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**The Major Questions Doctrine Slams the Door Shut on UMC Rulemaking**

by

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The Federal Trade Commission’s (FTC) current leadership appears likely to issue substantive rules concerning “unfair methods of competition” (UMC) at some point. FTC Chair Lina Khan, in an [article](#) with former FTC Commissioner Rohit Chopra, argued that the commission has the authority to issue UMC rules pursuant to the Federal Trade Commission Act based on [Petroleum Refiners Association v. FTC](#) and a subsequently enacted provision in 1975. But *Petroleum Refiners* is a nearly 50-year-old, untested, and heavily criticized opinion that predates the major questions doctrine and widespread adoption of textualism in the courts. Application of the major questions doctrine and modern, textualist methods of statutory interpretation almost certainly would lead to a determination that the commission lacks UMC rulemaking authority.

Our submission to this *Truth on the Market* symposium argues that today’s Supreme Court would find that the FTC lacks authority to issue UMC rules under the major questions doctrine.<sup>[1]</sup> Part I reviews the provisions of the FTC Act relevant to UMC rulemaking and scholarly commentary on

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the issue. Part II argues that, applying the major questions doctrine as the Court has done in recent opinions such as [NFIB v. OSHA](#), the Supreme Court would find that the FTC lacks UMC rulemaking authority because Congress could not have intended such a cryptic delegation to authorize sweeping rules of such economic significance.

### **Text, Structure, and Interpretation of the FTC Act**

The FTC Act establishes the FTC and its authority. Section 5 of the [FTC Act](#) declares unlawful “unfair methods of competition in or affecting commerce” and empowers the commission to stop them. The law provides specific procedures for an administrative adjudicatory process that the commission “shall” use to stop unfair methods of competition when it identifies them and believes stopping them is in the public interest. The remainder of Section 5 involves provisions related to available remedies and jurisdiction for appeal of final decisions from FTC adjudications. This is the extent of explicit authority the FTC Act contains related to UMC.

In the next portion of the same subchapter, Section 6(g) states: “The Commission shall also have power . . . to make rules and regulations for the purpose of carrying out the provisions of this subchapter.” In 1973’s [Petroleum Refiners Association v. FTC](#), the U.S. Court of Appeals for the D.C. Circuit interpreted this provision to grant the commission substantive rulemaking authority to implement Section 5. While *Petroleum Refiners* involved rules regarding “unfair or deceptive acts or practices” under Section 5, rather than UMC rules, its reasoning, if still valid today, seemingly could authorize the commission to issue UMC rules. But the FTC has never issued UMC rules to date.

Congress responded to *Petroleum Refiners* by enacting laws in 1975 and 1980 that imposed significant procedural burdens on the FTC’s rulemaking process for unfair or deceptive acts. These burdens, known as the “Magnuson-Moss procedures,” are [far more exacting](#) than the Administrative Procedure Act’s notice-and-comment rulemaking process and, since adopted, they have had the effect of stopping the FTC from issuing rules for governing unfair or deceptive acts.

FTC Chair Khan believes that, in adopting the Magnuson-Moss procedures, Congress has implicitly codified *Petroleum Refiners*’ holding that the FTC has authority to issue UMC rules. She argues that legislative history for the 1975 amendments show that Congress rejected a version of the bill that applied Magnuson-Moss procedures to all FTC rulemaking, rather than just unfair or deceptive acts rulemaking. And the enacted statute, as well as the conference report for the adopted law, [stated](#) that Magnuson-Moss procedures “shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce.” Khan [believes](#) that this provision implicitly recognized that, in accord with the holding of *Petroleum Refiners*, that Section 6(g) grants the commission authority to issue substantive UMC rules. Moreover, in [her view](#), if the FTC adopted her position as its official interpretation of the statute, it would be entitled to *Chevron* deference.

Other commentators disagree persuasively. Richard Pierce [notes](#) that the provision Khan points to as implicitly adopting *Petroleum Refiners* just as easily could be interpreted to clarify that Magnuson-Moss procedures do not apply to interpretative rules and policy statements for UMC adjudications. This argument, though, does not completely eliminate ambiguity, because the statute used the non-exclusive word *including* in the phrase “rules (including interpretative rules) and

general statements of policy” rather than expressly limiting the exemption to those two types of rules.

But Pierce, more forcefully, [argues](#) that Khan’s interpretation depends on the *Petroleum Refiners* interpretation of the FTC Act remaining good law, and this is doubtful. *Petroleum Refiners* employed a non-textualist method of statutory interpretation that courts [do not apply](#) today. That case [held](#) that an ambiguous grant “to make rules and regulations for the purpose of carrying out the provisions of this subchapter” should be construed to favor the agency’s interpretation of its authority under that provision. This holding appears to conflict with the Supreme Court’s more searching review for identifying congressional delegations to agencies to issue substantive rules in [Untied States v. Mead Corp.](#), a case decided more than two decades after *Petroleum Refiners*. *Mead Corp.* explained that agencies are entitled to *Chevron* deference for their application of their authorizing statutes when “Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”

The D.C. Circuit itself may have already implicitly overruled *Petroleum Refiners* while applying *Mead Corp.* in more recent cases. In [American Library Association v. FCC](#), the D.C. Circuit adopted a far more skeptical reading of a similar general grant of authority—the Federal Communications Commission’s (FCC) general grant in Title I of the Communications Act, which reads: “The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.” The FCC had issued its Broadcast Flag Order relying solely on its general grant of authority in Title I.

But the D.C. Circuit, applying *Mead Corp.*, [held](#) that the FCC could only issue substantive rules pursuant to its general grant of authority when: “(1) the Commission’s general jurisdictional grant under Title I covers the subject of the regulations and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.” In other words, only when the substantive rules reasonably relate to explicit authority contained in the Communications Act. *Petroleum Refiners* is inconsistent with this subsequent holding of the D.C. Circuit.

Further, William Kovacic—a former FTC chair, commissioner, and general counsel—[explains](#) that the unanimous Supreme Court opinion in [AMG Capital Management LLC v. FTC](#) implicitly refutes *Petroleum Refiners*. In *AMG*, the Court rejected the FTC’s interpretation of Section 13(b) of the FTC Act, which states that the commission “may bring suit in a district court of the United States to enjoin” violations of the law that the FTC enforces. The FTC argued that Section 13(b) empowered it to seek equitable monetary relief, despite the provision’s circumscribed focus on injunctions. But the court explained that this focus on injunctions, as well as the structure of the act as a whole, counseled otherwise. And unlike Section 13(b), other FTC Act provisions expressly empower the commission to seek “other forms of relief” in addition to injunctions, demonstrating that Congress would have explicitly authorized equitable monetary relief if it intended Section 13(b) to provide it.

As Kovacic [explains](#), the *AMG* opinion was “not so generous” to the FTC’s interpretation of the FTC Act, refuting the deferential approach of *Petroleum Refiners*. It seems unlikely, given the above criticisms of *Petroleum Refiners*, that the Court would be any more deferential to an attempt by Khan or a future FTC chair to issue substantive UMC rules. This is especially true because, as

explained below, the major questions doctrine likely would resolve the question of the FTC’s UMC authority against the commission.

### **Today’s Major Questions Doctrine Most Likely Would Slam the Door Shut on FTC UMC Rulemaking**

Under current jurisprudence, the Supreme Court’s application of the major questions doctrine most likely would slam the door shut on the FTC’s supposed authority to issue UMC rules. The major questions doctrine is a canon of statutory interpretation that the Court developed as an exception or limitation to application of *Chevron* deference, even if the Court appears to now [apply it independently of \*Chevron\*](#). It applies to judicial review of agency interpretations of statutory authority to issue substantive rules. Put simply, the major questions doctrine is a linguistic canon that [requires](#) “Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance,” or put more colloquially, that prevents Congress from “hiding elephants in mouseholes.”

The underlying purpose of the major questions doctrine is the protection of separation of powers. However, the context in which it protects separation of powers is not entirely clear because the Court’s views appear to be, at present, unsettled.<sup>[2]</sup> The “clear statement” version of the major questions doctrine protects separation of powers by preventing the executive branch from relying on strained interpretations of delegated statutory authority. But multiple Supreme Court justices have at times argued for a *substantive* major questions doctrine—one that would bar certain “major” delegations altogether, regardless of the clarity of the congressional delegation.<sup>[3]</sup> For our purposes, in this piece, we apply the major questions doctrine as a clear-statement rule, which at present is the controlling law.

There are several factors that the Court has identified as warranting application of the major questions doctrine. The two most common factors can be thought of as (1) claims of sweeping authority, or massive elephants, enabled through (2) cryptic statutory texts, or tiny mouseholes. For example, in [Alabama Association of Realtors v. HHS](#), the Supreme Court applied the major questions doctrine, in part, because the “sheer scope” of the rule in that case was dramatic—affecting 80% of the country’s population and superseding a traditional area of state regulation. In other words, a massive elephant. An example of a tiny mousehole is, in [NFIB v. OSHA](#), the Occupational Safety and Health Administration’s (OSHA) reliance on statutory authority for “workplace safety” regulations to require broad public-health mandates like compulsory vaccination, which affects people far beyond the confines of the workplace.

Other relevant factors include assertions of authority despite long-held contrary indications from Congress and the agency itself, or a history of failure to assert similar authority. For example, in [Brown & Williamson Tobacco Corp. v. FDA](#), the Court found it relevant that the Food and Drug Administration (FDA) asserted regulatory authority over tobacco products, despite Congress’ creation of a distinct regulatory structure for tobacco outside the purview of the FDA and decades of assertions by Congress and FDA leadership that the FDA lacked authority to regulate tobacco. In [NFIB](#), the Court noted that OSHA’s vaccine mandate was its first sweeping public-health measure under the Occupational Health and Safety Act in its more than 50 years of existence.

Applying the major questions doctrine to the FTC’s supposed UMC rulemaking authority would mean that the commission almost certainly lacks such authority. First, many of the relevant factors

for the major questions doctrine are present. The scope of potential UMC rulemaking is sweeping, covering most of our nation’s economy—a big elephant. And the provision supposedly enabling the commission’s rulemaking authority—Section 6(g), which contains general language, rather than an explicit delegation of authority to the commission—amounts to a tiny mousehole. The FTC Act provision Khan points to as implicitly codifying *Petroleum Refiners* is even less specific; it simply asserts that Section 18a of the FTC Act will have no effect on the FTC’s UMC rulemaking authority. But if the commission *never had such rulemaking authority in the first place* under Section 6(g), then this provision is irrelevant and provides no implicit codification, let alone the clear statement required by the major questions doctrine. Thus, an even tinier mousehole.

Analysis of the statutory text and legislative history Khan identifies shows precisely how tiny that mousehole is. As mentioned above, Khan believes that Congress’ rejection of a draft bill that applied Magnuson-Moss procedures to UMC rulemaking proves that Congress implicitly endorsed *Petroleum Refiners*. Not so. Instead, by clarifying that Section 18a “shall not affect any authority of the Commission to prescribe rules ... with respect to unfair methods of competition in or affecting commerce,” Congress likely was *rejecting Petroleum Refiners* as applied to UMC rulemaking. Congress did indeed codify the *Petroleum Refiners* holding that the FTC has authority to issue rules for unfair or deceptive acts or practices by subjecting them to the rigorous Magnuson-Moss procedures. But by stating that those procedures did not affect the FTC’s authority for UMC rules, any authority for the commission to issue such rules depends *solely* on interpretation of Section 6(g)—or the continued vitality of *Petroleum Refiners*. A provision that says *nothing* about the issue at hand is among the *tiniest* imaginable mouseholes.

Further, the FTC, since its creation in 1914, has failed to issue any UMC rulemakings over the past 108 years. As Richard Pierce [explains](#), between 1914 and 1962, when the unfair or deceptive practice rules under review in *Petroleum Refiners* were first introduced, “the FTC, Congress, courts, and scholars were unanimous in their belief that the FTC did not have the power to issue legislative rules.” An assertion claiming such authority to issue rules now would be a bureaucratic power-grabbing bridge too far, if not to nowhere.

Should the occasion arise, for all the reasons discussed, we predict the Supreme Court will slam the door shut on FTC UMC rulemaking authority.

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<sup>[1]</sup> It is also possible that any UMC rules issued would be determined to violate the nondelegation doctrine, aside from whether reviewing courts considered the major questions doctrine part and parcel of the nondelegation doctrine. In this essay, we are focusing on current major questions doctrine jurisprudence that often is not tied, at least explicitly, to traditional nondelegation doctrine analysis.

<sup>[2]</sup> We authored a [law review article](#) dedicated to this subject.

<sup>[3]</sup> See, for example, Justice Neil Gorsuch’s dissent in [Gundy v. United States](#), joined by Chief Justice John Roberts and Justice Clarence Thomas, which argued that the major questions doctrine should step in to replace the Court’s failure to enforce the nondelegation doctrine.