



April 10, 2023

By electronic submission: <http://www.regulations.gov>

Federal Trade Commission
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex C)
Washington, DC 20580

Re: Noncompete Clause Rulemaking, Matter No. P201200

To whom it may concern:

On behalf of the Restaurant Law Center (the “Law Center”) and the National Restaurant Association (the “Association”), we appreciate the opportunity to submit comments in response to the Notice of Proposed Rulemaking (the “NPRM”) issued by the Federal Trade Commission (“FTC” or the “Commission”) to amend 16 CFR Part 910 and published in the Federal Register on January 19, 2023. We write to express our concerns about, and opposition to, the NPRM.

I. Interest of the Commenters

The Law Center is a 501(c)(6) legal entity affiliated with the Association and launched in 2015 with the expressed purpose of promoting laws and regulations that allow restaurants to continue growing, creating jobs, and contributing to a robust American economy. The Law Center’s goal is to protect and to advance the restaurant industry and to ensure that the views of America’s restaurant and foodservice industry (the “Industry”) are taken into consideration by giving its members a stronger voice, particularly in the courtroom, but also before legislative and administrative bodies. The Law Center files comments and pursues cases of interest to the Industry.

Founded in 1919, the Association is the largest trade association representing the Industry in the world. The Industry comprises nearly one million restaurants and other foodservice outlets employing more than 15 million people—approximately 10 percent of the U.S. workforce.

Restaurants are job creators and the nation's second-largest private sector employer. Despite the size of the Industry, small businesses dominate the sector, and even larger chains are often collections of smaller franchised businesses.

II. Factual and Legal Deficiencies in the NPRM

The Law Center and the Association's opposition to the NPRM is threefold: (1) the NPRM is unnecessary and counterproductive because business owners in the restaurant industry use noncompetes only sparingly, in order to protect their most valuable trade secrets, confidential information, and customer relationships, rather than with low wage workers; (2) the Commission lacks clear Congressional authorization to regulate, much less ban, noncompetes; and (3) the regulation of noncompetes has been a state law issue for over 200 years, and state legislatures should continue deliberating and debating the issue and enacting compromise legislation that is best for their citizens. Indeed, should the NPRM go into effect, there are likely to be unanticipated consequences that could harm employees and consumers in the restaurant industry rather than helping them, and could reduce competition rather than increasing it.

- 1. The NPRM is unnecessary and counterproductive because business owners in the restaurant industry use noncompetes only sparingly, in order to protect their most valuable trade secrets, confidential information, and enterprise customer relationships, rather than to limit the mobility of low wage workers.**

The Commission suggests that noncompetes are used regularly with low wage workers, that employers coerce employees into signing them, and that their use reduces wages. But that is simply not the case in the restaurant industry in the Law Center and the Association's experience. Rather, noncompetes are used only sparingly with senior-level employees in order to protect business owners' most valuable trade secrets, confidential information, and customer relationships; and such employees are asked to sign them voluntarily in exchange for handsome consideration, such as long-term incentives, discretionary bonuses, promotions, generous separation packages, and the like.

- A. Noncompetes are not typically used in the restaurant industry with low wage workers.**

While the public face of the restaurant industry may be the many waiters, hostesses, bartenders, line cooks, dishwashers, and others who serve as the backbone of the industry, employers in the restaurant industry almost never use noncompetes with those types of employees. In fact, it is not uncommon for waiters, line cooks and other hourly paid workers to work at two different competing restaurant brands on different days of the week to maximize their earnings, all with the knowledge of their restaurant employers. Indeed, the Law Center and the Association strongly

discourage such practices and would not oppose targeted protections for low wage workers, such as compensation thresholds, enacted by *state legislatures*. But that is only one facet of the workforce in the restaurant industry.

Behind the scenes, there are all manner of employees who have access to their employers' most sensitive business, marketing, pricing, and technical information, as well as relationships with their employers' vendors and customers. For example, strategic information about future advertising campaigns, branding, menu changes, expansion plans, and target markets is all highly confidential and would be extremely damaging if it were to land in a competitor's hands. These roles can range from senior executives to finance to marketing to buyers to information technology professionals.

For example, a finance executive will typically have access to highly sensitive financial information, including multi-year plans for capital investment, pricing strategy, expansion plans, potential merger and acquisition opportunities, cost of goods sold, gross margins, financial projections, compensation structures, and the like that, if it were to fall into the hands of a competitor, could severely harm a restaurant business. A marketing executive will similarly have access to future marketing plans and strategies, planned menu innovation, as well as data analytics concerning the effectiveness of their existing and past strategies and loyalty programs; a buyer will have access to important vendor relationships and confidential information concerning discounts and markups; and an information technology professional will have access to proprietary restaurant management systems, point of sale technologies, website and mobile app trade secrets, waitlist management solutions, planned technology developments, and cybersecurity measures, among many other things.

Indeed, reasonable noncompetes are particularly important for foodservice management businesses, which provide on-site restaurants, cafeterias, and catering services to other businesses (such as stadiums, office buildings, and hospitals). Foodservice management companies invest significant resources in training and deploying skilled manager-level and salaried employees to establish on-site operations, build client relationships, and run and evolve the day-to-day operations of those sites based upon client and customer needs. Information about these engagements, such as profit margins, markups, financial projections, and the like, are very closely guarded.

If any of these types of employees were free to leave at will and immediately start working for a direct competitor across the street in the same or similar capacity, disclosure and/or use of highly confidential information is virtually inevitable, notwithstanding trade secret law and applicable confidentiality agreements. There is simply no adequate way to prevent information leak when a high-level employee leaves and joins a direct competitor in the same or a similar position. This is particularly true as businesses in the restaurant industry implement more workplace technologies that make work more efficient, yet open up employers to increased risks of misappropriation by employees. Increased remote work arrangements for the types

of employees subject to noncompetes increase these risks as well. However, properly tailored noncompetes can protect against such inevitable harm.

B. Small businesses in the restaurant industry will be adversely impacted by the NPRM.

Many businesses in the restaurant industry are small mom-and-pops with one or two restaurants, or small local franchisees. These businesses will be particularly affected by the NPRM. The increased costs that the NPRM will impose upon small businesses will be undoubtedly higher than the Commission estimates.¹ The NPRM will also create disadvantages for small businesses vis-à-vis their larger competitors in other ways. For example, small businesses use noncompetes to protect their legitimate business interests just as larger businesses do.

However, the loss of confidential business information with a departing employee will be felt more acutely, in particular when lost to a larger competitor with vastly more resources that hires a key employee and trades upon that employee's knowledge of confidential and proprietary business information.² Trade secret laws can protect certain confidential information, but trade secret litigation is reactive, not proactive, and can be prohibitively expensive and time consuming, such that small business cannot reasonably take advantage of that option in many cases.³ In other words, larger, more established companies, can bully small businesses and decrease competition if noncompetes are banned—exactly what the FTC is charged with preventing.

C. A reasonable compensation threshold would protect low wage workers from the misuse of noncompetes.

Several states have implemented compensation thresholds for noncompetes to address this very concern. Specifically, eleven states plus the District of Columbia have passed laws prohibiting the use and enforcement of noncompetes against “low wage” workers, defined variously as those earning compensation of anywhere from

¹ For example, the Office of Advocacy at the U.S. Small Business Administration found that the FTC “ignored potential important small business impacts . . . such as the costs of hiring additional legal resources if the proposed rule went into effect. There may also be increased costs of hiring and retaining workers, which some small entities are currently struggling with.” Comments on the NPRM from Major L. Clark, III, Deputy Chief Counsel, and Jennifer A. Smith, Assistant Chief Counsel, (March 20, 2023) at 3. Found at <https://advocacy.sba.gov/wp-content/uploads/2023/03/FTC-Noncompete-Clause-Comment-Letter-Filed.pdf> on March 28, 2023.

² In some cases, small businesses could even end up facing “potential closure,” i.e., going out of business. *Id.*

³ As the Office of Advocacy highlighted, “the legal process often involves protracted proceedings and astronomical legal fees which small entities may not be able to afford.” *Id.*

\$14.50 per hour to \$150,000 per year for most employees.⁴ Some are simple wage thresholds (e.g., District of Columbia, Illinois); others are formulas based on minimum wage, the poverty level, or the like (e.g., Maine, Virginia); and a few are based, at least in part, on whether an employee is exempt under the Fair Labor Standards Act (e.g., Massachusetts, Rhode Island).

If the Commission had the legal authority to regulate noncompetes (which, as discussed below, it does not), it could have taken a similar, more targeted approach. Had the Commission done so, noncompetes would likely not be enforceable against most front and back of the house workers in the restaurant industry—the very employees the Commission seeks to protect. Rather, they would be limited to the types of executives and professionals identified above, who could do serious harm to their employers should they take trade secrets to a competitor (either intentionally or inadvertently) or trade on their employer’s goodwill to steal enterprise customers.

While non-solicitation covenants and trade secret laws provide some measure of protection, non-solicits do not address the misappropriation of trade secrets, and the trade secret laws are largely reactive, rather than proactive, and are inherently limited (because they cannot remove information already in a person’s head, nor is it always apparent until it is far too late that trade secrets have been misappropriated). As noted above, trade secret litigation is frequently far more complex, time consuming, and costly than noncompete litigation—indeed, many noncompetes disputes are resolved pre-litigation—and larger, more established companies can use trade secret litigation to bully newer, smaller market entrants thereby harming competition.

D. Executives and other employees who could harm their employers are asked to *voluntarily* sign noncompetes in the restaurant industry, typically in exchange for handsome consideration.

While there are always bad actors, it is not the Law Center and the Association’s experience that employers in the restaurant industry regularly—or even often—coerce employees to sign noncompetes. To suggest otherwise ignores the fact that employees often receive substantial consideration in exchange for signing noncompetes, not only in the form of a job and a salary, but often also equity and other forms of compensation. Indeed, employees in the restaurant industry are most commonly asked to *voluntarily* sign noncompetes in connection with long term incentive

⁴ On one end of the spectrum is New Hampshire, where the threshold is \$14.50 per hour, and on the other end is the District of Columbia, where the threshold is \$150,000 for most employees and \$250,000 for medical specialists. Other states with compensation thresholds include Colorado, Illinois, Maine, Maryland, Massachusetts, Nevada, Oregon, Rhode Island, Virginia, and Washington state. Some of the thresholds increase annually or on other set schedules, whereas others utilize formulas tied to inflation. A few will not increase without statutory amendments. See Russell Beck, “New Non-compete Wage Thresholds for 2023,” *Fair Competition Law Blog* (Feb. 6, 2023), available at <https://fair-competitionlaw.com/2023/02/06/new-noncompete-wage-thresholds-for-2023/>.

plans, as consideration for discretionary bonuses, or in connection with promotions or generous separation packages. These may not be “wages” per se, but they are potentially lucrative forms of compensation that would not be provided in many cases absent the protection of noncompetes, thereby potentially harming employees if the NPRM is enacted.

The Commission also ignores the enormous bargaining power employees have had since the economy was reopened after COVID-19 government shutdowns. This has been particularly acute in the restaurant industry where there are more jobs than available workers.⁵

E. Notice requirements can protect against so-called coercion.

Several states have recently enacted laws to address the issue of so-called employer coercion by requiring advance notice of noncompetes, often at the time an offer of employment is made or weeks before they are to take effect, such that employees can make informed decisions before accepting new jobs and resigning from old ones. Specifically, eight states plus the District of Columbia currently have statutory notice requirements.⁶ Some are tied to when an offer is made (*e.g.*, Maine, D.C.) or accepted (*e.g.*, Colorado, New Hampshire); others are tied to the commencement of employment (*e.g.*, Illinois, Massachusetts, Oregon); Virginia requires the posting of a notice at all times; Colorado requires a separate, standalone notice to be provided to employees subject to noncompetes; and Oregon additionally requires that the employer provide a signed copy of the noncompete to an employee within 30 days *after* his or her termination. Again, setting aside its lack of authority, the Commission could have taken this more modest approach.⁷

F. Banning noncompetes could harm employees, the market, and competition in the restaurant industry.

Finally, if it were true, as the Commission suggests, that noncompetes drive down wages, and that doing away with them will increase workers’ earnings by hundreds of billions of dollars each year and cost employers over \$1 billion in compliance costs, then prices will naturally *increase* as employers attempt to recoup their diminishing profits. This would certainly be the case in the restaurant industry where margins can be low, and, as much as possible, any increased costs are necessarily passed

⁵ National Restaurant Association, “2022 State of the Restaurant Industry,” available at <https://restaurant.org/research-and-media/research/research-reports/state-of-the-industry/>; *see also* “Nearly Half of Restaurants Struggle to Hire, Retain Employees,” *PYMNTS* (July 26, 2022), available at <https://www.pymnts.com/restaurant-innovation/2022/nearly-half-of-restaurants-are-having-difficulty-hiring-retaining-employees/>.

⁶ Colorado, Illinois, Maine, Massachusetts, New Hampshire, Oregon, Virginia, Washington, and the District of Columbia.

⁷ The Law Center and the Association would not oppose *state* legislation requiring advance notice of noncompetes.

along to consumers. Indeed, restaurants go out of business every year due to cost increases outside of their control, whether due to market forces or government regulation, so the additional costs resulting from the NPRM may very well reduce competition and harm consumers.

2. The FTC Does Not Have the Legal Authority to Ban Noncompetes.

The Commission relies on Section 5 of the FTC Act as its purported legal basis to promulgate the NPRM. But Section 5 only vaguely permits the Commission to “prevent persons, partnerships, or corporations,” with certain enumerated exceptions including nonprofits, “from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”⁸ Notably, when Section 5 was enacted in 1914, noncompetes were already in wide use in the United States and had been governed by state law for over a century. Indeed, four states had already passed legislation banning noncompetes at that time—North Dakota (1865), California (1872), Oklahoma (1890), and Michigan (1905)⁹—so it was clearly an issue being discussed and debated in state legislatures across the country. It is telling that, until now, the Commission has never once in its 109-year existence relied on its authority under Section 5 to regulate noncompetes.

That is because the Commission has no such authority, as the United States Supreme Court made clear just last year in its decision in *West Virginia v. EPA*.¹⁰ Chief Justice Roberts wrote for the majority that, pursuant to the Major Questions Doctrine, “in certain extraordinary circumstances, both 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.”¹¹ In his concurring opinion, Justice Gorsuch succinctly described the relevant factors to be considered in determining “when an agency action involves a major question for which [such] clear congressional authority is required.”¹² Application of these factors leads to only one reasonable conclusion: the regulation of noncompetes is a major question for which clear congressional authority is required—and Congress did not provide such authorization to the Commission to regulate noncompetes.

⁸ 15 U.S.C. §45(a)(2).

⁹ Michigan repealed that ban in 1985, leaving California, North Dakota, and Oklahoma as the only three states that currently ban noncompetes.

¹⁰ 597 U.S. —, 142 S. Ct. 2587 (2022).

¹¹ *Id.*, 142 S. Ct. at 2609.

¹² *Id.*, 142 S. Ct. at 2620 (Gorsuch, J., concurring).

A. The regulation of noncompetes is a matter of great political significance.

First, “the doctrine applies when an agency claims the power to resolve a matter of great ‘political significance.’” There can be no doubt that the issue of whether and to what extent noncompete agreements should be *retroactively banned* at the federal level is a matter of great political and economic significance; indeed, the current administration, itself, has made it so. For example, during the 2020 presidential campaign, then-candidate Biden’s campaign website declared that “[a]s president, Biden will *work with Congress* to eliminate all non-compete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets[.]”¹³ In other words, President Biden ran his national campaign for President, in part, on a promise to ban nearly all noncompetes. It does not get much more significant than that.

This was not the first time that the federal government made the regulation of noncompetes an issue of great political significance. In March 2016, the U.S. Department of the Treasury issued a report entitled “Noncompete Contracts: Economic Effects and Policy Implications,” which made several claims that are echoed in the NPRM.¹⁴ This was followed a few months later by the Obama Administration’s “State Call to Action on Non-Compete Agreements,” which encouraged state legislators to adopt policies to reduce the misuse of noncompete agreements and recommended certain reforms to state laws.¹⁵ At the same time, the White House issued a survey that encouraged employees to share with the administration “how noncompete agreements or wage collusion are holding you down,” and expressing concern about “the improper use of noncompete agreements, where companies make workers promise when they are hired that if they leave the company, they can’t work for another company in the same industry.”¹⁶

If this alone were not enough to satisfy the “political significance” factor, consider that the Supreme Court “has found it telling when Congress has ‘considered and rejected’ bills authorizing something akin to the agency’s proposed course of action. That too may be a sign that an agency is attempting to ‘work around’ the legislative process to resolve for itself a question of great political significance.”¹⁷ Bills

¹³ See <https://joebiden.com/empowerworkers/> (emphasis added).

¹⁴ See https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Economic_Effects_and_Policy_Implications_MAR2016.pdf.

¹⁵ See <https://obamawhitehouse.archives.gov/sites/default/files/competition/noncompetes-call-toaction-final.pdf>.

¹⁶ See <https://obamawhitehouse.archives.gov/webform/how-have-non-competes-and-wage-collusion-affected-you> (initially the survey was hosted at: <http://go.wh.gov/Your-Non-Compete-Story>).

¹⁷ *West Virginia v. EPA*, 142 S. Ct. 2587, at 2621 (Gorsuch, J., concurring).

seeking to regulate, if not outright ban, the use of noncompetes have been introduced in Congress by members of both parties on no fewer than a dozen occasions since 2015,¹⁸ including six such bills in 2022 alone.¹⁹ None has ever passed.

B. The FTC seeks to regulate a significant portion of the American economy

Second, under the Major Questions Doctrine, “an agency must point to clear congressional authorization when it seeks to regulate ‘a significant portion of the American economy.’”²⁰ The Commission’s own words make it clear that the NPRM would regulate a significant portion of the American economy; indeed, that is its express purpose.

Specifically, the Commission estimates that “[a]bout one in five American workers—approximately 30 million people—are bound by a non-compete clause and are thus restricted from pursuing better employment opportunities.” The Commission further estimates that “the proposed rule would increase American workers’ earnings between \$250 billion and \$296 billion per year.”²¹ Indeed, the NPRM includes dozens of pages addressing the supposed economic impacts of noncompetes, and cites to numerous studies by labor economists purporting to support its views on the subject. In addition to the estimated effect on wages, “[t]he Commission estimates

¹⁸ In 2015, Senator Chris Murphy (D-CT) introduced the “Mobility and Opportunity for Vulnerable Employees Act” (the “MOVE Act”), which sought to prohibit the use of noncompetes with low wage employees. At around the same time, federal legislators filed two other bills, the “Limiting the Ability to Demand Detrimental Employment Restrictions Act,” which was very similar to the MOVE Act, and the “Freedom for Workers to Seek Opportunity Act,” which sought to ban the use of noncompetes for grocery store workers. Three years later, Senators Murphy, Elizabeth Warren (D-MA), and Ron Wyden (D-OR) introduced the “Workforce Mobility Act of 2018,” which would have imposed a federal ban on the use of employee noncompetes. A companion bill was introduced in the House. Then, in January 2019, Senator Marco Rubio (R-FL) introduced the “Freedom to Compete Act,” which would have prevented employers from entering into or enforcing noncompetes with employees who are nonexempt under the Fair Labor Standards Act. Later that year, Senators Murphy and Todd Young (R-IN) introduced the “Workforce Mobility Act,” which would have banned post-employment noncompetes outright; Representatives Scott Peters (D-CA) and Mike Gallagher (R-WI) introduced a companion version of this bill in the House.

¹⁹ The VA Hiring Enhancement Act (H.R.3401), which would have voided noncompetes for physicians going to work at VA hospitals; the Workforce Mobility Act of 2021 (one in the House (H.R.1367) and one in the Senate (S.483)), which would have banned employee noncompetes; the Freedom To Compete Act (S.2375), which would have banned noncompetes for workers who are not exempt under the Fair Labor Standards Act; the FTC Whistleblower Act of 2021 (H.R.6093), which would have voided noncompetes for whistleblowers to the FTC; and the Employment Freedom for All Act (H.R.5851), which would have voided noncompetes for employees fired for not complying with their employer’s COVID-19 vaccine mandate.

²⁰ *West Virginia v. EPA*, 142 S. Ct. 2587, at 2621 (Gorsuch, J., concurring).

²¹ 88 Fed. Reg. 3482 (Jan. 19, 2023)

firms' direct compliance costs and the costs of firms updating their contractual practices would total \$1.02 to \$1.77 billion.”²²

This tracks the Treasury Department's March 2016 report, which posited that “a considerable number of American workers (18% of all workers, or nearly 30 million people) are covered by noncompete agreements,” and made several claims about the purported impact of that on the economy, including that: “[r]educed job churn caused by non-competes is itself a concern for the U.S. economy”; “[n]on-compete enforcement can stifle this mobility, thereby limiting the process that leads to agglomeration economies”; and “while in some cases non-compete agreements can promote innovation, their misuse can benefit firms at the expense of workers and the broader economy.”²³

C. Noncompete regulation has been the exclusive domain of state law for over 200 years

Third, “the major questions doctrine may apply when an agency seeks to ‘intrud[e] into an area that is the particular domain of state law. . . . When an agency claims the power to regulate vast swaths of American life, it not only risks intruding on Congress’s power, it also risks intruding on the powers reserved to the States.”²⁴ This factor is particularly apt in the noncompete context, as states have been regulating them for over 200 years.²⁵ Indeed, in just the past decade, more than three quarters of all states have considered enacting and/or amending their noncompete laws,²⁶ and in 2022 alone, no fewer than 98 noncompete bills were introduced in at least 29 state legislatures.²⁷ Even the Commission acknowledges that “[s]tates have been particularly active in restricting non-compete clauses in recent years,” noting:

²² 88 Fed. Reg. 3528 (Jan. 19, 2023).

²³ See https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Economic_Effects_and_Policy_Implications_MAR2016.pdf.

²⁴ *West Virginia v. EPA*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (cleaned up).

²⁵ See *Bradford v. New York Times Co.*, 501 F.2d 51 (2d Cir. 1974) (noting that “employee restraints have been known to the common law since the 15th century . . . and a state court or, in a diversity case, a federal court applying state law, provides the usual forum for protecting the employee and whatever interest the public may have”); *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.”); *Hess v. Gebhard & Co.*, 808 A.2d 912, 918 n.2 (Pa. 2002) (“The earliest known American case involving a restrictive covenant is *Pierce v. Fuller*, 8 Mass. 223 (1811).”).

²⁶ “Why Are Fast Food Workers Signing Noncompete Agreements?,” *New York Times* (Sept. 29, 2021).

²⁷ Russell Beck, “Eight States with 39 Pending Noncompete Bills: Colorado is changing its non-compete law—again,” *Fair Competition Law Blog* (July 6, 2022), available at <https://faircompetitionlaw.com/2022/07/06/8-states-with-39-pending-noncompete-bills-colorado-is-changing-its-noncompete-law-again/>.

Of the twelve state statutes restricting non-compete clauses based on a worker's earnings or a similar factor (including the D.C. statute), eleven were enacted in the past ten years. States have also recently passed legislation limiting the use of non-compete clauses for certain occupations. Other recent state legislation has imposed additional requirements on employers that use non-compete clauses.²⁸

Recognizing this, as noted above, in its 2016 State Call to Action on Non-Compete Agreements,” the Obama Administration encouraged *state* legislators to adopt policies to reduce the misuse of non-compete agreements and recommended certain reforms to *state* laws.²⁹

Nevertheless, despite numerous attempts at the state level to ban noncompetes, no state has done so since 1890.³⁰ That is not due to a lack of significant effort, however, as legislators in several states have introduced legislation that is virtually identical in effect to the NPRM, but in each case ended up enacting more targeted compromise legislation.

For example, in 2018, the Massachusetts legislature enacted the Massachusetts Noncompetition Agreement Act after almost a decade of debate.³¹ The process leading to passage of that law began with a proposal to ban noncompetes outright in the Commonwealth, but ended with comprehensive compromise legislation that limits the categories of employees against whom they may be enforced, requires notice, and no longer permits continued employment as consideration for existing employees, but otherwise more or less codifies the common law and permits noncompetes of up to 12 months in duration.

Similarly, effective January 1, 2022, Illinois enacted noncompete legislation that likewise started out as a proposal to ban noncompetes but ended with the relevant constituencies reaching a far narrower compromise, again including

²⁸ 88 Fed. Reg. 3494 (Jan. 19, 2023).

²⁹ See <https://obamawhitehouse.archives.gov/sites/default/files/competition/noncompetes-call-toaction-final.pdf>.

³⁰ As noted above, the three states that ban noncompetes are California (1872), North Dakota (1865), and Oklahoma (1890). Moreover, although the D.C. Council passed legislation in 2020 that would have banned most employee noncompetes, by the time it went into effect in 2022 it had been watered down by amendment such that it merely included wage thresholds and notice requirements.

³¹ Mass. Gen. Laws. Ch. 149, § 24L.

compensation limits and notice requirements.³² Indeed, the Illinois statute was passed *unanimously* in both houses of the state legislature.

And the District of Columbia Council actually *passed* legislation in 2020 that would have banned most employee noncompetes,³³ but by the time it went into effect in 2022 it, too, had been watered down and merely included compensation thresholds and notice requirements.³⁴

Thus, even the legislatures of three of the most employee-friendly jurisdictions in the nation decided against banning noncompetes after careful consideration and input from all of their constituencies. Similar stories could undoubtedly be told in other states as well. As Justice Gorsuch further warned in his concurring opinion in *West Virginia v. EPA*, if Congress were permitted to delegate its legislative power to the executive branch rather than undertaking the difficult task of reaching a broad consensus through the legislative process, “little would remain to stop agencies from moving into areas where state authority has traditionally predominated. . . . That would be a particularly ironic outcome, given that so many States have robust non-delegation doctrines designed to ensure democratic accountability in their state law-making processes.”³⁵

Thus, leaving aside whether and to what extent noncompetes should be regulated, it is indisputable that the matter has been a lively one among the individual states for over 200 years, and in particular over the past decade. For the Commission to materially involve itself in this issue would, under *West Virginia v. EPA*, require Congress to have acted clearly and definitively in authorizing it.

D. Congress Did Not Authorize the FTC to Regulate Noncompetes.

Because the regulation of noncompetes constitutes a major question, for the Commission to now ban them Congress must have provided it with clear authorization to do so. As Commissioner Wilson points out in her dissenting statement, “that clear authorization is unavailable.”³⁶ The plain language of Section 5 of the FTC Act, and its historical application, further confirm that to be the case.

³² 820 Ill. Comp. Stat. Ann. 90/1, *et seq.*; see Peter Steinmeyer and Brian Spang, “Ill. Noncompete Reform Balances Employee And Biz Interests,” *Law360* (June 2, 2021), available at <https://www.law360.com/articles/1387841/ill-noncompete-reform-balances-employee-and-biz-interests>.

³³ Ban on Non-Compete Agreements Amendment Act of 2020, D.C. Act 23-563.

³⁴ Non-Compete Clarification Amendment Act of 2022, D.C. Law 24-175.

³⁵ *West Virginia v. EPA*, 142 S. Ct. at 2618 (Gorsuch, J., concurring).

³⁶ 88 Fed. Reg. 3545 (2023).

Justice Gorsuch again concisely delineates the factors that are to be considered in determining whether Congress has made such a clear delegation to an executive agency.³⁷ The Commission asserts that Congress’s delegation to it of the authority to regulate “unfair methods of competition” applies to the regulation of noncompetes because “the scope of Section 5 is not confined to the conduct that is prohibited under the Sherman Act, Clayton Act, or common law,” but rather also reaches “incipient violations of the antitrust laws—conduct that, if left unrestrained, would grow into an antitrust violation in the foreseeable future,” as well as conduct that, while not prohibited by the Sherman or Clayton Acts, “violates the spirit or policies underlying those statutes.”³⁸ Based on that interpretation of its Section 5 authority, the Commission jumps to the conclusion that “it 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.”³⁹

But the Commission has never before interpreted its authority under the FTC Act in that manner, and one relevant factor in the Constitutional analysis is that “courts may examine the agency’s past interpretations of the relevant statute.”⁴⁰ Indeed, Congress passed the FTC Act in 1914, long after noncompetes were already being used widely in the American economy.

Tellingly, in the 109 years since, the Commission has *never once* interpreted that language of the FTC Act as permitting it to regulate noncompetes. Moreover, “[n]umerous courts have recognized the general rule that agreements not to compete, entered into in conjunction with the termination of employment or the sale of a business, do not offend the federal antitrust provisions if they are reasonable in duration and geographical limitation.”⁴¹ As the Seventh Circuit held over 40 years ago,

³⁷ *West Virginia v. EPA*, 142 S. Ct. at 2622-23 (Gorsuch, J., concurring).

³⁸ 88 Fed. Reg. 3499 (2023).

³⁹ *Id.*

⁴⁰ *West Virginia v. EPA*, 142 S. Ct. 2587, at 2623 (Gorsuch, J., concurring). Indeed, that the Commission has never before interpreted its authority under the FTC Act to regulate noncompetes is confirmed by the fact that one stated purpose of its January 9, 2020 public workshop was “to examine whether there is a sufficient legal basis . . . to promulgate a Commission Rule that would restrict the use of non-compete clauses in employer-employee employment contracts.” See <https://www.ftc.gov/news-events/events/2020/01/non-competes-workplace-examining-antitrust-consumer-protection-issues>. (Emphasis added.)

⁴¹ *Frackowiak v. Farmers Ins. Co.*, 411 F. Supp. 1309, 1318 (D. Kan. 1976) (citing *Day Cos. v. Patat*, 403 F.2d 792 (5th Cir. 1968); *Alders v. AFA Corp. of Florida*, 353 F. Supp. 654 (S.D.Fla.1973); *Bradford v. New York Times Co.*, 501 F.2d 51 (2d Cir. 1974)); see also *U.S. v. Empire Gas Corp.*, 537 F.2d 296, 307 (8th Cir. 1976); *Perceptron, Inc. v. Sensor Adaptive Machs., Inc.*, 221 F.3d 913, 919 (6th Cir. 2000); *Consultants & Designers, Inc. v. Butler Serv. Grp., Inc.*, 720 F.2d 1553, 1560-61 (11th Cir. 1983); *Snap-On Tools Corp. v. FTC*, 321 F.2d 825, 837 (7th Cir. 1963); *Energex Enters., Inc. v. Anthony*

“[l]egitimate reasons exist to uphold noncompetition covenants even though by nature they necessarily restrain trade to some degree. The recognized benefits of reasonably enforced noncompetition covenants are by now beyond question.”⁴²

Justice Gorsuch pointed out in his concurring opinion in *West Virginia v. EPA* that, “[w]hen an agency claims to have found a previously ‘unheralded power,’ its assertion generally warrants ‘a measure of skepticism.’”⁴³ Thus, the Supreme Court would look skeptically at the NPRM and conclude that Congress did not provide clear authorization in the FTC Act permitting the Commission to do so.⁴⁴

3. The regulation of noncompetes is a state law issue, and state legislatures should continue deliberating and debating the issue and enacting compromise legislation that is best for their constituencies.

As discussed above, noncompetes have been regulated by state law for over 200 years. Numerous states recently have enacted laws that balance protections for employees while preserving employer interests, and which reflect the nuanced concerns of citizens of those states. Tellingly, despite proposals in multiple states to ban noncompetes outright, including most recently in Illinois, Massachusetts, and Washington, D.C., no state has done so since 1890 and each state or city that began with such a proposal in the recent past has ended up with compromise legislation.

Attitudes toward restrictive covenants do not fit neatly in to a “conservative” or a “liberal” political litmus test, as there are competing interests recognized by those on both sides of the political aisle. On the one hand, noncompetes are one of the most effective tools to protect trade secrets and confidential information, customer relationships, and a business’s investment in itself and its employees. On the other hand, noncompetes can impede employee mobility, and thereby may conflict with fundamental notions of individual liberty in certain circumstances.

Forty-seven states and the District of Columbia permit post-employment noncompetition agreements to varying degrees, while only three states ban them.⁴⁵ Two

Doors, Inc., 250 F. Supp. 2d 1278, 1284 (D. Colo. 2003); *Baker’s Aid v. Hussmann Foodservice Co.*, 730 F. Supp. 1209, 1216 (E.D.N.Y. 1990); *Verson Wilkins Ltd. v. Allied Prods. Corp.*, 723 F. Supp. 1, 6 (N.D. Ill. 1989).

⁴² *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 265 (7th Cir. 1981).

⁴³ *West Virginia v. EPA*, 142 S. Ct. 2587, at 2623 (Gorsuch, J., concurring).

⁴⁴ Erik W. Weibust and Stuart M. Gerson, “FTC Authority to Ban Noncompetes Shaky After EPA Ruling,” *Law360* (July 14, 2022), available at <https://www.law360.com/articles/1511340/ftc-authority-to-ban-noncompetes-shaky-after-epa-ruling>.

⁴⁵ Beck Reed Riden 50-State Noncompete Survey, available at <https://beckreedriden.com/wp-content/uploads/2022/11/Noncompetes-50-State-Survey-Chart-20221121.pdf>; Epstein Becker Green 50-State Noncompete Survey, available at <https://www.ebglaw.com/50-State-Noncompete-Survey>.

of the states that ban them (North Dakota and Oklahoma) are among the most conservative politically, while the third, California, is among the most liberal politically. Notably, each of these states passed its noncompete ban in the 1800s, well before the FTC came into existence in 1914, and no state has done so since.

In recent years, examples of misuse of noncompetes have received wide media attention, which has led to an active debate across the country about the appropriate uses of noncompetes. As noted above, eleven states plus the District of Columbia have passed laws prohibiting the use and enforcement of noncompetes against “low wage” workers, defined variously as those earning compensation of anywhere from \$14.50 per hour to \$150,000 per year for most employees. Similarly, eight states plus the District of Columbia currently have statutory notice requirements.

But with one swipe of a regulatory pen, the Commission proposes to overrule choices the citizens of 47 states and the District of Columbia made *through their elected representatives*. Such an antidemocratic action should not be lightly taken. As Justice Louis Brandeis famously stated in his oft-cited dissenting opinion in *New State Ice Co. v. Liebmann*:

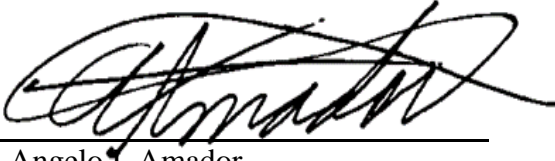
To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.⁴⁶

III. Conclusion

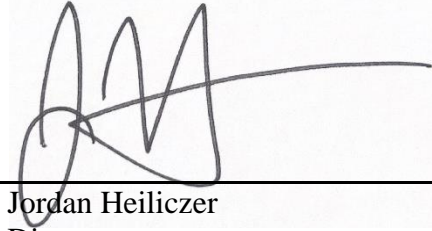
For the reasons set forth herein, the Law Center and the Association ask that the FTC withdraw the NPRM. We thank you for the opportunity to submit these comments and look forward to working with the FTC moving forward on such an important issue to the restaurant industry nationwide.

⁴⁶ 285 U.S. 262, 311 (1932).

Sincerely,



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