Case No. 23-0625

United States Court of Appeals

for the

Ames Circuit

AMES ELECTRIC COMPANY,

Plaintiff-Appellee

v.

R. JOSEPH WELLES, IN HIS OFFICIAL CAPACITY
AS CHAIR OF THE FEDERAL TRADE COMMISSION,

Defendant-Appellant

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF AMES

BRIEF FOR APPELLANT

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6:30pm, March 8, 2023
Ames Courtroom

Oral Argument

Questions Presented

1. Does the Federal Trade Commission's statutory mandate to proscribe "unfair methods of competition" authorize it to issue a rule banning the use of noncompete clauses in employment contracts?

2. Does Ames Electric Company enjoy state action immunity from the Commission's generally applicable rule against noncompete clauses?

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Opinions and Orders

The memorandum opinion and accompanying order of the United States District Court for the District of Ames granting Ames Electric's motion for summary judgment and denying the Commission's corresponding motion can be found at pages 4–10 of the Joint Appendix. The procedural order detailing the issues presented on appeal can be found on page 3 of the Joint Appendix.

Statement of Jurisdiction

The United States District Court for the District of Ames possessed subject matter jurisdiction because Ames Electric's claim presented a question arising under federal law, namely 15 U.S.C. § 45(a) and 5 U.S.C. § 706(2). *See* 28 U.S.C. § 1331. The District Court entered a final judgment on December 30, 2022, *see* JA-9, and the Federal Trade Commission filed a timely appeal on January 5, 2023, *see* JA-14. The United States Court of Appeals for the Ames Circuit has jurisdiction over this appeal from a final judgment under 28 U.S.C. § 1291.

Relevant Provisions

This case involves Article I, § 8, cls. 1, 3, and Article VI, cl. 2 of the United States Constitution; The Federal Trade Commission Act, 15 U.S.C. §§ 45(a)–(b), 46(g), and 57(a); The Administrative Procedure Act, 5 U.S.C. § 706(2); 18 A.C.A. §§ 2004 and 2010; and 16 C.F.R. § 910. Each is reproduced in relevant part in the Appendix.

Statement of the Case

Article I of the United States Constitution grants Congress the power to "regulate commerce . . . among the several states." U.S. CONST. art. I, § 8, cl. 3. Article VI, meanwhile, makes laws passed by Congress the "supreme law of the land," notwithstanding any contrary state laws. *Id.* art. VI, cl. 2. Taken together, these two constitutional provisions establish the principle that when it comes to the national economy, Congress makes the rules. If state law conflicts, federal law carries the day.

After a decade under the Articles of Confederation, the Framers of our Constitution feared interstate protectionism that would undermine economic health and political vitality alike. *See* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 259–260 (4th ed. 1873). So, from a loose confederation, they formed a single country that would have a single economy. And from the beginning, these United States would recognize that while states retained the power to regulate commerce within their borders, Congress would regulate commerce that transcended those borders even if that regulation was contrary to state policy. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209–10 (1824).

Today, Ames Electric seeks to invert that paradigm. In 2017, Ames banned the use of noncompete clauses in employment contracts

within its territory. 18 A.C.A. § 2004. The next year, it created a carveout for its state's "pseudo-private utilities," allowing limited exceptions to its state's general rule "upon a showing of extraordinary need" after it concluded that sometimes "the economic value of a noncompete clause exceeds the cost it might impose on Ames citizens." 18 A.C.A. § 2010. At the time, neither Ames policy violated federal law. But in 2022, the Federal Trade Commission (FTC) issued a final rule pursuant to its statutory authority prohibiting noncompetes across the United States, expressly superseding any contrary state law. *See* 16 C.F.R. § 910.4.

That statutory authority originated in 1914, at the height of the antitrust movement, when Congress passed the FTC Act. *See FTC v. AT&T Mobility LLC*, 883 F.3d 848, 854 (9th Cir. 2018). The Act outlaws "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." FTC Act § 5, 15 U.S.C. § 45(a)(1). It also authorizes the FTC to "prevent" such methods, acts, and practices. *Id.* § 45(a)(2). The FTC's rule on noncompetes does just that: it identifies noncompetes as an unfair method of competition and prohibits their use. 16 C.F.R. § 910.2.

Despite this rule, Ames Electric wants to retain the favored position it enjoyed under Ames' prior carveout. Under Ames' policy, a utility that shows an "extraordinary need" may enter a noncompete

agreement with an employee after a "fact-specific inquiry." 18 A.C.A. § 2010(1)(a). From there, a legislative commission composed of Ames business leaders must review "any noncompete agreement" a utility enters, and utilities that enter such agreements must submit a report to the commission. 18 A.C.A. § 2010(2). The commission also may audit a utility's noncompete policy to ensure statutory compliance and suspend utilities that violate the policy for six months. 18 A.C.A. § 2010(3)(a). But according to an affidavit in its own submission to the district court, Ames Electric:

> (1) systematically enters noncompete agreements "in all employment contracts for management level positions and for all employees associated with the utility's research and development department," JA-16–17;
>
> (2) has never been audited under the statute, JA-17; and
>
> (3) does not "always act[] in accordance with the express terms" of the state law, per the state commission, *id.*

Ames Electric brought this pre-enforcement challenge, seeking to enjoin the regulation in Ames so that it may "protect its business interests." JA-5. The district court granted its motion, finding that although the FTC had the authority to issue the regulation, Congress did not intend for FTC regulations to reach state actors. *See* JA-7. The FTC appeals the latter determination.

Summary of the Argument

Congress set a national policy. The FTC implemented that national policy. Now, Ames Electric seeks to subvert that national policy. Because the district court's ruling is at odds with the federal competitive economic system inherent in our constitutional structure, this Court should reverse.

Congress empowered the FTC to identify and eliminate evolving unfair methods of competition. Pursuant to that mandate, the Commission prohibited noncompete agreements in employment contracts. The district court properly upheld this action. Noncompete clauses—long recognized as injurious to competitors and threatening industry concentration in our time—fall squarely within the statute's prohibition on "[u]nfair methods of competition." In prohibiting them, the FTC properly used its § 46(g) rulemaking authority. And because Congress clearly authorized the FTC to identify problems and implement solutions for anticompetitive conduct, the noncompete rule overcomes Ames Electric's major questions challenge.

Neither can Ames Electric insulate itself from federal scrutiny through state action immunity. As a threshold matter, this Court should not apply state action immunity at all. The state action immunity developed in *Parker v. Brown*, 317 U.S. 341 (1943), was created to protect intrastate regulations from the Sherman Act—not state laws

whose effects spill beyond state borders and run afoul of the FTC Act. Even if state action immunity were to apply, Ames Electric falls outside of its protective shield. The State of Ames did not clearly articulate a policy that allowed for the programmatic noncompetes Ames Electric employed. Moreover, Ames did not reserve any power to modify particular decisions nor has it adequately exercised any of its oversight tools to actively supervise Ames Electric. Ultimately, Ames Electric is a market participant seeking to reap the benefits of both the private and public sector without any of the requisite accountability. This Court should reverse the lower court's judgment.

Argument

I. THE STANDARD OF REVIEW IS *DE NOVO*.

Appellate courts review a district court's grant of summary judgment *de novo*. *See Paramount Media Grp., Inc. v. Vill. of Bellwood*, 929 F.3d 914, 919 (7th Cir. 2019). This Court must reverse the grant of summary judgment unless Ames Electric, the moving party, has shown that it is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). If "inferences [can] be drawn from the underlying facts," they "must be viewed in the light most favorable to" the FTC, the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam).

II. THE COMMISSION'S NONCOMPETE RULE IS WITHIN ITS CONGRESSIONAL MANDATE TO PROSCRIBE "UNFAIR METHODS OF COMPETITION."

If this case is significant, it is not unusual. More than a century ago, Congress created the FTC with a simple, if daunting, responsibility: suppressing "unfair methods of competition." 15 U.S.C. § 45(a)(1). Congress deliberately avoided enumerating specific practices, knowing that industry could just as quickly develop new ones. *FTC v. Sperry Hutchinson Co.*, 405 U.S. 233, 240 (1972) (citing S. REP. NO. 63-597, at 13 (1914)). Instead, the Act framed a structure in which the Commission would apply familiar standards to new facts. And for a century, the Commission has shouldered that responsibility, working doggedly to prevent monopolistic practices.

In 2022, the FTC continued that long tradition, turning its attention to a longstanding device with newfound prominence. Noncompete clauses in employment contracts have always constrained workers from changing jobs. But in recent decades, they have exploded in prevalence with profound consequences. Today, as many as twenty percent of all American workers are subject to these clauses, precipitating industry concentration and lowering wages. Evan P. Starr, et al., *Noncompete Agreements in the U.S. Labor Force*, 64 J.L. & ECON. 53, 53 (2021). Based on these facts, the FTC—using the tools Congress

gave it—banned these clauses. This determination fell within the statute's ambit.

The FTC is on firm ground when it chooses to promulgate general standards by rulemaking instead of adjudication. Though the issue is economically significant, the major questions doctrine requires only that such actions have "clear congressional authorization." *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). Congress delineated the boundaries of the Commission's responsibility, and the subject of this rule falls squarely within them. Moreover, no constitutional concerns here demand a cramped reading of Congress's plain text. In short, the Commission has worked day in and day out to solve the problems of the day.

A. The use of noncompete clauses in employment contracts is an "unfair method of competition."

Section 5 of the FTC Act implements "a flexible concept with evolving content." *FTC v. Bunte Bros.,* 312 U.S. 349, 353 (1941) (citing *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304, 311–12 (1934)). Though "unfair methods of competition" encompasses violations of the Sherman and Clayton Acts, it is not limited to them. *Sperry*, 405 U.S. at 243–44 (1972). Instead, the standard operates on two levels. *See FTC v. Raladam Co.*, 283 U.S. 643, 647 (1931).

First, "*methods of competition*" describes a broad class: everything doing "substantial injury to consumers . . . or competitors" which *could* impose anticompetitive effects on the market. *Sperry*, 405 U.S. at 244–45 n.5; *Raladam*, 283 U.S. at 647 ("substantial injury of the public"). In determining what methods have this threshold anticompetitive effect, the Commission may rely on "common sense and economic theory," *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 456 (1986), but need not have "embark[ed] upon a full-scale economic analysis of competitive effect," *Atl. Refining Co. v. FTC*, 381 U.S. 357, 371 (1965). Many business methods will impose some injury on competitors—the use of gift cards to funnel business away from rivals, for example—without being objectionable.

Hence, the specification of "*unfair* methods" focuses on a subset of that class—those methods that are actually unfair in "light of particular competitive conditions," *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 533 (1935), in that they tend toward industry concentration, *see Raladam*, 283 U.S. at 650. On this second question, the Act authorizes "the Commission, in the first instance, to determine whether a method . . . is unfair." *Atl. Refining*, 381 U.S. at 367. This question being a matter of fact and policy, a reviewing court asks whether the FTC's view is reasonable under substantial evidence

review or arbitrary and capricious review. *Cf. Ind. Dentists*, 476 U.S. at 454.

Though this "*Raladam* deference" is congruent with the *Chevron* deference owed to any agency, it rests on even stronger grounds. Where *Chevron* concerned the "implicit[]" delegation in any statutory gap, *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984), the congressional delegation to the Commission was explicit, *see infra* pp. 17–23.[1]

1. Noncompete clauses are an anticompetitive method doing injury to competitors.

The status of noncompete clauses as a "restraint of trade" was "[a]mong the most ancient rules of the common law," arising "[a]s early as the second year of Henry V. (A.D. 1415)." *Alger v. Thacher*, 36 Mass. (19 Pick.) 51, 52 (1837). After all, they "discourage industry and enterprise, . . . prevent competition and enhance prices[,] . . . [and] expose the public to all the evils of monopoly." *Id.* at 54. Later cases recognized only a "*limited*" exception to this rule and then only at "the good sense and sound discretion of the tribunal." *Id.* at 53–54 (discussing *Broad v. Jollyffe*, (1621) 79 Eng. Rep. 509 (KB)). But the principle

[1] Though unnecessary in this case, it would be appropriate for this court to apply *Chevron*. *See* 467 U.S. at 844.

remained: "wise laws protect individuals and the public, by declaring all such contracts void." *Id*. at 54.

As in their time, so in ours. Labor markets operate by the same principles as any other: workers and businesses competing amongst themselves to secure the most beneficial arrangements. Noncompete clauses restrict this market supply. *See generally* Liyan Shi, *Optimal Regulation of Noncompete Contracts*, ECONOMETRICA (forthcoming 2023) (manuscript at 33–36). In doing so, they limit competition among the workers vying for a given position and between the businesses seeking their talent. *Id.* Restricted in their acquisition of talent, competitors are then handicapped in their ability to compete more broadly. *Cf.* 1 ADAM SMITH, THE WEALTH OF NATIONS, 264–65 (Clarendon Press 1976) ("to narrow the competition, is always the interest of the dealers," but against the "interest of the publick"). Noncompete clauses—facially preventing the access of competitors to talent and workers to competing employers—are anticompetitive.

2. The Commission's determination that noncompete agreements are unfair is reasonable.

On the matter of unfairness, a reviewing court does not make the empirical judgment in the first instance. *Atl. Refining*, 381 U.S. at 367. Accordingly, this Court should not undertake its own "rule of reason" analysis. *Cf. Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 62

(1911). Instead, the question is only whether the Commission's empirical views are reasonable ones. Here, on an appeal from summary judgment against the Commission—where all facts are construed against the movant—and where Appellee has not brought a *State Farm* challenge, *see* JA-3, the FTC's view merits respect.

And the Commission's determination is reasonable by all accounts. Not only do these methods impose some injury on competitors, the economic literature indicates that this injury redounds through the market in particularly pernicious—and unfair—ways. Such clauses increase industry concentration and consumer prices while inhibiting both job creation and entrepreneurship.[2] Moreover, noncompete clauses likely produce substantially lower wages. *See* Matthew S. Johnson, et al., *The Labor Market Effects of Legal Restrictions on Worker Mobility* at 2 (Jun. 2020), https://bit.ly/3lkEVUe. Noncompete clauses are among the unfair methods targeted by the Act.

[2] *See, e.g.*, Naomi Hausman & Kurt Lavetti, *Physician Practice Organization and Negotiated Prices: Evidence from State Law Changes*, 13 AM. ECON. J. APPLIED ECON. 258, 284 (2021) (finding increased industry concentration and consumer prices); Sampsa Samila & Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth*, 57 MGMT. SCI. 425, 432 (2011) (finding lowered job creation and new business formation).

B. It was proper for the Commission to proceed by rulemaking.

Although the FTC has typically regulated fair competition through adjudication, Congress also empowered the agency to proceed by rulemaking. *See Nat'l Petroleum Ass'n v. FTC*, 482 F.2d 672, 698 (D.C. Cir. 1973); *see also* Rohit Chopra & Lina Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 365 (2020). The plain text, statutory structure, and subsequent legislative amendments of the FTC Act all evince this authority. And where Congress has not precluded one method of policymaking, agencies have their choice between rulemaking or adjudication. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947); *see also* William T. Mayton, *The Legislative Resolution of the Rulemaking vs. Adjudication Problem in Agency Lawmaking*, 1980 Duke L.J. 103, 103–04.

1. Congress granted the Commission rulemaking authority.

The first two sentences of Section 5 of the Act charge the Commission with prohibiting "[u]nfair methods of competition." FTC Act § 5(a), 15 U.S.C. § 45(a). The next paragraph of the Act lays out the procedural safeguards necessary in adjudication. *Id.* § 45(b). The section after that provides that the Commission may "[f]rom time to time . . . make rules and regulations for the purpose of carrying out the

provisions of this subchapter." *Id.* § 46(g). "This subchapter" refers to the whole of §§ 41–58, including § 45(a)'s proscription of "unfair methods." *See id.* ch. 2, subch. I. And courts routinely interpret "rules and regulations" broadly to include both procedural and substantive rulemaking. *Nat'l Petroleum*, 482 F.2d at 678–80 (discussing parallel statutory constructions for the FCC, Federal Power Commission, FAA, and Civil Aeronautics Board). All of this textual support comports with the FTC Act's historical context. In contrast to the antitrust law at the time, the initial Act envisioned a bold Commission tasked with creating a consistent and predictable body of competition law. Kacyn H. Fujii, National Petroleum Refiners *Is (Still) Correctly Decided*, YALE J. REG. NOTICE & COMMENT (Mar. 28, 2022), https://bit.ly/3jMrufE.

The inclusion of specific adjudication procedures in § 45(b)'s foreground does not conflict with the generalized rulemaking authority in § 46(g)'s background. Congress often speaks with greater specificity when providing for adjudication than it does for rulemaking. *Compare* Administrative Procedure Act, 5 U.S.C. §§ 556–557 (outlining formal adjudication), *with id.* § 553 (informal rulemaking). Regardless, adjudication and rulemaking are complementary: each generally applicable rule must be enforced through adjudication. *See Nat'l Petroleum*, 482 F.2d at 674. Ames Electric is without adjudication's

process protections here only because *it* reached out to bring a pre-enforcement challenge.

The D.C. Circuit recognized the validity of Commission rulemaking fifty years ago in 1973. *Nat'l Petroleum*, 482 F.2d at 697–98. Then, after a particularly controversial run of FTC rulemaking, Congress picked up the pen once more. *See* Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975, Pub. L. No. 93-637, § 202, 88 Stat. 2183, 2193 (codified as amended at 15 U.S.C. § 57a). The Magnuson-Moss Amendment cabined the reach of the Commission's rulemaking power with respect to "unfair or deceptive acts or practices." 15 U.S.C. § 57a(a)(1). But it made plain that "[t]he preceding sentence shall not affect any authority . . . to prescribe rules . . . with respect to unfair methods of competition." *Id.* § 57a(a)(2).

In leaving the relevant power undisturbed, the amendment gestures at exactly that—the Commission's power to make rules marking out "unfair methods of competition." *Cf. Glossip v. Gross*, 576 U.S. 863, 894 (2015) (Scalia, J., concurring) ("It is impossible to hold unconstitutional that which the Constitution explicitly *contemplates*.") And even were the amendment mere congressional silence on the relevant power, it would leave intact what § 46(g) grants and the D.C. Circuit recognized: that the FTC may make rules proscribing unfair methods of competition.

2. *Schechter* does not straitjacket the Commission to adjudication.

The Supreme Court in *Schechter* used the FTC Act as a foil in striking down the National Industrial Recovery Act (NIRA). 295 U.S. at 532–34. The Court praised the FTC Act's clear standards, narrow subject matter, and "quasi judicial body" that would proceed by "formal complaint . . . notice and hearing . . . [and subsequent] judicial review." *Id.* at 533. But, crucially, the Court faulted NIRA for lacking "this administrative procedure" or "any administrative procedure of an analogous character." *Id.*

Rulemaking is of an analogous character. Since the APA's passage, this Court has repeatedly recognized rulemaking as the preferred mode for the formulation of general standards. *See, e.g.*, *SEC v. Chenery Corp.*, 332 U.S. at 202 (stating that "filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules"); *NLRB v. Wyman-Gordon*, 394 U.S. 759, 764 (1969). If *Schechter* has an adjudicatory ambiance, that must be understood in its pre-APA context: Before § 553's safeguards, rulemaking was subject only to the most modest due process protections. *See Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 444–46 (1915).

Today, rulemaking is subject to many of the same or similar restraints as adjudication. *See*, *e.g.*, *Ass'n of Data Processing v. Bd. of Governors*, 745 F.2d 677, 684 (D.C. Cir. 1984) (Scalia, J.) (describing the distinction between substantial evidence and arbitrary and capricious review as "largely semantic"). Indeed, though courts generally leave "[t]he choice between rulemaking and adjudication" to "the [agency's] discretion," that choice may be forced—*in favor of rulemaking*—only in narrow circumstances. *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294–95 (1974).

C. Because the Commission possesses "clear congressional authorization," the significance of the agency action cannot warp the statute.

The major questions doctrine balances two truths. On the one hand, courts presume that Congress makes major policy decisions itself; this presumption operates both as a default rule concerning congressional intent and a recognition of the separation of powers principles constraining what Congress *may* delegate. *See West Virginia*, 142 S. Ct. at 2609; *Benzene Case*, 448 U.S. 607, 646 (1980). At the same time, Congress often *does* wish to delegate broad powers to an agency. *See City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) ("Congress knows to speak . . . in capacious terms when it wishes to enlarge[] agency discretion."). This delegation could recognize an agency's unique

expertise and adaptability, *see Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 151 (1991), or simply acknowledge that "the burdens of minutiae" would otherwise clog the legislative process, *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940).

As understood in *West Virginia v. EPA*, this major questions doctrine has two steps. The court asks (1) whether the agency action is a "major" one, as informed especially by the action's "economic and political significance." 142 S. Ct. at 2610–14. If the action is major, the Court then (2) adopts a clear statement rule, reading the governing statute with an eye to finding a "clear congressional authorization" beyond a "merely plausible textual basis." *Id.* at 2609. Crucially, no degree of significance will categorically prohibit agency action. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 471 (2001). Instead, significance merely underscores that "the Government should turn square corners in dealing with the people." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020).

The Commission's rule implicates significant economic and political issues. Nonetheless, the FTC Act provides precisely the "clear congressional authorization" a reviewing court seeks. This authorization is written on the face of the Act. It inheres in the Act's structure. It springs from its drafting history. It is liquidated in Supreme Court precedent. If Congress is anywhere clear, it is so here.

And the Commission's action poses no threat under the nondelegation doctrine. With neither this separation of powers rationale nor the legislative intent rationale bearing the necessary weight, any strong application of constitutional avoidance is unwarranted.

1. Text, structure, history, and case law support a broad reading of the Commission's mandate.

In its very first sentence, Section 5 of the Act declares "unfair methods of competition" unlawful. 15 U.S.C. § 45(a)(1). In its second, it "empower[s] and direct[s]" the Commission to make that promise real. *Id.* § 45(a)(2). Where "[i]t would not have been a difficult feat of draftsmanship" to cabin the breadth of the FTC Act," *Keppel*, 291 U.S. at 310, this "comprehensive language . . . neither invites nor supports a narrow construction." *FTC v. Eastman Kodak Co.,* 274 U.S. 619, 627 (1927). To the contrary, the generality and prominence of this language indicate that Congress spoke to the Commission's responsibility for *all* methods of unfair competition, subject, as always, to judicial review.

When courts *have* cabined statutory authorizations under the major questions doctrine, the operative language has lacked the FTC Act's clarity. In *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994), the Court found that the word "modify" was too subtle to authorize transformative industry regulations, *id.* at 231. In *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021), the Court found that

the CDC's claimed power to issue eviction moratoria could not spring from a catch-all term at the end of a list of specifics—"a wafer-thin reed on which to rest such sweeping power," *id.* at 2487–89. And in *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014), the Court found an absence of "clear congressional authorization" for the EPA's interpretation of a regulatory measure because the interpretation "would overthrow" the authorizing statute's "structure and design," *id.* at 321. The list goes on. *See NFIB v. OSHA*, 142 S. Ct. 661, 666 (2022) (holding that OSHA conflated "occupational risk and risk more generally"); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (rejecting what would require an "extremely strained understanding" of "safety"). In each, agencies claimed broad power from atop the interpretive balance beam. But the FTC—left foot firmly on § 45(a), right foot on § 46(g)—is not so easily toppled by an enterprising plaintiff.

In those rare cases where courts have declined to read broad authorizations into broad language, the provisions at issue were buried and obscure. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("Words of a statute must be [contextualized] to their place in the overall statutory scheme."). Thus, in *West Virginia,* the Court prevented the EPA from reading a broad authorization out of an "ancillary provision" in the Clean Air Act that the agency had rarely used. 142 S.

Ct. at 2610. And in *Whitman*, the Court ignored provisions containing potentially broad authorizations because the provisions lacked "prominence" in the statutory scheme. 531 U.S. at 468 n.1. However, the FTC's authorization to regulate "unfair methods of competition" is quite literally the most prominent provision in the statute. While Congress does not commonly "hide elephants in mouseholes," *id.* at 468, it does, on occasion, provide enclosures for elephants. It has done so here.

The Supreme Court's understanding of the Act's historical context backstops this view. *See Brown & Williamson*, 529 U.S. at 153 (using legislative history in a major questions inquiry). Concerned with the evolving nature of anticompetitive practices and the hydraulic relationship between regulation and industry, Congress wished to "supplement and bolster" the existing Sherman Act. *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966). Drafters explicitly considered, and rejected, limiting the breadth of "unfair methods of competition" by enumerating particulars. *Sperry*, 405 U.S. at 240 (observing that "there is no limit to human inventiveness in this field" (quoting H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.)). Instead, Congress created a Commission "specially competent" in "information, experience and careful study" of anticompetitive practices. *Keppel*, 291 U.S. at 314.[3] The

[3] The same could not be said for the EPA in *West Virginia*, which had "itself admitted" that it lacked the requisite expertise to exercise the authority it had claimed. 142 S. Ct. at 2612.

body was "virtually unanimous" in understanding § 45 to "permit[] the commission to act against any form of conduct detrimental to competition." Neil Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. Rev. 227, 280 (1980).

As in *West Virginia*, courts have constrained an agency's claimed power when Congress has preempted that power. 142 S. Ct. at 2614; *see also Brown & Williamson*, 529 U.S. at 157 (holding Congress had claimed for itself the power to regulate tobacco). But no statute preempts the FTC from regulating noncompete clauses. Nor has Congress time-limited the FTC's regulatory authority. *Ala. Ass'n*, 141 S. Ct. at 2486–87 (observing that Congress had terminated its express authorization for the CDC's eviction moratorium). True, Congress has voted down bills that would have mandated an agency to ban noncompete clauses. *See, e.g.*, Workforce Mobility Act of 2021, H.R. 1367, 117th Cong. (2021) (requiring either the Department of Labor or FTC to ban noncompetes). But, per *West Virginia*, failed legislation is only relevant to determining whether an agency action is "significant" in the first place, not to differentiate between "clear congressional authorization" and "a merely plausible . . . basis." 142 S. Ct. at 2609. There, the Court discussed failed amendments to the Clean Air Act in building to the necessity of a clear authorization—the statutory analysis followed in a completely different

subsection. *See id.* at 2614 (compare Section III.B with III.C). After all, "speculation about why a later Congress declined to adopt new legislation" is "a particularly dangerous basis" for statutory analysis. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1747 (2020). Regardless, the text and legislative history of the FTC Act evince precisely the "clear congressional authorization" demanded.

2. As no credible nondelegation threat exists to the FTC Act, constitutional avoidance need not operate on the statute.

The second rationale for the major questions doctrine is the set of separation of powers principles that make a court reluctant to recognize a broad delegation of policymaking authority. *West Virginia*, 142 S. Ct. at 2609 (citing *Util. Air*, 573 U.S. at 324); *see also id.*, at 2616–20 (Gorsuch, J., concurring) (describing a clear statement rule assuring that Congress does not "inadvertently cross constitutional lines" (quoting Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 180 (2010))). Where nondelegation concerns threaten, constitutional avoidance is appropriate as a matter of respect for Congress's good faith, the avoidance of unnecessary collisions between branches, and to prevent the waste of the political capital that went into producing the statute. *Cf. Rescue Army v. Mun. Ct. of City of L.A.*, 331 U.S. 549, 571 (1947). But where, as here, the particular

constitutional question before this Court has been settled since 1935—where it is known that no nondelegation monster lurks underneath the bed—a court need not grip the statutory blanket quite so tightly. *See* Barrett, *supra*, at 179–80.

The FTC Act, NIRA's foil in *Schechter*, poses no nondelegation threat. The Supreme Court there was clear that though the Commission possesses broad discretion to pursue its mandate, the procedural safeguards built into the Act and its narrow focus on anticompetitive methods place it on the right side of the constitutional line. *Schechter*, 295 U.S. 495, 532–34 (1935). The same result follows under *Whitman*. There, the Court asked whether Congress provided "an intelligible principle to which [the agency] is directed to conform." *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 409 (1928)). Though the specificity required of this principle "varies according to the scope of the power congressionally conferred," a "determinate criterion" is unnecessary even in "sweeping regulatory schemes." *Id.* at 475.

The FTC finds its intelligible principle in preventing "the extinction of rivals and the establishment of monopoly," *Raladam*, 283 U.S. at 650, by determining which business methods produce "substantial injury to consumers . . . or competitors," *Sperry*, 405 U.S. at 244–45 n.5. This principle provides no less clear guidance over no more

broad a subject matter than the Public Utility Holding Company Act's mandate to prevent "unnecessar[y] complicat[ion]" or "unfair[] or inequitabl[e] distribut[ion] of voting power" in corporate structure. *See Whitman*, 531 U.S. at 474 (2001) (discussing *Am. Power & Light Co. v. SEC,* 329 U.S. 90, 104–05 (1946)). And the FTC Act provides substantially clearer guidance than did the Communications Act in compelling regulation to make "more effective use of radio in the public interest." *See id.* (discussing *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943)). Congress's clear conferral of power on the FTC, vigorous as it is, bears no constitutional frailty under *Whitman*.

In sum, any extant approach to unconstitutional delegation allows for the mandate given to the Commission in Section 5 of the FTC Act. The Supreme Court recognized as much in *Schechter*, and no development in the decades since threatens this understanding. Against this backdrop, the "separation of powers principles" animating *West Virginia*, 142 S. Ct. at 2609, are that much less pressing. Therefore, this Court should uphold the lower court's determination that the FTC had the power to issue 16 C.F.R. § 910.

III. AMES ELECTRIC'S USE OF NONCOMPETE AGREEMENTS IS NOT PROTECTED BY STATE ACTION IMMUNITY.

It is one thing for a state to license a carefully-regulated monopoly of, say, a single trash hauler. After all, one town has only so much trash.

Cf. Tri-State Rubbish, Inc. v. Waste Mgmt., Inc., 998 F.2d 1073, 1077, 1081 (1st Cir. 1993). It is another thing entirely for a state to grant a get-out-of-federal-economic-regulation free card to a favored company, allowing it to reap financial benefits while imposing asymmetric costs on out-of-state businesses and consumers who cannot do anything about it. In *Parker v. Brown*, 317 U.S. 341, 368 (1943), the Supreme Court authorized the former. It had nothing to say about the latter, the reverse preemption scheme that this lawsuit seeks to license.

Ames' policy defies our constitutional structure, the expressed will of Congress, and the considered judgment of the FTC. By granting state action immunity, the district court erred in two ways: (1) by applying *Parker* in the first instance, and (2) by determining Ames articulated a clear state policy and actively supervised its implementation. This Court should reverse.

A. Ames' program is outside the scope of state action immunity.

From the beginning, *Parker* represented a compromise between federal antitrust law and state regulation. The *Parker* Court acknowledged that in our system of dual sovereignty, states retain an interest in regulating their own economies, and sometimes, they might have valid reasons to do so in ways that would otherwise run afoul of federal antitrust law. 317 U.S. at 350–51. But the Court also

acknowledged that Congress could preempt a state from implementing an anticompetitive program that affected interstate commerce. *Id*.

The doctrine of state action immunity that emerges from *Parker*, then, is based on twin presumptions: (1) Congress does not ordinarily seek to "nullify a state's control" over its intrastate regulatory program, *id.* at 351, but (2) states may not simply declare the violation of federal law to be lawful, *id.* (citing *N. Sec. Co. v. United States*, 193 U.S. 197, 344–45 (1904)). In other words, states may not "selectively repeal the Sherman Act by sanctioning private cartels and other antitrust violations." Rebecca Haw Allensworth, *The New Antitrust Federalism*, 102 VA. L. REV. 1387, 1396 (2016).

In the decades since, the Court has permitted departures from federal antitrust law only out of respect for federalism and only when a state "accept[s] political responsibility" for its regulation. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992); *see also N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 505 (2015) ("[I]t is necessary in light of *Parker*'s rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control.").

Because Ames cannot accept political responsibility for a program whose anticompetitive effects spill well beyond its own borders, the program cannot be entitled to state action immunity when it is at odds with federal law. To confer state action immunity on the Ames program

would amount to licensing a reverse preemption regime: the federal government enacts a law binding on employers nationwide, and Ames exempts (a favored few of) its employers from having to comply with it. *Cf.* Frank Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 25 (1983) (noting the "curious" status of "inverse preemption").

If the anticompetitive state policy would affect only Ames, it might be acceptable under state action immunity. To the extent it undermined Ames' economy, Ames voters could hold its leaders accountable. But Ames' regulation spills well beyond its own borders. It prohibits managers and engineers alike from working at any other companies, including—and perhaps especially—other states' utility companies, whose pool of available workers shrinks as a direct consequence of Ames' regulation. In the Dormant Commerce Clause context, we call that sort of policy "direct targeting," and it is almost per se illegal. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) ("[W]here simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected."). The principle is no different here, and *Parker* itself was clear that whatever its scope encompassed, it did not permit states simply to exempt their employers from generally applicable federal law. 317 U.S. at 351.

This Court has at least two doctrinal pathways that provide sufficient basis to uphold the federal regulation without applying state action immunity. First, it can adopt a per se rule that regulation under the FTC Act is not subject to state action immunity. Alternatively, it could limit that holding to regulations with substantial interstate spillover effects.

1. State action immunity should not apply to the FTC Act.

Parker's state action immunity doctrine was created for the Sherman Act. It should not apply to the FTC Act because the Commission's historical context and structure reflect fundamentally different aims. The Supreme Court in *Ticor* expressly reserved judgment on *Parker* immunity's applicability to the FTC Act because, in that case, the Commission did not assert "any superior pre-emption authority." *Ticor*, 504 U.S. at 635. Here, we do. Acting pursuant to delegated legislative authority, the FTC acted through rulemaking to reach a considered judgment about the anticompetitive effects of noncompete clauses and issued a rule banning them in the United States. *See supra* p. 3. Because Ames' statute contravenes that rule, it must be preempted pursuant to the Supremacy Clause.

The Sherman Act, passed a quarter century before the FTC Act, sought to bolster state anti-monopoly law through the increased

availability of penalties and reflected a vision of commerce fundamentally narrower than the one the Supreme Court later described in *Wickard v. Filburn*, 317 U.S. 111 (1942). The year after *Wickard*, the *Parker* Court determined that, to respect the regulatory scheme Congress created through the Sherman Act, a background presumption exempting the states' activities was necessary. *Parker*, 317 U.S. at 351–52.

By the turn of the twentieth century, the nature of Congress's concern about anticompetitive regulations had changed, particularly as it observed a "race to the bottom" fueled by state regulations that continuously undercut one another. *See* Daniel Crane & Adam Hester, *State-Action Immunity and Section 5 of the FTC Act*, 115 MICH. L. REV. 365, 384–88 (2016). To address this concern, one option would have been to nationalize corporations law. Instead, Congress developed a commission that could target the excesses of anticompetitive behavior that affected interstate commerce while respecting states' general primacy over corporations in their own states. *See id.* at 388–89; Note, *The State Action Exemption and Antitrust Enforcement Under the Federal Trade Commission Act*, 89 HARV. L. REV. 715, 732–36 (1976).

Although the FTC Act does not mention preemption explicitly, its history provides a significantly weaker base for *Parker* immunity than does the Sherman Act's. By the time of the FTC Act, the Supreme Court

had blessed Congress's ability to touch intrastate economic activity when regulating interstate commerce. Congress passed the FTC Act the same year the Supreme Court decided the *Shreveport Rate Case*, 234 U.S. 342 (1914), which held that "where the interests of the freedom of interstate commerce are involved," Congress and the agencies it establishes "must control" even in the face of contrary state regulation, *id.* at 360. The historical record shows that the Interstate Commerce Commission, whose power *Shreveport* affirmed, was on the minds of legislators as they debated what would become the FTC. *See* Crane & Hester, *supra*, at 397–99. Senator Cummins, for example, stated that he had no doubt Congress had the power to preempt an anticompetitive state law. "[O]therwise, our power to regulate commerce is subordinate to the legislation and sovereignty of the States," he said. *Id.* at 398. Senator Thomas observed that this federal supremacy reflected "precisely the course which [he thought] this legislation should take." *Id.*

The structure of the FTC Act reflects those attitudes. It contains no private right of action. It limits criminal penalties. It has a broader scope than prior regulations. These factors buttress the conclusion (1) that the FTC Act reaches more conduct than the Sherman Act, and (2) that preempting states poses few of the federalism concerns espoused in *Parker*. *See* Note, *supra*, at 733–35; *Emps. of the Dep't v. Dep't of Pub.*

Health & Welfare, 411 U.S. 279, 286 (1973) (noting that an act's lack of punitive penalty provisions suggests its applicability to states).

In sum, when it wrote the FTC Act, Congress saw a national problem that required a national solution. Therefore, the basis for state action immunity is inapposite to the Commission. This Court should rule on the question the Supreme Court reserved in *Ticor* and treat the FTC Act on its own terms.

2. The substantial interstate economic spillover of Ames' regulation provides an independent and sufficient basis to preclude Ames Electric from state action immunity.

This Court need not adopt a categorical rule completely abrogating state action immunity under the FTC Act to vindicate the principles the Supreme Court carefully balanced in *Parker*. Instead, this Court could focus on the core rationale of *Parker*—accountability—and adopt a narrower test for whether state action immunity should apply.

Specifically, when a state regulation functionally targets interstate commerce by imposing substantial economic spillovers, it cannot be entitled to immunity that would insulate it from those affected by those spillovers. Then-Professor Frank Easterbrook decried this sort of "monopoly overcharge" associated with anticompetitive state regulation that causes economic harm beyond a state's borders.

Easterbrook, *supra*, at 45–46. In his view—and that of the FTC here—a state can do anticompetitive things only when that state bears its own costs. *Id.* at 47–48. As the Supreme Court emphasized in *Ticor*, "States must accept political responsibility for actions they intend to undertake. . . . Federalism serves to assign political responsibility, not to obscure it." *Ticor*, 504 U.S. at 636.

Here, Ames imposes costs on its sister states without bearing the requisite accountability. If this effect of 18 A.C.A. § 2010 stands, Ames Electric will be able to hire anyone it wants while restricting any other states' utilities (or other companies, for that matter) from hiring its managers or engineers. No utility anywhere else in the United States can engage in similar anticompetitive conduct, leaving them at a disadvantage caused by Ames' ploy to exempt its utilities from federal antitrust law. Why? Because the FTC determined that such conduct was an unfair trade practice and, in 16 C.F.R. § 910, banned it nationwide. If the people of Ames—or like-minded citizens elsewhere—want to contest that determination, they can do so. That recourse is the essence of the political accountability that lies at the heart of our democratic system and of the federalism concerns that underlie *Parker*. But that recourse is absent for citizens in other states to challenge the Ames statute. For that reason, this Court can decline to confer state action immunity when an anticompetitive state policy affects interstate

commerce by causing substantial economic spillovers and uphold the FTC's regulation.

B. Even if state action immunity applies to the FTC Act, it does not shield Ames Electric.

Because of "the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state-action immunity is disfavored.'" *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013) (quoting *Ticor*, 504 U.S. at 636).

Nevertheless, when a state acts "as sovereign," *Parker*, 317 U.S. at 352, that action may be immune to federal antitrust law if it fits into one of three narrow exceptions. First, exercises of a State's core sovereign power—such as decisions of its supreme court—receive *automatic immunity*. *See Dental Exam'rs*, 574 U.S. at 504. Second, local government entities may have *municipal immunity* if they act under a "clearly articulated and affirmatively expressed as state policy." *See id.* at 504 (quoting *Phoebe Putney*, 568 U.S. at 225). Finally, entities that do not qualify for automatic or municipal immunity may still be exempt from federal antitrust law if they satisfy both the clear articulation requirement *and* are "actively supervised by the State." *See id.* at 504, 510 (quoting *Phoebe Putney*, 568 U.S. at 225).

Ames Electric does not fit into any of these exceptions. As a self-described for-profit "pseudo-private utilit[y]," JA-16, it is far from a sovereign power and does not act like a municipality. Ames Electric does not fit into the third category either: the State of Ames has neither clearly articulated approval for nor actively supervised Ames Electric's programmatic imposition of noncompete agreements.

1. Ames Electric does not qualify for automatic or municipal state action immunity.

Automatic state action immunity is available only for unambiguous exercises of sovereign state authority. *See Dental Exam'rs*, 574 U.S. at 504 ("State legislation and 'decision[s] of a state supreme court, acting legislatively rather than judicially,' will satisfy this standard . . . because they are an undoubted exercise of state sovereign authority." (quoting *Hoover v. Ronwin*, 466 U.S. 558, 567–68 (1984))). By contrast, Ames Electric is "privately run" and has little contact with the state apart from intermittent reporting requirements. JA-16. As one court put it, there is "no colorable argument" that a state-owned electric utility could invoke automatic immunity. *Century Aluminum of S.C., Inc. v. S.C. Pub. Serv. Auth.*, 278 F. Supp. 3d 877, 885 (D.S.C. 2017).

Ames Electric has none of the features of a local government entity that would entitle it municipal immunity. Municipalities get special treatment because they serve the public interest and are

accountable to the electorate. *See Hallie v. City of Eau Claire*, 471 U.S. 34, 46–48 (1985). By contrast, active market participants—like Ames Electric—are presumed to "pursue their own self-interest under the guise of implementing state policies." *Phoebe Putney*, 568 U.S. at 226; *cf.* SMITH, THE WEALTH OF NATIONS, *supra*, at 135–36 ("People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the publick, or in some contrivance to raise prices."). That concern applies to Ames Electric: its senior management and Human Resources Manager select who must enter a noncompete agreement. JA-16–17. As Ames delegated decision-making authority to those most likely to serve their own private motives, Ames Electric must show both clear articulation and active supervision. *See Dental Exam'rs*, 574 U.S. at 511. It fails to do so.

2. The State of Ames has not clearly articulated a state policy authorizing Ames Electric to impose noncompete agreements.

An anticompetitive state policy is "clearly articulated" when "the displacement of competition was the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." *Phoebe Putney*, 568 U.S. at 229. Clear articulation is a high bar. *See Cantor v. Detroit Edison Co.*, 428 U.S. 579, 597 (1976) ("[T]he standards for ascertaining the existence and scope of such an exemption surely must

be at least as severe as those applied to federal regulatory legislation.").[4] Ames Electric cannot satisfy that demanding standard.

State action immunity is not available unless Ames "fores[aw] and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Phoebe Putney*, 568 U.S. at 229. Ames *did* clearly intend to allow pseudo-private utilities, in "extraordinary" cases, to use noncompete agreements after case-by-case, "fact-specific" inquiries. *See* 18 A.C.A. § 2010. But because Ames Electric has done something different, the clear articulation test is not satisfied.

a. Ames Electric's programmatic use of noncompete agreements is not authorized by Ames law.

At a minimum, the clear articulation test requires "state-law authority to act." *See Phoebe Putney*, 568 U.S. at 228; PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 225a (4th & 5th eds. 2022) ("[T]he 'state itself' must have authorized the challenged activity in the state law sense of permitting the relevant actor to engage in it.").

[4] Twice in the past ten years the Supreme Court has stressed that the clear articulation test is a demanding requirement. In 2013, a unanimous decision in *Phoebe Putney* chided the Eleventh Circuit for applying "our clear-articulation test too loosely." 568 U.S. at 229. Then, in 2015, *Dental Examiners* emphasized that clear articulation "by itself" "rarely will achieve [the] goal" of showing that "an anticompetitive policy is indeed the policy of a State." 574 U.S. at 507.

Ames Electric does not have state law authority to act. Ames state law authorizes noncompete agreements only after case-by-case evaluations. "Pseudo-private" utilities can enter a noncompete agreement "with *an* employee upon *a* finding of extraordinary need." 18 A.C.A. § 2010(1) (emphasis added). And "[f]or *each* such agreement, the utility must undertake *a* fact-specific inquiry." *Id.* § 2010(1)(a) (emphasis added). The statute's use of singular articles commands singular inquiries. This is underscored by the requirement that the inquiries be "fact-specific" and apply to "each" agreement. *Cf. Specific*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981) ("restricted by nature to a particular individual, situation, relation, or effect"); *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021) ("'[A]' notice would seem to suggest just that: 'a' single document").

Ames Electric has flouted that case-by-case expectation. The utility, in its own words, "require[s] noncompete clauses in *all* employment contracts for management level positions and for *all* employees associated with the utility's research and development department." JA-16–17 (emphasis added). This across-the-board policy was justified by an inchoate fear for "Ames Electric's ability to compete." JA-17. Adopting a single policy based on hazy worries is the opposite of the policy articulated by the statute: case-by-case findings based on fact-specific inquiries. In case there was any doubt, the state oversight

commission found that Ames Electric "had not always acted in accordance with the [statute's] express terms." JA-17.

When evaluating state action immunity defenses, appellate courts do not hesitate to make careful distinctions about the scope of authority under state law. *See, e.g.*, *Chamber of Com. of the U.S. v. City of Seattle*, 890 F.3d 769, 777, 785–87 (9th Cir. 2018) (finding no clear articulation because state law authorized regulation of "rates charged *to passengers*" but not fees "charge[d] *to drivers*" (emphasis added)); *Quadvest, L.P. v. San Jacinto River Auth.*, 7 F.4th 337, 348 (5th Cir. 2021) (finding no clear articulation because "[e]ven if [the utility's] Enabling Statute could be read as vesting [the utility] with monopoly power over the market for surface water," Supreme Court precedent "cautions against interpreting such statutory authority as extending to the entire wholesale raw water market."). Ames Electric also makes an error about its scope of authority: Ames' law authorizes noncompetes for employees after case-by-case findings—not carte blanche decrees.

b. Ames Electric's programmatic use of noncompete agreements is inconsistent with state policy goals.

To be clearly articulated, an anticompetitive act must also be "consistent with [the state's] policy goals." *Phoebe Putney*, 568 U.S. at 229; *cf. Kay Elec. Co-op. v. City of Newkirk*, 647 F.3d 1039, 1044 (10th

Cir. 2011) (Gorsuch, J.) ("Antitrust violations come in a variety of flavors and just because the state has authorized one doesn't mean it has authorized all.").

Ames Electric's programmatic use of noncompetes is inconsistent with Ames' default policy goal of *banning* noncompetes. Before adopting its utility-specific exception, in 2017 Ames declared a pro-competition policy for all employment contracts: noncompete clauses are "unlawful." 18 A.C.A. § 2004. It would hardly be "consistent with its policy goals," *Phoebe Putney*, 568 U.S. at 229, for Ames Electric to sweep aside the pro-competition background presumption by applying noncompetes to entire categories of employees. In any case, state action immunity is "disfavored" as a matter of federal law's pro-competition policy. *Ticor*, 504 U.S. at 636; *see* AREEDA & HOVENKAMP, *supra*, ¶ 225a ("The general principle is that ambiguities in state authorizing provisions should be construed against authorization."). Here, state law piles on to the pro-competition presumption.

Courts take such background pro-competition policies as evidence that clear articulation is lacking. *See, e.g.*, *Ellis v. Salt River Project Agric. Improvement & Power Dist.*, 24 F.4th 1262, 1277 (9th Cir. 2022) (finding no clear articulation when one state law allowed a utility to set electricity rates, but other state laws demonstrated "a general policy favoring competition"); *Cedarhurst Air Charter, Inc. v. Waukesha*

County, 110 F. Supp. 2d 891, 893–94 (E.D. Wis. 2000) (finding no clear articulation when a state statute gave a county authority to "establish, operate and regulate a local airport" but other state laws articulated a "strong pro-competitive policy"). Ames articulated a policy in favor of noncompetes after case-by-case findings, not noncompetes applied to entire categories of employees.

c. This Court should not acquiesce to Ames Electric's incorrect interpretation of Ames state law.

In almost all circumstances, clear articulation requires "state-law authority to act." *See Phoebe Putney*, 568 U.S. at 227. However, if the entity engaging in anticompetitive activity violates state law exclusively in "complex or subtle ways," then it might still satisfy the clear articulation requirement. *Fisichelli v. City Known as Town of Methuen*, 956 F.2d 12, 14 (1st Cir. 1992) (Breyer, C.J.). The Supreme Court noted that, to prevent state action immunity "from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law." *See City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 372 (1991).

Ames Electric's distortion of Ames law is neither complex nor subtle. On its face, the law allows for noncompete agreements only after

an employee-specific, "fact-specific" determination. *See* 18 A.C.A. § 2010. Compare that clarity with the murkiness in *Omni Outdoor*, where the Court declined to plumb the depths of what "health, safety, morals or the general welfare" meant under South Carolina state law. 499 U.S. at 371. Acquiescing to Ames Electric's cavalier, self-interested interpretation of a state statute would allow subordinate state entities to ignore federal law, "stand[ing] federalism on its head." *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1*, 171 F.3d 231, 236 (5th Cir. 1999) (en banc).

3. Ames is not actively supervising Ames Electric's anticompetitive behavior.

To supervise actively, a state must (1) have the power to review particular anticompetitive acts and (2) to exercise that power to disapprove of those acts that fail to accord with state policy. *Patrick v. Burget*, 486 U.S. 94, 101 (1988). The "mere *potential*" to supervise is not the same as active supervision. *Ticor*, 504 U.S. at 638 (emphasis added). The exercise of that supervisory power must establish "ultimate control" over challenged anticompetitive conduct. *Patrick*, 486 U.S. at 101.

Ames permits active market participants to engage in anticompetitive conduct without adequate supervision. The state improperly delegated "ultimate authority" to Ames Electric: Ames cannot give input on or modify individual decisions Ames Electric

makes. *See* 18 A.C.A. § 2010. Thus, Ames cannot ensure that Ames Electric's decisions further state interests, and it has no corrective mechanism for those that do not.

And whatever power it does have, Ames has done nothing to express disapproval of Ames Electric's anticompetitive acts that are inconsistent with state policy. The district court erred when it declared that Ames' inaction was "just as likely an indication of tacit approval as it is evidence of indifference." JA-9. When an actor breaches the express terms of a statute, the legislature must intervene in order to satisfy the active supervision requirement. *See Ticor*, 504 U.S. at 638. Here, Ames lets the fox guard the henhouse alone.

a. Ames lacks the requisite power to review the anticompetitive acts of Ames Electric.

A state must have ultimate control over challenged anticompetitive conduct. *Ticor*, 504 U.S. at 634. This control requires the ability to veto or modify particular decisions to certify their compliance with state policy. *Dental Exam'rs*, 574 U.S. at 515.

Ames lacks such authority. Rather, Ames Electric has sole authority to determine who must enter a noncompete agreement. JA-11. Ames can neither review individual cases nor veto Ames Electric's decision before a noncompete agreement goes into effect. *See id.* The district court's assessment notwithstanding, JA-8, this scheme is a far

cry from that of California's New Motor Vehicle Board, where the Board had to approve *ex ante* any new retail motor vehicle dealership, *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 96 (1978). Ames retains no prophylactic power to stop anticompetitive conduct that diverges from state interests or runs afoul of the public good.

Moreover, once a noncompete agreement is issued, Ames cannot revoke it. *See Patrick*, 486 U.S. at 103 (finding no active supervision where the state's authority did not include the "power to disapprove private . . . decisions"). The commission can audit, suggest reforms, or even suspend Ames Electric's authority. *See* 18 A.C.A. § 2010. But none of that matters. Not one of these tools can nullify any noncompete agreement. Absent that power, active supervision cannot occur. *See Dental Exam'rs*, 574 U.S. at 515; *cf. Bates v. State Bar of Ariz.*, 433 U.S. 350, 362 (1977) (granting state action immunity where Arizona Supreme Court subjected each decision to "pointed re-examination").

b. Whatever potential for regulatory review Ames has, Ames did not even express disapproval of—let alone actively oversee—Ames Electric's anticompetitive conduct.

Even if a state has the power to review particular decisions, absent active supervision in fact, a state cannot be entitled to state action immunity. *Ticor*, 504 U.S. at 638. The mere potential for a state

to supervise does not mean the state has actually supervised *Id*. To constitute active supervision, a state must exercise its power to express disapproval when a party's particular anticompetitive conduct fails to accord with state policy. *Patrick*, 486 U.S. at 101.

Though Ames knew that Ames Electric's admitted conduct failed to accord with state policy, it did nothing. The commission found that Ames Electric "had not always acted in accordance with the express terms of Section 2010." JA-17. For example, Ames Electric's programmatic noncompete agreements breach the statutory requirement for case-by-case analysis. *See supra* pp. 37–42. Nevertheless, the commission has never audited Ames Electric. JA-17. Without an audit, the commission cannot suspend Ames Electric's authority under the statute—the only mechanism by which Ames Electric can be punished under § 2010. Moreover, even knowing about the breach, Ames' Legislature complacently suggested it would "consider possible amendments to Section 2010." JA-17. Over a year later, it has not taken any step to cease Ames Electric's ongoing breach of the statute nor to discipline Ames Electric for such anticompetitive conduct.

The district court erred when it posited that "legislative inaction is just as likely an indication of tacit approval as it is evidence of indifference." JA-9. The Supreme Court has repeatedly recognized that

a state does not actively supervise if it does not review each decision and disapprove of those decisions discordant with state policy. *See, e.g.*, *Patrick*, 486 U.S. at 101; *Dental Exam'rs*, 574 U.S. at 515. The fact that the commission ignored Ames Electric's breach of state law underscores the insufficiency of its supervision. By disregarding Ames Electric's known breach, Ames violated a core tenet of active supervision. Therefore, Ames Electric cannot enjoy state action immunity.

Conclusion

We respectfully request that this Court REVERSE the lower court's grant of Ames Electric's motion for summary judgment, and REMAND this case for further proceedings.

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APPENDIX

U.S. CONST. art. I, § 8, cls. 1, 3

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

. . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

U.S. CONST. art. IV, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

18 A.C.A. § 2004 | Noncompete Rule

1. It is unlawful for any employer to enter into, or attempt to enter into, a non-compete clause with a worker; to maintain with a worker a non-compete clause; or to represent to a worker that the worker is subject to a non-compete clause.

18 A.C.A. § 2010 | Pseudo-Private Utility Companies

To assure the state maintains its successful pseudo-private utilities, the state's utilities shall be granted exceptions to 18 A.C.A. § 2004 upon a showing of extraordinary need. After hearing from the leaders of the state's great utilities, the Legislature is persuaded that in some circumstances the economic value of a noncompete clause exceeds the cost it might impose on Ames citizens. To that end:

1. Any pseudo-private utility created by the state shall have the authority to enter a noncompete agreement with an employee upon a finding of extraordinary need and only then when the agreement will not unduly harm Ames workers.
    a. Extraordinary circumstances may exist where an industry is suffering from tight labor conditions, to recoup high

employee training costs, or where the nature of the employee's work demands such an agreement. These examples are illustrative only. They are neither exhaustive nor prima facie evidence of extraordinary need. For each such agreement, the utility must undertake a fact-specific inquiry.

2. The Legislature shall convene a bi-annual commission comprised of Ames business leaders to review any noncompete agreement established under this section. In advance of the convening of the commission, every utility who has entered noncompete agreements must submit a report to the commission describing the number of such agreements and the reasons for their existence. The commission shall review these reports and suggest reforms, if any, to this legislation.
3. The commission retains the authority to audit, no more than once a year, any utility's noncompete policy to ensure compliance with this statute.
    a. The audit shall consist of a review of all documents related to any utility's noncompete policy. Upon a finding that the utility had violated this statute, the commission may suspend the utility's authority under this statute for a period not to exceed six months.

Federal Trade Commission Act, § 5, 15 U.S.C. § 45

(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, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

. . . .

(b) Proceeding by Commission; modifying and setting aside orders

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue [institute adjudication].

Federal Trade Commission Act, § 6, 15 U.S.C. § 46

The Commission shall also have the power to–

. . .

(g) Classification of corporations; regulations

From time to time classify corporations and (except 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.

Federal Trade Commission Act, § 18, 15 U.S.C. § 57a

(a) Authority of the 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 of 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 . . .

(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.

Administrative Procedure Act, 5 U.S.C. § 706(2)

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

. . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

16 C.F.R. § 910.1 | Definitions

(a) Business entity means a partnership, corporation, association, limited liability company, or other legal entity, or a division or subsidiary thereof.

(b) Noncompete clause.

(1) Noncompete clause means a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer

(2) Functional test for whether a contractual term is a noncompete clause. The term noncompete clause includes a contractual term that is a de facto noncompete clause because it has the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer.

. . .

(c) Employer means a person, as defined in 15 U.S.C. 57b-1(a)(6), that hires or contracts with a worker to work for the person.

. . .

(f) Worker means a natural person who works, whether paid or unpaid, for an employer.

. . .

16 C.F.R. § 910.2 | Unfair methods of competition.

(a) Unfair methods of competition. It is an unfair method of competition for an employer to enter into or attempt to enter into a noncompete clause with a worker; maintain with a worker a noncompete clause; or represent to a worker that the worker is subject to a noncompete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable noncompete clause.

(b) Existing noncompete clauses.

(1) Rescission requirement. To comply with paragraph (a) of this section, which states that it is an unfair method of competition for an employer to maintain with a worker a noncompete clause, an employer that entered into a noncompete clause with a worker prior to the compliance date must rescind the noncompete clause no later than the compliance date.

(2) Notice requirement.

(A) An employer that rescinds a noncompete clause pursuant to paragraph (b)(1) of this section must provide notice to the worker that the worker's noncompete clause is no longer in effect and may not be enforced against the worker.

. . .

16 C.F.R. § 910.4 | Relation to State laws.

This Part 910 shall supersede any State statute, regulation, order, or interpretation to the extent that such statute, regulation, order, or interpretation is inconsistent with this Part 910. A State statute, regulation, order, or interpretation is not inconsistent with the provisions of this Part 910 if the protection such statute, regulation, order, or interpretation affords any worker is greater than the protection provided under this Part 910.

16 C.F.R. § 910.5

Compliance with this Part 910 is required as of January 1, 2023.