April 19, 2023

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Ms. April Tabor
Secretary of the Commission
United States Federal Trade Commission
600 Pennsylvania Avenue NW,
Suite CC– 5610 (Annex C),
Washington, DC 20580

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

Dear Ms. Tabor,

The New Civil Liberties Alliance ("NCLA") welcomes this opportunity to comment on the proposed *Non-Compete Clause Rule*, 88 Fed. Reg. 3,482 (Jan. 9, 2023) ("Proposed Rule"), by the United States Federal Trade Commission ("FTC" or the "Commission"). NCLA submits this comment in response to that notification of Proposed Rule and invitation to submit comments.

Because the Proposed Rule, as explained below in more detail, upends the laws of all 50 states to the extent they vary from it and explicitly invokes preemption, it far exceeds FTC's authority under the "Major Questions Doctrine" and, in any event, misbalances any reasonable definition of "unfairness" under the FTC Act. For these and other reasons stated below, FTC should not nationalize non-compete law when the Congress of the United States has not done so.

STATEMENT OF INTEREST

NCLA is a nonpartisan, nonprofit civil-rights organization and public-interest law firm devoted to defending constitutional freedoms. The administrative state poses an especially serious

threat to civil liberties. No other current aspect of American law denies more rights to more people. Although Americans still enjoy a shell of their Republic, a vastly different sort of government has developed within it—a type, in fact, that the Framers designed the Constitution to prevent. This unconstitutional state within the United States is the focus of NCLA's attention.

In this instance, NCLA takes issue with the FTC's attempt to federalize state contract law with virtually no attention to the various interests of the states and market participants developed under the law of contract over more than a hundred years. In particular, the Proposed Rule completely ignores the traditional legal analysis of non-competes based on factors such as length of time (sometimes called "temporal length"), subject matter, or geographic scope. Except for transfer of ownership transaction and franchisee relationships, it makes no allowance for the compensation of the worker or the trade and other secrets to which they are exposed in employment or any specialized training they may undergo solely because of the non-compete clause.

By its terms, the Proposed Rule affects 30 million workers spread across the entire country and subject to a myriad of contracts and under many different contract law requirements. Proposed Rule, 88 Fed. Reg. at 3,482-83, 3,515 (Overview and § 910.4 (preemption of state law)). This Proposed Rule is therefore subject to the Major Questions Doctrine, which the Supreme Court announced by name in *West Virginia v. EPA*, __ U.S. ___, 142 S. Ct. 2587 (2022). If the Proposed Rule is implemented, it will demonstrate the FTC Act has no intelligible principle to guide the agency and therefore violates the non-delegation doctrine. In addition, the requirement to reform existing contracts and inform workers that they cannot and will not be enforced is a taking of property as it seizes 100% of the value of the non-compete clause and transfers it to one party.

In addition to suing agencies to enforce constitutional limits on the exercise of administrative power, NCLA encourages agencies to curb their own unlawful exercise of such

power by establishing meaningful limitations on administrative rulemaking, adjudication, and enforcement. The courts are not the only government bodies with the duty to attend to the law. Agencies have a duty to follow the law and avoid unlawful modes of governance. All agencies must ensure that their modes of rulemaking, adjudication, and enforcement comply with the Administrative Procedure Act ("APA") and the Constitution.[1]

COMMENT

The FTC, through its policy and enforcement mechanisms, wields tremendous power over large swaths of America's economy. Its Bureau of Competition, along with the Department of Justice's Antitrust Division, monitors, investigates, and prosecutes alleged anticompetitive mergers and business practices. The Proposed Rule seeks to expand that power through a broad reading of regulatory power under Section 6(g) of the FTC Act. While the power to make regulations in support of the FTC Act's Section 5 purposes was upheld by the D.C. Circuit a half-century ago, it has not been used again, and never this broadly. *Nat'l Petrol. Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973). Critically, the Supreme Court has not upheld such power. At a time when longstanding positions of the FTC are being decisively rejected by the Supreme Court, regulation as sweeping as the Proposed Rule is ill-advised. *See Axon Enterprise, Inc. v. FTC*, __ U.S. __, Nos. 21-86, 21-1239, slip op. (Apr. 14, 2023) (unanimous decision against FTC's position that district courts did not have jurisdiction over constitutional challenges); *AMG Cap. Mgmt., LLC v. FTC*, __ U.S. __, 141 S. Ct. 1341 (2021) (unanimous decision against FTC power to obtain disgorgement).

There is no national non-compete law the FTC is enforcing. Instead, state contract law regulates non-competes and these laws, reflecting the conflicting interests, arguments, and

[1] The first signer of this this letter is also experienced in litigation against FTC enforcement actions and has litigated against the enforcement of non-compete clauses under state law.

widespread differences in labor markets throughout the country, differ widely. *See* John M. McAdams, *Non-Compete Agreements: A Review of the Literature*, SSRN 2 n.7 (Dec. 31, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3513639 (last visited Mar 15, 2023) (noting California and North Dakota do not enforce them at all and other states exempt technology workers (Hawaii), low-wage workers (Oregon and Washington), and health care workers (various states)). The interests protected by non-competes and the different standards they apply make a brief summary difficult, but some have endeavored to compile them. *See Employee Noncompetes: A State-by-State Survey*, Beck Reed Riden LLP (Feb. 11, 2023).[2]

The Proposed Rule's effect of upending this long-standing expression of Federalism bodes ill for its legality. For instance, OSHA's similar claim of power to regulate vaccine policy in every business in the United States against the state's traditional rule fared poorly. *NFIB v. DOL*, __ U.S. __, 142 S. Ct. 661 (2022) (finding likelihood of success on the merits that regulation was beyond the power of the agency). The reasons that regulation was struck down place a dark cloud over the Proposed Rule. First, that rule was the first time in its half-century of existence that the agency had tried such a thing. *Id.* at 666. Second, even though the statute was broad it was not meaningless and "workplace safety" had a meaning. *Id.* at 665. Third, the rule there was not tailored to a specific industry or circumstance but cut broadly across all swaths of the American economy. *Id.* at 666. Like the regulation proposed there, the one at issue here is "no 'everyday exercise of federal power.'" *Id.* at 665 (citations omitted).

Even the chimerical benefit of a nationwide rule is not obtained by the Proposed Rule because whole industries are exempt from FTC regulation and their rules and regulations are

[2] https://faircompetitionlaw.com/wp-content/uploads/2023/02/Noncompetes-50-State-Noncompete-Survey-Chart-20230211-updated.pdf

assigned to another agency under the FTC Act. *See FDIC Consumer Compliance Examination Manual* at VII-1.1 (June 2022) (explaining banking agencies enforce Section 5 of the FTC Act for agencies they supervise); *What the FTC Does*, Fed. Trade Comm'n, https://www.ftc.gov/news-events/media-resources/what-ftc-does

> The Federal Trade Commission enforces a variety of antitrust and consumer protection laws affecting virtually every area of commerce, with some exceptions concerning banks, insurance companies, non-profits, transportation and communications common carriers, air carriers, and some other entities.

What the FTC Does, *supra*.

The Proposed Rule is also an unbound ukase that any non-compete in any industry (except those not regulated by the FTC) is "unfair." The FTC is not bound under the FTC Act to only pursue violations of the Sherman and Clayton Acts and may address "unfair methods of competition" beyond the letter of those statutes, but it still must adopt and apply appropriate standards "to protect a respondent against abuse of power." *E.I du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 137 (2d Cir. 1984) (citing *FTC v. Sperry & Hutchinson Co*., 405 U.S. 233, 248 (1972)).

The FTC has not done that with the Proposed Rule. Instead in a few short years it has created conditions of upheaval that attempt to make any practice the majority of the FTC dislikes a violation of the FTC Act without any discernible standard. The Proposed Rule is more dangerous and more problematic because the FTC is rejecting all the restraints it put on itself and all the precedent on antitrust law the courts have crafted in reviewing FTC and Justice Department actions since the 1960s. On July 9, 2021 the FTC withdrew its 2015 bi-partisan statement on unfair methods of competition. *Statement of the Commission on the Withdrawal of the Statement of the Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC*

Act, Fed. Trade Comm'n (July 9, 2021).[3] This was replaced by a Policy Statement that abandoned both the "rule of reason" and the "consumer benefit" test substituting competitive affects that impacted "consumers, workers, or other market participants." *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, File No. P221202, at 9 (Nov. 10, 2022).[4]

The Proposed Rule, untethered to the consumer standard, the Clayton or Sherman Act or the clear precedent of antitrust law is not meaningfully tied to any statute passed by Congress, including the FTC Act. This fact poses three insuperable problems to the Proposed Rules and its ability to withstand judicial review. First, the Major Questions Doctrine, announced in *West Virginia v. EPA* but foreshadowed in earlier cases, precludes the Proposed Rule. The Proposed Rule by its terms upends the laws of most states, affects over one-fifth of the working population, and is a grand departure from all previous FTC practice. It constitutes one of those "extraordinary cases" where the "'history and the breadth of the authority that [the agency] has asserted' and the 'economic and political significance' of that assertion [of power], provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *West Virginia*, 142 S. Ct. at 2608 (second alteration added) (quoting *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 159 (2000)). In fact, the Proposed Rule is almost a one-for-one analog to EPA's claim that Section 111(d) of the Clean Air Act empowered it to "substantially restructure the American energy market." Here, the FTC claims Sections 6(g) and 5 of the FTC Act give it the power to "substantially restructure the American [employment] market." *Id*. at 2610. Similarly, like EPA there, the FTC here is claiming to "discover in a long-extant statute an unheralded power" that

[3]https://www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf

[4] https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf

represents a "transformative expansion of [its] regulatory authority." *Id.* (citations omitted). The FTC has not adopted the Proposed Rule in one market where, perhaps, the negative and positive effects of non-competes are well studied and known. It has not cabined the Proposed Rule to particular types of employees as state laws often do. In the teeth of Supreme Court cases strongly disapproving this type of novel assertion of power, the FTC has issued the Proposed Rule to grab as much of the American employment market as possible. This is the course most likely to fail in the Court.

The further the FTC strays from traditional antitrust principles, as it now has with both its Policy Statement and this Proposed Rule, the nearer it comes to traducing the non-delegation doctrine. If "unfairness" is transformed into an entirely subjective word that means whatever a majority of the FTC wants it to mean at any given moment, it ceases to be (if it ever was) an "intelligible principle" upon which congressional delegation can hang. *See Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (striking down prohibitions on transporting "hot oil" because there was no discernible principle of congressional delegation); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down poultry regulations as exceeding Congress's power to delegate). Notably, *Schechter Poultry* contrasted the National Industrial Recovery Act ("NIRA") with the case-by-case, industry-by-industry approach of the FTC as it then was. 295 U.S. at 532-33 ("What are 'UNFAIR METHODS OF COMPETITION' are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest.") (citations omitted); *Id.* at 552 (Cardozo, J., concurring) (FTC addresses "adequate appreciation of varying conditions"). In other words, FTC's Proposed Rule abandons the very judiciousness and industry-specific analysis that has led courts to uphold its actions in the past. The current Court has shown signs of taking the non-

delegation principles expressed by both the majority and concurrence and dissents in both 1935 cases seriously. *See Gundy v. United States*, __ U.S. __, 139 S. Ct. 2116 (2019) (plurality decision upholding criminal statute against non-delegation challenge with three dissents and one concurrence). Justice Gorsuch's citation and description of both *Schechter Poultry* and *Panama Refining Co.* puts in stark relief the jeopardy in which the Proposed Rule will find itself upon promulgation. *Id.* at 2137-38 (Gorsuch, J., dissenting) (approval of the reasoning of both cases). The Proposed Rule does not rely on any industry-by-industry analysis. It is not the product of any congressional disapproval by statute of non-compete clauses. It floats in the air unmoored to antitrust law as developed by the courts or adjudication of the issue as developed by the Commission. And it will fail to survive legal challenge as a direct result of these shortcomings.

Finally, contract rights are property rights. *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) ("Contract rights are a form of property rights and as such may be taken for a public purpose provided that just compensation is paid.") (citation omitted). The Proposed Rule is not forward-looking. It requires all current employers with a non-compete clause to rescind the non-compete and notify employees that it is null and void. Proposed Rule, 88 Fed. Reg. at 3,511-14 (§ 910.2(b)(1)(2)). FTC would thus take 100% of the value of the non-compete to the employer without compensation in violation of the Fifth Amendment to the Constitution's Takings Clause. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127-28 (1978) (citing cases where regulation had destroyed 100% of economic benefit was deemed a "taking"); *Cienega Gardens v. United States*, 331 F.3d 1319, 1329-30, 1334 (Fed. Cir. 2003) (regulation abrogating contract rights between private parties was a taking of property and compensable). It bears noting that in almost every state the breach of a non-compete agreement is an "irreparable" harm that allows an injunction. *See, e.g.*, *Ayco Co., L.P. v. Frisch*, 795 F. Supp. 2d 193, 205 (N.D.N.Y. 2011)

("[G]enerally when a party violates a non-compete clause, the resulting loss of client relationships and customer goodwill built up over the years constitutes irreparable harm." (citation omitted)). Because the abrogation of non-competes is nearly *per se* an irreparable harm, it is likely that the Proposed Rule would be almost immediately enjoined while its constitutionality gets determined.

CONCLUSION

FTC's ability to make rules at all under Section 6(g) has not been fully established. The Proposed Rule traduces the Major Questions Doctrine. Combined with FTC's recent Policy Statement, the Proposed Rule likely violates the Supreme Court's current non-delegation doctrine. Finally, the Proposed Rule exacts a taking against every employer against which it purports to inflict a rescission of contract. Because of the well-developed case law on the nature of non-competes, it is likely that the Proposed Rule would be immediately enjoined as inflicting irreparable harm.

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Thank you again for this opportunity to provide NCLA's views on this important issue. Should you have any questions, please contact John J. Vecchione at john.vecchione@ncla.legal.

Very truly yours,

/s/ *John J. Vecchione*

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