No. 24-13102

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

PROPERTIES OF THE VILLAGES, INC.

Plaintiff-Appellee,

v.

FEDERAL TRADE COMMISSION

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida
No. 5:24-cv-00316 (Corrigan, J.)

Brief of *Amicus Curiae* Open Markets Institute in Support of Defendant-Appellant

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1-1, the following parties, not identified in the earlier-filed briefs, have an interest in the outcome of this appeal (as defined under the rule):

• Open Markets Institute – *Amicus Curiae*

• Tara Pincock – counsel for *Amicus Curiae*

• Sandeep Vaheesan – counsel for *Amicus Curiae*

• Kyle Wallace – counsel for *Amicus Curiae*

Pursuant to Fed. R. App. P. 26.1, the Open Markets Institute states that it is a non-profit corporation and, as such, no entity has any ownership interest in it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Legislative Materials

Federal Trade Commission Materials

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

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SUMMARY OF ARGUMENT

Congress gave the Federal Trade Commission ("FTC" or "Commission") extensive authority to identify and prohibit conduct that it deems unfair methods of competition. This authority extends to non-compete clauses because these contracts fall firmly in the FTC's wheelhouse. Indeed, they are the type of contracts that the Commission has regulated since it was created in 1914.

As jurists and scholars have recognized, non-compete clauses are the *original* restraint of trade. Judge Learned Hand acknowledged this fact when he

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[1] All parties consent to the filing of this *amicus* brief. No counsel for a party has authorized this brief in whole or in part, and no party, party's counsel, or any other person, other than *amicus curiae* or its counsel, has contributed money that was intended to fund preparing or filing this brief.

stated that the federal antitrust laws "certainly forbid all restraints of trade which were unlawful at common-law, and one of the oldest and best established of these is a contract which unreasonably forbids any one to practice his calling." *Gardella v. Chandler*, 172 F.2d 402, 408 (2d Cir. 1949) (Hand, J.).

Congressional supporters of the FTC Act wanted to stop unfair competitive practices before firms could obtain and maintain monopolistic market positions. As is clear from the Congressional record, they intended the FTC's authority to be "broad and flexible" in order to stop unfair competitive practices before they grew into a bigger problem. *See E. I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 136 (2d Cir. 1984).

The drafters of the FTC Act consciously used a phrase—unfair methods of competition—that was broad and elastic. They wanted to use a term that was sufficiently broad because they knew it would be impossible to catalog all unfair competitive practices. The term "unfair methods of competition" was not found in the Sherman Act, nor in the Clayton Act, which Congress was debating in parallel to the FTC Act in 1914. They chose this term because it was not tied to an existing body of law. Moreover, they intended the Act to "cover[] every practice and method between competitors upon the part of one against the other that is against public morals." 51 Cong. Rec. 11,112 (1914) (Sen. Newlands).

The courts have repeatedly stressed the breadth of the FTC Act's prohibition on unfair methods of competition. Practices that are permissible under the Sherman and Clayton Acts may still violate the Act. Because of the Act's broad latitude, courts have recognized that the Commission can block restraints of trade in their incipiency "without proof that they amount to an outright violation of . . . the Clayton Act or other provisions of the antitrust laws." *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966); *see also FTC v. Texaco, Inc.*, 393 U.S. 223, 225 (1968) ("Congress enacted s 5 of the Federal Trade Commission Act to combat in their incipiency trade practices that exhibit a strong potential for stifling competition.").

In exercising its unfair methods of competition authority, the FTC has a long history of taking legal action against restraints between buyers and sellers, including restraints between manufacturers and distributors and those between employers and employees. These contracts are referred to as vertical restraints in antitrust law parlance because they are "made up and down the supply chain." *Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 3d 786, 793 (S.D. Ill. 2018).

The FTC has a record of challenging both price and non-price vertical restraints. In 2015, for example, this Court affirmed an FTC decision concerning a monopolistic manufacturer's use of vertical restraints with its distributors. *McWane, Inc. v. FTC*, 783 F.3d 814 (11th Cir. 2015). As such, non-compete clauses are one type of non-price vertical restraints between workers and employers that fits squarely within the FTC's century-long litigation and policymaking program.

The non-compete rule represents the latest FTC action against vertical restraints and is firmly in this agency's wheelhouse. It is consistent with the Commission's 110 years of rulemaking, adjudication, and enforcement using its unfair methods of competition authority. The FTC's decision to make policy through rulemaking is a reasonable exercise of discretion and which is advantageous for businesses and the public. Moreover, it enacted a rule that was applicable to all firms in its jurisdiction and obtained extensive public input when it was developing its final rule.

ARGUMENT

I. The FTC Has Expansive and Flexible Authority to Prohibit Unfair Methods of Competition

Congress gave the FTC expansive authority to identify and outlaw conduct that the Commission deems unfair methods of competition. The FTC was created in response to congressional and popular frustration with the Sherman Act—the narrow judicial interpretations of this law specifically. Congressional supporters of the FTC Act wanted to stop unfair competitive practices before firms successfully employed them to obtain monopolistic market positions.

Members of Congress recognized that attempting to catalog all unfair competitive practices in a bill was an exercise in futility. They were aware of many of the commonly used unfair competitive practices, such as boycotts, exclusive dealing, espionage, and tying. 51 Cong. Rec. 11,228 (1914) (remarks of Sen. Robinson). Yet, corporations and their sophisticated counsel would always develop new strategies and tactics to obtain an unfair competitive edge. One senator likened it to burglars who are constantly identifying new methods of breaking locks. 51 Cong. Rec. 12,792 (1914) (remarks of Sen. Brandegee). A representative of the Illinois Manufacturers' Association remarked that "there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others." S. Rep. No. 597, at 13 (1914).

By design, the drafters used a phrase—unfair methods of competition—that was broad and elastic. This open-ended character is a feature of the law, not a bug. This term was not found in the Sherman Act, nor in the Clayton Act that Congress was debating and developing in parallel with the FTC Act. They chose "unfair methods of competition" because it was capacious, flexible, and not tied to an existing body of court decisions. Senator Newlands, the chief sponsor of the law in the Senate, declared that the law would "cover[] every practice and method between competitors upon the part of one against the other that is against public morals." 51 Cong. Rec. 11,112 (1914). Senator Hollis, who played a major role in the legislative development of the FTC Act, touted its flexibility as a virtue. 51 Cong. Rec. 11,179 (1914).

Further, Congress delegated interpretation of the phrase to the new FTC. *See Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2263 (2024) ("[S]ome statutes expressly delegate to an agency the authority to give meaning to a particular statutory term.") (internal quotations omitted). Rather than entrusting the courts with primary interpretive authority, Congress set up a specialized administrative body for the task. A leading proponent of the FTC Act in the House of Representatives stated that interpretation and application of unfair methods of competition was "best accomplished through the action of an administrative body of practical men thoroughly informed in business who will be able to apply the rule enacted by Congress to particular business situations." 51 Cong. Rec. 14,927 (1914) (remarks of Rep. Covington). As the Supreme Court wrote, "Congress intentionally left development of the term 'unfair' to the Commission." *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 367 (1965).

Many congressional supporters of the FTC Act wanted to stop monopolies before they emerged and became entrenched. Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. Rev. 227, 242-43 (1980). The history of litigation under the Sherman Act at the time showed that once monopolies were established, they were exceedingly difficult to dislodge through lawsuits.

Prevention was a major theme in the legislative debates. Senator Reed expressed his aim to "strike those [unfair] acts in their incipiency instead of after they have been actually worked out into a complete system of monopoly or restraint of trade." 51 Cong. Rec. 13,118 (1914). Similarly, Senator Cummins believed the law would "prevent the beginning of the attempt to monopolize, the beginning of the insidious efforts toward the restraint of trade and commerce." 51 Cong. Rec. 11,455 (1914). Senator Newlands, likewise, declared that his goal was to "check monopoly in the embryo." 51 Cong. Rec. 12,030 (1914).

Accordingly, Congress outlawed unfair methods of competition in general. Unlike Section 2 of the Sherman Act, Congress did not limit the application of the prohibition on unfair methods of competition only to monopolists and near-monopolists. 15 U.S.C. § 2; *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993).

The courts have repeatedly stressed the breadth of the FTC Act's prohibition on unfair methods of competition. The FTC can arrest trade restraints in their incipiency "without proof that they amount to an outright violation of . . . the Clayton Act or other provisions of the antitrust laws." *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966). Two years later after *Brown Shoe*, the Court affirmed this theme and stated, "Congress enacted s 5 of the Federal Trade Commission Act to combat in their incipiency trade practices that exhibit a strong potential for stifling competition." *FTC v. Texaco, Inc.*, 393 U.S. 223, 225 (1968). Congress intended the FTC's authority to be "broad and flexible" in order to enjoin unfair competitive practices well before they created monopolies. *E. I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 136 (2d Cir. 1984). *See also Shell Oil Co. v. FTC*, 360 F.2d 470, 479 (5th Cir. 1966) ("Section 5 is intended to halt practices in their incipiency that may show promise of developing into violations of the Sherman and Clayton Acts and to defeat practices not specifically proscribed by those laws but contrary to the principles animating the Sherman and Clayton Acts.").

The FTC is critically not confined by the letter or spirit of the antitrust laws. In a landmark 1972 decision on the FTC's authority, the Supreme Court stated the FTC, in interpreting its unfair methods of competition power, can "consider[] public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws." *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972). As such, the FTC can consider broader public policy when identifying and challenging unfair methods of competition. *Id.* at n.5. A unanimous Court affirmed this broad interpretation of the FTC's unfair methods of competition power, stating it "encompass[es] not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons." *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986). In recognition of this broad authority, the Second Circuit wrote that the

Commission may prohibit as unfair methods of competition practices that are "a violation of the antitrust laws *or* collusive, coercive, predatory, restrictive or deceitful." *Du Pont*, 729 F.2d at 137 (emphasis added).

II. The FTC Has Long Challenged Vertical Restraints as Unfair Methods of Competition

In employing its unfair methods of competition authority, the FTC has a long history of taking legal action against restraints between buyers and sellers, including between manufacturers and distributors and employers and employees. In the language of antitrust law, these contracts are vertical restraints because they are "made up and down the supply chain." *Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 3d 786, 793 (S.D. Ill. 2018). The FTC has challenged price and non-price vertical restraints. Non-compete clauses are one type of non-price vertical restraints between workers and employers. Thus, they fit squarely within the FTC's century-long litigation and policymaking program.[2]

Since its inception, the FTC has brought dozens of actions against vertical restraints that set prices. Vertical price restraints prevent a party, such as a retailer,

[2] Viewing each vertical restraint in isolation risks making many FTC actions appear novel and unprecedented and improperly narrowing the broad and elastic authority that Congress gave the FTC through the major questions doctrine. Recognizing that non-competes are part of a broader class of contracts that the FTC has long regulated avoids this risk. Notably, the Supreme Court has treated vertical restraints as a single class of contracts and subjected them all to the same general legal standard under the Sherman Act. *Ohio v. Am. Express Co.*, 585 U.S. 529, 541 (2018).

from freely setting resale prices on goods it carries. On several occasions, the FTC challenged minimum resale price restraints as unfair methods of competition. *E.g.*, *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *Lenox, Inc. v. FTC*, 417 F.2d 126 (2d Cir. 1969).

The FTC has also attacked assorted non-price vertical restraints. Non-price vertical restraints limit a firm's ability to select the goods it carries and where it does business. It challenged exclusive dealing and tying. Many of these actions led to appellate decisions affirming FTC opinions. *E.g.*, *Brown Shoe*, 384 U.S. 316; *Mytinger & Casselberry, Inc.*, 301 F.2d 534 (D.C. Cir. 1962).

In a trilogy of cases in the 1960s, the FTC challenged tying-like practices in the oil and gas industry. The FTC sued major oil companies for pressuring independent gas stations that bought and resold their fuel into carrying the tires, batteries, and accessories of favored partners. Two of these cases went up to the Supreme Court, and all three actions resulted in victories for the FTC. *Atlantic Refining,* 381 U.S. 357; *Texaco*, 393 U.S. 223; *Shell Oil Co.*, 360 F.2d 470.

Rather than represent an artifact of old practice, FTC enforcement actions against firms using vertical restraints have continued in the 21st century. Over the past 20 years, the FTC has consistently targeted exclusive dealing by monopolistic businesses. It has taken legal action against businesses for using exclusive deals with trading partners as a method of unfairly maintaining their monopolies. *E.g.*, *FTC v. Surescripts, LLC*, 665 F. Supp. 3d 14 (D.D.C. 2023); *FTC v. Shkreli*, 581 F. Supp. 3d 579 (S.D.N.Y. 2022); *In re IDEXX Labs.*, 155 F.T.C. 241 (2013). Notably, this Court upheld one of the FTC's exclusive dealing decisions in 2015. *McWane, Inc. v. FTC*, 783 F.3d 814 (11th Cir. 2015).

FTC actions against the unfair use of vertical restraints have continued in this decade. In 2022, the FTC filed an action against two major pesticide makers for their exclusive dealing with distributors. *FTC v. Syngenta Crop Prot. AG*, 711 F. Supp. 3d 545 (M.D. N.C. 2024). The complaint survived a motion to dismiss filed by the two corporations. *Id.* The FTC's landmark suit against Amazon challenges the online giant's use of vertical restraints with its market sellers. It recently overcame a motion to dismiss in that case. *FTC v. Amazon.com, Inc.*, No. 2:23-CV-01495-JHC, 2024 WL 4448815 (W.D. Wash. Sept. 30, 2024).

Non-compete clauses are the *original* vertical restraint and restraint of trade. At common law, restraint of trade "nearly always referred to limiting or prohibiting someone from engaging in a particular trade or business." Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-examination of the Consumer-Welfare Hypothesis*, 54 J. Econ. Hist. 359, 369 (1993). Judge Learned Hand recognized this history in a 1949 opinion. The venerable jurist wrote that the federal antitrust laws "certainly forbid all restraints of trade which were unlawful at common-law, and one of the oldest and best established of these is a contract which unreasonably forbids any one to practice his calling." *Gardella v. Chandler*, 172 F.2d 402, 408 (2d Cir. 1949) (Hand, J.).

Building on its history of vertical restraints enforcement and competition policy, the FTC has brought enforcement actions against employers for using non-competes. In the past few years, the FTC has entered settlements with employers that used and enforced non-compete clauses with their workers. Under the settlements, the employers agreed to stop using and enforcing these contracts against workers. *E.g.*, *In re Anchor Glass Container Corp.*, 2023 WL 3856535 (F.T.C.); *In re Ardagh Group S.A.*, 2023 WL 2263324 (F.T.C.); *In re Prudential Sec., Inc.*, 2023 WL 2526760 (F.T.C.).

III. The Non-Compete Clause Rule Represents the Latest FTC Action Against Vertical Restraints

The non-compete clause rule represents the latest FTC action against vertical restraints. It is consistent with the FTC's 110 years of rulemaking, adjudication, and enforcement under its unfair methods of competition authority. Further, the FTC's decision to make policy through rulemaking is a reasonable exercise of discretion and, indeed, is advantageous for both businesses and the public.

The FTC compiled abundant evidence in support of the rule. The Commission exhaustively reviewed the empirical research on non-compete clauses and found adverse effects on labor market mobility, wages, wage growth, small business formation, and technological innovation. It also evaluated the availability of less restrictive alternatives to protect business information and retain workers, such as trade secret law, non-solicitation agreements, and offering higher pay and promotions for workers. Based on the documented harms and availability of more targeted alternatives, it reasonably concluded that a complete prohibition on non-compete clauses is justified.

The FTC's decision to make policy through rulemaking instead of adjudication is an entirely legitimate choice. As Judge Corrigan concluded, the text of Section 6(g) of the FTC Act clearly and unambiguously grants the FTC the power to write substantive regulations. Dkt. No. 59, at 11-15. Text is supreme in statutory construction and trumps external materials. In 2020, Justice Gorsuch, writing for a Supreme Court majority, offered this directive on statutory construction: "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Bostock v. Clayton Cnty, Ga.*, 590 U.S. 644, 653 (2020). In accordance with the decisions of the D.C. and Seventh Circuits, Judge Corrigan recognized that text of a law is supreme in statutory construction and ruled that the FTC can write substantive competition rules under 6(g). *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 686 (D.C. Cir. 1973); *United States v. JS & A Group, Inc.*, 716 F.2d 451, 454 (7th Cir. 1983).

While used infrequently in recent times, the FTC historically employed rulemaking as an important method of policymaking. In the 1960s, the FTC wrote dozens of competition and consumer protection rules restricting a wide range of practices, including the advertising of cigarettes. *E.g.*, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324 (July 2, 1964), repealed by 30 Fed. Reg. 9484 (July 29, 1965); Advertising and Labeling as to Size of Sleeping Bags, 28 Fed. Reg. 10900 (Oct. 11, 1963), repealed by 60 Fed. Reg. 65528 (Dec. 20, 1995). An agency does not forfeit its statutory authority merely because it has chosen not to exercise its powers for a long time. *United States v. Morton Salt Co.*, 338 U.S. 632, 647-648 (1950). The FTC's powers "are not lost by being allowed to lie dormant, any more than nonexistent powers can be prescripted by an unchallenged exercise." *Id.* at 647.

Federal agencies have broad latitude to decide whether to make policy through adjudication or rulemaking. The Supreme Court ruled that federal agencies have the discretion to make policy through either rulemaking or adjudication. *SEC v. Chenery Corp.*, 332 U.S. 194, 201-02 (1947). In general, that decision is not one for courts to second guess after the fact.

In addition to being entirely permissible under administrative law, the FTC's decision to proceed through rulemaking has critical procedural and substantive advantages over policymaking through adjudication. First, the agency had the opportunity to review the entire body of quantitative and qualitative evidence on non-compete clauses. Second, the agency, as required by the Administrative Procedure Act, solicited public comment and used this collective wisdom—more than 26,000 comments—to refine its final rule. Third, a rule applies to all firms subject to the Commission's jurisdiction. Adjudication, by contrast, would result in consent orders applicable only to businesses sued by the Commission and not bind all other businesses, including those similarly situated to parties found liable by the FTC. A rule creates a level competitive playing field, whereas adjudication does not.

CONCLUSION

For the reasons stated above, the order granting the preliminary injunction should be reversed.

Dated: November 12, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing to be served to counsel of record for all parties via ECF.

Dated: November 12, 2024

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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