Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

April 19, 2023

Re: Non-Compete Clause Rulemaking, Matter No. P201200

Public Knowledge applauds the FTC for opening this rulemaking proceeding on the subject of non-compete agreements in employment contracts. Competition rulemaking is a critical tool for the FTC, and it is so important for the agency to use this tool going forward to maximize the impact it can have on protecting competition in our economy. According to Section 5 and Section 6(g) of the Federal Trade Commission Act (FTC Act), the FTC has the legal authority to promulgate rules in accordance with the Administrative Procedures Act. This authority is not challenged by the "Major Questions" doctrine. Non-compete agreements not only harm workers, they also harm consumers in the form of diminished competition by deterring new business formation and expanding into new lines of business. We hope the FTC will act quickly to promulgate this rule so that consumers and workers can receive the benefits of competition as soon as possible, and so that the FTC can continue its important work with additional rulemaking processes.

I. Competition rulemaking is a valuable tool for the FTC

The FTC must exercise its competition rulemaking authority to fulfill Congress' mandate. This tool provided by Congress can help the FTC work faster to keep up with changes in the marketplace or in economic learning, use limited resources more efficiently, and provide greater clarity to market participants.

Our antitrust laws, including Section 5 of the FTC Act, are not very detailed and specific. This strategy of lawmaking has important benefits, like leaving room for improved economic learning over time, leaving details and specifics up to agency experts, and allowing agencies the flexibility to change with marketplace changes like new technologies. Today, economic learning has identified significant shortcomings in the way that antitrust law has been enforced for many years. *See, e.g.*, Stigler Committee on Digital Platforms Final Report, Sept. 16, 2019, https://www.chicagobooth.edu/research/stigler/news-and-media/committee-on-digital-platforms-final-report. Our antitrust agencies are now doing the important work of incorporating that economic learning into their enforcement efforts. However, enforcement alone will be an incredibly slow way for that updated economic learning to trickle down to courts and litigating parties and actually improve competition in the marketplace.

A relevant example can be found in the so-called "reverse payments" or "pay-for-delay" settlements the FTC fought against at the turn of the millennium. The FTC lost a lot of pay-for-

delay cases before it finally won against Actavis. Pay-for-delay was the strategy of branded drug manufacturers settling patent infringement suits by paying competing generic drug manufacturers to stay out of the market for years. The settlements seemed suspicious, or at least counter-intuitive, because most patent infringement suits are settled by having the infringer pay the patent holder. In reverse payments patent settlements, the patent holder paid the alleged infringer. In exchange, the competitor agreed to stay out of the market longer. The two parties essentially agreed not to compete, and then carved up the monopoly rents.

In 2010, the FTC published a report pointing to the past nine years during which it had "invested substantial resources" in investigating and litigating these cases. "Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions", FTC Staff Study, Jan. 2010, at 5, https://www.ftc.gov/sites/default/files/documents/reports/pay-delay-how-drug-company-pay-offs-cost-consumers-billions-federal-trade-commission-staff-study/100112payfordelayrpt.pdf. The agency asked Congress to intervene by passing legislation clarifying that the settlements were illegal, but Congress failed to do so. Finally, in 2013, twelve years after the report said the effort had begun, the FTC claimed victory: In Actavis v. FTC, the Supreme Court ruled that pay-for-delay settlements actually can violate the antitrust laws. 570 U.S. 136 (2013). This was an incredible accomplishment by the FTC and its staff. It's a testament to the importance of an expert agency and the value the FTC is bringing to antitrust enforcement.

At the same time, it's a frustrating story because it took so much FTC staff work over such a long period of time. The pay-for-delay project was narrowly targeted, whereas bringing recent case law on nascent competition, duties to deal, and other key priorities in line with current economics is a much bigger project. And we need it on a much quicker timeline. We cannot continue to rely on twelve-year or longer enforcement projects to clarify important legal questions in antitrust. The FTC must use its competition rulemaking authority.

A. Using limited resources efficiently

It's no secret that the FTC is being asked to do more and more, while its resources today pale in comparison to the resources it has previously had. Over nearly 40 years, the number of mergers and acquisitions has increased from about 2300 in 1985 to over 25,000 in 2021, while the number of full-time staff at the FTC has decreased by nearly two-thirds during this time. United States M&A Statistics, IMAA, https://imaa-institute.org/mergers-and-acquisitions-statistics/united-states-ma-statistics/; Holly Vedova, *Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave*, Federal Trade Commission, Sep. 28, 2021, https://www.ftc.gov/enforcement/competition-matters/2021/09/making-second-request-process-both-more-streamlined-more-rigorous-during-unprecedented-merger-wave. The passage of the Merger Filing Fee Modernization Act last year will bring a meaningful increase in funds, but Congress must appropriate even greater budgets for the FTC in the future. In addition, the FTC must carefully marshal its limited resources to do more with less. Rulemaking is an important part of this effort.

Though rulemaking requires an up-front investment of significant staff time, it pays dividends once the rule is in place. Rather than clarifying the law slowly and partially through individual litigations time and time again, rulemaking can provide that same clarity in one fell swoop. This

saves litigation resources going forward through deterrence. Market participants know clearly what conduct is allowed and what conduct is prohibited, and violations can be identified and resolved more simply. Litigation can be avoided or simplified to be less expensive, both for the FTC and for defendants.

B. Keeping up with the pace of change

As explained in the pay-for-delay example, litigation to improve and clarify the law is a very slow process. In theory, Congress can also improve and clarify the law. However, it has become clear that legislating is also a long and laborious process that frequently fails. It is not realistic to hope that Congress will pass highly specific legislation and then continually update it to address new technologies. Instead, Congress adopted a smart strategy in passing the FTC Act: legislate big picture values and leave detailed applications up to an expert agency. This way, the agency can do the detailed ongoing work of applying the values that Congress laid out to new technologies and new market realities. As it turns out, regulation is actually the fastest way to keep up with changing markets and new economic learning. Particularly in fast-moving internet and technology markets, rulemaking is a critical tool for competition law.

C. Agency expertise

In the pay-for-delay example, the FTC compiled considerable research to identify the problem and explain it to judges. Rulemaking is a more structured opportunity for the agency to build expertise or, in the case of non-compete agreements, take advantage of existing expertise.

Administrative agencies are where expertise in our government should and does reside. Agencies have the staffing levels and resources to hire, build, and maintain expertise. The FTC in particular has multiple teams of attorneys, economists, and now technologists, studying the competitive environments in a variety of industries over the course of many years. More than judges or Congress, agencies are well-positioned to do in-depth research over time and to work through competing values set forth by Congress. For a greater discussion of the value of an expert agency in promoting competition, see two important resources from Public Knowledge, Harold Feld, The Case for the Digital Platform Act, Oct. 4, 2019, www.digitalplatformact.com, and Al Kramer, "A Lesson From The Landmark AT&T Breakup", May 19, 2022, https://publicknowledge.org/policy/a-lesson-from-the-landmark-att-breakup-both-a-sector-specific-regulator-and-antitrust-enforcers-were-needed/. In the rulemaking process, the FTC can better identify and take seriously the broad benefits that an industry-wide change can have on competition and consumers, as compared to adjudication alone.

D. Rules can be clearer and more comprehensive than court opinions

Businesses seek clarity on the types of conduct that are prohibited and permissible. Rulemaking can provide that clarity. Some have complained that the new Section 5 statement, though much more detailed than the statute passed by Congress, is not sufficiently detailed to offer the level of clarity and predictability businesses and corporate attorneys would like. Rulemaking is an even more clear and specific statement from the agency, and additionally benefits from going through the full formal process for stakeholder engagement set forth by the Administrative Procedure

Act. In fact, rulemaking can be even more clear and comprehensive than the judge-made rules of judicial precedent.

II. The FTC has the legal authority for competition rulemaking

The FTC can promulgate rules under UMC in accordance with the Administrative Procedure Act. Section 5 of the Federal Trade Commission Act (FTC Act) declares that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." Congress clearly delegated rulemaking authority to the FTC in Section 6(g) of the FTC Act. The statute authorizes the Commission to: "to make rules and regulations for the purpose of carrying out the provisions of this subchapter." 15 U.S.C. § 46(g).

The history and statutory context likewise emphasize that Congress granted – and therefore intended the FTC to use – rulemaking authority to clarify what constitutes "unfair methods of competition." The agency last used its authority to define an "unfair method of competition" in 1970, issuing a rule that failure to post octane numbers on gasoline pumps constituted both an unfair method of competition and an unfair and deceptive act. The reviewing district court reversed, finding that the FTC lacked statutory authority to issue rules under its unfair methods of competition authority and was restricted to case-by-case adjudication. *National Petroleum Refiners Assoc. v. FTC*, 340 F. Supp. 1343 (D.D.C. 1972). In a lengthy and detailed opinion, the D.C. Circuit reversed. Reviewing both the plain language of the statute and the legislative history of the Federal Trade Commission Act of 1914, the Court determined that Congress had not simply intended the FTC to act as an enforcer of the antitrust laws in the same manner as the Department of Justice. "[W]e are convinced that the broad, undisputed policies which clearly motivated the framers of the Federal Trade Commission Act of 1914 would indeed be furthered by our view as to the proper scope of the Commission's rule-making authority." *NPRA* at 686.

Two years later, Congress substantially modified the Commission's rulemaking authority with the Magnuson-Moss Warranty and Federal Trade Commission Improvement Act, Pub. L. 93-637. Had Congress disagreed with the FTC's assertion of rulemaking authority under its competition authority, it surely would have acted to correct it. Instead, the Magnuson-Moss Act explicitly ***preserved*** the FTC's competition rulemaking authority. First, Congress added a savings clause to the FTC's general grant of rulemaking authority in Section 6(g). More importantly, Congress explicitly stated that the new limitations imposed by the Magnuson-Moss Act "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." Section 202, codified at 45 U.S.C. § 57a(a)(2).

Congress could not have spoken more clearly. Neither the savings clause inserted into 45 U.S.C. § 46(g) nor the direct statement in 45 U.S.C. § 57a(a)(2) have meaning unless Congress intended the FTC to make rules with regard to unfair methods of competition.

III. The proposed rule does not raise concerns under the "Major Question Doctrine"

The Supreme Court's decision last term in *W. VA v. EPA*, 142 S. Ct. 2587 (2022), and the announcement of the "Major Question Doctrine" as a doctrine of administrative law similar to "*Chevron* Deference" or "the arbitrary and capricious standard" has created considerable confusion. According to *W. Va. V. EPA*, an agency action raises a "major question" as to whether Congress intended to confer on the agency the power to craft a particular rule or take a particular action, even if a plausible reading of the statute might otherwise support the agency's interpretation if: "the history and the breadth of the authority that [the agency] has asserted, ***and*** the economic ***and*** political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." At 2608 (cleaned up, emphasis added). This is especially true where an agency relies on "oblique or elliptical language" to effect a "fundamental change on a statutory scheme." At 2609. How to define the relevant terms – "history," "breadth," "economic and political significance" – remains unclear. Are all of these factors required (as would seem to be suggested by the use of the conjunctive "and" rather than "or"),or is it sufficient if only one of these factors is present. Precisely how explicit must the statute be to overcome the "hesitation" that arises from the presence of these "major question factors." Indeed, jurists and scholars opposing the doctrine have criticized the subjectiveness of these terms as a reason to reject the idea altogether. *See generally United States Telecom Assoc. v. FCC*, 855 F.3d 381, 382-388 (D.C. Cir. 2017) (en banc) (Srinivansan, J. concurring in denial of rehearing en banc).

Accordingly, commenters explain here why (a) the current rulemaking does not raise a major question; or, (b) even if the proposed rule raises a "major question," Congress has clearly vested the FTC with the authority to issue the proposed rule.

The matter is further confusing because scholars and jurists supporting the doctrine prior to *W. Va v. EPA* have advanced numerous formulations – even different suggested names – of what we now call the Major Question Doctrine. For example, in his dissent to denial of *en banc* review in *USTelecom v. FCC*, then Judge Kavanaugh cited a highly restrictive version under the name "Major Rule Doctrine" which would essentially prevent an agency from exercising even powers explicitly granted by Congress in any new circumstance. USTelecom, 855 F.3d at 417-426 (Kavanagh, J dissenting). While the majority opinion references the *USTelecom* dissent in passing, *W.VA v. EPA* at 2609, it does not cite this dissenting opinion among the cases frequently cited and discussed in the majority opinion as providing the basis for Major Question Doctrine. Nor does the Gorsush concurrence providing a list of potential "red flags" for considering when to apply the Major Question Doctrine *id.*at 2616-2626 (hereafter "Gorsuch Checklist") refer to Kavanaugh's "Major Rule" formulation. We should therefore conclude that the majority rejected the most restrictive versions of the "Major Rule" or "Major Question" doctrine.

A. Major Question Doctrine Is an "Extraordinary"Analysis That Does Not Otherwise Affect Administrative Law

The *W. VA v. EPA* Court emphasized that generally the normal course of analysis under the APA applies. It is only in "extraordinary" cases that a court should "hesitate" to simply accept the agency's assertion of authority. Indeed, the majority opinion states no fewer than three times that major question will apply only in "extraordinary" cases. *Id.* at 2607, 2609. Therefore, the presumption remains that agency action is subject to the standard arbitrary and capricious

analysis of the Administrative Procedure Act and the familiar two-step *Chevron* analysis. Additionally, the Court made it clear that it was not "announcing the arrival" of a new doctrine, at 2610, but that "these cases have arisen from all corners of the Administrative state." At 2608. In other words, *W. VA. V. EPA* does not overrule or negate any previous precedent, such as the discretion of an agency to choose between rulemaking or case-by-case adjudication.
A case in which an agency exercises its clearly delegated powers in a subject area clearly delegated it by Congress should not raise a "major question" under the formulation adopted in *W. VA v. EPA*. This is particularly important to remember where the subject matter of the agency is broad, such as that of the FTC's authority to prevent "unfair methods of competition." *National Petroleum Refiners Association v. FTC*, 482 F.2d 672, 684 (D.C. Cir. 1973) ("*NPRA*") ("The FTC's charter to prevent unfair methods of competition is tantamount to a power to scrutinize and to control, subject of course to judicial review, the variety of contracting devices and other means of business policy that may contradict the letter or the spirit of the antitrust laws") Finally, even where a case is "major," that does not end the inquiry. At a minimum if Congress has "clearly" delegated the agency authority to act, then the question is resolved and we proceed to the standard APA analysis. While a court may be "skeptical" of a new or broad assertion of power a court "cannot interpret federal statutes to negate their own stated purpose." King v. Burwell, 576 U.S. 473, 498 (2015).

In considering the current rulemaking, two potential questions arise under the Major Question Doctrine. First, given that the FTC has rarely used its rulemaking authority under Section 6(g) to define unfair methods of competition, does the FTC's decision to use rulemaking here constitute a "Major Question?" If the FTC may act through rulemaking generally, can it apply its authority to noncompete agreements? As discussed below, nothing about the Major Question Doctrine prevents the FTC from adopting the proposed rule.

B. The FTC's Use of Rulemaking Does Not Raise any Issues Under Major Question Doctrine

As a general matter, the discussion of statutory authority for rulemaking in Section III of this comment should end the inquiry. Where Congress has spoken clearly and unambiguously, that ends the matter. This is not a case where the agency relies on "cryptic language" or an "ancillary provision" or "gap filler" *W. VA v. EPA* at 2610; Gorsuch Checklist at 2622. This language appears as part of the list of agency powers. It expressly instructs the agency to make rules and regulations for the purpose of carrying out the provisions of this subchapter – including the prohibition on unfair methods of competition.

While the *W. Va v. EPA* noted that when the agency claims a power it has not previously claimed it may raise a "red flag," dormancy is not a reason to question a clear and unambiguous delegation of authority by Congress. The case here is similar to that presented in *American Hospital Association v. NLRB*, 499 U.S. 606 (1991). That case dealt with the National Labor Relations Board's decision "for the first time since [the NLRB] was established in 1935," *Id.* at 608, to use its rulemaking authority rather than case-by-case adjudication to determine the number of permissible bargaining units for hospitals. The language Congress used to delegate rulemaking to the NLRB closely resembles that of the FTCA, granting the NLRB: "authority from time to time to make, amend, and rescind . . . such rules and regulations as may be

necessary to carry out the provisions" of the Act." *Id.* at 609. The Court rejected the argument that the agency's preference for adjudication over the previous 55 years had somehow negated the rulemaking authority granted by Congress. *Id.* at 610.

Rulemaking to define methods of unfair competition does not raise a major question, and to the extent it does Congress has spoken clearly to the subject.

C. The Subject of the Current Rulemaking Does Not Raise a Major Question.

Determining whether the subject matter of the current rulemaking, non-compete clauses, raises a major question is a more difficult question. Congress did not expressly instruct the FTC to regulate labor agreements. Additionally, regulation of noncompete agreements undoubtedly impacts a wide swath of industry practices, and potentially billions of dollars in economic activity. Finally, the power claimed by the FTC comes from its general organic statute and not a specific delegation – a statute that is over 105 years old. All of these factors raise "red flags" under the Gorsuch Checklist. Examining the facts of *W. VA v. EPA,* the cases cited by *W. VA v. EPA* for guidance, and considering the specific nature of the FTC, we can conclude that the current rulemaking does not stray into the area of "Major Question Doctrine." Or, if it does, Congress has spoken with sufficient clarity to overcome the initial "hesitation."

Again, it is important to recall that the majority opinion apparently rejected the strictest formulation – the "Major Rules Doctrine" – which would have required an agency to seek new authorization from Congress whenever it applied its general authority to a new factual situation. E.g., When the FCC would have classified broadband as a "telecommunications service" despite the clear statutory duty to regulate communications services based on their classification. *See* USTelecom dissent. Instead, the majority explained that the Major Question Doctrine is "extraordinary," and therefore should not arise in the normal course of an agency performing its duty. *W.VA v. EPA* at 2607. Furthermore, the majority distinguished between the express powers of an agency based on its organic statute as opposed to "ancillary" or "gap filler" provisions. *See also*, Gorsuch Checklist at 2623 (conceding that "old statutes may be written in ways to apply to new and previously unanticipated situations"). Likewise, the majority criticized relying on "oblique and elliptical language to make radical or fundamental changes to a statutory scheme." @2609 It is still the case, however, that Congress uses clear and direct open-ended language to delegate authority to agencies in accordance with *Chevron* and established doctrines of administrative law. *See*, *Little Sisters of the Poor Saints Peter & Paul Home v. PA*, 140 S. Ct. 2367, 2380 (2020). While statutory context provides proper guidance in understanding the limits of the delegation of agency authority, courts must not interpret statutes "to negate their own stated purposes." *Burwell*, 576 U.S. at 493.

An examination of the cases cited by the *W. VA v. EPA* majority provide further guidance on when an agency strays from the general authority vested by Congress into the "extraordinary" realm of Major Question Doctrine. For example, in *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120 (2000), it was not simply that the FDA decided to regulate cigarettes when it had not previously done so. The FDA relied on a new interpretation of the word "device," holding for the first time that a cigarette was a "device" for delivering nicotine. While plausible, this interpretation was hardly intuitive. After a lengthy examination of the statutory history of the

Food, Drug and Cosmetics Act, the majority concluded that Congress never intended the general word "device" to mean cigarettes – something Congress was intimately familiar with and had considered but rejected placing under the FDA's authority. Similarly, *Burwell*, *National Federation of Independent Businesses v. OSHA*, 142 S. Ct. 661 (2022), and *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485 (2021) did not simply involve a natural application of the general power of the agency to a new circumstance. They involved matters wholly outside the normal scope of the agencies' expertise and in areas well beyond what Congress could reasonably foresee. In *Burwell,* the Court found it implausible that Congress would delegate decisions on health policy to the IRS. In *NFIB*, The Court concluded that Congress had not clearly given OSHA the authority to enact what amounted to a national vaccine mandate, even if it had the effect of making the workplace safer. In *Alabama Association of Realtors*, the Court found the CDC's imposing a nationwide moratorium on evictions seemed utterly out of step with the other types of responses Congress expressly authorized the CDC to take. Again, while the agency interpretations of their general authority were plausible, an examination of the statutory context persuaded the Court that Congress did not intend to extend the agencies' authority into fields considerably outside their general scope.

By contrast, the scope of the Federal Trade Commission ***is*** business agreements that produce unfair methods of competition. *NPRA* 582 F.2d at 684-85. It is impossible for the FTC to do its job without impacting industry practices across a wide range of industries. As new practices and new "methods of unfair competition" arise, Congress intends the FTC to address them. A major motivation for creating the Federal Trade Commission was to create an agency with greater flexibility and expertise than the Department of Justice to address the speed with which businesses created new methods of unfair competition and the complexity of these new arrangements. *Id.* at 687-89. Accordingly, when new methods of unfair competition emerge, it does not raise a "major question" for the FTC to address them. For example, when the FTC determined that pay-for-delay settlements from pharmaceutical companies were often sham judicial settlements to protect patent monopolies, the FTC acted to address this new practice with enforcement actions. *See*, FTC, "Pay for Delay: When Drug Companies Agree Not to Compete," https://www.ftc.gov/news-events/topics/competition-enforcement/pay-delay.

Gonzales v. Oregon, 546 U.S. 243 (2006), one of the cases cited by *W. VA v. EPA* as foundational to the Major Question Doctrine, illustrates the proper scope of analysis when addressing an agency's expanded use of its general authority. There, the Attorney General sought to use his power under the Controlled Substances Act to suspend a physician's authority to prescribe medication for assisted suicide under Oregon's assisted suicide law. The Attorney General cited the statute's authority to deny, suspend or revoke a physician's prescription power where it would be "inconsistent with the public interest." *Id.* at 254. In determining that Congress did not intend the AG to use this power to regulate the practice of medicine in this fashion, the Court contrasted the narrow "public interest standard" of the Controlled Substances Act with the broad authority vested in the Federal Communications Commission through its public interest standard, noting: "In many cases, the authority is clear because the statute gives the agency broad power to enforce all provisions of the statute." *Id.* at 258.

Put another way, context matters not merely to confine authority, but to demonstrate the proper expansion of authority. The question is not whether the agency has ever applied the authority in

question to the specific practice at issue, but whether the practice at issue falls within the general subject matter Congress intended the agency to address. To believe otherwise would eliminate the FTC's ability to address new methods of unfair competition. It is no answer to say that the FTC is permitted to address new methods of unfair competition on a case-by-case basis, but not through its rulemaking authority. Congress clearly granted the FTC rulemaking authority "to make rules and regulations for the purpose of carrying out this subsection." 47 U.S.C. § 46(g). This is precisely the kind of language the Court found in *Gonzales* "clear," rather than "oblique and elliptical." *Cf. W.VA*. *See also AHA* 499 U.S. at 613-14. Similarly, the authority to prohibit unfair methods of competition is central to the FTC's purpose, and cannot reasonably be characterized as "ancillary" or a "gap filler."

Furthermore, to argue that the FTC strays into Major Question Doctrine when it acts to eliminate a widespread practice because doing so raises the economic cost of compliance or because it requires elimination of a practice across multiple industries would produce the absurd result that the more widespread an anticompetitive practice becomes, the less able the FTC becomes to address it through rulemaking. But it is precisely when a practice is widespread that rulemaking is best suited rather than case-by-case adjudication. Rohit Chopra & Lina M. Khan, "The Case for 'Unfair Methods of Competition' Rulemaking", 87 U. Chic. L. Rev. 357, 377–79 (2020), *NPRA* 482 F.2d at 690-91. *See also AHA* 499 U.S. at 612; Administrative Conference of the United States, "Facilitating the Use of Rulemaking by the National Labor Relations Board," (1991) (discussing important benefits of rulemaking by agencies that typically rely on adjudication). The argument that somehow rulemaking is different from case-by-case adjudication because it (potentially) impacts multiple industries and therefore engenders a question of "economic and political importance" further fails because case-by-case adjudication produces precedent applicable across all industries. *NPRA* 482 F.2d at 691-92 (rejecting argument that "substantive rulemaking represents a sufficiently important innovation in Commission practice for us to balk at authorizing its use on the basis of an arguably ambiguous statute in the absence of very firm indications of affirmative and specific legislative intent" in part because precedent essentially functions as rulemaking). To accept the argument that rulemaking creates a major question would require eliminating the authority of precedent when it accomplishes a similar, broad elimination of an unfair method of competition.

In short, agency authority is agency authority. Where the FTC has authority to pursue a practice via litigation, there is no sound reason to exclude that subject as a reasonable subject for rulemaking under Section 6(g). The question therefore becomes whether the subject of the current rulemaking, employment contracts, reasonably falls into the sort of practice Congress intended the FTC to police for unfair methods of competition.

The scope of modern antitrust law includes efforts to limit competition for labor. *See, e.g.*, In re *Ry. Indus. Emp. No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464 (W.D. Pa. 2019); *Butler v. Jimmy John's Franchise*, LLC, 331 F. Supp. 3d 786 (S.D. Ill. 2018). The Department of Justice and the FTC have jointly issued guidance on labor practices that raise a "red flag" under the antitrust laws. "Antitrust Red Flags for Employment Practices" FTC and DOJ, Oct. 20, 2016, https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_red_flags.pdf. And, as the NPRM itself observed, the FTC has been active in the area of non-compete agreements since 2019. 88 Fed. Reg. 3497 (proposed Jan. 19, 2023) (to be codified at 16 CFR

910). The rulemaking therefore arises naturally from the FTC's growing experience in this area, and not from some novel or unprecedented exercise of authority.

D. Major Question Should Not Be Confused with Other Arguments on the Validity of the Rules Adopted.

If Congress disagrees with the agency's policy choice, it falls to Congress to override the agency. *AHA* at 617. Congress has, in fact, restricted the FTC's authority with regard to the agency's consumer protection powers both with regard to process and substance. Magnuson-Moss Warranty—Federal Trade Commission Improvements Act, Pub. L. No. 93-637, 83 Stat. 2183 (1975) (codified as amended at 15 U.S.C. § 57a(a)(2) (2012))(restricting process); Federal Trade Commission Act Amendments of 1994, Pub. L. No 103-312, 108 Stat. 1691 (1994)(restricting substance). Congress may also simply disapprove of any rule the FTC adopts under the Congressional Review Act, *See*, 5 U.S.C. §§ 801-806, or craft its own remedy to address concerns over non-compete clauses.

Nothing in either the subject matter of non-compete agreements or the selection of rulemaking as the appropriate means of addressing use of non-compete agreements as an "unfair method of competition" raises concern under the Major Question Doctrine. Congress has clearly provided the FTC with both sufficient rulemaking authority and substantive authority. Addressing the anticompetitive impact of non-compete agreements does not raise a question of "economic and political importance" simply because the practice has become a widespread means of preventing competition for workers. To the contrary, it is precisely where an unfair method of competition has grown ubiquitous over a short period that rulemaking is precisely the remedy Congress has envisioned.

III. Non-competes can slow innovation and harm consumers

Non-compete clauses in employment contracts diminish worker mobility in many industries. Many commenters have already highlighted the impacts of these anticompetitive contract terms on workers. Non-compete clauses also harm consumers, by deterring entrepreneurship and other forms of new business formation or expanding to new lines of business, which can lead to diminished competition, innovation, and product quality, as well as higher prices.

There are a variety of ways that competition depends on worker mobility. New businesses may be formed by a former employee of an existing firm using their expertise to create a new competitor. Or, a new business may need to hire employees with relevant expertise in order to compete. An existing business that wishes to enter a new industry, expanding to compete against some existing firms, may also wish to hire employees currently working in the field. Making worker mobility difficult or impossible with non-competes can be a very effective strategy at preventing new competitors from entering the market. Indeed, the proposed rule notes studies showing that where non-competes are more enforceable, we see lower rates of new business formation. Sampsa Samila & Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth*, 57 Mgmt. Sci. 425, 432 (2011); Evan Starr, Natarajan Balasubramanian, Mariko Sakakibara, Screening *Spinouts? How Noncompete Enforceability Affects the Creation,*

Growth, and Survival of New Firms, Informs (Jan. 12, 2017), https://doi.org/10.1287/mnsc.2016.2614.

Employers may use a non-compete in part as a way to protect specialized knowledge of the internal workings of the company. They may fear that if an employee with that specialized knowledge goes to work for a competitor, that information may be used to compete against them. If our goal is to promote innovation, we need to balance rewarding innovators and making new innovations available to build off of. This is the difficult balancing act that our intellectual property laws are tasked with. The patent system makes the detailed information about an innovation public, while giving the inventor a legal right to prevent others from using that information for a number of years. Trade secret law allows a company to protect proprietary information. Both patents and trade secrets continue to be legal avenues for protecting private business information, without needing to rely on non-compete agreements, which have significant additional negative externalities.

In his book, The Master Switch, former Special Assistant to the President for Technology and Competition Policy, Tim Wu describes the history of Bell Labs. While others may point to the mega-monopoly of AT&T as a source of innovation, Wu identifies the innovations that were squelched because they didn't support AT&T's powerful position in the market. Any innovation that was deemed disruptive would not receive additional investment and would not come to market. Wu argues persuasively that this is typical of monopolists. Though they may spend a great deal of money on research and development, truly innovative inventions that might disrupt the status quo are often not in the interest of that monopolist and will need someone else to bring them to market. Tim Wu, The Master Switch (2010).

Empirical data on this question may be hard to come by. It's notoriously difficult to measure true innovation. Research and development budgets are an imperfect measure due to the problems identified by Wu and others. Number of patents can also be a suspect measure, since patents are often issued for inventions that actually provide little to no benefit. One relevant study attempted to evaluate the actual value of patented inventions when non-competes are more enforceable and found that the actual value of the inventions was higher when non-competes were less enforceable. Zhaozhao He, "Motivating Inventors: Non-Competes, Innovation Value and Efficiency" 21 (May 18, 2021), https://ssrn.com/abstract=3846964.

IV. The FTC must move forward quickly with this rulemaking process

While stakeholder engagement is a valuable part of the rulemaking process, it is also important the FTC not delay this process. American workers, consumers, and competitors cannot wait for the important benefits they will see as a result of this rule. If rulemaking is truly to be a useful tool for the FTC going forward, it's important to strike a balance between stakeholder engagement and working quickly. There are other issues ripe for rulemaking that the FTC should consider next, so it's important to be able to move through these rulemaking processes efficiently.