



April 17, 2023

*Via electronic submission: <http://www.regulations.gov>*

April Tabor, Secretary of the Commission  
Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue, NW  
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Washington, DC 20580

**Re: Notice of Proposed Rulemaking, Federal Trade Commission; Non-Compete Clause Rule (88 Fed. Reg. 3,482-3,546, January 19, 2023)**

Dear Ms. Tabor:

The U.S. Chamber of Commerce appreciates the opportunity to submit comments regarding the Commission's proposed Noncompete Rule.<sup>1</sup>

The Chamber and its membership are strongly opposed to the Proposed Rule. It would categorically ban nearly *all* noncompete agreements—regardless of individual circumstances, such as a worker's skill, job responsibilities, access to competitively sensitive and proprietary information, bargaining power, or compensation—and require that organizations rescind all existing agreements and provide notice to affected workers of such rescission. Such a proposal fails to recognize that noncompete agreements can serve vital procompetitive business and individual interests—such as protecting investments in research and development, promoting workforce training, and reducing free-riding—that cannot be adequately protected through other mechanisms such as trade-secret suits or nondisclosure agreements. For centuries, courts have recognized the procompetitive benefits of noncompete agreements and balanced those benefits against any negative costs imposed by particular noncompete agreements. As perhaps acknowledged by the Commission's request for comments on narrower alternatives, the Commission's categorical ban would sweep in millions of noncompete agreements that pose no harm to competition, and in fact benefit the U.S. business community, economy, workers, and consumers.

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<sup>1</sup> See Fed. Trade Comm'n, Notice of Proposed Rulemaking: Non-Compete Clause Rule, RIN 3084-AB74, at 213-214 (Jan. 5, 2023).

The Commission should withdraw the Proposed Rule for three basic reasons. First, the Commission is not authorized under the Federal Trade Commission Act to promulgate binding regulations related to “unfair methods of competition.” The Commission relies on Section 6(g) of the Act, but that provision grants the Commission the narrow authority to develop internal procedural rules related to its powers to investigate suspected violations of the law and to publish reports. Section 6(g) does not empower the Commission to issue sweeping substantive regulations that bind private parties. The major-questions doctrine also cuts firmly against reading such powers into the Act.

Second, noncompete agreements are not categorically “unfair,” as history and precedent demonstrate. Noncompete agreements have never been considered *per se* violations of the antitrust laws. On the contrary, courts have long recognized that such agreements serve a range of procompetitive ends. If the statutory phrase “unfair methods of competition” allows the Commission to prohibit agreements not shown to limit competition in any way, then the Commission’s authority under the FTC Act would lack any intelligible limiting principle and reflect an unconstitutional delegation of legislative power. And its proposal to retroactively invalidate existing noncompete agreements raises serious due-process concerns.

Third, the Commission’s proposal would represent arbitrary and capricious decision-making in violation of the Administrative Procedure Act. The Proposed Rule’s justifications for a categorical ban on noncompete agreements rest on an inaccurate and selective assessment of the available research. In particular, the Commission’s dismissal of business justifications for noncompete agreements ignores the inadequacy of alternatives and elevates speculative competitive harms over well-recognized procompetitive benefits. The Proposed Rule also would generate considerable uncertainty and frustrate compliance with other laws.

## **I. BACKGROUND**

Firms in every sector of the economy rely on noncompete agreements to protect investments in their workforce, to prevent workers with access to confidential information from aiding competitors, and to structure compensation programs. Similarly, employees subject to noncompete agreements benefit from training opportunities and increased compensation or severance payments. Agreements temporarily restricting a worker’s ability to work for a competitor have been enforced since the Founding. Each State has developed a legal framework to determine when worker noncompetes are valid and enforceable, virtually always based on a fact-dependent assessment of competing interests. As the Commission’s proposal recognizes, there are very few decisions assessing worker noncompetes under the federal antitrust laws, and only one case challenging such an agreement under the FTC Act. In none of those decisions was a noncompete agreement held to violate federal law. Those decisions do not justify any rulemaking, let alone a blanket ban.

**A. Businesses Have Long Entered Into Noncompete Agreements For Reasons That Benefit Both Firms And Workers And Increase Innovation and Competition.**

Noncompete agreements benefit both companies and workers. First, these agreements benefit employees by promoting employers' investments in their workers. As the Commission's own economist John McAdams recently explained, noncompete agreements can "solve a 'holdup' problem for certain types of investment (*e.g.*, training, information sharing) into employees," which emerges when employers "forgo making certain investments in their workforce knowing that employees would be able to subsequently quit and appropriate the value of the investment."<sup>2</sup> In other words, employers are more likely to spend resources on employee training and development when they do not fear that the employees will immediately take that knowledge to a competitor. "[B]y discouraging worker attrition before the firm has had the time to recoup the cost of its upfront investment," noncompetes encourage "mutually beneficial" investments.<sup>3</sup> McAdams also notes that noncompete agreements "allow firms to reduce recruitment and training costs by lowering turnover."<sup>4</sup> Noncompetes can also help firms prevent a free-riding problem wherein competitor firms rely on poaching workers to reduce their own training costs. Thus, firms benefit by retaining well-trained employees, and employees benefit from more training opportunities and the stability of lower workplace turnover, which can improve team efficiency and morale.<sup>5</sup>

Second, and relatedly, employees benefit from negotiated noncompetes through increased wages and other benefits exchanged for the noncompete agreement.<sup>6</sup> For

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<sup>2</sup> John McAdams, *Non-Compete Agreements: A Review of the Literature*, Fed. Trade Comm'n Bureau of Economics Research Paper 6 (2019) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3513639](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3513639).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Id.* at 3.

<sup>5</sup> See Florence Shu-Acquaye, *The Effect of Non-Compete Agreements on Entrepreneurship: Time to Reconsider?*, 10 U. Puerto Rico Bus. L.J. 92, 102 (2019) ("For example, in the area of sports, it is said that professional athletes would benefit from a 'fixed term contract' instead of [hopping] from one team to another. This would result in a 'lower worker turnover' which invariably may result in the employer's readiness to invest even more in the employees through training.").

<sup>6</sup> McAdams, *supra* note 2, at 3, 6; Fed. Trade Comm'n, *Forum Examining Proposed Rule to Ban Noncompete Clauses* at 18-19 (Feb. 16, 2023) (Testimony of LeAnn Goheen) ("Employment agreements that include a non-compete clause are signed in exchange for higher compensation.") (hereinafter Forum); See also *id.* at 42 (Testimony of Eric Poggemiller) (explaining that "many [agreements] have been signed as part of a negotiated severance

instance, many businesses offer forfeiture-for-competition agreements that do not actually restrict where an employee can work. Instead, those agreements condition supplementary payments on an employee's not working for a competitor for a certain amount of time after leaving his or her job.<sup>7</sup> Thus, these agreements, which may fall within the scope of the Proposed Rule, serve as a bargaining chip for both employers and employees.

Third, noncompete agreements protect crucial business information and "increase the returns to research and development," thereby promoting innovation.<sup>8</sup> It is undeniable "that innovation and business developments take large amounts of time, money and trial and error."<sup>9</sup> Without the protections afforded by noncompete agreements, firms will be less willing to engage in this essential development, or to involve a broad range of employees in such efforts. Noncompete agreements are therefore an essential component of how businesses protect their confidential information.<sup>10</sup> Recent scholarship demonstrates that noncompete agreements are not easily replaced by other forms of protection, such as trade-secret laws or nondisclosure agreements. Although trade-secret laws provide some protection, noncompete agreements "may represent a more efficient mechanism to prevent proprietary knowledge transfers in certain circumstances, particularly when monitoring and the enforcement of trade-secrets law is costly."<sup>11</sup>

Finally, noncompete agreements help ensure that stronger competitors enter the marketplace. Recent empirical studies show that, although increased enforcement of noncompete agreements tends to be "associated with fewer spin-off firms within the same industry," the spin-off firms that do emerge must be willing and able to take on incumbent firms protected by noncompetes, and are therefore "larger, faster growing, and have a higher likelihood of surviving the initial years."<sup>12</sup> As a result, evidence

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payment, which the employee is not otherwise entitled to [and] [s]ometimes they're granted as part of a stock grant").

<sup>7</sup> See *infra* at 37 (discussing forfeiture-for-competition agreements).

<sup>8</sup> McAdams, *supra* note 2, at 3.

<sup>9</sup> Shu-Acquaye, *supra* note 5, at 101.

<sup>10</sup> See Camila Ringeling, et al., *Noncompete Clauses Used in Employment Contracts*, Comment of the Global Antitrust Institute 4-5, & n.7, n.9 (Feb. 7, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3534374](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3534374).

<sup>11</sup> *Id.* at 5; see discussion of trade-secret litigation *infra* section II.C.1.

<sup>12</sup> McAdams, *supra* note 2, at 17.

suggests that, even in areas where noncompetes reduce the number of total players in the market, noncompetes encourage the development of more viable market entrants.<sup>13</sup>

## **B. The Longstanding Legal Framework Governing Noncompete Agreements Both Recognizes Their Benefits And Limits Their Overreach.**

### **1. State law**

Noncompete agreements have always been regulated by the States, whether through state statutes or common law.<sup>14</sup> In some States, legislatures and courts have regulated the use of such agreements for over two centuries.<sup>15</sup> And the debate over the enforceability of noncompete agreements continues in statehouses around the country, with many States considering new noncompete legislation in the last year.<sup>16</sup> As a result, there is currently significant variation (and innovation) regarding the treatment of noncompete agreements in the United States. But the vast majority of States recognize that noncompete agreements provide meaningful benefits to workers and businesses alike, and thus should be enforced in many circumstances.

In most States, noncompete agreements are considered on a case-by-case basis and enforced so long as they are reasonable. In Michigan, for example, a statute provides factors for courts to consider in determining whether a noncompete agreement is valid and enforceable, including the duration of the agreement, its geographic scope, and the line of business involved.<sup>17</sup> Those factors resemble the requirements that

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<sup>13</sup> *Ibid.*; see Forum, *supra* note 6, at 20 (testimony of Jim Paretti) (Commenters also noted the important role that noncompetes have in protecting small, nascent companies, explaining that “restrictive covenants help small startup businesses from large, predatory competitors who can afford to pay over market simply to buy away their key talent.”).

<sup>14</sup> See 88 Fed. Reg. 3482, 3482 (Jan. 19, 2023) (“[N]on-compete clauses between employers and workers are traditionally subject to more exacting review under state common law than other contractual terms.”).

<sup>15</sup> See, e.g., *Acordia of Ohio, L.L.C. v. Fishel*, 978 N.E.2d 823, 830 (Ohio 2012) (Pfeifer, J., dissenting) (“Since the early 18th century . . . many jurisdictions have allowed noncompete agreements to be enforced when they are reasonable.”).

<sup>16</sup> See Russell Beck, *42 Noncompete Bills in 18 states – and 3 Federal Bills*, JDSupra (Feb. 6, 2023), <https://www.jdsupra.com/legalnews/42-noncompete-bills-in-18-states-and-3-5990096/> (tracking 42 currently debated bills concerning noncompete agreements in 18 state legislatures introduced since the beginning of 2023).

<sup>17</sup> Mich. Comp. Laws Ann. § 445.774a(1) (a noncompete agreement is valid and enforceable “if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business”); 88 Fed. Reg. at 3494 (“In the 47 states where at least some non-compete clauses may be enforced, courts use a reasonableness inquiry to determine

developed under the common law of many other States to determine when a particular agreement is “reasonable.”<sup>18</sup> Applying that flexible standard, numerous state courts have recognized that businesses have legitimate and procompetitive interests in, among other things, protecting goodwill and investments in worker training,<sup>19</sup> preventing competitors from exploiting access to confidential information,<sup>20</sup> and ensuring that the seller of a business will not turn around and compete for the buyer’s clients.<sup>21</sup>

Some States place more restrictive conditions on the enforceability of noncompete agreements. In Massachusetts, for example, the term of agreements normally must not “exceed 12 months.”<sup>22</sup> Massachusetts also has a strict notice requirement, mandating that the agreement “be provided to the employee by the earlier of a formal offer of employment or 10 business days before the commencement of the employee’s employment.”<sup>23</sup> Other States regulate noncompete agreements by making them unenforceable against certain types of workers, particularly low-wage employees.<sup>24</sup> In Maine, for example, “an employer may not require or permit an employee earning wages at or below 400% of the federal poverty level to enter into a noncompete agreement with the employer.”<sup>25</sup> But again, notwithstanding these restrictions, each of these States recognizes that noncompete agreements “allow

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whether to enforce a noncompete clause, in addition to whatever statutory limits they are bound to apply.”).

<sup>18</sup> See *Teachout Sec. Servs., Inc. v. Thomas*, 2010 WL 4104685, at \*2-3 (Mich. Ct. App. Oct. 19, 2010); see also *St. Clair Med., P.C. v. Borgiel*, 715 N.W.2d 914, 918 (Mich. Ct. App. 2006) (“[Section] 4a(1) represents a codification of the common-law rule that the enforceability of noncompetition agreements depends on their reasonableness.”) (internal quotation marks omitted).

<sup>19</sup> See, e.g., *Payroll Advance, Inc. v. Yates*, 270 S.W.3d 428, 434 (Mo. Ct. App. 2008); *Desantis v. Wackenhut Corp.*, 793 S.W.2d 670, 682 (Tex. 1990).

<sup>20</sup> See, e.g., *Advance Cont. Equip. & Design LC v. Lamere*, 2015 WL 5089167, at \*3 (Minn. Ct. App. Aug. 31, 2015); *Frieburger v. J-U-B Engineers, Inc.*, 111 P.3d 100, 105 (Idaho 2005); *DeSantis*, 793 S.W.2d at 682; *Cent. Adjustment Bureau v. Ingram Assoc. Inc.*, 622 S.W.2d 681, 685-686 (Ky. App. 1981).

<sup>21</sup> See, e.g., *Boulangerv. Dunkin Donuts Inc.*, 815 N.E.2d 572, 641-643 (2004).

<sup>22</sup> Mass. Gen. Laws Ann. ch. 149, § 24L(b)(iv).

<sup>23</sup> *Id.* at § 24L(b)(i).

<sup>24</sup> See R.I. Gen. Laws § 28-59-3(a)(4) (“A noncompetition agreement shall not be enforceable against . . . [a] low-wage employee,” defined as an employee whose annual salary is not more than 250% of the federal poverty level); see also 820 Ill. Comp. Stat. Ann. 90/10 § 10(a) (“No employer shall enter into a covenant not to compete with any employee unless the employee’s actual or expected annualized rate of earnings exceeds \$75,000 per year.”).

<sup>25</sup> Me. Rev. Stat. tit. 26, § 599-A(3).

[private] parties to work together to expand output and competition” and thus readily enforces agreements that satisfy the statutory requirements.<sup>26</sup>

Only a few States prohibit noncompete agreements or treat them as largely unenforceable.<sup>27</sup> In California, for example, an agreement “by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.”<sup>28</sup> Even California provides certain limited exceptions, however, and will enforce noncompete agreements arising in connection with a merger or sale of a business.<sup>29</sup> In any event, the key point is that from the time of the Founding to the present, the enforceability of noncompete agreements has been governed by state and common law, and States have taken different approaches consistent with principles of federalism.

## 2. Federal law

As the Commission’s proposal recognizes, there has never been a successful challenge to a worker noncompete agreement under the FTC Act, the Clayton Act, or the Sherman Act.<sup>30</sup> Although a few plaintiffs have pursued federal challenges to worker noncompetes, those claims have uniformly failed.

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<sup>26</sup> *Lake Land Employment Group of Akron v. Columber*, 804 N.E.2d 27, 30 (Ohio 2004) (explaining that “[m]odern economic realities . . . do not justify a strict prohibition of noncompetition agreements between employer and employee in an at-will relationship” and recognizing that “[i]f one party can trust the other with confidential information and secrets, then both parties are better positioned to compete with the rest of the world.”) (internal quotation marks omitted).

<sup>27</sup> See, e.g., Brandon Kemp, *Noncompetes in Oklahoma Mergers and Acquisitions*, 88 Okla. B.J. 128, 128 (2017) (noncompete agreements “have been prohibited by statute in Oklahoma since 1890,” before Oklahoma was admitted as a state).

<sup>28</sup> Cal. Bus. & Prof. Code § 16600.

<sup>29</sup> *Id.* §§ 16600-16602.5. For example, California does not restrict noncompetes to individuals who own above a certain percentage of a business but rather states that “[a]ny member may . . . agree that he or she or it will not carry on a similar business within a specified geographic area.” *Id.* § 16602.5.

<sup>30</sup> 88 Fed. Reg. at 3496-3497. The Commission cites *United States v. American Tobacco Corp.*, 221 U.S. 106 (1911), as an example of a plaintiff’s achieving “some degree” of “success” in a challenge to a noncompete provision. But *American Tobacco* involved a series of anticompetitive acts, including a string of acquisitions that the Court viewed as predatory. Noncompete agreements were discussed in a single sentence, where the Court stated it was not considering the “legality” of the noncompete agreements “isolatedly viewed.” *Id.* at 183. The Commission also points to *Signature MD, Inc. v. MDVIP, Inc.*, 2015 WL 3988959 (C.D. Cal. Apr. 21, 2015). But that decision, which was resolved at the motion-to-dismiss stage, noted the “legitimate business concerns” served by noncompete agreements and held that “the

First, contrary to the approach taken by the Proposed Rule, worker noncompetes are not *per se* violations of the FTC Act or Sherman Act. *Per se* rules are reserved for situations in which courts have extensive experience with a restraint and are certain that the competitive harms outweigh any competitive benefits.<sup>31</sup> Under current law, *per se* condemnation is reserved for agreements to fix prices, allocate markets, or rig bids. Worker noncompete agreements, by contrast, do not qualify for *per se* treatment because “postemployment restraints . . . serve legitimate business purposes,” such as “prevent[ing] a departing employee from expropriating his employer’s secrets and clientele.”<sup>32</sup> In fact, the Seventh Circuit concluded decades ago that “[t]he recognized benefits of reasonably enforced noncompetition covenants are by now beyond question.”<sup>33</sup> Accordingly, courts assess those agreements under a more flexible rule-of-reason framework.

Second, under the rule of reason, a single firm’s noncompete agreements will almost never have a substantial effect on competition—an essential prerequisite for liability when an agreement is not a *per se* violation of the law.<sup>34</sup> As opposed to agreements among competitors to fix wages or to not poach one another’s employees, there will be few if any circumstances in which a single employer’s noncompete agreements would harm competition in a relevant market.<sup>35</sup> And if agreements pass muster under state law, meaning they are necessarily limited in scope and duration, it is hard to see how they would harm competition. Unsurprisingly, the Commission does not cite a single case where a plaintiff successfully alleged that a noncompete agreement violated the federal antitrust laws.

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reasonableness of the [noncompete agreements] will ultimately be a factual determination.” *Id.* at \*6-7.

<sup>31</sup> See *Arizona v. Maricopa Cty. Med. Soc.*, 457 U.S. 332, 343-344 (1982) (“Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable.”).

<sup>32</sup> *Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057, 1082 (2d Cir. 1977).

<sup>33</sup> *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 265 (7th Cir. 1981); see also *Consultants & Designers, Inc. v. Butler Serv. Grp., Inc.*, 720 F.2d 1553, 1560-1561 (11th Cir. 1983) (“Ever since the decision of the Supreme Court in *United States v. Addyston Pipe & Steel Co.* there has been an unbroken line of cases holding that the validity of covenants not to compete under the Sherman Act must be analyzed under the rule of reason.”) (citations omitted).

<sup>34</sup> 88 Fed. Reg. at 3496 (citing *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018)).

<sup>35</sup> See, e.g., *Caremark Homecare, Inc. v. New England Critical Care, Inc.*, 700 F. Supp. 1033, 1035-1036 (D. Minn. 1988).



### C. The Commission Nonetheless Proposes A Rule That Would Effectively Ban Noncompete Agreements Nationwide.

On January 19, 2023, the Commission issued a proposed rule regarding noncompete agreements, which would ban noncompete agreements nationwide, with only a possible narrow exception for certain agreements connected to the sale of a business. The Proposed Rule is striking in its breadth. It would reach agreements with employees and independent contractors; it defines “non-compete clauses” to include any agreement that “has the effect of prohibiting [a] worker from seeking or accepting employment”; and it draws no distinctions between workers, including based on their status as partner or owners (versus employees or independent contractors), their seniority, their access to competitively sensitive or proprietary information, the skill required to perform their jobs, their bargaining power, or their compensation.<sup>36</sup> If adopted, according to the Commission’s own data, the rule would immediately outlaw more than 30 million noncompete provisions negotiated by companies and workers,<sup>37</sup> and require businesses to notify workers those agreements are no longer in effect.<sup>38</sup>

As statutory authority for this rulemaking, the Commission has invoked Sections 5 and 6(g) of the FTC Act. Section 5 “declare[s] unlawful” “[u]nfair methods of competition in or affecting commerce” and “empower[s]” the Commission to “prevent” those acts.<sup>39</sup> Section 6(g) relates to the Commission’s investigative powers, and authorizes the Commission to “[f]rom time to time classify corporations and . . . to make rules and regulations for the purpose of carrying out” the FTC Act.<sup>40</sup>

Perhaps acknowledging the impermissible breadth of its proposed categorical ban—and despite stating that it has already evaluated the costs and benefits of possible alternatives<sup>41</sup>—the Commission has requested comments regarding possible alternatives. According to the Commission “[t]hese alternatives flow from two key questions: (1) whether the rule should impose a categorical ban on noncompete clauses or a rebuttable presumption of unlawfulness, and (2) whether the rule should apply uniformly to all workers or whether there should be exemptions or different standards for different categories of workers.”<sup>42</sup> With respect to the second question, the

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<sup>36</sup> 88 Fed. Reg. at 3535.

<sup>37</sup> *Id.* at 3485 (“Based on the available evidence, the Commission estimates that approximately one in five American workers—or approximately 30 million workers—is bound by a non-compete clause.”).

<sup>38</sup> *Id.* at 3511.

<sup>39</sup> 15 U.S.C. § 45(a).

<sup>40</sup> *Id.* § 46(g).

<sup>41</sup> 88 Fed. Reg. at 3530-3531.

<sup>42</sup> *Id.* at 3516.

proposed rule explores partial bans that “apply different rules to different categories of workers based on a worker’s job function, occupation, earnings, another factor, or some combination of factors.”<sup>43</sup> For example, the Commission has requested comments on an approach that would prohibit noncompete clauses for most workers but not senior executives or other “highly paid and highly skilled workers.”<sup>44</sup> But as presently proposed, its Rule does not include any such distinctions, but rather applies categorically to all noncompete agreements applicable to all categories of workers.

## II. DISCUSSION

The Commission lacks the legal authority to pursue its proposed Noncompete Rule, both because the FTC Act does not empower the Commission to issue regulations respecting unfair methods of competition and because worker noncompetes are not categorically unfair. As noted above, noncompetes may even benefit competition in the market for products and services. And even if the Commission had the legal authority, its sweeping national ban is not supported by the available evidence. Given these defects, the Commission should rescind its proposal. If the Commission nonetheless decides to move forward, any alternatives to limit the reach of the Rule would be preferable to the proposed categorical ban.

### A. The Commission Lacks The Authority To Promulgate Rules Respecting Unfair Methods of Competition.

Section 5 of the FTC Act declares unlawful “unfair methods of competition” and empowers the Commission to pursue individual enforcement actions to adjudicate potential violations. The FTC Act has never authorized the Commission to adopt generally applicable substantive rules defining unfair methods of competition, and the Commission did not assert the authority to do so in the century-plus following the enactment of the FTC Act. The Commission must exercise its Section 5 authority through existing adjudicatory procedures on a case-by-case basis.

The Commission now claims that it can promulgate “unfair method of competition” rules under Section 6(g) of the FTC Act.<sup>45</sup> But the structure and history of the Act, as well as the Commission’s own historical understanding of its authority, demonstrate that Section 6(g) empowers the Commission to develop internal rules to govern its own affairs. It is not a font of authority to issue substantive rules that bind private parties. That reading is confirmed by Congress’s subsequent amendments to the Act, which reinforce the background understanding that the Commission lacks the authority to issue competition regulations. And if there were any doubt about the

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<sup>43</sup> *Id.* at 3518.

<sup>44</sup> *Id.* at 3502.

<sup>45</sup> *Id.* at 3499.

Commission’s authority on this score, it is resolved by the major-questions doctrine, which cautions agencies against reading vague and ancillary provisions to authorize powers with “vast economic and political significance.”<sup>46</sup>

## 1. The structure and history of the FTC Act

The FTC Act was enacted in 1914. Section 5 of the Act “declared unlawful” “unfair methods of competition,” and authorized the Commission to enforce that prohibition through individual orders.<sup>47</sup> Under Section 5, “[w]henver the [C]ommission shall have reason to believe that any [person] has been or is using any unfair method of competition in commerce,” the Commission “shall issue and serve upon such person . . . a complaint stating its charges.”<sup>48</sup> That complaint initiates “administrative proceedings” before the Commission, which may require the violator to cease and desist the unlawful practice.<sup>49</sup> In 1938, Congress amended Section 5 to also prohibit “unfair or deceptive acts or practices in commerce” and gave the Commission the authority to investigate and punish individual violations in the same manner.<sup>50</sup>

Section 6 of the FTC Act is titled “additional powers of Commission.”<sup>51</sup> From its enactment until now, Section 6 has given the Commission various investigative and administrative powers, including the authority to “gather and compile information” as part of its investigations, “to require” regulated parties “to file . . . annual and special” reports, to “investigate and report the facts relating to any alleged violations of the antitrust [laws],” and to publish reports in the public interest.<sup>52</sup> As relevant here, Section 6(g) provides the Commission authority to “from time to time classify corporations and . . . to make rules and regulations for the purpose of carrying out the provisions of this subchapter.”<sup>53</sup>

The text and structure of the FTC Act demonstrate that Section 6(g) empowers the Commission to develop internal rules needed to “carry[] out” its investigative and reporting functions—*e.g.*, “establishing procedures to protect the confidentiality of . . .

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<sup>46</sup> *Util. Air Regulatory Grp. v. Evt’l Protection Agency*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson*, 529 U.S. 120, 160 (2000)).

<sup>47</sup> *See* Federal Trade Commission Act, § 5, 38 Stat. 717, 719 (Sept. 26, 1914).

<sup>48</sup> *Ibid.*

<sup>49</sup> *AMG Cap. Mgm’t, LLC v. Fed. Trade Comm’n*, 141 S. Ct. 1341, 1346 (2021).

<sup>50</sup> Pub. L. 75-447, § 3, 52 Stat. 111, 111-114 (1938).

<sup>51</sup> 15 U.S.C. § 46.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Id.* § 46(g).

information” provided by private companies<sup>54</sup>—not substantive rules that bind private parties.<sup>55</sup> First, Section 6(g) says nothing whatsoever about unfair methods of competition or any other substantive authority of the Commission. On the contrary, Section 6(g) makes explicit reference only to “classify[ing] corporations”—an ancillary power related to the Commission’s authority to require reports from corporations. Similarly, the surrounding provisions of Section 6 only discuss investigative and reporting powers, further confirming that Congress did not in the second half of Section 6(g) grant the Commission overarching authority to create substantive rules.<sup>56</sup>

Finally, Section 6(g)’s grant of rulemaking authority is not accompanied by any sanction. At the time of the FTC Act’s passage, Congress followed “a convention for indicating whether an agency had the power to promulgate legislative rules,” whereby “the inclusion of a separate provision in the statute attaching ‘sanctions’ to the violation of rules and regulations promulgated under a particular rulemaking grant” was understood to convey substantive rulemaking power.<sup>57</sup> For instance, the Warehouse Act of 1916 authorized the Secretary of Agriculture to “suspend or revoke any warehouseman’s license for any violation of the rules and regulations made under the Act.”<sup>58</sup> Given that history, the omission of any particular sanction for violating Section 6(g) signals that it is only directed at internal administrative matters.

The drafting history of the Act confirms Section 6(g)’s limited place in the overall scheme. During the congressional debates over the FTC Act, the House of Representatives envisioned the Commission as a purely investigative body. In the House proposal, the Commission would gather information and produce reports, and then make recommendations to the Attorney General, who would ultimately decide how best to enforce the law.<sup>59</sup> By contrast, the Senate wanted the Commission to be an enforcement agency in its own right, with the power to punish potential violations through “case-by-case proceedings.”<sup>60</sup> After the two chambers negotiated over the

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<sup>54</sup> *Aluminum Co. of Am. v. Fed. Trade Comm’n*, 589 F. Supp. 169, 172, 178 (S.D.N.Y. 1984).

<sup>55</sup> *See Util. Air Reg. Grp.*, 573 U.S. at 321 (“[R]easonable statutory interpretation must account for both ‘the specific context in which . . . language is used’ and ‘the broader context of the statute as a whole.’” (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570-571 (1995).

<sup>56</sup> *See AMG Cap. Mgm’t*, 141 S. Ct. at 1348 (holding that the “language and structure” of the FTC Act undercut the Commission’s claim of disgorgement authority).

<sup>57</sup> Thomas W. Merrill & Kathryn T. Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 493 (2002).

<sup>58</sup> *Id.* at 493 n.123.

<sup>59</sup> *See* Noah Joshua Philips, *Against Antitrust Regulation*, Am. Enter. Inst. 2 (2022), <https://www.aei.org/wp-content/uploads/2022/10/Against-Antitrust-Regulation.pdf?x91208>.

<sup>60</sup> *Id.* at 3.

draft legislation, the final FTC Act reflected both visions: the Senate-proposed enforcement powers became Section 5 of the Act, while the House-proposed investigative powers became Section 6. Importantly, throughout the entire legislative process, neither the House nor the Senate ever suggested that the Commission would have broad *substantive* rulemaking authority.<sup>61</sup>

## 2. Subsequent amendments to the FTC Act

Amendments to the FTC Act confirm that the Commission lacks substantive rulemaking authority related to unfair methods of competition. Congress has repeatedly passed legislation granting the Commission authority to promulgate substantive rules on specific subjects. That was necessary precisely because the Commission does not have general rulemaking authority related to unfair methods of competition. And each time Congress has granted the Commission the power to write new regulations, it has clearly identified the substantive authority at issue.

First, in the decades following passage of the FTC Act, Congress enacted a number of laws granting the Commission narrow rulemaking authority to address specific industries. Those statutes include:

- the Wool Products Labeling Act, 15 U.S.C. § 68d, which authorized the Commission “to make rules and regulations for the manner and form of disclosing information required by this subchapter, and for segregation of such information for different portions of a wool product as may be necessary to avoid deception or confusion, and to make such further rules and regulations under and in pursuance of the terms of this subchapter as may be necessary and proper for administration and enforcement”;
- the Textile Fiber Products Identification Act, 15 U.S.C. § 70e(c), which authorized the Commission “to make such rules and regulations, including the establishment of generic names of manufactured fibers, under and in pursuance of the terms of this subchapter as may be necessary and proper for administration and enforcement”;
- the Fur Products Labeling Act, 15 U.S.C. § 69f(b), which authorized the Commission “to prescribe rules and regulations governing the manner and form of disclosing information required by this subchapter, and such further rules and regulations as may be necessary and proper for purposes of administration and enforcement of this subchapter”;
- the Flammable Fabrics Act, 15 U.S.C. § 1194(c), which authorized the Commission “to prescribe such rules and regulations, including provisions for maintenance of

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<sup>61</sup> Merrill & Watts, *supra* note 57, at 505 (“Under established practices for reconciling bills in conference, the Committee could not have granted the FTC legislative rulemaking powers, because neither bill granted the agency such authority.”); Philips, *supra* note 59, at 2.

records relating to fabrics, related materials, and products, as may be necessary and proper for administration and enforcement of this chapter. The violation of such rules and regulations shall be unlawful and shall be an unfair method of competition and an unfair and deceptive act or practice, in commerce, under the Federal Trade Commission Act”; and

- the Fair Packaging and Labeling Act, 15 U.S.C. § 1454(a), which authorized the Commission “to promulgate regulations” “with respect to . . . consumer commodit[ies].”

As these examples demonstrate, Congress knows how to specifically give the Commission the power to make substantive rules in furtherance of its “enforcement” authority when it wants to. And Congress would have had no need to provide the Commission with new rulemaking authority related to an unfair method of competition—as it did in the Flammable Fabrics Act—if, as the Proposed Rule assumes, the Commission had that authority all along.

Second, Congress enacted a major overhaul of the Commission’s enforcement authority in the Magnuson-Moss Warranty—FTC Improvement Act of 1975. The Magnuson-Moss Act authorized the Commission to issue rules related to its Section 5 enforcement powers. But that legislation singled out *only* the Commission’s “unfair or deceptive acts and practices” authority, and left the Commission’s authority regarding “unfair methods of competition” unchanged.<sup>62</sup> Moreover, Magnuson-Moss subjected the Commission’s new rulemaking powers to extensive procedural requirements, such as the obligation to hold an informal hearing, if requested, that would include, among other things, cross-examination of witnesses by interested parties.<sup>63</sup> By authorizing the Commission to engage in rulemaking subject to more onerous procedural requirements for “unfair and deceptive trade practices,” Congress did not bless the Commission’s authority to issue more lax rules respecting “unfair methods of competition.”<sup>64</sup>

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<sup>62</sup> Pub. L. 93-637, § 202 (codified at 15 U.S.C. § 57a); *See Comments of the Am. Bar Ass’n in Connection with the Fed. Trade Comm’n Workshop on “Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues”* 56 (Apr. 24, 2020) (“Magnuson-Moss represented a compromise between those who opposed the idea of giving the FTC broad legislative rulemaking authority, especially when unaccompanied by restrictions on its exercise, and those who thought that the FTC always had rulemaking authority, but acknowledged that explicit codification of that authority would be helpful.”).

<sup>63</sup> 15 U.S.C. § 57a(c).

<sup>64</sup> Congress amended the Commission’s rulemaking authority for unfair and deceptive trade practices in 1980. *See* Pub. L. 96-252, 94 Stat. 374. Once again, those amendments said nothing about rulemaking authority for unfair methods of competition. *See* Christine S. Wilson, Commissioner, *Dissenting Statement of Commissioner Christine S. Wilson Regarding the “Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act”* 15-16 (Nov. 10, 2022) (hereinafter Wilson Dissent).

Finally, Congress again revisited the Commission’s rulemaking authority in 1994 by codifying the agency’s policy statement with respect to “unfair or deceptive acts or practices.”<sup>65</sup> Those amendments specifically mentioned the Commission’s rulemaking procedures under the Magnuson-Moss Act. Here again, Congress’s considered judgment of rulemaking for “unfair or deceptive acts or practices,” and its complete silence on rulemaking for “unfair methods of competition,” further signals that the Commission lacks substantive rulemaking authority under Section 6(g).

All told, Congress has acted many times to empower the Commission to write substantive rules, and it has used unmistakably clear language to do so. Yet it has never seen fit to give the Commission the general power to promulgate regulations respecting unfair methods of competition.

The Commission has long been aware that it lacks the power to issue substantive rules. Before 1962, the Commission never sought to do so. On the contrary, it indicated that it lacked the power to do so.<sup>66</sup> And when Congress revisited the Commission’s rulemaking authority a decade later, the Commission’s statement to Congress asserted rulemaking authority related only to unfair and deceptive trade practices, rather than unfair methods of competition.<sup>67</sup>

### 3. Major-questions doctrine

If there were any doubt that the Commission lacks the authority to promulgate “unfair method of competition” rules, the major-questions doctrine cuts decisively against the Commission’s interpretation. As the Supreme Court recently explained in

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<sup>65</sup> See FTC Act Amendments of 1994, Pub. L. 103-312, § 9 (amending the FTC Act to require the Commission find that an “act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition” before declaring it unlawful); see also *Fed. Trade Comm’n v. Wyndham Worldwide Corp.*, 799 F.3d 236, 244 (3d Cir. 2015) (discussing the codification of the pre-existing agency policy).

<sup>66</sup> *National Petroleum Refiners Ass’n v. Fed Trade Comm’n*, 482 F.2d 672, 693 (D.C. Cir. 1973) (“[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.”); see generally Maureen Olhausen & Ben Rossen, *Dead End Road: National Petroleum Refiners Association and FTC “Unfair Methods of Competition” Rulemaking*, *The FTC’s Rulemaking Authority: Concurrences* (forthcoming 2023).

<sup>67</sup> H. Rep. 161, 95th Cong., at 45 (Feb. 23, 1977) (Appendix II, Federal Trade Commission—Agency Views, Statement of Federal Trade Commission by Christian S. White, Asst. Director for Special Statutes). This report characterizes the Commission’s octane rules as implicating only “unfair or deceptive acts and practices,” even though the Commission had earlier taken the position that the octane rules also proscribed “unfair methods of competition.” See Olhausen & Rossen, *supra* note 66, at 9-10.

*West Virginia v. EPA*, courts “expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.”<sup>68</sup> That principle recognizes that “[e]xtraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms, or subtle devices,” even when there is a “colorable textual basis” for the agency’s position.<sup>69</sup>

The Commission’s claim of competition rulemaking authority undoubtedly qualifies as a major question under *West Virginia*. As the Proposed Rule demonstrates, the Commission could use regulations related to unfair methods of competition to fundamentally alter the American economy. Given the expansive scope of Section 5, the Commission’s enforcement authority under that statute extends to a wide range of nationwide economic activity, including mergers and acquisitions, exclusive dealing contracts, and even patent suits.<sup>70</sup> When Congress gave the Commission such broad authority to bring these kinds of enforcement actions, it required the Commission to prove that the *specific conduct* at issue harmed competition, meaning that each enforcement action turned on its particular facts. But if the Commission has the authority to issue substantive *rules* categorically defining “unfair methods of competition,” then it may do so in *all* of the areas to which its Section 5 authority extends, thereby outlawing a massive number of private agreements or business activities without regard to whether each one actually harms competition and upending decades of antitrust jurisprudence on which the business community relies. Congress would never have authorized the Commission to make nationwide decisions with such “economic and political significance” without saying so explicitly, particularly at a time when administrative rulemaking was still uncommon and Congress was decades away from enacting the APA.<sup>71</sup>

Moreover, at the time of the FTC Act’s passage, several amendments providing substantive rulemaking were considered and rejected by Congress.<sup>72</sup> And after a federal court rejected the Commission’s attempt to issue a substantive rule in 1972, Congress once again considered and rejected “legislation that would confer legislative

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<sup>68</sup> *West Virginia v. Env’tl Protec. Agency*, 142 S. Ct. 2587, 2605 (2022); *Utility Air Regulatory Grp.*, 573 U.S. at 324 (internal quotation marks omitted); *see also Nat’l Fed. of Indep. Bus. v. Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665 (2022).

<sup>69</sup> *West Virginia*, 142 S. Ct. at 2609 (internal quotation marks omitted).

<sup>70</sup> *See* Complaint, *In re Meta Platforms, et al.*, Docket No. 9411 (Aug. 11, 2022); Complaint, *In re Broadcom Inc.*, Docket No. C-4750 (June 29, 2021); Complaint, *In re Abbvie Inc., et al.*, No. 2:14-cv-5151 (E.D. Pa. 2014).

<sup>71</sup> *West Virginia*, 142 S. Ct. at 2608-2610.

<sup>72</sup> *See* Thomas M. Dyer & James B. II. Ellis, *FTC’s Claim of Substantive Rule-Making Power: A Study in Opposition*, 41 Geo. Wash. L. Rev. 330, 336 (1972).



rulemaking authority on the FTC.”<sup>73</sup> In analyzing a major question, a lack of authority not previously exercised may be “reinforced by the Commission’s unsuccessful attempt . . . to secure from Congress an express grant of [the challenged] authority.”<sup>74</sup>

Finally, the Commission’s claimed authority here is particularly suspect because it rests on a “newfound power in the vague language of an ancillary provision” of a statute.<sup>75</sup> In *West Virginia*, for example, the Supreme Court noted that a minor provision of the Clean Air Act, which the agency had consistently used to impose requirements on specific sources of pollution, could not be used to require coal plants to subsidize the production of clean energy.<sup>76</sup> The same logic applies here. Section 6(g) is a minor part of the FTC Act. It is housed in a part of the statute that relates to investigative powers, and it refers to rulemaking authority alongside the power to “classify corporations.” Not only does Section 6(g) say nothing directly about substantive rulemaking authority, but it does not mention the Commission’s enforcement powers at all. And prior to its proposed Noncompete Rule, the Commission had not relied on that authority in nearly fifty years.

#### 4. *National Petroleum Refiners*

The Commission’s view that Section 6(g) confers substantive rulemaking power to prohibit “unfair methods of competition” relies on a single authority: the D.C. Circuit’s opinion in *National Petroleum Refiners Association v. Federal Trade Commission*.<sup>77</sup> The Commission’s reliance is misplaced. *National Petroleum Refiners* was wrongly decided and is inconsistent with modern principles of statutory interpretation, particularly those that apply when agencies claim a broad grant of statutory authority.

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<sup>73</sup> Merrill & Watts, *supra* note 57, at 555.

<sup>74</sup> *Fed. Trade Comm’n v. Bunte Bros.*, 312 U.S. 349, 352 (1941); *see also West Virginia*, 142 S. Ct. at 2610 (noting that “the Agency’s discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself”).

<sup>75</sup> *West Virginia*, 142 S. Ct. at 2610 (internal quotation marks omitted); *see also Loving v. IRS*, 742 F.3d 1013, 1021 (D.C. Cir. 2014) (Kavanaugh, J.) (“In light of the text, history, structure, and context of the statute, it becomes apparent that the IRS never before adopted its current interpretation for a reason: It is incorrect.”); *Fin. Plan. Ass’n v. SEC*, 482 F.3d 481, 490-91 (D.C. Cir. 2007) (finding a “weakness” in SEC’s interpretation when it “flouts six decades of consistent SEC understanding of its authority under” the statute).

<sup>76</sup> *Ibid.*

<sup>77</sup> Fed. Trade Comm’n, *A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority* (May 2021), <https://www.ftc.gov/about-ftc/mission/enforcement-authority>.

In 1971, the Commission adopted a rule declaring it unlawful for gas stations not to post octane-rating numbers on their pumps.<sup>78</sup> That rule marked the Commission's first attempt to issue a rule enforcing Section 5 in the nearly 60 years since the Act's passage.<sup>79</sup> When the rule was challenged in court, the district court held that the Act "[did] not confer upon the Federal Trade Commission the authority to promulgate Trade Regulation Rules that have the effect of substantive law."<sup>80</sup> But the D.C. Circuit reversed, holding that Section 6(g) was a broad grant of substantive rulemaking power to define "unfair methods of competition" and "unfair or deceptive acts or practices."<sup>81</sup>

That conclusion rested on a number of errors. First, the court reasoned that because Section 5 did not include language *excluding* rulemaking as a means of enforcement, Section 6 could be used to create legislative rules to further the purposes of Section 5.<sup>82</sup> According to *National Petroleum Refiners*, "unless the legislative history reveals a clear intent to the contrary, courts should resolve any uncertainty about the scope of an agency's rulemaking authority in favor of finding a delegation of the full measure of power to the agency."<sup>83</sup> As explained above, courts should apply the opposite presumption. Before an agency claims a broad new power, it must point to clear congressional authorization. And it must identify more than a statutory "mousehole[]" as support for its newfound authority.<sup>84</sup>

Second, *National Petroleum Refiners* elevated legislative history and policy judgments above the text and structure of the FTC Act.<sup>85</sup> In so doing, it ignored the many textual indications that Section 6(g) is not a grant of broad substantive rulemaking authority, such as the reference to "classifying corporations." And it failed to account

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<sup>78</sup> Merrill & Watts, *supra* note 57, at 554-55 (2002); *see* 36 Fed. Reg. 23871 (Dec. 16, 1971).

<sup>79</sup> The Commission first experimented with legislative rulemaking in 1962, when the agency instituted a new procedure: Trade Regulation Rules. Merrill & Watts, *supra* note 57, at 551-553. "The actual effect of the rules was unclear because the FTC did not immediately attempt to bring any enforcement actions based on them." *Id.* at 553. In 1964, the agency promulgated its first major Trade Regulation Rule dealing with the unfair and deceptive practices surrounding the advertising and labeling of cigarettes. *Ibid.* Congress responded to this exercise of rulemaking by overriding the Commission's rule one year later, and "enact[ed] a weak labeling bill as a substitute for the strong restrictions contained in the FTC cigarette rule." *Id.* at 553.

<sup>80</sup> *National Petroleum Refiners Ass'n v. Fed. Trade Comm'n*, 340 F. Supp. 1343, 1345-49, 1350 (D.D.C. 1972).

<sup>81</sup> *National Petroleum Refiners Ass'n*, 482 F.2d at 698.

<sup>82</sup> *Id.* at 675-677.

<sup>83</sup> Merrill & Watts, *supra* note 57, at 557.

<sup>84</sup> *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

<sup>85</sup> *National Petroleum Refiners*, 482 F.2d at 686.

for the FTC Act's overall structure, wherein Section 6(g) is a minor part of a provision that grants the Commission no regulatory authority at all.

Finally, *National Petroleum Refiners* disregarded Congress's practice in granting agencies rulemaking authority in other statutes. At the time of the FTC Act's passage, Congress normally paired broad grants of rulemaking authority with specific sanctions applicable to violations of the agency's rule.<sup>86</sup> As discussed above, that was true of many statutes authorizing rulemaking by the Commission prior to the D.C. Circuit's decision. By contrast, Section 6 of the FTC Act provided no specific sanction for violating any rules issued under Section 6(g). In fact, Congress acted within two years of the *National Petroleum Refiners* decision to clearly authorize substantive "unfair and deceptive acts or practices" regulations through the Magnuson-Moss Act, without providing similar authority for "unfair methods of competition."

Notably, although the Commission now invokes *National Petroleum Refiners* as a clear source of substantive rulemaking authority, the Commission did not attempt to issue a substantive competition rule in the half-century after that decision was issued. For the last 50 years, the Commission has not been willing to rely on *National Petroleum Refiners* and test the extent of its rulemaking authority. The rule at issue in *National Petroleum Refiners* thus remains the FTC's only competition rulemaking in more than a century.<sup>87</sup> Further, the Commission has never attempted to write a standalone competition rule, as the rule at issue in *National Petroleum Refiners* relied on the Commission's authority to proscribe both "unfair methods of competition" and "unfair or deceptive acts and practices."

## **B. The Commission Lacks The Authority To Decree That All Worker Noncompete Agreements Are Unfair.**

Section 5 proscribes "unfair methods of competition."<sup>88</sup> Although that phrase covers a range of anticompetitive acts and agreements, it cannot be read to include all worker noncompete agreements. Worker noncompete agreements were commonly enforced at the time Congress enacted the FTC Act. Numerous court decisions have

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<sup>86</sup> See Merrill & Watts, *supra* note 57, at 472.

<sup>87</sup> See *Loving*, 742 F.3d at 1021 ("And in the circumstances of this case, we find it rather telling that the IRS had never before maintained that it possessed this authority."); *Fin. Plan. Ass'n*, 482 F.3d at 490–91; see also *West Virginia*, 142 S. Ct. at 2609 ("[B]oth separation of powers principles and a practical understanding of legislative intent make us reluctant to read into ambiguous statutory text the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to clear congressional authorization for the power it claims.") (internal citations omitted) (internal quotation marks omitted).

<sup>88</sup> 15 U.S.C. § 45(a).

recognized the procompetitive benefits of such agreements and have upheld them against challenges under the FTC Act and the Sherman Act. Were there any doubt, as with the Commission’s interpretation of Section 6(g), its claim of sweeping authority to condemn all worker noncompetes—regardless of whether the individual is a partner or owner, the breadth of the restriction, the nature of the worker’s job, or the business interests in enforcing the agreement—does not survive scrutiny under the major-questions doctrine.

To defend the position that *all* worker noncompetes are “unfair,” the Commission’s proposal invokes its recent Policy Statement on Section 5.<sup>89</sup> The Chamber has previously raised concerns about the Commission’s Policy Statement, which marks a fundamental departure from the agency’s previous policy and purports to allow the Commission “to deem any business conduct ‘unfair’ without any showing of harm to consumers, anticompetitive intent, market power, or market definition.”<sup>90</sup> The proposed Noncompete Rule highlights each of those concerns. It also demonstrates that, if the Commission is right about the meaning of “unfair methods of competition,” then Section 5 constitutes an unconstitutional delegation of legislative power to the Executive Branch.

History, precedent, and ordinary tools of statutory interpretation undercut the Commission’s view that worker noncompetes are categorically “unfair.” Given the lack of support for the Commission’s legal position—and the clear constitutional problems raised by its interpretation—the Commission should reconsider the legal analysis of Section 5 reflected in the proposed Noncompete Rule.

## 1. The history of noncompete agreements

Noncompete agreements have been known to the common law since the 15th century<sup>91</sup> and have been present in the United States since the Founding.<sup>92</sup> As the Commission’s proposal recognizes, state courts have long applied case-specific tests to determine when noncompete agreements are enforceable. When Congress enacted the FTC Act in 1914, covenants “by an . . . agent not to compete with his . . . employer

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<sup>89</sup> 88 Fed. Reg. at 3499 & n.230.

<sup>90</sup> See Sean Heather, *FTC’s Section 5 Policy Statement Effectively Declares Competition Illegal*, U.S. Chamber of Commerce (Nov. 10, 2022), <https://www.uschamber.com/finance/antitrust/the-ftcs-section-5-policy-statement-effectively-declares-competition-illegal>.

<sup>91</sup> See *Bradford v. New York Times Co.*, 501 F.2d 51, 60 (2d Cir. 1974). The first recorded decision involving a noncompete agreement in the common law appears to be *Dyer’s Case* in 1414. Y.B. 2 Hen. V, f.5, pl. (1414).

<sup>92</sup> See *Pierce v. Fuller*, 8 Mass. 223 (1811) (finding valid an early noncompete agreement involving stage coaches between Boston and Providence).

after the expiration of his time to service” were “generally upheld as valid.”<sup>93</sup> Courts presume that Congress was well aware of this settled law when it passed the FTC Act.<sup>94</sup> Yet there is no indication that Congress intended the Act to categorically ban as an “unfair method of competition” what was at that time a common (and lawful) business practice.

Precedent also confirms that noncompetes are not categorically “unfair.” Courts applying the antitrust laws have recognized that noncompete agreements “often serve legitimate business concerns such as preserving trade secrets and protecting investments in personnel.”<sup>95</sup> As a result, those agreements are assessed under the case-specific “rule of reason,” rather than through categorical *per se* rules.<sup>96</sup> In fact, the only litigated decision challenging a noncompete under Section 5 found that the agreement was lawful.<sup>97</sup> Although the Commission acknowledges the weight of authority holding that noncompetes do not invariably violate antitrust laws, they point to no authority going the other way.<sup>98</sup>

The Commission’s proposal to categorically ban worker noncompete agreements is a stark departure from this body of law. The Supreme Court has long cautioned against creating new *per se* rules in competition law, noting “[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act.”<sup>99</sup> Here, not only is there no “considerable experience” demonstrating that noncompete agreements are anticompetitive, there is a deep and longstanding body of state law suggesting the opposite.

## 2. Longstanding state regulation of noncompete agreements

The Commission’s interpretation of Section 5 is also incompatible with bedrock principles of federalism. If Congress “intends to alter the usual constitutional balance

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<sup>93</sup> *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898) (collecting cases).

<sup>94</sup> *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (“We assume that Congress is aware of existing law when it passes legislation.”).

<sup>95</sup> *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 900 (9th Cir. 1983).

<sup>96</sup> *Eichorn v. AT&T Corp.*, 248 F.3d 131, 144 (3d Cir. 2001), as amended (June 12, 2001) (collecting cases).

<sup>97</sup> *See Snap-On Tools Corp. v. Fed. Trade Comm’n*, 321 F.2d 825, 837 (7th Cir. 1963).

<sup>98</sup> *See supra* note 30.

<sup>99</sup> *United States v. Topco*, 405 U.S. 596, 607-608 (1972); *see Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 23 (1979) (“Not all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints.”).

between the States and the Federal government,” it must be “unmistakably clear.”<sup>100</sup> That principle is particularly apt when an agency’s regulation would disrupt areas of “traditional state regulation.”<sup>101</sup>

As discussed above, every State has developed its own body of statutory and case law to determine the enforceability of noncompete agreements.<sup>102</sup> Those state-law regimes reflect specific judgments about how best to weigh the interests of workers, employers, and the public at large. Although some States have adopted a restrictive approach to worker noncompete agreements,<sup>103</sup> others are more permissive.<sup>104</sup> In fact, many state-law decisions address the very same concerns that motivate the Commission’s proposal. State noncompete laws vary based on the occupation of the worker at issue,<sup>105</sup> and many decisions distinguish between noncompetes that restrict higher-paid and lower-paid workers.<sup>106</sup> And some states continue experimenting, choosing to move towards greater enforceability of noncompetes. In 2011, Georgia passed the Restrictive Covenants in Contracts Act, making noncompete agreements entered into after passage of the Act generally enforceable by statute. Ga. Code Ann. § 13-8-50. The Act does not apply to noncompetes entered into before 2011, which continue to be subject to greater scrutiny.<sup>107</sup> Critically, nearly every state recognizes that worker noncompetes are beneficial in some circumstances and can serve a range of legitimate and procompetitive purposes. *Supra*, at Section I.B.1.<sup>108</sup>

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<sup>100</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (internal quotation marks omitted).

<sup>101</sup> *Metro Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985).

<sup>102</sup> *Compare SWAT 24 Shreveport Bossier, Inc. v. Bond*, 808 So. 2d 294, 298 (La. 2001) (Louisiana’s “strong public policy restricting these types of agreements”) *with BDO Seidman v. Hirshberg*, 712 N.E.2d 1220, 1223 (N.Y. 1999) (New York’s “prevailing standard of reasonableness in determining the validity” of noncompete agreements).

<sup>103</sup> 88 Fed. Reg. at 3494 (noting that California, North Dakota, and Oklahoma have adopted policies that make noncompete agreements “void for nearly all workers”).

<sup>104</sup> *See supra* section I.B.1.

<sup>105</sup> *Ibid.*

<sup>106</sup> *See Braman Chem. Enters. v. Barnes*, No. CV064020633S, 2006 WL 3859222, at \*22 (Conn. Super. Ct. Dec. 12, 2006); *see also* Va. Stat. § 40.1.28.7:8 (“No employer shall enter into, enforce, or threaten to enforce a covenant not to compete with any low-wage employee.”).

<sup>107</sup> *See Trujillo v. Great S. Equip. Sales, LLC*, 657 S.E.2d 581, 583 (Ga. Ct. App. 2008).

<sup>108</sup> *See e.g.*, Ga. Code Ann. § 13-8-50 (“The General Assembly finds that reasonable restrictive covenants contained in employment and commercial contracts serve the legitimate purpose of protecting legitimate business interests and creating an environment that is favorable to attracting commercial enterprises to Georgia and keeping existing businesses within the state.”); *see also* Robert W. Gomulkiewicz, *Leaky Covenants-Not-to-Compete as the*

The Commission recognized all of this in its Proposed Rule, noting both the states' longstanding regulation of worker noncompete agreements and the tremendous variety of regulatory approaches.<sup>109</sup> But the Commission's rule nonetheless seeks to federalize a huge swath of state contract law. Although it is true that both States and the federal government have long exercised power over competition, the federal antitrust laws have not historically been used to challenge ordinary employment and commercial agreements. Instead, antitrust enforcement in the labor market has focused on agreements among competing employers. Before adopting a rule that would fundamentally reshape the federal-state balance of power over longstanding contractual agreements between employers and their employees, the Commission should be assured that Congress has approved of its policy. Congress has never provided such authorization, let alone clearly.

### 3. Major-questions doctrine

As with the Commission's claim of newfound rulemaking authority under Section 6(g), its attempt to categorically ban all worker noncompetes under Section 5 also violates the major-questions doctrine. The Commission's proposed ban would clearly have "vast economic and political significance."<sup>110</sup> If the proposed Noncompete Rule is adopted, employers and workers across the United States, in every sector of the economy, would be forced to rescind noncompete clauses. And the proposed Rule would require employers to engage in a costly effort to provide notice regarding existing noncompetes to all current and former employees.<sup>111</sup> Given the sheer magnitude of the Rule's implications, the Commission's interpretation "falls comfortably within the class of authorizations that [courts] have been reluctant to read into ambiguous statutory text."<sup>112</sup>

The language "unfair methods of competition" does not clearly authorize a categorical ban on worker noncompete agreements. The Supreme Court's recent decision in *NFIB v. OSHA* is instructive. In response to the Covid-19 pandemic, the Occupational Safety and Health Administration invoked its broad authority to issue "emergency temporary standards" to promulgate a rule requiring employers to either

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*Legal Infrastructure for Innovation*, 49 U.C. Davis L. Rev. 251, 255 (2015) ("[M]ost states enforce non-competes that are reasonable as to duration, geographic reach, and scope of work covered."); U.S. Dep't of the Treasury, *Non-compete Contracts: Economic Effects and Policy Implications* 15 (2016) ("Currently, nearly all states will enforce non-compete agreements to some extent.").

<sup>109</sup> 88 Fed. Reg. at 3494-3496.

<sup>110</sup> *Utility Air Regulatory Grp.*, 573 U.S. at 324 (internal citation omitted).

<sup>111</sup> 88 Fed. Reg. at 3511.

<sup>112</sup> *Utility Air Regulatory Grp.*, 573 U.S. at 324.

mandate the vaccination of their workforce or impose weekly testing protocols. Applying the major-questions doctrine, the Supreme Court held that the broad words of the statute did not “plainly authorize[]” the agency’s actions.<sup>113</sup> Although OSHA had the authority to “regulate [Covid-19] risks associated with working in particularly crowded or cramped environments,” it could not use that authority to regulate other workplaces where “the danger . . . differs in both degree and kind.”<sup>114</sup> The same logic applies here: the Commission’s proposal tries to exploit ambiguity in a vague phrase like “unfair methods of competition” to pursue an unprecedented policy of vast significance. Even assuming the Commission may challenge particular noncompetes as injurious to competition, it may not impose a blanket ban on noncompete agreements.

Two additional considerations confirm that Congress should not be understood to have given the Commission the authority to issue a sweeping, nationwide ban on noncompete agreements. First, the Commission’s policy suffers from “a lack of historical precedent.”<sup>115</sup> Never before has the Commission taken the position that worker noncompete agreements are unlawful regardless of their terms or business justifications. Nor has the Commission ever sought to ban a common business practice as an “unfair method of competition” without any opportunity for the defendant to show that the benefits of the agreement outweigh the harms.<sup>116</sup> In both respects, the proposed Noncompete Rule is entirely unprecedented.

Second, Congress recently considered and rejected legislation to address worker noncompete agreements at the federal level.<sup>117</sup> And earlier this year, members of the Senate and House from both parties reintroduced the Workforce Mobility Act, which would have limited the use of worker noncompetes. That legislation, which has repeatedly been proposed for years without receiving a vote, would give the Commission authority to enforce violations of the statute.<sup>118</sup> Notably, the legislation would empower the Commission by designating worker noncompetes as “unfair or deceptive acts and

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<sup>113</sup> *Nat’l Fed. of Indep. Bus.*, 142 S. Ct. at 665.

<sup>114</sup> *Id.* at 666.

<sup>115</sup> *Ibid.* (citing *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010)).

<sup>116</sup> Apart from suits alleging per se violations of the antitrust laws, the Commission has previously argued that business practices should be “*presumptively* unlawful,” thereby giving the defendants the chance to demonstrate that the challenged agreement was valid in their particular circumstances. *Fed. Trade Comm’n v. Actavis, Inc.*, 570 U.S. 136, 159 (2013).

<sup>117</sup> *See, e.g.*, Restoring Workers’ Rights Act of 2022, H.R. 8755, 117th Cong. § 2 (2022); Freedom To Compete Act of 2019, S.124, 116th Cong. § 3 (2019).

<sup>118</sup> Workforce Mobility Act of 2023, S. 220, H.R. 731, 118th Cong., 1st Sess., §§ 3, 6.



practices,” not as “unfair methods of competition.”<sup>119</sup> This legislation is strong evidence both that the Commission currently lacks the power to regulate worker noncompetes and that the Commission is wrong to think about those agreements as “unfair methods of competition.”

Taken together, the Commission’s interpretation of Section 5 in the proposed Noncompete Rule has all of the hallmarks of a major-questions case. The Commission is claiming the authority to fundamentally transform the economy in a way that improperly “intrude[s] into an area that is the particular domain of state law” and curtails the power of state governments; it is doing so without any historical precedent for its interpretation; and its proposal would achieve through regulatory fiat what Congress has consistently declined to accomplish through the legislative process.<sup>120</sup> The Commission should abandon its effort to do so unless and until Congress provides the necessary authorization.

#### 4. Nondelegation doctrine

To support its novel view of Section 5, the Commission’s proposal relies on its recent “Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act.”<sup>121</sup> That Policy Statement marked a fundamental departure from longstanding agency policy, which “had been adopted on a bipartisan basis by the Commission six years prior because it embodied a sound approach to antitrust law that reflected decades of legal precedent and economic learning.”<sup>122</sup> According to the Policy Statement, it is now the Commission’s view that

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<sup>119</sup> *Id.* § 6.

<sup>120</sup> *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J, concurring) (internal citation omitted). Justice Gorsuch’s concurrence in *West Virginia* identified three factors to determine when the major-questions doctrine should apply: first, if Congress has “‘considered and rejected’ bills authorizing something akin to the agency’s proposed course of action”; second, if the agency “seeks to regulate ‘a significant portion of the American economy’”; and finally, if the agency’s proposed action “seeks to ‘intrud[e] into an area that is the particular domain of state law.’” *Id.* at 2620-21. As shown herein, the Commission’s interpretation of Section 5 checks all three boxes.

<sup>121</sup> Fed. Trade Comm’n, Comm’n File No. P221202 (Nov. 10, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyStatement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf) (hereinafter policy statement).

<sup>122</sup> Wilson Dissent, *supra* note 64, at 1.

“Section 5 reaches beyond the Sherman and Clayton Acts to encompass various types of unfair conduct that tend to negatively affect competitive conditions.”<sup>123</sup>

As the Chamber has previously explained, the Section 5 Policy Statement provides very little guidance on what conduct violates the FTC Act. For instance, it states that conduct is “unfair” when it “goes beyond competition on the merits” and “tends to foreclose or impair the opportunities of market participants.”<sup>124</sup> The Commission’s Policy Statement has already generated considerable uncertainty for the Chamber and its members and has chilled procompetitive conduct in the marketplace.

As the Proposed Rule demonstrates, the Section 5 Policy Statement also raises grave constitutional concerns. The Commission’s view that worker noncompetes are categorically unlawful runs counter to centuries of precedent recognizing that some noncompete agreements serve legitimate business interests. Yet the Commission believes it can nonetheless prohibit all of those agreements—as well as any other agreement that “effectively precludes [a] worker from working in the same field after the conclusion of the worker’s employment with the employer”—under Section 5.<sup>125</sup> If that is correct, and the Commission can condemn ordinary business practices as “unfair methods of competition,” then Section 5 of the FTC Act reflects an unconstitutional delegation of power from Congress to the Executive Branch.

A statutory delegation to an executive agency is constitutional only so “long as Congress lays down by legislative act an intelligible principle” to cabin the agency’s discretion.<sup>126</sup> “[A] nondelegation inquiry always begins (and often almost ends) with statutory interpretation.”<sup>127</sup> If the term “unfair methods of competition” is not understood in light of history and precedent, and if the Commission can condemn any business practice as unfair based on nothing more than “nefarious-sounding adjectives,”<sup>128</sup> then there is effectively no limit to what the Commission may do under Section 5.<sup>129</sup> To the extent there is any doubt about the proper meaning of “unfair

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<sup>123</sup> Policy Statement, *supra* note 121, at 1.

<sup>124</sup> *Id.* at 8-9.

<sup>125</sup> 88 Fed. Reg. at 3535.

<sup>126</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (citing *Mistretta v. United States*, 488 U.S. 361, 372 (1989)).

<sup>127</sup> *Ibid.*

<sup>128</sup> 88 Fed. Reg. at 3540 (Wilson, Comm’r, dissenting).

<sup>129</sup> *See, e.g., A. L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539, 551 (1935) (striking down a provision of the National Industrial Recovery Act authorizing “codes of fair competition”).

methods of competition,” the Commission should interpret the statute to avoid an unlawful delegation of legislative power.

## 5. Retroactivity

The Commission’s proposal also raises significant constitutional and fairness concerns due to its sweeping retroactivity. As the Supreme Court has noted, “a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.”<sup>130</sup> That presumption recognizes that “retroactivity is generally disfavored in the law, in accordance with ‘fundamental notions of justice’ that have been recognized throughout history.”<sup>131</sup> In particular, retroactively applicable regulations may violate the Constitution when they severely disrupt settled expectations.<sup>132</sup>

The Commission’s categorical ban would impose considerable retroactive consequences. The Proposed Rule not only prohibits virtually all noncompete clauses going forward, it seeks to unilaterally void almost every existing noncompete agreement and force employers to notify current and former employees of the now-invalidated clauses.<sup>133</sup> In doing so, the Proposed Rule undercuts strong reliance interests for both employers and workers, as well as buyers and sellers in the context of negotiated transactions, and undermines the benefit of the bargain obtained by parties for contracts agreed to in the past. If the Proposed Rule goes into effect, employers may lose the benefit of noncompete agreements they already paid for, while workers may be asked to return severance payments or other compensation that was conditioned on agreeing to a noncompete.<sup>134</sup>

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<sup>130</sup> *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

<sup>131</sup> *Eastern Enterprises v. Apfel*, 524 U.S. 498, 532-533 (1998) (O’Connor plurality) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J. concurring)) (internal citation omitted)). Although a plurality of Justices held that the statute in *Eastern Enterprises* violated the Takings Clause, Justice Kennedy concurred on the ground that the statute was unconstitutional as a matter of substantive due process. *See* 524 U.S. at 550.

<sup>132</sup> *Id.* at 528-529; *see also Verizon West Virginia, Inc. v. West Virginia Bureau of Emp. Programs*, 586 S.E.2d 170, 195-196 (W. Va. 2003) (applying *Eastern Enterprises* to a claim based on a retroactive regulation).

<sup>133</sup> 88 Fed. Reg. at 3535.

<sup>134</sup> Forum, *supra* note 6, at 42 (Testimony of Eric Poggemiller) (“If these contracts are rescinded, rescission typically restores the parties to the position that they occupied prior to the contract. So would the employer then be entitled to sue the employee to require a repayment of any consideration that’s granted?”).

The Commission asserts that the Proposed Rule “would not apply retroactively” because all an employer must do is rescind existing noncompete agreements by a compliance date in the future.<sup>135</sup> But that argument is a complete *non sequitur*. Noncompete agreements in existence today reflect promises made and transactions negotiated in the past. For instance, an executive who agreed to receive additional compensation from his former employer on the condition that he not work for a competitor would be able to ignore his end of the bargain following the Commission’s categorical ban, even though his former employer had already satisfied its part of the deal. Given the significant retroactive consequences of the proposal, the Commission should wait for a clear statement from Congress confirming its authority to invalidate tens of millions of preexisting contracts before proceeding with its Noncompete Rule.

### **C. The Commission’s Proposed Rule Is Poorly Reasoned.**

Even if the Commission had the legal authority to issue a rule outlawing noncompete agreements, the Administrative Procedure Act requires that it do so only as the result of a thorough and well-reasoned decision-making process. The Commission’s proposal does not meet that standard for at least five reasons. First, the Commission drastically underestimates the costs of its proposal by ignoring or minimizing the business justifications for noncompete agreements and by erroneously concluding that the benefits of noncompetes—including intellectual-property and goodwill protection and investments in the labor force—can be achieved through other means. Second, the Commission overstates the benefits of the Noncompete Rule. Contrary to the Commission’s assertions, the economic literature on noncompetes paints a complicated picture, and includes a number of studies demonstrating that noncompete agreements may advance competition and benefit workers. Third, the Commission fails to justify the considerable breadth of the Noncompete Rule—which applies to independent contractors, exempt organizations, and most agreements connected to the sale of a business—or to account for the significant uncertainty created by many aspects of the Noncompete Rule, such as its definition of “de facto” noncompete agreements. Fourth, the Commission’s proposal does not comply with the requirement to consider burdens on small business under the Regulatory Flexibility Act. Fifth, the Commission’s proposal conflicts with other federal laws that recognize or rely on the validity of noncompete agreements.

#### **1. The Commission underestimates the costs of its categorical ban.**

The Commission’s proposal distorts the available evidence, leaning heavily on inconclusive, ungeneralizable studies, while disregarding more robust research showing that noncompetes can benefit workers and competition. In the process, the Commission greatly discounts the costs of its proposed categorical ban, an error that

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<sup>135</sup> 88 Fed. Reg. at 3512.

undermines the entire basis for the Commission’s rule. As Commissioner Wilson explained in dissent, “the Commission’s decision to rely on cherry-picking evidence that conforms to [a predetermined] narrative provide[s] little confidence in the integrity of the rulemaking process or the ultimate outcome.”<sup>136</sup>

First, the Commission gives short shrift to research showing the value of noncompetes. The Commission devotes only four paragraphs to describing the many ways in which noncompete agreements can benefit workers and businesses—a discussion that pales in comparison to the many pages discussing their potential harms. As a result, the Commission overlooks important evidence.<sup>137</sup> One recent study not cited by the Commission concluded that noncompete agreements are “related to increases in firm-sponsored training, riskier [research and development] investments, and increases in firm value and the likelihood of acquisition.”<sup>138</sup> Another study emphasizes the importance of noncompete agreements to reducing employee turnover, which can cost businesses “approximately twenty five percent of an employee’s annual salary.”<sup>139</sup> And one of the studies relied on by the Commission found that “total compensation and incentive pay are higher if CEOs have more enforceable [noncompete agreements],” even though the Commission nowhere mentions that conclusion.<sup>140</sup> In addition to those studies, commenters at the Commission’s recent forum on noncompete agreements also explained that “[i]n many states where non-competes are banned, [their] members have problems with recruitment and retention,” as well as “problems with proprietary information.”<sup>141</sup>

The Commission’s proposal failed to give these studies their proper weight. Even though the proposal makes passing reference to research that undermines its ban, it simply asserts that “the evidence that noncompete clauses benefit workers or consumers is scant.”<sup>142</sup> Given the body of research showing that noncompetes provide real benefits, that conclusion is not consistent with the existing literature. Indeed, as

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<sup>136</sup> *Id.* at 3543 (Wilson, Comm’r, dissenting).

<sup>137</sup> Norman D. Bishara & Evan Starr, *The Incomplete Noncompete Picture*, 20 Lewis & Clark L. Rev. 497, 535 (2016) (“Though it is tempting to think that the rapidly expanding empirical noncompete literature has sufficiently answered the interesting and relevant questions for firms, workers, and policymakers . . . there remain severe limitations to our understanding of noncompetes.”).

<sup>138</sup> *Ibid.*

<sup>139</sup> Griffin Toronjo Pivateau, *Preserving Human Capital: Using The Noncompete Agreement to Achieve Competitive Advantage*, 4 J. Bus. Entrepreneurship & L. 319, 327 (2011).

<sup>140</sup> Omesh Kini, Ryan Williams & Sirui Yin, *CEO Noncompete Agreements, Job Risk, and Compensation*, 34 Rev. Fin. Stud. 4701, 4701 (2021).

<sup>141</sup> Forum, *supra* note 6, at 30 (Testimony of Alex Hendrie).

<sup>142</sup> 88 Fed. Reg. at 3508.

discussed above, courts have repeatedly recognized the competitive benefits of noncompetes, finding that such benefits were “beyond question.”<sup>143</sup>

Second, the Commission incorrectly assumes that businesses have alternative means of achieving the legitimate benefits of noncompete agreements. Specifically, it suggests that businesses could use nondisclosure agreements or lawsuits under state trade-secret law as a way to protect their confidential information if noncompete agreements were no longer available. But there are important differences between each of these tools that make nondisclosure agreements and trade secret laws poor substitutes for noncompetes. In particular, the confidential information that businesses may wish to protect is much broader than the scope of trade-secret law, so even if an employer took on the expense of pursuing trade-secret litigation, that alternative could still be inadequate.<sup>144</sup> Additionally, noncompete agreements are prophylactic; they are “used as a means of minimizing the potential for trade secret misappropriation by preventing an employee from working for a competitor or engaging in a competing enterprise” in the first place.<sup>145</sup>

Commenters at the Commission’s forum highlighted those important distinctions, noting that noncompetes “provide a different kind of protection” from nondisclosure agreements.<sup>146</sup> In particular, the speakers emphasized that nondisclosures are inadequate because a worker “cannot excise [a company’s] confidential information from her brain” and “knows what avenues [a] competitor should follow and what blind alleys it should avoid.”<sup>147</sup> Thus a worker can use confidential information from a former employer to provide significant advantages to a competitor without truly violating the terms of a nondisclosure agreement.

Nondisclosure agreements and trade-secret violations are also difficult to prove and costly to litigate. By relying on noncompetes over nondisclosure agreements or trade-secret law, “employers avoid the difficulties of proving an actual or threatened misappropriation of trade secrets to secure an injunction,” a costly and time-consuming process.<sup>148</sup> For example, to prove a typical trade-secret violation, an “employer must prove that the employee misappropriated trade secret information,” which requires that the employer “separate its trade secrets from the employee’s general skill and knowledge,” and “prove that the employee took trade secrets through improper

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<sup>143</sup> *Lekro-Vend Corp.*, 660 F.2d at 265.

<sup>144</sup> Noncompetes can also prevent the transfer of potentially sensitive technology and business secrets to foreign entities, thereby protecting the U.S. economy as a whole.

<sup>145</sup> Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 Am. Bus. L.J. 107, 117 (2008).

<sup>146</sup> Forum, *supra* note 6, at 8 (Testimony of Emily Glendinning).

<sup>147</sup> *Ibid.*

<sup>148</sup> Garrison & Wendt, *supra* note 145, at 117.

means.”<sup>149</sup> Proving one, let alone both, of those features is no easy feat. Indeed, a recent survey suggests that the median cost of litigating a trade secret case is \$4.1 million when between \$10 million and \$25 million is at risk and \$7.4 million when more than \$25 million is at risk.<sup>150</sup>

Moreover, some States make trade-secret suits even more difficult to prove by failing to apply the “inevitable disclosure” doctrine. That doctrine helps a plaintiff-former employer “prove a claim of trade secret misappropriation by demonstrating that defendant’s new employment will inevitably lead him to rely on the plaintiff’s trade secrets.”<sup>151</sup> But many States do not accept that presumption, and thereby require an employer to prove that trade secrets were already used by a competitor before prevailing on its claim.<sup>152</sup>

The Commission’s proposal does not meaningfully engage with these differences. The record compiled by the Commission “provides no evidence that” nondisclosure agreements or trade-secret protections “are effective substitutes for non-compete agreements,” and the Commission “cites no instances where these mechanisms have been used effectively in lieu of non-compete clauses.”<sup>153</sup> The Proposed Rule also fails to explain the widespread use of noncompete agreements today despite the availability of other mechanisms to protect employer information—particularly in States with robust trade-secret protections.<sup>154</sup> If noncompetes are as unnecessary as the Commission suggests, it is unlikely so many businesses would still rely on them.

The Commission’s own proposal undermines its suggestion that businesses use nondisclosure agreements as viable alternatives to noncompetes. The proposed Noncompete Rule defines noncompetes to include “de facto non-compete clauses,” a

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<sup>149</sup> Robert W. Gomulkiewicz, *Leaky Covenants-Not-to-Compete as the Legal Infrastructure for Innovation*, 49 U.C. Davis L. Rev. 251, 286 (2015).

<sup>150</sup> Malathi Nayak, Costs Soar for Trade Secrets, Pharma Patent Suits, Survey Finds, Bloomberg Law (Sept. 19, 2019), <https://news.bloomberglaw.com/ip-law/costs-soar-for-trade-secrets-pharma-patent-suits-survey-finds>.

<sup>151</sup> *PepsiCo, Inc. v. Redmond*, 54 F. 3d 1262, 1269 (7th Cir. 1995).

<sup>152</sup> *See, e.g., Kinship Partners, Inc. v. Embark Veterinary, Inc.*, 2022 WL 72123, at \*7 (D. Ore. Jan. 3, 2022) (“Because Oregon law favors employee mobility, the Court declines to adopt the inevitable disclosure doctrine or apply it to this case.”).

<sup>153</sup> 88 Fed. Reg. at 3543.

<sup>154</sup> *Id.* at 3505 (“Trade secret law provides employers with an alternative means of protecting their investments in trade secrets.”).

definition the Commission admits would sweep in many nondisclosure agreements.<sup>155</sup> The proposed Noncompete Rule therefore suggests that employers can avoid the costs of its ban by relying on nondisclosure agreements, while also conceding that its ban could prohibit those agreements as well.

Third, the Commission glosses over the costs to workers of its categorical ban. For example, the Commission estimates that “3.1% fewer workers would receive training in a given year, as a result of the proposed rule.”<sup>156</sup> Although that decline in workforce training is problematic in its own right, there are reasons to question the Commission’s analysis. The Commission’s figures are based on a single study, which it then extrapolates across the entire workforce.<sup>157</sup> And the Commission’s assessment of costs fails to discuss how the lack of employer-provided training will impact affected workers, including by increasing out-of-pocket training costs or by decreasing workers’ competitiveness in the job market. The Commission also fails to consider other losses workers may experience in the face of a non-compete ban, such as lower compensation resulting from employers’ reduced motivation to offer long-term incentive-based awards (*e.g.*, company stock).

The Commission also grossly underestimates the costs to businesses of implementing the Proposed Rule, particularly as they are forced to adopt more expensive and time-consuming methods to protect their valuable information. The Commission recognizes that “[f]irms may seek to update their contractual practices by expanding the scope of non-disclosure agreements (NDAs) or other contractual provisions to ensure that they are expansive enough to protect trade secrets and other valuable investments” (though the Commission also says such provisions could be deemed *de facto* noncompetes).<sup>158</sup> The Commission then estimates the total cost of updating those provisions will range from about \$246 to \$493 in lawyer fees per business.<sup>159</sup> That estimate fails to account for the costs to workers and employers

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<sup>155</sup> *Id.* at 3482 (recognizing that “under the proposed definition of ‘non-compete clause,’ such covenants would be considered non-compete clauses where they are so unusually broad in scope that they function as such”).

<sup>156</sup> *Id.* at 3529.

<sup>157</sup> *Id.* at 3529 n.504. The cited study, which “examines the effect of noncompete enforceability on training and wages,” shows that “[a]n increase from non-enforcement to mean enforceability is associated with a 14% increase in training, which tends to be firm-sponsored and designed to upgrade or teach new skills.” *Id.* at 3529 n.504 (citing Evan Starr, *Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete* (May 24, 2018), <https://ssrn.com/abstract=2556669>).

<sup>158</sup> 88 Fed. Reg. at 3528.

<sup>159</sup> *Id.* at 3529. We arrive at this range for individual firms using the Commission’s estimate. The Commission assumes that “the average firm that uses a non-compete clause employs the



based on increased reliance on nondisclosure litigation.<sup>160</sup> Such suits are costly to bring and very difficult to prove.<sup>161</sup> And the costs of complying with the Commission’s proposed rule are magnified by the requirement to notify all current and former workers of rescinded noncompete agreements. Yet the Commission’s cost-benefit analysis leaves out or underestimates many of those important costs.

The Proposed Rule also ignores the costs associated with businesses’ inability to protect their confidential information, even when a non-disclosure agreement is in place. Under the Proposed Rule, employers will be powerless to prevent a key employee from using sensitive, confidential, and critical data or product knowledge to aid a competitor firm. While perhaps hard to calculate, these costs would be real and significant—the very reason firms use noncompetes in the first place. At a minimum, there will be *some* cost to protecting sensitive information, and the Proposed Rule wholly ignores that cost and does not even attempt to quantify it. And those costs will ultimately be borne both by employers who must protect their confidential information to succeed and by employees who rely on that success for their livelihood.

Finally, the Commission’s proposal ignores the tax consequences of banning noncompetes. For tax purposes, “[a] covenant not to compete constitutes an intangible asset.”<sup>162</sup> During acquisitions, companies typically record noncompete agreements as assets of the firm. But if those agreements are banned, firms would be required to write off those assets, leading to financial costs.

## 2. The Commission overestimates the benefits of its categorical ban.

The Commission’s analysis of benefits attributable to its categorical ban also is deeply flawed. At various points in the rulemaking, the Commission relies on stale or limited data, without accounting for recent legal developments or contrary research. All

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equivalent of four to eight hours of a lawyer’s time” and thus “calculate[s] the total expenditure on updating contractual practices to range from \$61.54\*4\*49.4%\*6,102,412=\$742.07 million to \$61.54\*8\*49.4%\*6,102,412=\$1.48 billion.” *Id.* Using these numbers, we find that the Commission is predicting an individual business will spend between \$61.54\*4 = \$246.16 and \$61.54\*8= \$492.32 on lawyers’ fees.

<sup>160</sup> Rosemary Scott, *FTC’s Non-Compete Law Could Propel Rise in Trade Secrets Lawsuits*, BioSpace (Feb. 8, 2023), <https://www.biospace.com/article/ftc-s-non-compete-law-could-propel-rise-in-trade-secrets-lawsuits/>.

<sup>161</sup> *Ibid.* (noting that “when a plaintiff is presenting their case in court, they walk a tightrope between proving sensitive information has been shared and not revealing said information to the public,” which is just one of the many difficulties plaintiffs face in bringing these cases).

<sup>162</sup> *Lorvic Holdings, Inc. v. Commissioner of Internal Revenue*, 1998 WL 437287, at \*7 (Tax Ct. 1998).

told, the limited evidence relied on by the Commission does not support its incredibly broad proposal.

First, the Commission’s proposed rulemaking does not fully engage with contrary views. During its 2020 workshop on noncompete agreements, the Commission heard testimony that economic literature on noncompetes is “[s]till far from reaching a scientific standard for concluding [that noncompete agreements] are bad for overall welfare” and that “welfare tradeoffs are likely context-specific, and may be heterogeneous.”<sup>163</sup> Yet the Commission never explains what has changed in recent years to allay those concerns.

Second, the Commission at numerous points draws major conclusions from stale and incomplete data. For instance, the Commission’s top-line conclusion that “one in five American workers—or approximately 30 million workers—is bound by a non-compete clause,” is based in large part on a single study from 2021.<sup>164</sup> According to the Commission, this study is entitled to considerable weight because it had “the broadest and likely the most representative coverage of the U.S. labor force.”<sup>165</sup> But that paper based all of its findings on a survey conducted nearly a decade earlier.<sup>166</sup> Reliance on this old survey is particularly concerning because, as the Commission points out, “there is no consistent data available on the prevalence of non-compete clauses over time.”<sup>167</sup> And that study was also based on a nonrepresentative online sample—a selection-bias issue the authors were careful to note in presenting their findings. The other estimates of the prevalence of noncompetes mentioned by the Commission suffer from limitations as well, either because they rely on unrepresentative samples<sup>168</sup> or cover only subsets of the labor force.<sup>169</sup> The unreliability of the Commission’s estimate of the prevalence of noncompetes is important. If the Commission’s estimate is too high, the Commission may be failing to account for recent state laws that have reduced the number of noncompete agreements and may be overestimating the benefits of its rule against the

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<sup>163</sup> Kurt Lavetti, Economic Welfare Aspects of Non-Compete Agreements, Remarks at the Fed. Trade Comm’n Workshop on Non-Compete Clauses in the Workplace (Jan. 9, 2020), [https://www.ftc.gov/system/files/documents/public\\_events/1556256/non-compete=workshop-slides.pdf](https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete=workshop-slides.pdf).

<sup>164</sup> 88 Fed. Reg. at 3485; see Evan P. Starr, James J. Prescott, & Norman D. Bishara, *Noncompete Agreements in the U.S. Labor Force*, 64 J.L. & Econ. 53, 53 (2021).

<sup>165</sup> 88 Fed. Reg. at 3485.

<sup>166</sup> *Ibid.*

<sup>167</sup> *Id.* at 3486.

<sup>168</sup> *Id.* at 3485 n.42 (“[A] key limitation of the Payscale.com survey is that it is a convenience sample of individuals who visited Payscale.com during the time period of the survey and is therefore unlikely to be fully representative of the U.S. working population.”).

<sup>169</sup> *Id.* at 3485-3486.

status quo. On the other hand, if the Commission’s estimate is too low, it may suggest that more businesses are relying on these agreements, leading to higher compliance costs than the Commission has anticipated if the Rule were to become effective.

The Commission similarly relies on stale and flawed data in its estimate of increased worker earnings. The Commission’s analysis of that issue is primarily based on a 2020 economic study,<sup>170</sup> which apparently provides “the most direct estimate of the increase in workers’ earnings given a prohibition on non-compete clauses.”<sup>171</sup> But that study too relies on an outdated dataset examining noncompete enforceability between 1991 to 2014.<sup>172</sup> The same is true yet again of the Commission’s reliance on another study to estimate that its ban would increase worker earnings by 1%. That study relied on case panel data from 1996, 2001, 2004, and 2008.<sup>173</sup> And when the Commission applied that 1% figure to each State to project the benefits of its Rule, it used state-law data that was fifteen years old.<sup>174</sup>

The Commission’s failure to rely on more recent data is inconsistent with both its acknowledgment that the legal landscape for worker noncompetes is rapidly evolving and the sheer breadth of its proposed rule. The proposal notes that “States have been particularly active in restricting noncompete clauses in recent years,”<sup>175</sup> and that, of the twelve recent state statutes that restrict the use of noncompetes, “eleven were enacted

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<sup>170</sup> 88 Fed. Reg. at 3486 n.63; see Matthew S. Johnson, Kurt Lavetti, & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* 2 (2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3455381](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381).

<sup>171</sup> 88 Fed. Reg. at 3522.

<sup>172</sup> Johnson, Lavetti, & Lipsitz, *supra* note 170, at 2.

<sup>173</sup> 88 Fed. Reg. at 3522; Starr, *supra* note 157.

<sup>174</sup> 88 Fed. Reg. at 3523. Others have noted the errors in the Commission’s analysis of worker earnings following its proposed ban. For instance, a recent article explained that all of the studies cited by the Commission to support its wage increase estimate suffer from an “inability to adequately measure employees’ skills and relevant prior work experience.” Stephen G. Bronars, *FTC Evidence that Non-Competes Reduce Earnings is Inconclusive*, Bloomberg Law (Mar. 7, 2023), <https://news.bloomberglaw.com/us-law-week/ftc-evidence-that-non-competes-reduce-earnings-is-inconclusive>. Because these studies do not actually compare the job qualifications of new hires at different levels of enforceability, it is impossible to “distinguish between an increase in competition and firms hiring slightly more experienced” workers post-ban. *Id.* In other words, because firms may have a preference to hire more experienced workers if noncompete agreements are unenforceable (meaning they cannot always protect their investments in worker training), any visibly higher earnings are actually related to firms hiring more qualified and skilled employees, not the result of a ban on noncompetes. *Id.*

<sup>175</sup> 88 Fed. Reg. at 3494.

in the past ten years.”<sup>176</sup> By relying on studies of enforcement practices from decades ago, the Commission’s analysis ignores the possibility that many of the expected benefits it attributes to its Noncompete Rule have already been realized through developments in state law. The authors of the 2014 survey relied on by the Commission put the point well: “When researchers opt to rely on an outmoded and inaccurate binary legal enforcement variable, they are, in effect, incorporating into their empirical analysis demonstrably false assumptions about state legal environments.”<sup>177</sup>

The Commission’s proposal tried to address this defect in its reasoning by acknowledging that because “some states have passed legislation causing non-compete clauses to be more difficult to enforce for subsets of their workforces, [a] prohibition on non-compete clauses today [would] have a *slightly lesser effect* than a prohibition would have had in 2014.”<sup>178</sup> But the Commission’s failure to consider more recent evidence does not just undermine its analysis at the margins; it calls into question the rationale for a categorical ban in the first place. Although an administrative agency may sometimes be forced to rely on outdated research, the APA demands that the agency’s chosen policy go no further than the evidence can support. Here, the Commission has proposed a sweeping noncompete ban that will displace huge swaths of state law on a categorical basis. Yet the Commission has not pointed to any meaningful evidence evaluating the effects of current state laws on the costs and benefits of worker noncompetes.

The Commission’s recent enforcement actions demonstrate the problem. At the same time the Commission proposed its categorical ban, it also announced three consent orders involving noncompete agreements.<sup>179</sup> One of those enforcement actions centered on noncompete agreements for a security company in Michigan that imposed very restrictive conditions on former security guards. But even before the Commission initiated its unprecedented action, a Michigan trial court had already held those agreements could not be enforced as a matter of state law.<sup>180</sup> As the state court explained, those agreements were “not legally reasonable in scope (100 miles), duration (two years) or the type of service (employment as a security guard) prohibited.”<sup>181</sup> The

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<sup>176</sup> *Ibid.*

<sup>177</sup> James J. Prescott et al., *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, 2016 Mich. St. L. Rev. 369, 386 (2016).

<sup>178</sup> 88 Fed. Reg. at 3522 (emphasis added).

<sup>179</sup> *FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers*, Fed. Trade Comm’n (Jan. 4, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers>.

<sup>180</sup> *Prudential Security, Inc. v. Pack*, No. 18-015809-CB (Mich. Cir. Ct. Apr. 18, 2019).

<sup>181</sup> *Id.* at \*2.

other two enforcement actions were brought against the largest U.S. manufacturers of glass food and beverage containers. Both of the companies had imposed extremely broad noncompetes on hundreds of employees.<sup>182</sup> According to the Commission, one company prevented former employees “from working for, owning, or being involved in any other way with any business in the United States” selling similar products.<sup>183</sup> The other was even broader, preventing former employees “from directly or indirectly performing” a similar service “for any business in the United States, Canada, or Mexico.”<sup>184</sup> Both sets of agreements exemplify contracts that would be held unlawful under the common law because of their extremely broad geographic scope.<sup>185</sup> As those enforcement actions aptly demonstrate, a federal across-the-board ban is not necessary to address the Commission’s concerns about noncompete agreements, and the Commission can hardly claim expertise in the area of noncompetes by cherry-picking a few extreme examples that would likely be invalid under any test.

Third, the Commission suggests that it has identified the benefits from the Proposed Rule through its “years of work on noncompetes.”<sup>186</sup> But as Commissioner Wilson noted in her dissent, until the day before the proposed rulemaking was made public, “the Commission had announced no cases (and therefore had no experience and no evidence) to conclude that non-compete clauses harm competition in labor markets.”<sup>187</sup> Even more troubling, “the only litigated FTC case challenging a non-compete clause found that a non-compete provision covering franchise dealers did *not* violate Section 5 of the FTC Act.”<sup>188</sup> Although the Commission has also sponsored a series of workshops related to noncompetes, the expert views at those workshops also do not support a categorical ban. As discussed above, Professor Kurt Lavetti, the author of three studies cited in the proposed rulemaking, stated at a recent workshop that the economic literature is “[s]till far from reaching a scientific standard for concluding [that non-compete agreements] are bad for overall welfare” and that there is no full understanding of “the distribution of effects on workers.”<sup>189</sup> Given this record, the

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<sup>182</sup> *Supra*, note 179.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Indeed, the state court in *Pack* held that a geographic restraint of “200 mile[s] is not reasonable.” No. 18-015809-CB, at \*10.

<sup>186</sup> 88 Fed. Reg. at 3537

<sup>187</sup> *Id.* at 3542 (Wilson, Comm’r, dissenting).

<sup>188</sup> *Id.* (citing *Snap-On Tools Corp. v. Fed. Trade Comm’n*, 321 F.2d at 837).

<sup>189</sup> *Id.* (citing Kurt Lavetti, *Economic Welfare Aspects of Non-Compete Agreements, Remarks at the Fed. Trade Comm’n Workshop on Non-Compete Clauses in the Workplace* (Jan. 9, 2020), [https://www.ftc.gov/system/files/documents/public\\_events/1556256/non-compete=workshop-slides.pdf](https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete=workshop-slides.pdf)).

Commission has no basis to rely on its experience in forecasting that the proposed rule will benefit workers and employers.

**3. The Commission’s categorical ban is overly broad and will generate considerable uncertainty.**

The breadth and imprecision of the Noncompete Rule as currently proposed will create considerable costs for businesses and workers that the Commission has not adequately taken into account.<sup>190</sup> The Commission’s proposed ban relies on vague definitions that sweep in a huge number of private contracts, and the evidence and analysis included in the proposal do not offer sufficient guidance regarding the rule’s scope or the rationale for its application to many ordinary commercial agreements.

First, the Commission has defined noncompete agreements to include any “contractual term that is a *de facto* non-compete clause because it has the effect of prohibiting the worker from seeking or accepting work with a person or operating a business after the conclusion of the worker’s employment with the employer.”<sup>191</sup> As the Commission recognizes, that definition could apply to many agreements that do *not* prohibit employment at another firm or that only refer to nondisclosure obligations.<sup>192</sup> If the proposed Noncompete Rule were to go into effect as written, businesses would face extreme uncertainty and consequently be forced to spend considerable resources trying to identify *de facto* non-competes. And the uncertainty regarding that definition would have a chilling effect on research, development, and innovation, causing employers to abandon agreements that protect their confidential information out of fear of unprecedented enforcement actions by the Commission. The Commission has not accounted for the costs of this uncertainty in its proposal.

Second, the Commission’s categorical ban would apply to high-income workers, senior executives, partners, and owners of organizations. The Commission’s own proposal notes that noncompete agreements are not exploitative or coercive in those contexts in part because “many senior executives negotiate their noncompete clauses

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<sup>190</sup> Research on regulatory uncertainty suggests that “increased uncertainty can lead to significant reductions in hiring, investment, consumption, and output in the economy.” Zhoudan Xie, *Comparing Regulatory Uncertainty with Other Policy Uncertainty Measures*, Reg. Studies Ctr. (Feb. 2, 2022), <https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2022-06/gw-reg-studies-comparing-regulatory-uncertainty-with-other-policy-measures-zxie.pdf>.

<sup>191</sup> 88 Fed. Reg. at 3509.

<sup>192</sup> *Id.* at 3509-3510 (stating that “a covenant between an employer and a worker that requires the worker to pay the employer or a third-party entity for training costs if the worker’s employment terminates within a specified time period, where the required payment is not reasonably related to the costs the employer incurred for training the worker,” would be a *de facto* noncompete).

with the assistance of expert counsel.”<sup>193</sup> And the proposal cites research demonstrating that the increased enforcement of noncompete agreements is associated with wage increases for highly skilled workers.<sup>194</sup> Therefore, even taking the Commission’s proposal at face value, a categorical ban on noncompete agreements for higher-income workers is not justified by the evidence.

Third, the Commission has defined “worker” to include “a natural person who works, whether paid or unpaid” for “any natural person, partnership, corporation, association, or other legal entity, including any person acting under color or authority of State law.”<sup>195</sup> The Commission’s definition reaches employees, independent contractors, and arguably partners and owners.<sup>196</sup> That definition is inconsistent with the arguments the Commission offers for its categorical ban. The Proposed Rule repeatedly notes abusive or oppressive practices involving noncompete agreements in employment relationships, particularly in the context of entry-level or low-wage employees. But partners, owners, and independent contractors do not fit this paradigm and their engagements exist outside of the employer-employee relationship.<sup>197</sup> Partners or owners enjoy a position of bargaining power and information symmetry that makes restrictions on competition reasonable and pro-competitive. And independent contractors will frequently have an economic incentive to negotiate with the firms that engage them. The Commission did not consider these salient differences in its proposal, nor did it cite any evidence about the effect of noncompete agreements on independent contractors. Instead, it asserted that it was including independent contractors in its rule out of concern that an employee-only ban would lead employers to misclassify their workers under federal law.<sup>198</sup> But the Commission cannot justify its ban on noncompete agreements for independent contractors based on mere speculation employers might violate other laws.

Fourth, the Commission’s proposed Noncompete Rule would apply to noncompete agreements included in the sale of a business, so long as a worker holds less than a 25% stake in the business being sold.<sup>199</sup> No State has limited noncompete

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<sup>193</sup> *Id.* at 3504.

<sup>194</sup> *Id.* at 3486 (citing Kurt Lavetti, Carol Simon, & William D. White, *The Impacts of Restricting Mobility of Skilled Service Workers Evidence from Physicians*, 55 J. Hum. Res. 1025, 1042 (2020)).

<sup>195</sup> *See* 15 U.S.C. 57b-1(a)(6).

<sup>196</sup> 88 Fed. Reg. at 3511.

<sup>197</sup> *See, e.g., Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 327 (1992) (observing that agency law principles, judicial precedent, and “the common understanding,” among other sources, all recognize the “difference between an employee and an independent contractor”).

<sup>198</sup> 88 Fed. Reg. at 3511.

<sup>199</sup> *Id.* at 3515.

agreements so drastically in that context. California, for example, enforces any noncompete agreement involved in the sale of a business, regardless of ownership stake.<sup>200</sup> Under the Commission’s proposal, noncompete commitments paid for as part of the sale of a business would be invalid for many partnerships and closely held corporations, even though those agreements have long been an important part of commercial transactions. Sellers of a business frequently obtain material financial benefits in a transaction at substantially lower levels of ownership than 25%, and buyers have valid commercial interests in protecting the value of the acquired business through a noncompete. The Commission’s proposal is likely to have a chilling effect on the acquisition of partnerships and closely held companies. Although the Commission notes that its 25% threshold is necessary to protect “a few entrepreneurs sharing ownership interest in a startup [that] sell their firm,” it makes no attempt to explain why an arbitrary figure of 25% is preferable to a lower threshold.<sup>201</sup> And the Commission fails to account for the obvious fact that the sale of a business does not typically involve unequal bargaining power or coercion.

Fifth, it is unclear whether the definition of noncompete agreements in the Proposed Rule sweeps in forfeiture-for-competition arrangements and clawback provisions typically included in the compensation and benefits programs for highly paid workers. Those provisions “condition an employee’s receipt of certain benefits [such as stock options or other compensation] on that employee’s promise not to compete with the former employer” for a period of time.<sup>202</sup> By their plain terms, those agreements do not prevent a worker from accepting any employment whatsoever. Instead, the only consequence of taking new employment with a competitor is forfeiting (or being obligated to repay) a bonus, a nonqualified retirement benefit, or other supplementary compensation.<sup>203</sup> The Commission has not explained how such forfeiture or clawback provisions (some of which are governed by the federal Employee Retirement Income Security Act) could harm competition, nor has it accounted for the costs of its ban to workers who have negotiated for increased compensation through those arrangements.

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<sup>200</sup> Noncompete agreements are permitted in California if the clause is executed in conjunction with the dissolution or sale of a business entity by (i) business owners, (ii) members of limited liability companies, or (iii) partners in a partnership. See Cal. Bus. & Prof. Code §§ 16601, 16602, 16602.5.

<sup>201</sup> 88 Fed. Reg. at 3510.

<sup>202</sup> Daniel J. Raker, *A Lower Level of Scrutiny? New Alternatives for an Effective Restraint on Competitive Activity*, 39 Loy. U. Chi. L.J. 751, 751 (2008). Apart from forfeiture-for-competition clauses, the Proposed Rule may also sweep in agreements that allow a “worker” to join a competitor upon the payment of a reasonable liquidated damages amount to compensate an employer for damages resulting from the competitive activity.

<sup>203</sup> *Ibid.*



Sixth, the proposal creates uncertainty and unfairness for employers that compete with businesses outside the Commission’s jurisdiction. The Commission lacks the authority to regulate non-profit employers, as well as certain firms from various sectors of the economy.<sup>204</sup> As a result, the proposed ban on noncompete agreements will not apply to those organizations. But many employers within the Commission’s jurisdiction actively compete with exempt organizations. For instance, a for-profit hospital may compete with a non-profit hospital. Under the Commission’s rule, the exempt businesses could require noncompete agreements from their workforce, while the non-exempt business could not.<sup>205</sup> Given the data suggesting that noncompete agreements are associated with increased training and innovation, that disparity will give some employers an unfair competitive advantage.<sup>206</sup> This unfairness would be greatly reduced if the Commission challenged noncompete agreements case by case. But the proposal’s categorical ban will inevitably create winners and losers across a large number of industries where the Commission does not have the authority to regulate every competitor in the market.

For all of those reasons, the Commission’s across-the-board rule is both overbroad and imprecise. Both concerns could be addressed by challenging specific noncompete agreements on a case-by-case basis through the adjudicatory procedures created by the FTC Act, rather than through a rulemaking. Yet the Commission’s proposal does not discuss its authority to engage in adjudication, nor does it explain why it believes rulemaking is preferable to adjudication in this context.

#### **4. The Commission’s consideration of burdens on small businesses lacked rigor.**

The Regulatory Flexibility Act requires the Commission to consider effects on small businesses as part of its rulemaking. Although the Commission acknowledged this obligation in its proposal, it concluded that the Noncompete Rule was not expected

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<sup>204</sup> 88 Fed. Reg. at 3510 (citing 15 U.S.C. §§ 44 and 45(a)(2)).

<sup>205</sup> As one commenter at the Commission’s public forum pointed out, “the non-compete ban would apply to some 20% of hospitals across the country that [are] tax paying hospitals. But the ban would not apply to 80% of hospitals in this country that are tax-exempt.” Forum, *supra* note 6, at 29-30 (Testimony of Kathleen Tenoever). That commenter further explained, “[t]his uneven playing field between tax paying and tax-exempt hospitals is illogical” and it would also “create significant unintended distortions in the competitive playing field” and “create fundamentally different rules of the game for different entities in the same industry based solely on tax status.” *Id.* at 30.

<sup>206</sup> *Supra*, at 26-27.

to “have significant impact on a substantial number of small entities.”<sup>207</sup> That conclusion is obviously wrong.

First, the Commission’s estimate as to the number of small businesses that would be burdened by the Rule was based on a single, incomplete study.<sup>208</sup> That study “only counted firms with no union members who said all employees signed noncompetes” and restricted the survey population to “private-sector business establishments of 50 or more employees.”<sup>209</sup> Reliance on one incomplete study to calculate the impact on small businesses risks significantly undercounting the number of firms that will need to comply with the Noncompete Rule.

Second, the Commission’s estimate of projected small business costs ignores important considerations. The Commission’s cost estimate assumes between four and eight hours of a lawyer’s time to ensure compliance (calculated as \$723.7 million and \$1.45 billion, respectively).<sup>210</sup> But as discussed above, the Noncompete Rule would likely trigger new litigation costs for small businesses forced to rely on trade-secret protections, new costs related to businesses’ ability to satisfy the demanding standards for injunctive relief, and a bevy of associated costs related to lost business relationships and ideas. The Commission barely mentions this concern in another part of the rulemaking, stating it is merely “possible” that litigation costs will increase, and the “Commission is not aware of any evidence” to measure this change.<sup>211</sup> As one industry report notes, the Commission’s categorical ban will “force biotech companies to find another way to protect themselves against the unlawful sharing of confidential information,” likely through the increased use of trade-secret litigation.<sup>212</sup> As that report recognizes, noncompetes are critical to small start-ups in the biotech and other tech sectors and allow them to protect their intellectual property, which may be their defining asset. Eliminating noncompetes for these firms would prevent them from developing and expanding their businesses, and may deal a catastrophic blow if employees with their most important secrets and IP could walk out the door at any time.<sup>213</sup> And

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<sup>207</sup> 88 Fed. Reg. at 3531.

<sup>208</sup> *Id.* at 3531-3532 & n.518.

<sup>209</sup> Alexander J.S. Colvin & Heidi Shierholz, Econ. Pol’y Inst., Noncompete Agreements 13 (2019).

<sup>210</sup> 88 Fed. Reg. at 3533.

<sup>211</sup> *Id.* at 3530.

<sup>212</sup> Scott, *supra* note 154.

<sup>213</sup> *See* Forum, *supra* note 6, at 47 (Testimony of Sam Westgate) (“We are deeply concerned that if non-compete agreements are not allowed for key employees, the revolving door for those employees could eventually force smaller companies out of business, as they’re constantly training new competition, and sensitive internal information is readily available to competitors.”)

preventing small businesses from recording the value of their noncompete agreements as intangible assets of the firm may significantly diminish the firm's value to potential buyers. The Commission is required to consider those costs to small businesses under the Regulatory Flexibility Act.

Notably, the U.S. Small Business Administration's Office of Advocacy, which is tasked with "represent[ing] the views of small entities before federal agencies and Congress," recently noted its opposition to the Commission's Proposed Rule.<sup>214</sup> The Office of Advocacy explained that the Commission ignored certain costs associated with its proposal, including "the costs of hiring additional legal resources" and "hiring and retaining workers, which some small entities are currently struggling with."<sup>215</sup> It also disagreed with the Commission's "universal ban" and encouraged a more nuanced and targeted approach.<sup>216</sup> This call for caution from another independent agency in the Executive Branch should give the Commission serious pause before it charges ahead with a noncompete ban that will significantly alter the ability of small businesses to compete.

## **5. The Commission's categorical ban conflicts with other federal laws.**

Many aspects of federal law recognize the benefits of noncompete agreements. First, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), of which the United States is a signatory, ensures that "natural and legal persons" have the right to protect commercially valuable secrets through contract law.<sup>217</sup> The Commission's categorical ban would undermine the United States' ability to meet that obligation. Second, the Tax Code recognizes that payments made to a former employee for "refraining from performing services" should not be treated as a bonus subject to higher tax requirements.<sup>218</sup> That policy presumes that some employees will receive adequate consideration for an agreement not to compete, apart from the compensation they received for performing their job. But the Commission's categorical ban would prevent workers from bargaining for that pay. Third, another provision of the federal antitrust laws, Section 8 of the Clayton Act, prohibits simultaneous service as a director

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It's been our experience that it's very difficult to prove a violation of a non-disclosure agreement.").

<sup>214</sup> Small Bus. Admin., Office of Advocacy, Letter to April Tabor Re: Federal Trade Commission's Non-Compete Clause Rule RIN: 3084-AB74, at 2 (Mar. 20, 2023).

<sup>215</sup> *Id.* at 3.

<sup>216</sup> *Id.* at 3-4.

<sup>217</sup> TRIPS, art. 39(2).

<sup>218</sup> 26 C.F.R. § 1.280G-1.

or officer of two corporations that compete with one another. Under the Commission's rule, a company might violate Section 5 of the FTC Act by simply including a provision in an officer's contract requiring compliance with the Clayton Act. Each of those conflicts would be avoided by a more balanced position that singles out abusive noncompete agreements. If the Commission continues with a categorical ban, those conflicts are unavoidable.

**D. The Commission Should Abandon or Substantially Revise The Proposed Rule.**

The Commission lacks the authority to issue rules respecting unfair methods of competition. And Section 5 does not authorize the Commission to issue categorical bans on noncompete agreements. For those reasons, the Commission should abandon its rule. But if the Commission decides to move forward with rulemaking to address noncompetes, there are a number of alternatives it should consider.

First, the Commission should consider issuing a rule under its Section 5 authority related to unfair and deceptive acts and practices. Through the Magnuson-Moss Act, Congress has authorized Commission rulemaking to address consumer protection, and has required the Commission to follow rigorous procedures when crafting rules in that area. The Commission could utilize those procedures to explore a rule requiring greater transparency around noncompete agreements, which would ensure that employees know about these restrictions before accepting a job.

Second, setting to the side the Commission's legal authority, the Commission should revise the definition of "non-compete clause" to exclude *de facto* noncompetes. As explained above, that unbounded definition will create considerable uncertainty about the scope of the Commission's proposed rule and will inevitably sweep in a large number of agreements that do not implicate any of the concerns noted by the Commission. Moreover, the Commission's decision to include *de facto* noncompetes undermines its argument that the benefits of its proposed rule outweigh the costs. The research relied on by the Commission is focused on contractual terms that are clearly noncompetes, not contractual terms that in some way "ha[ve] the effect of prohibiting the worker from seeking or accepting work with a person or operating a business after the conclusion of the worker's employment."<sup>219</sup> As such, even if the Commission's view of the evidence were correct, it would not support a definition that includes *de facto* noncompetes.

Third, the Commission should also consider any and all alternatives to limit the Rule's scope. Those limits would include the following, which are not mutually exclusive:

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<sup>219</sup> 88 Fed. Reg. at 3509.

- An amendment to apply the noncompete rule only to new agreements rather than agreements that are already in effect;
- An amendment to the rule's definition of "worker" to exclude independent contractors, partners, and owners;
- An amendment adding an income threshold to allow noncompete agreements for highly paid workers and/or corporate officers;
- An amendment allowing noncompete agreements that are reasonable in scope (duration, geography, etc.);
- An exemption for agreements that involve the sale of a business or equity in a company, regardless of ownership level;
- An exemption for forfeiture-for-competition agreements or agreements that allow a worker to join a competitor upon payment of a reasonable liquidated damages amount, which do not prevent workers from seeking employment with a competitor;
- An exemption permitting noncompete agreements associated with severance, retirement, or garden leave payments; and
- An exemption permitting noncompete agreements associated with intellectual property or confidential business information where the agreement is used in conjunction with other restrictive covenants.

Even with those limitations, the Rule would still exceed the Commission's statutory authority and may impose costs that cannot be justified by the Rule's estimated benefits. But any more limited alternative is preferable to the categorical ban proposed by the Commission. Given the number and complexity of available alternatives, the Commission should also take more time to fully analyze each one to determine if it is preferable to existing regulation.

If the Commission determines that the Proposed Rule requires significant changes, the Commission will likely need to resubmit the rule for public comment. Under the APA, a notice of proposed rulemaking must "provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully."<sup>220</sup> That requirement "improves the quality of agency rulemaking by ensuring that agency regulations will be tested by exposure to diverse public comment."<sup>221</sup> When an agency's final rule significantly departs from what was proposed or includes detailed regulations

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<sup>220</sup> *United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 825 F.3d 674, 700 (D.C. Cir. 2016) (internal quotation marks omitted).

<sup>221</sup> *Small Refiner Lead Phase-Down Task Force v. Evt'l Protection Agency*, 705 F.2d 506, 547 (D.C. Cir. 1983) (internal quotation marks omitted).

that were not adequately previewed in the initial proposal, a new round of comment is necessary to afford interested parties an opportunity to participate.<sup>222</sup>

Although the Commission has stated that it is considering certain alternatives, many of the other alternatives listed above were not mentioned in its proposal. And even though the Commission discussed in broad strokes the idea of adding a rebuttable presumption or income threshold, the APA requires agencies to “describe the range of alternatives being considered with reasonable specificity.”<sup>223</sup> “Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision-making.”<sup>224</sup> For that reason, the mere suggestion of an income threshold or rebuttable presumption does not provide the public with a specific range of alternatives to study and submit reasoned comments. For example, the costs and benefits of an income threshold designed to protect only low-wage workers (*e.g.*, income threshold at 250% of the federal poverty level) would be very different from a threshold meant to apply to every worker except senior executives (*e.g.*, income threshold set at \$500,000). Given the significant implications of a nationwide noncompete ban of any form and the legal requirement to provide meaningful opportunities for participation, the Commission should seek additional comments from the public if it makes important changes to the Proposed Rule.



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<sup>222</sup> *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009).

<sup>223</sup> *Small Refiners Lead Phase-Down Task Force*, 705 F.2d at 547.

<sup>224</sup> *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994) (internal citations omitted).