

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION**

PROPERTIES OF THE VILLAGES,
INC.,

Plaintiff,

v.

Case No. 5:24-cv-316-TJC-PRL

FEDERAL TRADE COMMISSION,

Defendant.

PRELIMINARY INJUNCTION

Before the Court is Plaintiff's Motion for Stay of Effective Date and Preliminary Injunction. The Court conducted a hearing on August 13, 2024, the record of which is incorporated by reference. At the conclusion of the hearing, the Court announced its reasoning and decision on the record. The transcript of the Court's findings is attached to this Order. For the reasons stated therein,

It is hereby **ORDERED** that Plaintiff's Motion for Stay of Effective Date and Preliminary Injunction (Doc. 25) is **GRANTED** to the extent stated below.

It is further **ORDERED** that as of the date of this order, the Federal Trade Commission and its agents are **ENJOINED** from implementing or enforcing the Final Rule entitled "Non-Compete Clause Rule," 89 Fed. Reg.

38342 (May 7, 2024) against Plaintiff, Properties of the Villages, Inc., until further order of the Court. No bond is required.

DONE AND ORDERED in Jacksonville, Florida this 15th day of August, 2024.



Timothy J. Corrigan
TIMOTHY J. CORRIGAN
United States District Judge

Attachment

s.

Copies:

Counsel of record

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

PROPERTIES OF THE
VILLAGES, INC.,

Plaintiff,

vs.

FEDERAL TRADE
COMMISSION,

Defendant.

Jacksonville, Florida

Case No. 5:24-cv-316-TJC-PRL

August 14, 2024

2:02 p.m.

Courtroom No. 10D

EXCERPT OF MOTION HEARING
BEFORE THE HONORABLE TIMOTHY J. CORRIGAN
UNITED STATES DISTRICT JUDGE

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transcript produced by computer.)

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P R O C E E D I N G S

August 14, 2024

2:02 p.m.

* * * * *

(Recess from 3:55 p.m. to 4:05 p.m.; all parties present.)

COURT SECURITY OFFICER: All rise. This Honorable Court is now in session.

Please be seated.

THE COURT: So today I've heard argument on the plaintiff Properties of the Villages, Inc.'s motion for stay of effective date and preliminary injunction.

And in the interest of time, meaning that the rule that is the subject of the motion is scheduled to take effective three weeks, I think, from today, and in the interest of giving the parties a quick answer, as opposed to waiting for a written opinion, which as you all know takes substantially longer, and given the compressed time frames that the Court was dealing with in this case, I've decided to read my decision from the bench.

What that means, of course, is that my decision, which will be captured in the transcript, will not be as polished or scholarly or complete as a published decision, but it will give my reasoning and my decision so the parties can make whatever further decisions are necessary before the final rule is scheduled to take effect.

And I'll direct the parties to the transcript of the

1 hearing afterwards, and the court reporter can make those
2 arrangements, because they will capture the Court's ruling, and
3 also can be used for any appellate purposes.

4 And I will try to be deliberate in my reading. I
5 know there are some members of the press that are listening and
6 maybe trying to capture the ruling, and so I'll try to be as
7 deliberate as I can be.

8 On May 7th of 2024, the Federal Trade Commission
9 issued a rule banning nearly all existing and future
10 non-compete clauses, finding that non-competes are an unfair
11 method of competition.

12 And, of course, that's published at 89 Federal
13 Register 38342.

14 That rule is slated to take effect on September 4th
15 of 2024, three weeks from today.

16 The plaintiff, Properties of the Villages, Inc., a
17 real estate broker in The Villages whose agents are all subject
18 to non-compete clauses, filed their complaint on June 21st,
19 2024 bringing four counts under the Administrative Procedure
20 Act, 5, U.S.C., Section 706(2); the latter two counts also
21 allege violations of the federal Constitution.

22 In Count I, plaintiff alleges the FTC does not have
23 substantive rulemaking authority over unfair methods of
24 competition.

25 In Count II, plaintiff alleges that even if the FTC

1 has substantive rulemaking authority, the new non-compete rule
2 exceeds that authority.

3 In Count III, plaintiff alleges that even if the FTC
4 has authority to make this rule, it is impermissibly
5 retroactive.

6 In Count IV, plaintiff alleges the non-compete rule
7 violates the commerce clause.

8 I note that the complaint does not allege that the
9 final rule is arbitrary and capricious, as is frequently
10 litigated in APA cases.

11 The Court has federal question jurisdiction, venue is
12 proper in the Ocala Division, and plaintiff, who is subject to
13 the ruling it is challenging, has standing to bring these
14 claims.

15 On July 2nd, 2024, plaintiff filed a motion seeking
16 to preliminarily enjoin enforcement of the new rule against it,
17 and seeking a stay of the September 4 effective date. The FTC
18 responded, plaintiff replied, and I allowed numerous interested
19 parties to file amicus briefs.

20 In preparation for this hearing, I've read the
21 complaint, the parties' briefs on the motion for preliminary
22 injunction's and stay, all of the amicus briefs, the *Ryan* case
23 out of Texas, the *ATS* case out of Pennsylvania, pertinent
24 portions of the Federal Trade Commission Act, the FTC final
25 rule, parts of the record of the FTC's decision-making process,

1 the dissents authored by two of the five commissioners, and
2 more judicial decisions than I can count, particularly
3 decisions from the Eleventh Circuit and the United States
4 Supreme Court. And I've now heard helpful argument from
5 skilled lawyers.

6 The questions presented are important and close. In
7 the compressed time I've had, I've given this my best effort.
8 I'm somewhat comforted in knowing that my decision today is
9 likely not to be the end of it.

10 I'd like to start with the lens through which we're
11 focused today. Plaintiff is seeking a preliminary injunction
12 asking the Court to enjoin the FTC from enforcing its new
13 non-compete rule against it. The motion also seeks a stay of
14 the rule, set to go into effect on September 4th, 2024. The
15 standards for both the preliminary injunction and the stay are
16 essentially the same.

17 There's a Supreme Court case that says that.

18 I'm going to now announce the standard for
19 preliminary injunction in the Eleventh Circuit. It's
20 black-letter law in the Eleventh Circuit, so I'm not going to
21 bother to cite the cases, because it will just take too long.
22 But this is all, I think, black-letter law that can't really be
23 disputed.

24 In the Eleventh Circuit a preliminary injunction is
25 an "extraordinary remedy never awarded as of right."

1 "Its purpose is merely to preserve the relative
2 positions of the parties until a trial on the merits can be
3 held."

4 "A district court may grant a preliminary injunction
5 only if the moving party establishes that, No. 1, it has a
6 substantial likelihood of success on the merits; No. 2, it will
7 suffer irreparable injury unless the injunction is granted;
8 No. 3, the harm from the threatened injury outweighs the harm
9 the injunction would cause the opposing party; and the
10 injunction would not be adverse to the public interest."

11 When, as here, "the government is the opposing
12 party," "the third and fourth factors merge."

13 "The district court exercises substantial discretion
14 in weighing the four relevant factors to determine whether
15 preliminary injunctive relief is warranted." And a "failure to
16 show any of the four factors is fatal" to the request for a
17 preliminary injunction.

18 In the Eleventh Circuit, "a preliminary injunction is
19 an extraordinary and drastic remedy not to be granted unless
20 the movant clearly establishes the 'burden of persuasion' as to
21 each of the four prerequisites. The first factor, substantial
22 likelihood of success on the merits, is 'generally the most
23 important of the four factors.'"

24 To demonstrate a "substantial likelihood of success,"
25 a party need not show "certain" success, but it must be "likely

1 or probable." A party must do more than show that "its theory
2 of the case is substantial and not frivolous;" rather, it must
3 "convince the court that its theory is likely meritorious."

4 Relevant to this APA case, the Supreme Court in the
5 recent case of *Loper Bright Enterprises versus Raimondo*, 144
6 Supreme Court 2244, a 2024 case, very recent, the Supreme Court
7 has stated in overruling *Chevron* that "courts must exercise
8 their independent judgment in deciding whether an agency has
9 acted within its statutory authority, as the APA requires.
10 Careful attention to the judgment of the Executive Branch may
11 help inform that inquiry.

12 And while the court "may not defer to an agency
13 interpretation of the law simply because a statute is
14 ambiguous," "when a particular statute delegates authority to
15 an agency consistent with constitutional limits, courts must
16 respect the delegation, while ensuring that the agency acts
17 within it."

18 As to substantial likelihood of success on the
19 merits, plaintiff raises issues as to each of the four counts
20 of its complaint on its motion for preliminary injunction, but
21 I'll discuss the issues as a whole, as opposed to going by each
22 count.

23 Issue 1: Plaintiff contends that the FTC does not
24 have substantive rulemaking authority over methods of unfair
25 competition.

1 The FTC's rulemaking authority derives from 15,
2 U.S.C., Section 45, known as Section 5, and 15, U.S.C., Section
3 46, known as Section 6.

4 In Section 5, Congress "empowered and directed" the
5 FTC "to prevent" for-profit businesses "from using unfair
6 methods of competition in or affecting commerce and unfair or
7 deceptive acts or practices in or affecting commerce."

8 That's 15, U.S.C., Section 45(a)(2).

9 And in my recitation I may not always cite the
10 specific case page number or citation, but I'm going to do the
11 best I can, but I don't want to unduly lengthen the
12 presentation. I think it will be obvious to the reader where
13 I'm -- what I'm referencing.

14 Section 5 also include mechanisms for enforcement
15 actions brought by the FTC to stop a violation of this rule.

16 And that's 15, U.S.C., Section 45(b) through (m).

17 Section 6, titled "Additional powers of the
18 Commission," provides authority for the FTC to undertake
19 various investigations, require reports of various entities,
20 publish periodic information and reports, assist with
21 international investigations, and, in subsection (g), Congress
22 gave the FTC authority for "classification of corporations;
23 regulations" -- that's the title of it -- described as the
24 authority to "from time to time classify corporations and
25 except as provided in section 57a(a)(2) of this title," which

1 addresses rulemaking with respect to unfair or deceptive acts
2 or practices, "to make rules and regulations for the purpose of
3 carrying out this subchapter."

4 And that's 46(g) or Section 6(g). And the operative
5 language there, of course, is to make rules and regulations for
6 the purpose of carrying out the subchapter.

7 The FTC's position is that given its mission in
8 Section 5 to prevent businesses from using unfair methods of
9 competition, combined with its authority in Section 6(g) to
10 make rules and regulations, the FTC has the authority it needed
11 to pass the non-compete final rule.

12 Plaintiff raises several points as to why the text,
13 structure, and history of the statute fail to support this
14 authority, and without addressing -- and without addressing
15 every single one, I'll touch on the most significant.

16 Plaintiff argues that the placement of Rule 6
17 authority within a list of otherwise ministerial acts such as
18 recordkeeping and publications makes it implausible to believe
19 that Congress was granting the FTC the authority to make
20 substantive rules as opposed to procedural rules. This is the
21 argument about "hiding an elephant in a mousehole."

22 Plaintiff also contends that it defies logic to
23 believe Congress would convey such broad authority in the
24 single sentence of Section 6 while devoting 14 separate
25 subsections to the FTC's rulemaking authority with regard to

1 unfair or deceptive acts or practices.

2 Plaintiff argues that Section 6(g) does not have the
3 other indicia of being a substantive rule because it lacks
4 procedural requirements and penalty provisions such as those
5 that accompany the unfair or deceptive acts or practices
6 rulemaking.

7 It argues that if Section 6 granted the FTC such
8 broad rulemaking authority, Congress would not have needed to
9 pass the 1975 Amendments, which are known as the Magnuson Moss
10 Warranty-Federal Trade Commission Improvement Act amendments.
11 That sets out the rulemaking procedure for unfair or deceptive
12 acts or practices.

13 Plaintiff contends that the 1975 Amendment's
14 statement that it is not disturbing "any" other authority to
15 prescribe rules with regard to unfair methods of competition
16 did not convey substantive rulemaking authority in Section
17 6(g).

18 Plaintiff argues that aside from FTC rulemaking in
19 the 1960s and '70s, the FTC only has previously exercised its
20 authority on a case-by-case basis under Section 5, and that it
21 "strains credulity that the FTC had this immense power but
22 declined to exercise it for 50 years."

23 That's a quote from the plaintiff's motion.

24 All of these arguments have some force, but I do not
25 find that plaintiff presents a substantial likelihood of

1 success on the merits with any of them. Nothing in Section 6
2 says it is limiting the FTC's rulemaking to "procedural" rules.

3 The 1975 Amendment specifically says the FTC's
4 rulemaking with regard to unfair methods of competition is
5 undisturbed. And the 1980 Amendments recognize that amendments
6 to Commission rules could have annual effects on the national
7 economy in excess of \$100,000,000.

8 Read together, the various components of the statute
9 show Congress conferred at least some form of substantive
10 rulemaking authority to the FTC with regard to unfair methods
11 of competition.

12 Two circuit courts have looked at the FTC's
13 substantive rulemaking authority and have found it resides in
14 Section 6 as well.

15 In *National Petroleum v. FTC*, which I won't cite, the
16 D.C. Circuit held that "the plain language of
17 Section 6(g) . . . gives the Commission the authority to make
18 rules and regulations for the purpose of carrying out the
19 provisions Section 5" and that the Commission "is authorized to
20 promulgate rules defining the meaning of statutory standards of
21 illegality the Commission is empowered to prevent."

22 So too in the follow-on Seventh Circuit case *United*
23 *States versus JS&A*, the Seventh Circuit incorporated by
24 reference the *National Petroleum's* decision -- the *National*
25 *Petroleum's* "lengthy discussion of the Commission's rulemaking

1 authority under section 6(g)," and agreed with it with
2 approval.

3 And, as Judge Kelley Hodge stated in her recent *ATS*
4 decision, Congress gave the FTC authority to "prevent" unfair
5 methods of competition, not just go after someone who already
6 engaged in it, and that that authority resides in Section 6(g).

7 Issue 2: Plaintiff argues that the new non-compete
8 rule violates the commerce clause.

9 Plaintiff raises a few constitutional arguments,
10 claiming there's no interstate commerce connection, a
11 separation of powers concern, and the non-delegation doctrine.
12 While again these positions are arguable, I don't find that
13 plaintiff has demonstrated a substantial likelihood of success
14 as to any of them as stand-alone arguments.

15 Issue 3: Plaintiff argues the new non-compete rule
16 exceeds the FTC's authority.

17 Plaintiff also argues that not all non-competes are
18 unfair competition, pointing to the Sherman Act; that
19 non-competes are in the core domain of state regulation; and
20 challenges the rule as being improperly retroactive. I'm not
21 persuaded that the plaintiff can show a substantial likelihood
22 of success as to any of these arguments.

23 That leaves us with the plaintiff's position that
24 this new rule cannot stand because it is subject to the major
25 questions doctrine.

1 If I were to stop at this point, I would conclude
2 that the plaintiff, though making a plausible case, has not
3 shown a substantial likelihood of success on the merits. But
4 recent jurisprudence from the Supreme Court, in combination
5 with the breadth and the scope of the FTC's final rule,
6 requires me to consider the FTC's authority to issue the final
7 rule in the context of the major questions doctrine.

8 In discussing these issues, I have considered, among
9 other, these key cases: From the Supreme Court, *Biden v.*
10 *Nebraska*, 143 S.Ct. 2355, a 2023 case; *West Virginia v. EPA*,
11 597 U.S. 697, a 2022 case; *National Federation of Independent*
12 *Business v. Department of Labor*, 595 U.S. 109, a 2022 case;
13 *Alabama Association of Realtors v. Department of Health and*
14 *Human Services*, 594 U.S. 758, a 2021 case; *Utility Air*
15 *Regulatory Group v. EPA*, 573 U.S. 302, a 2014 case; *FDA v.*
16 *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, a 2000 case.

17 I've also considered some circuit authority from the
18 Tenth Circuit, *Bradford v. Department of Labor*, 101 F.4th 707,
19 10th Circuit, 2024; and from the Fourth Circuit, *North Carolina*
20 *Coastal Fisheries Reform Group v. Captain Gaston LLC*, 76 F.4th
21 291, a 4th Circuit 2023 case; and from my own circuit, the
22 Eleventh Circuit case of *West Virginia v. U.S. Department of*
23 *Treasury*, 59 F.4th 1124, 11th Circuit 2023, also touches on the
24 major questions doctrine.

25 I have also considered the rule itself and the

1 dissenting decisions of FTC Commissioners Ferguson and Holyoak,
2 who discuss the major questions implication of the final rule.
3 The amicus brief of the administrative law professors also
4 discusses the major questions doctrine, as do the parties in
5 their brief. So I've had a lot of exposure to the rule through
6 that reading.

7 Under the major questions doctrine, the Court assumes
8 that Section 6(g) of the FTC Act grants some type of
9 substantive rulemaking authority and that there's a plausible
10 textual basis for it. But the question is: Does it grant the
11 FTC the authority to issue this particular rule? Does the rule
12 implicate a major question?

13 The major questions doctrine is the name recently
14 given to a long-standing principle governing the interpretation
15 of statutes conferring power on administrative agencies. The
16 principle is this: When an agency claims to have the power to
17 issue rules of "extraordinary . . . economic and political
18 significance," it must "point to 'clear congressional
19 authorization' for the power it claims."

20 The doctrine assumes, as is true here, that the FTC's
21 reading of its authority under Section 6(g) is plausible, but
22 requires more, given the significant consequences of the rule.

23 As the cases discuss, as, for example, in the *North*
24 *Carolina Coastal Fisheries* case from the Fourth Circuit, the
25 major questions doctrine may be understood in either of two

1 ways; first, as a clear-statement rule enforcing the
2 constitutional prohibition on the delegation of legislative
3 authority, thereby protecting the separation of powers.

4 This rule does not forbid Congress from conferring on
5 agencies the power to make rules of vast economic and political
6 significance; rather, to protect the separation of powers, the
7 rule requires Congress to state its intention to confer that
8 power clearly and unambiguously.

9 Second, the doctrine may be understood as the
10 "context" against which a statutory delegation is enacted, and
11 therefore "a tool for discerning, not departing from, the
12 text's most natural interpretation."

13 And in talking about this I am borrowing language
14 from the cases that I told you that I had read. I'm not trying
15 to match them up particularly and cite them precisely in my
16 reading, but I am relying on language from the Supreme Court
17 cases.

18 Thus -- and so let me go back.

19 The doctrine may be understood as the "context"
20 against which a statutory delegation is enacted, and therefore
21 "a tool for discerning, not departing from, the text's most
22 natural interpretation. Thus, common sense, informed by
23 constitutional structure, tells us that Congress normally
24 intends to make major policy decisions itself, not leave those
25 decisions to agencies."

1 It tells us we "should 'typically greet' an agency's
2 claim to 'extravagant statutory power' with at least some
3 'measure of skepticism,'" or, as the cases say, to "hesitate"
4 before finding the agency action lawful.

5 To determine whether a major question is implicated,
6 the Supreme Court looks at a number of non-exhaustive factors;
7 first is whether the rule affects "a significant portion of the
8 American economy."

9 Here, the Commission estimates that one-fifth of
10 American workers, or approximately 30 million employees, are
11 subject to a non-compete that would be affected by this rule.

12 While the FTC has tried to estimate the economic
13 costs and benefits of the final rule, they are hard to measure
14 with precision.

15 But, by one metric, the FTC estimates that employers
16 will pay from 400 to 488 billion dollars more in wages over ten
17 years under the rule, which, of course, might be a good thing
18 for wage earners, but is a significant economic impact by
19 anyone's measure.

20 The Commission lists other multi-billion dollar
21 financial impacts as well.

22 And that is in a chart found as part of the rule at
23 89 Federal Register at 38470. And you heard in reference to
24 argument today some other numbers, potentially 2.7 percent
25 impact on business revenue. Also, the FTC has acknowledged

1 that the cost of compliance in the aggregate will be in the
2 billions of dollars.

3 So suffice it to say that the transfer of value from
4 employers to employees, from some competitors to other
5 competitors, from existing companies to new companies, and
6 other ancillary effects, will have a huge economic impact. And
7 there is likely other economic activity attributable to the
8 rule that the FTC has not even attempted to account for. Thus,
9 the final rule does affect a significant portion of the
10 American economy.

11 The Supreme Court also considers the political
12 significance of the rule and whether it regulates in an area
13 that has previously been the domain of state law, or implicates
14 federalism concerns. Neither the FTC nor any other federal
15 agency has previously tried to regulate non-competes in a
16 meaningful way. However, non-competes have been the subject of
17 substantial debate and regulation in the states, including some
18 states which have banned them altogether.

19 The final rule would preempt state laws regarding
20 non-competes to the extent that those state laws permitted them
21 in certain circumstances.

22 There is a long history of both common law of
23 contracts and increasingly a statutory overlay that regulates
24 non-competes at the state level. Non-competes have also been
25 the subject of political debate at the federal level with, as

1 we heard today, unsuccessful legislative efforts over the years
2 to regulate non-competes.

3 I even read one of the FTC's commissioners who was in
4 the majority on the final rule -- said that she was still
5 hopeful of and working toward a legislative enactment to
6 address non-competes.

7 The Tenth Circuit also observes that the major
8 question doctrine is more likely to be implicated when the
9 agency rule constitutes "an enormous and transformative
10 expansion of regulatory authority," as opposed to the
11 government's procurement authority. Of course, the final rule
12 here is a hugely consequential expansion of regulatory
13 authority.

14 Another major question factor which does favor the
15 FTC is that, to the extent that non-competes can be categorized
16 as "unfair method of competition," the final rule can be
17 considered as in the "wheelhouse" of the FTC under Section 5.
18 And the FTC Act does contemplate that large sums of money can
19 be implicated by FTC rulemaking, as I previously adverted to.

20 However, on balance, given the sweep and the breadth
21 of the final rule, including its application to existing
22 contracts, I find it substantially likely -- and the plaintiffs
23 have shown me this -- that it presents a major question as
24 defined by the Supreme Court.

25 The next issue then is has Congress, in Section 5 and

1 6(g), rendered a sufficiently clear expression of legislative
2 intent to authorize the final rule.

3 Section 5 is admittedly a broad grant of authority to
4 "prevent unfair methods of competition." It does not address
5 rulemaking at all, just case-by-case adjudication authority,
6 however.

7 Section 6(g) is part of a section that deals
8 primarily with reports and investigative powers. And even the
9 "rules and regulations" portion of Section 6(g) has to share
10 space with "classifying corporations," which is a more
11 ministerial function.

12 That 6(g) may not be the behemoth that the Commission
13 says it is is evidenced by the fact that the Commission has
14 never tried substantive rulemaking of this magnitude before
15 this and had never even brought non-compete enforcement actions
16 until it announced some consent decrees literally the day
17 before it announced its Notice of Proposed Rulemaking.

18 I think there was one back in 1963 that had something
19 to do with non-competes, so I want to add that caveat, but I
20 believe that was overturned by the Seventh Circuit. That's the
21 *Snap-on* case.

22 So while these eleventh-hour non-compete consent
23 decrees that the FTC talks about allows the Commission to say
24 that "non-competes have already been subject of FTC scrutiny
25 and enforcement actions, so subjecting them to rulemaking is a

1 more incremental, and thus less significant, step than it would
2 be for an agency to wade into an area not currently subject to
3 its enforcement authority," as the FTC says at page 38353 of
4 the rule, given the timing of these consent decrees a day
5 before the announcement of the proposed rulemaking, and the
6 lack of previous enforcement efforts, this argument by the FTC
7 carries little weight.

8 Indeed, "this lack of historical precedent, coupled
9 with the breath of authority the Commission now claims, is a
10 telling indication that the final rule extends beyond the
11 Commission's legitimate reach," citing the *National Federation*
12 *of Independent Business* cases -- case, 595 U.S., at 119-20.

13 Indeed, the FTC's new assertion of this expansive
14 authority in the long-standing but relatively dormant Section
15 6(g) is further evidence that the final rule is not authorized.

16 I have considered the *National Petroleum* case, as I
17 have said earlier, but wonder whether faced with the sweeping
18 nature of the final rule and the Supreme Court's recent major
19 questions jurisprudence, it would have ruled in the FTC's favor
20 in today's case.

21 I've also considered the *ATS* court's view that the
22 major questions doctrine "is not applicable."

23 I agree with the *ATS* court that the doctrine -- the
24 major questions doctrine is reserved for "extraordinary" cases
25 "in which the history and the breadth of the authority that the

1 agency has asserted, and the economic and political
2 significance of that assertion, provide a reason to hesitate
3 before concluding that Congress meant to confer such
4 authority."

5 So it has to be extraordinary. You can't -- you
6 can't have a major questions inquiry in every agency rulemaking
7 case or every agency action. And I recognize that. It does
8 have to be extraordinary.

9 And I further don't take issue with the *ATS* court's
10 finding that the non-compete rule deals with an issue of unfair
11 methods of competition so it operates within the FTC's "core
12 mandate." But I disagree with the *ATS* court that the
13 Commission has ever exercised its Section 6(g) rulemaking power
14 in the scope and the manner that it seeks to do with the final
15 rule.

16 Borrowing from Justice Barrett's concurring opinion
17 in *Biden v. Nebraska*, if a parent gives a babysitter a credit
18 card and says "make sure the kids have fun while we're out,"
19 the parent might expect that the babysitter would take the kids
20 out for ice cream, but would not expect the babysitter to take
21 the kids on an overnight trip to Las Vegas. Likewise here:
22 Without clear Congressional permission, the final rule, the
23 FTC's equivalent of a trip to Las Vegas, is unauthorized.

24 An administrative agency's power to regulate must
25 always be grounded in a valid grant of authority from Congress.

1 With a rule as sweeping and consequential as this one, the
2 Section 6 language, both by its text, placement, context, and
3 history, falls short.

4 I find that the plaintiff has shown a substantial
5 likelihood of prevailing on its claim that the final rule
6 exceeds the FTC's authority under its organic act, as stated
7 and alleged in Count II of plaintiff's complaint.

8 Of course, my ruling here is based on the law, not on
9 the policy questions of the proper role of non-competes in the
10 American economy, a question decidedly outside of my purview,
11 nor does my decision on this specific rule require me to
12 determine the parameters of the FTC's substantive rulemaking
13 authority generally or in a different case.

14 For example, it's not before me as to whether a
15 rulemaking that would bar non-competes as to hourly workers or
16 as to a specific industry would pass muster. That's not before
17 me. I'm only dealing with the final rule that I have in front
18 of me.

19 So I now turn to the other factors to secure a
20 preliminary injunction. First, irreparable harm.

21 To demonstrate irreparable harm, a party must show it
22 will suffer injuries that are "neither remote nor speculative,
23 but actual and imminent."

24 And, again, this is black-letter Eleventh Circuit
25 law.

1 "An injury is irreparable only if it cannot be undone
2 through monetary remedies."

3 "The possibility that adequate compensatory or other
4 corrective relief will be available at a later date . . .
5 weighs heavily against a claim of irreparable harm."

6 The Court rejects the FTC's argument that by not
7 filing suit and its motion immediately after the rule was
8 passed, POV sat on its rights and forfeited any argument that
9 the harm is irreparable. Unlike cases in which that might be
10 true, the rule has not yet gone into effect, so POV has not
11 allowed that to have consequence before it filed its suit and
12 motion.

13 Also, the compressed period from when the final rule
14 issued on May 7th, 2024, and its effective date of September
15 4th, 2024, made this timing all but inevitable.

16 POV has demonstrated that if the rule goes into
17 effect against it, it will incur costs to review its existing
18 contracts for compliance with the rule, and to strategize on
19 how best to change their existing agreements and business
20 models.

21 And I understand the objection to the affidavit
22 that's attached to the reply. I would typically allow
23 additional affidavit practice, because injunctions are done on
24 affidavit and not -- we don't have evidence, so we don't have
25 somebody able to testify and to meet other arguments.

1 But even if I disregard that affidavit, it just makes
2 common sense that there are going to be costs -- and, in fact,
3 the Commission recognized those costs in its own rulemaking.
4 There are going to be compliance costs to change contracts, to
5 enter into decisions on how to go forward from here, to figure
6 out how to deal with existing contracts.

7 There's obviously going to be a compliance cost that
8 are more than de minimis. And there is no readily available
9 way to recover those monetary damages from the government
10 should the ultimate decision be made that the rule is invalid.

11 There's also the business disruptions caused by
12 having to comply with the rule while its efficacy is being
13 litigated, which I think also feeds into a finding of
14 irreparable harm.

15 So I'm going to find if the FTC is not enjoined from
16 enforcing the new rule against POV it will suffer actual and
17 imminent harm that cannot be undone through money damages.

18 And, of course, the Eleventh Circuit case that
19 recognizes that unrecoverable monetary loss is an irreparable
20 harm is *Georgia v. President of the United States*, 46 F.4th
21 1283, at 1302. That's a 2022, 11th Circuit case.

22 As to the final two factors needed to secure an
23 injunction, the balance of equities and the public interest,
24 they too favor entry of a preliminary injunction. While it is
25 true as the FTC says that the public interest is often of

1 concern when the government "is enjoined by a court from
2 effectuating statutes enacted by representatives of its
3 people," here plaintiff has demonstrated a substantial
4 likelihood that the government may in fact not be operating
5 within the bounds of the statute enacted by those
6 representatives. Also, the FTC will not be substantially
7 harmed by the maintenance of the status quo until a final
8 decision on the validity of the final rule is reached. These
9 two factors -- final factors favor entry of an injunction.

10 Plaintiff's motion for a preliminary injunction is
11 granted. The Court will enter a preliminary injunction
12 prohibiting enforcement of the final rule as to the Properties
13 of the Villages, Inc. The injunction only applies to the
14 Properties of the Villages; the Court is not -- repeat not --
15 entering a stay of the final rule generally, nor is the Court
16 entering an injunction of nationwide application. It is
17 strictly limited to the party that's before the Court that
18 brought the suit.

19 * * * * *

CERTIFICATE

UNITED STATES DISTRICT COURT)
)
MIDDLE DISTRICT OF FLORIDA)

I hereby certify that the foregoing transcript is a true and correct computer-aided transcription of my stenotype notes taken at the time and place indicated herein.

DATED this 15th day of August, 2024.

s/Shannon M. Bishop
Shannon M. Bishop, RDR, CRR, CRC