Stevens & Lee

White Paper

U.S. Supreme Court Appears Ready to Tackle a Major Separation of Powers Issue

This white paper discusses *FCC v. Consumers' Research*, a case now set for consideration by the U.S. Supreme Court, along with a review and analysis of the major impact it may have on how and when Congress may permissibly delegate regulatory authority to federal agencies and the implications for those agencies in the administration and operation of the federal government.

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On Nov. 22, 2024, the U.S. Supreme Court granted certiorari in a case that is expected to address one of the most hotly contested and politically charged issues in the current regulatory environment. The case, *Federal Communications Commission v. Consumers' Research*, (*FCC/Consumers' Research*) concerns, among other things, the extent to which Congress may constitutionally delegate authority to federal executive agencies to administer statutes.[1]

In case after case of late, litigants seeking to limit the powers of those agencies have asserted that the statutory authority under which they are operating was impermissibly delegated to them in violation of Article I, Section 1 of the Constitution. That Section provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States…." This in turn has opened the door to disputes as to whether, when and how Congress, in enacting a statute, may delegate authority to an executive agency to promulgate rules and regulations to carry out the statute's purposes without abdicating its legislative power.

This article is divided into five sections. Section I discusses the constitutionality of congressional delegations generally. Section II reviews the *FCC/Consumers' Research* case and other recent cases involving delegation challenges. Section III outlines the questions to be presented to the Supreme Court in *FCC/Consumers' Research*. Section IV considers the potential impact of the case on Congress, the agencies and the courts. Section V discusses the major questions doctrine, the repeal of the *Chevron* doctrine and the ongoing challenges to the Federal Trade Commission's (FTC) noncompete ban as they relate indirectly to the delegation question.[2]

I. The Constitutionality of Delegations

The basic principles respecting the constitutionality of a congressional delegation as they have been interpreted and applied for some time were summarized by Justice Kagan writing a plurality opinion for the Supreme Court in *Gundy v. United States*, 588 U.S. 128 (2019). In *Gundy*, the Court rejected the petitioners' argument that there had been an unconstitutional delegation of authority by Congress to the Attorney General involving portions of the Sex Offender Registration and Notification Act. Per Justice Kagan:

- Article I, Section 1 of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."

[1] The case is being heard along with a companion case, *SHLB Coalition et. al. v. Consumers' Research*, *et. al.*

[2] Throughout this article, interior quotations, citations and references to the quoted material are sometimes not included.

- Based on that provision, Congress may not transfer to another branch powers which are strictly and exclusively legislative.
- Congress may, however, confer substantial discretion on executive agencies to implement and enforce the laws.
- A statutory delegation is constitutional provided Congress lays down by legislative act an "intelligible principle" to which the agency is directed to conform.[3]

As further explained by Justice Kagan, under prevailing law, these standards are not demanding. In fact, "[o]nly twice in this country's history (and that in a single year) have we found a delegation excessive — in each case because Congress had failed to articulate any policy or standard to confine discretion … We have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[4]

That said, there appears to be strong sentiment on the part of a number of justices (possibly a majority) in favor of assessing the constitutionality of delegation less "leniently" than has historically been the case. This will almost certainly prove relevant in the *FCC/Consumers' Research* case and may be of great significance across the entire federal agency landscape.

The changed approach to assessing the constitutionality of delegations could take the form of either eliminating the intelligible principle standard in favor of a different standard or retaining it but applying it such that, in either case, Article I and the vesting of legislative authority and responsibility in Congress are, in the view of these justices, properly respected.

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[3] The "intelligible principle" doctrine dates back to the Supreme Court's 1928 decision in *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928). There, the Court upheld Congress's empowering and directing the President to increase or decrease duties under the Tariff Act of 1922. Chief Justice Taft, delivering the opinion of the Court, wrote: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."

[4] Subsequent to the *J.W. Hampton* case, in two cases in the 1930s involving the National Industrial Recovery Act, the Court held unconstitutional delegations to the President of authority – in one case to prohibit certain forms of interstate transportation and in the other case to promulgate certain codes of fair conduct. The Court in each case concluded that Congress had provided the President with no policy or standards as to how to exercise the delegated authority, thus effectively granting the President unfettered power. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935;); *Panama Refining Co. v. Ryan*, 293 U.S. 338 (1935).

This is clearly reflected in Justice Gorsuch's dissent in *Gundy*, in which Justices Roberts and Thomas joined.[5] In his dissent, Justice Gorsuch writes: "[I]t would frustrate the system of government ordained by the Constitution if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals. Through the Constitution after all the people had vested the power to prescribe rules limiting their liberties in Congress alone. No one, not even Congress, had the right to alter that arrangement. As Chief Justice Marshall explained, Congress may not 'delegate . . . powers which are strictly and exclusively legislative.'" (citing *Wayman v. Southard*, 10 Wheat. 1, 42–43 (1825).[6]

For Justice Gorsuch, in assessing whether a particular delegation is permissible, there should be three guiding principles:

- First, provided Congress makes the policy decisions when regulating private conduct, it may authorize another branch to "fill up" the details.
- Second, once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding.
- Third, Congress may assign the executive and judicial branches certain non-legislative responsibilities.

Accordingly, Justice Gorsuch further writes: "[t]o determine whether a statute provides an intelligible principle we must ask: Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands."

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[5] Justice Alito, signaling agreement with the dissenters, wrote a concurring opinion concluding that he could not say that the statute at issue lacked an adequately discernible standard, but would reconsider that approach in an appropriate case. Justice Kavanaugh did not participate but, based on his concurring opinion in the Court's later denial of rehearing in the *Gundy* case and in a companion case, he also seems ready to reconsider the Court's current approach to the nondelegation issue.

[6] Along similar lines, in *Free Enterprise Fund v. PCAOB*, 561 U. S. 477 (2010), Justice Roberts, delivering the opinion of the Court, wrote: "Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people."

II. The *FCC/Consumers' Research* Case and Other Recent Cases Involving Delegation Challenges

FCC/Consumers' Research

The *FCC/Consumers' Research* case is an appeal from a decision of the Fifth Circuit Court of Appeals sitting en banc in which the court in a split decision (nine to seven) held unconstitutional Congress's delegating certain "taxing power" to the FCC, which then subdelegated it to a private corporation.[7]

Under the Telecommunications Act of 1996, Congress requires the FCC to operate universal service subsidy programs using mandatory contributions from telecommunications carriers to a Universal Services Fund (USF) designed to fund telecommunications subsidies to schools, libraries, health care facilities and low-income individuals. Pursuant to Section 254(b)(5) of the Act, the FCC is authorized to establish "specific, predictable, and sufficient . . . mechanisms to preserve and advance universal service." Pursuant to this grant of authority, the FCC levies "contributions" to the USF from telecommunications carriers, and distributes the monies raised "to people, entities, and projects to expand and advance telecommunications services." In implementing the programs, the FCC appointed a private company as the program's administrator, authorizing it to perform various administrative tasks.

While ultimately holding that it was the combination of the delegation to the FCC and subdelegation that violated Article I, the court also concluded that the mandatory contributions were taxes and that in delegating its taxing power to the FCC pursuant to Section 254 of the Act, Congress may have delegated its legislative power to tax without supplying any principle, "let alone an intelligible principle," to guide the FCC's discretion as it regulates telecommunications services.

The court identified two of Section 254's subsections that it considered relevant: Section 254(d) which provides that USF funding should be "sufficient . . . to preserve and advance universal service," and Section 254(b)(1), which suggests that telecommunications services "should be available at . . . affordable rates."

The court concluded that these statutory phrases supply no principle at all. According to the court, that funding should be sufficient to preserve and advance universal service is meaningful "only if the concept of universal service is sufficiently intelligible [and] it is not."

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[7] Consumers' Research, one of the petitioners in the case, is a nonprofit corporation that, among other things, has been bringing lawsuits in federal district courts throughout the U.S. challenging the authority of various executive agencies.

As for Section 254(b), it sets out aspirational principles rather than "inexorable statutory command[s]." It is apparent that "the only real constraint on [the] FCC's discretion to levy excise taxes on telecommunications carriers (and American consumers in turn) is that rates should remain affordable … [b]ut saying telecommunications services should remain affordable amounts to no guidance whatsoever."[8]

Also, according to the court, the breadth of Section 254's delegation is especially troublesome because the statute insulates the FCC from the principal tool Congress has to control the FCC's universal service decisions — the appropriations power.

In concluding that it had grave concerns about Section 254's constitutionality, it also distinguished the powers granted the FCC from the delegations that it identifies as having been upheld in other cases: delegations implicating special agency expertise; delegations implicating the power to impose criminal sentences; and delegations involving the power to impose conditions on the use of public property. "[U]nlike other congressional delegations implicating core legislative functions, § 254 is a hollow shell that Congress created for [the] FCC to fill — so amorphous that no reviewing court could ever possibly invalidate any FCC action taken in its name."

In contrast, the dissent concluded that the subsidy programs were not unconstitutional. In the view of the dissenters, Section 254 does provide an intelligible principle and the FCC maintains control over the administrator. According to the dissent, the context, purpose and history surrounding Section 254 evinces a clear intelligible principle delimiting agency discretion.

It does this because the statute provides far more detailed guidance than others that the court has upheld, i.e., by requiring the FCC to base policies for the preservation and advancement of universal service on six specific principles: by specifying the entities that must pay universal service contributions and the terms on which they must do so; by specifying the types of services that the FCC may fund; by identifying the beneficiaries that may receive subsidies and the ways in which the subsidies may be used; and by requiring universal service support to be sufficient to achieve the purposes of Section 254.

The Fifth Circuit's decision squarely conflicts with virtually identical cases involving Consumers' Research in two other circuits. *Consumers' Research v. FCC*, 67 F. 4th 773 (6th Cir. 2023) and *Consumers' Research v. FCC*, 88 F. 4th 917 (11th Cir. 2024).

[8] As discussed below, the Fifth Circuit in *Jarkesy v. SEC* had previously held a delegation to the Securities and Exchange Commission (SEC) unconstitutional because Congress had provided no guidance to the SEC as to how to exercise its authority to choose whether to bring an enforcement action within the agency or in an Article III court.

The Sixth Circuit held that Section 254 does not violate the nondelegation doctrine because the statute contains an intelligible principle, and there is no private nondelegation violation because the administrator is subordinate to the FCC and provides only "ministerial support."

The Eleventh Circuit similarly concluded that there are no unconstitutional delegations under Section 254. In reaching its conclusion, the court recited the fact that a statutory delegation is constitutional provided that Congress lays down by legislative act an intelligible principle, and emphasized that the standards necessary to satisfy the nondelegation doctrine are not demanding. A delegation of legislative power will be constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it and the boundaries of this delegated authority. The delegation under Section 254 satisfied this standard.

The differing results in these cases reflects to some extent how different judges can disagree based on the particular facts as to whether Congress has done enough in a statute to supply an adequate principle or has in fact supplied no principle at all (recognizing that the law as it presently stands demands very little). It also reflects to some extent how differing judges consider and apply the intelligible principle doctrine altogether.

Other Recent Cases Involving Delegation Challenges

In addition to the *FCC/Consumers' Research* dispute, in recent years disputes have been litigated concerning the limits of permissible delegation involving various agencies other than the FCC. Notwithstanding each courts' stated application of the intelligible principle standard as historically applied, this litigation has nevertheless produced differing results. These cases include, among others:

- **Securities and Exchange Commission** (*Jarkesy v. Securities and Exchange Commission*, 34 F.4th 446, 459 (5th Cir. 2022)), affirmed by the Supreme Court on other grounds, 603 U.S. ___ (2024). (In this case, the Fifth Circuit concluded that Congress had unconstitutionally delegated legislative power to the SEC when it gave the SEC the unfettered authority to choose whether to bring enforcement actions in Article III courts or within the agency while saying "nothing at all indicating how the SEC should make that call in any given case.")
- **Consumer Financial Protection Bureau** (*Consumer Fin. Prot. Bureau v. Law Offices of Crystal Moroney, P.C.*, 63 F. 4th 174 (2nd Cir. 2023)). (In this case, the Second Circuit held that the Consumer Financial Protection Bureau's (CFPB) funding structure does not violate the nondelegation doctrine. According to the court, the Consumer Financial Protection Act (CFPA) under which it was created sets forth its purposes and lists five objectives and six primary functions for the CFPB and thus satisfies the lenient intelligible principle standard.)

- **Consumer Financial Protection Bureau** (*Community Financial Services Association of America v. Consumer Financial Protection Bureau* No. 21-50826 (5th Cir. 2022)). (While holding that the CFPB's "payday" lending rule is invalid because its funding structure violates the Appropriations Clause of the Constitution, the Fifth Circuit also held that the adoption of the rule by the CFPB pursuant to the provisions of the CFPA was the result of a lawful delegation by Congress to the CFPB. The court pointed to the fact that, in the act, Congress articulated its general policy preferences, established the CFPB as the agency to apply them and set boundaries — albeit broad ones — on the Bureau's rulemaking authority. The case was subsequently decided by the Supreme Court but only as to the Appropriations Clause issue with the Court reversing the Fifth Circuit (No. 22-448 May 16, 2024, request for rehearing denied Nov. 12, 2024).
- **Department of Labor** (*Mayfield v. U.S. Department of Labor*, 23-50724 (5th Cir. Sept. 11, 2024)). (The Fifth Circuit held that the Department of Labor did not exceed the authority delegated to it by Congress when it adopted a rule pertaining to certain exemptions from minimum wage and overtime protections and Congress's delegation of authority to issue the rule was not an unconstitutional delegation.)
- **U.S. Food and Drug Administration** (*Big Time Vapes, Inc. v. FDA*, 963 F.3d 436 (5th Cir. 2020)). (The court rejected the claim by a manufacturer of electronic nicotine delivery systems that Section 901(b) of the Family Smoking Prevention and Tobacco Control Act, which authorizes regulation of listed tobacco products and of "any other tobacco products that the Secretary of HHS by regulation deems to be subject to [the Act]," violates the nondelegation doctrine
- **Secretary of Interior, Bureau of Land Management** (*United States v. Pheasant* (U.S. District Court for the District of Nevada, No. 3:21-cr-24 (Apr. 26, 2023)). (The court concluded that Congress's delegation to the Secretary of the Interior of broad legislative authority under the Federal Land Management Policy Act to determine when a rule is necessary for the management, use and protection of public lands did not provide any guidance or restraint as to when the Secretary shall promulgate rules and, accordingly, constitutes an unconstitutional delegation.)

III. The Grant of Certiorari

In granting certiorari in *FCC/Consumers' Research* and with respect to the delegation issues, the Court requested that the parties brief and argue:

1) Whether Congress violated the nondelegation doctrine by authorizing the FCC to determine, within the limits set forth in Section 254, the amount that providers must contribute to the Fund;

2) Whether the FCC violated the nondelegation doctrine by using the administrator's financial projections in computing universal service contribution rates; and

3) Whether the combination of Congress's conferral of authority on the FCC and the FCC's delegation of administrative responsibilities to the administrator violated the nondelegation doctrine.[9]

IV. Implications for the Role and Authority of Administrative Agencies

As thus set for consideration, the *FCC/Consumers' Research* case clearly presents the possibility of the Court setting out more definitive and possibly new guidance as to how federal courts will treat delegation issues. This in turn may result in significant additional restrictions on the role and authority of many, if not most, federal agencies.

At this juncture, there appear to be a number of possible outcomes. These include, among others:

1. Affirming the Fifth Circuit's holding that the combination of the delegation to the FCC and its subdelegation to the administrator was constitutionally invalid because Congress, in delegating its legislative power to tax, had not supplied the FCC with any intelligible principle to guide its discretion as it regulates telecommunications services, applying the intelligible principle standard as it has historically been applied;
2. Again applying the intelligible principle standard as it has historically been applied, affirming the Fifth Circuit and holding that the delegation to the FCC of the power to tax was itself invalid (i.e., irrespective of there being a subdelegation);

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[9] In granting certiorari, the Court also requested that the parties brief and argue whether the case is moot in light of the challengers' failure to seek preliminary relief before the Fifth Circuit. If the case is disposed of on mootness grounds, the delegation questions will obviously remain unresolved.

3. Reversing the Fifth Circuit, adopting reasoning similar to that of the dissenters and concluding that Congress had supplied the FCC with an intelligible principle and the subdelegation to the administrator was merely ministerial;
4. Affirming the Fifth Circuit and holding that the combination of the delegation and subdelegation was constitutionally invalid, but applying the nondelegation doctrine as articulated by Justice Gorsuch in the *Gundy* case[10]
5. Affirming the Fifth Circuit based on there having been an unconstitutional delegation to the FCC (irrespective of there also having been a subdelegation), but applying the nondelegation doctrine as articulated by Justice Gorsuch in the *Gundy* case.

If the Court were to affirm or reverse as described in 1, 2 or 3 above, the intelligible principle standard as it has historically been applied would remain untouched. If, on the other hand, a nondelegation doctrine was adopted along the lines of that suggested by Justice Gorsuch in *Gundy*, the impact would be dramatic (although likely less so if the affirmance was based on there having been the combination of delegations).

While the current application of the intelligible principle standard results in the limited possibility of success in challenging delegations, under the nondelegation doctrine as articulated by Justice Gorsuch, the likelihood of success will increase. To withstand challenges and satisfy the applicable requirements, Congress, in delegating, will be required to satisfactorily make the policy judgments, prescribe the rules and set forth the facts that the agency must consider as well as the criteria against which to measure them. Only then can the agency be delegated authority to find the facts, apply them against the criteria laid out by Congress and fill in the details.

There are clearly difficulties inherent in this approach. For instance, it is often the case that Congress, having identified an area in which statutory intervention is required (sometimes on an as soon as possible basis), and while being capable of clearly articulating its legislative objectives, lacks the resources, expertise and overall capacity required to draft the legislation with the scope and specificity required to satisfy the nondelegation doctrine as described above.

The resulting inability to more broadly delegate under such circumstances may effectively impair Congress's ability to carry out its legislative function. In some instances, Congress may choose not to legislate at all and in other instances feel

[10] The Court could conceivably reverse the Fifth Circuit applying the nondelegation doctrine as articulated by Justice Gorsuch in the *Gundy* case but this is extremely unlikely.

compelled to draft narrower statutes, in either case failing to accomplish valid legislative objectives.

Also, while under the nondelegation doctrine as proposed by Justice Gorsuch, Congress can assign to the executive and judicial branches non-legislative responsibilities, the line between what is legislative and what is non-legislative may be unclear. In addition, it will almost certainly be the case that the line between policy-making and filling in the details will be a blurry line and fact-finding may bleed into policy-making and vice-versa.

In any case, all of this will need to be worked out and this will inevitably result in more court involvement over an extended period of time. This will shift more power and responsibility to the courts as the volume of litigation increases. It will also inevitably result in conflicting outcomes across the federal judiciary, which will in turn require more involvement by the Supreme Court.

The role of agencies will be limited and the role of the courts expanded and there will likely be some amount of confusion among the three branches as they adjust. There is also the question of what effect this may have on statutory delegations already in place.

V. Cases Outside of Delegation as a Prelude

While application of the intelligible principle doctrine has resulted in no successful challenges to legislative delegations at the Supreme Court level in many years, those delegations are already being constrained at least to some extent without the need to abandon the doctrine on account of the application of the "major questions" doctrine and the Court's recent reversal of the *Chevron* doctrine as discussed below.[11] At the same time, the delegation issue is very much a part of the litigation involving the validity of the FTC's ban on noncompete agreements.

The Major Questions Doctrine

The nondelegation doctrine is closely related to the major questions doctrine. Under the latter and as explained by the Supreme Court in *West Virginia v. EPA*, 597 U.S. 697 (2022), there are cases in which the history and breadth of the authority that an agency is asserting and the economic and political significance of that assertion "provide a reason to hesitate before concluding that Congress meant to confer such authority." These are cases involving major questions, and in such cases something more than a

[11] Delegations are also constrained at least in part by the application of basic statutory authority principles. To the extent a reviewing court strictly scrutinizes the claimed authority, the claim may fail and that may line up with the result if nondelegation principles were instead applied. (The overlap will not be perfect because there will obviously be instances in which Congress clearly granted authority, but the grant itself was invalid, applying nondelegation principles.)

merely plausible textual basis for an agency's action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.

In *West Virginia v. EPA*, 597 U.S. 697 (2022), the Court held that Congress did not grant the EPA, in the Clean Air Act, the authority to devise emissions caps based on the "generation shifting approach" the agency took in its Clean Power Plan. The question as to whether the claimed authority had been granted was a major question given its vast economic and political significance and the EPA's claim of authority emanating from the vague language of a long-extant, but rarely used, statute designed as a gap-filler was no clear delegation.

Similarly, in *National Federation of Independent Business v. OSHA*, 595 U.S 109 (2022), the Supreme Court, in a *per curiam* opinion, held that the vaccine mandate that had been imposed on most employers on a nationwide basis by the Occupational Safety and Health Administration (OSHA) was no "everyday exercise of federal power," but was instead a significant encroachment into the lives and health of a vast number of employees, i.e., it was effectively a major question.

The Court stated that it expected Congress to "speak clearly when authorizing an agency to exercise powers of vast economic and political significance." OSHA's mandate clearly qualified as an exercise of such authority and the act on which it was based did not plainly authorize the mandate.[12] According to the Court, the Occupational Safety and Health Act empowered OSHA to establish workplace safety standards, not broad public health safety standards.

Justice Gorsuch wrote a concurring opinion in which he explained the relationship between the nondelegation doctrine and the major questions doctrine and perhaps signaled how the Court may ultimately either apply the intelligible principle standard differently than it has in the past or instead apply a different test in assessing the constitutionality of congressional delegations. He wrote:

> Why does the major questions doctrine matter? It ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives. If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress.

[12] Justices Kagan, Breyer and Sotomayer dissented.

> In this respect, the major questions doctrine is closely related to what is sometimes called the nondelegation doctrine.
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> ….
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> The nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials.
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> ….
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> Whichever the doctrine, the point is the same. Both serve to prevent government by bureaucracy supplanting government by the people. … And both hold their lessons for today's case. On the one hand, OSHA claims the power to issue a nationwide mandate on a major question but cannot trace its authority to do so to any clear congressional mandate. On the other hand, if the statutory subsection the agency cites really did endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority.

The Reversal of the *Chevron* Doctrine

Another recent development relating to agency authority follows from the Supreme Court's decision last term in *Loper Bright Enterprises v. Raimondo* (No. 22-451) (June 28, 2024).

There, the Court reversed the *Chevron* doctrine pursuant to which courts were required to defer to an agency's interpretation of what Congress intended in connection with a particular statute.

Post-*Loper*, even if there is statutory authority for a rule or regulation, even if the delegation to the agency is permissible, and even if the major questions doctrine does not prevent the agency from acting, a court, in adjudicating a dispute concerning whether the agency properly interpreted congressional intent in promulgating the rule or regulation, is no longer required to defer to the agency's interpretation. The practical effect is that this serves as an additional constraint on agency authority, in this case by placing the validity of the agency's action in the hands of an Article III court.

The FTC's Noncompete Ban as a Laboratory for Examining Delegation and Related Challenges to Agency Action

The constitutionality of congressional delegations as before the Court in *FCC/Consumers' Research* is very much a part of the pending challenges to the FTC's rule banning noncompetes (Rule), which was scheduled to take effect Sept. 4, 2024, but is now barred by a nationwide injunction.

As has been extensively reported, in *Ryan LLC et.al. v. Federal Trade Commission,* No. 3:24-CV-00986-E, 2024 WL 3879954 (N.D. Tx. Aug. 20, 2024), Judge Ada M. Brown in the U.S. District Court for the Northern District of Texas granted summary judgment in favor of Ryan, LLC, a tax services firm, along with certain intervenors, and issued the injunction. (The FTC subsequently appealed the decision to the Fifth Circuit.)

In *Properties of the Villages, Inc. v. FTC*, No. 5:24-cv-000316-TJC-PRL, 2024 WL 3870380 (M.D. Fl. Aug. 15, 2024), a district court judge in the Middle District of Florida issued a preliminary injunction prohibiting the FTC from enforcing the Rule as to the named plaintiff. (The FTC has filed an appeal to the Eleventh Circuit.)[13]

In each of these cases, one of the principal arguments advanced by the petitioners in challenging the constitutionality of the Rule is that, even if the FTC had statutory authority to issue the Rule under Sections 5 and 6(g) of the Federal Trade Commission Act, the delegation of that authority to the agency was an impermissible delegation under Article I.[14]

While the ultimate fate of the Rule may no longer be in the hands of the courts, it being likely that with anticipated changes in the composition of the FTC following the presidential election, the FTC will drop its pending appeals and withdraw the Rule,[15] nevertheless, the constitutionality of congressional delegations that is both at the heart of the *FCC/Consumers' Research* case and an important part of the ongoing litigation

[13] There had been a third case, *ATS Tree Services, Inc. v. FTC*, No. 24-1743, 2024 WL 3511630 (E.D. Pa. Jul. 23, 2024), in which a district court judge in the Eastern District of Pennsylvania denied the request of ATS Services, a tree services company, for a preliminary injunction and a stay of the Rule's effective date. ATS petitioned the court to temporarily stay the case because the relief it was seeking — setting aside the Rule — had already been ordered on a nationwide basis by the court in *Ryan*. On September 11, the FTC petitioned the court to deny ATS's request for the stay. On Oct. 4, ATS filed a notice of voluntary dismissal.

[14] While the delegation issue was raised by the plaintiffs in the *Ryan* case, because the court granted the plaintiffs' request for summary judgment based on the absence of statutory authority for the promulgation of the Rule and on the Rule's being "arbitrary and capricious" and hence illegal under Section 706 of the Administrative Procedures Act, it did not go on to consider the question whether there had been an unconstitutional delegation. In *Properties of the Villages*, the court concluded that the question as to the validity of the Rule was a major question given its economic and political significance and that Congress had not "clearly and unambiguously" stated its intention to confer upon the FTC the power to issue the Rule.

[15] When the rule was adopted, it was adopted by a vote of three to two along party lines – with Chairperson Lina Khan and the two other Democrats on the Commission voting in favor of it and the two Republican Commissioners voting against it. Changes in the composition of the FTC following President-elect Trump taking office are expected.

with respect to the Rule will continue to be litigated in other cases involving other federal agencies and the scope of their regulatory authority.

To address these issues in greater detail, an addendum to this article provides a detailed review of the pending cases challenging the validity of the Rule along with an analysis and assessment of the critical issues that would determine its fate if a reconstituted FTC does not drop the cases. In this way, it serves as a vehicle for a more detailed analysis of both the delegation issue and various other issues that have been and will continue to be litigated with respect to the role, authority and structure of federal agencies, issues that include:

- Did Congress delegate statutory authority to an agency to promulgate the rule or regulation;
- If so, was that delegation constitutional;
- Did its promulgation involve a major question and, if so, can the agency point to clear congressional authorization for the authority it claims;
- Is the rule or regulation invalid because the agency's structure violates the Take Care Clause in Article II of the Constitution and the separation of powers; and
- Is the rule or regulation "arbitrary and capricious" such that under Section 706 of the Administrative Procedures Act, a reviewing court must hold it unlawful and set it aside?

Addendum to Supreme Court Appears Ready to Tackle a Major Separation of Powers Issue

This is an addendum to the article titled "Supreme Court Appears Ready to Tackle a Major Separations of Powers Issue." It discusses the pending cases challenging the validity of the Federal Trade Commission's (FTC or Commission) rule (Rule) banning most noncompete agreements, and uses those cases as a jumping off point for purposes of providing a review of the critical issues as they are being litigated in those cases and in other cases challenging the validity of other rules and regulations promulgated by other agencies across the entire executive agency landscape.

The article to which this is an addendum discusses the Supreme Court's recent grant of certiorari in *Federal Communications Commission v. Consumers' Research*. In that case, the Court appears likely to reconsider and possibly redefine the limits on Congressional delegation of authority to federal agencies, an issue that is an integral part of the pending challenges to the Rule.

Preface

The FTC issued the Rule on April 23, 2024, scheduled to take effect on Sept. 4. On Aug. 20, a federal district court judge issued a nationwide injunction blocking the Rule from taking effect. That injunction remains in place pending the appeal by the FTC to the Fifth Circuit Court of Appeals in that case and to the Eleventh Circuit in a related case.

The Rule was adopted by a three to two vote with the three Democratic Commissioners voting in favor and the two Republican Commissioners voting against it. With President-elect Trump taking office later this month and with his having recently named Commissioner Andrew Ferguson to replace Commissioner Lina Khan as Commission Chair and his naming Mark Meador to replace Chairperson Khan, the composition of the Commission will change once the nominees are confirmed, and it is very likely that the Commission will end its pending appeals and withdraw the Rule.

That said, even assuming the Rule is ultimately withdrawn and the appeals ended, the core statutory and constitutional issues that are involved in the cases, i.e., the presence or absence of statutory authority for an agency rule or regulation; the applicability of the "major questions" doctrine; the constitutionality of the applicable Congressional delegation; the constitutionality of the issuing agency's structure and operation; and the question whether promulgation of the rule or regulation was arbitrary and capricious, will continue to be front and center in other cases involving challenges to agency rules and regulations, some of which are already the subject of pending litigation.

Introduction

As has been widely reported, on Aug. 20, 2024, Judge Ada M. Brown in the U.S. District Court for the Northern District of Texas in *Ryan LLC et.al. v. Federal Trade Commission*, No. 3:24-CV-00986-E, 2024 WL 3879954 (N.D. Tx. Aug. 20, 2024) granted the plaintiffs'[16] request for summary judgment and enjoined the Rule from taking effect on a nationwide basis.[17] (Judge Brown had previously issued a preliminary injunction staying the Rule's taking effect.)

Judge Brown's decision was predicated on her concluding that the FTC lacked statutory authority to issue the Rule and that the Rule was "arbitrary and capricious" because it is "unreasonably overbroad without a reasonable explanation" and therefore constitutes unlawful agency action which must be set aside under the Administrative Procedure Act (APA).

The FTC appealed the decision to the Fifth Circuit on Oct. 18. In the meantime, and as also been widely reported, two other cases involving challenges to the legality of the Rule have been decided by federal district courts in other jurisdictions.

In one of these, *Properties of the Villages, Inc. v. FTC*, No. 5:24-cv-000316-TJC-PRL, 2024 WL 3870380 (M.D. Fl. Aug. 15, 2024), a district court judge in the Middle District of Florida issued a preliminary injunction prohibiting the FTC from enforcing the Rule as to the named plaintiff, Properties of the Villages, Inc. On Sept. 24, the FTC filed an appeal to the Eleventh Circuit.

In the other, *ATS Tree Services, Inc. v. FTC*, No. 24-1743, 2024 WL 3511630 (E.D. Pa. Jul. 23, 2024), a district court judge in the Eastern District of Pennsylvania denied the request of ATS Services, a tree services company, for a preliminary injunction and a stay of the Rule's effective date. On Sept. 6, ATS petitioned the court to temporarily stay the case because the relief it is seeking — setting aside the Rule — has already been ordered on a nationwide basis by the district court in *Ryan*. On Sept. 11, the FTC

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[16] The plaintiffs are Ryan LLC, a tax services firm, and as intervenors, the Chamber of Commerce of the United States of America, Business Roundtable, Texas Association of Business and Longview Chamber of Commerce.

[17] The ban on noncompetes as set forth in the Rule includes very limited exceptions. Among others, these pertain to certain noncompete agreements entered into as part of a bona fide sale of a business, noncompete agreements where a cause of action related to the agreement accrued prior to the effective date of the Rule, and noncompete agreements for certain senior executives that were in place as of the effective date. The Rule would also not apply to corporations over which the FTC lacks jurisdiction including, for example, entities that are not organized to carry on business for their own profit or that of their members.

petitioned the court to deny ATS's request for the stay. On Oct. 4, ATS filed a notice of voluntary dismissal.

Given that the *Ryan* and *Properties Villages* cases are now on appeal in different federal districts, and while again recognizing that the cases may not go forward, it is worthwhile considering in depth the critical issues involved and the reasoning that undergirds them, especially since the issues themselves will survive the outcome of the cases and be of importance in other cases involving different agencies and different rules and regulations.

This article is broken into three parts: first, some background information; then a summary of the principal substantive issues that are involved in these cases; and finally, a detailed review of how those issues have been handled by the courts both in the cases involving the Rule and in cases involving different regulatory agencies and different rules and regulations. Notably, this includes the *FCC v. Consumers' Research* case, which involves the constitutionality of rulemaking authority granted to the Federal Communications (FCC) under the Telecommunications Act of 1996, which, as discussed in the article to which this addendum is a part, has now been taken up by the Supreme Court.

I. Background

At the outset, it is important to bear in mind that in each of the three cases challenging the Rule, the plaintiffs were seeking a preliminary injunction to stop the Rule from taking effect. Accordingly, each court's consideration as to the substantive validity of the Rule must be seen through the prism of the rules that govern the issuance of an injunction.[18]

These rules require that the party seeking the injunction establish that: (i) it has a substantial likelihood of succeeding on the merits; (ii) it will suffer irreparable harm unless the injunction is granted; (iii) the harm from the threatened injury outweighs the harm the injunction would cause the opposing party; and (iv) the injunction would not be adverse to the public interest.[19]

In initially granting the plaintiffs' request for a preliminary injunction in the *Ryan* case, the court concluded that there was a substantial likelihood that they would succeed on the merits and success on the merits was confirmed when the court granted the plaintiffs' motion for summary judgment.

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[18] The same can be said as to most, if not all, of the other cases discussed in this article.

[19] With regard to the substantive issues decided in these cases, what the courts were essentially deciding was whether the party seeking the injunction and challenging the applicable rule or regulation had established that it had a substantial likelihood of succeeding on the merits.

In denying the request for an injunction in *ATS Services*, the court concluded that there was not a substantial likelihood of ATS Services succeeding on the merits.

In granting the request for an injunction in *Properties Villages*, the court concluded that there was a substantial likelihood that Properties Villages would succeed on the merits and meet the other requirements for an injunction.

The focus here is only on the substantive question as to the validity of the Rule (and the applicable rule or regulation in the other cases discussed). The article does not discuss the issues relating to irreparable harm and adversity to the public interest as they relate solely to an injunction.[20]

II. The Substantive Issues

In each of the three cases, as well as in the other cases discussed here, the challenges to the applicable rule or regulation are generally based on Section 706 of the APA, which provides in part that a reviewing court "shall hold unlawful and set aside" agency action found to be, among other things, arbitrary, capricious or otherwise not in accordance with law, contrary to constitutional right and power, or in excess of statutory authority.

The most significant substantive issues in the three cases are the following:

- Does the FTC have statutory authority to issue the Rule under the Federal Trade Commission Act (Act)? More specifically, does Section 6(g) of the Act authorize the FTC to issue substantive rules under Section 5 of the Act or is its rulemaking authority limited to procedural rules relating to adjudications of unfair methods of competition?

- Even if statutory authority has been granted at least in certain circumstances, is the question as to the FTC's power to issue the Rule a "major question" as that term was recently articulated by the Supreme Court in *West Virginia v. EPA,* 597 U.S. 697 (2022), and, if so, can the FTC point to clear congressional authorization for the authority it claims as is required in the case of a major question?

- Assuming the FTC has statutory authority to issue a substantive rule such as the Rule, did Congress's delegation of that authority to the FTC constitute an

[20] Throughout the article, interior quotations and references to the quoted material are generally not included.

unconstitutional delegation of legislative power to an administrative agency under Article I of the Constitution?

- Again, assuming such a delegation is permitted, is the Rule invalid because the FTC's structure violates the "Take Care" clause in Article II of the Constitution? While Article II places all executive authority in the President, the FTC's administrative law judges (ALJs) cannot be removed by the Commission except for good cause established and determined by the Merit Systems Protection Board (MSPB) whose members can only be removed by the President for good cause, resulting in the ALJs being insulated from presidential removal authority ("dual-layer" protection).

- Is the Rule arbitrary and capricious such that under Section 706 of the APA, a reviewing court must hold it unlawful and set it aside?[21]

Does the Agency Have the Statutory Authority to Promulgate the Rule?

In each of the three cases, the FTC asserts that it has statutory authority to issue substantive rules such as the Rule pursuant to Section 6(g) of the Act. Section 6(g) grants the FTC the power "to classify corporations" and, subject to limited exceptions, "to make rules and regulations" for the purpose of carrying out the provisions relating to unfair methods of competition (sometimes referred to as UMCs) and unfair or deceptive acts or practices (sometimes referred to as UDAPs). In each case, the plaintiffs assert that there is no statutory authority.

In Support of Statutory Authority as to the FTC and Rule

The FTC's argument in support of statutory authority proceeds as follows:

- The Act's plain text confers authority on the Commission to issue legislative rules defining and proscribing unfair methods of competition, including the Rule.

- Under Section 5 of the Act, titled "Unfair methods of competition unlawful; prevention by Commission," the FTC is empowered and directed to prevent persons, partnerships or corporations, with certain specified exceptions, from using UMCs and UDAPs in or affecting commerce.

[21] In some of the cases, the plaintiffs also separately challenge the validity of the Rule based on the fact that it is retroactive and that it bans all noncompetes instead of considering them on a case-by-case basis.

- Section 6 is titled "Additional Powers of Commission" and provides the FTC with additional mechanisms, including investigatory and regulatory powers to effectuate its mandate, specifically including the power under Section 6(g) to make rules and regulations.

- The plain meaning of that express grant of rulemaking authority is clear: the Commission is authorized to issue "rules and regulations" to carry out Section 5(a)'s directive, i.e., to "prevent" the use of UMCs – an inherently forward-looking directive requiring the FTC to take action to avoid or avert a future occurrence in addition to remediating or stopping past harm.

- The FTC has utilized its Section 6(g) authority on 26 occasions to promulgate substantive (legislative) rules regarding Section 5 violations, as to both UMCs and UDAPs. These included, among many others: the rule declaring it a UMC and a UDAP to mail unsolicited credit cards; the rule declaring it a UDAP to fail to disclose certain health warnings in cigarette advertising and on cigarette packaging; and rule declaring it a UMC and a UDAP to fail to disclose the minimum octane number on gasoline pumps.

- The D.C. Circuit Court of Appeals held that the Commission was empowered to issue substantive rules under Section 6(g) in *National Petroleum Refiners, Ass'n v. FTC*, 482 F.2d 672, 673 (D.C. Cir. 1973).

- The FTC's power to issue substantive rules was further confirmed via the 1975 Magnuson-Moss Act in which Congress made certain changes in the rules pertaining to UDAPs and again in the FTC Improvements Act of 1980.

In Opposition to There Being Statutory Authority as to the FTC and the Rule

In opposition, the plaintiffs in the *Ryan* and *Properties Villages* cases argue (and argued in the *ATS Services* case) that the text, structure and history of the Act all confirm that Section 6(g) does not provide the broad authority the FTC claims in issuing substantive rules. In summary, their argument proceeds as follows:

- The FTC has historically enforced the Act's prohibition on unfair methods of competition through case-by-case adjudication.

- Section 6 of the Act describes "[a]dditional powers of the Commission" that generally relate to its investigative authority and also grant it authority to conduct certain ministerial functions.

- Viewing the statute as a whole, the location of the alleged substantive rulemaking authority is suspect. First, the initial part of Section 6(g) merely vests the FTC with the power to "[f]rom time to time classify corporations;" the alleged substantive rulemaking power is the latter portion of that section.
- If the FTC is correct in its interpretation, then Congress did not choose to place such substantial power in a primary, independent place.
- Section 6(g) has been part of the Act since 1914, but aside from the brief experimentation with consumer protection rulemaking in the 1960s and 1970s, the FTC has not invoked that provision to issue substantive rules proscribing unfair methods of competition.
- No provision in the Magnuson-Moss Act supports the FTC's arguments.
- As to the *National Petroleum* case, it is a single case decided by the D.C. Circuit Court of Appeals 50 years ago and the interpretive method used by the court would not be used by the Supreme Court today.

In granting summary judgment and issuing the nationwide injunction, the court in *Ryan* accepted the arguments made by the plaintiffs as to the absence of statutory authority.

In denying the plaintiff's request for a preliminary injunction in *ATS Services*, the district court did the opposite accepting the FTC's argument that there was adequate statutory authority.

The district court in *Properties Villages* did something in-between. It acknowledged that the FTC does have substantive rulemaking authority in some instances, but whether that authority extends to the promulgation of the Rule constitutes a "major question" that must be answered via application of the test articulated by the Supreme Court in *West Virginia v. EPA*.[22] Applying that test (as discussed below), the court concluded that there was no statutory authority.

[22] In *West Virginia v. EPA*, 597 U.S. 697 (2022), the Court held that Congress did not grant the Environmental Protection Agency (EPA) in the Clean Air Act the authority to devise emissions caps based on the "generation shifting approach" the agency took in its Clean Power Plan. The question as to whether the claimed authority had been granted was a major question given its vast economic and political significance and EPA's claim of authority emanating from the vague language of a long-extant, but rarely used, statute designed as a gap-filler was no clear delegation.

The Statutory Authority Issue Involving Other Agencies and Other Statutes

Aside from the FTC and the Rule, disputes as to statutory authority have regularly been, and will continue to be, litigated in cases involving other agencies and other statutes.

By way of example, in *Alabama Association of Realtors, et. al. v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021), the Supreme Court ruled that Centers for Disease Control and Prevention (CDC) had exceeded its statutory authority when it imposed a nationwide moratorium on evictions of tenants who live in a county that was experiencing substantial or high levels of COVID-19 transmission and who make certain declarations of financial need.

In its per curiam opinion, the Court states: "It would be one thing if Congress had specifically authorized the action that the CDC has taken. But that has not happened. Instead, the CDC has imposed a nationwide moratorium on evictions in reliance on a decades-old statute that authorizes it to implement measures like fumigation and pest extermination. It strains credulity to believe that this statute grants the CDC the sweeping authority that it asserts."

Another recent example is the Fifth Circuit's decision in *National Association of Private Funds Managers, et al. v. Securities and Exchange Commission*, No. 23-60471 (5th Cir. 2024). There the court held that the Securities and Exchange Commission (SEC) had exceeded the authority granted it by Congress when it promulgated a rule under the Dodd-Frank Law and the Investor Advisors Act that imposed new disclosure requirements on private fund advisors and restricted certain of their activities.

The petitioners argued that the SEC's authority extended only to retail customers and not to private funds. The SEC argued otherwise on the basis of the fact that the broader term "investors" in a part of the statute otherwise describing obligations relating to "retail investors" manifested an intent on the part of Congress to permit the regulation of private funds. In agreeing with the petitioners and vacating the rule, the court stated that it was unlikely that Congress meant to switch to investors broadly in the middle of a provision otherwise devoted to retail investment.

In some respects, the court's reasoning in this case is analogous to what the district court in *Ryan* concluded in rejecting the FTC's argument that Congress had granted it authority to issue substantive rules via the language in Section 6(g) of the Act, which as previously explained, empowers it "[f]rom time to time [to] classify corporations and … to make rules and regulations for the purpose of carrying out the provisions of this subchapter."

Does the Validity of the Agency Action Involve a Major Question?

As explained by the Supreme Court in *West Virginia v. EPA*, there are extraordinary cases involving the authority of an agency to issue and enforce a rule that call for a different

approach to judicial review than would normally be the case. These are cases in which the history and breadth of the authority that the agency is asserting and the economic and political significance of that assertion provide a reason to hesitate before concluding that Congress meant to confer such authority. These cases involve major questions and something more than a merely plausible textual basis for the agency's action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.

The major questions issue was present in each of the three cases. In two of them the district court ruled on the issue. The issue has also been front and center in other cases involving agencies other than the FTC.

The Major Questions Issue and the Rule

Because the *Ryan* court granted the plaintiffs' request for summary judgment based on the absence of statutory authority and because the Rule was arbitrary and capricious (as explained below), it did not go on to consider whether a major question was involved.

The court in *ATS Services*, having held that there was statutory authority for the Rule, did go on to consider the major questions issue and concluded that the enforceability of the Rule did not involve a major question.

According to the court, the FTC has previously utilized its Section 6(g) rulemaking authority to promulgate substantive rules to prevent UMCs that had significant economic impact (see above examples given by the FTC). Therefore, this case is distinguishable from *West Virginia v. EPA* because in that case the EPA had only issued one prior rule. Also, prior courts had considered the question of substantive authority and ruled in favor of the FTC citing the *National Petroleum* case also discussed above.

The court in *Properties Villages* concluded the opposite. According to the court, the Rule involves a major question because it will affect a significant portion of the American economy based in part on the fact that:

- The FTC itself estimates that one-fifth of American workers, or approximately 30 million employees, are subject to a noncompete that would be affected by the Rule;
- The FTC estimates that employers will pay from $400 billion to $488 billion more in wages over 10 years under the Rule; and
- The FTC acknowledges that the cost of compliance in the aggregate will be in the billions of dollars.

The Rule, according to the court, would also be of extraordinary political significance because it regulates in an area that has previously been the domain of state law and implicates federalism concerns.

As to whether Congress stated its intention to confer power to issue the Rule "clearly and unambiguously," the court concluded, unlike the court in *ATS Services*, that there is in fact a lack of historical precedent for issuance of this type of rule. This coupled with the breadth of authority the FTC is claiming is "a telling indication that the final rule extends beyond the FTC's legitimate reach." This "new assertion of … expansive authority in the long-standing but relatively dormant Section 6(g) is further evidence that the final rule is not authorized."

In its opening brief filed on Nov. 4, 2024, in support of its appeal to the Eleventh Circuit in *Properties Villages*, the FTC disputes the fact that the validity of the Rule involves a major question.

According to the FTC, Section 6(g) of the Act makes clear that it has authority to promulgate legislative rules regarding unfair methods of competition—and the statutory text is not susceptible of the district court's construction permitting it to promulgate legislative rules that carry trivial, but not significant, effects.

Further, according to the Commission, while the Supreme Court has described the major questions doctrine as applying in those extraordinary circumstances where an agency has asserted authority of such unusual history, breadth and significance that there is a reason to hesitate before concluding that Congress meant to confer such authority, the doctrine is not implicated with respect to the Rule, where the Commission's assertion of authority falls squarely within the Commission's core expertise and mandate.

As to the assertion that the Rule has a relatively large economic effect, the FTC argues that: (i) it would be strange for Congress to have granted the Commission broad and significant authority but have limited its use to small and trivial ends; and (ii) it is of "no moment" that some states have previously regulated noncompete clauses more comprehensively than has the federal government. Of course, states will often regulate commercial activity, including unfair conduct, occurring within the State. But the Act reflects Congress's determination that such state-by-state regulation of commercial activity alone may be insufficient.

Major Questions Disputes Outside the FTC and the Rule

Outside of its application to the FTC and the Rule, the major questions issue has also been litigated involving other agencies under other statutes and will be before the Supreme Court this term.

Most recently, in *State of Texas v. Nuclear Regulatory Commission*, No. 21-60743 (Mar. 14, 2024), the major questions issue arose in a dispute involving the issuance by the Nuclear Regulatory Commission (NRC) of a license to a private company to store spent nuclear fuel away from the site of the reactor.

The Fifth Circuit first concluded that there was no statutory authority for the issuance of an off-site license. It then went on to conclude that the question whether the NRC has statutory authority to issue the license is a major question that "has been hotly politically contested for over a half century" and Congress has not provided a clear delegation of authority as is required.

The court noted that Congress itself has acknowledged that high-level radioactive waste and spent nuclear fuel have become major subjects of public concern. The court concluded that a decision of such magnitude and consequence rests with Congress or an agency acting pursuant to a clear delegation from Congress, and that there was no such clear delegation in this case. On Oct. 4, 2024, the Supreme Court granted certiorari to hear the case.

The major questions doctrine was also addressed by the Eleventh Circuit in a case involving a challenge to an executive order mandating federal contractor vaccine compliance. In *Georgia v. President of the United States*, 46 F.4th 1283 (11th Cir. 2022), the court struck down the order on what were effectively major questions grounds. Citing *West Virginia v. EPA*, the court concluded that the order's mandate had vast economic and political significance due to the "extreme economic burden" it imposed on parties who were required to comply with it and due to its major impact on the economy, and that Congress had not clearly authorized the President to issue a mandate this consequential.

Has There Been an Unconstitutional Delegation of Authority?

The question as to when and whether Congress has constitutionally delegated authority to an executive agency, including the power to promulgate rules and regulations, is discussed in detail in Parts I and II of the article to which this is an addendum. That discussion includes:

1. A review of the "intelligible principle" standard as it has historically been interpreted and applied by the Supreme Court and lower courts, and under which a statutory delegation will be found constitutional provided Congress lays down by legislative act an intelligible principle to which the agency is directed to conform, which has been relatively easy to satisfy:

2. A critique of that approach and a call for a more rigorous nondelegation doctrine that the proponents assert is more in line with the proper application of Article 1 (vesting all legislative power in Congress); and
3. A review of recent cases in which delegation challenges have been litigated, including in *FCC v. Consumers' Research*.

As to how the courts have handled the delegation issue in the three cases that have considered it with respect to the Rule:

Because the *Ryan* court granted the plaintiffs' request for summary judgment based on the absence of statutory authority and because the court held the Rule arbitrary and capricious, it did not go on to consider the question whether there had been an unconstitutional delegation.

Because the court in *Properties Villages* issued the injunction having concluded that the question as to the legality of the Rule was a major question and the FTC had not satisfied the requirement of clear congressional authorization, it perfunctorily treated the plaintiff's claim as to there being an unconstitutional delegation. The court acknowledged that the plaintiff's position was arguable, but then simply stated that the plaintiff had not demonstrated a substantial likelihood of success as a stand-alone argument.

The court in *ATS Services,* in denying the plaintiff's request for a preliminary injunction, did address and reject the plaintiff's argument that Congress's delegation of authority to the FTC was unconstitutional.

Applying the analysis laid out in the plurality opinion in *Gundy*, the court stated that the nondelegation doctrine requires only that Congress articulate an intelligible principle to guide the agency and that the intelligible principle standard is not demanding. Without much further discussion and analysis, the court looking to Section 6(g) of the Act concluded that, in the context of a request for a preliminary injunction, the plaintiff had not demonstrated that it had a substantial likelihood of success on the merits.

Does the Agency's Structure Violate Article II of the Constitution?

As noted above, the FTC's administrative structure provides "dual-layer" insulation from presidential supervision for FTC ALJs. They cannot be removed by the Commission except for good cause established and determined by the MSPB whose members can only be removed by the President for good cause. The issue is whether that dual-layer protection so greatly insulates those judges from presidential supervision as to violate Article II of the Constitution. Article II, Section 1 vests all executive authority in the President, and Article II, Section 3 provides that the President "shall take Care that the Laws be faithfully executed."

This issue has been the subject of litigation at the appellate court level as to the FTC and as to other federal agencies, some with similar dual-layer structures and some with single-layer protection. It has not been addressed by the Supreme Court of late.[23] What lurks in the background is the Court's 1935 decision in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). *Humphrey's Executor* considered the question whether, in the case of the FTC, it was constitutionally permissible to restrict the President's authority to control executive officials by granting the President the power to remove such officials only for cause and not at will. The Court held it was constitutional because the FTC at that time was a multimember, nonpartisan commission appointed to staggered terms that was exercising "quasi-legislative" and "quasi-judicial" powers and not executive powers.

At present, the fate of *Humphrey's Executor* looks increasingly grim and the possibility of it being overruled looks increasingly likely. That said, in recently denying certiorari in *Consumers' Research; By Two v. Consumer Products Safety Commission*, 91 F.4th 342 (5th Cir. 2024)) (en banc review denied April 16, 2024) (cert. denied Oct. 21, 2024), a case involving the Consumer Products Safety Commission (CPSC), as discussed below, the Court appears not quite ready to directly address the issue.

In *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197 (2020), the Court did hold that the for-cause removal restriction applicable to the sole director of the Consumer Financial Protection Bureau (CFPB) was unconstitutional. In so doing, it distinguished the structure/operation of the CFPB from the structure/operation of the FTC as it existed in 1935 and which formed the basis for the Court's holding in *Humphrey's Executor*. Chief Justice Roberts, writing the majority opinion, explained that the CFPB director serves a five-year term that guarantees abrupt shifts in leadership and the loss of agency expertise. In addition, the director cannot be dismissed as a mere legislative or judicial aide. Rather, the director possesses significant administrative and enforcement authority, including the power to seek "daunting monetary penalties" against private parties in federal court — a "quintessentially executive power" not considered in *Humphrey's Executor*.

Justice Roberts also distinguished the CFPB from the independent counsel in *Morrison v. Olson*, 487 U.S. 654 (1988). In that case the Court upheld the for-cause removal restriction with respect to an independent counsel, who was an inferior officer who had

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[23] The Supreme Court in *Jarkesy v. Securities and Exchange Commission*, 603 U.S. ___ (2024) was given the opportunity to rule on this issue as it relates to the Securities and Exchange Commission whose administrative structure is similar to that of the FTC, but instead decided the case on Seventh Amendment grounds. It was also addressed by the petitioner in *Axon Enter., Inc. v. FTC*, 968 F.3d 1173 (9th Cir. 2021), a case that went to the Supreme Court but only on the question of whether parties seeking to challenge the FTC's structure could bring suit directly in federal court and not go through the FTC's administrative process.

been appointed to investigate and prosecute particular alleged crimes involving high-ranking government officials and who had limited duties and no policymaking or administrative authority.

Prior to *Seila*, the Court had considered the constitutionality of the structure of the Public Company Accounting Oversight Board (PCAOB) in *Free Enterprise Fund v. PCAOB*, 561 U. S. 477 (2010). The PCAOB was created under the Sarbanes-Oxley Act of 2002, which introduced tighter regulation of the accounting industry. It consists of five members appointed by the SEC and is charged with enforcing Sarbanes-Oxley, the securities laws, the SEC's rules, its own rules and professional accounting standards.

While the PCAOB is placed under the SEC's oversight, its individual members cannot be removed by the SEC at will, but only for good cause shown, and the SEC's Commissioners cannot themselves be removed by the President except for inefficiency, neglect of duty or malfeasance in office. The Court held that this dual-layer protection structure was unconstitutional by conferring wide-ranging executive power on Board members without subjecting them to presidential control and distinguished *Humphrey's Executor* because the FTC was performing a quasi-legislative and quasi-judicial function rather than a purely executive one. It distinguished *Morrison* because there was not dual-layer protection in that case and, while the independent counsel was performing an executive function and was subject only to good cause removal, this was constitutionally acceptable because the independent counsel statute gave the Attorney General, an officer directly responsible to the President and through whom the President could act, "several means of supervising or controlling" the independent counsel.

By deciding the cases this way, the Court in *Seila* and *Free Enterprise* left *Humphrey's Executor* untouched while leaving open the possibility that it will be overruled in a later case based on the fact that the present FTC wields executive power and in many ways does not resemble the FTC considered by the Court in 1935. It should be noted that at least some of the justices were ready to overrule *Humphrey's Executor* in *Seila*, and the Court this term will be considering certain petitions in cases that will raise the question as to the continuing validity of *Humphrey's Executor*.[24]

At the appeals court level the constitutional question has recently been addressed as to the FTC by both the D.C. Circuit in *Meta Platforms, Inc. v. Federal Trade Commission*, No. 23-3562-RDM, 2024 WL 1121424 (D. D.C. Mar. 15, 2024) and by the Fifth Circuit in *Illumina, Inc. v. FTC*, No. 23-60167 (5th Cir. Dec. 15, 2023). In each case, the court

[24] In *Seila*, Justice Thomas (joined by Justice Gorsuch) concurring in part and dissenting in part wrote: "the foundation for *Humphrey's Executor* is not just shaky, it is nonexistent … [w]ith today's decision, the Court has repudiated almost every aspect of *Humphrey's Executor*. In a future case, I would repudiate what is left of this erroneous precedent."

rejected the claim that the FTC structure was unconstitutional explaining that *Humphrey's Executor* was still good law.

The constitutional issue has also been addressed at the appellate court level as to other federal agencies and with somewhat mixed results: as to the SEC in the *Jarkesy* case (along with the delegation and Seventh Amendment issues); and as to the Consumer Products Safety Commission by the Fifth Circuit in *Consumers' Research; By Two v. Consumer Products Safety Commission*; by the Tenth Circuit in *Leachco, Inc. v. Consumer Products Safety Commission*, No. 22-7060 (10th Cir. June 4, 2024) and by the U.S. District Court for the District of Massachusetts in *United States v. SunSetter Prods. LP*, No. 23-cv-10744-ADB, 2024 WL 1116062 (D. Mass. Mar. 14, 2024). Here, the courts have split as to the continuing impact of *Humphrey's Executor* and as to how the structure of the agencies in question compares to the FTC as it existed in 1935.

In *Jarkesy*, the Fifth Circuit held that the SEC's structure was unconstitutional because of the dual-layer removal restrictions, i.e., SEC ALJs are inferior officers; they perform substantial executive functions; they can only be removed by the SEC Commissioners if good cause is found by the MSPB; and SEC Commissioners and MSPB members can only be removed by the President for cause. And per the Supreme Court in the *Free Enterprise* case, the President must have adequate control over officers and how they carry out their functions. If principal officers cannot intervene in their inferior officers' actions except in rare cases, the President lacks the control necessary to ensure that the laws are faithfully executed.

In the *Consumers' Research; By Two* case, a Fifth Circuit panel, while in effect requesting that the Supreme Court overrule *Humphrey's Executor*, held that the CPSC was constitutionally structured notwithstanding that it is an independent agency whose members the President may remove only for cause. According to the court, "[a]lthough the Commission wields what we would today regard as substantial executive power, in every other respect it is structurally identical to the agency that the Supreme Court deemed constitutional in *Humphrey's*."

In *Leachco,* among the questions presented, was whether the for-cause restriction on the President's authority to remove the CPSC's Commissioners violated the separation of powers and whether the for-cause restriction on the Commissioners' ability to remove the agency's ALJs caused the CPSC's structure to be unconstitutional.[25] The Tenth Circuit held it did not, reasoning:

[25] Also before the court was the question whether, for purposes of preliminary-injunctive relief, can a separation-of-powers violation cause irreparable harm.

1. The exercise of some arguably executive functions does not undermine the constitutionality of tenure protections for officers of an expert, nonpartisan agency;

2. The CPSC is structured similarly to the FTC in *Humphrey's Executor* (multimember, staggered terms, nonpartisan composition); and

3. While the Supreme Court's reasoning in *Seila Law* did focus on the executive nature of powers given to the CFPB director, the Court in that case also emphasized that the CFPB's single-director structure was unique and perhaps suggested that the constitutional infirmity might have been cured had the CFPB's board been a multi-member board.

As to the petitioners' argument that the CPSC's ALJs can only be removed by the CPSC Commissioners for cause and that should be enough to hold the CPSC's structure unconstitutional under *Free Enterprise*, the court again held otherwise, explaining that the Supreme Court in *Free Enterprise* explicitly stated that its holding did not address the constitutionality of similar tenure protections for inferior officers who perform adjudicative functions, including ALJs.

In *SunSetter*, the district court held similarly to the courts in *Consumers' Research; By Two* and *Leachco* explaining that *Humphrey's Executor* remains binding and "continues to apply to any traditional independent agency headed by a multimember board ... like the CPSC."

Notwithstanding that the ultimate fate of *Humphrey's Executor* would be among the most important issues were the *Ryan* and *Properties Villages* cases to make it to the Supreme Court (which will almost certainly not be the case), the plaintiffs in *Ryan* did assert that the Rule should be invalidated on account of constitutional infirmity arising from the dual-layer protection. But the court did not ultimately address the issue because it granted summary judgment based on the absence of statutory authority and because the Rule was arbitrary and capricious.

The court in *Properties Villages* also did not address this issue because, according to the court, the plaintiffs' only constitutional claim was the one concerning nondelegation under Article I.

Similarly, in denying the plaintiff's request for an injunction in *ATS Services*, the court did not address the issue as it was not asserted by the plaintiff.

It should be noted that, in addition to the Article II issues with respect to the restrictions on the President's removal authority and the question as to the applicability of *Humphrey's Executor*, there may also be both due process issues, especially where, as

to the regulated party, the investigative and adjudicative functions are within a single agency,[26] and the Seventh Amendment right to a jury trial as was the case in *Jarkesy*.

Is the Rule or Regulation Arbitrary and Capricious and Therefore Unlawful?

Pursuant to Section 706 of the APA, a reviewing court must hold unlawful and set aside a rule if it is arbitrary and capricious.

Applying the "arbitrary and capricious" test, the courts have set aside rules and regulations on the following bases:

- Reliance on impermissible factors;
- No reasonable relationship to statutory purposes or requirements;
- Inadequate factual premises;
- Unsupported by any reasoning or based on seriously flawed reasoning;
- Failure to consider key aspects of the issue presented;
- Unexplained inconsistency with prior actions;
- Failure to consider alternative solutions;
- Failure to respond to relevant arguments or comments; or
- Disproportionate sanctions.

See, *A Guide to Judicial and Political Review of Federal Agencies* 1-257 (ABA, 2d ed. 2015) at 181–95.[27]

As to the Rule

The court in *Ryan* held that the Rule is arbitrary and capricious in that it is unreasonably overbroad without a reasonable explanation. According to the court, the FTC has offered no evidence to support its categorical ban on noncompete agreements, has

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[26] In addition to the petitioner's argument in the *Meta* case (discussed above) that the removal restrictions on the FTC's Commissioners and ALJs were unconstitutional, it also argued that its due process rights were violated because of the combination of investigative and adjudicative functions within a single agency, i.e., the FTC. The D.C. Circuit rejected this claim stating that under longstanding precedent, it is settled that an agency generally can constitutionally undertake both functions. See *Withrow v. Larkin*, 421 U.S. 35 (1975). Similarly, in the *Illumina* case (also discussed above), the petitioner made the same due process argument, and it was rejected by the Fifth Circuit, also citing *Withrow v. Larkin* as precedent.

[27] The Supreme Court considered the arbitrary and capricious standard in *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

failed to consider the positive benefits of noncompetes and has disregarded a substantial body of evidence supporting these agreements.

In addition, according to the court, the FTC failed to sufficiently address alternatives to the issuance of the Rule, in particular less disruptive alternatives that might allow the FTC to achieve its purported objectives at lower cost.

As for *ATS*, while it asserted in its complaint that the Rule was arbitrary and capricious, the court, in denying its request for an injunction, did not address the issue because ATS's motion for a stay of the effective date and issuance of an injunction apparently excluded that count.

Similarly, in *Properties Villages*, the plaintiff did not allege that the Rule is arbitrary and capricious and the court did not consider the issue.

Other Cases Involving the Arbitrary and Capricious Issue

The question whether an action is arbitrary and capricious and thus invalid has frequently arisen involving other agencies. A recent example: This past January in *State of Louisiana, et. al. v. U.S. Department of Energy* (No. 22-60146) (5th Cir. Jan. 8, 2024), the court held that the Department of Energy's issuance of a rule repealing prior rules relating to dishwasher and laundry machines was arbitrary and capricious. The court concluded that the Department had failed to consider various alternatives to the issuance of the repeal rule that were available. See also *Univ. of Tex. M.D. Anderson Cancer Cntr. v. HHS*, 985 F.3d 472, 475 (5th Cir. 2021) (court setting aside as arbitrary and capricious agency action premised on reasoning that fails to account for relevant factors or evinces a clear error of judgment).

III. Concluding Note

As can be seen from the above discussion, the question as to the validity of the Rule presents many of the most important and in many instances unresolved issues affecting congressional and presidential authority and the role of the federal courts, along with the power and authority of federal agencies and federalism concerns — all critical separation of powers issues.

Notwithstanding that the litigation with respect to the Rule will likely come to an end on account of the upcoming changes in the composition of the FTC, the core issues will continue to be litigated and many of them will ultimately be before the Supreme Court.

At the same time, there will undoubtedly be efforts on the part of the Trump administration to significantly alter the structure, operation and functionality of many if not most of the federal agencies, which will likely implicate various of the separation of

powers issues that are already center stage. This in turn may raise constitutional questions relating to the role and authority of Congress and importantly the role and authority of the federal courts, most notably the Supreme Court.

Accordingly, the promulgation of the Rule, the litigation with respect to the Rule and the likely demise of the Rule will only be the “tip of the iceberg” insofar as continued challenges to agency structure and authority are concerned.