FTC Authority To Ban Noncompetes Shaky After EPA Ruling

By **Erik Weibust and Stuart Gerson** (July 14, 2022)

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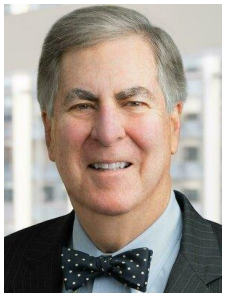

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Shortly after his inauguration in 2021, President Joe Biden issued Executive Order No. 14036 on promoting competition in the American economy, which encouraged the Federal Trade Commission to consider exercising its

> statutory rulemaking authority under the Federal Trade Commission Act to curtail what the administration and its advocates believe is the widespread use of non-compete clauses and other clauses or agreements that might unfairly limit worker mobility.[1]

Nothing of substance has yet resulted from this executive order, although the FTC ostensibly is considering how best to proceed. However, a recent U.S. Supreme Court decision may have made that task far more difficult, providing a potentially viable argument that the FTC lacks the authority to regulate — i.e., ban — noncompetes.

Even before the executive order, the FTC was studying this matter in recognition that the question of its authority was an open one.

On Jan. 9, 2020, the FTC held a public workshop titled "Non-Compete Clauses in the Workplace: Examining Antitrust and Consumer Protection Issues," the purpose of which was "to examine whether there is a sufficient legal basis and empirical economic support to promulgate a Commission Rule that would restrict the use of non-compete clauses in employer-employee employment contracts."[2]

One FTC commissioner, Noah Phillips, stated publicly in connection with that workshop that he does not believe the FTC has the authority to do so, citing the nondelegation doctrine, which several Supreme Court justices and many conservative critics of the administrative state argue should be reenergized to limit the extent of Congress' authority under the Constitution to delegate its legislative powers to the executive branch.[3]

The Supreme Court may have come close to validating Phillips' view in its June **6-3 decision** in West Virginia v. U.S. Environmental Protection Agency, albeit under what might be taken as a variant of the nondelegation doctrine: the major questions doctrine.[4]

As opposed to the nondelegation doctrine, which addresses whether Congress can delegate its legislative powers to the executive branch, and to what extent, the major questions doctrine addresses whether Congress has, in fact, done so, or whether the scope of its delegation is as extensive as the executive branch and administrative agencies like the FTC interpret it.

The court reached this conclusion without even referring to Chevron USA Inc. v. Natural Resources Defense Council, the well-known 1984 Supreme Court case concerning an agency's discretion to interpret its governing statutes.[5]

In addressing the potential applicability of the major questions doctrine to preclude the national prohibition or regulation of noncompete provisions, we recognize that there is a

fundamental precondition that must be met: The matter at issue must be major.

In other words, as the Supreme Court has noted, under normal circumstances an agency's interpretation of its statutory authority might routinely be upheld if its underlying statute might be implied to support it. However, where the issue is one of significant national policy effect, particularly with respect to the economy, congressional intent must clearly and unequivocally be stated in the law.

As we discuss below, we believe that, given the significance of noncompete agreements within the national economy, the Supreme Court's decision in West Virginia v. EPA would support the invocation of the major questions doctrine to prevent the FTC from acting as has been proposed.

In other words, assuming Congress has the authority to delegate to the executive branch department or administrative agency the power to regulate noncompetes nationwide — an issue that the Supreme Court has not yet addressed, directly or indirectly, and on which we take no position in this article — was its delegation to the FTC of the power to regulate "unfair methods of competition" in Section 5 of the FTC Act sufficiently clear to have actually granted the FTC that authority?[6]

Our view is that the answer is no. Congress did not clearly delegate to the FTC the power to regulate noncompetes nationwide, as it was required to do if that was its intent because the regulation of noncompetes constitutes a major question.

West Virginia v. EPA and the Major Questions Doctrine

Where many Supreme Court observers and analysts had predicted that the conservative justices would wield their majority to give new life to the nondelegation doctrine and, given various questions raised in oral argument, to pare back, or even eliminate, the doctrine of the Chevron deference, the court did neither.

Instead, while not referencing either nondelegation or Chevron, it applied the major questions doctrine to strike down a significant EPA emissions regulation that materially departed from a long-standing regulatory regime, a departure that the court concluded would have a significant detrimental effect on the national economy.

This is not the first time that the court invoked the doctrine, though not necessarily by name.

For example, in January of this year, a unanimous Supreme Court stayed the nationwide COVID-19 vaccine mandate of the Occupational Safety and Health Administration, on grounds much like those that obtained in the EPA case to hold that while Congress had acted in a number of ways to address the pandemic, it provided for nothing similar to or as extensive as what OSHA had attempted, let alone speak clearly to OSHA's authority to do so.[7]

By invoking the major questions doctrine, the court has held that administrative agencies must be able to demonstrate clear congressional authorization when they claim the power to make decisions of vast economic and political significance. Like other requirements for clear statements of legislative intention, for example concerning retroactivity, the major question doctrine is intended to protect foundational constitutional interests.

Looking to the West Virginia v. EPA decision itself to see what is major about it, we find

that, under the Clean Air Act, the EPA is authorized to regulated power plants by setting a standard of performance for certain pollution emissions.

Before 2015, the EPA always had addressed emission limits in terms of applying methods that would reduce pollution by requiring sources to operate more cleanly. However, that approach shifted to requiring sources to change their systems entirely by moving from dirtier to cleaner sources — think things like wind, solar and new facilities.

In striking down the regulation embodying the novel approach, Chief Justice John Roberts, writing for all six court conservatives, first opines that continuing injury to various states satisfies standing requirements, and then notes that the court is only deciding the question of authority, not how emissions might best be regulated.

Given the court's conclusion that the shift in question was of such significant proportions that it required invocation of the major questions doctrine, the answer is a clear "no."

It is interesting to note that, while there was disagreement between the dominant jurisprudential conservatives and the court's three more jurisprudentially liberal justices — particularly Justice Elena Kagan, herself an avowed textualist — that disagreement was limited to whether the facts were of sufficient valence to support the invocation of the major questions doctrine.

There was no disagreement as to whether the doctrine is a viable one.

In the end, though, the majority's conclusion that, while, under ordinary circumstances an agency's reading of its statute might be upheld, that is not the case where an agency has exerted extravagant statutory power in a matter of great political significance that greatly affects the national economy.

The FTC's Authority to Regulate Noncompetes in Light of West Virginia v. EPA

Before turning to the magnitude and effect of what the FTC and the Biden administration intend with respect to noncompetes, we examine the criteria for the major questions doctrine that we suggest should apply to limit the agency.

Carefully describing the limiting principle involved, Justice Roberts wrote in West Virginia v. EPA that, pursuant to the major questions doctrine,

> in certain extraordinary circumstances, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.[8]

In his concurring opinion, Justice Neil Gorsuch succinctly describes the relevant factors to be considered in determining "when an agency action involves a major question for which [such] clear congressional authority is required."[9]

Application of these factors leads to only one reasonable conclusion in our view: The regulation of noncompetes is a major question for which clear congressional authority is required.

The regulation of noncompetes is a matter of great political significance.

First, Justice Gorsuch notes that "the doctrine applies when an agency claims the power to resolve a matter of great 'political significance.'"

There can be no doubt that the issue of whether and to what extent noncompete agreements should be regulated at the federal level is a matter of political significance; indeed, Biden himself has made it so.

For example, during the 2020 presidential campaign his campaign website declared that

> [a]s president, Biden will work with Congress to eliminate all non-compete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets, and outright ban all no-poaching agreements.[10]

And this was not the first time that Biden caused the issue to be treated as a matter of national political importance. In 2016, the Obama administration issued its state call to action on noncompete agreements, which encouraged state legislators to adopt policies to reduce the misuse of noncompete agreements and recommended certain reforms to state law books.[11]

Then-Vice President Biden posted a lengthy contemporaneous message on his Facebook page[12] that linked to a White House survey that encouraged employees to share with the administration "how noncompete agreements or wage collusion are holding you down," and expressing concern about

> the improper use of noncompete agreements, where companies make workers promise when they are hired that if they leave the company, they can't work for another company in the same industry.[13]

Moreover, the current FTC chair, Lina Khan, is a former law professor and member of the New Brandeis antitrust movement, and was one of the principal authors of the 2019 Utah statement, which set forth a series of concrete proposals for the future of antitrust law and enforcement.[14]

One such proposal — the second out of 10, in fact — is that "[b]y rule or statute, non-compete agreements should be made presumptively unlawful." Khan has never been shy about her distaste for noncompetes and her desire to regulate them through FTC rulemaking.[15]

If this alone were not enough to satisfy the political significance factor, consider that the Supreme Court

> has found it telling when Congress has "considered and rejected" bills authorizing something akin to the agency's proposed course of action. That too may be a sign that an agency is attempting to "work around" the legislative process to resolve for itself a question of great political significance.[16]

Bills seeking to regulate, if not outright ban, the use of noncompetes have been introduced in Congress by members of both parties on no fewer than a dozen occasions since 2015, including six such bills that are currently pending.[17][18] None has ever passed.

The FTC is seeking to regulate a significant portion of the American economy.

Second, Justice Gorsuch notes "an agency must point to clear congressional authorization when it seeks to regulate 'a significant portion of the American economy.'"[19]

According to the Biden administration's fact sheet issued in connection with its July 9, 2021, executive order, "[r]oughly half of private-sector businesses require at least some employees to enter non-compete agreements, affecting some 36 to 60 million workers."[20]

And according to a survey from 2014, "38.1% of U.S. labor force participants have agreed to a noncompete at some point in their lives" and "18.1%, or roughly 28 million individuals currently work under one."[21]

Indeed, the Office of Economic Policy of the U.S. Department of the Treasury under the Obama administration issued a report in March 2016 titled "Noncompete Contracts: Economic Effects and Policy Implications," which posited that "a considerable number of American workers (18% of all workers, or nearly 30 million people) are covered by noncompete agreements," and made several claims about the purported impact of that on the economy, including that:

- "Reduced job churn caused by non-competes is itself a concern for the U.S. economy";
- "Non-compete enforcement can stifle this mobility, thereby limiting the process that leads to agglomeration economies"; and
- "[W]hile in some cases non-compete agreements can promote innovation, their misuse can benefit firms at the expense of workers and the broader economy."[22]

Unsurprisingly, the report concludes with a warning about the supposed effects of continued regular enforcement of noncompetes on the economy, and a suggestion that they be regulated:

> Noncompetes are a central labor market institution, with nearly one-fifth of all U.S. workers currently bound by such a contract. Surprisingly, noncompetes are widely distributed across education, occupation and income groups.
>
> Understanding the consequences of this institution for workers and the broader economy is therefore of great importance, especially in light of its central role in determining workers' prospects for wage growth and job mobility.
>
> Though noncompete contracts can have important social benefits, principally related to the protection of trade secrets, a growing body of evidence suggests that they are frequently used in ways that are inimical to the interests of workers and the broader economy.
>
> Enhancing the transparency of noncompetes, better aligning them with legitimate social purposes like protection of trade secrets, and instituting minimal worker protections can all help to ensure that noncompete contracts contribute to economic growth without unduly burdening workers.[23]

Just this year, the Treasury Department issued another report, this one titled "The State of Labor Competition," which takes a similarly dim view of noncompetes.[24]

After noting that "firm survey data suggest at least some employees have non-compete agreements at approximately two-thirds of firms," the report concludes that

> a lack of labor market competition can impact the broader economy. Lack of labor market competition contributes to high levels of income inequality, diminishes incentives for firms to invest, inhibits the creation and expansion of new firms, and reduces productivity growth through lower reallocation of labor across firms and industries.

Thus, according to the Biden administration itself — and the Obama administration previously — regulating noncompetes will have a significant impact on the U.S. economy. There should be no doubt that this is true.

Regulation of noncompetes has been the domain of state law for over 200 years.

Third, Justice Gorsuch notes that

> the major questions doctrine may apply when an agency seeks to intrud[e] into an area that is the particular domain of state law. ... When an agency claims the power to regulate vast swaths of American life, it not only risks intruding on Congress' power, it also risks intruding on the powers reserved to the States.

This factor is particularly apt in the noncompete context, as states have been regulating them for over 200 years.[25] In the past few years, more than three quarters of all states have considered enacting and/or amending their noncompete laws.[26]

Just this year alone, a total of 98 noncompete bills have been introduced in 29 state legislatures, with 39 bills currently pending in eight states.[27]

Indeed, despite numerous attempts at the state level to ban noncompetes, no state has permanently done so since 1890.[28] That is not due to a lack of effort, however, as legislators in numerous states have introduced legislation to ban noncompetes.

For example, in 2018, the Massachusetts Legislature enacted the Massachusetts Noncompetition Agreement Act after almost a decade of debate.[29]

The process leading to passage of this act began with a proposal to ban noncompetes outright in the commonwealth, and ended with compromise legislation that limits the categories of employees against whom they may be enforceable, requires notice, and no longer permits continued employment as consideration for existing employees, but otherwise more or less codifies the common law and permits noncompetes of up to 12 months in duration.

Thus, even the Democrat-dominated Legislature of one of the most employee-friendly states in the nation decided against banning noncompetes after careful consideration. Similar stories could be told in other states as well.[30]

Thus, without reference to the wisdom, or lack of it, with respect to regulating noncompetes, it is indisputable that the matter has been a lively one among the individual states.

For the FTC to materially involve itself in this issue would, under West Virginia v. EPA, require Congress to have acted clearly and definitively in authorizing it. It has not done so.

Congress Did Not Provide Clear Authority to the FTC to Regulate Noncompetes

Because the regulation of noncompetes, in our view, constitutes a major question, Congress must have provided clear authority to the FTC to do so.

Justice Gorsuch again clearly delineates the factors that are to be considered in determining whether Congress has made such a clear delegation to an executive agency.[31]

There are those, including the FTC chair, who would argue that Congress' delegation to the FTC of the authority to regulate "unfair methods of competition" applies to the regulation of noncompetes because — as their name suggests — noncompetes inherently limit competition in the labor market, albeit not necessarily unfairly.

But the FTC has never before interpreted the FTC Act in that manner, and one relevant factor in the constitutional analysis is that "courts may examine the agency's past interpretations of the relevant statute."[32] That represents the same analytical factor applied both with respect to the EPA case and the OSHA vaccine case.

Indeed, Congress passed the FTC Act in 1914, long after noncompetes were already being used widely in the American economy.[33] Tellingly, in the 108 years since, the FTC has never once interpreted that language of the act as permitting it to regulate noncompetes.[34]

Moreover, while it is well settled that "'[u]nfair methods of competition' under the FTC Act encompass violations of the Sherman Act,"[35]

> [n]umerous courts have recognized the general rule that agreements not to compete, entered into in conjunction with the termination of employment or the sale of a business, do not offend the federal antitrust provisions if they are reasonable in duration and geographical limitation.[36]

As the U.S. Court of Appeals for the Seventh Circuit held over 40 years ago in Lektro-Vend Corp. v. Vendo Co.,

> [l]egitimate reasons exist to uphold noncompetition covenants even though by nature they necessarily restrain trade to some degree. The recognized benefits of reasonably enforced noncompetition covenants are by now beyond question.[37]

"When an agency claims to have found a previously 'unheralded power,' its assertion generally warrants 'a measure of skepticism,'" according to the West Virginia v. EPA decision.[38]

Thus, it appears to us likely that the Supreme Court would look skeptically at any attempts by the FTC to regulate noncompetes and conclude that Congress did not provide clear authority in the FTC Act permitting the FTC to do so.

Conclusion

Permitting the FTC to regulate — i.e., ban — noncompetes nationwide under the auspices of

the "unfair methods of competition" language of Section 5 of the FTC Act, which is undoubtedly a politically and economically consequential act, would upend a significant portion of the U.S. economy and fly in the face of centuries of thoughtful contemplation, vigorous debate, and reasonable compromise at the state level.

This plainly places it within the ambit of the major questions doctrine, if not also the nondelegation doctrine. And not only has the FTC never before interpreted its authority under the FTC Act to apply to the regulation of noncompetes, but federal courts have uniformly held that noncompetes are not per se violations of the Sherman Act.

Accordingly, based on the Supreme Court's reasoning and holding of West Virginia v. EPA, the FTC likely would be held to lack the authority to regulate, much less ban, employee noncompetes nationwide.

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[1] Exec. Order No. 14036, 86 C.F.R. 36987 (July 9, 2021).

[2] https://www.ftc.gov/news-events/events/2020/01/non-competes-workplace-examining-antitrust-consumer-protection-issues.

[3] https://www.ftc.gov/system/files/documents/public_statements/1561697/phillips_-_remarks_at_ftc_nca_workshop_1-9-20.pdf. Commissioner Phillips further explained that his "[n]on-delegation concerns may also be exacerbated by other factors here, including the lack of clarity in the rulemaking authority, the traditional commitment of the issue to the states, the fact that neither the FTC nor any court has found non-competes to violate the FTC Act's prohibition against 'unfair methods of competition,' and the lack of a good historical precedent.".

[4] West Virginia, et al. v. Environmental Protection Agency, et al., 597 U.S. ---, --- S.Ct. ---, 2022 WL 2347278 (June 30, 2022) (Gorsuch, J., concurring). All citations to this decision hereinafter will omit internal citations.

[5] 467 U.S. 837 (1984).

[6] 15 U.S.C. § 45.

[7] National Federation of Independent Business v. OSHA, 595 U.S. ---, 142 S. Ct. 661 (2022).

[8] West Virginia v. EPA, 2022 WL 2347278, at *13.

[9] West Virginia v. EPA, 2022 WL 2347278, at *22-23 (Gorsuch, J., concurring).

[10] https://joebiden.com/empowerworkers/. At least at the time of this statement, then-candidate Biden acknowledged that he would have to "work with Congress" to accomplish this goal. Having failed to accomplish this goal legislatively, he has now turned to the FTC to get it done.

[11] https://obamawhitehouse.archives.gov/sites/default/files/competition/noncompetes-calltoaction-final.pdf.

[12] https://www.facebook.com/VicePresidentBiden/posts/1786398901588706:0.

[13] https://obamawhitehouse.archives.gov/webform/how-have-non-competes-and-wage-collusion-affected-you (initially the survey was hosted at: http://go.wh.gov/Your-Non-Compete-Story).

[14] https://onezero.medium.com/the-utah-statement-reviving-antimonopoly-traditions-for-the-era-of-big-tech-e6be198012d7.

[15] For example, in a 2020 law review article Chairwoman Khan co-authored with former FTC Commissioner Rohit Chopra, she opined that noncompetes "deter workers from switching employers, weakening workers' credible threat of exit, and diminishing their bargaining power" and that "[b]y reducing the set of employment options available to workers, employers can suppress wages." Rohit Chopra and Lina M. Khan, The Case for "Unfair Methods of Competition" Rulemaking, 87 U. Chi. L. Rev. 357, 373 (March 5, 2020). She also incorrectly posits that noncompete litigation is "effectively nonexistent" because "[e]mployers now frequently include in employment contracts forced arbitration clauses and class action waivers, provisions that prevent workers from banding together to bring a case in court. Any challenges must be pursued in isolation and through a private arbitrator, whose proceedings lie entirely outside the common law system." Id. Chairwoman Khan previously served as legal director at the Open Markets Institute, which petitioned the FTC in 2019 to ban noncompetes. See Petition for Rulemaking to Prohibit Worker Non-Compete Clauses (March 20, 2019), available at: https://aboutblaw.com/YkQ.

Indeed, at another public workshop the FTC held jointly with the Department of Justice on December 6-7, 2021, titled "Making Competition Work: Promoting Competition in Labor Markets," Chairwoman Khan noted that "asymmetric relationships [between employer and employee] can enable firms to impose take it or leave it contract terms, including for example, non-compete clauses" and outlined specific agency goals, including "scrutinizing whether certain terms in employment contracts, particularly in take it or leave it contracts may violate the law," ultimately concluding that she is "committed to considering the commission's full range of tools, including enforcement and rulemaking."
See https://www.ftc.gov/system/files/documents/public_events/1597830/ftc-doj_day_1_december_6_2021.pdf AND
https://www.ftc.gov/system/files/ftc_gov/pdf/2110187GPMExpressKhanStatement.pdf.

And just last month, in a formal statement issued in connection with the FTC's settlement of an administrative complaint challenging an acquisition in the oil and gas industry based on the inclusion of noncompete provisions in the asset purchase agreement, Chairwoman Khan reiterated her belief that "[n]oncompete agreements affect millions of Americans every day" and that their inclusion in employment contracts causes "harm to employees."
See https://www.ftc.gov/system/ files/ftc_gov/pdf/ 2110187GPMExpressKhanStatement.pdf (June 10, 2022).

[16] West Virginia v. EPA, 2022 WL 2347278, at *22 (Gorsuch, J., concurring).

[17] In 2015, Senator Chris Murphy (D-CT) introduced the "Mobility and Opportunity for Vulnerable Employees Act" (the "MOVE Act"), which sought to prohibit the use of noncompetes with low wage employees. At around the same time, federal legislators filed two other bills, the "Limiting the Ability to Demand Detrimental Employment Restrictions Act," which was very similar to the MOVE Act, and the "Freedom for Workers to Seek Opportunity Act," which sought to ban the use of noncompetes for grocery store workers. Three years later, Senators Murphy, Elizabeth Warren (D-MA), and Ron Wyden (D-OR) introduced the "Workforce Mobility Act of 2018," which would have imposed a federal ban on the use of employee noncompetes. A companion bill was introduced in the House. Then, in January 2019, Senator Marco Rubio (R-FLA.) introduced the "Freedom to Compete Act," which would have prevented employers from entering into or enforcing noncompetes with employees who are nonexempt under the Fair Labor Standards Act. Later that year, Senators Murphy and Todd Young (R-IN) introduced the "Workforce Mobility Act," which would have banned post-employment noncompetes outright; Representatives Scott Peters (D-CA) and Mike Gallagher (R-WI) introduced a companion version of this bill in the House.

[18] The VA Hiring Enhancement Act (H.R.3401), which would void noncompetes for physicians going to work at VA hospitals; the Workforce Mobility Act of 2021 (one in the House (H.R.1367) and one in the Senate (S.483)), which would ban employee noncompetes; the Freedom To Compete Act (S.2375), which would ban noncompetes for workers who are not exempt under the Fair Labor Standards Act; the FTC Whistleblower Act of 2021 (H.R.6093), which would void noncompetes for whistleblowers to the FTC; and the Employment Freedom for All Act (H.R.5851), which would void noncompetes for employees fired for not complying with their employer's COVID-19 vaccine mandate.

[19] West Virginia v. EPA, 2022 WL 2347278, at *22 (Gorsuch, J., concurring).

[20] https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/. This Fact Sheet cites to a 2019 survey performed by the Economic Policy Institute, which concluded that "somewhere between 27.8% and 46.5% of private-sector workers are subject to noncompetes. Applying this share to today's private-sector workforce of 129.3 million means that somewhere between 36 million and 60 million private-sector workers are subject to noncompete agreements." Colvin, Alexander and Shierholz, Heidi, "Noncompete agreements: Ubiquitous, harmful to wages and to competition, and part of a growing trend of employers requiring workers to sign away their rights" (December 10, 2019), available at https://www.epi.org/publication/noncompete-agreements/.

[21] Starr, Evan and Prescott, J.J. and Bishara, Norman D, "Noncompetes in the U.S. Labor Force" (October 2020), Journal of Law and Economics 2021, available at SSRN: https://ssrn.com/abstract=2625714 or http://dx.doi.org/10.2139/ssrn.2625714. The Economic Policy Institutes attempts to explain the difference between the results from this study, conducted in 2014, and its own later study by suggesting that "the surveys were three years apart, suggesting that the use of noncompetes is growing" and noting that its study "was a survey of business establishments, while the earlier instrument was a survey of workers in the private sector or in a public health care system. While businesses know whether their workers are subject to noncompete agreements, workers may not know or remember they are covered by a noncompete, and thus may underreport being subject to them."

[22] https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Econimic_Effects_and_Policy_Implications_MAR2016.pdf. The White House issued a summary and analysis of the Treasury Department's report in May 2016 titled "Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses," promising that it would "identify key areas where implementation and enforcement of non-competes may present issues, examine promising practices in states, and identify the best approaches for policy reform. Researchers must continue to assess and identify promising policy reforms and the potential impact of those reforms including unintended consequences."
See https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_ final2.pdf.

[23] Id.

[24] https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf.

[25] See Bradford v. New York Times Co., 501 F.2d 51 (2nd Cir. 1974) (noting that "employee restraints have been known to the common law since the 15th century . . . and a state court or, in a diversity case, a federal court applying state law, provides the usual forum for protecting the employee and whatever interest the public may have"); Acordia of Ohio, L.L.C. v. Fishel, 133 Ohio St. 3d 356, 363 (2012) (Pfeifer, J., dissenting) ("Since the early 18th century . . . many jurisdictions have allowed noncompete agreements to be enforced when they are reasonable."); Hess v. Gebhard & Co., 808 A.2d 912, 918 n.2 (Pa. 2002) ("The earliest known American case involving a restrictive covenant is Pierce v. Fuller, 8 Mass. 223 (1811)."); see also Catherine L. Fisk, Catherine L. Fisk, Working Knowledge: Trade Secrets, Restrictive Covenants In Employment, And The Rise Of Corporate Intellectual Property, 1800–1920, 52 Hastings L.J. 441, 453–54 (2001).

[26] "Why Are Fast Food Workers Signing Noncompete Agreements?," New York Times (Sept. 29, 2021) (quoting Russell Beck). As noted above, moreover, even the Obama Administration acknowledged this in its 2016 "State Call to Action on Non-Compete Agreements": "State legislators across the country have drafted legislation and passed laws to curtail abusive and unfair agreements . . . . In the past year alone, at least a dozen states . . . considered reform, approximately half of which passed legislation that required changes to how non-compete agreements are regulated and two of which considered outright bans." See note 10. Likewise, in its summary and analysis of the 2016 Treasury Department report, the Obama Administration recognized that "[u]ltimately, most of the power is in the hands of State legislators and policymakers in their ability to adopt institutional reforms that promote the use and enforcement of non-competes in instances that appropriately weigh their costs and benefits and in ways that provide workers appropriate levels of transparency about their rights." See note. 21.

[27] Russell Beck, "Eight States with 39 Pending Noncompete Bills: Colorado is changing its noncompete law — again," Fair Competition Law (July 6, 2022), available at https://faircompetitionlaw.com/2022/07/06/8-states-with-39-pending-noncompete-bills-colorado-is-changing-its-noncompete-law-again/.

[28] The three states that ban noncompetes are California (1872), North Dakota (1865), and Oklahoma (1890). Michigan banned noncompetes in 1905, but later repealed the ban in 1985. See Matt Marx, Deborah Strumsky & Lee Fleming, Mobility, Skills, And The Michigan Noncompete Experiment, 55(6) Management Science 875-889, at 6 (April 15, 2009). Moreover, although the D.C. Council passed legislation in 2020 that would ban most employee noncompetes, the effective date of that law keeps being delayed and it is unclear

whether it will ever go into effect, at least in its current form (which, itself, contains exemptions for certain types of workers).

[29] Mass. Gen. Laws. Ch. 149, § 24L.

[30] Justice Gorsuch further warned that if Congress were permitted to delegate its legislative power to the executive branch rather than undertaking the difficult task of reaching a broad consensus through the legislative process, "little would remain to stop agencies from moving into areas where state authority has traditionally predominated. . . . That would be a particularly ironic outcome, given that so many States have robust nondelegation doctrines designed to ensure democratic accountability in their state lawmaking processes." West Virginia v. EPA, 2022 WL 2347278, at *20 (Gorsuch, J., concurring).

Similarly ironic is Chairwoman Khan – a prominent member of the so-called "New Brandeis" antitrust movement – seeking to unilaterally remove this important issue from the domain of what Justice Brandeis himself described as laboratories of democracy in New State Ice Co. v. Liebmann, 285 U.S. 262 (1932), and placing it instead in the domain of unelected bureaucrats. Indeed, Justice Brandeis is quoted as having said after the Supreme Court unanimously ruled to gut large swaths of the New Deal under the nondelegation doctrine in A.L.A Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935): "This is the end of this business of centralization, and I want you to go back and tell the President that we're not going to let this government centralize everything. It's come to an end. As for your young men, you can call them together and tell them to get out of Washington – tell them to go home, back to the States. That is where they must do their work." Harry Hopkins, "Statement to Me by Thomas Corcoran Giving His Recollections of the Genesis of the Supreme Court Fight" (April 3, 1939). As progressive as he may have been, we cannot imagine that Justice Brandeis would be pleased with a legal movement using the imprimatur of his name to promote such a centralized, federal approach to an issue that traditionally has been the province of the states.

[31] West Virginia v. EPA, 2022 WL 2347278, at *24-25 (Gorsuch, J., concurring).

[32] West Virginia v. EPA, 2022 WL 2347278, at *24 (Gorsuch, J., concurring). Indeed, that the FTC has never before interpreted its authority under the FTC Act to regulate noncompetes is confirmed by the fact that one stated purpose of its January 9, 2020 public workshop was "to examine whether there is a sufficient legal basis . . . to promulgate a Commission Rule that would restrict the use of non-compete clauses in employer-employee employment contracts." (Emphasis added). Commissioner Phillips further confirmed this unremarkable fact in his public comments associated with that workshop. See note 4, supra.

[33] See note 25, supra.

[34] See notes 4 and 32, supra.

[35] FTC v. Shkreli, 2022 WL 135026, at *30 (S.D.N.Y. Jan. 14, 2022) (citing FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454-55 (1986)).

[36] Frackowiak v. Farmers Ins. Co., 411 F. Supp. 1309, 1318 (D. Kan. 1976) (citing Day Cos. v. Patat, 403 F.2d 792 (5th Cir. 1968); Alders v. AFA Corp. of Florida, 353 F. Supp. 654 (S.D.Fla.1973); Bradford v. New York Times Co., 501 F.2d 51 (2nd Cir. 1974)); see also, e.g., U.S. v. Empire Gas Corp., 537 F.2d 296, 307 (8th Cir. 1976); Perceptron, Inc. v. Sensor Adaptive Machs., Inc., 221 F.3d 913, 919 (6th Cir. 2000); Consultants & Designers,

Inc. v. Butler Serv. Grp., Inc., 720 F.2d 1553, 1560-1561 (11th Cir. 1983); Snap-On Tools Corp. v. FTC, 321 F.2d 825, 837 (7th Cir. 1963); Energex Enters., Inc. v. Anthony Doors, Inc., 250 F. Supp. 2d 1278, 1284 (D. Colo. 2003); Baker's Aid, a Div. of M. Raubvogel Co. v. Hussmann Foodservice Co., 730 F. Supp. 1209, 1216 (E.D.N.Y. 1990); Verson Wilkins Ltd.v. Allied Prods. Corp., 723 F. Supp. 1, 6 (N.D. Ill. 1989).

[37] Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 265 (7th Cir. 1981), cert. denied, 455 U.S. 921 (1982).

[38] West Virginia v. EPA, 2022 WL 2347278, at *24 (Gorsuch, J., concurring).