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
No. 5:24-cv-00316-TJC

BRIEF OF THE STATES OF FLORIDA, ARKANSAS, GEORGIA, IDAHO, INDIANA, IOWA, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA, AND WEST VIRGINIA AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE

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January 22, 2025

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133. State of Louisiana,

134. State of Maine,

135. State of Maryland,

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138. State of Minnesota,

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140. State of Montana,

141. State of Nebraska,

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145. State of New York,

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148. State of Rhode Island,

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STATEMENT OF THE ISSUES

Whether the Federal Trade Commission's ("FTC") ban on virtually all non-compete agreements is a lawful restriction on "[u]nfair methods of competition." 15 U.S.C. § 45(a)(1).

INTEREST OF AMICUS CURIAE

The District of Columbia and seventeen states ("the supporting states") submitted an amicus brief in support of the FTC arguing that the Commission's near-categorical ban on non-compete agreements is sound economic policy. Brief of the District of Columbia, et al., at 18–19, ECF No. 47. The elected policymakers of most of those states disagree. FTC, *Dissenting Statement of Commissioner Andrew N. Ferguson, Joined by Commissioner Melissa Holyoak* 4 (June 28, 2024), https://tinyurl.com/3j8dxrtx ("*Ferguson Dissent*").[1] Just four states ban non-compete agreements altogether. *Id.* While they vary as to the details, every other state generally allows non-compete agreements, so long as they are reasonable. *Id.*

That approach recognizes that not *all* non-compete agreements are unfair. They certainly can be, but they very often achieve broad pro-competitive benefits. Among other things, reasonable non-compete agreements give employers breathing room to hire key employees and share critical information with them—allowing the creation of those jobs in the first place. And there is no sound basis to conclude as a categorical

[1] *See also* State Noncompete Law Tracker, Economic Innovation Group (Oct. 11, 2024), https://eig.org/state-noncompete-map/.

matter that alternatives, such as non-disclosure agreements, intellectual-property rights, and invention-assignment agreements, suffice to achieve the same benefits. *Id.* at 37–40. The benefits of a non-compete clause, the burdens imposed, and the effectiveness of alternatives are fact-dependent questions—the answers to which will vary from agreement to agreement, business to business, and state to state.

In finding for the first time in the history of the 110-year-old Federal Trade Commission Act ("FTCA") the authority to ban virtually all non-compete agreements as "[u]nfair methods of competition," 15 U.S.C. § 45(a)(1), the Commission rejected the consensus of 46 states that contracting parties should be free to negotiate and execute reasonable non-compete clauses. Whether under the presumption against preemption or the major-questions doctrine, the FTCA falls well-short of the clarity necessary to undergird the Commission's invasion and displacement of this area of traditional state concern, which would invalidate millions of agreements with potentially massive economic impact across the country.

For the reasons set forth below, the undersigned amici states ask this Court to affirm.

SUMMARY OF THE ARGUMENT

The Commission's rule exceeds the scope of the authority that Congress bestowed on it in the FTCA. That statute, which limits the Commission to preventing "[u]nfair methods of competition," does not justify a nationwide ban on non-competes. 15 U.S.C. § 45(a)(1).

I. For starters, Congress must speak clearly when it intends to alter the federal-state balance of authority in an area of law. *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991). Indeed, courts are not "quick to assume" that Congress has preempted vast swaths of state law, because that "radical[] readjust[ment]" is something Congress does not often do. *Bond v. United States*, 572 U.S. 844, 858 (2014) (quotation omitted).

A radical shift is precisely what has occurred here. States have regulated non-compete clauses and contract law since the Founding. The federal government, in contrast, has never done so. This dramatic change from state to federal regulation requires a clear statement from Congress that does not exist.

II. The rule also raises major questions of economic and political significance. Congress does not silently delegate such choices to administrative agencies. When an agency's action raises major questions, Congress must clearly authorize that action in the relevant administrative statute.

The rule has all the hallmarks of a major question. Its economic consequences will rank in the hundreds of billions of dollars. It will halt the ongoing state and federal political debates about how best to regulate non-compete clauses. It will shift sizable power from the states to the federal government. And the Commission has not purported to have this sweeping power in its more than 100 years of existence. A clear statement authorizing the Commission's rule is therefore necessary, and no such clear statement exists in the FTCA.

III. Even without those canons, the rule cannot stand. The FTCA incorporates antitrust law that has long subjected nearly every type of restraint on trade to reasonableness balancing, unless that type of agreement proves consistently unreasonable with little procompetitive benefit. Non-compete agreements are subject to reasonableness balancing, and reasonable non-compete agreements are not categorically unreasonable. The Commission has neither the considerable experience nor the evidence to dispute that premise. And despite the Commission's efforts to paper over empirical evidence showing the benefits of non-compete clauses, these agreements plainly secure significant procompetitive benefits in the marketplace.

ARGUMENT

The FTCA bars "[u]nfair methods of competition" and gives the Federal Trade Commission the power to enforce that prohibition. 15 U.S.C. § 45(a)(1). But "courts must exercise independent judgment in determining the meaning of statutory provisions." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2262 (2024). Even when a statute "delegates discretionary authority to an agency," the courts must still "independently interpret the statute" by "fix[ing] the boundaries of [the] delegated authority" and "ensuring the agency has engaged in reasoned decisionmaking within those boundaries." *Id.* at 2263 (quotation omitted).

The text of the FTCA confirms that the Commission has exceeded its statutory authority for three reasons. First, Congress must speak clearly when it seeks to alter the federal-state balance. It has not done so. Second, the major-questions doctrine requires

a clear statement because the Commission's rule makes huge political and economic waves by claiming a new power in a longstanding statute. Yet there is no such clear statement. Finally, the antitrust background of the FTCA and the longstanding history of non-compete agreements both before and after its enactment confirm that reasonable non-compete agreements are not categorically "unfair."

I. THE FTCA DOES NOT CONTAIN THE CLEAR STATEMENT NECESSARY TO PREEMPT STATE LAW ALLOWING REASONABLE NON-COMPETE AGREEMENTS.

When federal statutes touch on "areas of traditional state responsibility," preemption threatens to "effect a significant change in the" balance of power between the federal and state governments. *Bond*, 572 U.S. at 858 (citing and quoting cases). Thus, "to alter the usual constitutional balance between the States and the Federal Government, [Congress] must make its intention to do so unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460 (quotation omitted). That goes double when the question is whether Congress delegated preemption authority to an administrative agency, *see Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001), particularly an agency headed by a tenure-protected board like the FTC. Thus, the Supreme Court has "assum[ed] that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority," especially where, as here, a ruling would "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* In sum, Congress must "make its intention clear and manifest if it intends to pre-empt the historic powers

of the States," *Gregory*, 501 U.S. at 460 (quotation omitted), and all the more so if Congress intends to let an agency foray into a traditional area of state power, *see* Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 Nw. Univ. L. Rev. 695, 708 (2008) (noting that "[t]he relatively small number of savings clauses suggests that" Congress does not often intend to provide preemptive power to agencies).

One such traditional area of state power is the regulation of employment agreements. *See Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979) ("Commercial agreements traditionally are the domain of state law."); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987) ("[T]he establishment of labor standards falls within the traditional police power of the State."). Indeed, the regulation of non-compete agreements specifically has deep roots in the states. English common law first permitted reasonable non-compete agreements in 1711. *Ferguson Dissent* at 2–3. Like much of the English common law, the English rules for non-competes were incorporated into state law judicially or by statute. *See, e.g.*, Fla. Stat. § 2.01 (adopting "[t]he common and statute laws of England" as they stood on "the 4th day of July, 1776"). From there, state legislatures codified and modified the English rule of reason for non-compete clauses as they saw fit. *Ferguson Dissent* at 3–5; *see also* Harlan M. Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 644–46 (1960) (discussing non-compete regulations from the late 19th and early 20th centuries); Brief of the District of Columbia, et al., at 4–5. Yet despite the convoluted picture painted by the supporting states, Brief of the District of Columbia, et al., at 4–11, nearly all states still permit reasonable non-compete

agreements, *Ferguson Dissent* at 4; *see also* State Noncompete Law Tracker, *supra* note 1. And critically, the federal government has never, until the Commission's rule, invaded that field by regulating non-compete agreements, meaning the area has been one not merely of *traditional* state regulation, but one of *exclusive* state regulation. *Ferguson Dissent* at 5.[2]

Despite all that, the Commission has seized the power to preempt all state regulation in this area. The result is a "uniform and predictable federal regulation," Brief of the District of Columbia, et al., at 1, only in the sense that it sets the ceiling for non-compete agreements in all 50 states at zero. The Commission's approach thus dramatically alters the historical federal-state balance and, accordingly, must be premised on a "plain statement" from Congress authorizing the rule. *Gregory*, 501 U.S. at 461. That is, the rule would "readjust[] the balance of state and national authority," so the FTCA must be "reasonably explicit" to empower "the Federal government [to] take[] over" those "local radiations" set aside by the rule. *BFP v. Resolution Tr. Corp.,* 511 U.S. 531, 544 (1994).

But the phrase "[u]nfair methods of competition" is anything but explicit. The FTCA is no more than a general grant of authority to "prevent . . . unfair methods of

[2] To be sure, non-competes were "contract[s] in restraint of trade" at common law, which are regulated by the Sherman Act. *Ferguson Dissent* at 5. But as Commissioner Ferguson correctly notes in his dissent, regulation of non-competes using the federal antitrust laws has all but failed. *Id.*

competition," 15 U.S.C. § 45(a)(2), and Congress does not accomplish "[e]xtraordinary grants of regulatory authority" like this through "modest words, vague terms, or subtle device[s]." *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (quotation omitted). And even if the phrase were "a colorable textual basis" for the rule, *id.* at 722, it would be an "oblique or elliptical" way to radically shift the regulatory status quo over non-compete clauses, *id.* at 723; *see also Ferguson Dissent* at 20 (describing how the Commission's supposed authority is based on "oblique language tucked away in an ancillary subsection of its organic act"). The Supreme Court has repeatedly held that such "deliberately vague" language does not show that Congress "intended to grant substantial discretion to the [agency]." *Biden v. Nebraska*, 143 S. Ct. 2355, 2372 (2023) (quotation omitted). This Court should hold the same here.

II. THE FTCA DOES NOT CONTAIN THE CLEAR STATEMENT REQUIRED BY THE MAJOR-QUESTIONS DOCTRINE.

The major-questions doctrine also counsels against the rule. In short, that canon provides context for reading statutory text. "[C]ourts expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *West Virginia*, 597 U.S. at 716 (quotation omitted). Because Congress does not "delegate" "extraordinary" authority in "cryptic" ways, courts will reject an "expansive construction of [a] statute" where that construction presents a major question and there is no clear statement confirming the agency's authority. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000). When deciding whether agency action presents

a major question, courts look to the economic and political significance of the question, whether the agency is upsetting the federal-state balance, and whether the agency has ever claimed that power before. *West Virginia*, 597 U.S. at 721–22; *see also id.* at 743–44 (Gorsuch, J., concurring, joined by Alito, J.) (discussing factors). All four factors show that the Commission's rule raises major questions.

1. When courts look at economic significance, they ask whether an administrative action would regulate "a significant portion of the American economy." *See West Virginia*, 597 U.S. at 722.

The non-compete rule will have dramatic economic consequences. The rule "invalidates thirty million existing contracts." *Ferguson Dissent* at 1. It could cause employers to decrease capital investment to the tune of nearly $100 billion. *Id.* at 13. As the Commission has admitted, the transfer of value from employers to employees would be in the hundreds of billions of dollars. Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38433 (May 7, 2024). And the Commission's rule is a "significant encroachment into the lives . . . of a vast number of employees" because it would upset their employment relations. *Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin.* (*NFIB*), 595 U.S. 109, 117 (2022) (per curiam). Those economic impacts align with prior major questions. *See Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 594 U.S. 758, 764 (2021) (per curiam) (finding an economic impact of $50 billion to be economically significant); *Biden*, 143 S. Ct. at 2373 ("between $469 billion and $519 billion"); *NFIB*, 595 U.S. at 120 ("billions of dollars in . . . compliance costs" sufficient).

2. As for political implications, courts look to whether the topic "has been the subject of an earnest and profound debate across the country." *West Virginia*, 597 U.S. at 732.

The proper way to regulate non-compete clauses has long been debated. While nearly all states permit reasonable non-competes, four states (and the District of Columbia) ban such clauses outright. *Ferguson Dissent* at 4; *see also* State Noncompete Law Tracker, *supra* note 1. And as the supporting states admit, state approaches to non-competes are "diverse" at the margins. Brief of the District of Columbia, et al., at 1, 5–8 (explaining how several states have flirted with income thresholds and banning non-competes for particular industries). With this history of disparate state regulation has come vociferous debate. More than half of the states have altered their laws on non-competes in the last 20 years, and Congress has unsuccessfully attempted to regulate non-compete agreements several times. *See Ferguson Dissent* at 14. The Commission's rule short-circuits that vigorous democratic debate and replaces it with the judgment of unelected, removal-protected officials who "Americans cannot vote . . . out," even when those bureaucrats "get it wrong." *Id.* at 7.

3. Courts also ask whether the law "intrudes into an area that is the particular domain of state law." *Ala. Ass'n*, 594 U.S. at 764. This federalism canon "travel[s]" with the major-questions doctrine because Congress rarely attempts to "intrud[e] on powers reserved to the States" in silent manners. *West Virginia*, 597 U.S. at 744 (Gorsuch, J., concurring, joined by Alito, J.). For the reasons laid out above, *supra* 5–8, few areas fall

more squarely within the states' domain. The Commission's rule therefore "intrude[s] on the traditional legislative prerogatives of the States." *Ferguson Dissent* at 11 n.88.

4. Finally, the Commission concedes that its use of this authority is unprecedented. *See* 89 Fed. Reg. at 38353 (Non-competes are "not currently subject to [the Commission's] enforcement authority"). The "lack of historical precedent, coupled with the breadth of authority that the [Commission] now claims, is a telling indication that the mandate extends beyond the agency's legitimate reach." *NFIB*, 595 U.S. at 119 (quotation omitted). Like other statutes, the FTCA is "not an open book to which the agency [may] add pages and change the plot line," one hundred years later. *West Virginia*, 597 U.S. at 723 (alteration in original) (quotation omitted).

"No regulation premised on" unfair methods of competition "has even begun to approach the size or scope of the Final Rule." *Ferguson Dissent* at 19 (quotation omitted). For the first 50 years of the FTCA, the Commission never relied on any rulemaking power for unfair methods of competition. *Id.* at 19–20. And even when the Commission did, it never created rules for non-compete clauses; in fact, the Commission had not used even its *adjudicatory* powers to bring a single case against the use of a non-compete agreement until right before it issued its rule. *Id.* at 5–6. Simply put, the rule "is by far the most extraordinary assertion of authority in the Commission's history." *Id.* at 1.

* * *

Each of these factors shows that the Commission's action implicates major questions. As a result, the FTCA must supply a clear statement authorizing the Commission

to wipe away all non-compete regulations nationwide. As discussed above, *supra* 7–8, the Act does not come close.

III. EVEN IF A CLEAR-STATEMENT RULE DOES NOT APPLY, NON-COMPETE AGREEMENTS ARE NOT CATEGORICALLY "UNFAIR METHODS OF COMPETITION."

Canons aside, the Commission's rule should fall. The Commission may prevent "[u]nfair methods of competition." 15 U.S.C. § 45(a)(1). But the antitrust principles that undergird the FTCA treat only the most pernicious of agreements as per se unlawful, retaining the background rule of reason for all others—especially for vertical agreements like non-compete clauses for employees. *Ferguson Dissent* at 35–37. Under the rule of reason's three-step framework, a person making out an unlawful practice must show that the alleged restraint of trade has substantial anti-competitive effects. *Ohio v. Am. Express Co.*, 585 U.S. 529, 541 (2018). Then, "the burden shifts to the defendant to show a procompetitive rationale for the restraint." *Id.* Lastly, the burden shifts back to the plaintiff to prove that the benefits of the agreement "could be reasonably achieved through less anticompetitive means." *Id.* at 542. Per se treatment is "appropriate only after courts have had considerable experience with the type of restraint at issue, . . . and only if they can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886–87 (2007). Where those effects are "not immediately obvious," courts are "reluctan[t]" to use the per se rule. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

"Typically only 'horizontal' restraints"—those "'imposed by agreement between competitors'—qualify as unreasonable per se." *Am. Express*, 585 U.S. at 540–41. In contrast, vertical restraints—those "imposed by agreement between firms at different levels of distribution"—are almost always subject to the rule of reason. *Id.* at 541; *see also Ferguson Dissent* at 36–37 & n.297; D. Francis & C. Sprigman, *Antitrust: Principals, Cases, and Materials* 274 (2d ed. 2024) ("Thus, today, with an asterisk for tying arrangements, no vertical restraints are per se illegal.").

The FTCA incorporates that dichotomy between per se and rule-of-reason treatment. *See Ferguson Dissent* at 35 n.286. While the FTCA is somewhat broader than the antitrust laws, that is no reason to "throw out the window more than a century of Sherman Act precedent." *Id.* The courts have consistently relied on antitrust standards when elaborating on the meaning of the Commission's authority. *See, e.g.*, *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 136 (2d Cir. 1984); *Chuck's Feed & Seed Co., Inc. v. Ralston Purina Co.*, 810 F.2d 1289, 1292–93 (4th Cir. 1987) ("[T]he FTC Act functions as a kind of penumbra around the federal antitrust statutes. . . . [T]he scope of the FTC is . . . linked to the antitrust laws."). After all, the FTCA "was designed to supplement and bolster the Sherman Act and the Clayton Act—to stop in their incipiency acts and practices which, when full blown, would violate those Acts." *Fed. Trade Comm'n v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394–95 (1953); *see also* William Holmes & Melissa Mangiaracina, *Antitrust Law Handbook* § 7:2 (2014) ("For the most part . . . the [Federal

Trade Commission Act] has been held coterminous with the Sherman and Clayton Acts.").

The Commission has thus sought to add "a third per se rule to American antitrust law." *Ferguson Dissent* at 37. Non-competes with employees "are vertical agreements between the supplier of labor" (the employee) and "the purchaser of labor" (the employer), because the employer and employee operate "at different levels of a supply chain." *Ferguson Dissent* at 34 & n.283. Circuit courts thus routinely subject these types of vertical agreements to the rule of reason under antitrust statutes. *See id.* at 35 n.284 (citing cases). As this Court noted, "there has been an unbroken line of cases holding that the validity of covenants not to compete under the Sherman Act must be analyzed under the rule of reason." *Consultants & Designers, Inc. v. Butler Serv. Grp., Inc.*, 720 F.2d 1553, 1561–64 (11th Cir. 1983).

The tradition of state regulation in this arena underscores that non-competes do not trigger per se treatment. As the supporting states concede, states have been regulating non-competes for centuries—both before the FTCA and after its enactment. *Supra* 6–7. That longstanding tradition and "regular course of [state] practice" both before and after Congress's creation of the FTCA "liquidate[s]" the Act's meaning, *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 35–36 (2022) (cleaned up), and suggests that ordinary speakers did not understand the FTCA to erase the reasonable non-compete agreement.

Nothing the Commission relied on in its rule is sufficient to support per se treatment. The Commission relied on "[a] handful of economic and sociological studies" to show the supposed universal unfairness of non-compete clauses. *Ferguson Dissent* at 37. Its reliance on the average effects of these agreements is insufficient, however, to show that this type of agreement "would be invalidated in all or almost all instances under the rule of reason." *Leegin Creative Leather Prods.*, 551 U.S. at 886–87; *see also Ferguson Dissent* at 43–44. And the Commission's findings also came alongside "empirical evidence" that such agreements "increase investment in human capital of workers, capital investment, and [research and development] investment." *Ferguson Dissent* at 37 (alteration in original). Those procompetitive effects cannot be so easily wiped away.

Nor did the Commission explain how its proposed alternatives (such as nondisclosure agreements) would provide the same procompetitive effects of non-compete agreements. *Id.* at 38. That makes sense because while other contracts may "preclude an employee from engaging in certain behaviors with his or her former employer's rival," those agreements "do not prevent him or her from working for that rival." *Id.* at 39. But non-compete clauses "are structural" because "[t]hey prevent former employees with unique insight into a company from joining a competitor in the first place." *Id.* This type of record, which at best ignores those complications, is insufficient to justify the rule. *Id.* at 39–40.

CONCLUSION

This Court should affirm the district court's grant of a preliminary injunction.

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I certify that on January 22, 2025, I electronically filed this document with the Clerk of Court using the Court's CM/ECF system, which will send a notice of docketing activity to all parties who are registered through CM/ECF.

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