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EMPLOYER LAW REPORT BLOG POST: REGULATION BY CAPITULATION

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Regulation by capitulation: The tension between the FTC abandoning its defense of the Non-Compete Rule and the administrative law requirements for rescinding rules

The Federal Trade Commission's decision in September 2025 to abandon its defense of the Non-Compete Rule—while simultaneously pursuing targeted enforcement actions against specific employers—raises fundamental questions about the boundaries of executive constitutional judgment and administrative law. This analysis examines whether the FTC's approach represents a legitimate exercise of the executive branch's authority to decline defense of unconstitutional regulations, or an impermissible attempt to circumvent the procedural requirements that *Motor Vehicle Manufacturers Association v. State Farm* imposes on agency policy reversals. The distinction matters: if agencies can effectively rescind regulations by declaring them constitutionally indefensible and abandoning their defense, it would create a concerning loophole in the Administrative Procedure Act's requirement for reasoned decision-making and public participation in regulatory changes.

The FTC's Non-Compete Rule and its abandonment

In April 2024, the FTC voted 3-2 along party lines to issue a final rule comprehensively banning non-compete agreements for most workers nationwide, declaring such agreements unfair methods of competition under Section 5 of the FTC Act. [1] The rule would have prohibited new non-compete agreements and invalidated existing agreements for all workers except senior executives earning over $151,164 annually in policy-making

positions. Scheduled to take effect Sept. 4, 2024, the FTC estimated the rule would increase worker earnings, enhance innovation, and generate over 8,500 new businesses annually. [2]

The rule immediately faced legal challenges. On Aug. 20, 2024, Judge Ada Brown granted summary judgment in *Ryan, LLC v. FTC*, finding the FTC lacked substantive rulemaking authority regarding unfair methods of competition and that the rule was arbitrary and capricious, ordering it "shall not be enforced or otherwise take effect." [3]

Following the change in presidential administrations, on Sept. 5, 2025, the Commission voted 3-1 to voluntarily dismiss its appeals in both *Ryan* and a similar Eleventh Circuit case. Chairman Andrew Ferguson and Commissioner Melissa Holyoak, who had dissented from the original rule on statutory authority grounds, noted the district court validated their position. [4]

While abandoning the blanket ban, the FTC simultaneously signaled its intention to pursue targeted enforcement actions against specific abusive non-compete practices, with Chairman Ferguson stating the action "makes clear that the Trump-Vance Commission will act as a cop on the beat, enforcing the antitrust laws against unlawful noncompete agreements."[5] On Sept. 4, 2025, the FTC filed an enforcement action against Gateway Services, the nation's largest pet cremation company, for allegedly imposing overly broad non-compete agreements on nearly 1,800 employees that prohibited them from working in the pet cremation industry anywhere in the United States for one year, regardless of position or wage level. [6]

The *State Farm* standard for regulatory rescission

The Supreme Court's 1983 *Motor Vehicle Manufacturers Association v. State Farm* decision established that agencies rescinding regulations must provide a "reasoned analysis" for the change beyond initial rulemaking requirements. [7] The Court rejected treating rescission the same as refusing to regulate initially, noting revocation reverses the agency's informed judgment about implementing congressional policies. [8]

Agencies must display awareness they are changing position, cannot depart from prior policy sub silentio, and—while not always requiring more detailed justification than new policy—they must show good reasons for the change. [9] The analysis must explain the departure, address contradictory factual findings, and consider reliance interests—with more detailed justification required when new rules contradict prior factual findings. [10]

Department of Homeland Security v. Regents of the University of California (2020) reinforced these requirements, invalidating DHS's rescission of the Deferred Action for Childhood Arrivals (DACA) program for failing to adequately consider reliance interests.[11] While administration changes legitimize reappraising program costs and benefits, agencies must remain within congressional bounds. [12]

Loper Bright Enterprises v. Raimondo (2024), which overruled Chevron deference, has not altered the State Farm standard. While courts now exercise independent judgment on statutory interpretation, they continue reviewing policy discretion under *State Farm's* deferential arbitrary and capricious standard. [13] Because *Loper Bright* does not compel rescinding rules previously upheld under *Chevron*, an agency choosing rescission makes a voluntary decision fully subject to *State Farm's* requirements. [14]

Executive authority to decline defense of federal laws

The executive branch's practice of declining to defend laws deemed unconstitutional while continuing enforcement—an "enforcement-litigation gap"—dates to World War II. The first documented example arose in 1943 when President Truman permitted federal employees to continue working despite congressional termination orders, while the Solicitor General challenged the law as an unconstitutional bill of attainder, ultimately prevailing in *United States v. Lovett*. [15]

A 1980 Attorney General opinion established that while the Attorney General must defend both Acts of Congress and the Constitution, when conflict arises, he can "almost always" best discharge responsibilities by defending the Act. [16] However, in rare cases involving "transparently unconstitutional" requirements, the Executive's constitutional duty may require defiance. [17] *Myers v. United States* established that the President's duty does not require executing unconstitutional statutes provisionally until judicial invalidation. [18]

The practice requires two conditions: executive ability to change the status quo without ex ante judicial authorization and affected parties' inability to seek immediate judicial preservation of the status quo. [19] The Take Care Clause provides the textual foundation, though scholars dispute whether it imposes absolute enforcement duty or permits constitutional judgment. [20]

Limits exist—there is no general "dispensing power" allowing presidential whim. [21] The practice requires careful constitutional analysis, typically reserved for cases where defense would require arguments unmakeable in good faith. [22] Modern safeguards allow either the House or Senate to intervene when the executive declines defense, ensuring advocacy for federal laws. [23]

Contemporary scholarship suggests evaluating enforcement-litigation gaps differently based on constitutional claims—presumptively justified for Article II powers, weaker for individual rights. [24] Critics cite expressive effects, accountability problems, and argue the President must either enforce and defend or neither. [25]

Distinguishing constitutional non-defense from improper regulatory rescission

The FTC's decision to cease defending the Non-Compete Rule differs fundamentally from traditional enforcement-litigation gaps. First, unlike statutes, this involves an agency regulation created through and modifiable

by administrative process. While Congress's statutes cannot be unilaterally repealed by the executive, agencies possess explicit APA authority to modify their own regulations. [26]

Second, the constitutional basis for non-defense appears weak. Historical practice shows non-defense is most justified for "transparently unconstitutional" actions or when defense requires bad-faith arguments. [27] The Non-Compete Rule's validity involves complex statutory authority questions under the major questions doctrine—not fundamental constitutional violations like bills of attainder. [28]

Most significantly, abandoning defense while claiming constitutional concerns could circumvent *State Farm's* requirements. The APA mandates notice-and-comment for substantive regulatory changes. [29] If agencies could avoid these requirements by declaring rules constitutionally indefensible, it would create a significant administrative law loophole. [30]

Proper *State Farm* compliance would require formal rescission proceedings: issuing proposed rulemaking notices explaining the legal and policy basis, accepting public comments, and providing reasoned explanation addressing reliance interests and alternatives. [31] *DHS v. Regents* provides particularly relevant guidance, invalidating DACA rescission for inadequate consideration of reliance interests despite legal doubts. [32]

The timing matters: if coinciding with administration change and reflecting primarily political rather than legal judgments, it strengthens the inference that non-defense circumvents *State Farm*. [33] Courts have rejected agencies' attempts to effectively nullify regulations through litigation tactics rather than APA procedures. In *National Mining Association v. McCarthy*, the D.C. Circuit emphasized agencies must use "statutorily prescribed procedures" rather than "an ad hoc stay." [34]

Concluding thoughts

While the executive possesses legitimate authority to decline defense of unconstitutional laws in appropriate circumstances, using this authority to abandon the Non-Compete Rule appears to improperly bypass *State Farm's* requirements. The rule presents neither clear constitutional violation nor structural separation of powers conflict historically justifying non-defense. Instead, it involves precisely the policy judgment and statutory interpretation that *State Farm* requires addressing through reasoned analysis and proper procedures.

Allowing non-defense to substitute for formal rescission would undermine administrative law's framework, permitting agencies to escape procedural requirements by declaring their rules legally indefensible. If the FTC believes the Non-Compete Rule is legally flawed, it must follow *State Farm's* mandate and rescind it through the same deliberative process by which it was created.

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Footnotes

1. FTC Announces Rule Banning Noncompetes, FTC (Apr. 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes.
2. Noncompetes: What You Should Know, FTC, https://www.ftc.gov/news-events/features/noncompetes.
3. Ryan LLC v. FTC, No. 3:24-cv-00986, slip op. at 27 (N.D. Tex. Aug. 20, 2024); Ryan Lawsuit Succeeds in Striking Down Federal Trade Commission (FTC) Ban on Non-Compete Agreements, RYAN (Aug. 20, 2024), https://ryan.com/about-ryan/press-room/2024/ryan-lawsuit-succeeds-in-striking-down-ftc-ban-on-non-compete-agreements/.
4. Federal Trade Commission Files to Accede to Vacatur of Non-Compete Clause Rule, FTC (Sept. 5, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/09/federal-trade-commission-files-accede-vacatur-non-compete-clause-rule.
5. FTC Takes Action Against Worker Noncompete Agreements, Insurance Journal (Sept. 5, 2025), https://www.insurancejournal.com/news/national/2025/09/05/838042.htm.
6. FTC Takes Action to Protect Workers from Noncompete Agreements, FTC (Sept. 4, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/09/ftc-takes-action-protect-workers-noncompete-agreements; Gateway Pet Memorial Services, FTC (Sept. 2025), https://www.ftc.gov/legal-library/browse/cases-proceedings/gateway-pet-memorial-services.
7. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).
8. Id. at 41–42.
9. Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221–22 (2016) (citing FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009)).
10. Agency Rescissions of Legislative Rules, CONG. RSCH. SERV., https://www.congress.gov/crs-product/R46673.
11. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1913–15 (2020).
12. State Farm, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part).
13. Loper Bright Enterprises v. Raimondo and the Future of Agency Interpretations of Law, CONG. RSCH. SERV., https://www.congress.gov/crs-product/R48320.

14. Jack Jones & Max Sarinsky, What Loper Bright and Statutory Stare Decisis Mean for Deregulation, YALE J. ON REG. (July 1, 2025), https://www.yalejreg.com/nc/what-loper-bright-and-statutory-stare-decisis-mean-for-deregulation-by-jack-jones-max-sarinsky/.

15. Aziz Z. Huq, Enforcing (But Not Defending) "Unconstitutional" Laws, 98 VA. L. REV. 1001, 1013, 1017 (2012), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1412&context=public_law_and_legal_theory; United States v. Lovett, 328 U.S. 303, 315-16 (1946).

16. Benjamin R. Civiletti, Att'y Gen., The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, Op. Letter to Chairman of the S. Subcomm. on Limitations of Contracted & Delegated Auth., at 55 (July 30, 1980), https://www.justice.gov/file/149186-0/dl?inline.

17. Id. at 56.

18. Id. at 59 (citing Myers v. United States, 272 U.S. 52, 176–77 (1926)).

19. Huq, supra note 15, at 1014–15

20. U.S. CONST. art. II, § 3; Neal Devins & Saikrishna Prakash, The Indefensible Duty to Defend, 112 COLUM. L. REV. 507, 509 (2012).

21. Saikrishna Bangalore Prakash, The Executive's Duty to Disregard Unconstitutional Laws, 96 GEO. L.J. 1613, 1616 (2008).

22. Civiletti, supra note 16, at 59–60.

23. Daniel J. Meltzer, Executive Defense of Congressional Acts, 61 DUKE L.J. 1183, 1191 (2012); 28 U.S.C. § 2403(a) (2018); 2 U.S.C. §§ 288c(a), 288e(a) (2018).

24. Huq, supra note 15, at 1007, 1029.

25. Id. at 1051–52, 1061–62; Devins & Prakash, supra note 20, at 509.

26. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587–88 (1952); 5 U.S.C. § 553(b)–(c).

27. Civiletti, supra note 16, at 56.

28. West Virginia v. EPA, 142 S. Ct. 2587, 2608–10 (2022); Nathan Richardson, Antideference: COVID, Climate, and the Rise of the Major Questions Canon, 108 VA. L. REV. ONLINE 174, 176–78, 180–82 (2022).

29. State Farm, 462 U.S, at 41–42; 5 U.S.C. § 553(b)–(c).

30. Kathryn A. Watts, Proposing a Place for Politics in Arbitrary and Capricious Review, 119 YALE L.J. 2, 8–10 (2009).

31. Fox Television Studios, 566 U.S. at 515.

32. Regents, 140 S. Ct. at 1913–15

33. Watts, supra note 30, at 40–45; Huq, supra note 15, at 1028.

34. Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 251–52 (D.C. Cir. 2014); see also Clean Air Council v. Pruitt, 862 F.3d 1, 9 (D.C. Cir. 2017).