Dead-End Road: *National Petroleum Refiners Association* and FTC "Unfair Methods of Competition" Rulemaking

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Abstract

The Federal Trade Commission (FTC) has never tried to travel down the road of "unfair methods of competition" (UMC) rulemaking in the nearly fifty years since the D.C. Circuit decided National Petroleum Refiners Association v. FTC. This paper explains how that road is essentially a dead end. Part II discusses the history of the FTC's rulemaking authority and summarizes arguments in favor of UMC rules. Part III discusses National Petroleum Refiners and explains why it would be overruled using modern principles of statutory interpretation. Part IV rebuts the argument that Congress ratified the FTC's UMC rulemaking authority in Magnuson-Moss and later legislation, and Part V argues that the subsequent history of the octane rating rule at issue in National Petroleum Refiners is further evidence that the FTC lacks authority to promulgate UMC rules.

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I. Introduction

The Federal Trade Commission (FTC) has long steered the direction of competition law by engaging in case-by-case enforcement of the FTC Act's prohibition on unfair methods of competition, interpreted as generally coterminous with the Sherman Act. Recently, some have argued that the FTC's exclusive reliance on case-by-case adjudication is too long and arduous a route and urged the Commission to take a shortcut by invoking its purported authority to promulgate unfair methods of competition (UMC) rules under section 6(g) of the Federal Trade Commission Act.[1] These critics argue that UMC rulemaking would reduce ambiguity in the law, lower the costs of enforcement, and allow increased public participation through notice-and-comment procedures.[2] They also assert that UMC rules can reach much further than the Sherman Act and regulate much broader swathes of business conduct.

Proponents of UMC rulemaking rely on *National Petroleum Refiners Association v. FTC*, a 1973 D.C. Circuit decision, which upheld the Commission's authority to issue broad legislative rules under the FTC Act.[3] They argue that *National Petroleum Refiners* provides a clear path and that Congress effectively ratified the D.C. Circuit's decision when it enacted detailed rulemaking procedures governing unfair or deceptive acts or practices (UDAP) in the Magnuson-Moss Warranty–Federal Trade Commission Improvement Act of 1975 (Magnuson-Moss). Because Magnuson-Moss did not address UMC rules, the argument goes, the Commission's authority to issue such rules was left intact, the rules are governed by the Administrative Procedure Act[4] (APA), and any FTC interpretations of UMC are entitled to *Chevron* deference. They argue that the FTC merely needs to race down a wide-open road with streamlined APA rulemaking to make sweeping changes to the competition landscape for all U.S. businesses subject to FTC oversight.

As this paper will address, the premise of this argument is fundamentally incorrect. As discussed in another paper[5] and outlined below, modern courts reject the type of permissive statutory analysis applied in *National Petroleum Refiners*. Even since that recent paper, the Supreme Court has posted additional stop signs for agencies seeking to newly assert broad powers not explicitly granted by Congress. Moreover, contemporaneous congressional reaction to *National*

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1 Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. Chi. L. Rev. 357 (2020).

2 *Id.*

3 482 F.2d 672 (D.C. Cir. 1973).

4 5 U.S.C. § 553 *et seq.*

5 Maureen K. Ohlhausen & James Rill, *Pushing the Limits? A Primer on FTC Competition Rulemaking*, U.S. Chamber of Com. (Aug. 12, 2021), https://www.uschamber.com/assets/archived/images/ftc_rulemaking_white_paper_aug12.pdf.

Petroleum Refiners was not to embrace broad FTC rulemaking but rather to put in place strong guardrails on FTC UDAP rulemaking. As this paper explores, the congressional history of the particular FTC rule at issue – the octane rating rule – also points in the direction of a lack of broad UMC rulemaking, as Congress eventually adopted the rule as solely a UDAP provision with heightened restrictions on FTC rulemaking.

Thus, the road to UMC rulemaking, which the agency wisely never tried to travel down in the almost fifty years since *National Petroleum Refiners*, is essentially a dead end. If the agency tries to go that route, it will be an unfortunate detour from its clear statutory direction to engage in case-by-case enforcement of section 5.

Part II of this paper discusses the history of the FTC's rulemaking authority and summarizes the arguments in favor of UMC rules. Part III discusses *National Petroleum Refiners* and explains why it would be overruled using modern principles of statutory interpretation, while Part IV rebuts the argument that Congress ratified the FTC's UMC authority in Magnuson-Moss and later legislation. Finally, Part V argues that the subsequent history of the octane rating rule at issue in *National Petroleum Refiners* is further evidence that the FTC lacks authority to issue UMC rules.

II. Broad UMC Rulemaking Authority Contradicts the History and Evolution of the FTC's Authority

The FTC Act grants the Commission broad authority to investigate unfair methods of competition and unfair and deceptive acts or practices across much of the American economy. Rather than defining with specificity particular violations of the FTC Act, Congress granted the agency broad investigatory powers and provided for case-by-case enforcement and adjudication before an administrative tribunal with deep subject matter expertise. As originally enacted in 1914, the FTC Act empowered the Commission to prevent "unfair methods of competition" and established an elaborate adjudicative and investigative framework in sections 5 and 6 of the Act. The 1938 Wheeler-Lea amendments[6] expanded the FTC's authority to also prevent "unfair or deceptive acts or practices"

The FTC's administrative adjudicative authority under "Part 3" is central to the FTC's mission of preserving fair competition and protecting consumers,[7] as reflected by the comprehensive adjudicative framework established in section 5 of the FTC Act.[8] Section 5 authorized the Commission to prevent UMC (and later UDAP) by filing a complaint concerning the conduct at issue, holding hearings

6 Wheeler-Lea Act of 1938, ch. 49, § 3, 52 Stat. 111.

7 16 C.F.R. Part 3.

8 15 U.S.C. § 45.

before an administrative tribunal, and, if persuaded the law has been violated, issuing cease-and-desist orders that can be enforced in federal court.[9] A key feature of Part 3 adjudication is that the litigation process is overseen and ultimately decided by subject-matter experts attuned to the goals, legal frameworks, and other details of antitrust and consumer protection law, who would be well suited to resolve difficult and novel questions of law and fact.[10] To further the agency's expertise, section 6 of the FTC Act detailed various investigative powers of the Commission to collect confidential business information and conduct industry studies.

In contrast to this detailed adjudicative and investigatory framework, the original FTC Act contained only one sentence describing the agency's ability to make rules, buried rather inconspicuously among provisions authorizing investigations into foreign trade conditions and publications of reports to Congress. As originally enacted, section 6(g) provided that the FTC would have authority "[f]rom time to time [to] classify corporations and… to make rules and regulations for the purpose of carrying out the provisions of this [Act]."[11] Whereas section 5 provided a detailed administrative scheme for the enforcement of cease-and-desist orders and judicial review of agency decisions, the FTC Act fails to provide for any sanctions for violations of rules promulgated under section 6 or otherwise specify that such rules would carry the force of law.[12] This minimal delegation of power arguably conferred the right to issue procedural but not substantive rules.[13] Early legislative amendments to the FTC's authority only underscored the Commission's lack of substantive rulemaking authority. For example, statutes like the Wool Products Labeling Act[14] and the Fur Products Labeling Act[15] expressly conferred legislative rulemaking authority

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9 Federal Trade Commission Act of 1914, 38 Stat. 719 § 5.

10 *See, e.g.*, Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?*, 12 J. Comp. L. & Econ. 623, 624 (2016).

11 38 Stat. 722 § 6(g) (codified as amended at 15 U.S.C. § 46(g)).

12 *See* Am. Bar Ass'n, Comments of the Antitrust Law Section of the American Bar Association in Connection with the Federal Trade Commission Workshop on "Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues" 54 (Apr. 24, 2020), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/april-2020/comment-42420-ftc.pdf (asserting that "the Act['s] fail[ure] to provide any sanctions for violating any rule adopted pursuant to Section 6(g) . . . strongly suggest[s] that Congress did not intend to give the agency substantive rulemaking powers when it passed the Federal Trade Commission Act") (internal citations omitted).

13 Royce Zeisler, Chevron *Deference and the FTC: How and Why the FTC Should Use* Chevron *to Improve Antitrust Enforcement*, 2014 Colum. Bus. L. Rev. 266, 281 (2014); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules With the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 549 (2002).

14 Ch. 871, § 6(a), 54 Stat. 1128, 1131 (1940) (codified as amended at 15 U.S.C. § 68d(a)) (authorizing the FTC to make rules and regulations "as may be necessary and proper for administration and enforcement"). Congress gave the rules promulgated under this general rulemaking grant legislative effect through various statutory provisions. For example, section 3 provided that the introduction into commerce of any wool product that was misbranded within the meaning of the Act or of the rules or regulations promulgated by the FTC was unlawful. *Id.* § 3, 54 Stat. at 1129 (codified at 15 U.S.C. § 68h).

15 Ch. 298, § 8(b), 65 Stat. 175, 180 (1951) (codified at 15 U.S.C. § 69f(b)) (authorizing the FTC to promulgate rules and regulations "as may be necessary and proper for purposes of administration and enforcement of this Act").

to the FTC, grants of authority that would have been superfluous if Congress had already authorized such rules under section 6(g) of the FTC Act.[16]

Consistent with the understanding that Congress did not authorize substantive rulemaking, the FTC made no attempt to promulgate rules with the force of law for nearly fifty years after it was created,[17] and at various times indicated that it lacked the authority to do so.[18] Between 1914 and 1962, the FTC convened trade practice conferences to supplement some of the inefficiencies of case-by-case adjudication and identify practices that violated laws administered by the FTC.[19] The conferences gathered industry or consumer groups to identify proposed rules about a certain industry, and, after a public hearing, the FTC would issue a "trade practice conference rule."[20] Such "rules" were not considered legally binding and depended on voluntary compliance by industry.[21] In 1955, the FTC began to issue guides, which consisted of interpretive rules describing the FTC's opinion on the requirements of the FTC Act. Like trade practice conference rules, the guides did not carry the force of law.[22]

In 1962, the agency for the first time began to promulgate consumer protection trade regulation rules (TRRs), citing its authority under section 6(g).[23] Although these early TRRs plainly addressed consumer protection matters, the agency frequently described violations of the rule as both an unfair method of competition *and* an unfair or deceptive trade practice.[24] As the Commission itself has observed, "[n]early all of the rules that the Commission actually promulgated under section 6(g) were consumer protection rules."[25]

In fact, in more than a hundred years of the FTC Act, the agency has only once issued a solely competition rule. In 1967, the Commission promulgated the Men and Boys' Tailored Clothing Rule pursuant to authority under the Clayton Act,

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16 Merrill & Watts, *supra* note 13, at 549.

17 *Id.* at 549–50.

18 *Nat'l Petroleum Refiners*, 482 F.2d at 693 ("[T]he agency itself did not assert the power to promulgate substantive rules until 1962 and indeed indicated intermittently before that time that it lacked such power.").

19 Merrill & Watts, *supra* note 13, at 551.

20 *Id.*

21 *Id.*

22 *Id.* at 552.

23 Perhaps because the agency recognized its limited authority in this area and the potential political ramifications from its use, FTC's initial rules were rather trivial and uncontroversial. For example, in 1963 the FTC promulgated a rule requiring sleeping bags be marked with the size of the finished product rather than the dimensions of the materials used in making the bags. 16 C.F.R. § 400 (1964). Similarly, a 1965 TRR declared that the practice of describing household electric sewing machines as "automatic," "fully automatic," or "automatic zig-zag sewing machines" violated section 5. 16 C.F.R. § 401 (1966). *See also* Merrill & Watts, *supra* note 13, at n. 443.

24 *See, e.g.*, Advance Notice of Proposed Rulemaking, Trade Regulation Rule: Advertising and Labeling as to Size of Sleeping Bags, 60 Fed. Reg. 27240 (May 23, 1995) (to be codified at 16 C.F.R. pt. 400) ("The Sleeping Bag Rule, promulgated by the Commission on October 11, 1963, declares that it is an unfair method of competition and an unfair or deceptive practice to use the 'cut size' of the materials from which a sleeping bag is made to describe the size of a sleeping bag in advertising… .").

25 Fed. Trade Comm'n, A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority (revised, May 2021), https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority.

which prohibited apparel suppliers from granting discriminatory advertising allowances that limited small retailers' ability to compete.[26] The year after the Rule was promulgated, the Supreme Court decided *FTC v. Fred Meyer, Inc.*, which recommended the Commission issue detailed guidelines concerning promotional allowances.[27] The Commission accepted this invitation the following year by publishing the so-called Fred Meyer Guides, which set out general standards for promotional allowances applicable to all industries.[28] The Fred Meyer Guides largely rendered the Tailored Clothing Rule unnecessary. It appears never to have been enforced and was subsequently repealed.[29] The rule was never subject to challenge, and, as discussed more fully below, the fact that the agency has never again attempted to promulgate a solely competition rule is rather telling that it lacks the actual authority to do so.

Soon after these developments, the FTC promulgated the octane rating rule at issue in *National Petroleum Refiners*, in which the D.C. Circuit upheld the Commission's power to promulgate substantive rules under section 6(g) of the FTC Act. Proponents of UMC rulemaking like former FTC Commissioner Rohit Chopra and current Chair Lina Khan point to *National Petroleum Refiners* as evidence that the Commission retains the power to promulgate substantive competition rules governed only by the APA and, with respect to interpretations of UMC, entitled to *Chevron* deference.[30] They argue that UMC rulemaking would deliver significant benefits by providing clear notice to market participants about what the law requires, relieving the steep expert costs and prolonged trials common to antitrust adjudications, and fostering a "transparent and participatory process" that would allow for meaningful public participation.[31]

Chopra and Khan argue that UMC rulemaking would be appropriate to regulate conduct where an extensive enforcement record already exists or where anticompetitive conduct is unlikely to be challenged by private litigants (such as noncompete clauses). In practice, however, once the Commission unlocks broad rulemaking authority, it is unlikely that the agency would limit itself to such a narrow set of circumstances.[32] Setting aside the legality of the practice, broad UMC rulemaking would distract the FTC from the main task assigned to it – case-by-case enforcement and adjudication as an expert body. Rather than

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26 Notice of Repeal of Rule, Trade Regulation Rule: Discriminatory Practices in Men's and Boys' Tailored Clothing Industry, 59 Fed. Reg. 8527, 8528 (Feb. 23, 1994) (to be codified at 16 C.F.R. pt. 412).

27 390 U.S. 341 (1968).

28 16 C.F.R. pt. 240.

29 Notice of Repeal of Rule, , *supra* note 26. *See also* Jay B. Sykes, Cong. Rsch. Serv., LSB10635, The FTC's Competition Rulemaking Authority 1 (Aug. 12, 2021), https://crsreports.congress.gov/product/pdf/LSB/LSB10635.

30 Chopra & Khan, *supra* note 1, at 378–79.

31 *Id.*

32 Indeed, some have already called on the Commission to engage in UMC rulemaking untethered to any of the principles described by Chopra and Khan, such as a rule prohibiting all online behavioral advertising. *See* Petition for Rulemaking by Accountable Tech, 86 Fed. Reg. 73206 (Dec. 27, 2021).

applying its expertise to specific facts and complex legal issues through enforcement supported by substantial evidence, it appears that the Commission is seeking a shortcut to its desired outcome, bypassing Congress and the courts along the way.[33] Further, if it promulgates such rules through abbreviated notice-and-comment rulemaking, FTC would claim extremely broad substantive authority to directly regulate business conduct across the economy with relatively few of the procedural guardrails that Congress felt necessary for FTC's consumer protection TRRs.

With Chair Khan at the helm of the FTC, the agency has already begun to pave the way for new UMC rulemakings. For example, President Biden's Executive Order on promoting competition called on the Commission to promulgate UMC rules addressing noncompete clauses and pay-for-delay settlements, among other issues.[34] Further, as one of Chair Khan's first actions, the Commission rescinded – without replacing – its bipartisan Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, divorcing (at least in the Commission majority's view) section 5 from prevailing antitrust law principles and leaving the business community without any current guidance as to what the Commission considers "unfair."[35] More recently, the Commission's Statement of Regulatory Priorities filed with the Office of Information and Regulatory Affairs stated that the FTC "in the coming year will consider developing both unfair-methods-of-competition rulemakings as well as rulemakings to define with specificity unfair or deceptive acts or practices."[36] As described in the following sections, this foray into UMC rulemaking is likely to take the FTC down a dead-end road.

III. The Signs are Clear: *National Petroleum Refiners* Does Not Comport With Modern Principles of Statutory Interpretation

As described above, the FTC's authority to conduct rulemaking under section 6(g) has been tested in court only once, in *National Petroleum Refiners*, where the D.C. Circuit upheld the Commission's authority to promulgate a UDAP and UMC rule requiring the disclosure of octane ratings on gasoline pumps.[37] The district

33 *See, e.g.*, Ohlhausen & Rill, *supra* note 5.

34 Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 9, 2021).

35 *See* Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson on the "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/system/files/documents/public_statements/1591710/p210100phillipswilsondissentsec5enforcementprinciples.pdf.

36 Fed. Trade Comm'n, Statement of Regulatory Priorities 1 (Dec. 2021), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf.

37 482 F.2d at 674.

court had ruled against the FTC, concluding that the agency lacked statutory authority to issue legislative rules under section 6(g). The D.C. Circuit panel unanimously reversed the district court on this ground and remanded for further consideration. The court rejected the argument that section 6(g) only permitted the FTC to promulgate administrative or procedural rules and instead held that the FTC could issue substantive rules applicable to the entire FTC Act, including section 5.[38] The court concluded that rulemaking would "carry out what the Congress agreed was among [the FTC's] central purposes: expedited administrative enforcement of the national policy against monopolies and unfair business practices. Under the circumstances, since Section 6(g) plainly authorizes rule-making and nothing in the statute or in its legislative history precludes its use for this purpose, the action of the [FTC] must be upheld."[39] As described in more detail below, the court's statutory interpretation and rationale for upholding such a broad grant of authority is far afield from recent Supreme Court precedent.

At the time of the decision in *National Petroleum Refiners*, section 6(g) authorized the FTC to "make rules and regulations for the purpose of carrying out the provisions of sections 41 to 46 and 47 to 58 of this title."[40] The court rejected the argument that section 6(g) only permitted the FTC to promulgate administrative and procedural rules applicable to the adjudication and enforcement powers in section 5, holding instead that the FTC could issue substantive rules defining the statutory standard of UMC or UDAP in advance of adjudicative proceedings.[41] The court disagreed that substantive rulemaking under section 6(g) would circumvent the FTC Act's adjudicatory framework in section 5 because, after promulgating rules, the FTC must still enforce them through adjudication.[42] Because section 5(b), which describes the FTC's administrative proceedings and authority to issue cease-and-desist orders, "does not use limiting language suggesting that adjudication alone is the only proper means of elaborating the statutory standard," the court concluded that rulemaking was not inconsistent with the statute.[43]

The court also rejected the contention that section 6(g) rulemaking authority was "limited to specifying the details of the Commission's nonadjudicatory, investigative and informative functions" described in the rest of section 6.[44] Instead, the court found that section 6(g) "clearly states that the Commission 'may' make rules and regulations for the purpose of carrying out the provisions

38 *Id.* at 674–78.

39 *Id.* at 693.

40 *Id.* at 676 (quoting section 6(g) of the FTC Act).

41 *Id.* at 674–78.

42 *Id.* at 675.

43 *Id.*

44 *Id.* at 676.

of Section 5"[45] and "liberally… construe[d] the term 'rules and regulations'"[46] based on "judicial precedents concerning rule-making by other agencies and the background and purpose of the Federal Trade Commission Act[.]"[47] The court claimed those precedents established "[t]he need to interpret liberally broad grants of rule-making authority like the one we construe here."[48]

After analyzing the statutory text and other agencies' rulemaking authority, the court turned to pragmatic concerns about the benefits that rulemaking provides to fulfilling the agency's mission. The court emphasized that "there is little question that the availability of substantive rule-making gives any agency an invaluable resource-saving flexibility in carrying out its task of regulating parties subject to its statutory mandate" and extolled the benefits of rulemaking over case-by-case adjudication when developing agency policy.[49] Substantive rulemaking authority would permit the FTC to carefully consider and develop ideal standards of conduct, avoid the slow development of rules through adjudication, and minimize the unfairness of a case-by-case approach that requires compliance of only the party at issue while leaving other competitors free to commit violations.[50] The court concluded that the "policy innovation" enabled by rulemaking "underscore[d] the need for increased reliance on rule-making rather than adjudication alone."[51]

In looking to the FTC Act's legislative history, the court found it "ambiguous" as to whether the FTC was limited to a prosecutorial function and reasoned that the "relationship between rule-making's probable benefits and the broad concerns evident when the FTC was created, together with the express language of section 6(g)," compelled that "any purported ambiguity of the statute be resolved in favor of the Commission's claim."[52] Further, the *National Petroleum Refiners* court was entirely unconcerned that the FTC had not asserted this authority in nearly a half-century of the agency's existence, reasoning that an agency's powers "are not lost by l[ying] dormant."[53] Nor was the court deterred by the fact that the FTC had previously taken the position that it lacked substantive rulemaking authority, finding that it was not the agency's place to define its authority and that such issues of statutory interpretation were more properly resolved by a reviewing court.[54]

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45 *Id.* at 677.

46 *Id.* at 678.

47 *Id.*

48 *Id.* at 680.

49 *Id.* at 681–84.

50 *Id.* at 683–84.

51 *Id.* at 684.

52 *Id.* at 691.

53 *Id.* at 693–94.

54 *Id.* at 694.

The D.C. Circuit's opinion in *National Petroleum Refiners* has had an impact on the development of administrative law, but there is little question that it reads today like an anachronism. The administrative "canon" described in *National Petroleum Refiners* provides that an ambiguous grant of rulemaking authority should be construed to give agencies the broadest possible powers so that they will have flexibility in determining how to effectuate their statutory mandates.[55] Not only has the Supreme Court never explicitly adopted this approach, recent decisions strongly suggest it would decline to do so if presented the opportunity. Some scholars have gone so far as to argue that no current Supreme Court justice would approach statutory interpretation the way the D.C. Circuit did in *National Petroleum Refiners*.[56]

As discussed in another recent paper,[57] the D.C. Circuit's opinion is in clear tension with the "elephants-in-mouseholes" doctrine first described by the Supreme Court in *Whitman v. Am. Trucking Ass'ns*,[58] because it largely ignored the significance of the FTC Act's detailed adjudicative framework and instead relied on the fact that section 5(b) did not use specific limiting language that would cabin the rulemaking authority provided in section 6(g).[59] The D.C. Circuit's reasoning that Congress buried sweeping legislative rulemaking authority in a vague, ancillary provision, alongside the ability to "classify corporations," stands in direct conflict with the Supreme Court's admonition in *Whitman*.[60]

Modern courts would also look to interpret the structure of the FTC Act to "produce[] a coherent enforcement scheme."[61] For instance, in *AMG Capital Management v. FTC*, the Supreme Court struck down the FTC's use of section 13(b) to obtain equitable monetary relief, in part because the FTC Act elsewhere imposes specific limitations on the Commission's authority to obtain monetary relief. As such, the Court found it "highly unlikely that Congress would have enacted provisions expressly authorizing *conditioned* and *limited* monetary relief if the Act, via § 13(b), had already implicitly allowed the Commission to

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55 *See* Merrill & Watts, *supra* note 13, at 492.

56 *See* Final Transcript at 295–96, Fed. Trade Comm'n, Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues (Jan. 9, 2020), https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete-workshop-transcript-full.pdf ("MR. PIERCE: So the interpretive method that was used in that case was fairly commonly used on the DC Circuit at that time. There is no Justice today, not just Gorsuch but Kagan, Breyer, there is no Justice today that would use [the reasoning of *National Petroleum Refiners*]. . . . I teach it as an illustration of something no modern court would do.").

57 *See* Ohlhausen & Rill, *supra* note 5.

58 531 U.S. 457, 468 (2001). The "elephants-in-mouseholes" doctrine provides that "Congress… does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Id.*

59 *See* Ohlhausen & Rill, *supra* note 5, at 11–12.

60 The Supreme Court applied similar reasoning in AMG Capital Management, LLC, et al. v. FTC, 593 U.S. __, 141 S. Ct. 1341, 1348 (2021) when it struck down FTC's claimed authority to obtain equitable monetary relief under section 13(b) of the FTC Act. *See* Ohlhausen & Rill, *supra* note 5, at 12. *See also* Steven A. Reed, Scott A. Stempel & Daniel S. Savrin, *The US Supreme Court holds that the FTC lacks the authority to seek equitable monetary relief in cases brought in federal court under FTC Act Section 13(b) (AMG Capital Management)*, e-Competitions April 2021, art. No. 100669. Concurrences+

61 *AMG*, 141 S. Ct. at 1349.

obtain that same monetary relief and more without satisfying those conditions and limitations."[1] Also in contrast to *National Petroleum Refiners*, which lauded the benefits and efficiencies of rulemaking for the agency's mission, the *AMG* court expressly rejected this mode of analysis, writing: "Our task here is not to decide whether [the FTC's] substitution of § 13(b) for the administrative procedure contained in § 5 and the consumer redress available under § 19 is desirable. Rather, it is to answer a more purely legal question" of whether Congress granted authority or not.[2] The same rationale applies to UMC rulemaking.

The unanimous *AMG* decision was no judicial detour, and the Supreme Court has routinely posted clear road signs that Congress is expected "to speak clearly when authorizing an agency to exercise powers of vast economic and political significance," as UMC rulemaking would do.[3] Since 2000, the Court has increasingly applied the "major questions doctrine" to limit the scope of congressional delegation to the administrative state in areas of major political or economic importance. For example, in *FDA v. Brown & Williamson*, the Supreme Court declined to grant *Chevron* deference to an FDA rule interpreting the Food, Drug, and Cosmetic Act as permitting the agency to regulate nicotine and cigarettes.[4] Crucial to the Court's analysis was that the FDA's rule contradicted the agency's own view of its authority dating back to 1914 while asserting jurisdiction over a significant portion of the American economy.[5] In *Utility Air Regulatory Group v. EPA*, the Court invoked the major questions doctrine to strike down EPA's greenhouse-gas emissions standards as an impermissible interpretation of the Clean Air Act, finding that "EPA's interpretation is… unreasonable because it would bring about an enormous and transformative expansion in [the] EPA's regulatory authority without clear congressional authorization."[6]

Most recently, the Supreme Court's decision striking down OSHA's COVID-19 vaccine mandate is further evidence that the lanes are closed to overbroad statutory construction. In *National Federation of Independent Business v. OSHA,* the Court narrowly construed the Occupational Health and Safety Act to find that OSHA lacked authority to impose a nationwide vaccine mandate because the statute authorizes the agency to enact only "*occupational* safety and health standards," not "broad public health measures."[7] The Court found it persuasive that the agency had never adopted a broad public health regulation in the

1 *Id.*

2 *Id.* at 1347.

3 *See, e.g.*, Alabama Ass'n of Realtors v. Dep't. of Health & Hum. Servs., 594 U.S. __, 141 S. Ct. 2485, 2489 (2021).

4 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000).

5 *Id. See also* Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 Minn. L. Rev. 2019 (May 2018).

6 573 U.S. 302, 324 (2014).

7 Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 665 (2022) (*per curiam*).

half-century of its existence, concluding that "[t]his 'lack of historical precedent,' coupled with the breadth of authority that the Secretary now claims, is a 'telling indication' that the mandate extends beyond the agency's legitimate reach."[8] The Court gave no credence to the fact that the rule would likely save lives and prevent hospitalizations, stating, "It is not our role to weigh such tradeoffs. In our system of government, that is the responsibility of those chosen by the people through the democratic processes. Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly."[9] Because broad UMC rulemaking authority under section 6(g) is similarly a question of potentially "vast economic and political significance," and would also represent a significant departure from past agency precedent, all signals suggest that the FTC's efforts to promulgate such rules would promptly be met by a flashing red light.

Finally, while *National Petroleum Refiners* lauded the benefits of rulemaking authority and emphasized its usefulness for carrying out the FTC's mission, the Supreme Court has since clarified that "[h]owever sensible (or not)" an interpretation may be, "a reviewing court's 'task is to apply the text [of the statute], not to improve upon it.'"[10] Whatever benefits rulemaking authority may confer on the FTC, they cannot justify departure from the text of the FTC Act.[11]

IV. The Road Not Taken: Congress Did Not Ratify UMC Rulemaking Authority and the FTC Did Not Assert It

Two years after the D.C. Circuit's decision in *National Petroleum Refiners*, Congress enacted the Magnuson-Moss Warranty–Federal Trade Commission Improvement Act of 1975 (Magnuson-Moss).[12] Section 202(a) of Magnuson-Moss amended the FTC Act to add a new section 18, which, for the first time, gave the FTC express authority to issue UDAP rules while imposing heightened procedural requirements for such rulemaking.[13] Congress designated Magnuson-Moss as the sole authority under which the FTC can issue trade regulation rules addressing UDAP, but the statute does not expressly address UMC rulemaking authority.[14] Instead, the statute only says that the Commission's authority to

8 *Id.* at 666 (quoting Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 505 (2010) (cleaned up).

9 *Id.*

10 EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 508–09 (2014).

11 *Id. See also, e.g., Alabama Ass'n of Realtors*, 141 S. Ct. at 2490 ("It is indisputable that the public has a strong interest in combating the spread of the COVID-19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends.").

12 Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified as amended in scattered sections at 15 U.S.C. § 41 *et seq.*).

13 15 U.S.C. § 57a.

14 15 U.S.C. § 57a(a)(2).

promulgate rules under section 18 "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."[15] As it currently stands, section 6(g) authorizes the FTC "(except as provided in section 57a(a)(2) of this title) to make rules and regulations for the purpose of carrying out the provisions of this subchapter."[16]

UMC rulemaking proponents argue that Magnuson-Moss effectively ratified *National Petroleum Refiners* and affirmed the Commission's authority with respect to substantive UMC rules.[17] This revisionist interpretation is incorrect. To be sure, Congress expressly ratified that case's holding with respect to UDAP rules by creating explicit rulemaking procedures, enforcement mechanisms, and remedies to address unfair and deceptive practices. But the savings provision in section 18(a)(2) that preserves "any authority" (as opposed to "the" authority) of the Commission to prescribe UMC rules reflects, at most, an agnostic view on whether FTC in fact possesses such authority. Rather, it suggests that whatever authority may exist for UMC rulemaking was unchanged by section 18 and that Congress left the question open for the courts to resolve. The FTC itself appears to have recognized this uncertainty, as evidenced by the fact that it has never even attempted to promulgate a UMC rule in the nearly fifty years following the enactment of Magnuson-Moss.[18]

Congress's ambivalence is further underscored by the express enforcement and remedial provisions in Magnuson-Moss for UDAP rule violations without any parallel scheme for UMC rules. For example, section 205(a) of Magnuson-Moss amended section 5 of the FTC Act to authorize the FTC to sue for civil penalties against a party that violates a UDAP rule.[19] Section 206(a) created a new section 19 of the FTC Act that authorizes the FTC to bring suit in federal court for equitable monetary and other relief for UDAP rule violations.[20] The fact that Congress authorized a detailed enforcement and remedial scheme for UDAP rule violations but said nothing about UMC rules strongly signals that it did not ratify the holding of *National Petroleum Refiners* for UMC rulemaking.

The legislative history of Magnuson-Moss also reflects congressional skepticism that *National Petroleum Refiners* was correctly decided. The House Report refers several times to the case, and it is apparent that Congress understood its holding.[21] The Senate bill did not contain any new provisions relating to the FTC's rulemaking

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15 *Id.*

16 15 U.S.C. § 46(g).

17 Chopra & Khan, *supra* note 1, at 369–70.

18 Zeisler, *supra* note 13, at 282.

19 15 U.S.C. § 45(m).

20 15 U.S.C. § 57b.

21 *See* H.R. Rep. No. 93-1107 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7702.

power,[22] but the House bill, by contrast, included a proposed section 18 that eliminated section 6(g) and expressly limited the FTC's rulemaking authority to UDAP regulations.[23] Specifically, the House's proposal would have "replace[d] the existing rulemaking authority of the FTC under section 6(g) of the Act with a new section 18 which authorizes the FTC to issue rules defining with specificity the acts or practices which are unfair or deceptive and which are within the scope of section 5(a)(1) of the Federal Trade Commission Act."[24] The House bill included enhanced rulemaking procedures for UDAP rules out of concern that the APA alone provided "inadequate" procedural safeguards in light of the "potentially pervasive and deep effect of rules defining what constitutes unfair or deceptive acts or practices and the broad standards" set by the definition of UDAP.[25]

The House's version was ultimately rejected, and the final bill reflects a compromise that leaves open the question of UMC rulemaking authority without endorsing it. While Chopra and Khan suggest that *National Petroleum Refiners* remains enshrined in law because Magnuson-Moss applied only to UDAP rules,[26] congressional silence on UMC hardly endorses the Commission's authority and is not likely to persuade an appellate court today. For instance, the Supreme Court has made clear that it "does not follow… that Congress' failure to overturn a statutory precedent is reason for [a court] to adhere to it" and that it is "'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of [a court's] statutory interpretation."[27] That is because "Congress takes no governmental action except by legislation."[28] Congressional silence merely indicates "Congress's failure to express any opinion" and offers little insight into legislative intent.[29] To rely on congressional acquiescence to a judicial interpretation, there must be "overwhelming evidence" that Congress considered and rejected the "precise issue" before the Court.[30] Although Congress considered *National Petroleum*

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22 S. Rep. No. 93-1408 (1974) (Conf. Rep.), *as reprinted in* 1974 U.S.C.C.A.N. 7755, 7761 ("The Senate bill contained no provisions relating to rulemaking procedures to be followed by the Federal Trade Commission.").

23 *Id.* at 7762 ("These rules [authorized by the House bill] would have been limited to defining acts or practices which were unfair or deceptive within the meaning of section 5(a)(1) of the Act. The FTC would have been prohibited from prescribing rules with respect to unfair competitive practices."); *see also* H.R. Rep. No. 93-1107, 1974 U.S.C.C.A.N. at 7727 (section 18 "would be the exclusive substantive rulemaking authority of the FTC under the Federal Trade Commission Act. Thus, the Commission would not have rulemaking authority with respect to unfair methods of competition to the extent they are not unfair or deceptive acts or practices.").

24 H.R. Rep. No. 93-1107, 1974 U.S.C.C.A.N. at 7727.

25 *Id.*

26 Chopra & Khan, *supra* note 1, at 378.

27 Patterson v. McLean Credit Union, 491 U.S. 164, 175 n. 1 (1989) (internal citations omitted). *See also* Bob Jones Univ. v. United States, 461 U.S. 574, 600 (1983) ("Non-action by Congress is not often a useful guide" to statutory interpretation).

28 Rapanos v. United States, 547 U.S. 715, 750 (2006) (plurality opinion).

29 *Id.*

30 *Id*.

Refiners, it ultimately took no action, either affirmative or negative, on the FTC's UMC rulemaking authority. Hardly the "overwhelming evidence" required to read *National Petroleum Refiners* into the law.[31]

V. The Forgotten Journey: The History of the Octane Rating Rule Reinforces the FTC's Lack of UMC Rulemaking Authority

Those that argue that *National Petroleum Refiners* is still good law and that Congress silently endorsed UMC rulemaking have shown no interest in how the journey of the octane rating rule continued after the case and where it eventually ended. The FTC's 1971 octane rating rule declared the failure to post octane disclosures on gasoline pumps both an unfair method of competition *and* an unfair or deceptive practice. But what has remained unexplored in the debate over FTC UMC rulemaking is what happened to the rule after the D.C. Circuit's decision upheld rulemaking under section 6(g) and what that tells us about congressional and agency views on UMC authority.

The octane rating rule upheld by the D.C. Circuit never took effect and was ultimately replaced when Congress enacted the Petroleum Marketing Practices Act (PMPA), Title II of which addressed octane disclosure requirements and directed the FTC to issue new rules under the PMPA.[32] But, despite previous claims by the FTC that the rule drew on both UDAP and UMC authority, Congress declined to provide any authority beyond UDAP. While it is impossible to say whether Congress concluded that UMC rulemaking was unwise, illegal, or simply unnecessary, the PMPA – passed just two years after Magnuson-Moss – suggests that UMC rulemaking did not survive the enactment of section 18. A brief summary of the rule's meandering journey follows.

The D.C. Circuit remanded *National Petroleum Refiners* back to the district court for further consideration, limited to the adequacy of the administrative record underlying the rule. The district court, in turn, ordered the FTC to complete an environmental impact statement before attempting to put the rule into effect.[33] While the environmental impact analysis was pending, Congress began consideration of the PMPA. After its enactment, the Commission, based on an analysis of the statute and its legislative history, understood Congress to have intended the requirements of Title II of the PMPA to replace those of the original octane rating rule.[34] For example, the octane rating method specified by section 202(c)

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31 *See also* Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 327 n. 17, 340 n. 34 (1971) (no congressional approval of court precedent where statute was otherwise revised and provisions that would have overruled precedent "disappeared" from proposed legislation).

32 Pub. L. No. 95-297, 92 Stat. 322 (June 19, 1978).

33 44 Fed. Reg. 19160 (Mar. 30, 1979).

34 *Id.* at 19161.

of the PMPA was the same as the method that was required by the Commission's 1971 rule.[35] The FTC treated the enactment of the PMPA as effectively repealing the rule and published an announcement of the rule's repeal in the Federal Register.[36]

Section 203(a) of the PMPA gave the FTC "procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements of [Title II] and rules prescribed pursuant to the requirements of this title."[37] The House report recounted the long history of FTC's attempts to enact an octane rating disclosure rule as well as the legal challenges the rule had faced and concluded that legislation was needed "to assure prompt and permanent enforcement of an octane posting requirement."[38] The House report further noted that the legislation should "seek to avoid wasteful repetition of much of the effort which the F.T.C. has already expended on this subject."[39]

Testimony in House subcommittee hearings centered on the question of whether the legislation should direct the FTC to enact a TRR on octane posting under expedited procedures that would be authorized by the legislation, or whether Congress should enact its own statutory requirements regarding the testing, certification, and posting of octane ratings.[40] Ultimately, Congress adopted a statutory definition of octane ratings (identical to the method adopted by the FTC in its 1971 rule) and granted the FTC rulemaking authority under the APA to update definitions and prescribe different procedures for determining fuel octane ratings.[41] Congress also specified that certain rules, such as those requiring manufacturers to display octane requirements on motor vehicles, would have heightened rulemaking procedures, such as rulemaking on the record after a hearing.[42]

Whereas the FTC's 1971 rule invoked both UDAP and UMC authority, the PMPA specifically provides that violations of the statute, or any rule promulgated under the statute, "shall be an unfair or deceptive act or practice in or affecting commerce."[43] Although section 203(d)(3) of the PMPA specifically exempts the FTC from the procedural requirements under section 18, it does not simply revert

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35 *Id.*

36 Revocation of Trade Regulation Rule, Part 422 – Posting of Minimum Octane Numbers on Gasoline Dispensing Pumps, 43 Fed. Reg. 43022 (Sept. 22, 1978).

37 Pub. L. No. 95-297, 92 Stat. 322 (June 19, 1978).

38 H. Rep. No. 95-161, at 18 (Apr. 5, 1977).

39 *Id.*

40 *Id.* at 19.

41 PMPA § 203(c), 92 Stat. at 336.

42 *Id.* § 203(d).

43 *Id.* § 203(e), 92 Stat. at 337.

to section 6(g) or otherwise leave open a path for UMC rulemaking. The record makes clear, however, that Congress was aware of the FTC's desire to claim UMC authority in connection with the octane rating rule. When the House Committee on Interstate and Foreign Commerce in the 93rd Congress heard testimony on its version of Magnuson-Moss – which, as discussed in Part IV above, would have explicitly eliminated any FTC authority for UMC rulemaking – the FTC testified that UMC authority was necessary to regulate octane ratings, stating:

> First, the bill would appear to restrict the Commission's existing authority to promulgate rules to prohibit "unfair methods of competition." The Commission perceives no reason for curtailing its powers in this area. Admittedly, the Commission's consumer protection responsibilities are more conducive to the rulemaking process, and, for this reason, the Commission does not foresee a high level of rulemaking activity in the antitrust area. That is not to say, however, that rulemaking is not an appropriate or an effective regulatory device for antitrust enforcement. For instance, where the legality of identical, similar, or related practices of an anticompetitive nature may be addressed responsibly and more efficiently in a single proceeding than in a case-by-case adjudication, law enforcement by rulemaking would be considered more favorably.… Finally, it should be noted that some practices, such as the failure to post octane ratings involved in the *National Petroleum Refiners* case, constitute both an unfair trade practice and an unfair method of competition. These should be handled in a single proceeding in which the Commission's full authority over all activity in violation of the Act may be exercised.[44]

After Magnuson-Moss was enacted, however, neither Congress nor the FTC tried to include UMC rulemaking in the PMPA. In a written statement reflecting the FTC's views on the PMPA incorporated in the House report, the FTC described its original octane rating rule as UDAP only, stating that "[t]he Commission has for many years endorsed the idea of posting octane information on gasoline pumps… [and] promulgated a trade regulation rule which declared that the failure to post minimum octane numbers on gasoline pumps constituted an unfair and deceptive act or practice in violation of section 5 of the Federal Trade Commission Act."[45] While not dispositive, the FTC's apparent abandonment of its request for UMC authority after Magnuson-Moss, and Congress's decision to limit the PMPA exclusively to UDAP, certainly suggests that UMC did not survive *National Petroleum Refiners* and that Congress did not endorse FTC UMC rulemaking.

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44 H. Rep. No. 93-1107, at 57, Letter from Charles A. Tobin, Secretary, Federal Trade Commission (Apr. 29, 1974) (emphasis added).

45 H. Rep. No. 95-161, at 45, Appendix II, Federal Trade Commission – Agency Views, Statement of Federal Trade Commission by Christian S. White, Asst. Director for Special Statutes (Feb. 23, 1977).

VI. Conclusion

Despite the lack of high-octane support for FTC UMC rulemaking authority, the agency appears poised to embark on a journey of broad, legislative-style competition rulemaking under section 6(g) of the FTC Act. This would be a dead end. The shortcut to rulemaking set forth in *National Petroleum Refiners* has been closed off by subsequent actions by Congress and the courts. UMC rulemaking, rather than advancing clarity and certainty about what types of conduct constitute unfair methods of competition, would very likely be viewed by the courts as an illegal left turn. It would also be a detour for the agency from its core mission of case-by-case expert adjudication of the FTC Act, which, given limited agency resources, could result in a years-long escapade that significantly detracts from overall enforcement. The FTC should instead seek to build on the considerable success it has seen in recent years with administrative adjudications, both in terms of winning on appeal and in shaping the development of antitrust law overall by creating citable precedent in key areas.