June 4, 2025

Andrew Ferguson
Chairman
Federal Trade Commission

Re: Defense of FTC's Non-Compete Clause Rule

Dear Chairman Ferguson,

We, the undersigned, write to urge you and Commissioners Bedoya, Holyoak, Meador, and Slaughter to vigorously defend the Non-Compete Clause Rule in the two pending challenges to the rule. The rule represents a legitimate exercise of the Federal Trade Commission's statutory authority and is rooted in the history of FTC enforcement and policymaking and based on a raft of quantitative and qualitative evidence. Defending this rule should be the centerpiece of a pro-worker agenda for the FTC.

I. The FTC's Clear Authority to Enact the Non-Compete Clause Rule

The FTC has clear statutory authority to write substantive competition rules. As Justice Gorsuch wrote for the Supreme Court in 2020, "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law."[1] Congress granted the FTC the power to "to make rules and regulations for the purpose of carrying out the provisions of [the FTC Act]."[2] In faithfully following the text of the statute, the D.C. Circuit described this text as "clear as it is unlimited."[3] The court further stated, "Ambiguous legislative history cannot change the express legislative intent."[4]

Indeed, the use of the phrase "rules and regulations" indicates a congressional desire to grant the FTC authority to write both procedural and substantive rules. As an illustration of this point, the Federal *Rules* of Civil Procedure concerns procedure while the Code of Federal *Regulations* contains substantive regulations.

The Supreme Court has consistently upheld the FTC's expansive power to interpret "unfair methods of competition."[5] The FTC can outlaw a range of practices, including those that do not necessarily violate the Sherman and Clayton Acts.[6] As such, referring to the three statutes as the

[1] Bostock v. Clayton Cnty, Ga., 590 U.S. 644, 653 (2020).
[2] 15 U.S.C. § 46(g).
[3] Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 693 (D.C. Cir. 1973).
[4] Id. at 686.
[5] *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) ("[L]egislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.").
[6] *See* FTC v. Indiana Federation of Dentists, 476 U.S. 447, 454 (1986) ("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.").

monolithic "antitrust laws" erases important differences between them, including the FTC Act's broader substantive scope. Further, the FTC Act does not raise nondelegation concerns. In nearly 250 years, the Court has invalidated statutes on nondelegation grounds *only twice*.[7] In one of those cases, the Court expressly recognized the FTC Act as a permissible assignment of policymaking power by Congress to a federal agency.[8]

II. The FTC's History of Regulating Vertical Restraints

In employing its unfair methods of competition authority, the FTC has a long history of taking legal action against restraints between buyers and sellers, including between manufacturers and distributors and employers and employees. In the language of antitrust law, these contracts are vertical restraints because they are "made up and down the supply chain."[9] Non-compete clauses are a type of vertical restraint between workers and employers.

Since its creation in 1914, the FTC has attacked assorted vertical restraints such as exclusive dealing and tying. Many of these actions led to appellate wins for the FTC.[10] In a trilogy of cases in the 1960s, the FTC challenged tying-like practices in the oil and gas industry. The FTC sued major oil companies for pressuring independent gas stations that bought and resold their fuel into carrying the tires, batteries, and accessories of favored partners. Two of these cases went up to the Supreme Court, and all three actions resulted in victories for the FTC.[11]

Non-compete clauses are the original vertical restraint and restraint of trade. At common law, restraint of trade "nearly always referred to limiting or prohibiting someone from engaging in a particular trade or business."[12] In a 1949 opinion, Judge Learned Hand recognized this history. The venerable jurist wrote that the federal antitrust laws "certainly forbid all restraints of trade which were unlawful at common-law, and one of the oldest and best established of these is a contract which unreasonably forbids any one to practice his calling."[13]

The FTC's non-compete prohibition is the latest action against vertical restraints. It is not a policy aberration but a logical extension of what the FTC has done for more than a century.

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[7] Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[8] *Schechter Poultry*, 295 U.S. at 533-34. *See id.* at 552 (Cardozo, J., concurring) ("I have said that there is no standard, definite or even approximate, to which legislation must conform. Let me make my meaning more precise. If codes of fair competition are codes eliminating 'unfair' methods of competition ascertained upon inquiry to prevail in one industry or another, there is no unlawful delegation of legislative functions when the President is directed to inquire into such practices and denounce them when discovered. For many years a like power has been committed to the Federal Trade Commission with the approval of this court in a long series of decisions.").

[9] Butler v. Jimmy John's Franchise, LLC, 331 F. Supp. 3d 786, 793 (S.D. Ill. 2018).

[10] *E.g.*, FTC v. Brown Shoe Co., 384 U.S. 316 (1966); Mytinger & Casselberry, Inc., 301 F.2d 534 (D.C. Cir. 1962).

[11] Atlantic Refining Co. v. FTC, 381 U.S. 357 (1965); FTC v. Texaco, Inc., 393 U.S. 223 (1968); Shell Oil Co. v. FTC, 360 F.2d 470 (5th Cir. 1966).

[12] Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-examination of the Consumer-Welfare Hypothesis*, 54 J. ECON. HIST. 359, 369 (1993).

[13] Gardella v. Chandler, 172 F.2d 402, 408 (2d Cir. 1949) (Hand, J.).

III. Abundant Evidence Supporting the Rule

The FTC compiled ample evidence in support of the rule. Staff exhaustively reviewed the quantitative and qualitative evidence on the incidence and effects of non-compete clauses. Instead of cherry-picking the evidence, they reviewed and presented studies finding both harms and benefits from the use of non-compete clauses by employers.

Further, the FTC reviewed the purported benefits of non-compete clauses and examined the availability of less restrictive alternatives to these contractual provisions. Rather than dismiss employer interests, the FTC appreciated the need for businesses to protect trade secrets and investments in employee training and customer relationships. The Commission, however, concluded that non-compete clauses are an overbroad and flawed tool to achieve these goals and identified more targeted methods of protecting business interests, including trade secret law and non-solicitation agreements. Additionally, the FTC explained that employers can retain workers through regular raises and promotions and fair treatment at the workplace rather than relying on one-sided contracts that restrict worker mobility.

The FTC acted properly in enacting a complete ban. In light of the abundant evidence compiled and its detailed reasoning, the FTC reasonably concluded that the use and enforcement of non-compete clauses are an unfair method of competition in violation of the FTC Act. As such, the FTC established a "rational connection between the facts found and the choice made."[14]

The FTC more than satisfied its burden under the APA. The Commission did what the Supreme Court directed agencies to do—and then some—by "examin[ing] the relevant data and articulat[ing] a satisfactory explanation for its action."[15] Accordingly, under the "narrow" scope of judicial review, the rule satisfies the requirements of the APA.[16]

The Non-Compete Clause Rule is a reasonable exercise of the FTC's statutory powers and supported by ample evidence. Accordingly, it should be strongly defended in court.

Thank you for your time and consideration.

Sincerely,

Open Markets Institute
American Economic Liberties Project
Center for Digital Democracy
Demand Progress Education Fund
Economic Policy Institute
Economic Security Project

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[14] Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962).
[15] Motor Vehicle Manufacturers Association of U.S., Inc. v. State Farm Mutual Auto Insurance Co., 463 U.S. 29, 43 (1983).
[16] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009).

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CC: Commissioner Alvaro Bedoya
Commissioner Melissa Holyoak
Commissioner Mark Meador
Commissioner Rebecca Kelly Slaughter