



April 19, 2023

BY ELECTRONIC SUBMISSION

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:

The National Retail Federation (“NRF”) submits these 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 NRF’s opposition to – and concerns with – the NPRM.

I. Interest of the Commenters

NRF, the world’s largest retail trade association, passionately advocates for the people, brands, policies, and ideas that help retail thrive. NRF empowers the industry that powers the economy. Retail is the nation’s largest private-sector employer, contributing \$3.9 trillion to annual GDP and supporting one in four U.S. jobs – 52 million working Americans. For over a century, NRF has been a voice for every retailer and every retail job, educating, inspiring, and communicating the powerful impact retail has on local communities and global economies. NRF regularly advocates for the interests of retailers, large and small, in a variety of forums, including before the legislative, executive, and judicial branches of government. Nearly all of NRF’s members would qualify as “employers” under the NPRM and therefore stand to be affected by it.

II. Factual and Legal Deficiencies in the NPRM

NRF’s primary opposition to the NPRM is based on the Commission’s lack of authority to regulate, much less ban, noncompetes, as Commissioner Wilson points out in her dissenting statement. The regulation of noncompetes is an issue of great political significance and, without clear congressional authorization, the Commission seeks to regulate a significant portion of the American economy, in an area that has been governed exclusively by state law for over 200 years. Moreover, the Commission’s primary concerns for taking such a drastic action – protection of lower-wage and lower-level workers as illustrated by the NPRM’s

“illustrative...examples”¹ – are simply not borne out in the retail industry in NRF’s experience. Rather, the retail industry uses noncompetes in fair and appropriate circumstances. Indeed, should the NPRM go into effect, there are likely to be unintended and unanticipated consequences that could harm employees and consumers in the retail industry rather than helping them, and could reduce competition rather than increasing it. The regulation of noncompetes is a state law issue, and state legislatures should continue debating the issue and enacting compromise legislation that is best for their constituencies, as they have done for years.

1. The Commission Lacks 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.”² 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, by 1914, four states had already passed legislation banning noncompetes –North Dakota (1865), California (1872), Oklahoma (1890), and Michigan (1905)³ – 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. Plainly, that is because, at the time Section 5 was enacted in 1914, the term “unfair” was not intended to include noncompetes, a key factor the Supreme Court will look to in analyzing the statute.

The Commission has no authority to regulate noncompetes, because Congress did not clearly authorize the Commission to do so, and the United States Supreme Court explained just last year in its decision in *West Virginia v. EPA* that clear Congressional authorization is required for agency actions that involve major questions such as this.⁴ Chief Justice Roberts wrote for the majority that, pursuant to the Major Questions Doctrine, “in certain extraordinary circumstances,

¹ The eight “illustrative ... examples” of what the Commission views as unfair noncompete use include: (1) security guards; (2) glass container manufacturing workers; (3) sandwich shop workers; (4) a steelmaker executive; (5) an office supply company sales representative; (6) national payday lender workers; (7) warehouse workers; and (8) an ophthalmologist. Notably, the steel company executive’s noncompete appears to be what courts refer to as a “janitor clause,” which purports to prohibit the worker from taking any job at a competitor, even as a janitor. Courts uniformly refuse to enforce such restrictions because they are overbroad and unfair. President Biden gave similar examples during his State of the Union address. While merely “illustrative,” the scope of this list is important because it highlights circumstances where the vast majority of courts and commentators would agree that noncompetes would be unfair and inappropriate. None of these “illustrative examples,” nor the academic literature the NPRM cites, focus analysis on workers, roles, or circumstances where noncompetes have been recognized as fair and appropriate to protect legitimate business interests. To turn a phrase, the Commission appears to be using the bad apples to regulate the oranges.

² 15 U.S.C. §45(a)(2).

³ Michigan repealed that ban in 1985, leaving California, North Dakota, and Oklahoma as the only three states that currently ban noncompetes legislatively.

⁴ *West Virginia, et al. v. Environmental Protection Agency, et al.*, 597 U.S. —, 142 S. Ct. 2587 (2022).

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.”⁵ 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.”⁶ 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 promulgate competition rules or to regulate noncompetes.

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, and outright ban all no-poaching agreements.”⁷ 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 politically significant than that.

This was not the first time that the federal government made it clear that the regulation of noncompetes is 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.⁸ 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.⁹ 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

⁵ *West Virginia v. EPA*, 142 S. Ct. 2587, at 2609.

⁶ *West Virginia v. EPA*, 142 S. Ct. 2587, at 2620 (Gorsuch, J., concurring).

⁷ <https://joebiden.com/empowerworkers/> (emphasis added).

⁸ https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Economic_Effects_and_Policy_Implications_MAR2016.pdf.

⁹ <https://obamawhitehouse.archives.gov/sites/default/files/competition/noncompetes-calltoaction-final.pdf>.

they are hired that if they leave the company, they can't work for another company in the same industry."¹⁰

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.”¹¹ Bills 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 2015,¹² including six such bills in 2022 alone.¹³ None has ever passed.

B. The Commission 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.’”¹⁴ 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

¹⁰ <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>).

¹¹ *West Virginia v. EPA*, 142 S. Ct. 2587, at 2621 (Gorsuch, J., concurring).

¹² 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.

¹³ 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.

¹⁴ *West Virginia v. EPA*, 142 S. Ct. 2587, at 2621 (Gorsuch, J., concurring).

per year.”¹⁵ 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 firms’ direct compliance costs and the costs of firms updating their contractual practices would total \$1.02 to \$1.77 billion.”¹⁶

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]educd 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.”¹⁷

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.” This factor is particularly apt in the noncompete context, as states have been regulating them for over 200 years.¹⁸ Indeed, in the past few years, more than three quarters of all states have considered enacting and/or amending their noncompete laws,¹⁹ and in 2022 alone, no fewer than 98 noncompete bills were introduced in at least 29 state legislatures.²⁰ Even the Commission acknowledges that “[s]tates have been particularly active in restricting non-compete clauses in recent years,” noting that:

¹⁵ 88 Fed. Reg. 3482 (Jan. 19, 2023).

¹⁶ 88 Fed. Reg. 3528 (Jan. 19, 2023).

¹⁷https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Economic_Effects_and_Policy_Implications_MAR2016.pdf.

¹⁸ See *Bradford v. New York Times Co.*, 501 F.2d 51 (2nd 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*, 133 Ohio St. 3d 356, 363 (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).”); see also Catherine L. Fisk, Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants In Employment, And The Rise Of Corporate Intellectual Property*, 1800–1920, 52 *Hastings L.J.* 441, 453–54 (2001).

¹⁹ “Why Are Fast Food Workers Signing Noncompete Agreements?,” *New York Times* (Sept. 29, 2021).

²⁰ Russell Beck, “Eight States with 39 Pending Noncompete Bills: Colorado is changing its noncompete law — again,” *Fair Competition Law* (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.²¹

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 noncompete agreements and recommended certain reforms to *state* laws.²²

Nevertheless, despite numerous attempts at the state level to ban noncompetes, no state has done so since 1890.²³ 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.²⁴ The process leading to passage of that law began with a proposal to ban noncompetes outright in the Commonwealth, but ended with 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 compensation limits and notice requirements.²⁵ 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,²⁶ but by the time it went into effect in 2022 it, too, had been watered down and merely included compensation thresholds and notice requirements.²⁷

²¹ 88 Fed. Reg. 3494 (Jan. 19, 2023).

²² <https://obamawhitehouse.archives.gov/sites/default/files/competition/noncompetes-calltoaction-final.pdf>.

²³ As noted above, the three states that ban noncompetes are California (1872), North Dakota (1865), and Oklahoma (1890). Michigan banned noncompetes in 1905, but later repealed the ban in 1985.

²⁴ Mass. Gen. Laws. Ch. 149, § 24L.

²⁵ 820 Ill. Comp. Stat. Ann. 90/1, *et seq.*; Peter A. 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>.

²⁶ Ban on Non-Compete Agreements Amendment Act of 2020, D.C. Act 23-563.

²⁷ Non-Compete Clarification Amendment Act of 2022, D.C. Law 24-175.

Thus, even the legislatures of several 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.²⁸ As Justice Gorsuch further warned in his concurring opinion, 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 nondelegation doctrines designed to ensure democratic accountability in their state lawmaking processes.”²⁹

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 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 Clearly Authorize the Commission 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.”³⁰ The plain language of Section 5 of the FTC Act, and its historical application, further confirm that to be the case.

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.³¹ The Commission has posited that Congress’s delegation to the Commission 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.”³² Based on that interpretation of its Section 5 authority, the Commission jumps to the conclusion that “it is an unfair method of competition for

²⁸ For example, two other notoriously employee-friendly states, Washington and Oregon, both enacted compromise legislation in the past decade. RCW 49.62, ORS 653.295. And several other states have enacted legislation affirmatively permitting, if not approving of, the use of reasonable noncompetes. *See, e.g.*, O.C.G.A. 13-8-50 (“The General Assembly finds that reasonable restrictive covenants contained in employment and commercial contracts serve the legitimate purpose of protecting legitimate business interests and creating an environment that is favorable to attracting commercial enterprises to Georgia and keeping existing businesses within the state.”).

²⁹ *West Virginia v. EPA*, 142 S. Ct. 2587, at 2618 (Gorsuch, J., concurring).

³⁰ 88 Fed. Reg. 3545 (2023).

³¹ *West Virginia v. EPA*, 142 S. Ct. 2587, at 2622-2623 (Gorsuch, J., concurring).

³² 88 Fed. Reg. 3499 (2023).

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.”³³

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.”³⁴ 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 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.”³⁵ As the Seventh Circuit held over 40 years ago, “[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.”³⁶

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.’”³⁷ Thus, it appears to us likely that 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.

2. Even if it had Authority to Ban Noncompetes Under its Section 18 Rulemaking Authority, the Commission’s Rationales for Doing So are not Representative of the Retail Industry and May Have Unintended and

³³ *Id.*

³⁴ *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.” (Emphasis added).

³⁵ *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 (2nd Cir. 1974)); see also, e.g., *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, 1560-1561 (11th Cir. 1983); *Snap-On Tools Corp. v. FTC*, 321 F.2d 825, 837 (7th Cir. 1963); *Energex Enters., Inc. v. Anthony Doors, Inc.*, 250 F. Supp. 2d 1278, 1284 (D. Colo. 2003); *Baker’s Aid, a Div. of M. Raubvogel Co. 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).

³⁶ *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 265 (7th Cir. 1981), cert. denied, 455 U.S. 921 (1982).

³⁷ *West Virginia v. EPA*, 142 S. Ct. 2587, at 2623 (Gorsuch, J., concurring).

Unanticipated Consequences That Could Harm Employees, Consumers, and Competition

The NPRM is based on five premises that are not representative of the retail industry in NRF's experience: (1) noncompetes are regularly used with low wage workers; (2) noncompetes reduce workers' wages; (3) noncompetes stifle new businesses and new ideas; (4) employers regularly coerce workers into signing noncompetes; and (5) noncompetes harm consumers. Indeed, the NPRM likely will have unintended and unanticipated consequences in that the increased costs associated with compliance with the NPRM undoubtedly will lead to the hiring of fewer employees and potentially even the destruction of smaller retailers, which will harm employees, consumers, and competition.

A. Noncompetes are not common with low wage workers in the retail industry; and even if they were, compensation thresholds would remedy that problem.

The Commission repeatedly suggests that noncompetes are used regularly with low wage workers such as hairstylists and warehouse workers. But that is simply not the case in the retail industry in NRF's experience.

While the public face of the retail industry may be the many cashiers, waitstaff, baggers, and others who serve as the backbone of the industry, retailers almost never use noncompetes with those types of employees. Indeed, NRF strongly discourages such practices and would not oppose a *state* legislative prohibition of them. But that is only one facet of the workforce in retail.

Behind the scenes, there are all manner of employees who have access to their employers' most sensitive business and technical information, as well as relationships with their employers' vendors and customers. These roles can range from senior executives to finance to marketing to buyers to information technology professionals to supply chain and logistics specialists. For example, supply chain and logistics specialist in the retail industry often have access to sensitive financial data, strategic information related to the storage and movement of goods, and extensive knowledge of unique technologies and automation assets used to maximize efficiencies. Finance executives similarly have access to sensitive commercial and strategic information, including about the retailer's vendors and customers, financial projections, profit margins, compensation structures, and the like that, if it were to fall into the hands of a competitor, could severely harm a retailer. Marketing executives often possess extensive knowledge of an employer's proprietary loyalty strategies, future marketing plans and strategies, and data analytics concerning the effectiveness of their existing and past strategies. Human resources professionals naturally are privy to sensitive information about hiring and retention strategies, including pay, benefits, and other compensation, as well as labor modeling and sensitive financial information relating to labor costs and the resultant impact on margins. Buyers have access to important vendor relationships and confidential information concerning discounts and markups. Information technology professionals have access to algorithms used to track customer buying patterns, website hits, and security measures, among many other things. And staff focused on research and development, business strategy, new ventures, and mergers and

acquisitions all possess a range of highly sensitive and highly confidential information about retailers' future plans.

If any such executive or senior employee were free to leave at will, cross the street, and immediately start working for a direct competitor 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. This is particularly true as retailers implement more workplace technologies that make work more efficient, yet open up employers to increased risks of misappropriation by employees. Increased remote work arrangements increase these risks as well. However, properly tailored noncompetes can protect against such inevitable harm.

One NRF member has 50,000 employees but only enters into noncompete agreements with those at Vice President and above, which amounts to approximately 95 employees (0.19%). These individuals are highly paid employees at the highest level of the company who have sensitive business information. Should such executives leave, the knowledge they take with them could be used to the immediate benefit of a direct competitor, and the detriment of the employer. Moreover, the employer narrowly tailors the language to apply only to those competitors who are in the same particular line of retail business, not all retailers. The employer also includes language whereby the employee will be paid their base salary for nine months if they are required to decline an offer with a direct competitor. Such a program is legal, eminently reasonable, and necessary.

Another NRF member did not utilize noncompete agreements until a senior leader departed and immediately began an identical role with a key competitor. This individual had intimate knowledge of the employer's plans for the area he led and was familiar with its broader strategy and vulnerabilities. This particular employer had made extensive investments in the leader's development, including customized coaching from a third party and ongoing cohort-based programs facilitated by senior leaders. This company determined that the nondisclosure covenant it had in place with the departing executive was insufficient to protect the caliber of information he possessed from informing the competitor's decision making. Moreover, the company's in-house attorneys found enforcement of non-solicitation covenants to be an insufficient alternative to a noncompete agreement because individuals could easily circumvent them by avoiding the types of communications that could later establish that the covenant has been violated. In sum, the employer determined that a noncompete agreement is the most effective tool for ensuring trade secrets and confidential information do not become available to competitors.

Regardless, several states have implemented compensation thresholds for noncompetes to address the Commission's concern about protecting low wage workers. 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 \$14.50 per hour to \$250,000 per year. 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 authority to regulate noncompetes under its Section 18 rulemaking authority, it could have taken a similar, more targeted approach. Had it done so, noncompetes would likely not be enforceable against most public-facing employees in the retail industry. Rather, they would be limited to the types of employees identified above, who could do serious harm to employers should they take trade secrets to a competitor (either intentionally or inadvertently) or trade on their employer's goodwill to steal customers. While non-solicitation covenants and trade secret laws provide some measure of relief, 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). Moreover, trade secret litigation is often far more costly than noncompete litigation, and larger, more established companies can use it to bully newer, smaller market entrants thereby harming competition.

Given the lack of conclusive evidence that noncompetes are regularly used with low wage workers in the retail industry, and the statutory protections already in place in several states (with more following the trend each year), the Commission's proposed ban on noncompetes is overkill.

B. There is no conclusive evidence that Noncompetes reduce workers' wages in the retail industry.

The Commission asserts that “[b]ecause non-compete clauses prevent workers from leaving jobs and decrease competition for workers, they lower wages for both workers who are subject to them as well as workers who are not” and “estimates that the proposed rule would increase American workers’ earnings between \$250 billion and \$296 billion per year.”³⁸

But this is simply not borne out in the retail industry in NRF's experience. To the contrary, employees are often asked to *voluntarily* sign noncompetes in connection with long term incentive 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.

C. Noncompetes do not stifle new businesses and ideas in the retail industry.

The Commission repeatedly asserts that imposing noncompetes “hampers innovation, and blocks entrepreneurs from starting new businesses, and suggests that, “[b]y ending this practice, the Commission's proposed rule would promote greater dynamism, innovation, and healthy

³⁸ 88 Fed. Reg. 2501 (Jan. 19, 2023).

competition.” But the Commission again cites no conclusive evidence to support this claim, and it is simply not borne out in the retail industry in NRF’s experience.

If noncompetes really did “hamper[] innovation” and “block[] entrepreneurs from starting new businesses,” then the only innovation in the United States would be happening in California, North Dakota, and Oklahoma. Clearly that is not the case, with many of the more recent hubs of innovation being located in states that permit the enforcement of noncompetes (e.g., Texas, Utah, Florida), and relatively little in the way of innovation or entrepreneurship coming from North Dakota or Oklahoma, or even outside of Silicon Valley in California.

Indeed, some of the most innovative retail companies today are headquartered in places such as Arkansas (Walmart, Dillard’s), Illinois (Ulta Beauty, Dyson), Minnesota (Target), New York (Warby Parker, Casper), North Carolina (Lowes), Ohio (Bath & Body Works, Abercrombie, Express, Victoria’s Secret, DSW), Oregon (Nike, Adidas), Washington State (Amazon, Starbucks, Nordstrom), and other states that permit noncompetes. And increasing numbers of employers leave California every year despite its prohibition on the use and enforcement of noncompetes.³⁹ The decision as to where to start or locate a company is far more dynamic than simply whether noncompetes are permissible.

D. There is no evidence that retail employers coerce employees into signing noncompetes; even if there were, a notice requirement would suffice.

The Commission repeatedly accuses employers of using their “outsized bargaining power” to “coerce” workers into signing noncompetes. That is not NRF’s experience in the retail industry, however, and again, that is something the NRF would discourage if it were.

While there undoubtedly are bad actors, the Commission has cited no evidence that employers 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, as discussed above. And it also ignores the enormous bargaining power employees have had since the economy was reopened after COVID-19 government-mandated shutdowns, which has been particularly acute in the retail industry where there are more jobs than available workers.⁴⁰

Nevertheless, several states have recently enacted laws to address this purported inequity by requiring advance notice of noncompetes, often weeks before they are to take effect or at the time an offer of employment is made, such that employees can make informed decisions before

³⁹ Joseph Vranich and Lee E. Ohanian, “Why Company Headquarters are Leaving California in Unprecedented Numbers,” *Hoover Institution* (Sept. 14, 2022), available at: https://www.hoover.org/sites/default/files/research/docs/21117-Ohanian-Vranich-4_0.pdf.

⁴⁰ See, e.g., <https://www.bls.gov/news.release/jolts.htm>; see also <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/consumer-business/2022-retail-industry-outlook.pdf> (“Currently, the biggest pain point for retailers is at the store level, and 74% [of 50 major retail executives surveyed] expect shortages in customer-facing positioning.”).

accepting new jobs and resigning from old ones. Specifically, eight states plus the District of Columbia currently have statutory notice requirements.⁴¹ 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.

E. Unintended consequences: noncompetes do not harm retail consumers, but banning them could.

Perhaps the least convincing of all of its claims is when the Commission asserts that the use of noncompetes “ultimately harms consumers; in markets with fewer new entrants and greater concentration, consumers can face higher prices—as seen in the health care sector.” The Commission has cited no conclusive evidence for this generalized assertion; as Commissioner Wilson points out, it relies entirely on a single study of the healthcare industry.⁴²

Indeed, if it were true, as the Commission contends, 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 retail industry where margins can be low, and any increased costs are necessarily passed along to consumers. Indeed, retailers 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. Alternatively, retailers may cut back on their workforces or even replace workers with technology, if necessary.⁴³

⁴¹ Colorado, Illinois, Maine, Massachusetts, New Hampshire, Oregon, Virginia, Washington, and the District of Columbia.

⁴² 88 Fed. Reg. 3505 (2023) (“The NPRM does not provide a basis to conclude that findings with respect to the market for physicians and healthcare are generalizable, instead acknowledging that no comparable evidence exists for other markets. Also, the study that considers the effects of non-compete clauses on concentration does not draw conclusions about prices; the NPRM’s conclusion that non-compete provisions lead to higher prices requires assumptions about a relationship between concentration and prices. Moreover, the NPRM omits studies showing that reducing the enforceability of non-compete restrictions leads to higher prices for consumers.”).

⁴³ See, *e.g.*, Nikaela Jacko Redd and Lutisha S. Vickerie, “The Rise and Fall of Brick and Mortar Retail: The Impact of Emerging Technologies and Executive Choices on Business Failure,” *Journal of International Business and Law* (Vol. 17, Iss. 1, Art. 7, Dec. 1, 2017), available at <https://scholarlycommons.law.hofstra.edu/jibl/vol17/iss1/7/>; Rodney R. Sides and Lupine Skelly, “The Retail Profitability Paradox,” *MIT Sloan Management Review* (June 22, 2021), available at: <https://sloanreview.mit.edu/article/the-retail-profitability-paradox/>.

3. The Regulation of Noncompetes Should be Left to the States

As discussed above, noncompetes have been regulated by state law for over 200 years. Numerous states have enacted laws over the past decade 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 has started there 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 noncompetes to varying degrees, while only three states ban them.⁴⁴ Two of those states (North Dakota and Oklahoma) are among the politically most conservative, while California is among the most liberal politically.⁴⁵ Notably, each of these states (as well as California) passed their noncompete bans in the 1800s, well before the FTC came into existence in 1914, and no state has done so since.⁴⁶

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. 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 the choices made by the citizens of 47 states and the District of Columbia *through their elected representatives*. Such an antidemocratic action should not be lightly taken. As Justice Louis Brandeis famously stated in his dissenting opinion in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932):

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

⁴⁴ See Epstein Becker Green 50-State Noncompete Survey, available at <https://www.ebglaw.com/50-State-Noncompete-Survey>; see also Beck Reed Riden 50-State Noncompete Survey, available at <https://beckreedriden.com/wp-content/uploads/2022/11/Noncompetes-50-State-Survey-Chart-20221121.pdf>.

⁴⁵ See N.D. Cent. Code § 9-08-06; Cal. Bus. & Prof. Code § 16600; OK. Stat. §15-2 19A.

⁴⁶ Michigan also passed legislation banning noncompetes in 1905, but rescinded that legislation in 1985.

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.

III. Conclusion

For the reasons set forth herein, the National Retail Federation asks that the Commission withdraw the NPRM. We thank you for the opportunity to submit these comments and look forward to working with the Commission moving forward on such an important issue to retailers nationwide.

Sincerely,



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**We would like to thank outside counsel for their assistance in drafting these comments:*



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