ALL DRESSED UP WITH NO PLACE TO GO? THE FTC'S BAN ON NON-COMPETES IS READY, BUT LEGAL CHALLENGES AWAIT

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In April 2024, the Federal Trade Commission voted 3-2 to issue a final rule banning nearly all noncompete agreements in the United States. The rule, promulgated under the FTC Act, marks the next step in the FTC's push for more aggressive enforcement of the antitrust laws. The rule is remarkably broad but contains many nuances, including exceptions for noncompetes related to legitimate business sales, senior executives, and more. The rule is slated to effect on September 4, 2024, but has been challenged in federal district court on statutory, constitutional, and procedural grounds. Legal challenges to the rule may well take years to resolve and may even end up before the U.S. Supreme Court. It seems likely that the rule will not go into effect until after litigation fully winds its way through court, if ever. Indeed, the district court in *Ryan, LLC v. FTC* granted a limited preliminary injunction in July, which may foreshadow a broader injunction when that court issues its promised ruling on the merits in August.

Earlier this year, the Federal Trade Commission issued its long-awaited ban on noncompete agreements, triggering legal challenges before the rule was even published. These challenges are now proceeding as a single suit. Whether they succeed remains to be seen. But given the national importance of this issue, the case, *Ryan, LLC v. FTC*, seems destined for Supreme Court review. With that review a long way off, the ban may not take effect for years, if ever.

I. A RETURN TO FAIRNESS

The noncompete ban is part of a broader push by the FTC for more vigorous enforcement of antitrust laws, including most notably Section 5 of the FTC Act. Congress originally passed Section 5 to counter judicial erosion of the Sherman Act and, with it, reassert congressional power.[2] To achieve that goal, Congress used very broad language in crafting Section 5. While the Sherman Act prohibits discrete types of conduct — unreasonable restraints of trade and monopolization — Section 5 prohibits all "unfair methods of competition."[3]

For years, efficiency guided Section 5 enforcement. An unfair method of competition was an inefficient one, and efficiency was assessed by weighing anticompetitive effects against procompetitive ones. Efficiency even became official policy in 2015. That summer, the FTC announced that it would apply Section 5 using "a framework similar to the rule of reason."[4] Under this framework, the FTC would evaluate conduct by "taking into account any associated cognizable efficiencies and business justifications."[5]

This efficiency framework was cast aside less than six months into the Biden administration, with the FTC withdrawing the 2015 policy statement on Section 5 enforcement.[6] Its stated rationale was simple: By adopting a rule-of-reason framework, the 2015 policy statement had written "the Commission's standalone authority out of existence."[7]

In 2022, the FTC continued to distance itself from efficiency principles. In a speech that September, FTC Chair Lina M. Kahn signaled that the Commission was centering its Section 5 enforcement on fairness, not efficiency.[8] The next month, Commissioner Alvaro M. Bedoya echoed those remarks, calling for a return to fairness in Section 5 enforcement.[9]

The FTC followed up on this appeal to fairness in short order. In November 2022, the Commission issued a new Section 5 policy statement, which not only elevated fairness as the guiding principle for Section 5 enforcement, but also asserted an expansive view of the law's scope.[10] In January 2023, the FTC relied on its broad view of Section 5 to propose a ban on noncompete agreements.[11] During the notice-and-comment period, the FTC received more than 26,000 comments.[12] Those took more than a year to review, with the FTC voting 3-to-2 in April 2024 to finalize the rule.[13]

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2 See S. Rep. No. 62-1326, at 10 (1913).

3 15 U.S.C. § 45(a)(1).

4 Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, at 1 (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

5 *Id.*

6 Fed. Trade Comm'n, Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 9, 2021), https://www.ftc.gov/legal-library/browse/statement-commission-withdrawal-statement-enforcement-principlesregarding-unfair-methods.

7 *Id.* at 1.

8 Fed. Trade Comm'n, Remarks of Chair Lina M. Kahn (Sept. 16, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/KhanRemarksFordhamAntitrust20220916.pdf.

9 Alvaro M. Bedoya, "Returning to Fairness," *The American Prospect* (Oct. 10, 2022).

10 Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

11 Fed. Trade Comm'n, Press Release, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

12 Fed. Trade Comm'n, Pres Release, FTC Announces Rule Banning Noncompetes (Apr. 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes.

13 *Id.*

II. A NEAR-TOTAL BAN ON NONCOMPETES

The final rule declares it an unfair method of competition, and therefore a violation of Section 5, for employers to enter into noncompetes with most employees.[14] Unless it is enjoined by a court of competent jurisdiction, the rule is slated to take effect on September 4, 2024.[15]

The FTC has touted the final rule to be "a comprehensive ban on new non-competes with all workers."[16] Speaking in support of the rule, Chair Khan said it "will ensure Americans have the freedom to pursue a new job, start a new business, or bring a new idea to market."[17] The FTC expects the rule to create 8,500 new businesses each year, boost average annual wages by $524, and lead to anywhere from 17,000 to 29,000 new patents each year for the next decade.[18]

III. DEFINING "NON-COMPETE CLAUSE"

Even though the FTC promotes it as a broad ban, the 570-page final rule teems with nuance. Start with the definition of noncompete itself. The final rule defines a "non-compete clause" as a term of employment that "prohibits," "penalizes," or "functions to prevent" a worker from either working for another employer in the United States or operating a business in the United States.[19] Although some of those verbs may be straightforward, others leave room for interpretation.

"Prohibits" is clear but broad. As used in the final rule, it bans all terms of employment that expressly prohibit a worker from going to another employer or starting a business.[20] As the FTC noted, the term covers "the vast majority" of noncompetes. For example, it would cover a routine employment condition that prohibits a sandwich shop employee from working for another sandwich shop within three miles for two years post-employment.[21]

"Penalizes" is subtler, taking aim at employment terms that require the employee to pay a penalty for leaving for another employer or starting a business.[22] Take the sandwich shop worker from before: the noncompete carries the same three-mile, two-year term but adds $50,000 in liquidated damages. A financial penalty like this would bring the noncompete within the final rule's ambit. "Penalizes" also covers forfeiture-for-competition clauses.[23] These clauses extinguish an employer's obligation to provide promised-for compensation or benefits if an employee joins another company or starts a business.[24] One example would be a clause in a severance agreement that conditioned severance payments on that former employee not competing against the former employer for some period of time.[25] Just like liquidated damages, a forfeiture-for-competition clause "imposes financial consequences on a former employee as a result of termination of an employment relationship," the FTC wrote.[26]

"Functions to prevent" is subtler yet and leaves much room for interpretation. This part of the noncompete definition targets employment terms that restrain so much activity as to functionally prevent an employee from leaving.[27] This language could embrace nondisclosure agreements and training repayment agreement provisions — so-called "TRAPs."[28] A trucking company, for instance, may cover the cost for new

14 89 F.R. 38342, 38342 (May 7, 2024).

15 *Id.*

16 *Id.*

17 FTC Announces Rule Banning Noncompetes, *supra* note 11.

18 *Id.*

19 89 F.R. 38342, 38342 (May 7, 2024).

20 *Id.* at 38364.

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 See *id.*

26 *Id.*

27 *Id.*

28 *Id.*

drivers to obtain their commercial drivers' licenses and use TRAPs to ensure that the drivers stay long enough to recoup the investment. The FTC took care to note that NDAs, TRAPs, and other restrictive employment agreements do not necessarily function to prevent an employee from leaving, just that they could if they are broad and onerous enough.[29]

IV. NONRETROACTIVITY FOR SENIOR EXECUTIVES

Another nuance is that the final rule applies retroactively for most workers, but not all. For most workers, the rule not only prohibits an employer from entering into a noncompete going forward, but also prohibits the employer from enforcing existing noncompetes or representing that an employee remains subject to one.[30] By reaching back to existing noncompetes, the noncompete generally applies retroactively.

The one group of workers excepted from the rule's retroactive scope are "senior executives."[31] For them, the final rule only applies to noncompetes entered after the September 4, 2024, effective date.[32] Existing noncompetes for this class of workers remain enforceable, at least at the federal level.

Who counts as a senior executive has both an authority component and a compensation component. Starting with the authority component, a worker must be in a policymaking position to qualify as a senior executive.[33] A policymaking position is generally a company's C-suite, although it also includes anyone with "policymaking authority" over a business.[34] Policymaking authority is the authority to make final policy decisions that control significant aspects of a business.[35] One wrinkle in this definition relates to officers of a subsidiary or affiliate of a large corporation. These people are in a policymaking position only if they have policymaking authority over the entire corporation, not just the entity for which they are an officer.[36]

To qualify as a senior executive, a worker must also have received at least $151,164 in total compensation in the year before.[37] For those who worked only part of the prior year, they must have earned at least $151,164 when annualized.[38] Total compensation includes salary, commissions, and nondiscretionary bonuses and other nondiscretionary compensation. It does not include health insurance and other benefits.[39]

V. THREE KEY EXCEPTIONS

A third nuance with the final rule is that it is riddled with exceptions, so much so that there are too many to discuss here. Three exceptions stand out, however.

First, the final rule does not apply to noncompetes ancillary to certain corporate transactions.[40] Covered transactions include a bona fide sale of a business, the sale of an ownership interest in a business, and the sale of all or nearly all of a business's operating assets.[41] The FTC considers a bona fide sale as one made between two independent parties at arm's length after a reasonable opportunity to negotiate.[42] Noncompetes arising from these business sales remain enforceable.

29 *Id.*

30 *Id.* at 38502.

31 *Id.* at 38503.

32 *Id.*

33 *Id.* at 38502.

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.* at 38504.

41 *Id.*

42 *Id.* at 38438.

Second, the final rule does not apply to noncompetes giving rise to a cause of action accruing before the September 4, 2024, effective date.[43] Because of this exception, workers who have already violated a noncompete agreement cannot use the final rule to escape liability.[44] This exception also means that the final rule cannot be used as a shield in pending litigation about noncompetes.[45]

Finally, the final rule does not apply to noncompetes between a franchisee and a franchisor.[46] The final rule applies to the employees of the franchisee as well as those of the franchisor, but does not apply to the relationship between the franchisee and the franchisor. Noncompetes in this context are more like restrictive covenants between businesses than noncompetes between employer and employee.[47] They therefore fall outside the scope of the final rule.

Despite these nuances, the final rule is remarkable in its breadth. Starting in September, noncompetes in the United States will effectively be dead in all but very narrow circumstances. Of course, this assumes the final rule ever takes effect. That assumption is being tested with lawsuits seeking to block the noncompete ban.

VI. *RYAN, LLC v. FTC* WINS THE RACE TO FILE

Within a day of the FTC's vote to pass the final rule, two lawsuits were filed in different federal courts, both in Texas. The first to file was Ryan, LLC, a Dallas-based tax services software provider.[48] Not long after, a coalition led by the U.S. Chamber of Commerce brought a separate suit.[49] On May 3, the court in the second case stayed the action under the first-to-file doctrine.[50] Under this doctrine, courts are to stay, transfer, or dismiss a second-filed action to avoid interfering with the first-filed action.[51] As applied here, the first-to-file doctrine recognized that Ryan won the race to the courthouse; the Chamber of Commerce coalition could either join Ryan in its suit or wait for the action to run its course. The coalition chose the former option.[52] And with that, the fate of the FTC's noncompete ban hangs in the balance with *Ryan, LLC v. FTC*.

In its suit, Ryan mounts a three-front attack against the noncompete rule.[53] The first front challenges the rule on statutory grounds; the second, on constitutional grounds; and the third, on procedural grounds. Since intervening, the Chamber of Commerce has filed its own complaint, which seeks to set aside the noncompete rule for many of the same reasons as Ryan.[54]

A. Ryan's Statutory Challenge

Statutorily, Ryan argues that the FTC lacks the authority under its enabling act to issue substantive rules on unfair methods of competition.[55] Yes, the FTC Act grants the commission with authority to promulgate procedural rules, Ryan concedes.[56] But in its view, nothing in that act confers the FTC with substantive rulemaking authority.[57]

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43 *Id.* at 38504.

44 *Id.* at 38439.

45 See *id.* at 38440.

46 *Id.* at 38502.

47 See *id.* at 38452.

48 *Ryan, LLC v. Fed. Trade Comm'n*, No. 24-986 (N.D. Tex. Apr. 24, 2024), Compl., ECF No. 1.

49 *Chamber of Commerce of the U.S. v. Fed. Trade Comm'n*, No. 24-148 (E.D. Tex. Apr. 24, 2024), Compl., ECF No. 1.

50 *Chamber of Commerce of the U.S. v. Fed. Trade Comm'n*, No. 24-148 (E.D. Tex. May 3, 2024), Op. & Order, ECF No. 27.

51 *Id.* at 1.

52 *Chamber of Commerce of the U.S. v. Fed. Trade Comm'n*, No. 24-148 (E.D. Tex. May 10, 2024), Notice of Intervention, ECF No. 28.

53 See *generally Ryan, LLC v. Fed. Trade Comm'n*, No. 24-986 (N.D. Tex. Apr. 24, 2024), Am. Compl., ECF No. 22 ("*Ryan* Amended Complaint").

54 *Ryan, LLC v. Fed. Trade Comm'n*, No. 24-986 (N.D. Tex. Apr. 24, 2024), Intervenor Compl., ECF No. 37, at ¶¶ 87-119.

55 *Id.* ¶¶ 66-73.

56 *Id.* ¶ 69.

57 *Id.* ¶ 67.

Ryan marshals three arguments to support its view. First, the FTC Act's grant of rulemaking authority arises from Section 6(g), which according to Ryan does not allow the commission to issue substantive rules.[58] Section 6(g) authorizes the FTC to "classify corporations" and "make rules and regulations for the purposes of carrying out the provisions of this subchapter."[59] Ryan frames the reference to classifying corporations as key context to understand the nature and scope of the FTC's rulemaking authority under Section 6(g).[60] Ryan asserts that this context, combined with the absence of statutory penalties for violating Section 6(g), shows that this provision does not enable the FTC to issue substantive rules.[61] At most, it allows the FTC to pass procedural rules to aid in its adjudication of cases.[62]

Second, Ryan compares the FTC Act to the Magnuson-Moss Warranty-Federal Trade Commission Improvements Act to underscore its conclusion that Section 6(g) lacks a grant of substantive rulemaking authority.[63] The Magnuson-Moss Act contains as clear a grant of this authority as any, authorizing the FTC to issue "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce."[64] Congress enacted Magnuson-Moss decades after the FTC Act.[65] In Ryan's view, this congressional action would have been pointless if the commission already had substantive rulemaking authority under Section 6(g) of the FTC Act.[66] Ryan also points out what Magnuson-Moss did *not* do: Although it granted the FTC with the authority to issue rules on "unfair or deceptive" practices, it did not grant the same authority for rules on "unfair methods of competition," the language in Section 5 of the FTC Act under which the noncompete rule arises.[67]

Finally, Ryan appeals to the major questions doctrine to support its view that Section 6(g) does not invest the FTC with substantive rulemaking authority.[68] The major questions doctrine rejects claims of agency regulatory authority over an issue of vast economic and political significance without clear congressional authorization.[69] For Ryan, the noncompete rule falls within this doctrine.[70] On economic significance, Ryan estimates that the rule will invalidate 30 million existing noncompetes.[71] And on political significance, Ryan submits that the noncompete ban will preempt the laws of 46 states.[72] Given these effects, Ryan maintains that the rule cannot stand absent clear congressional authorization, which, in its view, is lacking in Section 6(g).[73]

B. Ryan's Constitutional Challenge

Ryan pairs these three statutory arguments with three constitutional ones. First, Ryan flags issues with the noncompete rule under the nondelegation doctrine. The nondelegation doctrine is an Article I safeguard.[74] It blocks Congress from delegating unfettered legislative power to agencies like the FTC.[75] Under this doctrine, a constitutional delegation of legislative power requires "an intelligible principle" by which the agency can

58 *Id.* ¶ 69.

59 15 U.S.C. § 46(g).

60 *Ryan* Am. Compl. ¶ 69.

61 *Id.*

62 *Id.*

63 *Id.* ¶ 70.

64 15 U.S.C. § 57a(a)(1)(B).

65 See *Ryan* Am. Compl. ¶ 28.

66 *Id.*

67 *Id.* ¶ 29.

68 *Id.* ¶ 71.

69 *W. Virginia v. Env't Prot. Agency*, 597 U.S. 697, 721–23 (2022).

70 *Ryan* Am. Compl. ¶ 71.

71 *Id.*

72 *Id.*

73 *Id.* ¶ 72.

74 See U.S. Const. art. I, § 1 (vesting "[a]ll legislative Powers" in Congress).

75 *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 529, 537–38 (1935)

exercise it.[76] In Ryan's view, such an intelligible principle is not in the FTC Act.[77] Ryan sees nothing in that law by way of guideposts to limit the substantive rulemaking the FTC claims in issuing the noncompete rule.[78] The rule, Ryan concludes, thus amounts to an unconstitutional exercise of legislative power.[79]

Ryan situates its second constitutional argument in Article II. Just as Article I vests Congress with legislative power, so Article II vests the President with executive power.[80] Agency officials — or in constitutional terms, "lesser officers" — may help execute the laws, but in doing so, they "must remain accountable to the President."[81] In practice, accountability often means that the President has the power to remove agency officials.[82] Ryan maintains that the FTC Act violates these constitutional principles by insulating the commissioners from presidential removal.[83] According to Ryan, the FTC Act achieves this unconstitutional insulation by granting the commissioners fixed terms of office during which they can be removed only for good cause.[84] For Ryan, the upshot of all this unconstitutional insulation is clear: The FTC commissioners issued the noncompete rule without proper accountability to the President, and so the rule comes from an unconstitutional exercise of executive power.[85]

Ryan's third constitutional argument is less developed yet very straightforward simple: The retroactive nature of the noncompete rule amounts to an unconstitutional taking for "depriv[ing] citizens of legitimate expectations and upset[ting] settled transactions."[86]

C. Ryan's Procedural Challenge

Ryan's final line of attack is procedural. According to Ryan, the 570-page rule violates the Administrative Procedure Act as "arbitrary and capricious decisionmaking" for skipping relevant data and failing to connect the information that the FTC considered with its decision to issue the final rule.[87] This, too, is a barebones claim and seems like it was tacked on for completeness.

As their suit winds its way through the courts, which could take years to resolve, Ryan and the Chamber of Commerce moved for a preliminary injunction to keep the noncompete rule from taking effect on September 4. The case has garnered significant attention from interest groups, elected officials, and others. Many filed amicus briefs, both in support and opposition to a preliminary injunction.[88]

D. The District Court Preliminarily Blocks the Noncompete Ban

On July 3, 2024, the court granted the motion for preliminary injunction.[89] It has committed to ruling on the ultimate merits of the noncompete ban by August 30, 2024.[90]

At this early stage, the court needed to only find a substantial likelihood of success on the merits based on the limited record before it. The court concluded that Ryan and the Chamber-led coalition met this standard with their statutory and procedural arguments.[91] The court

76 *Mistretta v. United States,* 488 U.S. 361, 372 (1989)

77 *Ryan* Am. Compl. ¶ 77.

78 *Id.*

79 *Id.* ¶ 79.

80 U.S. Const. art. II, § 1 (vesting "[t]he executive power" in the President).

81 *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 213 (2020).

82 See *id.*

83 *Ryan* Am. Compl. ¶¶ 81-85.

84 *Id.* ¶ 82.

85 *Id.* ¶¶ 83-85.

86 *Id.* ¶ 90 (quoting *E. Enterprises v. Apfel*, 524 U.S. 498, 501 (1998)).

87 *Id* ¶ 87(a)-(i).

88 See, e.g. *Ryan, LLC v. Fed. Trade Comm'n*, No. 24-986 (N.D. Tex. May 24, 2024), Amicus Brief in Support by the Society for Human Resources Management, ECF No. 65; *Ryan, LLC v. Fed. Trade Comm'n*, No. 24-986 (N.D. Tex. May 31, 2024), Proposed Amicus Brief in Opposition by Twelve Texas Elected Officials, ECF No. 108.

89 *Ryan, LLC v. Fed. Trade Comm'n*, No. 24-986 (N.D. Tex. July 3, 2024), Mem. Op. & Order, ECF No. 153.

90 *Id.* at 2.

91 *Id.* at 22-23.

never addressed their constitutional challenge. The court's decision is preliminary. With a more developed record, it could let the noncompete rule stand, however unlikely that outcome may be.

Starting with the FTC's statutory authority, the court agreed with Ryan and the Chamber-led coalition that Section 6(g) likely does not confer substantive rulemaking authority to the FTC based on the law's text, structure, and history.[92] On its text, the court observed that Section 6(g) contains no penalty provision, which indicates that it empowered the FTC to make only interpretive and procedural rules, not substantive ones.[93] On the law's structure, the court highlighted that Section 6(g) starts with a grant of authority to classify corporations and appears in the middle of a list of investigatory powers.[94] For the court, this location and structure of Section 6(g) reinforced that it did not grant substantive rulemaking authority.[95] Finally, on legislative history, the court stressed that the FTC disclaimed substantive rulemaking authority under Section 6(g) for nearly five decades.[96] Although a federal appeals court recognized the commission's authority to make substantive rules under Section 6(g) in the 1973, the FTC did not use this provision to promulgate a substantive rule from 1978 until the enactment of the noncompete ban.[97] This history paralleled amendments to the FTC Act, including most notably through the Magnuson-Moss Act. [98] Agreeing with the ban's challengers, the court pointed out that the Magnuson-Moss Act empowered the FTC to issue substantive rules only on unfair or deceptive acts or practices, not unfair methods of competition.[99]

The court also found the noncompete ban arbitrary and capricious under the Administrative Procedure Act on the limited record before it.[100] Contrasting the rule's categorical ban to the tailored treatment of noncompetes in various states, the court found insufficient justification and consideration of alternatives to let the sweeping national prohibition on noncompetes stand.[101]

It was not a complete victory for those opposed to the noncompete ban. Rather than issue a nationwide preliminary injunction, the court limited the scope of relief to Ryan and the Chamber-led coalition.[102] For everyone else, the noncompete rule is still slated to take effect in September, though this may change with the court's ruling on the ultimate merits expected in August.

VII. WILL THE NONCOMPETE RULE SURVIVE *RYAN*?

Whether Ryan and the Chamber of Commerce will prevail on the ultimate merits remains to be seen, but their suit raises three separate issues with the noncompete rule: statutory, constitutional, and procedural. The rule may well falter on any one of those grounds, especially considering the conservative bent of federal appellate court covering Texas. The rule may even end up before the Supreme Court. Indeed, the rule has many elements to pique the high court's interest: It is politically charged, it has national importance, and it sounds in many areas of administrative law in which many Justices have expressed an interest. Any Supreme Court review remains years away. It is doubtful the rule will take effect in the meantime, and almost certainly not on its September 4 effective date. At least for now, noncompetes remain alive and well in America.

92 *Id.*

93 *Id.*

94 *Id.* at 15-16.

95 *Id.*

96 *Id.* at 17.

97 *Id.*

98 *Id.* at 17-18.

99 *Id.*

100 *Id.* at 21.

101 *Id.* at 22-23.

102 *Id.* at 28-32.

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