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 THE PLAINTIFF-APPELLEE

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Oral Argument

Questions Presented

1. An agency may proceed by rulemaking only when Congress grants it the authority to do so, and rules of vast economic or political significance require a clear statement of congressional authorization. The FTC promulgated a rule that bans all noncompete clauses, deviating from the Commission's longstanding practice of not issuing substantive "unfair methods of competition" rules. Does the FTC Act authorize the Commission to promulgate the Noncompete Ban?

2. For more than eighty years, courts have held that federal antitrust laws do not nullify anticompetitive state policies. The Ames legislature passed a law authorizing Ames Electric to use noncompete agreements. Is Ames Electric's use of noncompete agreements pursuant to that state policy immune from FTC antitrust enforcement?

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The district court's order granting Ames Electric's motion for summary judgment and denying the FTC's corresponding motion, along with the accompanying memorandum opinion, is reproduced in pages 4–10 of the Joint Appendix. The procedural order from this Court certifying the FTC's appeal is reproduced on page 3 of the Joint Appendix.

Statement of Jurisdiction

Subject matter jurisdiction is proper under 28 U.S.C. § 1331 because Ames Electric pleaded a federal question. The United States Court of Appeals for the Ames Circuit has appellate jurisdiction over this appeal under 28 U.S.C. § 1291 because the FTC timely appeals the district court's granting of summary judgment for Ames Electric, a final judgment.

Relevant Provisions

This case involves Article I, § 8, cls. 1, 3 of the United States Constitution; The Federal Trade Commission Act, 15 U.S.C. §§ 45, 46, and 57a; 18 Ames Code Ann. §§ 2004, 2010; and 16 C.F.R. § 910. The relevant sections of each provision are reproduced in the Appendix.

Statement of the Case

The United States Constitution establishes a federal government of both limited and separated powers. Congress makes the laws, and the President enforces them. U.S. Const. art. I, § I (vesting "All legislative Powers" in the Congress); art. II, §§ 1, 3 (vesting the "executive Power" in the President and charging him to "take Care that the Laws be faithfully executed"). But Congress has never made a law that prohibits noncompete agreements. For that reason, 47 states plus Ames have determined to enforce the more than 28 million noncompete agreements into which their citizens have entered.[1] Now, for the first time in our nation's history, these contracts have been declared illegal as a matter of federal law—not by Congress, but by the FTC.

The FTC's Noncompete Ban

In September 2022, the Federal Trade Commission, led by Defendant-Appellant Chair R. Joseph Welles, promulgated a rule that prohibits employers from entering, maintaining, enforcing, or representing to employees that they are bound by noncompete agreements. 16 C.F.R. § 910 ("Noncompete Ban"). The rule purports to supersede all conflicting state laws, 16 C.F.R. § 910.4, thus enabling the

[1] *See* Evan P. Starr, J. J. Prescott & Norman D. Bishara, *Noncompete Agreements in the US Labor Force*, 64 J.L. & Econ. 53, 60 (2021).

FTC to take control of what it concedes is a major question of economic and political significance. *See* Appellant's Br. 8.

The FTC invoked §§ 5 and 6(g) of the FTC Act of 1914 as the source of its authority to make this rule.[2] JA-13. Section 5 prohibits both "unfair or deceptive acts or practices" and "unfair methods of competition." The FTC has long issued "unfair or deceptive acts or practices" rules pursuant to the Magnuson-Moss Act, a 1975 amendment to the FTC Act that clearly authorizes "unfair or deceptive acts or practices" rulemaking. Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975, Pub. L. No. 93-637, § 202(a), 88 Stat. 2183, 2193 (1975) (codified at 15 U.S.C. § 57a(a)). Since the passage of the Magnuson-Moss Act, the Commission has enforced § 5's "unfair methods of competition" prohibition solely through adjudication. *See, e.g.*, Federal Trade Commission, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015), bit.ly/3IfSvzZ. Now, the FTC has interpreted § 6(g) to authorize substantive "unfair methods of competition" rulemaking and has promulgated the Noncompete Ban under this putative power. *See* JA-13.

[2] Sections 5 and 6(g) of the FTC Act are codified at 15 U.S.C. §§ 45 and 46(g), respectively.

Ames Electric's Use of Noncompete Agreements

Concerned that the Noncompete Ban would nullify its ability to enter noncompete agreements pursuant to Ames State Law, Plaintiff-Appellee Ames Electric sued the FTC to challenge the legality of the rule. The State of Ames generally prohibits noncompete agreements. *See* 18 Ames Code Ann. § 2004. However, Ames has authorized its three state-created pseudo-private utility companies—including Ames Electric, JA-16—to enter into such agreements. *See* 18 Ames Code Ann. § 2010; JA-4. That authority is legally constrained by the requirement that noncompete agreements may only be used in "[e]xtraordinary circumstances." 18 Ames Code Ann. § 2010(1)(a). The law also contains a requirement that Ames Electric must "undertake a fact-specific inquiry" before entering into a noncompete agreement. 18 Ames Code Ann. § 2010(1)(a).

Moreover, Ames has empowered a Legislative Commission to review all the noncompete agreements into which Ames Electric enters. 18 Ames Code Ann. § 2010(2)–(3). The Legislative Commission is charged with reviewing all of Ames Electric's noncompete agreements, including Ames Electric's reasons for adopting them. *Id.* It also has the authority to formally audit Ames Electric and to completely suspend Ames Electric's ability to enter into *any* noncompete agreements. 18 Ames Code Ann. § 2010(3)(a). The Legislative Commission has already

completed its first review of Ames Electric. JA-17. It determined that Ames Electric failed to comply with certain terms of the statute, but it did not conclude that Ames Electric's conduct warranted a shutdown of its ability to use noncompete agreements. *Id.*

The legislature authorized the state's pseudo-private utility companies to use noncompete agreements because it recognized the economic importance of these tools. *See* 18 Ames Code § Ann. 2010. Ames Electric simply seeks to keep the lights on—for itself and for the people of Ames. But the Noncompete Ban would render Ames Electric's noncompete agreements unenforceable, leaving Ames Electric vulnerable to the dissemination of proprietary business and research and development information. JA-17.

Lower Court Proceedings

To vindicate the State of Ames's policy, Ames Electric brought a pre-enforcement challenge against the FTC seeking declaratory and injunctive relief. Ames Electric alleged that (1) the Commission lacks authority under the major questions doctrine to promulgate the Noncompete Ban, and that (2) even if the rule were valid, it could not operate against Ames Electric, since Ames Electric is immune from the rule under the antitrust state action doctrine. JA-5. The parties cross-moved for summary judgment, and the district court granted Ames Electric's motion. JA-10. The district court held that the FTC did not

exceed its authority in promulgating the rule because Congress intended for the FTC to broadly construe "unfair methods of competition." JA-7. However, the district court held that Ames Electric is immune from antitrust scrutiny because it acted pursuant to a clear state policy and Ames law "empowers the Legislature to actively supervise Ames Electric." JA-9. The FTC appealed. JA-18.

Summary of the Argument

I. The FTC lacks statutory authority to promulgate the Noncompete Ban. As an initial matter, Congress has not authorized the Commission to promulgate *any* substantive "unfair methods of competition" rules. The text, structure, and history of the FTC Act demonstrate that Congress authorized the FTC to police "unfair methods of competition" solely through adjudication. But even if this Court finds that the FTC may make substantive "unfair methods of competition" rules, it cannot make this one. The FTC concedes that the Noncompete Ban is a major question and therefore requires a clear statement of congressional authorization. But nothing in the text of the FTC Act clearly authorizes this expansive rule. Finally, the Noncompete Ban seriously risks running afoul of the nondelegation doctrine and exceeding Congress's commerce power. Constitutional avoidance thus counsels this Court to adopt what is already the best reading of the FTC

Act—that the Commission lacks authority to promulgate the Noncompete Ban.

II. Even if the Noncompete Ban is valid as a general matter, it is unenforceable against Ames Electric. That is because Ames Electric enjoys automatic state action immunity as an adjunct of the Ames legislature's policy authorizing pseudo-private utilities to use noncompete agreements. As a threshold matter, the FTC argues that the *Parker* immunity doctrine does not extend to the FTC Act. But the FTC waived that argument when it conceded in the district court that the FTC Act, like the Sherman Act, does not reach state action. Even if this Court considers the merits of the FTC's waived argument, it should follow decades of settled precedent and hold that *Parker* immunity applies.

Applying *Parker*, Ames Electric enjoys *ipso facto* immunity as an adjunct of the Ames State Legislature. Because Ames did not delegate any policymaking authority to Ames Electric, it is clear that Ames Electric's use of noncompete agreements truly is the policy of the State. Accordingly, the *Midcal* test is inapplicable. But even if *Midcal* does apply, Ames Electric satisfies that test because (1) it acts pursuant to a clearly articulated policy of the Ames legislature, and (2) Ames empowered a Legislative Commission that actively supervises Ames Electric's use of noncompete agreements.

Argument

I. STANDARD OF REVIEW.

The parties cross-moved for summary judgment, and the district court granted Ames Electric's motion. On appeal, courts "review de novo a district court's decision on cross-motions for summary judgment, construing all facts and drawing all reasonable inferences in favor of the party against whom the motion under consideration was filed." *E.g.*, *Kemp v. Liebel*, 877 F.3d 346, 350 (7th Cir. 2017). There are no material issues of fact in this case. Summary judgment is appropriate when "the movant is entitled to judgment as a matter of law." *Id.*

II. THE FTC LACKS THE AUTHORITY TO PROMULGATE THE NONCOMPETE BAN.

In this case, the FTC must clear two enormous hurdles. First, it must demonstrate that the FTC Act grants the Commission authority to promulgate *any* substantive "unfair methods of competition" rules. The text, structure, and legislative history of the FTC Act all point to a resounding "no." Second, as the FTC concedes, the Noncompete Ban is a major question that requires clear congressional authorization. No part of the FTC Act clearly authorizes the Noncompete Ban. With the FTC unable to clear either of these hurdles, this Court should hold that the FTC lacks authority to promulgate the Noncompete Ban.

A. The FTC lacks authority to issue any substantive rules defining "unfair methods of competition."

The FTC claims that Congress has empowered the Commission to "proceed by rulemaking." Appellant's Br. 13. With no substantive "unfair methos of competition" rulemaking authorization in the FTC Act's text, structure, or legislative history, the FTC relies on two sources: a law review article and an anachronistic and thoroughly discredited D.C. Circuit case, *National Petroleum*. *Id.* (citing Rohit Chopra & Lina Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. Chi. L. Rev. 357 (2020); *Nat'l Petroleum Ass'n v. FTC,* 482 F.2d 672 (D.C. Cir. 1973)). But even Chopra and Khan note that "[a]ntitrust law today is developed exclusively through adjudication," defeating the FTC's claim that its discovery of "unfair methods of competition" rulemaking authority is anything other than novel. Chopra & Khan, *supra*, at 359.

Although it is true that in *National Petroleum*, the D.C. Circuit found that § 6(g) granted the FTC authority to promulgate rules defining "unfair methods of competition" and "unfair or deceptive acts or practices," 482 F.2d at 697, the court relied on antiquated methods of statutory interpretation that do not comport with the Supreme

Court's—or any other court's—modern approach.[3] *Cf. AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1346 (2021) (declining in a unanimous ruling to accept the FTC's expansive reading of § 13(b) of the FTC Act).

In *National Petroleum*, the court's reasoning stemmed from the purported policy benefits of rulemaking. 482 F.2d at 681, 686, 690 (stating that rulemaking would be "an invaluable resource-saving flexibility in carrying out its task of regulating parties" that would "yield significant benefits"). The court, convinced of the policy benefits of "unfair methods of competition" rulemaking, then created a presumption of agency rulemaking power and worked backwards to read it into § 6(g). *See id.* at 685. But the Supreme Court since has emphasized that a court's task is not to decide whether an interpretation "is desirable." *AMG*, 141 S. Ct. at 1347. "Rather, it is to answer a more purely legal question": did Congress grant authority or not? *Id.*; *see also EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 509 (2014) ("[P]ractical difficulties . . . do not justify departure from [a statute's] plain text.").

Thus, *National Petroleum* does not control this question. Modern statutory interpretation does. The text, structure, and history of the

[3] *See* Final Transcript at 295–96, Fed. Trade Comm'n, Non-Competes in the Workplace, (Jan. 9, 2020), bit.ly/3XJYLFU (statement of Professor Richard Pierce) ("There is no Justice today . . . that would use [the reasoning of *National Petroleum*]. . . . I teach it as an illustration of something no modern court would do.").

FTC Act confer no substantive rulemaking authority to the FTC through §§ 5 and 6(g).

1. The text and structure of the FTC Act provide no support for the Commission's interpretation.

Like any other statutory construction case, this one must "begin with the language of the statute." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). And that is where it should end. The FTC Act's language "has a plain and unambiguous meaning" with regard to the Commission's lack of "unfair methods of competition" rulemaking authority. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). "[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). When "statutory language is unambiguous and the statutory scheme is coherent and consistent," like it is here, the inquiry ceases. *Robinson*, 519 U.S. at 340 (internal quotation omitted).

a. Section 5 demonstrates that adjudication is Congress's vision for "unfair methods of competition" enforcement.

Section 5 begins by articulating the FTC's core function: to enforce prohibitions of "unfair methods of competition" and "unfair or deceptive acts or practices." 15 U.S.C. § 45(a)(1). The remainder of § 5 then clearly identifies how the FTC is to accomplish that mandate: through adjudication. Section 5 discusses at great length the

adjudication procedures the FTC must follow, outlining every step of the process from how the Commission is to initiate adjudications to how and when parties may seek judicial review. *See* 15 U.S.C. § 45(a)–(n). But § 5 says nothing about enforcing the FTC's mandate through rulemaking. *See id*.

b. The text of Section 6(g) does not confer substantive rulemaking authority.

Section 6, titled "Additional powers of Commission," authorizes the FTC to undertake certain *investigatory* functions. 15 U.S.C. § 46. The body of the provision contains twelve subsections that deal specifically with procedural investigatory functions. It provides that "[t]he Commission shall also have power . . . to gather and compile information," to "investigate from time to time," "[t]o require . . . corporations . . . to file . . . reports," and "to make public from time to time . . . the information obtained by" its investigations. 15 U.S.C. § 46(a)–(l). This investigatory power complements the FTC's adjudicatory powers, as the Commission must naturally conduct some investigation before initiating enforcement proceedings.

Buried within § 6's twelve procedural subsections is § 6(g), which the FTC now claims as the basis for substantive rulemaking authority. Appellant's. Br. 13-14. Section 6(g) states: "the Commission shall also have power . . . from time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of

this subchapter." 15 U.S.C. § 46(g). The FTC argues that one half of one provision, buried deep in a section about the FTC's investigatory procedures, grants the Commission the authority to regulate the entire American economy. *See* Appellant's Br. 13–14. However, courts today recognize that Congress "does not . . . hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). If § 6(g) grants the FTC authority to regulate the entire American economy, it is not just an elephant, it is a mammoth. And the middle of § 6 is more like a keyhole than an "enclosure." *Contra* Appellant's Br. 21. Accordingly, § 6(g) must be read with an eye on its surrounding provisions. It defies the natural reading of § 6 to read into it a grant of substantive rulemaking authority.[4]

Additionally, the first clause of § 6(g), which grants the FTC authority to "from time to time classify corporations," further demonstrates that § 6(g) authorizes only procedural rules. "[C]lassify[ing] corporations" is a ministerial duty following from the FTC's power under § 6(b) to require reports from "corporations"; the Commission decides what entities are "corporations" in order to identify

[4] The FTC argues that it is free to select between rulemaking and adjudication. Appellant's Br. 13. But as the FTC's own source confirms, an agency may only choose between the processes that Congress has authorized it to exercise. *See* William T. Mayton, *The Legislative Resolution of the Rulemaking vs. Adjudication Problem in Agency Lawmaking*, 1980 Duke L.J. 103, 103–04 n.4. As this section will demonstrate, Congress granted the FTC only one option—adjudication.

those that must submit § 6(b) reports. Thomas M. Dyer & James B. II Ellis II, *FTC's Claim of Substantive Rule-Making Power: A Study in Opposition*, 41 Geo. W. L. Rev. 330, 335 (1972); *see also* Fed. Trade Comm'n, *A Brief Overview of the Federal Trade Commission's Investigation, Law Enforcement, and Rulemaking Authority* (May 2021), http://bit.ly/3K9dB5F. Thus, by placing the "rules and regulations" authority in the middle of eleven other housekeeping rules, and by combining it with the additional clerical task of "classify[ing] corporations," Congress made clear in the statute's text that § 6(g) is not a source of legislative rulemaking authority.

c. The Magnuson-Moss Act removes any doubt that the FTC lacks substantive "unfair methods of competition" rulemaking authority.

In 1975, Congress passed the Magnuson-Moss Act, which most notably grants the FTC substantive rulemaking authority *only* with respect to unfair and deceptive acts or practices. 15 U.S.C. § 57a. The FTC argues that the Magnuson-Moss Act affirmed the *National Petroleum* Court's finding that § 6(g) granted substantive rulemaking power to the Commission. Appellant's Br. 15. But even a perfunctory review of the statute's text forecloses such a conclusion.

Section 57a(a)(1)(B) affirmatively authorizes the FTC to prescribe "rules which define . . . *unfair or deceptive acts or practices*," but it omits any mention of "unfair methods of competition" rulemaking. 15 U.S.C. §

57a(a)(1)(B) (emphasis added). When "Congress includes particular language in one section of a statute but omits it in another," courts presume "that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Nken v. Holder,* 556 U.S. 418, 430 (2009). The omission of "unfair methods of competition" in § 57a's authorization of substantive rulemaking authority, therefore, demonstrates Congress's intention only to allow the Commission to make rules for "unfair or deceptive acts or practices."

Additionally, § 57a's grant of "unfair or deceptive acts or practices" rulemaking authority clarifies that § 6(g)'s language only grants procedural rulemaking authority. If this were not so and § 6(g) in fact already authorized substantive rulemaking, Congress's 1975 amendment would be entirely redundant. Courts "presume" that Congress "intends its amendment[s] to have real and substantial effect." *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768, 779 (2020). Where, as here, "an interpretation would render superfluous another part of the same statutory scheme," the canon against surplusage is at its strongest. *Yates v. United States*, 574 U.S. 528, 543 (2015). Thus, § 6(g) cannot be read to grant the FTC *any* substantive rulemaking authority without rendering § 57a(a)(1)(B) entirely redundant.

The FTC suggests that § 57a is not surplusage, but a "cabin[ing]" of FTC's authority to make "unfair or deceptive acts or practices" rules.

Appellant's Br. 15. But features of the Magnuson-Moss Act suggest that § 57a's "unfair or deceptive acts or practices" rulemaking is an initial grant, not a "cabin[ing]." Most notably, the Magnuson-Moss Act creates substantial sanction and remedy powers for "unfair or deceptive acts or practices" rules only. *See* 15 U.S.C. §§ 57b, 45(m) (authorizing the FTC to bring suits in courts for equitable, monetary, and other relief for "unfair or deceptive acts or practices" rule violations). Bestowing sanction and remedy authority is a feature of initial rulemaking grants, not of "cabin[ing]" existing authority. *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 516 (2002) (noting that Congress has often considered the "presence or absence of sanctions as the basis for distinguishing between legislative and housekeeping grants"). The creation of an enforcement scheme for "unfair or deceptive acts or practices" rule violations (and the lack thereof for "unfair methods of competition" rules) strongly suggests that the only thing Congress "picked up [its] pen" for in 1975 was to grant *initial* "unfair or deceptive acts or practices" rulemaking authority. *Cf.* Appellant's Br. 15.

The FTC argues that § 57a(a)(2) does not deprive it of the putative "unfair methods of competition" rulemaking authority it finds in § 6(g). Appellant's Br. 15. However, § 57a(a)(2)'s text refutes that argument. Section 57a(a)(2) explains that the "unfair or deceptive acts or practices"

rulemaking grant in § 57a(a)(1) "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."[5] 15 U.S.C. § 57a(a)(2) (emphasis added). By specifying "interpretive rules" and "general statements of policy"—two types of rules that do not carry the force of law—Congress made clear that the only rulemaking that § 57a(a)(2) was "not [to] affect" was the *procedural* rulemaking already authorized under § 6(g). *See* Antonin Scalia & Bryan Garner, Reading Law 195 (2012) (describing the *noscitur a sociis* canon).

2. The FTC's past interpretations of the FTC Act contradict its reading of the statute today.

Courts consider how an agency has viewed its own authority over time. *See AMG*, 141 S. Ct. at 1345–46 ("[I]n construing § 13(b), it is helpful to understand how the Commission's authority (and its interpretation of that authority) has evolved over time."). If an agency has maintained a longstanding view that it lacks authority to take certain actions, a court will find that to be a convincing indication that the agency lacks its newly discovered authority. *See Fin. Plan. Ass'n v. SEC*, 482 F.3d 481, 490 (D.C. Cir. 2007) ("[A]n additional weakness exists in the SEC's interpretation: It flouts six decades of consistent SEC understanding of its authority under [the statute]."); *see also Util. Air*

[5] In its brief, the FTC omits "interpretive rules" and "general statements of policy" from its quotation of § 57a(a)(2). *See* Appellant's Br. 15.

Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism." (internal citation omitted)); *FTC v. Bunte Bros.*, 312 U.S. 349, 352 (1941) (explaining that because agencies "presumably would be alert to exercise" their powers, failure to do so over a long period of time is "significant in determining whether such power was actually conferred").

The FTC's own record suggests that the Commission has not recognized an ability to promulgate substantive "unfair methods of competition" rules. Its annual reports have repeatedly found § 6(g) to merely supplement the FTC's investigatory function. *See, e.g.*, Annual Report of the Federal Trade Commission 36 (1922), bit.ly/3Kn6hng ("One of the most common mistakes is to suppose that the commission can issue orders, rulings, or regulations unconnected with any proceeding before it."); Annual Report of the Federal Trade Commission 81 (1925), bit.ly/3Z5glFu (pointing to investigatory powers, under § 6, as the primary mission of the economic division). Even the FTC's recent statements reference case-by-case adjudication as the agency's only approach to policing "unfair methods of competition." *See* Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (2015), bit.ly/3IfSvzZ; *see also* Chopra &

Khan, *supra*, at 359 ("Antitrust law today is developed exclusively through adjudication."). As the FTC has not attempted to promulgate an "unfair methods of competition" rule in the half century since the Magnuson-Moss Act was passed, it is questionable that the FTC has now discovered meaning in the FTC Act that its predecessors disavowed. Merrill & Watts, *supra*, at 549.

3. The legislative history confirms that the FTC has no substantive rulemaking authority to define "unfair methods of competition."

The legislative history of the FTC Act further confirms Congress's purpose for § 6(g): to grant solely procedural rulemaking authority. *See id.* at 505–06. The FTC Act reflects a compromise between the House bill, which contemplated an investigatory commission, and the Senate bill, which included enforcement power through adjudications. H.R. 15613, 63d Cong., 2d Sess. (1914); S. 416, 63rd Cong., 2d Sess. (1914). Critically, no version of the earlier bills that eventually became the FTC Act ever included substantive rulemaking authority. The Senate never entertained it, the House contemplated it but repeatedly rejected it, the Conference Committee did not include it in the final bill, and statements made during floor debates disavowed it.

Section 6(g) originated in the House version of the FTC Act.[6] The House proposal was narrower than the ultimate FTC Act: it would have established an investigative commission that could compile reports from corporations, classify them, and present its findings to Congress. H.R. 15613, 63d Cong., 2d Sess. (1914). Notably, the House bill included no enforcement power—neither adjudication nor substantive rulemaking. *Id.* In fact, the House considered and rejected multiple amendments that would have granted the Commission greater substantive authority, including one that would authorize the Commission "to make, alter, or repeal regulations further defining . . . unfair or oppressive competition." H.R. Rep. No. 533, 63rd Cong., 2d Sess., pt. 3 (1914); *see also* 51 Cong. Rec. 9047, 9056 (1914) (rejecting two attempts during House debates to give broad substantive rulemaking authority to the Commission).

Simultaneously, the Senate considered its own version of the FTC Act that would create a commission with both investigative and enforcement power. S. 416, 63rd Cong., 2d Sess. (1914). This bill denoted case-by-case adjudication as the Commission's sole enforcement power. S. 4160, 63rd Cong., 2d Sess. (1914). It contained *no* grant of rulemaking authority whatsoever, even for procedural rules. *Id.*

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[6] It read: "[T]he Commission may from time to time make rules and regulations and classifications of corporations for the purpose of carrying out the provisions of this Act." H.R. 15613, § 8.

The Conference Committee reconciled the two bills, reflecting the Senate's adjudicatory enforcement vision in § 5 and the House's investigatory vision in § 6. During the House floor debates about the compromise bill, Representative Harry Covington, the author of the language that became § 6(g), confirmed that "the FTC will have no power to prescribe the methods of competition . . . [because] it will not be exercising power of a legislative nature." 51 Cong. Rec. 14802 (1914). Congress proceeded to adopt the compromise bill as the Federal Trade Commission Act.

Subsequent Congressional actions bolster the already-convincing evidence that Congress did not intend for the FTC to promulgate substantive "unfair methods of competition" rules. After enacting the FTC Act, Congress passed multiple acts that grant substantive rulemaking authority to the FTC for specific actions. *See*, *e.g.*, Wool Products Labeling Act of 1939, 15 U.S.C. § 68(a); Fur Products Labeling Act Ch. 298, 15 U.S.C. § 69f(b); Textile Act, 15 U.S.C. § 70e; Flammable Fabrics Acts, 15 U.S.C. § 1194. Granting this kind of general legislative authority to the FTC would have been unnecessary if Congress had already granted that authority under § 6(g). *See* Dyer & Ellis, *supra*, at 340–344.

If the FTC believes it needs the authority to make substantive "unfair methods of competition" rules, "it is, of course, free to ask

Congress." *Cf. AMG*, 141 S. Ct. at 1352. But "broader powers . . . cannot be merely assumed." *FTC v. Raladam Co.*, 283 U.S. 643, 649 (1931). "[T]hey must be conferred by Congress." *Id.*

B. The FTC's Noncompete Ban presents a major question that demands clear congressional authorization, which Congress has not provided.

1. Nothing in the text of the FTC Act clearly authorizes the Noncompete Ban.

The FTC concedes that this case triggers the major questions doctrine, and rightfully so.[7] Appellant's Br. 18. Through this blunt exercise of power, the Commission seeks to nullify 28 million noncompete provisions, displace the contract law of 47 states, and extract an issue of live debate from the political process. *See* Starr, Prescott & Bishara, *supra,* at 60. This is a paradigmatic major questions case—exactly the type of "[e]xtraordinary grant[] of regulatory authority" that Congress "rarely accomplishe[s] through 'modest words,' 'vague terms,' or 'subtle device[s].'" *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). In major questions cases like this one, courts require "more than a merely plausible textual basis": the FTC "must point to 'clear congressional authorization' for the power it claims." *Id.* Section 5's vague language prohibiting "unfair methods of competition" comes

[7] Ames Electric agrees with the FTC that *Chevron* deference is "unnecessary in this case." Appellant's Br. 10 n.1. This is because courts decline to apply *Chevron* to major questions cases. *See, e.g.*, *King v. Burwell*, 576 U.S. 473, 485–86 (2015).

nowhere close to providing "clear congressional authorization" for the Noncompete Ban.[8]

In asserting that "[i]f Congress is anywhere clear, it is so here," Appellant's Br. 18, the FTC seems to forget what a clear-statement rule requires: "that the result sought must be unquestionably expressed *in the text*." *Clear-Statement Rule*, *Black's Law Dictionary* (11th ed. 2019) (emphasis added). Yet the FTC hardly attempts to engage with the relevant statutory language ("unfair methods of competition"). Instead, the Commission selectively reads the FTC Act's history and various court precedents in an attempt to insert clarity into § 5 that the text cannot bear. *See* Appellant's Br. 21–22. Even if § 5 provides a "colorable textual basis" for the Noncompete Ban at a high level of abstraction, it far from provides a clear statement. *See Brown & Williamson*, 529 U.S. at 133.

In *West Virginia*, the Court confronted similarly indeterminate language, holding that "best system of emission reduction" did not clearly authorize the EPA to determine America's appropriate mix of energy sources. 142 S.Ct. at 2599. The Court noted that "[a]s a matter of 'definitional possibilities' . . . almost anything could constitute such a

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[8] This Court need not decide if or when noncompete clauses are "unfair methods of competition." Likewise, this Court need not decide whether to adopt the FTC's newly invented "*Raladam* deference." *See* Appellant's Br. 10. Rather, the question is whether Congress clearly authorized the FTC to promulgate the Noncompete Ban—an expansive rule that bans *all* noncompetes, even those that may not be "unfair."

'system.'" *Id.* at 2614 (internal citations omitted). But "shorn of all context, the word is an empty vessel." *Id.* The same is true for "unfair methods of competition." "Such a vague statutory grant is not close to the sort of clear authorization required by [the Court's] precedents." *Id.* The FTC attempts to distinguish *West Virginia* from § 5 by noting that the Court characterized the statutory provision at issue in that case as "ancillary." Appellant's Br. 20. The FTC is correct that a provision's location within a statute may be one consideration, but the meat of the inquiry focuses on what the text at issue says—namely, whether or not it clearly authorizes the action in question. *West Virginia*, 142 S. Ct. at 2615–16.

In nearly every case in which the Court has found the existence of a major question, the government has lost. *See* Appellant's Br. 19–20 (citing six major questions cases that the government lost). The FTC attempts to distinguish some of those cases on technical grounds, *id.*, but the upshot of those cases is clear: broad statutory language like "unfair methods of competition" almost never clears the high bar of providing a clear statement. *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 250 (2006) (holding that "legitimate medical purpose" does not clearly authorize the Attorney General to intrude into the States' police power to regulate the practice of medicine); *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S.Ct. 2485, 2487 (2021) (holding that

"enforce[ment of] such regulations . . . necessary to prevent the introduction, transmission, or spread of communicable diseases" did not clearly authorize a nationwide eviction moratorium). Perhaps that is why the FTC does not cite a single major questions case in which the government wins.

The FTC additionally argues that the significance of an agency action is only relevant to determining if a major question exists, not to determining if Congress has provided a clear statement. *See* Appellant's Br. 18. But that is not so. In *NFIB v. OSHA*, there was no question that the vaccine-or-test rule fit within the language of OSHA's mandate: to enact standards "reasonably necessary or appropriate to provide safe or healthful employment." 142 S.Ct. 661, 663 (2022). The issue was whether the incredible scope of that rule exceeded what Congress had in mind for OSHA—precisely the question of materiality that the FTC asserts is not part of the clear statement analysis. *Id.* at 666 ("[T]he breadth of authority that the Secretary now claims[] is a 'telling indication' that the mandate extends beyond the agency's legitimate reach." (quoting *Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010)). Just as OSHA's mandate did not clearly authorize an action of the magnitude of the vaccine-or-test rule, § 5 does not clearly authorize the Noncompete Ban.

2. History, agency practice, and subsequent Congressional actions confirm that Congress did not clearly authorize the Noncompete Ban.

The FTC claims that noncompetes have been "long recognized as injurious to competitors." Appellant's Br. 5. But a fair read of the common law reveals that although noncompetes impose some restraints on trade, reasonable noncompetes, especially starting in the eighteenth century, were routinely found valid. *See Mitchel v. Reynolds*, 24 Eng. Rep. (1711) (cited in *Alger v. Thacher*, 36 Mass. 51, 53 (1837)) (holding that "restraint[s] of trade . . . made upon a good and adequate consideration" and "limited to a particular place" are presumptively valid and must be evaluated on a case-by-case basis). The *Mitchel* rule—that only "general" covenants aimed solely at stifling competition are invalid—has been the dominant approach for three centuries. *See United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281-83 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899); *Aya Healthcare Servs., Inc.*, 9 F.4th 1102, 1109 (9th Cir. 2021) (affirming that the *Addyston Pipe* rule remains good law).

As in our time, so in theirs. *Contra* Appellant's Br. 11. The common law, as discussed above, demonstrates that Congress would have been familiar with the potential trade-restricting effects of noncompetes when it enacted the FTC Act in 1914. The same was true of tobacco in *Brown and Williamson*. 529 U.S. at 138. There, the FDA

argued that it could claim authority to regulate tobacco as a newly discovered health risk. *Id.* But "the adverse health consequences of tobacco use were well known" when Congress created the FDA, and Congress chose not to clearly authorize the FDA to regulate in that area. *Id.* Analogously, if Congress had wanted to provide a clear statement prohibiting noncompetes in 1914, it would have.

Finally, courts are skeptical of agency actions in areas where Congress has explicitly declined to act. *NFIB*, 142 S.Ct. at 662-63 (2022) ("[A]lthough Congress has enacted significant legislation addressing the COVID–19 pandemic, it has declined to enact any measure similar to what OSHA has promulgated here."). Relevant to this case, Congress has considered and rejected several bills that would restrict noncompetes. *See, e.g.*, MOVE Act, S. 1504, 114th Cong. (2015); LADDER Act, H.R. 2873, 114th Cong. (2015); Workforce Mobility Act, S. 483, 117th Cong. (2021). The FTC is correct that congressional debate may indeed indicate that a given topic is politically significant, as is the case here. *See* Appellant's Br. 22. But the fact that members of Congress find it necessary to introduce bills banning noncompetes demonstrates that no existing law clearly authorizes such action.

Where Congress *has* legislated, it has done so in a way that is incompatible with an understanding that "unfair methods of competition" prohibits all noncompetes. This is evident, for example, in

26 U.S.C. § 197, a provision of the tax code that authorizes the amortization of certain noncompete agreements as intangible assets. If Congress believed § 5's prohibition of "unfair methods of competition" outlawed all noncompetes, it would hardly make sense for Congress to give businesses that use noncompetes a tax break. *Cf. W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 88 (1991) (demonstrating a "whole-code" approach to statutory interpretation).

The FTC asserts more than a dozen times that Congress granted it "clear" authorization to promulgate this rule, but the Commission cites no *clear* statutory language. For that matter, the FTC hardly cites any statutory language at all. Far from relying on a clear statement, the FTC should be envious of the "wafer-thin reed" the government stood on in *Ala. Ass'n of Realtors* because here, the FTC has no reed to stand on at all. *Cf.* 141 S. Ct. at 2489.

C. Constitutional avoidance counsels against confronting the serious constitutional issues the Noncompete Ban implicates.

When "a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932). In this case, the FTC's broad interpretation of "unfair methods of competition" seriously risks running afoul of the nondelegation doctrine and exceeding

Congress's commerce power. But by adopting what is already the best reading of the statute, *see supra* II.A, the Court may avoid reaching the merits of those substantial constitutional questions.

1. The FTC's interpretation of "unfair methods of competition" seriously risks violating the nondelegation doctrine.

In *Schechter*, the Court held that the National Industrial Recovery Act's codes of "fair competition"—language very similar to the FTC Act's "unfair methods of competition"—was an unconstitutional delegation of legislative authority. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935). But the Court distinguished the FTC Act based on the fact that the Commission operated on a *case-by-case basis* through adjudication. *Id.* at 533-34. According to the FTC, rulemaking is "of an analogous character" to adjudication from a due process perspective and thus should function as an appropriate stand-in. Appellant's Br. 16. But that misses the point—*Schechter* was not a due process case. *Schechter*, 295 U.S. at 551. The FTC avoided a delegation problem because the Court construed the FTC Act as requiring the Commission to determine "unfair methods of competition" "in *particular instances* . . . in the light of *particular competitive conditions* and of what is found to be a *specific and substantial public interest*." *Id.* at 533 (emphasis added). It was the individualized nature of how the FTC defined "unfair methods of competition," not the

procedural adequacy of the Commission's proceedings, that saved the FTC Act in *Schechter*. Thus, if the Court allows the FTC to abandon its practice of defining "unfair methods of competition" on a case-by-case basis, then the central distinction in *Schechter* falls apart, giving rise to a serious delegation problem.

Admittedly, the Court has not always vigorously enforced the nondelegation doctrine. *See Whitman*, 531 U.S. at 474. However, *Schechter* has not been overruled and speaks directly to the FTC Act. 295 U.S. at 533-34. Moreover, current members of the Court have expressed willingness to revive the nondelegation doctrine. *See Gundy v. United States*, 139 S. Ct. 2116, 2148 (2019) (Gorsuch, J., dissenting).

All of this raises a "serious doubt" of whether the FTC Act provides an intelligible principle for the FTC to define "unfair methods of competition" via blanket rulemaking. But the Court may avoid this question by adopting what is already the best reading of the FTC Act—that the Commission lacks substantive "unfair methods of competition" rulemaking authority. *Supra* II.A; *see generally* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223 (2000).

2. The Noncompete Ban, as applied to Ames Electric, exceeds the boundaries of the commerce clause.

To fall within Congress's commerce power, a law must fit into at least one of three categories: (1) "the use of the channels of interstate

commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; or (3) "activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). The Noncompete Ban, as applied to Ames Electric, cannot be justified under any.

Since Ames is not connected to the national electric grid and therefore does not transmit energy across state lines, *see* Semi-Final Record Responses, the FTC cannot justify the Noncompete Ban as regulating Ames Electric's use of either a channel or instrumentality of commerce. Nor can the FTC justify the Noncompete Ban as regulating "activities that substantially affect interstate commerce" because, again, Ames Electric operates wholly independent of the national electric market. *Id.* The FTC asserts that Ames Electric's limited use of noncompetes creates "substantial economic spillovers" by "restricting any other states' utilities . . . from hiring its managers or engineers." Appellant's Br. 33–34. But nothing in the record speaks to the scope of Ames Electric's noncompete clauses.

In addition to Ames Electric, the Noncompete Ban likely covers a multitude of companies whose activities are wholly intrastate. At bottom, the Noncompete Ban implicates substantial commerce power concerns. But the Court may avoid reaching the merits of this

constitutional question merely by adopting what is already the best reading of the statute.

III. AMES ELECTRIC'S USE OF NONCOMPETE AGREEMENTS IS IMMUNE FROM FEDERAL ANTITRUST ENFORCEMENT.

Eighty years ago, the Supreme Court determined that the Sherman Act does not prohibit state actors from engaging in anticompetitive conduct. *Parker v. Brown*, 317 U.S. 341, 351 (1943). This doctrine—that antitrust laws prohibit private parties, but not state actors, from engaging in anticompetitive conduct—is known as state action immunity. Ames Electric benefits from that immunity here. First, *Parker* immunity applies to the FTC Act, as the FTC itself conceded at the district court. *See* JA-7 n.1. Second, Ames Electric benefits from the state legislature's *ipso facto* immunity, since Ames Electric operates as an adjunct of the legislature's policy and exercises no regulatory authority of its own. Finally, even if this Court applies the two-prong *Midcal* test, Ames Electric would satisfy that test because Ames Electric acts pursuant to the clearly articulated state policy embodied in 18 Ames Code Ann. § 2010 and is actively supervised by the state's Legislative Commission. *See Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

A. State action immunity applies to the FTC Act—as the FTC conceded at the district court.

The FTC devotes an entire section of its brief to arguing that *Parker* state action immunity doctrine does not apply to the FTC Act. *See* Appellant's Br. 26–34. But the FTC waived that argument when it conceded at the district court that the *Parker* doctrine *does* apply to the FTC Act. *See* JA-7 n.1. The district court's opinion explained that "[t]he parties agree" that the FTC Act—like the Sherman Act—expresses no purpose to "nullify a state's control over its officers and agents." *Id.* Recounting the origins of the state action doctrine, the district court explained how it developed in the context of the Sherman Act. JA-7. But because only the FTC Act is at issue in this case, the district court inserted a footnote to memorialize the FTC's concession that the *Parker* doctrine also applies "here," to the FTC Act. JA-7 n.1.

On appeal, the FTC now takes the opposite position, asserting that the FTC Act *does* preempt state actions. Appellant's Br. 29. But "it is well established that failure to raise an issue in the district court constitutes a waiver of the argument." *Belitskus v. Pizzingrilli*, 343 F.3d 632, 645 (3d Cir. 2001). The FTC cannot "concede an issue in the district court and later, on appeal, attempt to repudiate that concession and resurrect the issue." *United States v. Gates*, 709 F.3d 58, 63 (1st Cir. 2013). If the rule were otherwise, a party could "lead a trial court down a primrose path" and then "profit from the invited error" on appeal, as

the FTC attempts to do here. *Id.* This practice of "sandbagging" the district court "cannot be tolerated." *United States v. Spero*, 331 F.3d 57, 62 (2d Cir. 2003).

This is not one of the "rare instances" where a court might exercise discretion to forgive a waiver. *Soo Line R.R. Co. v. Consol. Rail Corp.*, 965 F.3d 596, 601 (7th Cir. 2020). Courts "routinely decline to consider" even abstract legal questions that were not raised below. *Id.* at 602 (collecting cases). This legal question is not "so obvious" that failing to consider it would "result in a miscarriage of justice." *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1030 (5th Cir. 1982). On the contrary, the FTC's position—that *Parker* does not apply to the FTC Act—is so implausible that the FTC cannot cite a single case that supports it. Furthermore, in its opening brief, the FTC did not even so much as acknowledge its waiver, let alone provide any argument for why this Court should excuse it. The FTC simply proceeded as if nothing had happened, even though it is a "sophisticated party" that is "represented by able counsel." *Soo Line R.R. Co.*, 965 F.3d at 602. The FTC's failure to ask for this Court's forgiveness is an additional reason why the Court should not grant it.

But even if this Court were to consider the merits of the FTC's waived argument, it should follow decades of settled precedent and conclude that state action immunity applies to the FTC Act. Eighty

years ago, the Supreme Court held in *Parker* that the Sherman Act's prohibition on anticompetitive conduct only applies to private parties—not sovereign states. 317 U.S. at 351. Against the backdrop of our federal system of government, the Court refused to attribute to Congress "an unexpressed purpose to nullify a state's control over its officers and agents." *Id.* Although the Court first announced this doctrine of state action immunity in a case construing the Sherman Act, courts have extended the doctrine to the FTC Act, because the same principles of federalism that influenced the Court's interpretation of the Sherman Act apply with equal force to the FTC Act. *See Cal. State Bd. of Optometry v. FTC*, 910 F.2d 976, 980–81 (D.C. Cir. 1990) (discussing the FTC Act's text and legislative history).

The D.C. Circuit has expressly held that the *Parker* doctrine applies to the FTC Act. *See id.* The Commission relies on *FTC v. Ticor Title Insurance Co.*, but that case helps Ames Electric, not the FTC. *See* 504 U.S. 621 (1992). There, the Court went out of its way to criticize the view that *Parker* immunity does not apply to the FTC Act. *Id.* at 635 (noting that "[a] leading treatise has expressed its skepticism" of this view (citing 1 P. Areeda & D. Turner, Antitrust Law ¶ 218 (1978))). The *Ticor Title* Court stopped short of expressly articulating that holding only because the 1992 FTC wisely did not make the argument that today's FTC advances. *Id.* The Court then conducted a full state action

immunity analysis, under the assumption that *Parker* immunity *does* apply to the FTC Act. *See id.* ("We apply our prior [state action immunity] cases to the one before us."). Likewise, after *Ticor Title*, the Supreme Court has consistently applied the *Parker* doctrine to the FTC Act. *See, e.g.*, *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 222 (2013); *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 501, 506 (2015). These cases foreclose the FTC's claim that *Parker* immunity is not available under the FTC Act.

Finally, the FTC's argument that state action immunity should not be available when a state's regulation causes "substantial interstate economic spillover" deserves little attention. *See* Appellant's Br. 32. As an initial matter, virtually all state action immunity cases deal with state regulations that cause "substantial economic spillovers." *See, e.g.*, *Parker*, 317 U.S. at 360; *see also* Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & Econ. 23, 47 (1983) (noting that California's raisin regulation at issue in *Parker* caused raisin prices to rise, "to the glee of California's growers but the dismay of residents elsewhere"). Instead of citing any cases to support this theory, the FTC mischaracterizes a law review article by then-Professor Easterbrook. *See* Appellant's Br. 32–34. The FTC cites pages 45–48 from a section in that article entitled "A Suggestion for a New Antitrust State Action Doctrine." *See* Appellant's Br. 33–34; Easterbrook, *supra*, 45–49.

Clearly, Easterbrook wanted to change the law, not simply describe the current law. *See* Easterbrook, *supra*, at 40 (explaining that Part III "offer[s] a new version of the *Parker* doctrine" because "some changes could be beneficial"). In an attempt to get around this, the FTC incorrectly attributes to Easterbrook the view that "a state can do anticompetitive things only when that state bears its own costs." Appellant's Br. 33. However, Easterbrook said no such thing. Instead, he suggested that current law be reformed to incorporate that economic principle. *See* Easterbrook, *supra*, at 47. The FTC invites the Ames Circuit to upset a longstanding national consensus in antitrust law for the sake of its favored economic policy. This Court should decline and apply the law as it exists.

B. *Midcal* does not apply, and Ames Electric enjoys *ipso facto* state action immunity.

In any state action immunity analysis, the "first step" is to "identify the actor that performed the alleged anticompetitive conduct." *Edinboro Coll. Park Apartments v. Edinboro Univ. Found.*, 850 F.3d 567, 573 (3d Cir. 2017). When a state legislature is responsible for the anticompetitive conduct, it enjoys automatic state action immunity without needing to satisfy any heightened judicial scrutiny. *Hoover v. Ronwin*, 466 U.S. 558, 567–68 (1984). Moreover, the legislature's automatic immunity extends to private parties who act as an "adjunct" to the government's policy. *Edinboro*, 850 F.3d at 574; *see also Zimomra*

v. Alamo Rent-A-Car, Inc., 111 F.3d 1495, 1500 (10th Cir. 1997). By contrast, *Midcal* only applies when a private party has exercised delegated policymaking authority to promulgate an anticompetitive rule. *See Dental Exam'rs*, 574 U.S. at 505 (noting that heightened judicial scrutiny is necessary only when "a State delegates control over a market to a nonsovereign actor"). The entire purpose of the *Midcal* test is to determine "whether an anticompetitive policy is indeed the policy of a State." *Id.* at 507. But when a fully formed policy comes directly from the state legislature and leaves no room for policymaking discretion, the central question of *Midcal* is necessarily inapposite.

The *Midcal* test does not apply here because Ames Electric has no policymaking authority at all, and its use of noncompete agreements directly reflects the Ames legislature's policy. To be sure, Ames Electric is not a sovereign entity; it is a pseudo-private entity that serves "as an instrument of Ames'[s] energy regulatory program." *See* JA-8 n.2. But Ames Electric's anticompetitive conduct—the use of noncompete agreements—"is indeed the policy" of the sovereign state of Ames. *See Dental Exam'rs*, 574 U.S. at 507. The Ames legislature passed a law that

says exactly that.[9] 18 Ames Code Ann. § 2010. The legislature's requirement that Ames Electric use noncompetes only in "[e]xtraordinary circumstances" does not change the analysis. 18 Ames Code Ann. § 2010(1)(a). That provision is not a grant of discretion to Ames Electric to determine what counts as "[e]xtraordinary circumstances." *See id.* On the contrary, it is a legal limitation on Ames Electric's authority to implement the state's policy.

When Ames Electric purports to enter a non-compete agreement with an employee, the resulting agreement falls into one of two categories: (1) those that are valid, since they were entered into under extraordinary circumstances, and (2) those that are pieces of wastepaper with no legal effect, since the requisite extraordinary circumstances were not present. Accordingly, all the noncompete agreements in the first category—the valid ones, with legal effect—are directly authorized by Ames state law. The FTC's brief makes much of Ames Electric's past practice of using noncompete agreements for all managerial employees. Appellant's Br. 38. But Ames Electric does not ask this Court to determine whether Ames Electric's past practice was valid under § 2010;

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[9] It makes no difference that the Ames legislature has authorized, but not compelled, Ames Electric to use noncompete agreements. *See S. Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 61 (1985) (explaining that compulsion is not a prerequisite to finding of state action immunity, since "a compulsion requirement is inconsistent" with the values underlying *Parker*); *see also Cine 42nd St. Theater Corp. v. Nederlander Org.*, 790 F.2d 1032, 1042 (2d Cir. 1986) (noting that the Supreme Court has rejected a compulsion test).

that is a matter for Ames state courts to determine under Ames state law. Instead, in this pre-enforcement challenge, Ames Electric simply asks this Court to declare that Ames Electric is immune from the FTC's total ban on noncompete agreements, such that Ames Electric can continue to use them—*in whatever circumstances they are authorized by § 2010*, as determined by Ames state law.

This case is unlike those in which *Midcal* is necessary to police broad delegations of regulatory authority by states to private entities. For example, in *Dental Examiners*, the North Carolina legislature delegated to the State Board of Dental Examiners the authority to prohibit any unlicensed person from "unlawfully practicing dentistry." *Dental Exam'rs*, 574 U.S. at 499. Acting pursuant to that broad delegation, the Board then prohibited non-dentists from providing teeth-whitening services. *Id.* at 501. In reviewing whether the Board enjoyed state action immunity for this antitrust violation, the Supreme Court considered whether banning non-dentists from teeth whitening was in fact the policy of North Carolina, since the North Carolina legislature had said nothing about teeth whitening. *Id.* at 501, 507–08. By contrast, the Ames legislature directly authorized Ames Electric's use of noncompete clauses. Thus, since there is no question that permitting noncompetes is in fact the policy of Ames, *Midcal* does not apply.

Similarly, in *Midcal* itself, California delegated to wine wholesalers the authority to choose a fixed price at which the entire industry would be required to sell—without any guidance on what the price should be. 445 U.S. at 99–100. The Court refused to grant automatic immunity, since California's law delegated plenary policymaking authority to the private industry. *Id.* at 106. In contrast to that broad delegation, Ames's statute does not delegate *any* policymaking authority to Ames Electric. *See* 18 Ames Code Ann. § 2010. It simply authorizes Ames Electric to use noncompete agreements, subject to the legally binding constraint that noncompetes may only be used in extraordinary circumstances. *Id.* Thus, unlike the wine wholesalers in *Midcal*, Ames Electric is merely an adjunct of the Ames legislature's own policy.

Instead, this case is analogous to cases where courts have declined to apply *Midcal* to the actions of a private party that had no policymaking authority. In *Cine 42nd Street Theater Corp. v. Nederlander Organization, Inc.*, private companies acted in concert with governmental entities to redevelop Times Square in a manner that allegedly violated the antitrust laws. 790 F.2d 1032, 1035 (2d Cir. 1986). The Second Circuit determined that those private parties were entitled to automatic state action immunity without needing to satisfy the *Midcal* analysis, since the private parties' participation in the scheme

was "reasonably contemplated by the legislature." *Id*. The Court recognized that denying state action immunity to the private parties in those circumstances would "effectively block" the policy of the state. *Id*. Other circuits have followed this approach. *See, e.g.*, *Edinboro*, 850 F.3d at 580 (holding that *Midcal* did not apply to a private foundation working with a state-run university because the "University's immunity passes through to the foundation"); *Zimomra*, 111 F.3d at 1500 (extending government's immunity to private party without applying *Midcal*). Likewise, the Ames legislature clearly contemplated that Ames Electric would use noncompete agreements when it passed a law authorizing Ames Electric to do exactly that. To apply *Midcal* scrutiny to Ames Electric would risk defeating Ames's clear state policy.

C. Even if *Midcal* does apply, Ames Electric's use of noncompete agreements still enjoys federal antitrust immunity.

As established above, Ames Electric benefits from the state's *ipso facto* immunity from antitrust law under the *Parker* doctrine. But Ames Electric would enjoy immunity even if this Court applies the two-pronged *Midcal* test. Ames Electric satisfies the first prong because its use of noncompete agreements is "clearly articulated and affirmatively expressed as state policy." *Midcal*, 445 U.S. at 105. Section 2010 expressly states that Ames Electric is authorized to use noncompete agreements. *See* 18 Ames Code Ann. § 2010. The second prong is also

satisfied because Ames has "actively supervised" Ames Electric's use of noncompete agreements. *Midcal*, 445 U.S. at 105.

1. Ames Electric is acting pursuant to a clearly articulated state policy.

Ames Electric satisfies the first prong of the *Midcal* test because it uses noncompete agreements pursuant to a clearly articulated and affirmatively expressed policy of Ames. Section 2010 expressly states that "[a]ny pseudo-private utility created by the state"—like Ames Electric, *see* JA-16—"shall have the authority to enter a noncompete agreement with an employee" upon a finding of extraordinary need and a showing that the agreement will not unduly harm Ames workers. 18 Ames Code Ann. § 2010(1). This policy easily passes the Supreme Court's highly permissive standard for clear articulation, which requires only that the anticompetitive conduct be a "foreseeable result" of the grant of authority authorized by the statute. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985). Moreover, an entity does not fail the clear articulation standard even when its conduct was "substantively or even procedurally defective." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 371 (1991). "Errors of fact, law, or judgment by [an] agency are not 'authorized,'" but denying immunity on the basis of such errors would "transform[] . . . state administrative review into a federal antitrust job." *Id.* at 371–72. That would create the "unacceptable

consequence[]" of "undermining the very interests of federalism [*Parker*] is designed to protect." *Id.* (internal quotations omitted).

For proof that § 2010 counts as a clearly articulated state policy, look no further than the FTC's brief—which emphasizes the "clarity" of Ames's policy. Appellant's Br. 42. The FTC observes that "[o]n its face, the law allows for noncompete agreements only after an employee-specific, 'fact-specific' determination." *Id.* at 41–42. The FTC, trumpeting the clarity of the Ames statute, confidently alleges that "Ames Electric does not have state law authority" to routinely use noncompete agreements, since there is a "case-by-case expectation" which "Ames Electric has flouted." *Id.* at 37–38. In short, the FTC spends page after page asserting that the State of Ames *has a clear law* that Ames Electric has violated in the past. *Id.* at 36–41. But Ames Electric's past conduct is irrelevant to the purely legal question of whether § 2010 clearly articulates the State's policy. In this pre-enforcement challenge, Ames Electric does not ask this Court to assess the validity of its *past* conduct, a question of Ames state law. It simply asks the Court to approve its future use of noncompete agreements in a manner consistent with the clear state policy that all parties agree § 2010 evinces.

The FTC's confidence that Ames Electric has violated Ames policy itself shows the FTC's acknowledgement that Ames law is clear. Since

Ames Electric acted pursuant to § 2010, a clearly articulated Ames state policy, *Midcal*'s first prong is easily satisfied.

2. Ames actively supervises Ames Electric's use of non-compete contracts.

Midcal's second prong requires the state or one of its agents to "actively supervise" the anticompetitive conduct of private parties. *See Midcal*, 445 U.S. at 105. A supervisor must have the authority to (1) review the substance of a private party's anticompetitive decisions and (2) disapprove of anticompetitive conduct out of line with the state's policy, and (3) must actually exercise its review power. *See Dental Exam'rs*, 574 U.S. at 515. There is no "particular form of state or local regulation" necessary to satisfy this requirement. *Ticor Title*, 504 U.S. at 639. Rather, the inquiry is "flexible and context dependent," focusing on "whether the State's review mechanisms provide *realistic assurance* that a nonsovereign actor's anticompetitive conduct promotes [S]tate policy." *Dental Exam'rs*, 574 U.S. at 515 (internal quotations omitted) (emphasis added). Because the Ames Legislative Commission satisfies these requirements, Ames Electric's use of noncompete contracts satisfies *Midcal* scrutiny.

a. The Legislative Commission can substantively review Ames Electric's use of noncompete clauses.

A supervisor must have the power to review the reasons behind a private party's decisions, not just the procedures it follows. *See Patrick*

v. Burget, 486 U.S. 94, 102–03 (1988). Here, the Ames Legislature empowered a Legislative Commission to supervise Ames Electric's use of noncompete agreements. 18 Ames Code Ann. § 2010(2)–(3). There is no doubt that the Legislative Commission can supervise the substance of Ames Electric's noncompete provisions. For example, it must review the number of noncompete agreements each utility issues and the utility's "reasons" for issuing them. 18 Ames Code Ann. § 2010(2). It may also "audit . . . any utility's noncompete policy to ensure compliance" with the statute. 18 Ames Code Ann. § 2010(3). These provisions confer on the Legislative Commission ample authority to scrutinize the substance of Ames Electric's decisions. *See DFW Metro Line Servs. v. Sw. Bell Tel., Corp.*, 988 F.2d 601, 606 (5th Cir. 1993) (holding that a public utility commission's power to review whether rates were "unreasonable or in any way in violation of any provision of the law" satisfied *Midcal*).

b. The Legislative Commission has the power to disapprove of Ames Electric's use of noncompete contracts.

The second requirement of active supervision is that the supervisor must be able to "disapprove" of a private party's conduct. *See Patrick*, 486 U.S. at 101. The supervisor must be able to "veto or modify" any conduct that does not comport with state policy. *Dental Exam'rs*, 574 U.S. at 515. Here, the Legislative Commission clearly has the power

to veto Ames Electric's use of noncompete agreements, since the Legislative Commission can completely prohibit Ames Electric from using noncompete agreements for up to six months at a time. *See* 18 Ames Code Ann. § 2010(3)(a). That power to prospectively block Ames Electric from using any noncompete agreements counts as sufficient veto power. *See Porter Testing Lab'y v. Bd. of Regents for Okla. Agric. & Mech. Colls.*, 993 F.2d 768, 772 (10th Cir. 1993).

In *Porter*, a soil testing laboratory sued the Board of Regents for Oklahoma State University, claiming the University had failed its statutory obligation to report on its anticompetitive soil testing activities. *Id.* at 770. However, the University was found to be adequately supervised because it faced the threat of losing federal funding if it failed to comply with its statutory requirements. *See* 993 F.2d at 772–73. Withholding funds is a forward-looking remedy to correct a broad course of conduct, rather than a retroactive tool to correct individual instances of noncompliance. Likewise, the Legislative Commission's similarly powerful forward-looking remedy—suspending Ames Electric's authority to promulgate noncompetes altogether—satisfies Midcal scrutiny.

The FTC urges that for the Legislative Commission to have sufficient disapproval power, it must be able to retroactively "revoke" or "nullify" all invalid noncompete agreements into which Ames Electric

has entered. But the FTC cites no case that has adopted this rule. *See* Appellant's Br. 44. And the FTC's proposed rule cannot be correct in this context. If Ames Electric enters into a noncompete agreement that is contrary to Ames law, then that agreement has no legal force at all. It cannot be "revoked" or "nullified," since it is effectively a piece of wastepaper. If the Legislative Commission purported to "nullify" contracts that were already legally invalid, that would be an exercise in theatrics. Instead of granting the Legislative Commission that symbolic power, the Ames legislature granted real veto power by enabling the Commission to shut down entirely Ames Electric's use of noncompete agreements. *See* 18 Ames Code Ann. § 2010(3)(a).

Finally, an additional entity—the Ames state court system—possesses the "ultimate authority" to veto anticompetitive conduct for purposes of *Midcal* scrutiny. *Cf. Patrick*, 486 U.S. at 103–05 (leaving open the question of substantive judicial review as a means of active supervision). Ames law makes unenforceable all noncompete contracts, except those that comply with the substantive requirements in § 2010. *See* 18 Ames Code Ann. §§ 2004, 2010. Therefore, courts reviewing contracts for compliance with state law would have "the power to veto . . . particular decisions to ensure they accord with state policy." *Dental Exam'rs*, 574 U.S. at 515; *cf. Trigen Okla. City Energy Corp. v. Okla. Gas & Elec. Co.*, 244 F.3d 1220, 1226 (10th Cir. 2001) (stating that a

supervisor with "the powers and authority of a court of record" passes *Midcal* scrutiny). Because Ames Electric's employees could always challenge the legality of their noncompete agreements under § 2010(3)(a) in Ames court, there is no reason to demand that the Legislative Commission be able to cancel particular contracts. After all, interpretation of "[e]xtraordinary circumstances" is a matter of Ames law. 18 Ames Code Ann. § 2010(1). The Legislative Commission can use its broader "ultimate authority" under § 2010(3)(a) to police Ames Electric's conformance to Ames's policy while Ames courts supplement the Commission with individualized review. There is no reason the "[s]tate's review mechanisms" cannot combine two institutions working in tandem. *Dental Exam'rs*, 574 U.S. at 515.

c. The Legislative Commission exercised its authority to supervise Ames Electric.

Midcal requires not only that the Legislative Commission possess the authority to supervise Ames Electric, but also that the Legislative Commission did in fact exercise that supervisory authority. *Id.* If a supervisor determines that the private party has violated state policy, then the supervisor must exercise its disapproval power. *Patrick*, 486 U.S. at 101. Here, the Legislative Commission exercised its supervisory authority over Ames Electric by conducting its review of Ames Electric and delivering an opinion to the state legislature. JA-17. And the Legislative Commission had no need to exercise its veto power, since it

never concluded that Ames Electric violated Ames's anticompetitive policy. *See* JA-17.

The Legislative Commission has exercised its supervisory authority over Ames Electric. A supervisor can demonstrate active supervision merely by authoring an opinion that evaluates a private party's conduct. *See Yeager's Fuel, Inc. v. Pa. Power & Light Co.*, 22 F.3d 1260, 1271 (3d Cir. 1994); *DFW Metro Line*, 988 F.2d at 606 (holding that published decisions by commissioner inquiring into reasonableness of rates suffice). In *Yeager's Fuel*, a public utility supervisor read utilities' reports on their anticompetitive programs and authored its own final staff report evaluating them. *See* 22 F.3d at 1271–72. The Court found that the bureau's report qualified as actual supervision. *Id.* at 1272. Likewise, here, the Legislative Commission reviewed the utilities' § 2010(2) reports and described the shortcomings of Ames Electric's noncompete practices to the legislature. JA-17. Just as the bureau's evaluation of reports was sufficient for actual supervision in *Yeager's Fuel*, 988 F.3d at 1272, the Legislative Commission's performance of its review process constituted actual exercise of its review powers.

Additionally, supervisors must disapprove of anticompetitive acts of private parties that "fail to accord with state policy." *Patrick*, 486 U.S. at 101. The determination of whether the private party has violated state policy is committed to the discretion of the supervisor, and federal

courts do not second-guess that determination. *See Nugget Hydroelectric, L.P. v. Pac. Gas & Elec. Co.*, 981 F.2d 429, 435 (9th Cir. 1992) (finding active supervision on the basis of supervisor's published decisions reviewing private party's conduct without further inquiring into whether state policy determinations were accurate); *Yeager's Fuel*, 22 F.3d at 1271 (same).

The Legislative Commission had no need to exercise its power to disapprove of Ames Electric's conduct, since it never concluded that Ames Electric's noncompete provisions were repugnant to Ames's anitcompetitive policy. To be sure, the Legislative Commission's report says that Ames Electric "had not always acted in accordance with the express terms of Section 2010." Appellant's Br. 45 (quoting JA-17). But that was a conclusion that Ames Electric violated its *procedural* obligation to conduct a fact-specific inquiry each time it entered into a noncompete agreement. It was not a conclusion that Ames Electric violated the *substance* of Ames's policy—that noncompete agreements only be used in "[e]xtraordinary circumstances." 18 Ames Code Ann. § 2010(1)(a); *see Omni*, 499 U.S. at 371–72 (explaining that a party does not fall outside a state's anticompetitive policy merely by committing "[e]rrors of fact, law, or judgment"). The FTC does not dispute that the Commission was fully aware of the details of how Ames Electric used noncompete agreements. *See* Appellant's Br. at 44–46. The Legislative

Commission recognized that Ames Electric, although it failed to comply with its procedural obligations, nonetheless entered only into noncompete agreements when "[e]xtraordinary circumstances" were present—in line with Ames's anticompetitive policy as embodied in § 2010.

Indeed, the finding of the Legislative Commission's report—that Ames Electric "had not always acted in accordance with the express terms" of the Ames statute—compels that conclusion. *See* JA-17. The only "express terms" of § 2010 come from the procedural requirement that Ames Electric engage in "fact-specific inquir[ies]." JA-11. By contrast, the "[e]xtraordinary circumstances" requirement is not embodied in "express terms," since the statute provides only "illustrative" examples that are "neither exhaustive nor prima facie evidence" of what circumstances count as extraordinary. 18 Ames Code Ann. § 2010(1)(a). Accordingly, the Commission did not violate *Patrick*'s mandate to "disapprove" anticompetitive acts of private parties that "fail to accord with state policy." *Patrick*, 486 U.S. at 101 (emphasis added). And since the Commission clearly did review the substance of Ames Electric's use of noncompete agreements, it has satisfied the third and final element of *Midcal*'s active supervision prong.

Conclusion and Requested Relief

For the foregoing reasons, the judgment of the district court should be affirmed.

February 20, 2023

Respectfully submitted,

The Laurence H. Silberman Memorial Team

/s/ Max Alvarez

/s/ Eric Bush

/s/ Richard Dunn

/s/ Jessica Flores

/s/ Hayley Isenberg

/s/ Brandon Sharp

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.
>
> **(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 and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation

of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice

. . .

(c) Review of order; rehearing

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States . . .

. . .

(f) Service of complaints, orders and other processes; return

Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person . . . or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person . . . or (c) by mailing a copy . . .

(g) Finality of order

An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review . . .

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, § 6(g), 15 U.S.C. § 46(g)

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

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

(b) Procedures Applicable

(1) When prescribing a rule under subsection (a)(1)(B) of this section, the Commission shall proceed in accordance with section 553 of title 5 (without regard to any reference in such section to sections 556 and 557 of such title), and shall also (A) publish a notice of proposed rulemaking stating with particularity the text of the rule, including any alternatives, which the Commission proposes to promulgate, and the reason for the proposed rule; (B) allow interested persons to submit written data, views, and arguments, and make all such submissions publicly available; (C) provide an opportunity for an informal hearing in accordance with subsection (c); and (D) promulgate, if appropriate, a final rule based on the matter in the rulemaking record (as defined in subsection (e)(1)(B)), together with a statement of basis and purpose.

(2)

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

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

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

(d) Statement of basis and purpose accompanying rule; "Commission" defined; judicial review of amendment or repeal of rule; violation of rule

(1) The Commission's statement of basis and purpose to accompany a rule promulgated under subsection (a)(1)(B) shall include (A) a statement as to the prevalence of the acts or

practices treated by the rule; (B) a statement as to the manner and context in which such acts or practices are unfair or deceptive; and (C) a statement as to the economic effect of the rule, taking into account the effect on small business and consumers.

(2)

(A) The term "Commission" as used in this subsection and subsections (b) and (c) includes any person authorized to act in behalf of the Commission . . .

(3) When any rule under subsection (a)(1)(B) takes effect a subsequent violation thereof shall constitute an unfair or deceptive act or practice in violation of section 45(a)(1) of this title, unless the Commission otherwise expressly provides in such rule.

U.S. Const. art. I, § 8, cls. 1, 3

The Congress shall have Power . . .

. . .

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

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.
    1. 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.
    1. 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.

. . .

(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.