By Electronic Submission

April 19, 2023

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Ave. NW, Suite CC-5610 (Annex C)
Washington, DC 20580

Re: Non-Compete Clause Rulemaking, Matter No. P201200.

To Whom It May Concern:

Better Markets[1] appreciates the opportunity to comment on the Commission's proposed rule ("Proposal") to ban non-compete clauses as an unfair method of competition.[2]

Non-compete clauses, which restrict workers' ability to work for competing firms for a period of time within a certain geographic area following employment, have deprived tens of millions of American workers of the fundamental freedom to seek gainful employment elsewhere when their present employment relationship ends.

In its Notice of Proposed Rulemaking, the FTC seeks to categorically ban noncompete clauses, including for senior executives, with few exceptions. Based on the FTC's substantive rulemaking authority to prohibit "unfair methods of competition," the proposed rule would make

[1] Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

[2] FED. TRADE COMM'N, NON-COMPETE CLAUSE RULE, FTC-2023-0007-0001, (Jan. 9, 2023), https://www.regulations.gov/docket/FTC-2023-0007/document; FED. TRADE COMM'N, NON-COMPETE CLAUSE RULE ("Proposal"), 16 CFR Part 910, https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetenprm.pdf; *see also* FED. TRADE COMM'N, FTC PROPOSES RULE TO BAN NONCOMPETE CLAUSES, WHICH HURT WORKERS AND HARM COMPETITION (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

it unlawful for an employer to "enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to an enforceable non-compete clause."

Better Markets applauds the Commission for its action and supports the proposed ban on non-compete clauses, particularly with respect to non-executive workers, who comprise the majority of workers subject to such terms. As explained in the Release, by restricting workers' job mobility and freedom of movement, these contract clauses obstruct the smooth functioning of labor markets, resulting in lower wages and diminished worker and firm productivity. They also cause negative spillover effects, adversely affecting workers not subject to non-compete clauses, inhibiting entrepreneurial growth, competition, and innovation. In short, non-competes interfere with fair and competitive labor markets, shackle and commodify American workers, and unduly empower corporations to prioritize their own private gain over the basic freedoms and prosperity of Americans.

In addition to its core rationale, the Proposal is on sound footing across the board. The FTC has ample statutory authority to promulgate the rule; it is in keeping with well-established federal and state law; it follows an extensive period of study and analysis by the FTC; and its benefits far exceed its modest compliance and other costs.

BACKGROUND

Non-compete clauses are terms found in employment contracts that require workers, after they separate from their present employer, to refrain from accepting employment in a similar line of work or establishing a competing business for a specified period of time in a certain geographic area. For example, a software developer skilled in coding who is bound by a non-compete clause may be prevented from working for any other software company, or in any other position that involves coding, severely limiting their professional opportunities and harming their ability to earn an income or advance their career. An individual subject to a non-compete clause who leaves a company may thus be subject to the basic hardship and indignity of prolonged unemployment while they wait for the restriction to expire. Or they may be forced to relocate to another community, with the attendant cost and inconvenience.

While non-compete clauses were traditionally associated with highly paid, senior-level corporate executives, millions of Americans across a range of fields and types of work now find themselves subject to non-competes. Indeed, data show that approximately 30 million American workers — about one in five — are presently bound by non-competes with their current employers.[3] Moreover, more than 60 million workers have been bound by a noncompete at some point in their careers.[4]

[3] EVAN STARR, J.J. PRESCOTT & NORMAN BISHARA, NONCOMPETES IN THE U.S. LABOR FORCE 14 (2018).

[4] *Id.*

Non-competes are not only common among workers with higher education and earnings, but also among junior and mid-level employees, as well.[5] According to a Report published by the White House and the U.S. Treasury in 2016, around 15 percent of workers without a college degree are currently subject to noncompete clauses, and 14 percent of people earning less than $40,000 are subject to them.[6] Similarly, a 2019 study by the Economic Policy Institute found that roughly half — 49.4% — of businesses use noncompete agreements in their employment contracts.[7] In one particularly egregious example, sandwich franchise Jimmy Johns subjected many of its workers to non-competes that barred employees from working for any other food establishment within two miles if that establishment earned more than 10 percent of its revenue from selling sandwiches.[8] Non-competes have also become common in the financial services industry.[9] A 2019 report by the Economic Policy Institute found that roughly 58 percent of "finance, insurance, and real estate companies" used non-compete clauses for at least some of their workers.[10]

As we outline in more detail below, non-compete clauses inflict considerable harm on millions of American workers, and no countervailing benefits to competition justify their use. By restricting where workers can sell their labor after they leave their present employer, non-compete clauses deny the fundamental right to earn one's own living as one sees fit. Non-competes substantially restrict job mobility, leaving millions of Americans working in positions or industries they view as undesirable. Such restrictions disproportionately harm disadvantaged communities and those subject to workplace discrimination, harassment, abuse, or unsafe working conditions. Non-competes remove employees' ability to credibly threaten to leave their current position, undermining their bargaining position and reducing incentives for companies to offer competitive wages and benefits. Moreover, the reduced job mobility induced by non-competes tends to stifle

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5 *See* Conor Dougherty, *How Noncompete Clauses Keep Workers Locked In*, N.Y. TIMES (May 13, 2017), https://www.nytimes.com/2017/05/13/business/noncompete-clauses.html; Sophia Quinton, *Why Janitors Get Noncompete Agreements, Too*, PEW TRUSTS (May 17, 2017), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/05/17/why-janitors-get-noncompete-agreements-too; Steven Greenhouse, *Noncompete Clauses Increasingly Pop Up in Array of Jobs*, N.Y. TIMES (June 8, 2014), https://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html.

6 U.S. DEP'T OF TREASURY OFFICE OF ECON. POLICY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 11 (2016).

7 Alexander J.S. Colvin & Heidi Shierholz, *Noncompete Agreements: Ubiquitous, harmful to wages and to competition, and part of a growing trend of employers requiring workers to sign away their rights*, ECON. POLICY INST. (2019), https://www.epi.org/publication/noncompete-agreements/.

8 Aruna Viswanatha, *Sandwich Chain Jimmy John's to Drop Noncompete Clauses from Hiring Packets*, WALL ST. J. (June 21, 2016), https://www.wsj.com/articles/sandwich-chain-jimmy-johns-to-drop-noncompete-clauses-from-hiring-packets-1466557202.

9 Amy Whyte, *Noncompete Agreements Have Become 'Ubiquitous' in Financial Services and Elsewhere*, INSTITUTIONAL INV. (Dec. 10, 2019), https://www.institutionalinvestor.com/article/b1jdk6ljs0q2tp/Noncompete-Agreements-Have-Become-Ubiquitous-in-Financial-Services-and-Elsewhere; Colvin & Shierholz, *supra* note 7.

10 Colvin & Shierholz, *supra* note 7.

innovation, entrepreneurship, and new business formation, as well as reduce product quality and increase the prices of goods and services.

While the legal status of non-competes differs from state to state, all fifty U.S. states restrict non-competes at least to some degree.[11] Although state-by-state policies surrounding non-competes may in some cases offer valuable protections to workers, state law treatment of non-compete clauses varies considerably and is vastly complicated. As one state court once put it, this patchwork is "a sea – vast and vacillating, overlapping and bewildering. One can fish out of it any kind of strange support for anything, if he lives so long."[12] Moreover, although a resident may live in a state with favorable policies governing non-compete clauses, companies can and often do circumvent such protections through the use of "choice-of-law" provisions, which import alternative state law more favorable to them. In contrast, the FTC's proposed rule would provide a single, universal standard that would ensure that all American citizens nationwide are not subject to these harmful terms.

OVERVIEW OF PROPOSAL

The Commission issued the proposed Non-Compete Clause Rule on January 5, 2023, which would categorically ban employers from imposing non-compete clauses on workers.[13] The Proposal would broadly define "non-compete clause" as "a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer."[14] This definition would also specifically encompass *de facto* non-compete clauses that have the effect of "prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer."[15]

The Commission's rule would broadly apply to workers throughout the economy, including senior-level executives. The Proposal defines the term "worker" as "a natural person who works, whether paid or unpaid, for an employer."[16] The proposal clarifies that this term "includes, without limitation, an employee, individual classified as an independent contractor,

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11 *See Employee Noncompetes: A State-by-State Survey*, RUSSELL BECK, BECK, REED, RIDEN, LLP (Aug. 17, 2022), https://beckreedriden.com/wp-content/uploads/2022/08/Noncompetes-50-State-Survey-Chart-20220817.pdf; Notice of Proposed Rulemaking ("NPRM"), at 49-56; *see also* Cynthia Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 391 (2006).

12 *Arthur Murray Dance Studios of Cleveland v. Witter*, 105 N.E.2d 685, 687 (Ohio Ct. C.P. 1952).

13 *See* Proposal, *supra* note 2; *see also* CONG. RSCH. SERV., THE FTC'S NON-COMPETE CLAUSE RULE, https://crsreports.congress.gov/product/pdf/LSB/LSB10905.

14 Proposal, at 211.

15 Proposal, at 212.

16 Proposal, at 212.

extern, intern, volunteer, apprentice, or sole proprietor who provides a service to a client or customer."[17]

In its core provision, the Proposal would provide that:

> "[I]t is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe the worker is subject to an enforceable non-compete clause."[18]

Moreover, the Proposal also includes rescission and notice requirements instructing companies that they must rescind all prior non-compete agreements entered into prior to the rule's compliance date, as well as notify workers that the worker's non-compete clause has been rescinded.[19]

By the Commission's estimation, the proposed rule could increase the wages of American workers by nearly $300 billion per year, as well as expand career opportunities for approximately 30 million Americans.[20] Moreover, some studies show that a nationwide ban on non-compete clauses could close the gender and racial wage gaps by 3.6–9.1 percent.[21] The Commission also estimates consumer prices across a range of industries will decrease as a result of the proposed rule.[22] Other benefits to workers and labor markets are expected to accrue from the Proposal once finalized. These benefits include, among others, increased innovation, new business formation, job creation, and decreased corporate consolidation.

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17 Proposal, at 212–13.

18 *See* Proposal, at 69.

19 Proposal, at 124–127.

20 *See* Proposal, *supra* note 2, at 76, 103, 159–195.

21 Proposal, at 194–195.

22 Proposal, at 181.

COMMENTS

Better Markets applauds the Commission's action against non-compete clauses, which have plagued countless American workers for far too long. It is clear that these so-called 'agreements' — which are typically offered on a take-it-or-leave-it basis between two parties of vastly unequal bargaining power — stifle competition and innovation, exploit workers, and deprive labor markets of truly free and competitive participants.

The Federal Trade Commission is duly empowered to issue substantive rulemakings regulating "unfair methods of competition," and it has exercised this power appropriately here. Non-compete clauses are an unfair method of competition because they hinder the ability of competitors to hire workers and substantially burden commerce; at the same time, they are exploitative and coercive to workers both at the time of contracting and when workers wish to leave a company. Prohibiting non-compete clauses would bring considerable benefits to workers and markets alike. Conversely, the alleged benefits of non-competes fail to overcome the considerable benefits that a nationwide ban on these clauses would bring. Thus, American workers and labor markets would be better off without non-competes, and the FTC should proceed with its proposed rule to prohibit them.

I. The FTC Possesses Broad Substantive Rulemaking Authority to Prohibit Unfair Methods of Competition

Although some commenters have suggested otherwise,[23] the clear weight of legal and expert authority is to the effect that the Federal Trade Commission possesses broad substantive rulemaking authority to prohibit unfair methods of competition. Under Section 5 of the FTC Act, "unfair methods of competition" are declared unlawful.[24] Moreover, Section 6(g)[25] of the FTC Act empowers the agency to issue rules "for the purpose of carrying out" the agency's statute.[26] As the Commission rightly notes in the Release, taken together, Sections 5 and 6(g) of the FTC Act

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23 *See* Aaron L. Nielson, *D.C. Circuit Review – Reviewed: Was National Petroleum Refiners Association v. FTC Correctly Decided?*, YALE J. ON REG. (Jan. 10, 2020), https://www.yalejreg.com/nc/d-c-circuit-review-reviewed-was-national-petroleum-refiners-association-v-ftc-correctly-decided/; Richard J. Pierce, Jr., *Can the Federal Trade Commission Use Rulemaking to Change Antitrust Law?*, GEO. WASH. LAW FAC. PUBL'NS & OTHER WORKS 1561 (2021) (expressing skepticism that the contemporary Supreme Court would uphold *National Petroleum*'s finding that the FTC possesses substantive rulemaking authority to regulate unfair methods of competition), https://scholarship.law.gwu.edu/faculty_publications/1561.

24 15 U.S.C. 45(a)(1) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.").

25 15 USC 46(g).

26 15 U.S.C. § 45; 15 U.S.C. § 46. Section 6(g) of the original Federal Trade Commission Act authorizes the FTC "to make rules and regulations for the purpose of carrying out the provisions of this subchapter." Section 6(g) rules are enacted pursuant to the "informal rulemaking" requirements of Section 553 of the Administrative Procedures Act (APA), which apply to the vast majority of federal agency rulemaking proceedings.

"provide the Commission with the authority to issue regulations declaring practices to be unfair methods of competition."[27]

Indeed, the U.S. Court of Appeals for the D.C. Circuit held exactly that in *National Petroleum Refiners Association v. Federal Trade Commission*, 482 F.2d 672 (D.C. Cir. 1973). In *National Petroleum*, the FTC's power to issue substantive rulemaking with respect to unfair methods of competition was directly challenged, and the court squarely held that the FTC indeed possessed the power to issue not only procedural rules but also substantive rules.[28] The court held that the grant of rulemaking power in section 6(g) of the FTC Act applied to Section 5, which allowed the agency to issue rules with respect to "unfair methods of competition."[29]

In response to the *National Petroleum* decision, Congress later passed the Magnuson-Moss Warranty–Federal Trade Commission Improvements Act of 1975 ("Magnuson-Moss"), which set forth detailed rulemaking authority and procedures with respect to the "unfair and deceptive acts and practices" proscribed by Section 5. Magnusson-Moss did not alter, however, the substantive rulemaking authority with respect to "unfair methods of competition," which remains intact under the clear language of the statute and *National Petroleum*.[30]

Although historically the FTC has not often exercised this power, numerous scholars have recognized the FTC's substantive rulemaking authority to regulate unfair methods of competition.[31]

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27 Proposal, at 68. *See also Nat'l Petroleum Refiners Ass'n v. Fed. Trade Comm'n*, 482 F.2d 672, 677, 697–98 (D.C. Cir. 1973) ("Section 6(g) clearly states that the Commission 'may' make rules and regulations for the purpose of carrying out the provisions of Section 5 and it has been so applied."); Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHIC. L. REV. 357 (2020). For more arguments in favor of the FTC engaging in substantive competition rulemaking, *see generally* Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 TEX. L. REV. 1247, 1288–89 (2011); C. Scott Hemphill, 109 COLUM. L. REV. 673–82 (2009); Justin Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 250–52 (2014); Vaheesan, *Resurrecting 'A Comprehensive Charter of Economic Liberty': The Latent Power of the Federal Trade Commission*, *infra* note 31, at 651–57.

28 *Nat'l Petroleum Refiners Ass'n v. Fed. Trade Comm'n*, 482 F.2d 672 (D.C. Cir. 1973).

29 *National Petroleum*, 482 F.2d 672, 677, 697–98 (D.C. Cir. 1973) ("Section 6(g) clearly states that the Commission 'may' make rules and regulations for the purpose of carrying out the provisions of Section 5 and it has been so applied."); *see also* Marina Lao, *infra* note 31.

30 *See* Chopra & Khan, *supra* note 27; Marina Lao, *Competition Rulemaking: The Case for Boldness*, *infra* note 31; Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, *infra* note 31.

31 Marina Lao, *Competition Rulemaking: The Case for Boldness*, in RULEMAKING AUTHORITY OF THE US FEDERAL TRADE COMMISSION 1-29, CONCURRENCES (Daniel A. Crane, ed., 2022), https://ssrn.com/abstract=4093130; Chopra & Khan, *supra* note 27; Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645 (2017); Kacyn H. Fujii, *National Petroleum Refiners Is (Still) Correctly Decided*, YALE J. ON REG. (Mar. 28, 2022), https://www.yalejreg.com/nc/national-petroleum-refiners-is-still-correctly-decided-by-kacyn-h-fujii/.

The FTC's broad rulemaking authority to regulate unfair methods of competition is also consistent with the Commission's historical purpose and the need to define prohibited conduct to guide commercial behavior and limit the accumulation of monopoly power.[32] Congress created the Federal Trade Commission in the heat of the Progressive Era at the turn of the last century — a time when large, corporate monopolies ran wild and a strong trust-busting public sentiment grew.[33] Congress enacted the antitrust laws in response to growing public fears about and hostility toward the large-scale corporate entities that emerged in the decades following the Civil War."[34] As one scholar put it:

> The advent of big business on this massive scale was a traumatic event. '[T]he old gentry, the merchants of long standing, the small manufacturers, the established professional men, the civic leaders of an earlier era' saw themselves deprived of economic power, opportunity, personal independence, and social status. This urban middle class, the backbone of the progressive reform movement, was profoundly antagonistic to big business, and no one complained more bitterly than the owners of small businesses. Agrarian populism also identified big business, particularly the great railroad combinations, with the farmer's increasingly tenuous control over his livelihood. Labor sought strength in collective organization to protect itself from the power of massed capital. Thus, a broad spectrum of American society complained bitterly about the evil powers of the trusts.[35]

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32 *See* Committee Report of authorizing statute:

> There are many forms of combination, and many practices in business which have been so unequivocally condemned by the Supreme Court that as to them and their like the statute is so clear that no person can be in any doubt respecting what is lawful and what is unlawful; but as the statute is now construed there are . . . many other practices that seriously interfere with competition, and are plainly opposed to the public welfare, concerning which it is impossible to predict with any certainty whether they will be held to be due or undue restraints of trade.

Federal Trade Commission, S Rep No 597, 63d Cong., 2d Sess. 13 (1914). *See also* Everette MacIntyre & Joachim J. Volhard, *The Federal Trade Commission and Incipient Unfairness*, 41 GEO. WASH. L. REV. 407 (1973). A former FTC attorney and leading scholar of the Commission, reviewing the legislative record for the FTC Act, wrote, "The goal of halting incipient violations has more support in the legislative history than any of the other . . . categories of Section 5 violations" identified in the article. Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 242 (1980).

33 *See generally* Daniel A. Crane, *All I Really Need to Know About Antitrust I Learned in 1912*, 100 IOWA L. REV. 2025 (2015) (noting the historical backdrop preceding the creation of the Federal Trade Commission); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982) (noting that the floor debates over federal antitrust legislation suggest that Congress "condemned monopolies").

34 Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, *supra* note 31, at 658–59.

35 David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1226 (1988).

Indeed, the broad and flexible authority of the FTC to police corporate behavior is further evidenced by the FTC Act's legislative history and corroborating public statements from other legislators involved with its enactment. Senator Francis Newlands, the primary Senate Sponsor of the FTC Act, stated that he wanted the agency to be the "social machinery which will protect the individual from oppression and wrong."[36] Representative Morgan expressed hope that the FTC would "minimize the power of the large industrial corporation to concentrate wealth . . . and secure the people from unjust tribute levied by monopolistic corporations."[37]

The standard for what constitutes an unfair method of competition was meant to be flexible.[38] In enacting Section 5, Congress intentionally included the phrase "unfair methods of competition" to distinguish the FTC's authority under the pre-existing antitrust laws and under the definition of "unfair competition" at common law.[39] Well aware that a fixed, static definition of "unfairness" would soon become outdated with the passage of time, Congress intentionally gave the Commission the flexibility to adapt to changing circumstances by equipping it with substantive rulemaking power.[40] Moreover, this flexible standard was intended to empower the FTC to stop anticompetitive practices at their incipiency.[41]

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36 51 CONG. REC. 11,109 (1914) (statement of Senator Newlands).

37 51 CONG. REC. 8854 (1914).

38 *See Ind. Fed. Of Dentists*, 476 U.S. at 454 ("The standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons . . . ."); Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 74 (2003) ("[The principal Congressional supporters] of the FTC Act wanted a new agency that would prosecute if the Department faltered, enforcing a flexible new standard that could reach where the Sherman Act might not."); Averitt, *supra* note 33 at 237 ("The judicial decisions which have reviewed [the FTC Act's] legislative history confirm that the Commission has, as it must have, considerable flexibility in determining which particular acts or practices will constitute 'unfair methods of competition.'").

39 *See* 51 CONG. REC. 12936 (1914) (statement of Sen. Reed) ("It is my opinion that if we employ the term "unfair competition" as it is employed in this bill, without adding anything to it, the courts will adopt as the meaning of Congress that meaning which has been affixed to the term by all of the law dictionaries and by a great many legal authorities."). *See also* 51 CONG. REC. 12814 (1914) (statement of Sen. George Sutherland).

40 H.R. REP. NO. 63-1142, at 18–19.

41 *See* 51 CONG. REC. 13118 (statement of Sen. Reed) (declaring that Congress intended "to do something that will strike a death blow to monopoly. . . to arrest it in its infancy . . . [and] to strike those acts in their incipiency instead of after they have been actually worked out into a complete system of monopoly or restraint of trade."); *Id.* at 14927 (statement of Rep. Covington) ("the best and most, effective way to deal with the various practices of unfair or destructive competition which, if permitted to go on unchecked and uncontrolled, become potential for restraint of trade or monopoly"); *Id.* at 14929 (statement of Rep. Covington) ("We are seeking . . . to deal, with those practices of unfair trade in their incipient stages which if left untrammeled and uncontrolled become the acts which constitute in their culmination restraint of trade and monopoly and the groundwork of the trusts which have menaced us industrially"); *see also* MacIntyre & Volhard, *supra* note 33. A former FTC attorney and leading scholar of the Commission, reviewing the

The foregoing review of the law, judicial interpretation, legislative history, historical context, and scholarly opinion makes clear that it is properly the role of the Federal Trade Commission to police markets to ensure they are fair and competitive. The Proposal, aimed at curbing unfair methods of competition in the labor market, falls squarely within the scope of this authority. And like federal rules in general, the Commission's Unfair Methods of Competition rulemaking is governed by the procedures set forth in the Administrative Procedures Act, not Magnusson-Moss,[42] and FTC interpretations of 'unfair methods of competition' are thus subject to *Chevron* deference.[43]

II. Non-Compete Clauses for Workers are an Unfair Method of Competition

Courts have upheld FTC determinations of unfairness where the method of competition was found to be facially unfair.[44] Courts typically find conduct to be facially unfair if it is exploitative and coercive.[45] However, even in cases where the method of competition was not found to be facially unfair, courts have nonetheless condemned the conduct under Section 5 based on the impact of the conduct on competition.[46] In such cases, courts have condemned such

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legislative record for the FTC Act, wrote, "The goal of halting incipient violations has more support in the legislative history than any of the other . . . categories of Section 5 violations" identified in the article. Averitt, *supra* note 33 at 242.

42 Some observers wrongly contend that the FTC lacks authority to issue substantive unfair methods of competition rulemakings under the Administrative Procedures Act. *See, e.g.*, Maureen K. Ohlhausen & James Rill, *Pushing the Limits? A Primer on FTC Competition Rulemaking*, U.S. CHAMBER OF COM. (Aug. 12, 2021), https://www.uschamber.com/assets/archived/images/ftc_rulemaking_white_paper_aug12.pdf; Lawrence J. Spiwak, *A Change in Direction for the Federal Trade Commission?*, 22 FEDERALIST SOC'Y REV. 304 (2021).

43 *See* Chopra & Khan, *supra* note 27 at 375 ("Rulemaking under "unfair methods of competition" is governed by the Administrative Procedure Act and is eligible for Chevron deference."); Hurwitz, *supra* note 27 at 263-64 ("[F]irst, . . . the breadth of [Section 5] constructions likely to be considered permissible is very large; and second, . . . the proper forum in which to challenge such interpretations is not before the Article III courts. Given the breadth of the statute, once the matter has reached that point, there is great weight in favor of the FTC's position receiving Chevron deference."); Royce Zeisler, *Chevron Deference and the FTC: How and Why the FTC Should Use Chevron to Improve Antitrust Enforcement*, 2014 COLUM. BUS. L. REV. 266, 291–92 (2014).

44 *E.I. du Pont de Nemours & Co. v. FTC (Ethyl)*, 729 F.2d 128, 140 (2d Cir. 1984) ("In short, in the absence of proof of a violation of the antitrust laws or evidence of collusive, coercive, predatory, or exclusionary conduct, business practices are not "unfair" in violation of § 5 unless those practices either have an anticompetitive purpose or cannot be supported by an independent legitimate reason."); *Atlantic Refining Co. v. FTC* and *FTC v. Texaco, Inc., Atl. Refin. Co.*, 381 U.S. at 369–70; *Texaco, Inc.*, 393 U.S. at 228–29; *FTC v. R.F. Keppel & Bro.*, 393 U.S. 223 at 228–29 (1968).

45 *See* Proposal, 69–72.

46 *See FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 395–96 (1953); *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 14 (7th Cir. 1971); *Hastings Manufacturing Co. v. FTC*, 153 F.2d 253, 257 (6th Cir. 1946).

practices if they "significantly burden commerce."[47] Thus, the statutory standard can be met on either of two independent grounds: the method of competition is facially unfair, or, it significantly burdens competition.

Here, non-compete clauses satisfy both elements: They are an unfair method of competition because (1) they substantially burden commerce and separately because (2) they are exploitative and coercive to workers at the time of contracting as well as at the time workers wish to leave their current position. Under the FTC's substantive rulemaking authority to regulate 'unfair methods of competition,' each of these reasons alone is sufficient to support the Commission's ban on non-competes. The fact that all three are true here is all the more reason to proceed with the Commission's proposed rule as expeditiously as possible.

A. Non-Compete Clauses Are a Restrictive Conduct that Negatively Affects Competitive Conditions, Burdening a Significant Volume of Commerce

Because non-competes indisputably restrict workers from participating in the labor market, they are facially restrictive conduct subject to the antitrust laws.[48] Non-compete clauses reduce competition in labor markets by not only denying workers the ability to change their employer but also denying employers the ability to choose their employees. Restrictive non-compete clauses obstruct the competitive market's ability to sort workers and employers into the strongest and most suitable matches. When non-competes are as commonplace as they are now, many firms cannot hire who they wish to hire and many workers cannot work where they wish to work. Workers remain in their current position not because it is what is best for them but rather because they have signed a contract including a non-compete clause, one that is typically forced upon them.

With scores of employees unable to leave their present jobs, employers are less inclined to compete with other prospective employers by creating a positive work environment and offering competitive wages and benefits. Thus, the unfortunate reality for many American workers today is that they remain at their present company not because of the merits of the company itself, but rather because of the legal repercussions of a restrictive non-compete clause in their employment contract. It would be much healthier for labor markets — and markets overall — if workers and

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47 *Texaco, Inc.*, 393 U.S. at 230 (finding that the practice unfairly burdened competition for a not insignificant volume of commerce); *R.F. Keppel & Bro.*, 291 U.S. at 309 ("A practice so widespread and so far reaching in its consequences is of public concern if in other respects within the purview of the statute.").

48 *See, e.g., Am. Tobacco Co.*, 221 U.S. at 181–83 (holding several tobacco companies violated Sections 1 and 2 of the Sherman Act due to the collective effect of six of the companies' practices, one of which was the "constantly recurring" use of non-compete clauses); *Newburger, Loeb & Co., Inc.*, 563 F.2d at 1082 ("Although such issues have not often been raised in the federal courts, employee agreements not to compete are proper subjects for scrutiny under section 1 of the Sherman Act. When a company interferes with free competition for one of its former employee's services, the market's ability to achieve the most economically efficient allocation of labor is impaired. Moreover, employee-noncompetition clauses can tie up industry expertise and experience and thereby forestall new entry."); *see also* Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 ANTITRUST L. J. 165 (2020).

employers were free to make employment decisions based on the quality of the employment position rather than the restrictive impact of a "gotcha clause" in the fine print of their contracts.

Non-Compete Clauses Suppress Wages

By reducing the competitive pressures upon firms to compete for their labor, non-compete clauses reduce the incentives for companies to offer competitive wages to their employees, thus reducing labor wages across the board. Indeed, many suggest that non-competes could reduce wages by billions each year. As Professor Eric Posner once put it, "[W]ages generally decline rather than increase in states that enforce or strictly enforce noncompetes. . . . Noncompetes straightforwardly harm workers by depriving them of possible future offers."[49]

Several studies show that prohibitions against non-compete clauses result in higher wages for workers.[50] According to one study, which assessed the impact of the State of Oregon's ban against non-compete clauses, hourly workers' wages increased by 2.3 percent following the non-compete ban.[51] For workers in occupations that use non-compete clauses at a particularly high rate, the wage increase was doubled, with a 4.6 percent increase in wages. Another study finds similarly that greater enforceability of non-compete clauses in one state has negative impacts on workers' earnings in bordering states and that the effects are nearly as large as the effects in the state in which enforceability changed (though the effect diminishes as the distance to the bordering state increases).[52]

The notion that non-compete clauses suppress wages is further bolstered by the fact that changing jobs, or threatening to leave one's job, is among the most effectives ways to increase compensation.[53] According to one study, for example, "full-time workers who changed jobs saw their paychecks increase an average of 4.5 percent, an improvement over the 3.9 percent average that covers all full-time workers."[54] It is easy to see why this might be the case. If the credible threat of changing employers applies enough pressure on firms to induce them to keep wages high to retain employees, then non-competes are stripping workers of one of their most effective bargaining tools.

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49 Posner, *supra* note 48 at 165.

50 *See* Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, 68 MGMT. SCI. 143, 144 (2021).

51 *Id.* at 144.

52 Kurt Lavetti, Carol Simon & William D. White, *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians*, 55 J. HUM. RES. 1025 (2020).

53 *See* Evan Starr, Justin Frake & Rajshree Agarwal, *Mobility Constraint Externalities*, 30 ORG. SCI. 961 (2019).

54 Bourree Lam, *The Special Few Who Are Getting Raises in this Economy*, THE ATLANTIC (Feb. 8, 2016), https://www.theatlantic.com/business/archive/2016/02/job-switchers-raise/460044/.

Non-Compete Clauses Negatively Impact Entrepreneurship, Innovation, Product Quality, and Consumer Prices

The negative effects of non-compete clauses are not limited to employees. These clauses can also harm innovation and competition within particular industries.[55] By limiting the ability of employees to move between companies and work for competitors, non-compete clauses can stifle innovation and prevent the exchange of ideas and best practices between companies. As one scholar put it, "by reducing employee mobility, noncompetes prevent cross-fertilization of ideas across firms, in turn reducing innovation and growth."[56] This ultimately leaves companies worse off in that they lack the benefits of the free exchange of ideas and labor.

Moreover, through non-compete clauses, incumbent firms can and do "frequently discourage" employees from breaking out and starting rival firms.[57] Moreover, non-competes can favor larger, more dominant firms over smaller, newer firms. One scholar found that employees bound by non-competes often preferred to minimize the legal risks of departure "by going to an established competitor that has the resources to protect and indemnify them in the case of legal liability."[58] For example, some scholars have noted that after the State of Michigan permitted non-competes in the 1980s, inventors in that state who changed jobs "were considerably more likely to join larger firms" as opposed to smaller, newer firms.[59] Another reason non-competes favor larger firms over smaller firms is the fact that smaller firms tend to be less likely to litigate claims arising from non-competes compared to larger firms.[60]

Startups and smaller, newer firms cannot effectively compete with the larger firms that

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55 ORLY LOBEL, TALENT WANTS FREE: WHY WE SHOULD LEARN LOVE LEAKS, RAIDS, AND FREE RIDING 40 (2013) ("[L]ocalities with dense connections between innovators, knowledge flows, and human capital enjoy dramatically more innovation than smaller, protective, and more isolated settings.").

56 Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 578 (1999). *See also* ALAN HYDE, WORKING IN SILICON VALLEY: ECONOMIC AND LEGAL ANALYSIS OF A HIGH-VELOCITY LABOR MARKET (2003); ANNELEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128, 2–4 (1996); On Amir & Orly Lobel, *Driving Performance: A Growth Theory of Noncompete Law*, 16 STAN. TECH. L. REV. 833, 861–63, 866 (2013); Bruce Fallick et al., *Job-Hopping in Silicon Valley: Some Evidence Concerning the Micro-Foundations of a High Technology Cluster*, 88 REV. ECON. & STATS. 472, 472–73 (2006); Sampsa Samila & Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth*, 57 MGMT. SCI. 425, 427 (2011).

57 Steven Klepper & Peter Thompson, *Disagreements and Intra-industry Spinoffs*, 28 INT'L J. INDUS. ORG. 526, 531 (2010).

58 LOBEL, *supra* note 55 at 202.

59 Matt Marx & Lee Fleming, *Non-Compete Agreements: Barriers to Entry . . . and Exit?*, 12 INNOV. POL'Y & ECON. 39, 52 (2012).

60 This same effect is similarly borne out in patent infringement litigation. *See* Josh Lerner, *Patenting in the Shadow of Competitors*, 38 J. L. & ECON. 463, 489-91 (1995). *See id.* at 472 ("In general, small firms believed that their patents were infringed more frequently, but were considerably less likely to litigate these infringements.").

dominate many markets unless these smaller firms are able to freely hire some of the experienced employees that currently or previously work for the larger firms. However, non-compete clauses prevent the smaller firms from having the ability to entice these experienced workers away from the dominant market incumbents, thereby obstructing their efforts to successfully enter new markets. Even if a newer firm offers a better product or service, it often still cannot effectively compete with market incumbents simply because it cannot hire the workers who are necessary to the success of the company.

Moreover, by inhibiting entrepreneurial ventures that could otherwise enhance competition in goods and services markets, non-competes can facilitate consumer harm by reducing product quality and increasing consumer prices.[61] Indeed, some scholars have shown that the potential for consumer harm is greatest in exactly those industries in which non-compete clauses are likely to be used at the highest rate.[62] In another study, the authors found that as the enforceability of non-compete clauses increases, corporate concentration and the prices of consumer goods also increase.[63] This accords with the Commission's own estimates that the proposed rule would decrease health spending by approximately $148 billion annually in the health care sector alone.[64]

B. Non-Compete Clauses for Non-Executive Workers Are Exploitative and Coercive at the Time of Contracting.

Non-compete clauses for non-executive workers are exploitative and coercive because they take advantage of unequal bargaining power between employers and workers. Courts have long scrutinized so-called contracts of "adhesion" — i.e., contracts offered on a "take-it-or-leave-it" basis between parties of vastly unequal bargaining power — with particular care for the disadvantaged party.[65]

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61 *See* Naomi Hausman & Kurt Lavetti, *Physician Practice Organization and Negotiated Prices: Evidence from State Law Changes*, 13 AM. ECON. J.: APPLIED ECON. 258–96 (2021) (finding 45% of physicians are covered by CNCs and "show[ing] that a judicial decision decreasing NCA enforceability by 10% of the observed policy spectrum (about 0.39 standard deviations) causes physician prices to fall on average by 4.3%. This estimate suggests that such a policy change at the national level would reduce aggregate medical spending by over $25 billion annually."); Michael Lipsitz & Mark J. Tremblay, *Noncompete Agreements and the Welfare of Consumers*, SSRN ELECTRONIC J., (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3975864.

62 Lipsitz & Tremblay, *supra* note 60 at 6.

63 Hausman & Lavetti, *supra* note 60 at 284 ("We show that even modest increases in NCA enforceability lead to meaningful increases in physician prices. . . . [O]ur estimates suggest that if NCA enforceability decreased nationally by 0.1 units of the NCA Index, total physician spending would fall by about 4.2%—over $25 billion annually based on 2015 spending levels").

64 Proposal, at 103.

65 *See* RESTATEMENT (SECOND) OF CONTRACTS (1981) SEC. 188 CMT. G ("Postemployment restraints are scrutinized with particular care because they are often the product of unequal bargaining power and because the employee is likely to give scant attention to the hardship he may later suffer through loss of his livelihood.").

Contracts of adhesion are fundamentally unfair, or undemocratic as some scholars say.[66] With the stroke of a pen, corporations tuck away countless waivers and limitations of rights and protections in the fine print of jargon-filled contracts, even where rights may have been conferred by statute. Thus, firms replace the policy preferences of elected representatives with that of their own, degrading the democratic process and the rule of law.[67]

Employment contracts are inherently adhesive due to the strong imbalance of bargaining power between employers and workers.[68] Workers depend on their employers to provide their basic standard of living and sustenance. A significant percentage of workers have only their labor on which to depend and possess no other substantial sources of income. Nor do many Americans possess sufficient savings to meet a modest expense or go several months without work, something a non-compete clause might well force them to do.[69] As one Ohio state court observed in 1952, such an unequal distribution of power leaves workers unable to freely bargain for advantageous terms at the point of contracting when joining a new company:

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66 Larry Bates, *Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection*, 16 EMORY INT'L L. REV. 1, 1–2 (2002) ("[W]hen the law enforces the terms of the contract supplied by the seller, in effect it is allowing the seller to reshape the law to its advantage but without the popular participation we normally associate with legislation in a liberal state."); Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, *supra* note 10 at 530 ("[T]he overwhelming proportion of standard forms are not democratic because they are not, under any reasonable test, the agreement of the consumer or business recipient to whom they are delivered. Indeed, in the usual case, the consumer never even reads the form, or reads it only after he has become bound by its terms. Even the fastidious few who take the time to read the standard form may be helpless to vary it. The form may be part of an offer which the consumer has no reasonable alternative but to accept."); MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2014) (discussing how firms' rampant use of harmful contract terms oppresses ordinary citizens and undermines the rule of law through "democratic degradation").

67 Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, *supra* note 10 at 529; *see also* RADIN, *supra* note 65 (discussing how firms' rampant use of boilerplate contracts oppresses workers and consumers and undermines the rule of law through "democratic degradation"); *see also* Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract* (1943) (arguing that what is labeled as "freedom of contract" is often in reality a one-sided privilege).

68 *See* RESTATEMENT (SECOND) OF CONTRACTS SEC. 188, CMT. G (1981) ("Postemployment restraints are scrutinized with particular care because they are often the product of unequal bargaining power and because the employee is likely to give scant attention to the hardship he may later suffer through loss of his livelihood."); BD. OF GOV. OF THE FED. RES. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2017 12 (2018) (finding that only 19% of individuals between 30 and 39 and 26% of individuals between 40 and 49 receive any income from interest, dividends, or rental property).

69 *SEE* BD. OF GOV. OF THE FED. RES. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2017 21 (2018); Neal Gabler, *The Secret Shame of Middle-Class Americans*, THE ATLANTIC (2016), https://www.theatlantic.com/magazine/archive/2016/05/my-secret-shame/476415/ (noting that a 2014 survey found that over 60% of Americans did not possess the savings to cover a $1,000 emergency medical expense).

> The average, individual employee has little but his labor to sell or to use to make a living. He is often in urgent need of selling it and in no position to object to boiler plate restrictive covenants placed before him to sign. To him, the right to work and support his family is the most important right he possesses. His individual bargaining power is seldom equal to that of his employer.[70]

Moreover, few workers are likely to negotiate or seek assistance of counsel when signing their employment contracts. In fact, most workers are unlikely to consider a non-compete clause as negotiable, believing instead that their hiring is contingent on agreeing to the clause.[71] Indeed, in one survey of workers, only approximately 10 percent of workers presented with a non-compete clause attempted to negotiate changes to the terms of the non-compete or to request benefits in exchange for agreeing to it.[72] Fewer than 20 percent of workers consulted a lawyer over the non-compete clause, and this consultation with a lawyer is strongly correlated with efforts to negotiate around the non-compete clause. Most workers believed that their hiring was contingent on their signing the non-compete, and only approximately 11 percent of workers thought they would still be hired if they refused to sign the non-compete clause.[73] In another example,[74] fewer than one in six in the sample group asked a lawyer to review the non-compete. This figure fell to fewer than one in twenty when employers presented the non-compete on the first day of work, as opposed to in advance. Not a single worker in the study bargained over a non-compete in their employment contract. Moreover, even if some workers do attempt to negotiate the terms of their employment contracts, those workers are more likely to focus their bargaining over wages and benefits as opposed to contingent terms such as non-compete clauses, which are more likely to be seen as being offered on a take-it-or-leave-it basis.[75] Meanwhile, employers are repeat players with countless legal staff who are constantly engaged in hiring. Employers enjoy the benefits of greater experience and skill at bargaining. Against this backdrop, the typical worker cannot possibly hope to genuinely negotiate the terms of their employment contract.

C. Non-Compete Clauses for Non-Executives are Exploitative and Coercive at the Time of the Employee's Potential Departure

In addition to being exploitative and coercive at the time of contracting, non-competes for non-executive workers are also exploitative and coercive at the time of an employee's potential departure from their employer. Such non-competes are exploitative and coercive because they

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70 *Arthur Murray Dance Studios of Cleveland v. Witter*, 105 N.E.2d 685, 687, 704 (Ohio Ct. C.P. 1952).

71 Starr et al., *supra* note 3 at 18–19.

72 Starr et al., *supra* note 3.

73 *Id*.

74 Matt Marx, *The Firms Strikes Back: Non-compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOC. REV. 695, 706–708 (2011).

75 *See generally* Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power Via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963, 977-80 (2006).

substantially and unjustifiably restrict job mobility, forcing workers to either stay in a job they want to leave or choose an alternative field in which they have less knowledge and experience — a decision that will likely negatively impact their livelihood.[76] Non-competes substantially impair job mobility to the detriment of millions of American workers and the economy as a whole.

Non-compete clauses are exploitative because they restrict an employee's ability to find new employment after leaving their current job.[77] By preventing an employee from working for a competitor, or even in a related field, for a certain period of time and in a certain area, non-compete clauses limit an employee's potential job options and can harm their career prospects. This can be particularly detrimental for employees who work in specialized fields, where there may only be a limited number of potential employers or where specialized knowledge and experience may have little benefit outside this specific field.

Restrictions on job mobility can also limit the ability of workers to negotiate for better wages and benefits. When workers are unable to leave their job and find new employment opportunities, employers have less incentive to offer competitive wages and benefits. This can lead to workers being underpaid and undervalued, which can have long-term consequences for their financial stability and career prospects.

The freedom to leave is especially critical for victims of workplace discrimination, harassment, and other mistreatment at a company. Non-competes can compel workers to stay in a job where they are subject to gender or racial discrimination, sexual harassment, other forms of mistreatment on the job, or even threats to their health and safety.

This restriction on job mobility harms not only the individual workers but the economy as a whole. As noted by the Commission in the proposal, "[w]hether a worker is a senior executive or a security guard, non-compete clauses block the worker from switching to a job in which they would be better paid and more productive — restricting that worker's opportunities as well as the opportunities of other workers in the relevant labor market."[78]

Non-competes also disproportionally harm disadvantaged communities. In one study, for example, the authors found that "in addition to affecting average earnings across workers in the US workforce, strict NCA enforceability specifically harms workers who have historically faced disadvantages in the labor market."[79] The authors estimate that banning non-compete clauses

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76 Lavetti et al., *supra* note 51.

77 *See* Harriet Torry, *Resistance to Noncompete Agreements Is a Win for Workers*, WALL ST. J. (May 18, 2019), https://www.wsj.com/articles/resistance-to-noncompete-agreements-is-a-win-for-workers-11558195200.

78 Proposal, at 77.

79 Matthew S. Johnson, Kurt Lavetti, & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* at 38–39 (2021); *see also* Lavetti et al., *supra* note 51.

nationwide would close racial and gender wage gaps by 3.6 to 9.1 percent.[80] The authors therefore concluded that "limiting the enforceability of [non-compete clauses] would not only likely raise earnings on average, but also help close racial and gender wage gaps."[81] The Commission's proposed rule would therefore benefit not only workers overall but also, in particular, workers burdened by other economic disadvantages under the current system.

III. Non-Competes for Senior Executives Are an Unfair Method of Competition and Should Not Be Excluded from the Commission's Rule

Better Markets also supports the Commission's proposal to ban non-compete clauses for senior executives. Although there are admittedly important distinctions between non-executive and senior executive workers, senior executives should not be excluded from the Commission's rule.

While senior executives arguably have more bargaining power than many non-executive workers, this does not mean that they are on equal footing with their employer. Indeed, many senior executive workers still face exploitative pressure from companies both at the time of contracting and when they wish to leave a company. As with virtually all employment contracts, the employer still holds most of the leverage when negotiating contracts with executives. And the fact that executives may hold more bargaining power relative to their non-executive peers is no reason to deny them the important protections against restrictive non-compete clauses.

Moreover, like non-compete clauses for non-executives, non-competes for senior executives stifle innovation and competition, substantially burdening commerce, arguably to a greater degree than non-competes with lower-level employees. Widespread enforcement of non-compete clauses favors dominant and incumbent firms by making it more difficult for startups to recruit more experienced executives. Moreover, "established companies with ample resources can use noncompete litigation strategically, chilling movement of talent to startups that lack the resources to contest noncompetes in court."[82] As Professor Orly Lobel put it, "[a] ban on the use of noncompete clauses in employment contracts—for both executives and lower-level workers—

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80 Johnson et al., *supra* note 79.

81 Johnson et al., *supra* note 79 at 38–39:

> [W]e show that stricter NCA enforceability leads to a decline in workers' earnings and mobility. The earnings effect is greater for workers more likely to be bound by NCAs, and greater for females and racial minorities. We also find that the earnings effect of NCA enforceability spills over across legal jurisdictions, illustrating that NCA enforceability has far-reaching consequences on labor market outcomes, with effects that likely extend far beyond the subset of workers that actually sign NCAs.

82 Orly Lobel, *Should Noncompete Clauses for Executives Be Legal?*, *infra* note 83.

would help foster competitive job markets in the U.S., clearing the way for talent to flow toward growth and progress."[83]

Thus, the Commission should reject calls to exempt senior executive workers from the proposed rule. But to the extent the Commission is inclined to treat non-competes for senior executives differently at all, it should consider establishing a rebuttable presumption of illegality rather than excluding such clauses entirely from the protections of the Proposal.

IV. The Justifications for Non-Compete Clauses Are Unpersuasive and Can Be Addressed Through Other Means

Defenders of non-compete clauses typically assert the need to protect corporate intangible assets — such as sensitive business information — as justification for the use of these clauses in employment contracts. But corporate intangible assets can be protected through other, less restrictive means.

There are already laws in place providing for the protection of intangible assets. For example, employers can protect many of their intangible assets through intellectual property law by invoking copyright, patent, and trademark protections.[84] In many cases, this would be a far more appropriate means of protecting intangibles than the overly broad method of noncompete clauses. This is because, as one scholar put it, "noncompetes regulate the *inputs* to creation and invention, whereas intellectual property rights regulate the inventive or creative *outputs*."[85] Through non-competes, firms are able to circumvent the traditional boundaries of intellectual property law.[86] The mass spread of non-compete clauses prioritizes corporate intangibles over the fundamental right of millions of Americans to utilize their knowledge and expertise to the fullest possible extent.[87]

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83 Orly Lobel, *Should Noncompete Clauses for Executives Be Legal?*, THE WALL STREET JOURNAL (Sep. 22, 2021), https://www.wsj.com/articles/non-compete-clause-legal-11632244492.

84 *See generally* Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 WM. & MARY L. REV. 873 (2010).

85 *Id.* at 879.

86 *Id.*

87 *See* LOBEL, *supra* note 55 at 37 ("At their most dangerous, human capital controls such as noncompete agreements temporarily prevent workers who have trained and labored in a specific field with a specific set of knowledge from using their expertise in pursuing their passions and perhaps also from earning a living."); Moffat, *supra* note 84 at 928 ("By limiting the employment possibilities for employees, non-competes seek to control not only the output of human ingenuity and creativity, but also the source of it—the human capital itself.").

Moreover, businesses can readily invoke non-disclosure agreements[88] and trade secret laws[89] as means of prohibiting both current and former employees from disclosing certain information to competitors or to the public. In fact, trade secret law sometimes even allows businesses to protect intangibles that are not eligible for traditional intellectual property protection.[90]

Thus, the less restrictive alternatives of intellectual property law, non-disclosure agreements, and trade secret law already provide a means for businesses to protect their corporate intangibles without the need to resort to the considerably more harmful option of non-compete clauses. And to the extent any intellectual property is compromised by the absence of non-competes, "the benefits of a competitive labor market outweigh the risks of losing intellectual property."[91]

CONCLUSION

We hope these comments are helpful as the Commission finalizes the Proposed Rule.

Sincerely,

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88 *See generally* Orly Lobel, *Enforceability TBD: From Status to Contract in Intellectual Property Law*, 96 B.U. L. REV. 869, 874 (2016) (noting how post-employment contracts containing non-compete clauses typically also include other restrictions such as non-disclosure clauses).

89 Trade secrets are defined as information that derives its value from being unknown or unascertainable to the public and that is subject to reasonable efforts to maintain its secrecy. Uniform Trade Secrets Act § 1(4) (amended 1985). Misappropriation of trade secrets is already actionable.

90 *See generally* Eleanore R. Godfrey, *Inevitable Disclosure of Trade Secrets: Employee Mobility v. Employer's Rights*, 3 J. HIGH TECH. L. 161 (2004).

91 Lobel, *Should Noncompete Clauses for Executives Be Legal?*, *supra* note 83.

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