No. 24-10951

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RYAN L.L.C.,
Plaintiff-Appellee,

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; BUSINESS ROUNDTABLE; TEXAS ASSOCIATION OF BUSINESS; LONGVIEW CHAMBER OF COMMERCE,
Intervenors-Plaintiffs-Appellees,

v.

FEDERAL TRADE COMMISSION,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Texas

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Local Rule 29, prospective amicus curiae, The Buckeye Institute, respectfully requests leave to file an amicus brief in this case. A copy of the proposed amicus brief is attached to this filing. All parties have consented to the filing of this brief. The brief focuses on points not made by the parties, namely whether the Commission has authority under Section 5 of the FTC Act to declare non-compete agreement's unfair methods of competition. A determination of the Commission's authority under Section 5 is directly related to the statutory interpretation question presented by the parties. Thus, the proposed brief will assist the Court in determining the issues presented by the parties.

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute also files lawsuits and submits amicus briefs in furtherance of its mission. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3). Amicus briefs by The Buckeye Institute have been regularly accepted by this Court, other federal courts of appeals, and the Supreme Court of the United States.

For these reasons, The Buckeye Institute respectfully asks this Court to grant this motion and permit the filing of the attached amicus brief.

Respectfully submitted,

/s/ Robert Alt
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing motion for leave to file an amicus brief was served on all counsel of record via the Court's electronic filing system this 10th day of February 2025.

Respectfully submitted,

/s/ *Robert Alt*
Robert Alt
Counsel of Record for
The Buckeye Institute

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AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS

Ryan L.L.C., et al. v. Federal Trade Commission
No. 24-10951

The undersigned counsel of record for amicus The Buckeye Institute certifies that counsel is not aware of any person or entity as described in the fourth sentence of Rule 28.2.1 that has an interest in the outcome of this case other than those listed in the parties' certificates. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

/s/ *Robert Alt*
Robert Alt
Counsel of Record for
The Buckeye Institute

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 29(a)(4)(A) and 26.1 of the Federal Rules of Appellate Procedure, *amicus* states that it is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3); as such, it has no parent corporation, issues no stock, and thus no publicly held corporation owns more than ten percent of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

Constitutional Provisions

INTEREST OF AMICUS CURIAE[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute also files lawsuits and submits amicus briefs in furtherance of its mission. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3). Amicus briefs by The Buckeye Institute have been regularly accepted by this Court, other federal courts of appeals, and the Supreme Court of the United States.

SUMMARY OF THE ARGUMENT AND INTRODUCTION

The Federal Trade Commission's Non-Compete Clause Rule, 16 C.F.R. § 910 (2024) (the "Rule"), exceeds the Commission's authority granted by its enabling act and is otherwise legally deficient.

[1] Pursuant to Rule 29(a), The Buckeye Institute states that no counsel for any party has authored this brief in whole or in part and no person other than the amicus has made any monetary contribution to this brief's preparation or submission.

Under Section 5 of the Federal Trade Commission Act (the "FTC Act"), Congress "empowered and directed" the Commission "to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce . . . ." 15 U.S.C. § 45(a)(2). Under Section 6 of the FTC Act, the Commission has the power to "[f]rom 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." 15 U.S.C. § 46(g). The Commission claims the authority to ban non-compete clauses by arguing that (i) "non-compete clauses are 'unfair methods of competition' under Section 5 of the FTC Act, and (ii) pursuant to the authority granted them in Section 6(g), the Commission has the authority to issue the Rule." *Ryan LLC v. Fed. Trade Comm'n*, No. 3:24-CV-00986-E, 2024 WL 3297524, at *4 (N.D. Tex. July 3, 2024).

The district court focused its analysis on whether the Commission has the authority to create substantive rules under Section 6. But even if Section 6 authorizes the Commission to create substantive rules, the scope of that authority is limited to the authority granted elsewhere in the FTC Act—here, specifically, Section 5. To accurately interpret the Commission's authority under the FTC Act, it is crucial to understand whether the Commission has any underlying authority to regulate non-compete clauses. As this brief explains, it does not.

First, the Rule exceeds the Commission's authority that Congress granted to it under Section 5. The Supreme Court has explained that Section 5 was enacted to *supplement* the antitrust laws, not to regulate employment relations and anything else that the Commission might dream up.

Second, the Rule violates the major questions doctrine because (1) non-compete agreements are of great political interest as indicated by virtually every state regulating them either statutorily or via case law, (2) through the Rule, the Commission seeks to regulate a significant portion of the U.S. economy without a clear directive from Congress, and (3) the Rule invades—and invalidates—employment contracts traditionally governed by the states, all without explicit congressional approval.

Finally, the Rule is arbitrary and capricious. Although the Commission may consider established public policy in its determinations, public policy cannot be the primary factor. Instead of relying on public policies established by state legislatures and courts, the Commission has primarily based its conclusions on its newly minted public policy determination that non-compete agreements are bad for employees.

Given the Commission's lack of statutory authority, the Court should affirm the district court's decision, hold the Rule unlawful, and set it aside.

ARGUMENT

I. The Rule exceeds the Commission's statutory authority and violates the Administrative Procedure Act.

Under the Administrative Procedure Act, agency action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" must be held unlawful and set aside. 5 U.S.C. § 706(2)(C). By classifying non-compete agreements as unfair methods of competition, the Rule exceeds the Commission's statutory authority.

A. The FTC Act supplements antitrust laws by regulating unfair competition relating to antitrust-type actions; it does not regulate employment relations.

Section 5 of the FTC Act is codified in Title 15 of the U.S. Code, which is titled: "Commerce and Trade." Under federal law, employment relations are predominantly governed by Title 29 of the U.S. Code, which is titled: "Labor." Title 29 covers many aspects of employment law, but it does not attempt to regulate non-compete agreements.

In Section 5 of the FTC Act, Congress declared unlawful "[u]nfair methods of competition in or affecting commerce . . . ," 15 U.S.C. § 45(a)(2), and defined "commerce" to mean "commerce among the several States . . . ," 15 U.S.C. § 44. Congress's authority for the FTC Act arises from the Constitution's Interstate Commerce Clause, *see* U.S. Const. art. I, § 8, cl. 3, and accordingly, the Commission's authority is likewise limited by that clause. *See* 15 U.S.C. § 44. The

commission concurs, as it must. See Fed. Trade Comm'n, No. P221202, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* 8 (2022) (stating that an action can only be considered an unfair method of competition if it implicates competition in interstate commerce).

The statute does not define competition, but it is typically defined in the context of business commerce as "the effort of two or more parties acting independently to secure the business of a third party by offering the most favorable terms." *Competition*, Miriam-Webster, https://www.merriam-webster.com/dictionary/competition (last visited Jan. 29, 2025). *See also Competition, Black's Law Dictionary* (12th ed. 2024) ("The struggle for commercial advantage; the effort or action of two or more commercial interests to obtain the same business from third parties.").

It would be a stretch to evaluate the above language and conclude that Congress intended to give the Commission the authority to regulate the relationship between employers and employees. If that were the case, then it would have concurrent jurisdiction with—or perhaps superseding jurisdiction over the Department of Labor, an idea unsupported by any case law or legislative history. The common definition of competition is consistent with the history of the FTC Act.

Shortly after its passage, the Supreme Court explained that the FTC Act "was

intended to supplement previous anti-trust legislation." *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 453 (1922) (citation omitted). *See also Luria Bros. & Co. v. F.T.C.*, 389 F.2d 847, 859 (3d Cir. 1968) ("The Federal Trade Commission Act was designed as a supplement to and has been interpreted as a complement to the Sherman and Clayton Acts."). Although "the Commission has broad powers," those are "powers to declare *trade* practices unfair," not *employment* practices. *FTC v. Brown Shoe Co*., 384 U.S. 316, 320–21 (1966) (emphasis added). So it is no surprise that the Commission has never before tried to regulate employer-employee relations.

Nevertheless, the Commission now reads Section 5 of the FTC Act to include employment relations and cites several cases to support its novel interpretation. But those cases suggest the opposite. The Commission cites *Atlantic Refining Co. v. FTC*, 381 U.S. 357 (1965), for the proposition that it may regulate any conduct that burdens "a not insubstantial portion of commerce." Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38359 (May 7, 2024) (codified at 16 C.F.R. § 910) (quoting *Atlantic Refining Co.*, 381 U.S. at 371). However, *Atlantic* involved extensive antitrust-type behavior by the companies involved, which "effectively sew[ed] up large markets." *Atlantic Refining Co.*, 381 U.S. at 371. The Court explained that "[w]hen conduct does bear the characteristics of recognized antitrust violations it becomes suspect, and the Commission may properly look to cases applying those laws for guidance." *Id.* at 369–70. *FTC v. Texaco, Inc.*, 393 U.S. 223 (1968), also

cited by the Commission, similarly involved antitrust-related claims that involved the sale of goods.

The Commission next cites *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304 (1934), which again involved traditional notions of competition and commerce. The Court concluded that a marketing scheme aimed at children—designed to sell them a lower quantity of products than that offered at a comparable price by other sellers and low-quality goods—was an unfair method of competition because scrupulous manufacturers could not compete. *Id*. at 307–309. By citing *R.F. Keppel & Bro.*, the Commission oddly compares a marketing scheme to sell inferior products to children with non-compete agreements between working adults and their employers. Regulating anti-competitive behavior in the sale of candy is not remotely akin to regulating employer-employee relations.

The Commission's drastic expansion of its reach is unsupported by any legal precedent. "As the Commission moves away from attacking conduct that is either a violation of the antitrust laws or collusive, coercive, predatory, restrictive or deceitful, and seeks to break new ground by [banning] otherwise legitimate practices, the closer [judicial scrutiny of its rules] must be . . . ." *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 137 (2d Cir. 1984). The Commission has not justified its Rule sufficiently to withstand close judicial scrutiny. The Rule exceeds the Commission's statutory authority to regulate interstate commerce.

B. The Rule exceeds the Commission's authority under the major questions doctrine—only Congress can resolve a matter of great political significance, regulate a significant portion of the American economy, or intrude into an area of state law.

The Supreme Court "expect[s] Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Alabama Ass'n of Realtors v.* Dep't of Health & Hum. Servs., 594 U.S. 758, 764 (2021) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

> This expectation of clarity is rooted in the basic premise that Congress normally "intends to make major policy decisions itself, not leave those decisions to agencies." *United States Telecom Assn. v. FCC*, 855 F.3d 381, 419 (CADC 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc). Or, as Justice Breyer once observed, "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters [for agencies] to answer themselves in the course of a statute's daily administration." S. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986).

Biden v. Nebraska, 143 S. Ct. 2355, 2380 (2023) (Barrett, J., concurring). "[I]n a system of separated powers, a reasonably informed interpreter would expect Congress to legislate on 'important subjects' while delegating away only 'the details.'" *Id.* at 2380–81 (Barrett, J., concurring) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825)).

To guard against administrative agencies arrogating to themselves the authority to regulate questions appropriately reserved for Congress, the Court applies the major questions doctrine in cases where an agency (1) claims the authority to resolve a matter of great "political significance," (2) "seeks to regulate

a significant portion of the American economy," or (3) "seeks to 'intrud[e] into an area that is the particular domain of state law.'" *West Virginia v. EPA*, 597 U.S. 697, 743–44 (2022) (Gorsuch, J., concurring). "Although it is nominally a canon of statutory construction, [the Court] appl[ies] the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency." *Gundy v. United States*, 588 U.S. 128, 167 (2019) (Gorsuch, J., dissenting). *See also Nebraska*, 143 S. Ct. at 2380 (Barrett, J., concurring) (Congress reserving "big-time policy calls" for itself "makes eminent sense in light of our constitutional structure, which is itself part of the legal context framing any delegation.").

The Rule fits into all three major questions categories.

1. The Commission seeks to resolve a matter of great political significance.

A matter is of great political significance when Congress has "conspicuously and repeatedly declined to enact" the proposed regulation through statute. *West Virginia*, 597 U.S. at 724. The Commission asserted that "rather than attempt to define through statute the various unlawful practices," Congress delegated its responsibility to define an unfair method of competition to the Commission. Fed. Trade Comm'n, No. P210100, *Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act* 3 (2021),

https://tinyurl.com/284c83ns. Congress provided no guidance on how to define an unfair method of competition, but some evidence can be inferred from the fact that Congress passed Section 5 to supplement previous antitrust legislation. *See, e.g., Beech-Nut Packing Co.*, 257 U.S. at 453. Nonetheless, the Commission presumes to expand the definition and regulatory scope provided by an "unfair method of competition" far beyond the antitrust context to an area of law that it had never before claimed to regulate—without any additional congressional authorization. The Commission should not presume that Congress had "'delegate[d]' such a sweeping and consequential authority 'in so cryptic a fashion.'" *West Virginia*, 597 U.S. at 721 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). And the Court should not defer to the Commission's bold presumption of the statute's meaning. *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 396 (2024) (finding that deference to agency interpretations of the law "cannot be squared with the APA").

Both the executive branch and the legislative branch have taken actions showing that non-compete agreements have great political importance. In March 2016, the Department of the Treasury issued an extensive—36-page—report outlining the history of non-compete agreements, an analysis of types of government regulations, and "policy implications." Office of Economic Policy, U.S. Dept. of Treasury, *Non-compete Contracts: Economic Effects and Policy Implications*

(2016), https://tinyurl.com/2v5d6afx. The Commission itself acknowledged that non-compete type agreements have existed and been subject to judicial review for hundreds of years. Non-Compete Clause Rule, 89 Fed. Reg. at 38343.

Congress also expressed interest in this topic, introducing at least four non-compete bills from 2015 to 2019. *See* Russell Beck, *A Brief History of Noncompete Regulation*, Fair Competition Law (Oct. 11, 2021), https://tinyurl.com/5xuk75sh. Each of those bills failed. *Id*. If Congress intends to ban—partially or totally—non-compete agreements, it must do so through legislation that clearly outlines the limitations on non-compete agreements or directly instructs the Commission to ban them. When both the executive and legislative branches take such extensive interest in a topic, the Court should take notice that this matter is of great political significance.

Additionally, a matter is of great political significance when an agency "'claim[s] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority.'" *West Virginia*, 597 U.S. at 724 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324). But that is exactly what the Commission did. It re-interpreted Section 5 to create new authority.

Historically, the Commission has utilized its standalone Section 5 authority regarding unfair methods of competition in only a few cases. Fed. Trade Comm'n, *Address by FTC Chairwoman Edith Ramirez* 2 (2015),

https://tinyurl.com/36mydrf8. The Commission had focused its "'unfair methods' *enforcement* efforts on conduct that threatens competition or the competitive process, not conduct that conflicts with other public policy goals." *Id.* (emphasis added). Until recently, the Commission has

> consistently grounded its exercise of that authority "in the spirit" of the antitrust laws. In particular, it has confined its Section 5 cases to conduct that diminishes *consumer welfare* by harming competition or the competitive process, as opposed to conduct that merely harms individual competitors or poses public policy concerns unrelated to competition.

Id. at 4–5 (emphasis added).

But non-compete agreements control employment relationships, not consumer welfare. Never before has the Commission claimed expertise in employment law or tried to regulate employment decisions. Suddenly it acts as if it not only has expertise, but authority. Congress did not bestow any such authority, and the Commission lacks such expertise.

Indeed, Commissioner Wilson protested to the full commission that employer-employee relations are not considered "methods of competition" in or affecting interstate commerce. *See* Fed. Trade Comm'n, No. P201200, *Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule* 4–7 (2023). She further pointed out that the Commission lacks experience regulating non-compete agreements. *Id.* This point is significant because "just as established practice may shed light on the extent

of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *FTC v. Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941).

The Commission's efforts "'raise an eyebrow' by stepping outside its ordinary regulatory domain" of antitrust "into the province of other agencies." *All. for Fair Bd. Recruitment v. Sec. & Exch. Comm'n*, 125 F.4th 159, 182 (5th Cir. 2024) (en banc) (quoting *West Virginia*, 597 U.S. at 730). It is ordinarily expected that Congress will give authority over certain matters to the agency most suited and experienced in the matter. *See id.* Here, the Commission is not well suited for labor and employment relations. That would be the Department of Labor—which is charged with regulating employment relations. *See About Us*, U.S. Dep't of Labor, https://tinyurl.com/zsmuc56h (last visited Jan. 23, 2025) (noting that the Department of Labor's mission is to "foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights"). *See generally* 29 U.S.C. §§ 1–3361. It would be odd indeed if Congress placed an employment regulation in a title, i.e. Title 15, that does not purport to regulate employment or to grant authority to an agency that likewise does not otherwise regulate employment. "[B]y stepping outside its ordinary regulatory

domain" and "into the province of other agencies," the Commission's "burden under the major questions doctrine [is] all the heavier." *All. for Fair Bd. Recruitment*, 125 F.4th at 182.

The Commission is exceeding its authority to "supplement" the antitrust laws, *Beech-Nut Packing Co.*, 257 U.S. at 453, and is attacking employment decisions that, in many cases, do not affect competition in interstate commerce. Such a transformative expansion of regulatory power must be clearly expressed by Congress—which, in this case, it did not.

2. The Commission seeks to regulate a significant portion of the American economy.

"Put simply, the 'economic . . . significance' of [the Commission's] action is 'staggering by any measure,' *All. for Fair Bd. Recruitment*, 125 F.4th at 181 (quoting *Nebraska*, 143 S. Ct. at 2373). The Rule falls well within the Court's precedence. On the lower end, the Court struck down the Center for Disease Control's eviction moratorium, which affected between 6 and 17 million tenants with an estimated economic impact of $50 billion. *Alabama Ass'n of Realtors*, 594 U.S. at 764. Moving up, industry analysts estimated that the Clean Power Plan regulation struck down by the Court in *West Virginia* "would cause consumers' electricity costs to rise by over $200 billion." 597 U.S. at 746 (Gorsuch, J., concurring). And in *Nebraska*, the Court struck down the Secretary of Education's plan "to release 43 million borrowers from their obligations to repay $430 billion in student loans. 143 S. Ct. at 2372.

Here, the Commission estimates that approximately 30 million workers are subject to a non-compete agreement. Non-Compete Clause Rule, 89 Fed. Reg. at 38343. The Commission preliminarily found that the proposed rule would affect workers' earnings by $250-$296 billion *annually* and impose one-time direct compliance and contract updating costs of $1.02 to $1.77 billion. *Id.* at 38467. The Commission continues to expect the final rule to shift billions of dollars in the U.S. economy. *See id.* at 38470. The Commission claims that non-compete agreements "burden[] a not insubstantial portion of commerce." *Id.* at 38372, n.383. This acknowledgment indicates that the Rule has significant economic implications and regulates a substantial part of the economy. The Rule's economic impact exceeds that struck down in *Alabama Ass'n of Realtors* and falls comfortably within the Court's major questions precedence.

3 The Rule intrudes on an area of state law by preventing the formation of employment contracts.

Employment regulations are traditionally governed by state law and lie within the States' police powers. *E.g., Bedoya v. Am. Eagle Express Inc.*, 914 F.3d 812, 818 (3d Cir. 2019); *McDaniel v. Wells Fargo Invs., LLC*, 717 F.3d 668, 675 (9th Cir. 2013); *Chae v. SLM Corp.*, 593 F.3d 936, 944 (9th Cir. 2010) ("Contract and consumer protection laws have traditionally been in state law enforcement hands"). The Commission acknowledges that state policies regarding non-compete agreements vary significantly—with 47 states permitting some form of non-compete

agreements. Non-Compete Clause Rule Notice of Proposed Rulemaking, 88 Fed. Reg. 3482, 3494–495 (proposed on Jan. 19, 2023) (to be codified at 16 C.F.R. § 910). *See also* Brian M. Malsberg, *Covenants Not to Compete: A State-by-State Survey* (2013); Ferdinand S. Tinio, *Sufficiency of consideration for employee's covenant not to compete, entered into after inception of employment*, 51 A.L.R.3d 825 (originally published in 1973). Furthermore, courts, both state and federal, have interpreted these laws in various ways—resulting in a broad spectrum of regulatory schemes. *Compare, e.g., Olander v. Compass Bank*, 363 F.3d 560, 564 (5th Cir. 2004) (reviewing Texas's non-compete law) *with, e.g., Arthur J. Gallagher & Co. v. Babcock*, 703 F.3d 284, 288 (5th Cir. 2012) (reviewing Louisiana's non-compete law); *see also Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 774 (Tex. 2011) (overruling prior precedent because its "condition on the enforceability of noncompetes was more restrictive than the common law rule the Legislature intended to resurrect"). By attempting to override state law and mandate the rescission of contracts entered into under state law, the Rule infringes upon the States' right to regulate employment conditions within their own borders.

In all preemption cases—especially those involving legislation in fields traditionally regulated by the states—the courts "'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest* purpose of Congress.'" *Wyeth v. Levine*, 555

U.S. 555, 565 (2009) (emphasis added) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). The Commission has not identified any "clear and manifest" congressional purpose to supersede the states' traditional regulation of non-compete agreements. "If Congress thought state [laws regarding non-compete agreements] posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision" on this subject. *Id.* at 574. Because the Commission did not demonstrate a clear and manifest congressional purpose, the Rule must be set aside.

* * *

The Commission's Rule attempts to resolve a matter of great political significance, regulate a significant portion of the economy, and invade a traditional area of state law without authority from Congress. The Rule, therefore, exceeds the Commission's authority under the major questions doctrine.

II. The Rule is arbitrary and capricious because it relies on new public policy considerations and ignores well-established policies in 47 states.

Under the Administrative Procedures Act, agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" must be declared unlawful and set aside. 5 U.S.C. § 706(2)(A). As part of the required cost-benefit analysis for "determining whether an act or practice is unfair, the Commission may consider *established* public policies as evidence to be considered *with all other evidence*." 15 U.S.C. § 45(n) (emphasis added). The statute, however, only mentions established public policies. *See LabMD, Inc. v. FTC*, 894 F.3d 1221,

1229 (11th Cir. 2018) (noting that before the addition of (n), "the FTC specified that the policies relied upon 'should be clear and well-established'—that is . . . an act or practice's 'unfairness' must be grounded in statute, judicial decisions—i.e., the common law—or the Constitution"). Even well-established and proven "public policy considerations may not serve as a *primary* basis for such determination." 15 U.S.C. § 45(n) (emphasis added). Indeed, "[n]ormally, an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency . . . ." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). The Commission "*must* examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'" *Id.* (emphasis added) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Commission has not adhered to these fundamental principles.

The Rule ignores the established public policies implemented by 47 states. Some of these policies have been formalized in state statutes, while others have developed from state common law. *See generally* Malsberg, *supra*; Tinio, *supra*. These policies balance the rights of both employers and employees while also protecting confidential information, proprietary training, and employers' trade

secrets. Non-compete agreements can even lead to higher wages or severance payments for those who sign them. *See* Tinio, *supra* (noting that "some courts require a grant of benefits to the employee, in addition to the mere continuance of employment" for a non-compete agreement to be a valid contract supported by consideration). Therefore, disregarding these established public policies and primarily relying on the Commission's new policy is arbitrary and capricious.

A. The Commission must consider and balance many public policies before regulating non-compete agreements.

Forty-seven states permit non-compete agreements to varying degrees, while only three states outright prohibit such agreements—and for different reasons. State and federal courts have reviewed the state-specific laws governing various types of non-compete agreements. Entire treatises have been written on non-compete agreements and their complexities. *See, e.g,* Malsberg, *supra*. Tens of thousands of reported cases have explored the diverse range of non-compete terms tailored to fit specific situations, comply with specific state laws, and bind specific employees. Courts and state legislatures have rejected a one-size-fits-all approach. Courts have analyzed the types of compensation to employees for entering these agreements, *see* Tinio, *supra*, and they have distinguished between non-compete agreements signed at the start of employment and those that are ancillary to employment, *see Validity and enforceability of negative restrictive covenant in contract for services as affected by fact that it was not included in original contract of employment but in a*

subsequent contract for continuance of employment, 152 A.L.R. 415 (originally published in 1944). Additionally, some states have imposed limits on the geographic scope of non-compete agreements, particularly in relation to an employee's proprietary or confidential information. *See, e.g., Lake Land Emp. Grp. of Akron, LLC v. Columber*, 804 N.E.2d 27, 30 (Ohio 2004). Each state has reached different conclusions as to the proper level of regulation of non-compete agreements. That is the beauty and mandate of federalism. As Justice Brandeis so eloquently explained:

> Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The Commission overrules all of that with its "Washington knows best" arrogance. Assuming it is proper for an agency to simply override every state's system with a universal rule, it must evaluate each and every state's system, the finding behind the respective state statute, and explain why each state's court got it wrong. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 52 ("The agency must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made.' Generally, one aspect of that explanation would be a justification for [overruling] the [states'] regulation[s] before engaging in a search for further evidence."). The Commission did not do that. Thus,

the Commission failed in its duty and failed to elevate its analysis beyond the arbitrary and capricious standard, and the Rule is invalid.

The Rule is based on the Commission's new public policy preference, which disregards the established policy considerations and reasonableness factors regarding non-compete agreements that state legislatures and courts have developed and carefully examined over the years. *See, e.g., Lake Land Emp. Grp. of Akron, LLC*, 804 N.E.2d at 30 ("Such an agreement does not violate public policy, 'being reasonably necessary for the protection of the employer's business, and not unreasonably restrictive upon the rights of the employee.'" (citation omitted)). The Commission has replaced these well-considered state policies with its own public policy preference. As a result, the Rule is arbitrary and capricious and must be set aside.

CONCLUSION

Commissioner Christine Wilson cautioned that there would be "numerous and meritorious legal challenges . . . launched against the Rule," which would result in the Commission "essentially . . . directing staff to embark on a demanding and futile effort" to defend it. *Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule*, *supra*, at 10. Commissioner Wilson and the district court were correct: The

Commission has not justified—and cannot justify—the Rule. This Court should affirm the district court's decision setting aside the Rule.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing amicus brief was served on all counsel of record via the Court's electronic filing system this 10th day of February 2025.

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