to respond to the regulation. That is not the law.

B. The balance of the equities and the public interest compel reversal.

Even if plaintiff had demonstrated some irreparable economic harm, that minimal harm could not outweigh the countervailing interests of the Commission and the public in enforcement of the Non-Compete Rule.

1. The Commission and the public have substantial interests weighing against the entry of a preliminary injunction preventing enforcement of the Non-Compete Rule. For one, 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)

(quotation omitted). That is particularly true in this case, where the district court did not dispute the Commission's determination that non-compete clauses are generally unfair methods of competition and are thus prohibited under the FTC Act. Any injunction prohibiting the Commission from enforcing the Rule against plaintiff if it continues to engage in conduct that the Commission has properly determined is illegal inflicts irreparable harm on the Executive, Congress, and the public.

In addition, as the Commission explained in the Non-Compete Rule, the maintenance of non-compete clauses has substantial negative effects on workers, the economy, and the public. Non-competes reduce labor mobility and efficient matching between workers and employers, which suppresses wages for all workers (including those not subject to non-competes) and undermines productivity. 89 Fed. Reg. at 38,379-84. Moreover, non-competes inhibit new business formation and innovation by preventing workers from leaving their jobs to start competing firms and by preventing new and existing firms from hiring the workers that they need to compete. *Id.* at 38,388-91, 38,394-95. Those deleterious economic effects are underscored by the comments provided to the Commission by workers and entrepreneurs during the rulemaking process. Those comments provided numerous examples of workers who were prevented from taking a better job or starting a business by non-compete clauses, and the comments explained in detail how workers who are trapped by non-compete clauses may experience lower wages and worse working conditions. *See id.* at 38,342-46. Even an injunction limited to plaintiff affects persons and entities beyond

just plaintiff itself—including plaintiff's employees and other businesses. Moreover, as described in the Rule, leaving non-competes in place is likely to have adverse spillover effects on economic growth in the community in which plaintiff is situated. The district court's injunction thus directly and tangibly harms the current and former employees of plaintiff who are subject to non-compete clauses, as well as other workers and businesses who experience the negative spillover effects of plaintiff's use of those clauses.

2. The district court did not dispute the benefits of the Non-Compete Rule—or the concomitant negative effects of its injunction—for workers, like plaintiff's, who are subject to non-compete clauses; for businesses that would otherwise be free to attract that talent; or for the economy as a whole. Instead, the district court rejected the countervailing equities of the government and the public primarily on the ground that "the government may in fact not be operating within the bounds of the statute." Dkt. No. 59, at 26.

But that conclusion rests on a fundamental misapplication of the preliminary injunction framework. If the district court's approach were correct, the merits inquiry and equitable inquiry would collapse into one; any plaintiff who could demonstrate a likelihood of success on the merits could thereby negate any countervailing equities.

Not only does that position disregard the inherently tentative nature of a merits determination at the preliminary injunction stage, it has also been emphatically rejected by the Supreme Court. As the Court has explained, the preliminary injunction

framework requires distinct merits and equities showings, and, in all cases, courts are required to "balance the competing claims of injury" and "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (quotation omitted). In *Winter* itself, the Supreme Court declined to "address the lower courts' holding that plaintiffs" had "established a likelihood of success on the merits." *Id.* at 23-24. Nonetheless, the Court ultimately reversed the lower courts' entry of a preliminary injunction, concluding "that the balance of equities and consideration of the overall public interest" weighed in favor of the government—notwithstanding the Court's acceptance of the lower courts' conclusion that the agency action in question was likely unlawful. *Id.* at 26.

Similarly, the Supreme Court "has consistently rejected invitations" in other contexts "to replace traditional equitable considerations with a rule that an injunction automatically follows a determination" that a defendant acted illegally. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392-93 (2006). That is true even at final judgment, when a court's conclusion regarding a defendant's illegal action is final rather than—as at the preliminary relief stage—only tentative. *Id.*

Thus, the district court erred in failing to weigh the harms of its injunction against plaintiff's assertions of compliance-related economic injury. Any proper balancing of those competing harms would compel the conclusion that plaintiff is not entitled to preliminary relief.

CONCLUSION

For the foregoing reasons, the district court's entry of a preliminary injunction should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,561 words. This brief also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6), because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

s/ Urja Mittal
URJA MITTAL

ADDENDUM

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15 U.S.C. § 45(a)

§ 45. Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(4) (A) For purposes of subsection (a), the term "unfair or deceptive acts or practices" includes such acts or practices involving foreign commerce that—

(i) cause or are likely to cause reasonably foreseeable injury within the United States; or

(ii) involve material conduct occurring within the United States.

(B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.

. . .

15 U.S.C. § 46(g)

§ 46. Additional powers of Commission

The Commission shall also have power—

. . .

(g) Classification of corporations; regulations

From time to time classify corporations and (excepted as provided in section 57a(a)(2) of this title) to make rules and regulations for the purpose of carrying out the provisions of this subchapter.

. . .

15 U.S.C. § 57a(a)-(b)

§ 57a. Unfair or deceptive acts or practices rulemaking proceedings

(a) Authority of Commission to prescribe rules and general statements of policy

(1) Except as provided in subsection (h), the Commission may prescribe—

(A) interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title), and

(B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title), except that the Commission shall not develop or promulgate any trade rule or regulation with regard to the regulation of the development and utilization of the standards and certification activities pursuant to this section. Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

(2) The Commission shall have no authority under this subchapter, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of

this title). The preceding sentence shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce.

(b) Procedures applicable

(1) When prescribing a rule under subsection (a)(1)(B) of this section, the Commission shall proceed in accordance with section 553 of title 5 (without regard to any reference in such section to sections 556 and 557 of such title), and shall also

(A) publish a notice of proposed rulemaking stating with particularity the text of the rule, including any alternatives, which the Commission proposes to promulgate, and the reason for the proposed rule;

(B) allow interested persons to submit written data, views, and arguments, and make all such submissions publicly available;

(C) provide an opportunity for an informal hearing in accordance with subsection (c); and

(D) promulgate, if appropriate, a final rule based on the matter in the rulemaking record (as defined in subsection (e)(1)(B)), together with a statement of basis and purpose.

(2) (A) Prior to the publication of any notice of proposed rulemaking pursuant to paragraph (1)(A), the Commission shall publish an advance notice of proposed rulemaking in the Federal Register. Such advance notice shall—

(i) contain a brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and possible regulatory alternatives under consideration by the Commission; and

(ii) invite the response of interested parties with respect to such proposed rulemaking, including any suggestions or alternative methods for achieving such objectives.

(B) The Commission shall submit such advance notice of proposed rulemaking to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Energy and Commerce of the House of Representatives. The Commission may use such additional mechanisms as the Commission considers useful to obtain suggestions regarding the content of the area of inquiry before the publication of a general notice of proposed rulemaking under paragraph (1)(A).

(C) The Commission shall, 30 days before the publication of a notice of proposed rulemaking pursuant to paragraph (1)(A), submit such notice to the

Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Energy and Commerce of the House of Representatives.

(3) The Commission shall issue a notice of proposed rulemaking pursuant to paragraph (1)(A) only where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent. The Commission shall make a determination that unfair or deceptive acts or practices are prevalent under this paragraph only if—

(A) it has issued cease and desist orders regarding such acts or practices, or

(B) any other information available to the Commission indicates a widespread pattern of unfair or deceptive acts or practices.

. . .

15 U.S.C. § 57b-3(a)

§ 57b-3(a). Rulemaking process

(a) Definitions

For purposes of this section:

(1) The term "rule" means any rule promulgated by the Commission under section 46 or section 57a of this title, except that such term does not include interpretive rules, rules involving Commission management or personnel, general statements of policy, or rules relating to Commission organization, procedure, or practice. Such term does not include any amendment to a rule unless the Commission—

(A) estimates that such amendment will have an annual effect on the national economy of $100,000,000 or more;

(B) estimates that such amendment will cause a substantial change in the cost or price of goods or services which are used extensively by particular industries, which are supplied extensively in particular geographic regions, or which are acquired in significant quantities by the Federal Government, or by State or local governments; or

(C) otherwise determines that such amendment will have a significant impact upon persons subject to regulation under such amendment and upon consumers.

(2) The term "rulemaking" means any Commission process for formulating or amending a rule.