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
CASE NO. 5:24-CV-00316-TJC-PRL

BRIEF OF ATS TREE SERVICES, LLC AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE URGING AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* ATS Tree Services, LLC ("ATS") certifies that it is not a publicly traded corporate entity, it has no parent corporation, and that there is no publicly held corporation that owns 10% or more of its stock. Pursuant to Eleventh Circuit Rule 26.1-1, Amicus Curiae ATS certifies that to the best of its knowledge:

ATS Tree Services, LLC;

Pacific Legal Foundation;

Sean Radomski;

Joshua M. Robbins;

Adam Servin;

David Servin; and

Luke Wake

have an interest in the outcome of this case. Otherwise, to the best of its knowledge, the certificates of interested persons filed by Appellant and Appellee, Doc. 10; Doc. 16, and contained in the Appellant's and Appellee's briefs are complete, Doc. 20 at C-1; Doc. 76 at C-1.

s/ Joshua M. Robbins
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STATEMENT OF IDENTIFICATION

ATS Tree Services, LLC files this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and all parties to the appeal have consented to the filing of this brief.[1] ATS is a professional tree service business in Perkasie, Pennsylvania. As a small business, ATS operates on the basis of a mutual commitment between itself and its employees. ATS heavily invests in the training and professional development of its employees to ensure they have the skills necessary to engage in dangerous tree care work. In exchange, ATS requires its employees to sign reasonable non-compete agreements to protect ATS's significant investment. This agreement gives ATS at least a year before the benefit of ATS's training can be used to the advantage of a nearby direct competitor while still allowing former ATS employees to pursue other opportunities. Without this agreement, it would not be feasible for ATS to invest in employee training in the same way because of the significant likelihood its well-trained employees would be poached by competitors. A ban on non-compete agreements would seriously harm both ATS and its employees—ATS would lose its stable, well-trained workforce that safely and proficiently performs tree care work, and the employees would lose the

[1] ATS affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than ATS, its members, or its counsel made a monetary contribution to its preparation or submission.

benefit of the training and other professional development opportunities that they could otherwise use throughout their careers.

To protect this operational model, ATS filed its own legal challenge to the Federal Trade Commission's Non-Compete Clause Rule, 89 Fed. Reg. 38,342 (May 7, 2024) (the "Final Rule"). *ATS Tree Services, LLC v. FTC*, No. 2:24-cv-01743 (E.D. Pa.). Since the U.S. District Court for the Northern District of Texas set aside the Final Rule nationwide, *Ryan, LLC v. FTC*, --- F.Supp.3d ----, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024), there is no relief for the court to award ATS while the *Ryan* judgment is effective. As a result, ATS voluntarily dismissed its case. Notice, *ATS*, No. 2:24-cv-01743 (Oct. 4, 2024).

ATS files this amicus brief to continue to press its arguments in opposition to the Final Rule's near-total ban on non-compete agreements. In particular, ATS provides insight into the fair use of non-compete agreements by small businesses, a category of business that relies on non-compete agreements for their successful operation.

STATEMENT OF THE ISSUE

Whether the U.S. District Court for the Middle District of Florida correctly issued a preliminary injunction of the Final Rule for the Plaintiff-Appellee.

SUMMARY OF ARGUMENT

This Court should affirm the district court's preliminary injunction of the Final Rule because the Commission has neither statutory nor constitutional authority to promulgate it. The Commission claims the authority to issue sweeping legislative rules governing what it deems to be unfair methods of competition. But the Federal Trade Commission Act ("FTC Act") limits the Commission's authority to adjudicating the unfairness of particularized methods of competition. Even if the Commission had the statutory authority to issue such rules, the rules must be limited to conduct that is unfair, which the Final Rule does not do. Moreover, as the Supreme Court already determined in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 532–34 (1935), rulemaking based on a statutory standard of fairness is an unconstitutional delegation of legislative authority. For these reasons, among others, the Commission does not have the authority to issue the Final Rule.

First, Congress has only granted the Commission statutory authority to *adjudicate* unfair methods of competition, not to make legislative rules. The FTC Act requires that if the Commission identifies a potential unfair method of competition, it "shall" proceed through an adjudication. 15 U.S.C. § 45(b). It separately authorizes the Commission to make procedural rules for these adjudications and other interpretive rules or general statements of policy. 15 U.S.C. § 46(g). The Commission operated without making substantive competition rules for

nearly all of its 110 years in existence. Congress confirmed this understanding in 1975 when it authorized substantive rulemaking for a separate category of conduct.

Second, the FTC Act limits the Commission to declaring only *unfair* methods of competition to be unlawful. With the Final Rule, the Commission banned many fair and reasonable non-compete agreements used by small businesses to protect their investments in their employees. For example, ATS uses non-compete agreements to make it feasible to provide extensive employee training in the dangerous work of tree care and removal. Without these reasonable agreements, ATS would simply become a free training program for its direct competitors, something ATS cannot afford to be. Indeed, the Commission acknowledged in the Final Rule that non-compete agreements promote employee training.

Third, a statute that permits the Commission to create legislative rules for competition with no more direction than the word "unfair" is an unconstitutional delegation of legislative authority. In *Schechter Poultry* the Supreme Court already invalidated a statute that authorized the President to adopt codes of fair competition. In doing so, the Court distinguished as permissible the Commission's authorization to proceed against unfair methods of competition because it did so through adjudications. For the Commission to now claim that it can also issue legislative rules for unfair methods of competition puts itself squarely within the holding of *Schechter Poultry*.

ARGUMENT

I. THE COMMISSION LACKS THE AUTHORITY TO MAKE SUBSTANTIVE RULES FOR UNFAIR METHODS OF COMPETITION

The Commission claims substantive rulemaking authority through section 46(g) of the FTC Act to ban any method of competition whenever any three Commissioners should conclude such practice is "unfair." 89 Fed. Reg. at 38,502. But the FTC Act does not permit the Commission to make substantive, legally binding rules for "[u]nfair methods of competition" ("UMC"). *See* 15 U.S.C. §§ 45 and 46(g). The Commission was created to address UMCs through adjudications. *Id.* § 45(b); *Schechter Poultry*, 295 U.S. at 532–34. Congress also granted it, among other ancillary powers, limited authority to create procedural rules for these adjudications. 15 U.S.C. § 46(g). The Commission cannot rely on this procedural rulemaking authority to make substantive rules. *See NFIB v. OSHA*, 595 U.S. 109, 117 (2022).

A. The Text of the FTC Act Does Not Authorize Substantive Rulemaking for Unfair Methods of Competition

Section 46(g) cannot be interpreted to authorize substantive competition rulemaking. *Ryan*, 2024 WL 3879954, at *8–12. The Commission asserts that section 46(g) empowers it to "'carry[] out'" section 45's directive to "'prevent'" UMCs through rulemaking. Doc. 20 at 21–22. But the correct interpretation of section 46(g) must take account of section 45's mandate for the Commission to

"prevent" UMCs through adjudications. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). It is a "'fundamental canon of statutory construction'" that the relevant statutory text "'must be read ... with a view to [its] place in the overall statutory scheme.'" *Id.* Section 45(b) is explicit that if the Commission identifies a UMC, it "*shall* issue and serve … a complaint stating its charges" and "a notice of a hearing." 15 U.S.C. § 45(b) (emphasis added). The use of "'shall'" "normally creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). It demonstrates that Congress intended for adjudications to be the exclusive means for the Commission to proceed against unfair methods of competition. *See id.*; 15 U.S.C. § 45(b). That is the only way to "interpret the statute 'as a symmetrical and coherent regulatory scheme.'" *Brown & Williamson*, 529 U.S. at 133.

Section 46(g) also contains language that limits its rulemaking authority to procedural rules. Section 46(g) rules can only be issued for "carrying out the provisions" of the FTC Act. "[C]arrying out" presupposes there is a separate operative provision of the statute the rules implement—here, the power to prevent UMCs through adjudications. *See Nebraska v. Su*, 121 F.4th 1, 8 (9th Cir. 2024). And the Supreme Court has consistently recognized that the Commission's adjudicative function is an essential component of its implementation of Congress's declaration of UMCs to be unlawful. *See, e.g.*, *Schechter Poultry*, 295 U.S. at 532–

34; *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972). Thus, Section 46 is best read as "enumerat[ing] additional powers that generally aid in the administration of that adjudication-focused scheme." *Ryan*, 2024 WL 3879954, at *9.

Additionally, the Commission lacks an enforcement mechanism for section 46(g) rules, including statutory penalties for violations. *See* 15 U.S.C. §§ 45 and 46. This is a key indicator that a statute does not grant substantive rulemaking authority. *Ryan*, 2024 WL 3878854, at *10; *see also Am. Trucking Ass'ns v. United States*, 344 U.S. 298, 311 (1953). Historically, Congress withheld enforcement authority when it was only granting *procedural* rulemaking authority. *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 504–09 (2002). The Supreme Court has also linked substantive rulemaking with the presence of enforcement authority. *Am. Trucking*, 344 U.S. at 311. When section 46(g) was originally enacted in 1914, the Commission could not even issue final orders. Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717, 720 (1914); Thomas W. Merrill, *Antitrust Rulemaking: The FTC's Delegation Deficit*, 75 Admin. L. Rev. 277, 297 (2023). The Commission has gained enforcement authority over time for section 45 orders and violations of substantive rules banning unfair or deceptive acts or practices ("UDAP"), but *not* for section 46(g) rules. *See* 15 U.S.C. § 45(*l*) and (m).

Finally, the FTC Act's command for the Commission to "prevent" UMCs in section 45's adjudication authorization does not change the analysis. 15 U.S.C. § 45(a)(2). Among the definitions of "prevent" is "[t]o stop or intercept the approach, access, or performance of a thing." *Prevent*, Black's Law Dictionary 1352 (4th ed. 1968). The Commission's adjudications do just that for UMCs. 15 U.S.C. § 45(b). The only remedy in an adjudication is a cease-and-desist order, which is necessarily prospective. *Id.* These orders "prevent" a UMC from continuing. *Id.* § 45(a)(2). The Commission's cease-and-desist orders fulfill its mandate to "prevent" UMCs. 15 U.S.C. § 45(b).

B. The Historical Practice of the Commission and Congress Confirms the Lack of Substantive Rulemaking Authority

For the first nearly 50 years of the Commission's existence, neither Congress nor the Commission understood the Commission to have substantive rulemaking authority. *See* Merrill & Watts, *supra* at 549–52. The Commission did not issue its first substantive rule until 1963. *Id.* at 551–52; 89 Fed. Reg. at 38,349. But during that period the Commission demonstrated an interest in rulemaking by issuing non-binding and interpretive rules. Merrill & Watts, *supra* at 551–52. The issuance of non-binding, but *not* substantive, rules in this period reflects the Commission's understanding that it did not possess substantive rulemaking authority. This "want of assertion of power by those who presumably would be alert to exercise it" is "significant in determining whether such power was actually conferred." *FTC v.*

Bunte Bros. Inc., 312 U.S. 349, 352 (1941). Indeed, the Commission said outright in its 1922 Annual Report that "[o]ne 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 36 (1922).

Congress confirmed the Commission's lack of general rulemaking authority by granting the Commission discrete rulemaking authority. During this same roughly 50-year period, Congress authorized the Commission to make substantive rules for particular issues, including wood and fur products labeling and flammable fabrics. Merrill, *supra* at 301. These rulemaking authorizations were not directions for the Commission to exercise rulemaking authority under section 46(g) but were stand-alone authorizations to make substantive rules in furtherance of their respective statutes. Wood Products Labeling Act of 1939, ch. 871, § 6, 54 Stat. 1128, 1131; Fur Products Labeling Act, ch. 298, § 8, 65 Stat. 175, 179–80 (1951); Flammable Fabrics Act, Pub. L. No. 83-88, 67 Stat. 111, 112–13 (1953). Interpreting section 46(g) to authorize substantive rulemaking authority would impermissibly render these statutes superfluous. *See Corley v. United States*, 556 U.S. 303, 314 (2009).

The Commission's brief period of unauthorized substantive rulemaking from 1963 to 1978 does not alter this analysis. 89 Fed. Reg. at 38,349–50. These rulemakings had no congressional authorization. Merrill & Watts, *supra* at 551–52. The subject of these rulemakings was generally advertising and labeling, 89 Fed.

Reg. at 38,349–50, subjects that today are covered by UDAP rulemakings, *see* Merrill, *supra* at 305; 15 U.S.C. § 57a. Additionally, Congress affirmatively intervened to overrule one of these rules, implicitly rejecting the Commission's exercise of substantive rulemaking authority. Merrill, *supra* at 302; Merrill & Watts, *supra* at 553–54. Finally, the Commission did not issue any further substantive UMC rules through section 46(g) from 1978 until the Final Rule, another nearly 50-year span. *See* 89 Fed. Reg. at 38,349–50.

C. The Supreme Court Interpreted the FTC Act as Limited to Adjudication

In addition to the (historic) Commission and Congress, the Supreme Court does not consider section 46(g) to authorize substantive rulemaking. *Schechter Poultry*, 295 U.S. at 532–33. In *Schechter Poultry*, the Court held that the National Industrial Recovery Act's ("NIRA") authorization for the President to adopt codes of "fair competition" was an unconstitutional delegation of legislative authority. *Id.* at 531, 541–42. The Court distinguished the Commission from the NIRA because the meaning of the phrase "unfair methods of competition" was "left to judicial determination [by the Commission] as controversies arise," *not* rulemaking. *Id.* at 532. The Commission's structure as an exclusively adjudicatory agency was essential to the Court's reasoning in *Schechter Poultry*. *Id.* at 533–34. Indeed, the Court emphasized that the "procedure," in addition to the "subject-matter," distinguished the Commission from the NIRA. *Id.*

D. *National Petroleum* Was Wrongly Decided

The Final Rule relies heavily on the D.C. Circuit's decision in *National Petroleum Refiners Association v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), to support its substantive rulemaking authority, but that decision was wrong when it was decided. 89 Fed. Reg. at 38,350–51. *National Petroleum* held that the Commission had the authority to promulgate substantive rules pursuant to Section 46(g). 482 F.2d at 678. But *National Petroleum* is not the law in the Eleventh Circuit, has never been addressed by the Supreme Court, and should not be followed by this Court.

National Petroleum decided to "liberally [] construe" section 46(g)'s rulemaking authorization in order to "further[]" the "broad, undisputed policies" underlying the FTC Act. *Id.* at 686, 678. This is an outdated mode of analysis, especially after the directive in *Loper Bright Enterprises v. Raimondo* that courts must "independently" decide the scope of delegated authority. 603 U.S. 369, 395 (2024). And worse, it ignored the foundational precept that agencies "possess only the authority that Congress has provided." *NFIB*, 595 U.S. at 117.

National Petroleum also generally misapplied the main cases on which it relied. 482 F.2d at 678–81. *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 215–20 (1943), addressed the scope and specificity of rulemaking authority as to certain activities. *United States v. Storer Broad. Co.*, 351 U.S. 192, 202–03 (1956), and *Federal Power Commission v. Texaco, Inc.*, 377 U.S. 33, 39–42 (1964), addressed

whether agencies could promulgate substantive rules that would serve as a threshold for whether non-compliant regulated entities received a hearing. And *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 371–73 (1973), addressed whether or to what extent a grant of rulemaking authority was limited by other statutory provisions. None of these cases engaged with whether the rulemaking authority at issue was substantive or procedural in a manner that supported the conclusion in *National Petroleum*. *See* Merrill & Watts, *supra* at 556. But that is the threshold question here.

E. Subsequent Amendments to the FTC Act Confirm the Commission Lacks Substantive Unfair Method of Competition Rulemaking Authority

Congress's authorization of substantive rulemaking authority for UDAPs in 1975 confirms that the Commission did not have substantive rulemaking authority through section 46(g). *See* Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 202, 88 Stat. 2183, 2193–98 (1975) (the "1975 Amendments"). After the Commission's brief period of unauthorized rulemaking and *National Petroleum*, *see supra* Part I.B, D, Congress settled the confusion by giving the Commission—for the first time—substantive rulemaking authority *only* for UDAPs, 88 Stat. at 2193–98. This new grant of rulemaking authority cannot have ratified the Commission's prior interpretation or *National Petroleum* because Congress materially modified section 46(g). *See Jama v. ICE*,

543 U.S. 335, 349 (2005). And subsequent *procedural* amendments to the FTC Act in 1980 did not alter the scope of Congress's *substantive* rulemaking authorization. *See infra* Part I.E.3.

1. The 1975 Amendments Were a New Grant of Substantive Rulemaking Authority Only for UDAPs

The 1975 Amendments were an original grant of rulemaking authority for UDAPs. Section 57a(a) authorizes the Commission to "prescribe" "interpretive rules and general statements of policy" as well as "rules which define with specificity acts or practices which are [UDAPs]." 15 U.S.C. § 57a(a). This is drafted as an entirely new rulemaking authorization, rather than an amendment to section 46(g). *Id.* It requires the Commission to follow specific procedural requirements—including allowing for an "informal hearing" with interested parties. *Id.* § 57a(b), (c). It also created a judicial review scheme, which does not exist for section 46(g) rules. *Id.* § 57a(e). There is nothing about the rulemaking authorization that indicated Congress was legislating against the backdrop of preexisting substantive rulemaking authority in section 46(g). If it was, the procedural requirements and judicial review provisions could simply have been appended to section 46(g). As written, section 57a would be entirely pointless if the Commission already possessed substantive rulemaking authority through section 46(g). *See Ryan*, 2024 WL 3297524, at *9–10; *Corley*, 556 U.S. at 314.

The savings clause in the 1975 Amendments further confirms the 1975 Amendments' newly granted substantive rulemaking authority and excluded UMCs. The savings clause distinguishes section 57a from section 46(g) as a source of substantive rulemaking authority. 15 U.S.C. § 57a(a)(2). It makes section 57a the exclusive means for the Commission to make UDAP rules. *Id.* Then it states that the new rulemaking authorization does not affect "any authority" the Commission has "to prescribe rules (including interpretive rules), and general statements of policy, with respect to [UMCs]." *Id.* This language does not grant the Commission any rulemaking authority; it simply references preexisting authority. *Ryan*, 2024 WL 3879954, at *10. It is most naturally read to refer to the preexisting scope of rulemaking authority as established by sections 45 and 46, not as an acknowledgment that the Commission has all possible rulemaking authority for UMCs. The word "any" is defined as "some; one out of many; an indefinite number." *Any*, Black's Law Dictionary 120 (4th ed. 1968). As such, it does not provide definition to the extent of the authority to which it is referring; here, that is determined by section 46(g). Finally, "any" is not further clarified by the rest of the savings clause. The text simply uses the words "rules" and "general statements of policy," and clarifies that "rules" "includ[es] interpretive rules." 15 U.S.C. § 57a(a)(2). Because section 46(g) does not authorize substantive rulemaking authority, "rules" refers only to procedural and interpretive rules. *See supra* I.A. At

best for the Commission, "any" is an intentional expression of ambiguity by Congress as to the rulemaking authority the Commission already possessed for UMCs.

In their full statutory context, the 1975 Amendments cannot be understood as just an imposition of procedural requirements, narrowing the Commission's rulemaking authority. *See* Doc. 20 at 25–29. The 1975 Amendments *expanded* the scope of the FTC Act by replacing the phrase "in commerce" in section 45 with the broader phrase "in or affecting commerce." 88 Stat. at 2193; S. Conf. Rep. 93-1408 § 201 (1974). It is implausible that Congress narrowed the Commission's rulemaking authority in a statute that simultaneously expanded the Commission's jurisdiction. Congress also cleaned up the Commission's unauthorized substantive rulemakings. *See supra* Part I.B. The 1975 Amendments preserved the "validity of any rule which was promulgated under section [4]6(g)" or the development of which was "substantially completed" before the enactment of the 1975 Amendments. 88 Stat. at 2198. This would have been unnecessary if the Commission already had substantive rulemaking authority.

2. Congress Did Not Ratify the Commission's Substantive Rulemaking Through Section 46(g)

The Commission asserts that Congress ratified its interpretation of section 46(g) through the 1975 Amendments. Doc 20 at 25–29. But neither judicial nor administrative ratification is applicable here because Congress materially modified

the scope of section 46(g). *See Jama*, 543 U.S. at 349; *NLRB v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 274–75 (1974).

Congressional ratification of a judicial interpretation can only be assumed when Congress "simply reenact[s]" a statute "without change" and the "judicial consensus" about its meaning was "so broad and unquestioned that [the court] must presume Congress knew of and endorsed it." *Jama*, 543 U.S. at 349. Here, the 1975 Amendments did not reenact section 46(g), they materially amended it. 88 Stat. at 2193–98. The 1975 Amendments directly addressed the Commission's rulemaking authority by granting it substantive UDAP rulemaking authority for the first time, a dramatic change to the statute. *Id.* And Congress specifically amended section 46(g) to correspondingly exclude "interpretive rules and general statements of policy with respect to [UDAPs]" from its rulemaking authorization. *Id.* at 2193, 2198. A change to the scope of section 46(g) could hardly be a more "relevant change" for purposes of congressional ratification. *Holder v. Martinez Gutierrez*, 566 U.S. 583, 593 (2012).

Even assuming the 1975 Amendments satisfy the reenactment prong of the judicial ratification analysis, there was no "judicial consensus" in 1975 as to the meaning of section 46(g). *See Jama*, 543 U.S. at 351. In 1975, only a single court of appeals had decided just 18 months prior that section 46(g) permitted substantive rulemaking. *National Petroleum*, 482 F.2d 672. A single judicial opinion is grossly

insufficient to establish a "broad and unquestioned" judicial consensus. *Jama*, 543 U.S. at 349, 351.

Similarly, a preexisting administrative interpretation may be given "great weight" if it was "longstanding" and the statute was "re-enacted … without pertinent change." *Bell Aerospace*, 416 U.S. at 274–75. As discussed, section 46(g) was neither reenacted nor left unchanged. Additionally, the Commission's interpretation of section 46(g) was not longstanding in 1975; it dated only to 1963. 89 Fed. Reg. at 38,349. And it was preceded by "nearly a half-century" of no substantive rulemaking. Merrill & Watts, *supra* at 552. The substantive rules the Commission did promulgate from 1963 to 1978 generally regarded advertising and labeling issues, *not* competition. 89 Fed. Reg. at 38,349–50. Given these circumstances, "the [Commission] cannot provide the sort of 'overwhelming evidence of acquiescence' necessary" to conclude Congress ratified its interpretation. *Sackett v. EPA*, 598 U.S. 651, 682 (2023).

3. The 1980 Amendments Were Procedural Not Substantive

Subsequently, Congress passed the Federal Trade Commission Improvements Act of 1980 (the "1980 Amendments") that added an exclusively procedural requirement for substantive rules and amendments that have a "significant impact." Pub. L. No. 96-252, 94 Stat. 374, 388–90 (1980), *codified at* 15 U.S.C. § 57b-3. The Commission argues that Congress's definition of the term "rule" in the 1980

Amendments to include section 46(g) rules but exclude non-substantive rules reflected Congress's understanding that section 46(g) authorized substantive rulemaking. Doc. 20 at 30. But the definition of a word in a subsequent procedural statute cannot create substantive rulemaking authority. *Ryan*, 2024 WL 3879954, at *12; *cf. ICC v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U.S. 479, 505 (1897). Additionally, Congress preserved the validity of substantive rules promulgated under section 46(g) prior to the 1975 Amendments. 88 Stat. at 2198; 89 Fed. Reg. at 38,349–50. Congress would understandably want its new procedural requirements to apply to amendments to these rules where they meet the requirements of the 1980 Amendments.

II. THE FTC ACT DOES NOT AUTHORIZE THE COMMISSION TO BAN ALL NON-COMPETE AGREEMENTS AS UNFAIR METHODS OF COMPETITION

Even if the FTC Act permits the Commission to issue substantive rules for UMCs, the Commission cannot issue a blanket ban of non-compete agreements because the statute only declares *unfair* methods of competition to be unlawful. 15 U.S.C. § 45(a)(1). The Commission has not concluded that all the non-compete agreements covered by the Final Rule are unfair, ignoring their reasonable use by small businesses. *See, e.g.*, 89 Fed. Reg. at 38,493. Its aggregate analysis necessarily sweeps in non-compete agreements that are *fair* (like many of those used by small businesses) and therefore are not "unlawful" under 15 U.S.C. § 45(a)(1). Permitting

the Commission to evaluate business practices in the aggregate—banning fair and unfair iterations—is contrary to the text of section 45 and would "permit arbitrary or undue government interference with the reasonable freedom of action that has marked our country's competitive system." *E.I. du Pont de Nemours & Co. v. FTC ("Ethyl")*, 729 F.2d 128, 137 (2d Cir. 1984).

In particular, the Final Rule incorrectly dismisses *fair* uses of non-compete agreements by small businesses to protect their investments in employee training. *See, e.g.*, David Servin Comment, Dkt. FTC-2023-0007-9772, 1–3; U.S. Small Business Administration Office of Advocacy Comment, Dkt. FTC-2023-0007-21110, 3 ("SBA Off. Advocacy Comment"). Without non-compete agreements, valuable training and proprietary processes could be lost to larger direct competitors and disadvantage the small business against larger businesses. Servin Comment 1–3; SBA Off. Advocacy Comment 3; 89 Fed. Reg. at 38,492–93. Small business commenters specifically noted that they used non-compete agreements in response to "workers they had trained extensively" leaving for "a larger competitor." 89 Fed. Reg. at 38,493. Additionally, small businesses have a diminished ability to bear the costs of losing employees, valuable training, and proprietary information to direct competitors. *Id.* at 38,492. Without the protection of non-compete agreements, small businesses "could face a serious risk of loss and potential closure." SBA Off. Advocacy Comment 3.

Indeed, the Final Rule identifies non-compete agreements that are used to protect investments in employees as being beneficial. 89 Fed. Reg. at 38,422–23. The Commission acknowledges that "[t]here is some empirical evidence that non-competes increase investment in human capital of workers." *Id.* at 38,422. One study cited by the Commission identified a 14.7% reduction in the number of workers who receive training in occupations in which non-compete agreements are widely used when those agreements become unenforceable. *Id.* Evan Starr, *Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete*, 72 I.L.R. Rev. 783, 796–97 (2019). Another found that "knowledge-intensive firms invest substantially less in capital equipment" when non-compete enforceability is decreased and concluded one likely cause is that "firms may be more likely to invest in capital when they train their workers." 89 Fed. Reg. at 38,423; Jessica S. Jeffers, *The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship*, 37 Rev. Fin. Stud. 1, 28–29 (2024). And a third study comparing hair salons that do and do not use non-compete agreements found that salons "that use non-competes train their employees at a higher rate." 89 Fed. Reg. at 38,423; Matthew S. Johnson & Michael Lipsitz, *Why Are Low-Wage Workers Signing Noncompete Agreements?*, 57 J. Hum. Res. 689, 711 (2022). The Commission also acknowledges that the Final Rule may negatively impact employee investment by as much as $41 billion. 89 Fed. Reg. at 38,470.

ATS's own successful experience using reasonable non-compete agreements is further evidence that the Final Rule extends beyond the Commission's statutory authority to agreements that are fair. ATS provides a variety of tree care services, including tree trimming and removal, tree preservation, emergency responses to storm damage, and the preparation of tree management plans. The tree care ATS engages in requires specialized skills that ATS develops in its employees through extensive training to ensure that limbs or entire trees can be safely removed without unnecessary risks. This training includes instruction in ATS's proprietary procedures developed over 10 years in operation that allows ATS to provide high quality tree trimming services at competitive rates. *See* Servin Comment 1. Indeed, ATS is known in its community for its tree care expertise and is regularly called upon by other tree care companies to assist with technically difficult tree removals.

ATS employs around a dozen people to whom ATS is committed as both people and tree care professionals. *See id.* 1–2. The core of ATS's commitment to its employees is its training program. *See id.* ATS's employee training includes the opportunity to apprentice for six different roles or certifications. Each apprenticeship includes specialized training and the acquisition of any necessary internal or third-party certifications at ATS's expense. *See id.* For example, ATS trains interested employees to become skilled tree climbers, which includes on-the-job climbing training in the use of specialized climbing devices and technical rigging for lowering

tree limbs. For just the climbing training, ATS spends thousands of dollars to provide individual technical climbing gear and sacrifices productivity and income to ensure that the apprenticing employee develops the necessary skills.

ATS views its commitment to its employees as a two-way street. *Id.* 2–3. In exchange for ATS's investment, ATS requires its employees to make a limited commitment to ATS through a non-compete clause in the employment agreement. *Id.* 1–3. In general, the agreement requires, or would only be enforced to require, ATS employees not to engage in the same type of work they performed at ATS at a competitor tree care service provider within the geographic area in which the employee worked while at ATS for one year after leaving. *Id.* 1.

This mutual commitment between ATS and its employees is a critical component of ATS's internal operations and overall success in the tree care industry. It results in benefits both to ATS and its employees. ATS is able to maintain a stable, well-trained workforce that is practiced in ATS's specific processes, including safety protocols. *Id.* 1–3. ATS also gets one year to replace an employee that leaves—and the training and skills imparted by ATS on that employee—before the former employee can use the ATS-provided training for the benefit of a direct competitor. *See id.* 3. This makes it feasible for ATS to provide the training and professional development opportunities that it does. *Id.* 1. The employees receive training and third-party certifications that they can take with them throughout their careers should

they decide to leave ATS. The employees also benefit from working for a company that is personally invested in their individual growth. *See id.* 1–3.

The Final Rule would eliminate all these benefits for ATS and its employees. Without the ability to enforce its non-compete agreements, ATS would face the risk that its employees would leave and immediately transfer the benefit of ATS's training and investment to a direct competitor. *Id.* This is a significant risk because ATS's training program and reputation make ATS employees a prime target for poaching by competitors. Without its reasonable non-compete agreements, it would not be feasible for ATS to provide the same level of training and professional development if its investment could be lost to a direct competitor at any time. *Id.* 1. Instead, to the detriment of ATS and unskilled workers trying to enter the tree care trade, ATS may have to focus on hiring tree care employees who are already skilled, including from competitors. *Id.* 3. The result will be to reduce the quality and safety of tree care services as the competition for employees crowds out companies' commitment to training, quality, and safety, and to reduce the value of ATS going forward by disrupting its successful business model. *See id.* 2–3. It will also result in a lower quality work environment for tree care employees as they become valued exclusively for what they can provide to tree care businesses rather than part of a mutually beneficial business strategy focused on long-term growth and development. *See id.* 2–3.

III. THE FTC ACT UNCONSTITUTIONALLY DELEGATES LEGISLATIVE POWER TO THE COMMISSION

If the Commission has statutory authority for the Final Rule, the FTC Act violates the nondelegation doctrine by delegating power for the Commission to make rules defining unfair methods of competition without a sufficient standard. The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States ...." U.S. Const. art. I, § 1. As a result of this vesting clause, Congress may not "delegate ... powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825). Administrative agencies may only "fill up the details" on "subjects" "of less interest." *Id.* at 43. To avoid an unconstitutional delegation, Congress must provide executive branch agencies with an "'intelligible principle'" by which to regulate. *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 472 (2001).

Schechter Poultry already decided that rulemaking authority based solely on a standard of fair competition is an unconstitutional delegation of legislative authority. 295 U.S. at 530, 541–42. In *Schechter Poultry*, the defendants were criminally charged with violating the Live Poultry Code, promulgated under section 3 of the NIRA, which "authorize[d] the President to approve 'codes of fair competition.'" 295 U.S. at 508, 521–22. "[F]air competition" was undefined in the NIRA, which was otherwise devoid of any meaningful standard or limitation on the President's authority. *Id.* at 531, 541. *Schechter Poultry* took a similarly dim view of

the phrase "unfair methods of competition" in the FTC Act, explaining "that it does not admit of precise definition." *Id.* at 532. But critically, the Court found that the term would *not* be defined through substantive rulemaking as in the NIRA. *Id*. at 533. Instead, its meaning would be "determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest." *Id*. This finding was key to the Court's rejection of the NIRA, given that the Court explained that the "procedure" in addition to the "subject-matter" were major factors. *See id.* at 533–34.

Here, the Final Rule erases the Commission's distinctive role as an exclusively adjudicative body by creating the Commission's own code of fair competition in the labor market and claiming the authority to do the same for any other purportedly unfair method of competition. In fact, this very scenario was contemplated in *Schechter Poultry* because the NIRA provided that violations of the codes of fair competition "[were] to be deemed 'an unfair method of competition' within the meaning of the [FTC] Act." *Id.* at 534. So, the Final Rule functions in a nearly identical way as the unconstitutional fair competition codes in *Schechter Poultry*.

Rulemaking authority has long required clearer and more specific congressional authorization than adjudicative authority. *See, e.g.*, *Cincinnati*, 167 U.S. at 493, 501. Despite their "judicial form[]," adjudications "are exercises of …

the executive Power." *United States v. Arthrex*, 594 U.S. 1, 17 (2021) (quotation marks omitted). In contrast, rulemaking implicates the *legislative* power. *Cincinnati*, 167 U.S. at 505. A scheme where agencies may conduct adjudications but cannot legislate through substantive rules comports with our constitutional system of separated powers. *Id.* at 505–06. Thus, because Congress "cannot delegate legislative power," *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892), the Commission's adjudication authority does not mean that it can also make rules, *see Cincinnati*, 167 U.S. at 505–06.

Even on its own, the phrase "unfair methods of competition" fails to establish an "'intelligible principle.'" *Whitman*, 531 U.S. at 472. "[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Id.* at 475. Congress is expected to "provide substantial guidance" on regulations like the Final Rule "that affect the entire national economy." *Id.* Here, "unfair" is not enough. *See Schechter Poultry*, 295 U.S. at 532–33. It leaves the Commission free to exercise subjective judgment without sufficient legislative guidance. *See Panama Refin. Co. v. Ryan*, 293 U.S. 388, 430 (1935).

The standardless nature of the Act's prohibition on UMCs is underscored by comparing it to the guidance Congress provided regarding UDAPs. The Commission may only issue rules for UDAPs it determines are "likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not

outweighed by countervailing benefits to consumers or to competition." 15 U.S.C § 45(n). There is no such standard for evaluating UMCs. Congress is expected to "'legislate[] on [a] subject as far as [is] reasonably practicable.'" *Panama Refin.*, 293 U.S. at 427. Because Congress provided more definite standards for UDAPs, there is no reason it could not have provided similar standards for UMCs. Instead, if the Commission has the authority it claims, Congress gave the Commission a blank check to issue substantive rules through a vague and ambiguous standard. *See Schechter Poultry*, 295 U.S. at 541–42. Whether non-competes should be banned for every worker in the nation is unquestionably an "important subject[], which must be entirely regulated by the legislature itself." *Wayman*, 23 U.S. (10 Wheat.) at 43. Providing the Commission with no more guidance than the word "unfair" unconstitutionally delegates legislative power. *See Schechter Poultry*, 295 U.S. at 532–33. At a minimum, the FTC Act should not be interpreted to permit substantive rulemaking for unfair methods of competition to avoid this "'serious constitutional problem[].'" *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001).

CONCLUSION

For all the foregoing reasons, this Court should affirm the District Court's preliminary injunction of the Final Rule.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because the brief contains 6,323 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f).

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Dated: January 22, 2025

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on January 22, 2025.

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