

# BREAKING DOWN THE FTC NON-COMPETE BAN APPEALS: HEADING TO A CIRCUIT SPLIT AND SCOTUS INTERVENTION?

Insights  
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The Federal Trade Commission has appealed two federal trial court decisions – one in Texas and one in Florida – that prevented the agency from enforcing its near-total ban on non-compete agreements. The Texas appeal, filed on October 18, seeks to reverse a decision that completely set aside the ban for all employers across the nation. The Florida appeal, which was lodged back in late September, seeks to overturn a preliminary ruling that prevented the FTC from enforcing the ban against a single employer. These decisions are now heading up to the 5th and 11th Circuit Courts of Appeal, respectively. What do you need to know about these appeals and the likelihood of an eventual trip to the Supreme Court – and what you should do in the meantime?

## Primer on FTC Non-Compete Ban and Court Rulings

For a quick reminder on the scope of the ban and the details of the underlying rulings, read more below:

- [Feds Ban Non-Compete Agreements: A 5-Step Plan for Employers](#) (April 24)
- [Frequently Asked Questions About the FTC's Rule Banning Non-Compete Agreements](#) (May 16)
- [Florida Court is Next to Rule Against FTC's Non-Compete Ban, But Employers Not Yet in the Clear](#) (August 15)
- [BREAKING NEWS: FTC's Non-Compete Ban Struck Down for All Employers Nationwide](#) (August 21)

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**Jonathan Crook**

Partner

704.334.9313

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## Why Did the Lower Courts Rule Against the FTC?

Two different judges in Texas and Florida both ruled that the FTC could not enforce its non-compete ban, but they reached that result for different reasons.

- The **Texas court** held the FTC lacked the statutory authority to issue the ban, ruling that the agency generally does not have the power to issue substantive rules regulating unfair methods of competition. The FTC, as an administrative agency, can only do the things that Congress authorizes it to do through a statute, and the court concluded that it took things a few steps too far. But even if the FTC had that authority, the Texas court further held the ban was unlawful because it was “arbitrary and capricious.” The court was not impressed with what it called the agency’s unreasonably broad “one-size-fits-all” approach that did not target specific, harmful non-competes, and concluded the FTC failed to sufficiently address less drastic alternatives.
- The **Florida court**, on the other hand, sided with the FTC on nearly all its arguments. Unlike the Texas judge, the Florida judge concluded that the FTC has the statutory authority to issue substantive rules regulating unfair methods of competition. But the Florida judge prevented the FTC from enforcing the ban based on an issue the Texas judge did not reach – the “major questions” doctrine. Under this principle, the FTC had to show it had “clear congressional authorization” to issue the ban since the FTC’s rule was of “extraordinary” economic and political significance. The court held the FTC failed to make that showing.

## What Must the FTC Prove to Win on Appeal?

The FTC faces a difficult path to victory on appeal. Federal appellate courts, including the 5th and 11th Circuits, apply the “right for any reason” doctrine. This means they can affirm the result reached in the lower court for any reason supported by the law and the record, even if that argument was rejected in the lower court.

From a practical perspective, this means that the FTC will likely have to win on every argument raised by the challengers, not just the ones that formed the basis of the underlying rulings. Because the plaintiffs in both cases

attacked the ban from several angles, the FTC will have its work cut out for it on appeal.

Here is an overview of the arguments raised below, and whether they can support an affirmance on appeal:

### Non-Compete Ban Appeal Argument Matrix

ARGUMENT	TEXAS RULING	FLORIDA RULING	BASIS FOR AFFIRMING THE RESULT ON APPEAL?
The FTC lacks statutory authority to regulate unfair methods of competition through substantive rulemaking	Sided with plaintiffs	Sided with FTC	Yes, in both appeals
Even if the FTC has statutory authority, the rule is unlawful because it exceeds that authority	Did not address but raised by plaintiffs	Sided with FTC	Yes, in both appeals
The rule is unlawfully retroactive	Did not address but raised by plaintiffs	Sided with FTC	Yes, in both appeals
The rule is arbitrary and capricious	Sided with plaintiffs	Did not address; not raised by plaintiff	Yes, in Texas appeal; Possibly, in Florida appeal
The rule is unconstitutional because it violates the non-delegation doctrine	Did not address but raised by plaintiffs	Sided with FTC	Yes, in both appeals
The rule is unconstitutional because it violates the Commerce Clause	Did not address; not raised by plaintiffs	Sided with FTC	Not in Texas appeal; Yes, in Florida appeal
The rule is unlawful because the FTC is unconstitutionally insulated from the President	Did not address but raised by plaintiffs	Did not address; not raised by plaintiff	Yes, in Texas appeal; Possibly, in Florida appeal
The rule violates the "major questions" doctrine	Did not address but raised by plaintiffs	Sided with plaintiff	Yes, in both appeals
The proper remedy is vacatur with nationwide effect	Sided with plaintiffs	Did not address; not raised by plaintiff	Yes, in Texas appeal; Not in Florida appeal

\*NOTE: For ease of reference, we use the same language to describe the rulings in the Texas and Florida cases. However, the Florida decision was not a final ruling on the merits – it was an order granting the plaintiff’s motion for a preliminary injunction. The Texas decision was a final judgment on the merits.



### What Should Employers Do Next?

The FTC’s appeals do not immediately change the current landscape for employers. The Texas district court judgment setting aside the FTC’s ban will remain in effect nationwide during the pendency of the 5th Circuit appeal.

The 5th Circuit’s practitioner’s guide states that the median time from filing a notice of appeal to issuance of the court’s opinion is 7.8 months, so that is a fair estimate for how long the appeal may be pending. You can expect a similar

timetable for the 11th Circuit decision, so it would not be surprising to not see decisions until the middle of 2025.

There is a possibility that the 5th and 11th Circuits reach different conclusions on the various legal challenges to the ban. If a circuit split does result, the next stop would be the Supreme Court. Ultimately, the appeals process over the ban's legality may take years to fully resolve, as any SCOTUS decision would likely not occur until 2026.

For now, employers across the country can continue to maintain non-compete as their state laws allow. But you should also be aware of the National Labor Relations Board's continued focus on non-compete agreements and other covenants, like "stay-or-pay" provisions. Read more about these new developments here:

[Many Non-Compete Agreements Violate Federal Law According to NLRB's Chief Prosecutor: Your Top 7 Questions Answered](#) (June 1, 2023)

[NLRB Counsel Cracks Down On "Stay-or-Pay" Provisions and Non-Competes: 7 Steps Employers Should Consider in Response](#) (October 8, 2024)

## **Conclusion**

We will be monitoring the situation and providing updates as the court battles continue. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to gather the most up-to-date information directly to your inbox. Check out [Blue Pencil Box](#) for our daily updates on restrictive covenant law. If you have questions, please contact the authors of this Insight, your Fisher Phillips attorney, or any attorney in our [Employee Defection and Trade Secrets Practice Group](#).