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

REPLY BRIEF FOR APPELLANT

The Roger Fisher Memorial Team

Emily M. Miller
Basundhara Mukherjee
Benjamin R. Pontz
Benjamin C. Richardson
Benjamin C. Rolsma
Theodore A. Steinmeyer

Counsel for the Appellants

6:30pm, March 8, 2023
Ames Courtroom

Oral Argument

Table of Contents

Table of Authorities

Cases

Statutes

Rules

Treatises

Other Authorities

Argument

I. THE NONCOMPETE RULE FALLS WITHIN THE FTC'S CLEAR CONGRESSIONAL AUTHORIZATION.

A. The FTC holds substantive rulemaking authority over "unfair methods of competition."

1. Section 46(g) provides this authority in the first instance.

To hear Ames Electric tell it, Congress placed § 46(g) rulemaking among "clerical" items and so confined these rules to that "investigatory" cabinet. Appellee's Br. 12–14. The Supreme Court rejected a similar structural argument when construing the Federal Communication Commission's rulemaking grant; there, "make such rules and regulations" shared a section with clerical mandates to "classify" and "study." *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 217 (1943) (discussing 47 U.S.C. § 303(r)). As that placement did not deprive the FCC of substantive rulemaking power, *see id.*, neither does it deprive the FTC, *see Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 678 (D.C. Cir. 1973) (applying the Supreme Court's reasoning).

That grant of power should not be surprising. Rulemaking does not alter the scope of what the Commission may regulate, nor does it replace adjudication with respect to particular parties. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 771 (1969) (Black, J., concurring). Rules merely specify the Commission's legal standard before

adjudication begins rather than after it ends. *See Nat'l Petroleum*, 482 F.2d at 675. No wonder, then, that judges prefer rulemaking to adjudication with "near unanimity." 1 RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 6.8 (4th ed. 2002). Whether a mammoth or an elephant, the rulemaking animal sits comfortably in its statutory enclosure.[1]

2. Later legislation, including the Magnuson-Moss amendment, affirms this authority over "unfair methods of competition."

Appellee's reading of the Magnuson-Moss Amendment creates the same surplusage of which they accuse the Commission. Start where all agree: § 46(g) allowed *at least* "interpretive," "procedural," or "policy" rulemaking for both "unfair or deceptive acts" and "unfair methods" before the Magnuson-Moss Amendment. Appellee's Br. 12–15. But why, then, does § 57a(a)(1)(A) grant this very same power over "unfair or deceptive acts"? Because § 57a(a)(1) makes sense only against the backdrop of § 57a(a)(2)—revoking *all* rulemaking with respect to "unfair or deceptive acts" so the Amendment can cleanly initiate a renewed grant subject to the new procedural protections of § 57a(b). This view is

[1] Appellee's preferred metaphor for the Commission's authority, the mammoth, differs from elephants not in size but in fate: extinction by overzealous hunters. *See* Elizabeth Hilfrank, *Woolly Mammoth*, NATIONAL GEOGRAPHIC KIDS, https://bit.ly/3Zk3S0J (last visited Feb. 27, 2023).

consonant both with § 57a(a)(1) looking quite like an "initial grant," *see* Appellee's Br. 15–16, *and* with § 46(g) having previously authorized rulemaking writ large. Indeed, the pain § 57a(a)(1) takes to distinguish between procedural and substantive rulemaking makes the most sense if "rules," standing alone, evoked both. So no wonder § 57a(a)(2) speaks of the Commission's undisturbed authority to "prescribe rules (*including* interpretive rules)," but nowhere distinguishes and limits it to those. *Id.* (emphasis added).

Appellee then asks a separate question: if § 46(g) provides an umbrella rulemaking power, why would Congress separately grant specific rulemaking powers in later legislation? *See* Appellee's Br. 21 (discussing, *inter alia*, the Textile Act). We offer a simple answer: § 46(g)'s scope is limited to "the provisions of *this* subchapter," §§ 41–58 of the FTC Act. 15 U.S.C. §§ 41, 46(g) (emphasis added). All the later legislation Appellee discusses lives in distinct subchapters. *See* 15 U.S.C. §§ 68d(a), 69f(b), 70e(c). But Appellee's premise is right: the language § 46(g) shares with each of those grants—authorizing the Commission to "make" or "prescribe rules and regulations," *see id.*—does indeed "grant substantive rulemaking authority" over the relevant content, Appellee's Br. 21.

Finally, even if an agency declines to exercise power for a time, it does not just lose that power. Notably, the FTC did make an "unfair

methods" rule in 1967, but it later rescinded the rule on policy grounds. *See* Tailored Clothing Rule, Notice of Repeal, 16 C.F.R. § 412 (1994). Regardless, the Court made plain in *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001), that "an agency's voluntary self-denial has no bearing" on its authority's actual contents, *id.* at 473.

B. Congress clearly authorized the FTC to regulate "unfair methods of competition," which includes noncompetes.

1. Congress intended "unfair methods of competition" to encompass broad, flexible power.

Appellee gives the impression that clear authorization turns on whether Congress used the word "noncompete." *See* Appellee's Br. 23, 27–28. That approach confuses clarity with particularity and evades the core of the major questions inquiry: "a practical understanding of legislative intent." *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). That practical understanding requires that the frame of mind adopted by a reviewing court matches Congress's frame of mind in drafting the statute. To anachronistically assert that "if Congress had wanted" to use the word "noncompetes" in 1914, "it would have," Appellee's Br. 27, is to ignore the intent of a Congress that "explicitly considered, and rejected . . . enumerating the particular practices" it meant to address, *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 240 (1972). Appellee searches

for the chandelier among the silverware and, finding nothing, declares the dinner party ruined.

Consider, for a moment, the implications of Ames Electric's approach. Just as "unfair methods of competition" does not contain the word "noncompete," neither does it speak of collusive sponsorship agreements, *Atl. Refin. Co. v. FTC*, 381 U.S. 357, 365 (1965), quack "obesity cure[s]," *FTC v. Raladam Co.*, 283 U.S. 643, 644 (1931), nor exploitative "break and take" candy packaging, *FTC v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 306 (1934). On Appellee's reading, this "empty vessel," Appellee's Br. 24, would authorize *no* agency action in an area of significance. The logical endpoint of their argument is not major questions or constitutional avoidance but full-blown nondelegation.

2. This flexible power includes clear authorization for the noncompete rule.

Congress mandated that the Commission act against "unfair methods of competition," a "flexible concept with evolving content," *FTC v. Bunte Bros.,* 312 U.S. 349, 353 (1941), knowing full well that the provision's shadow would fall differently "in the light of particular competitive conditions," *A.L.A. Schechter Poultry Co. v. United States*, 295 U.S. 495, 533 (1935). The Commission is within Congress's clear authorization to the extent it faithfully applied Congress's legal standard to the facts before it. Appellant's Br. 8–12. Appellee's only

complaint in this sphere is that the Commission's rule covers "even those [noncompetes] that may not be 'unfair.'" Appellee's Br. 23 n.8. But the FTC Act allows overinclusive rules where necessary to "uproot" the unfair method. *Atl. Refin.*, 381 U.S. at 372–73.

C. No "serious doubt" about the constitutionality of the rule or the FTC exists.

1. Nondelegation is not a credible threat to the FTC.

By Ames Electric's own admission, the nondelegation doctrine is "not always vigorously enforced." Appellee's Br. 30. And whatever *Schechter* might suggest, Appellee presents no "intelligible principle" argument under *Whitman*, the binding standard for nondelegation. *See* Appellee's Br. 29–30. Instead, all Appellee can do to conjure constitutional doubt is speculate about the future vindication of past dissents. *Id.* at 30 (discussing *Gundy v. United States*, 139 S. Ct. 2116, 2148 (2019) (Gorsuch, J., dissenting)). But lower courts are bound by Supreme Court precedent "unless and until it is overruled." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 (2020) (Kavanaugh, J., concurring).

2. Appellee's Commerce Clause challenge is meritless.

To start, the noncompete rule regulates anticompetitive conduct in the labor market, *see* 16 C.F.R. § 910.1(b)(1)**,** not the "electric[ity] market," Appellee's Br. 31. In addressing this national economic problem, the federal government need not proceed case by case nor

consider each actor's particular relation to interstate commerce. *See Katzenbach v. McClung*, 379 U.S. 294, 299–303 (1964). A federal commerce power competent over "six species of subterranean invertebrates found only within two counties of Texas" certainly encompasses an anticompetitive interstate labor scheme. *Cf. GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 624 (5th Cir. 2003).

II. AMES ELECTRIC IS NOT PROTECTED BY STATE ACTION IMMUNITY.

A. State action immunity should not apply in the first place.

Procedural wrangling aside,[2] Appellee argues the D.C. Circuit's treatment of California's optometry market settles this issue. *See* Appellee's Br. 35 (citing *Cal. State Bd. of Optometry v. FTC*, 910 F.2d 976 (D.C. Cir. 1990)). To be clear, we think the D.C. Circuit got it wrong. Then-Professor Easterbrook offers this Court a different path that we argue is more faithful to the text and history of the FTC Act. *See* Frank

[2] Appellee argues that the FTC waived the issue of state action immunity's applicability by conceding it at the district court. Appellee's Br. 33–34. We dispute that characterization. But here, what was argued at the district court is irrelevant. This Court's procedural order directed parties to brief whether Ames Electric was entitled to state action immunity. JA-3. Further, the order expressly indicated that parties are "not confined" to arguments below. *Id.* Even insofar as the district court's opaque footnote about an apparent concession might ordinarily waive that issue on appeal, when lower court proceedings were not recorded, it falls to the Appeals Court to resolve discrepancies about that record. *See* FED. R. APP. P. 10(c)–(e). Here, this Court's procedural order does so by permitting parties to raise any arguments germane to issues on appeal. *See* JA-3. The FTC simply followed this Court's directions in briefing the scope of state action immunity. *See* Appellant's Br. 26–34.

Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 45 (1983) (arguing "he who calls the tune" should "also pay[] the piper"). But even if the FTC Act provides state action immunity for "quintessentially sovereign act[s]," *Cal. State Bd.*, 910 F.2d at 982, Ames' sovereign interest in regulating its intrastate economy does not extend beyond its borders. Thus, state action immunity ought not apply.

B. If state action immunity is available, Ames Electric is not entitled to it.

1. Ames Electric's gambit for automatic immunity fails.

Courts agree that state utilities do not qualify for automatic immunity. *See e.g.*, *Quadvest, L.P. v. San Jacinto River Auth.*, 7 F.4th 337, 346 (5th Cir. 2021) (no automatic immunity for state water utility); *Ellis v. Salt River Project Agric. Improvement & Power Dist.*, 24 F.4th 1262, 1276–77 (9th Cir. 2022) (state water and power utility); *Century Aluminum of S.C., Inc. v. S.C. Pub. Serv. Auth.*, 278 F. Supp. 3d 877, 885 (D.S.C. 2017) (state electric utility). And Appellee points to no case where an entity like Ames Electric enjoyed automatic immunity. Instead, Appellee snubs well-established doctrine.

The state action doctrine has three categories. Here, where Ames Electric "performed the alleged anticompetitive conduct," Appellee's Br. 37–38 (quoting *Edinboro Coll. Park Apartments v. Edinboro Univ. Found.*, 850 F.3d 567, 573 (3d Cir. 2017)), the case turns on which

category applies. The case Appellee cites, *Edinboro*, *see id.* at 38–42, defines the three categories:

> [T]he Supreme Court has established the following principles: [1] *ipso facto* immunity ['automatic immunity'] applies to state legislatures and state supreme courts, but not to entities that are state agencies for limited purposes; [2] *Midcal* scrutiny applies to private parties and state agencies controlled by active market participants; and [3] *Hallie* scrutiny applies to municipalities, and perhaps state agencies.

Edinboro, 850 F.3d at 573.

Ames Electric belongs in the second category. In 2015, the Supreme Court clarified that *Midcal* scrutiny applies whenever a "nonsovereign actor [is] controlled by active market participants." *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 503–04 (2015) (citing *Cal. Liquor Dealers v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)). Ames Electric is controlled by active market participants (and is itself a market participant). *See* Appellant's Br. 35–36. So obvious is this point that Appellee does not even contest it. Per *Dental Examiners*, active market participants like Ames Electric must satisfy *Midcal*, which requires *both* clear articulation *and* active supervision. No automatic immunity is available.

2. Ames Electric has not acted pursuant to a clearly articulated state policy.

The clear articulation inquiry does not deal in speculation. It always involves examining the fit between state law and previous real-

world anticompetitive actions. *See Phoebe Putney*, 568 U.S. 216, 225 (2013); 3 JULIAN VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REGULATION § 49.02[3][b] (2d ed. 2022) ("In its decisions involving *Parker* immunity, the Supreme Court examined state statutes or rules . . . to determine if they authorized or contemplated the actor's conduct."). Case after case considers specific past conduct in relation to state law. *See id.* § 49.02[3][b] n.152 (collecting cases).

Yet Appellee waffles about past conduct's relevance. On one hand, Appellee asserts that it will start anew and follow state policy. So, Appellee declares its past conduct "irrelevant to the purely legal question of whether § 2010 clearly articulates the State's policy." Appellee's Br. 44. Appellee then asks this Court for a strange, speculative form of relief: "approv[al of] its future use of noncompete agreements in a manner consistent with the clear state policy." *Id.* On the other hand, Ames Electric wants to use noncompetes in the same way it has for years. Appellee invokes its *past* use of noncompetes, fretting that "the Noncompete Ban would render Ames Electric's noncompete agreements unenforceable." *Id.* at 5. Appellee also asserts that Ames Electric "uses noncompete agreements pursuant to a clearly articulated and affirmatively expressed policy"—note the present tense. *Id.* at 43. Either way, Ames Electric fails clear articulation.

If Ames Electric wants "approv[al]" of all "future" noncompetes that are "consistent with the clear state policy," *id.* at 44, then its state action defense is not ripe. A dispute is ripe for pre-enforcement review only when "the legal issue presented is fit for judicial resolution." *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 153 (1967). And to be "fit," the issues raised cannot be "contingent upon future uncertainties." *GTE N., Inc. v. Strand*, 209 F.3d 909, 923 n.7 (6th Cir. 2000) (citing *Abbott*, 387 U.S. at 149). Here, the content of the actions for which Ames Electric seeks approval is uncertain—it depends on how (and whether) Ames Electric complies with Ames law. Only then will there be real world behavior available for the clear articulation inquiry.

But if Ames Electric instead wants to "vindicate," Appellee's Br. 5, its past use of noncompetes, it cannot escape that past. Appellee does not confront its past lawlessness. Instead, it offers platitudes about the "permissive[ness]" of the clear articulation inquiry. *Id.* at 43–44. But since clear articulation is always about fit between real world conduct and state law, if Ames Electric wants to continue its past practices, it must explain how *those past practices* fit with the State of Ames' clearly articulated policies. Appellee barely tries.

Appellee cannot have it both ways. Either Ames Electric's past conduct is relevant (and inconsistent with state policy) or it is not relevant (and the state action defense is not ripe). Ames Electric defends

Schrödinger's Noncompete; the utility's practice is unavailable for scrutiny until the moment it needs to speculate about future conduct to satisfy clear articulation.

3. Ames Electric is not actively supervised.

Beneath the "flexible and context dependent" inquiry of active supervision rests a floor of "a few constant requirements." *Dental Exam'rs*, 574 U.S. at 515. *Contra* Appellee's Br. 45. Appellee maintains that Ames does not have to "retroactively 'revoke' or 'nullify' all invalid noncompete agreements into which Ames Electric has entered." *Id.* at 47–48. The Supreme Court disagrees. It has declared that one "constant requirement" for active supervision is that "the supervisor must have the power to veto or modify *particular* decisions to ensure they accord with state policy." *Dental Exam'rs*, 574 U.S. at 515 (emphasis added). Ames lacks this power.

Ames' blanket ability to suspend Ames Electric's authority falls short of the Supreme Court's active supervision requirement. If Ames Electric is suspended, it can no longer enter *new* noncompetes. *See* JA-11. But this mechanism cannot overturn *existing* noncompetes. *See* 18 A.C.A. § 2010(3)(a). Further, such a blunt tool could not satisfy the Supreme Court's requirement that the state must have the power to veto *particular* decisions. *See Dental Exam'rs*, 574 U.S. at 515.

Nor can Appellee find solace in the potential for judicial review. In *Patrick v. Burget*, 486 U.S. 94 (1988), the Court found no active supervision where no statute provided for judicial review nor could any court determine the merits of the entity's decision. *Id.* at 104–05. Here, Appellee has pointed to neither a statute nor any legal grounds permitting Ames courts to review Ames Electric's decisions for compliance with state policy. *See Teladoc, Inc. v. Tex. Med. Bd.*, 2015 WL 8773509, at *8 (W.D. Tex. Dec. 14, 2015) (holding judicial supervision inadequate because the actor claiming immunity had not given "any example of judicial review which rejected the validity of a rule on the ground it did not 'accord with state policy.'"). Further, as it is unclear whether an Ames court could even review the merits of Ames Electric's noncompete decisions, *see Patrick*, 486 U.S. at 104, Appellee cannot shelter in Ames courts' shade.

Last, Ames has never exercised any authority to disapprove of acts that are discordant with state policy, Appellee's invented procedure-substance distinction notwithstanding. *See* Appellee's Br. 49–52. In fact, the procedure to conduct fact-specific inquiries is essential to the substance of the policy that noncompetes go into effect "upon a *finding* of extraordinary need." 18 A.C.A. § 2010(1) (emphasis added). Thus, by failing to disapprove of acts that violate state policy, Ames failed to actively supervise Ames Electric.

Conclusion

We respectfully request that this Court REVERSE the grant of Appellee's motion for summary judgment below and REMAND for further proceedings.

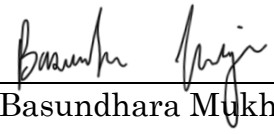
February 27, 2023

Respectfully submitted,

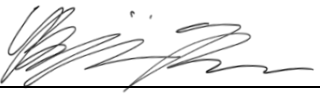
The Roger Fisher Memorial Team

Emily Miller

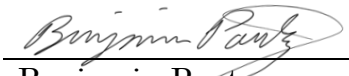
Benjamin Richardson



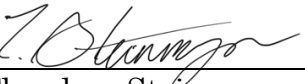
Basundhara Mukherjee



Benjamin Rolsma



Benjamin Pontz



Theodore Steinmeyer

APPENDIX

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.
> > . . . .

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

> The Commission shall also have the power to–
>
> **(a) Investigation of persons, partnerships, or corporations**
> To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce . . .
>
> **(b) Reports of persons, partnerships, and corporations**
> To require, by general or special orders, persons, partnerships, and corporations, engaged in or whose business affects commerce . . . to file with the Commission . . . reports or answers in writing to specific questions . . .
>
> **(c) Investigation of compliance with antitrust decrees**
> Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the Commission.
>
> **(d) Investigations of violations of antitrust statutes**
> Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

(e) Readjustment of business of corporations violating antitrust statutes

Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

(f) Publication of information; reports

To make public from time to time such portions of the information obtained by it hereunder as are in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use . . .

(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.

(h) Investigations of foreign trade conditions; reports

To investigate, from time to time, trade conditions in and with foreign countries . . .

(i) Investigations of foreign antitrust law violations

With respect to the International Antitrust Enforcement Assistance Act of 1994 [15 U.S.C. 6201 et seq.], to conduct investigations of possible violations of foreign antitrust laws (as defined in section 12 of such Act [15 U.S.C. 6211]).

(j) Investigative assistance for foreign law enforcement agencies

(1) In general

Upon a written request from a foreign law enforcement agency to provide assistance . . .

(k) Referral of evidence for criminal proceedings

(1) In general

Whenever the Commission obtains evidence . . . transmit such evidence to the Attorney General . . .

(l) Expenditures for cooperative arrangements

To expend appropriated funds for—

(1) operating expenses and other costs of bilateral and multilateral cooperative law enforcement groups conducting activities of interest to the Commission and in which the Commission participates . . .

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

(2) The Commission shall have no authority under this subchapter, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title). The preceding sentence shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce.

(b) Procedures Applicable

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

FED. RULES OF APPELLATE PROCEDURE 10 | The Record on Appeal

(a) **Composition of the Record on Appeal.** The following items constitute the record on appeal:

(1) the original papers and exhibits filed in the district court;

(2) the transcript of proceedings, if any; and

(3) a certified copy of the docket entries prepared by the district clerk.

(b) **The Transcript of Proceedings.**

(1) *Appellant's Duty to Order*. Within 14 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following:

(A) order from the reporter a transcript of such parts of the proceedings not already on file as the appellant considers necessary, subject to a local rule of the court of appeals and with the following qualifications:

(i) the order must be in writing;

(ii) if the cost of the transcript is to be paid by the United States under the Criminal Justice Act, the order must so state; and

(iii) the appellant must, within the same period, file a copy of the order with the district clerk; or

(B) file a certificate stating that no transcript will be ordered.

(2) *Unsupported Finding or Conclusion.* If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion.

(3) *Partial Transcript.* Unless the entire transcript is ordered:

(A) the appellant must—within the 14 days provided in Rule 10(b)(1)—file a statement of the issues that the appellant intends to present on the appeal and must serve on the appellee a copy of both the order or certificate and the statement;

(B) if the appellee considers it necessary to have a transcript of other parts of the proceedings, the appellee must, within 14 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered; and

(C) unless within 14 days after service of that designation the appellant has ordered all such parts, and has so notified the appellee, the appellee may within the following 14 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) *Payment.* At the time of ordering, a party must make satisfactory arrangements with the reporter for paying the cost of the transcript.

(c) **Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable.**

If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.

(d) **Agreed Statement as the Record on Appeal.**

In place of the record on appeal as defined in Rule 10(a), the parties may prepare, sign, and submit to the district court a statement of the case showing how the issues presented by the appeal arose and were decided in the district court. The statement must set forth only those facts averred and proved or sought to be proved that are essential to the court's resolution of the issues. If the statement is truthful, it—together with any additions that the district court may consider necessary to a full presentation of the issues on appeal—must be approved by the district court and must then be certified to the court of appeals

as the record on appeal. The district clerk must then send it to the circuit clerk within the time provided by Rule 11. A copy of the agreed statement may be filed in place of the appendix required by Rule 30.

(e) **Correction or Modification of the Record.**

(1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:

(A) on stipulation of the parties;

(B) by the district court before or after the record has been forwarded; or

(C) by the court of appeals.

(3) All other questions as to the form and content of the record must be presented to the court of appeals.

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.

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.

. . .