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The Honorable April Tabor
Secretary
Federal Trade Commission
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Submitted via <https://www.regulations.gov>

Re: Comments by the States of West Virginia, Utah, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Mississippi, Montana, Nebraska, Ohio, South Carolina, South Dakota, Tennessee, and Texas on the request for comment entitled *Non-Compete Clause Rule* (Docket No. 2023-00414)

Dear Secretary Tabor:

The States of West Virginia, Utah, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Mississippi, Montana, Nebraska, Ohio, South Carolina, South Dakota, Tennessee, and Texas appreciate the opportunity to submit the following comment in response to the Federal Trade Commission's proposed "Non-Compete Clause Rule," 88 Fed. Reg. 3482 (Jan. 19, 2023) (Proposed Rule).

Noncompete agreements present a notoriously difficult legal problem. Sometimes noncompetes advance important business interests—like protecting trade secrets and investments in technology and training—that ultimately serve consumers and grow the market. But they can also be abusive, particularly for lower-wage workers or in industries where the rationales for noncompetes are weaker and the consequences are sometimes crushing. Resolving this tension requires nuance and a precise regulatory pen. And that's how the States have been approaching this area of the law for centuries.

Federal courts have “long recognized the role of the States as laboratories for devising solutions to difficult legal problems.” *Oregon v. Ice*, 555 U.S. 160, 171 (2009). Finding the balance when it comes to noncompetes’ costs and benefits is no exception. The overwhelming majority of States allows these agreements in at least certain circumstances: An ocean of state-court decisions fleshes out the “when” and the “what kind.” And we’re now in an era of increased state legislative and executive attention to this issue, too. Over the past couple decades in particular, many States have been reevaluating how to address the same potential threats noncompetes can pose that the Commission leans on here—just without erasing this species of agreement altogether.

On behalf of our States, we write because noncompetes are not an issue a top-down categorical ban can solve. The Proposed Rule erases the lessons learned from thousands of state-law cases decided over hundreds of years in favor of a single economy-wide regulatory experiment. We moved away from that (quite literally) medieval mentality for good reason. We’ve also been right to recognize throughout our history that this subject is not predominantly a *federal* issue. State flexibility matters, especially in an area where tailored solutions can better reflect difficult-to-balance policy needs. Yet the Proposed Rule would jettison that nuance and state expertise in favor of a one-size-fits-all solution that cannot survive arbitrary-and-capricious review. Beyond that, this whole exercise rests on a shaky view of the Commission’s delegated powers.

As the primary enforcers of state antitrust and employment laws, we thus oppose the Proposed Rule on three fundamental bases. *First*, the Commission lacks statutory authority to issue this rule. *Second*, the rule would raise serious constitutional concerns. And *third*, the rule does not reflect reasoned decisionmaking. Particularly because the States have this issue well in hand, the Commission must suspend this unnecessary and unjustified effort.

Background

The Proposed Rule’s categorical ban on noncompetes would roll back over 300 years of legal thought. True, medieval England viewed noncompetes with extreme skepticism—the general labor shortages that followed the Great Plague combined with the medieval guild system’s limits on trade mobility made these agreements particularly damaging. See Charles E. Carpenter, *Validity of Contracts Not to Compete*, 76 U. PA. L. REV. 244 (1928); see also Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 4, 631-32 (1960) (explaining that the earliest noncompete cases involved restraints by “unethical” masters to keep people leaving apprenticeships from practicing their trade or entering guilds). But as the economy changed, so did courts’ view of noncompetes. See Blake, *supra*, at 637-38. Thus, with the watershed case of *Mitchel v. Reynolds*, 1 P. Wms. 181, 186 (1711), English courts began recognizing the legitimate purposes that voluntary noncompete agreements can serve.

American noncompete law took *Mitchel* and ran with it. Here, the States regulated noncompete agreements even before they became States, and they declined to reinvigate

medieval categorical bans. Instead, the case-by-case “reasonableness” approach that grew from *Mitchel* quickly became the foundation of state noncompete law. Blake, *supra*, at 630; *see, e.g., Pierce v. Fuller*, 8 Mass. 223, 226 (1811) (approving a noncompete and explaining that contracts “to restrain trade in particular places may be good, if executed for a sufficient and reasonable consideration”); *Beard v. Dennis*, 6 Ind. 200, 203 (1855) (collecting early noncompete cases and finding that noncompetes would be valid in Indiana unless “injurious to the public”); *Chappel v. Brockway*, 21 Wend. 157, 159 (N.Y. Sup. Ct. 1839) (“But there may be good reasons for allowing parties to contract for a limited restraint, as that a man will not exercise his trade or carry on business in a particular place, and when such reasons are shown, the contract will be upheld and enforced.”); *Appeal of McClurg*, 58 Pa. 51, 55 (1868) (holding a physician’s noncompete reasonable when it restricted him from practicing within a 12-mile radius).

So two through lines tie together the “legion” of American noncompete cases in the late nineteenth and early twentieth centuries. *See* Carpenter, *supra*, at 248 n.17. First, *state* courts took on this issue. And second, they largely recognized that the individual circumstances surrounding a particular noncompete decide whether it is a helpful or hurtful economic tool.

Little has changed with modern state-court jurisprudence: Assessing noncompetes remains an area of the law where the States are *most* active. A mid-century Ohio judge, for instance, found “so much authority” concerning noncompetes to all-but “drown[] him” in its “vast and vacillating” sea. *Arthur Murray Dance Studios of Cleveland v. Witter*, 105 N.E.2d 685, 687 (Ohio Ct. Com. Pl. 1952). One author in the 1980s speculated that “[t]here is probably no other area of the law in which there are more reported cases.” ANTHONY VALIULIS, COVENANTS NOT TO COMPETE: FORMS, TACTICS, AND THE LAW ix (1985). Twenty-first century state courts, too, have produced a “welter of cases” covering every conceivable noncompete issue. DONALD J. ASPELUND & JOAN E. BECKNER, § 1:1 *Overview*, in EMPLOYEE NONCOMPETITION LAW (Sept. 2022 update). And most of these decisions focus on a case-by-case analysis—the Proposed Rule itself notes that courts in all of the 47 States that allow some form of noncompetes “use a reasonableness inquiry to determine whether to enforce” them. 88 Fed. Reg. at 3494 (further explaining that most state courts adopt the Restatement (Second) of Contracts’s test that balances business interests with employee hardship and harm to the public).

In contrast to the States, the FTC has never done much with noncompetes. It has never issued a rule regarding noncompetes under any “unfair methods of competition” rulemaking authority. The one time it litigated one of its noncompete cases—60 years ago—the court held the noncompete did not violate the FTC Act’s “unfair methods of competition” provision. *Snap-On Tools Corp. v. FTC*, 321 F.2d 825, 837 (7th Cir. 1963). More generally, the Commission’s noncompete experience has been almost exclusively limited to contracts concerning business sales or mergers. Its first employer-employee noncompete experience came just a few months ago when it signed consent agreements with two glass-container manufacturers and a security company. And even that late-breaking experience is steps removed from the Proposed Rule, as the complaints in those cases focused on “the effects on employees,” not on competition writ large. 88 Fed. Reg. at 3542 (dissenting statement of Commissioner Christine S. Wilson). Indeed, none of the FTC’s

cases have ever found that “non-compete clauses harm competition in labor markets.” *Id.* So during the Commission’s century-plus tenure, regulating noncompetes has remained predominantly the States’ role.

The Proposed Rule would change that. In 2021, President Biden directed the FTC to use its “statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.” Executive Order No. 14036 of July 9, 2021: Promoting Competition in the American Economy, 86 Fed. Reg. 36,987, 36,992 (July 14, 2021), <https://tinyurl.com/2zy8wk22> (July 9, 2021). In January 2023, the FTC answered that call.

The Proposed Rule claims authority under Section 5(a)(1), which declares that “[u]nfair methods of competition in or affecting commerce ... are hereby declared unlawful,” 15 U.S.C. § 45(a)(1), and Section 6(g), which gives the FTC the additional “power” to “classify corporations and ... to make rules and regulations” enforcing the FTC Act, *id.* § 46(g).

Its substance is straightforwardly broad: The Proposed Rule would declare all noncompetes an unfair method of competition. It says that noncompetes are “unfair” under Section 5 of the FTC Act because they are “restrictive conduct that negatively affects competitive conditions” and because they are “exploitative and coercive at the time of contracting” and “at the time of the worker’s potential departure from the employer.” 88 Fed. Reg. at 3500. The Proposed Rule would thus make it “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 that the worker is subject to an enforceable non-compete clause.” *Id.* at 3535-36. Businesses must rescind all noncompetes within 180 days of final publication and notify any former or current worker bound by a noncompete within 45 days of rescission. *Id.*

The Proposed Rule defines a noncompete as any “contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker’s employment with the employer.” 88 Fed. Reg. at 3535-36. And it includes any contract term that has “the effect of” doing the same—for example, non-disclosure or trade secret agreements. *Id.* In keeping with this expansive approach, the proposal gives other terms like “employer” and “worker” their broadest possible definitions, too. *Id.* The Proposed Rule’s lone exception covers certain noncompetes connected to the sale of a business when the person bound by the noncompete is a substantial owner, defined as owning 25% or more of the business. *Id.* Otherwise, it returns to the long-abandoned world of categorical bans.

Discussion

I. The Proposed Rule Exceeds The FTC’s Delegated Powers.

A. Congress Did Not Give The FTC Power To Issue Rules Declaring Noncompetes An Unfair Method Of Competition.

The Proposed Rule can’t recover from its central flaw: The FTC is wrong that Sections 5 and 6(g) of the FTC Act empower it to act. 88 Fed. Reg. at 3482. The FTC lacks authority to promulgate *any* rules regarding unfair methods of competition, much less one banning an entire species of contract that courts have upheld in various contexts throughout the Act’s history. Instead, the Commission should continue using its traditional enforcement powers to police the Act’s prohibition on unfair methods of competition—the same way it has done things for more than 100 years.

1. Start with the FTC’s rulemaking authority generally. The agency’s responsibilities concerning “unfair methods of competition” and “unfair or deceptive acts or practices” are distinct grants of authority. Congress included substantive rulemaking power in only the second one.

The FTC was founded in 1914 as part of the federal government’s wider trust-busting mission. Originally, it focused only on rooting out “unfair methods of competition.” Congress concentrated on those methods because, in the words of one of the FTC Act’s main sponsors, they were “the chief means” larger businesses were “us[ing] to acquire a monopoly or partial control of the business field.” Randy Picker, *The FTC’s Non-Compete Ban Will Force Questions Over the Scope of its Authority*, PROMARKET (Jan. 11, 2023), <https://tinyurl.com/485h73a5>. Thus, when the FTC tried to regulate a deceptive “obesity cure,” the Supreme Court said “no.” The agency’s mandate was “curbing those whose unfair methods threatened to drive their competitors out of business”—not a broad directive to protect the public. *FTC v. Raladam Co.*, 283 U.S. 643, 650 (1931). So the FTC lobbied Congress for new powers. In 1938, Congress obliged by outlawing “unfair or deceptive acts or practices” and put the FTC in charge of enforcing the law. That new power also included a new, specific grant of authority to engage in rulemaking “with respect to unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 57a(a).

Nothing similar to that rulemaking power exists in Section 5, which reaches unfair methods of competition. It talks instead about the FTC’s adjudication authority. For example, Section 5(b) says the FTC “shall issue and serve ... a complaint” whenever it has a “reason to believe that any ... person, partnership, or corporation has been or is using any unfair method of competition” and that opening a proceeding would serve the public interest. 15 U.S.C. § 45(b). Section 5 also sets out procedures for hearings, agency orders, and reviewing hearing determinations. *Id.* § 45(b)-(d). And it establishes penalties for violating orders, including civil penalties and injunctions. *Id.* § 45(l). Nowhere does Section 5—or the rest of the Act—expressly grant authority to adopt competition rules.

So it is little surprise that the historic view of the FTC’s Section 5 powers was quite different from the Proposed Rule’s. For example, a House Report issued in 1957 highlighted the limited nature of the FTC’s powers; it described certain advisory rules about labeling and advertising and said that they “do not have the force and effect of law but are rather advisory interpretations as to what may constitute unfair methods of competition.” H.R. REP. NO. 85-986, at 2 n.1 (1957) (emphasis added). For more than a century, then, the agency fulfilled its task under Section 5 outside of rulemaking. Thomas W. Merrill & Kathryn T. Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 551 (2002). These alternate avenues include “formal powers to investigate,” “formal powers to prosecute,” and “informal authority to educate and work with business to facilitate compliance with the law.” MAUREEN K. OHLHAUSEN & JAMES RILL, U.S. CHAMBER OF COMMERCE, PUSHING THE LIMITS? A PRIMER ON FTC COMPETITION RULEMAKING 2 & n.2 (2021) (cleaned up), available at <https://tinyurl.com/6wrnhfy7>. In adjudication specifically, the FTC’s administrative law judges have developed significant expertise. *Id.* at 3. They conduct highly fact-bound analyses to ensure that each case’s outcome preserves consumer welfare and fulfills the purposes of the Act. *Id.* This process is central to preserving fair competition; it lets the FTC play an active role in shaping antitrust law while responding to changes in industries and the marketplace as a whole. *Id.* at 9-10.

Tellingly, after more than a century, the FTC has adopted only *one* substantive rule based strictly on competition principles—the FTC Men’s and Boy’s Tailored Clothing Rule, 16 C.F.R. § 412 (1968). But the Commission never enforced the rule, and the agency ultimately withdrew it. Notice of Rule Repeal, 59 Fed. Reg. 8,527 (1994). And over decades, “consistent with the statements in the FTC Act’s legislative history, Commission leadership testified before Congress that the Commission lacked substantive competition rulemaking authority.” 88 Fed. Reg. at 3544 (dissenting statement of Commissioner Christine S. Wilson).

For its about-face now, the Proposed Rule tries to unearth competition rulemaking power by looking to Section 6(g). The statute cannot bear this new weight. Section 6(g) gives the FTC power to “[f]rom time to time classify corporations and (except as provided in section 57a(a)(2) of this title) to make rules and regulations for the purpose of carrying out the provisions of this subchapter.” 15 U.S.C. § 46(g). But this authority is located in a section dealing primarily with the FTC’s procedural powers, such as how to investigate, how to classify corporations, and how to cover expenditures for cooperative arrangements. *Id.* § 46. Relatedly, Section 6(g) rulemaking lacks any concrete form of enforcement—another indicator that Congress intended it to be procedural rather than substantive. The Act’s text “included no sanction for violations of ... rules and regulations” adopted under Section 6(g), in contrast to the Commission’s power “to bring suit to prevent violations of the Act” and statutory “remedies for violations of the FTC’s cease-and-desist orders.” Merrill & Watts, *supra*, at 504. This difference “clearly suggests that Congress intended the rulemaking grant to serve as an adjunct to the FTC’s investigative duties, regarding which Congress had not given the agency the authority to act with the force of law.” *Id.* at 504-05. And all told, “the courts, Congress, the agency, and knowledgeable commentators” have

shared for years the view that Section 6(g)'s text does "not confer legislative rulemaking power on the FTC." *Id.* at 505-06.

To the extent a reviewing court may find legislative history helpful, Section 6(g)'s confirms the plain-text reading. When Congress passed the Act in 1914, it *rejected* proposals to confer authority on the FTC "to issue regulations defining more particularly unfair trade practices or unfair or oppressive competition"; the debates instead emphasized that the FTC "would not be exercising power of a legislative nature." David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 960-61 (1965) (cleaned up). So the Act's rulemaking provision was "confined essentially to matters of interpretation, procedure, and internal organization." *Id.*; *see also* Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 490-91 (1970) (the "legislative history [of Section 6(g)] suggests that this grant was intended to be no more than a routine grant of authority to promulgate procedural rules and did not confer any authority on the agency to use rulemaking to formulate and implement substantive policy").

Section 6(g) has remained relatively unchanged since the Act was adopted in 1914—the only difference came when the Magnuson-Moss Warranty Act of 1975 added the parenthetical phrase "except as provided in Section 57a(a)(2) of this title." Pub. L. 93-637, § 202(b), 88 Stat. 2183, 2198. That change did not expand Section 6(g) in the way the Proposed Rule would need it to, either. Magnuson-Moss specifically empowered the FTC to adopt rules about "unfair or deceptive acts or practices," and the first part of Section 57a(a)(2) explains that the Commission does not have any *other* authority in that area. 15 U.S.C. § 57a(a)(2). Then it explains that caveat does not "affect any authority of the Commission to prescribe rules ... with respect to unfair methods of competition." *Id.* Yet Magnuson-Moss left the FTC's authority over unfair methods of competition unchanged. So all Section 57a(a)(2) does is confirm that the agency's existing (procedural) rulemaking powers remained intact; it does not add to them. In other words, after Magnuson-Moss, the Commission had only the authority to regulate that it already had under Section 6(g).

Finally, the one case in the Act's 108-year history to hold that the FTC may issue unfair methods of competition rules—*National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973)—is not enough to sustain the Proposed Rule. *National Petroleum* concerned a rule that defined the failure to post octane rating numbers on gas pumps as "an unfair method of competition and an unfair or deceptive act or practice." *Id.* at 674. The D.C. Circuit upheld the rule, reasoning that Section 6's text did not expressly limit the Commission's rulemaking to procedural rules, nor did the FTC Act expressly limit the Commission's enforcement power to adjudication. *Id.* at 678. The court openly acknowledged that its brand of interpretation turned not on a specific textual delegation of powers, but on the Supreme Court's tendency at that time to "liberally" construe "broad grants of [agency] rule-making authority." *Id.* at 680-81. The court further reasoned that permitting substantive rulemaking would be fairer and more efficient than case-by-case adjudications. *Id.* at 681.

National Petroleum is an isolated deviation from the judicial, legislative, and scholarly consensus about the Act's scope. It was out of step with existing authority when it came down. As early as 1935, the Supreme Court had explained that Section 5 unfair methods of competition are "to be determined in particular instances, upon evidence, in the light of particular competitive conditions." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 532-33 (1935) (cleaned up). This holding makes sense only if Section 5 empowers the FTC to interpret, investigate, and enforce on a case-by-case basis, rather than through rulemaking. Similarly, the Seventh Circuit explained in 1949 that because Section 6(g)'s powers to "classify corporations" and "make rules and regulations" are "joined by the conjunction 'and,'" then the "latter power is related to the former"—or in other words, "the authority contained in Sec. [6(g)] must be limited to Sec. [6]." *United States v. Morton Salt Co.*, 174 F.2d 703, 708 (7th Cir. 1949), *rev'd on other grounds*, 338 U.S. 632 (1950). Early scholarship agreed, too. One professor, for example, wrote that "the Commission does not now possess the power to issue" rules "subject to judicial review and for the violation of which penalties will attach," in part because Section 6(g) does not provide for any "penalties for violations of such rules and regulations." Carl A. Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383, 457 (1964). Another agreed, lamenting that "[n]o suitable power to implement the antitrust laws by rules and regulations exists in any administrative agency," and that "the Commission seems to have construed [Section 6(g)] narrowly." Milton Katz, *The Consent Decree in Antitrust Administration*, 53 HARV. L. REV. 415, 430 & n.46 (1940).

Nor have any courts of appeals built on *National Petroleum* in the nearly half-century since it came down. Even the D.C. Circuit has never reaffirmed its holding. Instead, its reputation as an anomaly has only worsened with time—and modern approaches to textual interpretation help explain why. Twenty-five years ago, one scholar catalogued *National Petroleum*'s methodological flaws, concluding that a "textualist or intentionalist consideration of the statute involved would have yielded the conclusion that the FTC lacked power to issue such a rule." Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1071 (1998). Textually, Section 6(g) is "tucked away amidst a host of very minor, detailed powers," so when considered in light of the statute's structure and context, it is best read as "a 'housekeeping' provision conferring only the power to make rules governing procedure, not the power to issue substantive rules." *Id.* at 1072. And from an intentionalist frame, Congress passed the Act at a time "when statutes granting an agency power to issue legislative rules were rare," and "[i]t seems most unlikely that Congress would have intended to grant the Commission such an important power by using such casual and inconsequential language and with no relevant discussion" in the legislative history. *Id.* at 1071-73.

Other scholars explain that *National Petroleum* turned on "what amounted to a new canon: unless the legislative history reveals a clear intent to the contrary, courts should resolve any uncertainty about the scope of an agency's rulemaking authority in favor of finding a delegation." Merrill & Watts, *supra*, at 556-57. Another recently characterized the case as having an expired "'best if used by' date" because it is questionable whether its reasoning will "hold up today amid greater judicial skepticism about the regulatory state." William E. Kovacic, *The Durability of the*

Biden Administration's Competition Policy Reforms, 29 GEO. MASON L. REV. 945, 948 (2022). Still others have expressed similar doubts that modern courts would take the same interpretative approach to a new question of the Commission's rulemaking powers. *See, e.g.*, Aaron Nielsen, *D.C. Circuit Review—Reviewed: Was National Petroleum Refiners Association v. FTC Correctly Decided?*, YALE J. REG.: NOTICE & COMMENT (Jan. 10, 2020), <https://tinyurl.com/ye2x8a6h>.

Ultimately, the best indication that *National Petroleum's* approach would not withstand scrutiny today may be the Supreme Court's refusal just two years ago to afford *Chevron* deference to the FTC's view of a different statutory power. In *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021), the Court rejected an argument that Section 13(b)'s reference to a "permanent injunction" also included monetary relief because the Act provides a separate process to obtain monetary relief in Section 19. *Id.* at 1347, 1349. It was "highly unlikely" Congress would have implicitly authorized unlimited monetary relief in one section of the Act while "expressly authorizing conditioned and limited monetary relief" in another. *Id.* at 1349. Instead, interpreting the Act properly requires respecting its "coherent enforcement scheme." *Id.* In light of this textually tethered approach to the FTC's powers, it is hard to envision the Court adopting *National Petroleum's* view that "what isn't expressly forbidden is likely allowed." After all, it seems just as "highly unlikely" here that Congress would have implicitly granted power to regulate unfair methods of competition when it "expressly authoriz[ed]" that power for unfair or deceptive acts or practices in another section of the Act. *Id.* So the Supreme Court will almost certainly not give the Proposed Rule's approach to Section 6(g) the same welcome that the D.C. Circuit extended in 1973.

2. The Act would not support the Proposed Rule's assertion of power to adopt per se rules against noncompetes even if the FTC could issue substantive competition rules under Section 6(g). The Proposed Rule overreaches in its quest to outlaw virtually all noncompete agreements as anticompetitive—particularly where courts have repeatedly refused to sanction similar arguments for categorical bans throughout the FTC Act's history.

To begin, the federal case law supporting the Proposed Rule is exceptionally weak. The Proposed Rule quotes 17 cases involving the Sherman Antitrust Act and noncompetes. 88 Fed. Reg. at 3496. Every time a party argued in one of those cases that noncompetes were per se unlawful, the courts flatly rejected their claims. *Id.* In only two of them was a party even partially successful in challenging a *specific* noncompete. And of those, one of the two was decided in 1911, before the FTC Act was even passed. *Id.* The other is a 2015 California district court case holding that a too-large liquidated damages clause could be anticompetitive under the circumstances. *Id.* That's not a compelling place to begin when making a case that the FTC Act supports the Commission's extraordinary assertion of power to erase the vast majority of noncompete agreements nationwide.

Moving to Section 5 specifically does not bolster the Proposed Rule, either. The Commission litigated a case involving a noncompete just once, arguing that a corporation violated Section 5 by including a noncompete clause in contracts with its dealerships that said: "the Dealer

shall refrain from carrying on a similar business within the state or states in which he has been operating under this contract for one year from the date of termination.” *Snap-On Tools Corp.*, 321 F.2d at 827. But—consistent with the majority of States’ reasonableness approach to noncompetes—the Seventh Circuit emphasized that “[r]estrictive clauses of this kind *are legal* unless they are unreasonable as to time or geographic scope.” *Id.* at 837 (emphasis added). And thus, the court was “not prepared to say that [the noncompete clause] is a per se violation of the antitrust laws.” *Id.*

The Proposed Rule attempts to distinguish *Snap-On Tools* by saying it “concerned noncompetes used in the business-to-business context, not those used by an employer to restrict its workers.” 88 Fed. Reg. at 3538 n.11. But the FTC offers no explanation how this would make any difference. At most, the potential for greater abuse in an employer-employee context might make more individual noncompetes fail under the Seventh Circuit’s “time or geographic scope” test. But getting from that modest place to an all-out ban is a leap. It would be unreasonable to interpret Sections 5 and 6(g) as forbidding per se prohibitions on business-to-business noncompetes while at the same time allowing that drastic result for others.

It is also irrelevant that the FTC “did not argue for a per se rule” in *Snap-On Tools* “and so the issue was not litigated.” 88 Fed. Reg. at 3538 n.11. The Seventh Circuit understood the case-by-case versus per se distinction, and it rejected the latter. *Snap-On Tools Corp.*, 321 F.2d at 827. And it’s not like the Proposed Rule can rely on other decisions that have gone the other way on this issue. Though Section 5 case law concerning noncompetes is limited, *all* of it “endorses a fact-specific approach.” CONG. RSCH. SERV., THE FTC’S PROPOSED NON-COMPETE RULE 4 (2023), <https://tinyurl.com/mvb86xv2>. Take for instance the D.C. Circuit’s approach to the per se issue: It considered a noncompete clause in a distributorship contract stating that, after termination, distributors “could not for two years solicit as customers for any competitive products any former customers of petitioners’ product.” *Mytinger & Casselberry, Inc. v. FTC*, 301 F.2d 534, 536 (D.C. Cir. 1962). Just as the Seventh Circuit did, the court declined to adopt a per se rule against noncompete agreements, but it instead held that “[w]hat is an unfair method or practice within the contemplation of this section is a matter of judgment.” *Id.* at 539.

Until now, even the Commission agreed. A couple years before *Snap-On Tools* and *Mytinger* were decided, the FTC had examined an agreement “prohibit[ing] a dealer from engaging in a similar business for a period of one year after termination of its agreement.” *In the Matter of Rural Gas Serv., Inc.*, 59 F.T.C. 912, at *6 (1961). The Commission reasoned that “these covenants do not appear unreasonable” and thus “we cannot find that they violate Section 5.” A couple years later it announced in even plainer terms that noncompetes do not per se violate the Act. In *In re Carvel Corp.*, the FTC considered allegations that a corporation had violated Section 5 because of a franchisee contract clause that required franchisees “[t]o refrain from entering into a similar business within three years [and three miles of the prior location] after termination of the franchise.” 68 F.T.C. 128, at *32, *34 (1965). The FTC concluded that “[r]estrictive clauses of this type *are not illegal per se.*” *Id.* at *46 (cleaned up; emphasis added). The proper question under the Act is “whether they are unreasonable as to time or geographic scope.” *Id.* And under

that case-specific approach, the FTC *upheld* the noncompete as reasonable and, therefore, legal. *Id.* at *47.

It makes sense that neither courts nor the FTC itself have backtracked on these foundational decisions over the past six decades. Practically speaking, rejecting per se rules against noncompete agreements makes economic sense because, as discussed more below in Part III, noncompetes can have important benefits. “[E]conomic science and empirical evidence strongly suggest” as much—noncompetes can “overcome a market failure that would otherwise occur by ensuring that employers can capture the benefits of investing in the general human capital of their employees.” Alan J. Meese, *Don’t Abolish Employee Noncompete Agreements*, 57 WAKE FOREST L. REV. 631, 678 (2022). Fixing that market failure through properly tailored noncompetes can, in turn, “increase employee productivity and thus boost inter-brand competition.” *Id.* And these and other benefits explain why “courts have repeatedly and properly treated analogous effects as cognizable benefits for the purpose of assessing agreements under Section 1 of the Sherman Act and Section 5 of the FTC Act.” *Id.* (cleaned up). In other words—even recognizing that *some* noncompetes have great potential for abuse—the idea that these agreements are *always* noncompetitive flies in the face of market analysis and hundreds of years of judicial experience.

Finally, at a minimum, the Proposed Rule would not be able to preempt contrary state law because a blanket noncompete ban rests on such shaky statutory ground. The Proposed Rule assumes broad preemptive force: It “provide[s] that the Rule shall supersede any state statute, regulation, order, or interpretation to the extent that such statute, regulation, order, or interpretation is inconsistent with the Rule.” 88 Fed. Reg. at 3515. But FTC Act preemption has limits under the best of circumstances. The Act “does not, by its own force, pre-empt state prohibitions of unfair and deceptive trade practices,” so “state laws and regulations are not [automatically] preempted.” *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 423 n.5 (1992) (Stevens, J., dissenting). Nor did Congress intend for “the Commission’s regulations to ‘occupy the field’”; FTC rules have only that “preemptive effect which flows naturally from a repugnancy between the Commission’s valid enactments and state laws.” *Am. Fin. Servs. Ass’n v. FTC*, 767 F.2d 957, 989-90 (D.C. Cir. 1985). And under *these* circumstances, the case for preemption is especially weak because federal rules can preempt state law only when courts are “*certain* that Congress has conferred [such] authority on the agency.” *New York v. FERC*, 535 U.S. 1, 18 (2002) (emphasis added). “The Supremacy Clause grants supreme status only to the Laws of the United States”; federal regulations issued without clear congressional authority lack that force of law necessary to trigger preemption. *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1679 (2019) (cleaned up). Here, the FTC’s authority to finalize the Proposed Rule is anything but clear. It’s nonexistent. The Commission should set aside the Proposed Rule’s preemption provision or face the serious risk that it (along with the rest of the rule) will fail legal review.

B. Clear-Statement Canons of Construction Confirm That Congress Did Not Give The FTC Power To Ban Noncompetes.

If the plain text left any doubt about the FTC’s power to issue the Proposed Rule, the federalism and major questions clear-statement canons would put it to rest.

The Commission may seek refuge in *Chevron* deference, but *Chevron* applies only when a statute is ambiguous: “If the intent of Congress is clear, that is the end of the matter.” *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). And that threshold inquiry “employ[s]” all the “traditional tools of statutory construction.” *Id.* at 843 n.9. The Supreme Court confirmed as much two years ago in *AMG*, when it refused to defer to the Commission’s interpretation because the FTC Act’s overall structure refuted it. 141 S. Ct. at 1347. There, the issue was “just” whether Congress had implicitly authorized unlimited monetary relief in one section of the Act while “expressly authorizing *conditioned* and *limited* monetary relief” in another. *Id.* at 1349. Here, the question is whether Congress silently greenlighted power to erase the States’ longstanding regulatory power in an area of contract law that will have significant consequences across the entire labor market and economy. For power like *that*, the “traditional tools of statutory construction” require clear evidence that Congress meant the agency to step in. Nothing in the statute reaches that level.

First, take the federalism canon. The Proposed Rule would inappropriately upend the traditional division of powers between the federal government and the States. Respect for our federalist system’s balance requires “certain[ty] of Congress’ intent before finding that federal law overrides” state law “in areas traditionally regulated by the States.” *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (cleaned up). So courts do not assume that Congress exercises its “extraordinary power” to preempt state law implicitly. *Id.* Instead, courts look for a “clear statement” before concluding that Congress meant to alter the “usual constitutional balance of federal and state powers.” *Bond v. United States*, 572 U.S. 844, 858 (2014) (cleaned up). Put differently, Congress must use “exceedingly clear language.” *U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837, 1849-50 (2020).

The Proposed Rule runs smack into the federalism canon with no clear statement in sight. The Commission cannot avoid the fact that States have *always* been the primary regulators of noncompetes. As noted above, state courts have issued thousands upon thousands of cases examining noncompetes from every angle. And the content and sheer amount of that authority shows how States largely treat nuanced, fact-specific analysis as the lynchpin for protecting the important interests at stake. So for hundreds of years before the Commission decided to take up the task, state courts have been grappling with all of the same questions the Proposed Rule raises—questions of fairness, economic health, contract abuse, business interests, and the public good.

State legislatures are highly active in this space, too. *See, e.g.*, Russell Beck, *Employee Noncompetes: A State-by-State Survey*, BECK REED RIDEN LLP (Nov. 21, 2022), <https://tinyurl.com/b8ujvk65> (cataloging how States treat many noncompete issues). Legislative

debates over time highlight the many ways that States have weighed the competing policy interests at stake. Texas’s courts and legislature engaged in a dynamic dialogue in the 1990s, for instance, resulting in liberalizing the State’s treatment of noncompetes in hopes of spurred economic growth and innovation. *See* Charles M.R. Vethan, *The Development of the Texas Non-Compete: A Tortured History*, 45 TEX. J. BUS. L. 169, 188 (Spring 2013). Other state legislatures have softened or eliminated once-categorical bans. In the 1950s, for example, Florida’s legislature tempered its “extreme distaste” for noncompetes. Kendall B. Coffey & Thomas F. Nealon, III, *Noncompete Agreements under Florida Law: A Retrospective and a Requiem*, 19 FLA. STATE L. REV. 4, 1105, 1106 (1992). So too for Michigan. *See Bristol Window and Door, Inc. v. Hoogenstyn*, 650 N.W.2d 670, 679 (Mich. Ct. App. 2002) (noting that Michigan’s legislature had reinstated the common law’s case-by-case approach in 1985 when it repealed Michigan’s 1905 categorical ban). And even for the three States that have long functionally barred noncompetes—California, North Dakota, and Oklahoma, 88 Fed. Reg. at 3494—some exceptions exist. *See, e.g., Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 290-92 (Cal. 2008) (discussing statutory and court-created exceptions to California’s 1872 ban).

As the Proposed Rule acknowledges, legislative debate over noncompetes also abounds within the majority of States that allow them. Eleven of those 47 States limit noncompetes for low-wage workers. 88 Fed. Reg. at 3494 n.149 (Colorado, Illinois, Maine, Maryland, Massachusetts, Nevada, New Hampshire, Oregon, Rhode Island, Virginia, and Washington; plus the District of Columbia). Several States ban or limit noncompetes for certain industries or categories of workers. Nevada, for example, bans noncompetes for all hourly workers, and most States ban or limit noncompetes for “one or two occupations (most commonly, physicians).” *Id.* at 3494 & n.149. West Virginia falls in that latter category; it declares physician noncompetes void if they last longer than a year, extend more than 30 miles, or are applied against a fired employee. W. VA. CODE § 47-11E-2(a)-(b). Some States also enhance civil penalties for violating noncompete laws and are clamping down on the consideration required to support a valid noncompete agreement. *See* Andrew Reed, “*Know What’s Below, Call Before You Dig*”: *New State-Law Non-Compete Traps May Lie Beneath the Surface*, LOCKE LORD LLP (July 2021), <https://tinyurl.com/4fuk9f9e>.

Tellingly, much of this action is *recent*. So the Commission could not plausibly conclude that the States have abandoned the field. *See, e.g.,* 88 Fed. Reg. at 3494 (“States have been particularly active in restricting non-compete clauses in recent years.”). Since 2011, 29 States and the District of Columbia have passed bills changing their noncompete laws. Russel Beck, *The Changing Landscape of Trade Secrets Laws and Noncompete Laws Around the Country*, FAIR COMPETITION L., <https://tinyurl.com/2b684ynr> (last updated Feb. 12, 2023). These laws include additional restrictions on noncompetes in certain industries, heightened notice requirements for incoming employees, statutory limits on noncompete length, and more. 88 Fed. Reg. at 3494. And for every bill signed into law, many more are “being debated in statehouses every day.” Dawn Mertineit, *Non-Compete Regulation Should Be Left to the States, Not the FTC*, BLOOMBERG L. (Feb. 3, 2023, 4:00 a.m.), <https://tinyurl.com/ym9x2vkh>. As of February 6, 2023, there were 42 noncompete bills pending in 18 state houses across the country, with more expected in coming

months. Russell Beck, *42 noncompete bills in 18 states—and 3 federal bills*, JD SUPRA (Feb. 6, 2023), <https://tinyurl.com/yuy4c9cv>. These bills include a variety of proposals largely tailored to the same sort of concerns about exploiting low-wage and other workers that the Proposed Rule points to when seeking to justify its categorical ban.

State enforcement action has also kicked up in recent years. State attorneys general across the country are increasingly targeting abusive noncompetes, “adding legal muscle to the political and economic debate.” Conor Dougherty, *Illinois Wields New Power to Challenge Noncompete Agreements*, N.Y. TIMES (Oct. 25, 2017), <https://tinyurl.com/45s74bvw>. In 2018, for example, nearly a dozen state attorneys general investigated noncompetes used by eight fast food companies. Press Release, Office of the New Jersey Attorney General, AG Grewal Seeks Records from Eight Fast Food Companies About Use of Employee Non-Compete Agreements (July 9, 2018), <https://tinyurl.com/2kxmt2fy>. Other examples are easy to find. *See, e.g., New York State Attorney General investigating WeWork, sources say*, CNBC (Nov. 19, 2019, 7:25 a.m.), <https://tinyurl.com/ye2ywkzv> (describing state attorney general action concerning potential noncompete law violations).

In fact, until the lead up to the Proposed Rule, even the White House agreed that addressing noncompete abuse is a state matter. In early 2016, then-Vice President Biden noted that the White House would soon be “putting forward a specific set of best practices for *state reforms*” in this area. Vice President Biden 44, FACEBOOK (May 5, 2016), <https://tinyurl.com/3wy44jts> (emphasis added). When President Obama’s *state* “call to action” was issued a few months later, it praised “[s]tate legislators across the country [that] have drafted legislation and passed laws to curtail abusive and unfair” noncompetes, and asked “*state* policymakers” to keep working to address concerns for vulnerable workers. *State Call to Action on Non-Compete Agreements*, WHITE HOUSE (Oct. 25, 2016), <https://tinyurl.com/bdkcsjrd> (emphases added). The federal government—and the FTC in particular—got no mention.

In short, noncompetes have always been within the States’ traditional zone of authority, and they remain there today.

So given all this, courts will not assume lightly that Congress used its “extraordinary” preemption power, *Gregory*, 501 U.S. at 460, to let the Commission supersede the mountain of state case law and statutes that govern noncompetes. Yet no clear statement in the FTC Act shows that Congress meant to allow the Commission to ban outright agreements that 47 States allow. As explained already, Congress didn’t even include a clear statement that it intended for the FTC to adopt *any* rules related to unfair methods of competition. No Section 5 analogue exists, for example, to Section 18’s specific grant of authority to engage in rulemaking “with respect to unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 57a(a). The quest is even more futile for clear evidence that Congress intended to turn over to the Commission an area of law so pervasively connected with the States as noncompetes. This lack of clear intent is fatal to the Proposed Rule.

Second, the Commission’s novel interpretation of Section 5(a) also falters under the major questions doctrine. The Proposed Rule devotes less than half a paragraph to the major questions doctrine and makes only the conclusory argument that it does not apply because the Commission allegedly has “clear statutory authority.” 88 Fed. Reg. at 3538. The Commission should look again.

Last Term the Supreme Court confirmed that the major questions doctrine operates as a distinct constraint on agency power. *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). The doctrine not only protects important constitutional values like the separation of powers, due process, “self-government, equality, [and] fair notice,” but (like the federalism canon) it also prevents federal agencies from “intruding on powers reserved to the States” without clear authorization. *Id.* at 2621 (Gorsuch, J., concurring). If finalized, the Proposed Rule will be as vulnerable as other recent executive actions in which courts “greet[ed] assertions of extravagant statutory power over the national economy” with “skepticism.” *Id.* at 2609 (majority op.) (cleaned up).

Whether to ban noncompetes is a major question. For one thing, just as the EPA did, the Commission purports to “discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority.” *West Virginia*, 142 S. Ct. at 2610 (cleaned up). As already explained, the Commission has never applied its regulatory power in this way. *See Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (rejecting the CDC’s eviction moratorium, in part, by looking at the history of the CDC’s use of the provision at issue). Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.” *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001). So the fact that it has taken until now for the FTC to discover this broad-ranging power strongly suggests that Congress had nothing to do with the “alter[ation].”

Similarly, the Proposed Rule qualifies as an exercise of “vast economic and political significance.” *West Virginia*, 142 S. Ct. at 2605 (cleaned up). As to political heft, “for centuries” state courts “have stated repeatedly that covenants-not-to-compete implicate important public-policy interests.” *Maw v. Advanced Clinical Commc’ns, Inc.*, 846 A.2d 604, 615 (N.J. 2004) (Zazzali, J., dissenting). Indeed, “[v]irtually every court that has addressed the question of whether enforcement of noncompetition agreements is a matter of fundamental or important state policy” answered it “affirmatively.” *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 680 (Tex. 1990). And adding to that, the FTC’s “discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself,” *West Virginia*, 142 S. Ct. at 2610: Major bills addressing noncompetes have been introduced annually in Congress since at least 2015—amid intense debate. *See, e.g.*, Diego Areas Munhoz, *FTC Noncompete Proposal Breathes New Life Into Lawmaker Efforts*, BLOOMBERG L. (Jan. 31, 2023, 10:30 a.m.), <https://tinyurl.com/8e3rejd3j>; Clifford R. Atlas et al., *Bipartisan Bill to Ban Most Non-Compete Agreements Reintroduced in U.S. Senate*, NAT’L L. REV. (Feb. 3, 2023), <https://tinyurl.com/23rvf8mm>; Clifford R. Atlas et al., *U.S. Senator Reignites Federal Non-Compete Reform Efforts With Bill Aimed At Protecting Low-Wage Employees*, NAT’L L. REV. (Feb. 18, 2019), <https://tinyurl.com/y242z9rd>. In light of all that, “there is every reason to hesitate

before concluding that Congress meant to confer on [the FTC] the authority it claims.” *West Virginia*, 142 S. Ct. at 2610.

On the economic side, the Proposed Rule is “no everyday exercise of federal power.” *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 665, 665 (2022) (cleaned up). The FTC is preparing to issue a rule that will affect tens of millions of workers and cause hundreds of billions of dollars’ worth of economic impact. The Commission’s own numbers put flesh on the bones: “49.4% of firms or establishments use non-compete clauses”—meaning 2.94 million small firms, comprising 3.08 million small establishments, and affecting 30 million employees annually. 88 Fed. Reg. at 3532. And the Commission expects \$250 to \$300 billion in increased wages and \$150 billion in reduced consumer prices. *Id.* at 3485, 3508. Economic consequences like that put the Proposed Rule on all fours with OSHA’s decision to “order[] 84 million Americans to either obtain a COVID-19 vaccine or undergo weekly medical testing at their own expense.” *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 665. Or with EPA’s choice to issue a rule that would have “require[d] the retirement of dozens of coal-fired plants, and eliminate[d] tens of thousands of jobs across various sectors.” *West Virginia*, 142 S. Ct. at 2604 (cleaned up). Or with the CDC’s assertion that it could pause evictions in a way that implicated “80% of the country” and “between 6 and 17 million tenants,” and that had “nearly \$50 billion” worth of “economic impact.” *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489.

Lastly, looking beyond “the sheer scope of the [FTC’s] claimed authority,” the Proposed Rule is also poised to “intrude[] into an area that is the particular domain of state law.” *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489. As Commissioner Wilson’s dissent points out, the Proposed Rule would “prohibit[] conduct 47 states have chosen to allow.” 88 Fed. Reg. at 3540-41. So even if a reviewing court does not strike the rule down under the federalism canon, the concerns surrounding that doctrine also strengthen the case that the Commission is walking on major-questions ground. After all, had Congress wanted “to significantly alter” the federal government’s power “over private property” in the form of noncompetes, it would have done so using “exceedingly clear language.” *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489; *see also West Virginia*, 142 S. Ct. at 2620-21 (Gorsuch, J., concurring) (explaining that the major questions doctrine protects against agency “intru[sions] into an area that is the particular domain of state law”). A “colorable” or “merely plausible textual basis” is not enough. *West Virginia*, 142 S. Ct. at 2609-10. Because the Proposed Rule lacks “clear congressional authorization for the power it claims,” *id.* at 2609 (cleaned up), Congress reserved this major question for itself.

II. The Proposed Rule Violates The Constitution.

The Constitution also has something to say about the Proposed Rule’s overreaching scope.

For one thing, serious questions arise as to whether Congress *could* delegate power of this magnitude to the FTC. The same considerations that animate the federalism clear-statement canon call the Proposed Rule into question on Tenth Amendment grounds. Our federalist system of government takes seriously the idea that the States are closest to the people, and that variation

flowing from the laboratories of democracy is a feature, not a bug. *E.g.*, *Gregory*, 501 U.S. at 458 (“This federalist structure . . . assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society.”). But the Proposed Rule would erase centuries of state-level innovation and tailoring in an area of the law that affects 30 million employees and half of American companies. 88 Fed. Reg. at 3532. The power to regulate this space is *state* power that Congress not only did not transfer to the Commission, but very likely could not have had it wanted to.

Next, if the FTC is right that Congress gave it this broad power, then the FTC Act would offend the non-delegation doctrine. This doctrine requires Congress to provide sufficient guidance to agencies how to exercise their delegated power, as only Congress can make “fundamental policy decisions.” *Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 687 (Rehnquist, J., concurring in the judgment). Non-delegation is “vital to the integrity and maintenance” of our constitutional structure. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1982). So for Congress to delegate its power, there must be “specific restrictions” in the statute that “meaningfully constrain[]” the agency’s discretion. *Touby v. United States*, 500 U.S. 160, 166-67 (1991). Congress cannot give “literally no guidance” or be too vague when conferring power. *Whitman*, 531 U.S. at 474. Instead, Congress must at least provide “an intelligible principle to which [the agency] is directed to conform.” *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (Gorsuch, J., dissenting) (cleaned up). And while agencies can fill in statutory gaps with “judgments of degree,” *Whitman*, 531 U.S. at 475 (cleaned up), they cannot set “the criteria against which to measure” their own decisions, *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting). If Congress wants an agency to make policy, the directive to do so must be “sufficiently definite and precise.” *Yakus v. United States*, 321 U.S. 414, 426 (1944). And the level of discretion allowed “varies according to the scope of the power”—when delegations “affect the entire national economy,” the Constitution demands “substantial” guidance. *Whitman*, 531 U.S. at 475.

Any attempt to implement the Proposed Rule would violate these principles. Banning noncompete agreements is a straightforward exercise of legislative power. It is the “province of the legislature to prescribe general rules for the governance of society,” *Fletcher v. Peck*, 10 U.S. 87, 136 (1810), yet the Proposed Rule would do just that by redefining the rights of workers and companies nationwide. The Proposed Rule—purporting to affect hundreds of thousands of businesses, tens of millions of workers, and hundreds of billions of dollars—certainly looks and acts like an exercise of legislative power. Indeed, as explained above, Congress’s many attempts to pass a federal noncompete ban show that it thinks this is a legislative question, too. *See also* Russell Beck, *A Brief History of Noncompete Regulation*, FAIR COMPETITION L. (Oct. 11, 2021), <https://tinyurl.com/95txv3h7> (Oct. 11, 2021). Congress has introduced new bills aimed at curbing noncompetes even in the past several *weeks*. Steven J. Pearlman et al., *Legislation Seeking to Ban Non-Competes Reintroduced in Congress*, PROSKAUER ROSE LLP: L. AND THE WORKPLACE (Feb. 10, 2023), <https://tinyurl.com/bdeum7h3>. In short, whether employers and employees may sign noncompetes is one of the “fundamental policy decisions” that Congress has no business outsourcing.

And if the Proposed Rule is right that the FTC Act’s general rulemaking authority includes power to ban noncompetes, then Congress gave the agency functionally no limits to constrain that power. If concerns about general power imbalances between employers and employees are enough to make a whole category of employment contracts unfair methods of competition, for example, where does that reasoning end? The same could be said of almost any aspect of any employment relationship. Congress’s decision to give rulemaking power over specific unfair or deceptive acts or practices combined with case-by-case enforcement power over the broader category of unfair competition strikes a fair legislative balance with guardrails both the agency and the regulated public can discern. Reviewing courts would likely be skeptical of the Commission’s choice to shed the manageable limits that have governed its work until now.

III. The Proposed Rule Violates The APA’s Reasoned Decisionmaking Mandate.

As the Commission knows, finalizing the Proposed Rule will draw legal challenges under the Administrative Procedure Act. That statute “requires agencies to engage in reasoned decisionmaking, and directs that agency actions be set aside if they are arbitrary or capricious.” *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (cleaned up). Courts will evaluate whether the Proposed Rule “was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Id.* (cleaned up). Among other things, the Commission will need to establish that it “examined the relevant data and articulated a satisfactory explanation for [its] decision, including a rational connection between the facts found and the choice made.” *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2569 (2019) (cleaned up). “Unsubstantiated or bare assumptions” are not enough. *Nat. Res. Def. Council v. EPA*, 31 F.4th 1203, 1207 (9th Cir. 2022) (cleaned up).

For several reasons, the Proposed Rule does not reflect reasoned decisionmaking. So looking beyond the agency’s lack of statutory and constitutional authority, the Proposed Rule would fall on this basis, too.

As an initial matter, the Commission’s fact-blind approach is an unexplained, 180-degree shift from “[t]he limited Section 5 case law involving [noncompetes],” which unanimously “endorses a fact-specific approach.” THE FTC’S PROPOSED NON-COMPETE RULE, *supra*, at 4. This authority reflects the broader antitrust principle that per se rules of illegality should apply only to conduct that is manifestly anticompetitive. *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). Vertical agreements, for example—including vertical noncompete agreements—are almost all subject to the rule of reason. Herbert Hovenkamp, *Noncompete Agreements and Antitrust’s Rule of Reason*, REGUL. REV. (Jan. 16, 2023), <https://tinyurl.com/ft9ncb8s>; *see also Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 894 (2007) (noting that vertical agreements “can have either procompetitive or anticompetitive effects, depending upon the circumstances”). The Commission cannot avoid its obligation to explain its own dramatic shift from the existing law by pointing to its own failure to issue a noncompete rule before. After all, an agency may not “depart from a prior policy *sub silentio*” just as it cannot “simply disregard rules that are still on the books.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Similarly, the Commission must account for its decision to change its longstanding policy to evaluate noncompetes on a case-by-case basis. *E.g.*, *Carvel*, 68 F.T.C. 128, at *46; *see also CBS Corp. v. FCC*, 663 F.3d 122, 145 (3d Cir. 2011) (“[A]n agency cannot ignore a substantial diversion from its prior policies.”). Even the Commission’s most recent action in the noncompete space—January’s consent agreements—was more of the same. It included provisions prohibiting only some noncompetes. 88 Fed. Reg. at 3540 n.4 (dissenting statement of Commissioner Christine S. Wilson). The Proposed Rule is a massive policy shift; at a minimum, reasoned rulemaking requires recognizing as much.

The Proposed Rule fails on its own terms, too. *First*, it is unreasonably broad, improperly jettisoning the hard-won nuance from the current state-law regime. Not all noncompetes are bad: Even other parts of the federal government recognize that they can serve important social ends. *See, e.g.*, OFF. OF ECON. POL’Y, U.S. DEP’T OF THE TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS (2016), <https://tinyurl.com/yv7aw6dp> (“Treasury Report”). And because our tradition recognizes that noncompetes exist on a spectrum ranging from helpful to abusive, tailoring and flexibility have long been the bywords of noncompete law. The Proposed Rule’s new categorical approach arbitrarily ignores all that.

One of the Commission’s justifications is that we have understood “only in the last two decades” how noncompetes affect the economy. 88 Fed. Reg. at 3484. This isn’t true. As the Proposed Rule admits, the earliest English and American noncompete cases explicitly articulated how noncompetes can harm the economy. *Id.* at 3493 & n.143. Relatedly, the Proposed Rule treats the problem of low-wage workers being subject to noncompetes as a recent phenomenon. *Id.* at 3483-86. But States have been dealing with blue-collar and low- and middle-income noncompetes forever. *E.g.*, *Pierce*, 8 Mass. at 226 (stagecoach operator).

In reality, the overwhelming majority of States account for these considerations and a host of other factors. Take as an example *Reddy v. Community Health Foundation of Man*, 298 S.E.2d 906 (W. Va. 1982)—West Virginia’s watershed noncompete case. The court started from the premise that noncompetes are not “per se violation[s] of antitrust law,” and that enforcing them can sometimes be “essential to an effective marketplace, not inimical to one.” *Id.* at 910 (cleaned up). Weeding out *abusive* noncompetes requires balancing “the interests of the employer, the interests of the employee, and the interests of society at large.” *Id.* at 911. The court tests “the contractual underpinnings” of the agreement first, then moves to the “rule of reason” analysis. *Id.* at 915. Noncompetes can fail at that stage if (among other concerns) they are “excessively broad with respect to time or area” or if circumstances show that they were intended “merely to repress the employee ... rather than to protect the employer’s business.” *Id.* at 916. If a noncompete passes rule of reason, it then has to clear the “rule of best result”; the employer must prove a specific business “interest requiring protection.” *Id.* And even after that the employee can still “rebut” enforceability in several ways. *Id.* The end result is that the court may “shave[]” the noncompete “to reflect a proper balance between” all the interests at stake, because going beyond what’s needed to protect “legitimate business interests creates a dead economic loss.” *Id.* at 916-17.

Other States deploy similarly even-handed, multi-factored analyses that hold in tension the varied aspects of the public interest—harms and benefit to individual workers, businesses, and the economy as a whole. So the Proposed Rule’s lament that state courts do not pay enough attention to the public interest and miss “the aggregate effects of non-compete clauses,” 88 Fed. Reg. at 3495, rings off-key. State courts *do* recognize the combined effect of overbroad noncompetes. *See, e.g., Reddy*, 298 S.E.2d at 917. And many state courts explicitly recognize the public interest as part of their balancing analysis. *E.g., Boisen v. Petersen Flying Serv., Inc.*, 383 N.W.2d 29, 33 (Neb. 1986) (holding that a noncompete must be “reasonable in the sense that it is not injurious to the public”); *see also* Russell Beck, *Employee Noncompetes: A State-by-State Survey*, BECK REED RIDEN LLP (Nov. 21, 2022), <https://tinyurl.com/b8ujvk65> (noting that 30 States include weighing the public interest or public policy when considering whether a restraint is reasonable).

The Proposed Rule fails to adequately explain the need to throw all that out. It doesn’t explain why the FTC’s *own* case-by-case adjudication power cannot address the agency’s fears. Nor does it explain why rejecting common-law gradations is *better*. There’s no material difference under the proposed regime between a noncompete that limits competition in a 10-mile radius and one that limits competition in a 100-mile radius; one that forbids working for a discrete list of rival companies and one that forbids working in an entire industry; or one that lasts six months and one that lasts six years. The Proposed Rule is equally blind to variations outside the four corners of a noncompete. It treats all employers and employees the same: the mom-and-pop consulting shop is no different than General Motors, and the teenager running the register at Subway is no different than a Fortune 100 CEO. But the differences that have mattered to tens of thousands of state court judges and state legislators are not fictions. Good reasons confirm that “a one-size-fits-all approach may not be appropriate,” or that the success of “absolute prohibition[s]” may vary “in supporting industries as wide-ranging as software, hardware, pharma, entertainment, and apparel.” Orly Lobel, *Noncompetes, Human Capital Policy & Regional Competition*, 45 J. CORP. L. 931, 941 (2019).

Second, variety in state enforcement is not the bug the Proposed Rule thinks it is. The commissioners in the majority object that employers may try to contract away from unfavorable state laws using choice-of-law and forum-selection provisions. 88 Fed. Reg. at 3538 n.9 (statement of Commissioner Kahn). The States have this concern well in hand; state courts closely monitor whether it is reasonable to enforce these sorts of provisions, and they do not hesitate to shut down attempts to evade state statutes or public policies against noncompetes. *See, e.g., Osborne v. Brown & Saenger, Inc.*, 904 N.W.2d 34, 38 (N.D. 2017) (refusing to enforce a forum-selection clause that would allow enforcement of a noncompete against North Dakotans because it would violate state public policy); *Dill v. Cont’l Car Club, Inc.*, 2013 WL 5874713, at *11 (Tenn. Ct. App. Oct. 31, 2013) (refusing to honor a Florida choice-of-law provision because Florida noncompete law “is contrary to public policy in Tennessee”); *Bunker Hill Int’l, Ltd. v. Nationsbuilder Ins. Servs., Inc.*, 710 S.E.2d 662, 667 (Ga. Ct. App. 2011) (“[T]he agreement’s forum-selection provision is void because its application would likely result in the enforcement by an Illinois court of at least one covenant in violation of Georgia public policy.”); *Cox v. Dine-A-Mate, Inc.*, 501 S.E.2d 353, 355 (N.C. Ct. App. 1998) (refusing to enforce a forum selection clause

because the noncompete was “the product of unequal bargaining power”); *Cherry, Bekaert & Holland v. Brown*, 582 So. 2d 502, 507 (Ala. 1991) (rejecting a choice-of-law provision because the chosen State would enforce the noncompete and Alabama would not).

Beyond this, most States’ codes or case books include a general rule that choice-of-law and forum-selection provisions are unenforceable when obtained through fraud, duress, or other unconscionable means. *See, e.g.*, MICH. COMP. LAWS § 600.745(2)(c); *Jacobson v. Mailboxes Etc. U.S.A., Inc.*, 646 N.E.2d 741, 743 (Mass. 1995). Some state legislatures even prohibit noncompete forum selection clauses altogether. *See, e.g.*, *O’Hara v. Globus Med., Inc.*, 181 So. 3d 69, 85 (La. Ct. App. 2015). And in any event, if choice-of-law and forum-selection clauses really are the Achilles heel to state enforcement, that might be grounds for a narrow rule focusing on those types of provisions. The Proposed Rule has not shown why a categorical ban on noncompetes themselves is the solution.

Third, the evidence does not support the FTC’s first “independent” rationale that noncompetes negatively affect competitive conditions. 88 Fed. Reg. at 3500. The Proposed Rule’s academic support for this proposition is wafer-thin. Starting with the studies on noncompetes’ connection to wages, the Proposed Rule admits they are not “sufficiently probative.” *Id.* at 3487. They are plagued by “confounding factors” that make it inappropriate to show a causal connection between noncompete enforceability and earnings. *Id.* at 3487, 3489. Even the natural experiments from the variety in state laws are beset with difficulties that make it “impossible to disentangle [other] underlying differences.” *Id.* at 3488. The same issues affect the Proposed Rule’s studies regarding enforceability’s effect on the wages of workers *not* covered by noncompete clauses. *Id.* And the Proposed Rules admits that the distributional effects of increased wages (even despite these methodological hurdles) might not be statistically significant. *Id.*

The problems continue when moving to the Proposed Rule’s finding that decreased enforceability lowers consumer prices. That idea is based on just two studies regarding highly specific industries; the Proposed Rule fails to explain how they are generalizable. 88 Fed. Reg. at 3490. What’s more, though the proposal notes that the methodology of its healthcare-markets study is subject to the same confounding variables that limit the usefulness of other studies it cites, it inexplicably trusts the authors’ assurance that they can “identify a causal chain” linking noncompetes with higher consumer costs. *Id.* at 3490. The FTC never explains the authors’ causal reasoning or why it finds it persuasive. That omission matters because, as the FTC admits, this study is its *only* direct evidence that noncompetes lead to higher prices. *Id.* Worse, the Proposed Rule ignores an equally applicable study in the financial broker space showing that an agreement not to enforce noncompetes led to “higher prices and a decrease in quality.” *Id.* at 3543 (dissenting statement of Commissioner Christine S. Wilson).

Similarly, the finding that enforcing noncompetes hurts “the ability of competitors to access talent,” 88 Fed. Reg. at 3491, is based on a single study that focuses on executives only. *Id.* This narrow focus strongly suggests that the study is not representative of the average worker; it is thus poor support for a *categorical* ban. So too for the academic support for several other

points allegedly showing the negative consequences of noncompetes—those studies are mixed or point in no particular direction. The first study the Proposed Rule cites, for example, found that noncompetes’ effects vary widely: Despite the FTC’s totalizing rhetoric about all “workers,” that study found that “enforceability has little to no effect on earnings for non-college educated workers” or men. Matthew S. Johnson et al., *The Labor Market Effects of Legal Restrictions on Worker Mobility* (Oct. 12, 2020), <https://tinyurl.com/2xnucjcw>. And in the portion discussing noncompete enforceability’s effect on innovation, the Proposed Rule cites one study saying enforceability produced less innovation, one saying *perhaps* less innovation in the venture capital world, and one saying more innovation; two more studies said that enforceability led to more “breakthrough innovation” or fairly limited and contained increases in innovation. 88 Fed. Reg. at 3492-93. It is arbitrary and capricious to conclude from these five studies that the “weight of the evidence” shows that noncompete enforceability “broadly diminishes the rate of innovation.” *Id.* at 3492.

If anything, a common theme in the academic literature on noncompetes appears to be empirical uncertainty over whether these agreements hurt the economy. At the FTC’s 2020 workshop on noncompetes, for example, one scholar warned that we are “still far from reaching a scientific standard of concluding that” noncompetes “are bad for overall welfare.” Kurt Lavetti, Remarks at the FTC Workshop on Non-Compete Clauses in the Workplace 138 (Jan. 9, 2020), *available at* <https://tinyurl.com/2u8u8ww9>.

These weaknesses should have given the Commission more pause, particularly combined with evidence on the other side showing that there can be good business justifications for noncompetes. One study, for instance, shows that employees “who learn of their noncompete before they accept their job offer” see “9.7% ... higher earnings ... relative to those employees without a noncompete.” Evan Starr et al. *Noncompete Agreements in the U.S. Labor Force* (Oct 12, 2020), *available at* <https://tinyurl.com/3ubjwu5s>. Similarly, even the Proposed Rule has to acknowledge “the additional incentive” some noncompetes bring “to invest (in assets like physical capital, human capital, or customer attraction, or in the sharing of trade secrets and confidential commercial information).” 88 Fed. Reg. at 3493. And the studies it cites in support confirm that noncompetes “increase employee training and other forms of investment” by ~15% and 32%, respectively. *Id.* Although the proposal later calls these two studies “scant” evidence, *id.* at 3508, they are methodologically indistinguishable from others that the Proposed Rule relies on to declare noncompetes anticompetitive. And at least one was conducted by an author the FTC credits elsewhere (Evan Starr). *See, e.g., id.* at 3485 n.42. It appears the agency is employing a double standard to stack the studies deck in its favor.

The Proposed Rule gives unfairly short shrift to other studies concluding that noncompetes are an economic good, too. *See* Camila Ringeling, et. al, Comment on Noncompete Clauses Used in Employment Contracts 4-5 (Feb. 7, 2020), <https://tinyurl.com/mj7b5zmm> (summarizing evidence showing that noncompetes “encourage innovation” and “greater employer investments in employee training and human capital”). Consider the studies that may suggest a relationship between noncompetes and increased investment in workers and related capital. 88 Fed. Reg. at

3493. When minimizing noncompetes' benefits, the Proposed Rule highlights the studies' lack of an explicit causal connection, *id.*—but the FTC credited studies with the same flaw earlier. The Proposed Rule also finds inconclusive two studies arguing that noncompetes increase job creation. Its reasoning here is difficult to parse. One of the studies says noncompete enforcement in Michigan increased job creation at “startups” by about 8%. *Id.* at 3488-89. The Proposed Rule speculates that this increase is likely because “non-compete clauses prevent small firms from existing in the first place.” *Id.* at 3489. Yet it makes little sense to say that some small businesses gained jobs because noncompetes make it harder for small businesses to exist at all. And finally, the Proposed Rule takes pains to discount the benefits from increased worker training on the basis that it is simply “a transfer [of value] from workers to firms.” *Id.* at 3493. This analysis seems incomplete, too: It wrongly assumes that employers and employees are in a zero-sum relationship. Increasing workers' skills can benefit employees *and* their employers, making both more competitive.

In short, the FTC's mixed evidentiary bag is not a reasoned basis to toss out nearly all noncompete agreements nationwide. The Proposed Rule, after all, does not lay out factors and circumstances that make some or even many noncompetes abusive—it declares that the cons outweigh the pros for *all* of them. The strength of the evidence should reflect the drastic nature of the Commission's chosen cure. Here, the Proposed Rule's academic support falls short.

Fourth, the Proposed Rule's remaining justifications are not categorically true and thus cannot support a categorical ban, either. The FTC argues that noncompetes are both “exploitative and coercive” at the time of signing and at the time an employee leaves. 88 Fed. Reg. at 3500. No doubt some or even many noncompetes are coercive or contain exploitative elements. But these conditions are not always present. So a categorical solution that labels all noncompetes per se unfair methods of competition ignores the full sweep of the 2023 labor market.

The Proposed Rule finds exploitation for the vast majority of workers—all those “other than senior executives”—by assuming a baseline “unequal bargaining power between employers and workers.” 88 Fed. Reg. at 3502. Yet for every low-wage or entry-level worker this broad statement may describe, many other workers may hold materially different bargaining power. Consider, for example, a doctor who agrees to join a practice and signs a noncompete in exchange for a yearly percentage-based bonus. Particularly when the doctor is coming out of a competitive residency, she likely has multiple options for where to practice and holds many of the cards when it comes to negotiating favorable terms. Or take a mid-level software engineer headhunted by a new tech startup desperate for talent to get off the ground. He bargains from a position of strength—he already has a job and the training and experience the startup needs. Yet for both of these workers, the Proposed Rule's categorical approach assumes that once a noncompete is on the table their bargaining power goes away. Similarly, the coercion and exploitation justifications don't apply well to independent contractors or others with less conventional relationships to those who pay them for their work. Think electricians, truck drivers, or expert witnesses. In reality, relative bargaining strength defies economy-wide generalizations.

The Proposed Rule also gets it wrong in thinking that noncompetes are always exploitative or coercive at the time of departure. Noncompetes usually have geographic limits (at least the ones that are enforceable under States' reasonableness assessments). But in an increasingly mobile economy, many workers leave one job to take one several States away. The Proposed Rule assumes exploitation even in these circumstances when no one brings up a noncompete because the distance of the move makes its terms irrelevant. Common sense says that assumption is wrong. Federal case law does, too: Courts have long required a noncompete to be enforced before finding harm. *See, e.g., O'Regan v. Arb. Forums, Inc.*, 121 F.3d 1060, 1065-66 (7th Cir. 1997) (holding that "to apply antitrust laws to restrictive employment covenants, there must be some attempted enforcement of an arguably overbroad portion of the covenant"); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 267 (7th Cir. 1981) (noting that "a s[ection] 1 violation requires proof that the defendant knowingly enforced ... the ancillary noncompetition covenant"). The Proposed Rule is built on a presumption that upends this long-settled default.

The Proposed Rule's justifications are also troubling because no limiting principle keeps them from reaching beyond noncompetes. The Commission's assumptions about coercive and exploitative bargaining conditions are based on the nature of the employee-employer relationship. Yet this relationship is present every time workers sign any agreement with their employers—from internet and no-smoking policies to trade secret and nondisclosure agreements. Troublingly, the Proposed Rule does not explain why its conclusion that noncompetes are categorically exploitative would not apply to these and so many other agreements that make American workplaces operate every day. Making unequal bargaining power the lynchpin of unfair methods of competition could thus threaten much more of an employment contract than its noncompete clause.

A ban is also not the only way to deal with coercive and exploitative bargaining conditions where they *do* exist. As described above, state courts are already quite familiar with these sorts of inequalities in bargaining power. The Proposed Rule knows that, too. 88 Fed. Reg. at 3502. Indeed, the very cases it cites for this point confirm that sometimes even noncompetes made by parties with unequal bargaining power can be reasonable. *Id.* at 3502 n.263. So this is not so uniquely damaging an area of employment law that nothing but a ban will do. At least without evidence that case-by-case assessments are failing on a wholesale level, the fact that state courts already can and do deal with bargaining inequalities further undercuts the case for wholesale federal intervention.

Fifth, the Proposed Rule's limited exception for some noncompetes highlights the problems in its rationale for banning the rest. Under the exception, the Proposed Rule would not apply to "substantial owners"—defined as those holding at least a 25% ownership interest—who sell that business interest. 88 Fed. Reg. at 3535-36. Yet this exception undermines the absolutist nature of the rest of the Proposed Rule's ban. It implicitly admits that *some* noncompetes are economically and socially helpful. This concession to market realities puts the FTC on its heels because it cannot explain why a host of other hypothetical noncompetes would not also justify exemptions. Why, for instance, should a four-partner engineering firm be able to enforce a

noncompete against a partner who sells a quarter ownership interest to strike out solo, but not the five-partner firm in the next town where the ownership shares are just 20%?

The Proposed Rule gives three justifications for the exception after examining why some States have created similar exceptions to their own noncompete laws: The substantial ownership scenario involves equal bargaining power, an economic need to protect the business's goodwill, and no undue hardship to the seller. 88 Fed. Reg. at 3496. We agree that these factors are important in assessing a noncompete's reasonableness. The problem is that a substantial ownership situation is not the only context where they are found—so they prove more than the FTC intends. Any number of noncompetes could also be justified by showing the same or similar characteristics, so why not exempt them, too? Picking out one subset of noncompetes for special treatment but not others similarly situated is arbitrary. And the Proposed Rule's recognition that a completely categorical ban is too harsh shows why flexibility to treat agreements that arise out of similar circumstances the same matters.

Sixth, the Proposed Rule inappropriately sacrifices important business interests. Take those related to trade secrets, for instance. Noncompetes are often used as a prophylactic measure to deter misappropriation of trade secrets—workers with access to trade secrets are “much more likely to be bound by a non-compete, with about a 25 percentage point higher probability than those who report no interaction with clients, no access to client-specific information, and no possession of trade secrets.” Treasury Report, *supra*, at 11-12. In this context, noncompetes can “help[] employers fill a gap in the enforceability of trade secret law” given the difficulty “identify[ing] a theft” after employees leave to work for a competitor “because the employee may simply rely on her knowledge of those trade secrets while improving the production processes of the new employer.” Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 ANTITRUST L. J. 165, 180 (2020). The same can be said for non-solicitation agreements, where a business can't show breach until *after* it learns that a specific client was approached or poached, and where proving the case can complicate the client relationship. Noncompetes can be more effective proxies for these agreements, too.

Accounting for the costs of a proposed rule is part of reasoned decisionmaking. Yet the Proposed Rule does not grapple with the costs associated with eliminating firms' ability to use noncompetes as a tool to protect trade secrets or client lists, and then explain why the expected benefits justify that harm. The Commission concludes instead that there is not enough reliable data exploring the relationship between the enforceability of noncompete clauses and investment in creating or sharing trade secrets. 88 Fed. Reg. at 3493. And in any event, it reasons, trade secret law already gives employers a way to protect their investments. *Id.* at 3493. Neither rationale holds up.

When it comes to data, the FTC should have tried to confirm its suppositions by studying outcomes in the States that have banned noncompetes and those that have not. That first category is small, but not non-existent. Particularly when the FTC is jumping to the extreme solution of an outright ban, it is arbitrary to say lack of readily accessible data as precise as the agency would

prefer means it is ok to guess. And when it comes to the trade-secret law alternative, the FTC recognizes this will likely not be as effective as a noncompete. 88 Fed. Reg. at 3493. What's more, the federal government has made it harder to use the noncompete alternatives the FTC suggests, such as nondisclosure or trade-secret agreements. In a recent decision, for example, the NLRB held that certain nondisclosure agreements “would reasonably tend to coerce the employee” and could have “an impermissible chilling tendency on the Section 7 rights of all employees.” McLaren Macomb and Local 40 RN Staff Council, Off. and Pro. Emps., Int’l Union (OPEIU), AFL-CIO, 372 NLRB No. 58 (Feb. 21 2023), *available at* <https://tinyurl.com/ykrt7745>. The FTC’s proposed alternatives are cold comfort under circumstances like these.

Seventh and last, the Proposed Rule is vague. For a rule without much nuance, it still manages to leave open significant questions that will lead to confusion and over-deterrence—a particular concern in the context of a rule that is already broad by design. What does it mean, for instance, that non-disclosure, non-solicitation, and other agreements may count as “de facto non-compete clauses”? 88 Fed. Reg. at 3509. When do these agreements pass from having a typical scope to becoming “unusually broad”? *Id.* Extending the Proposed Rule to employee handbooks raises similar questions: Does a handbook that tries in good faith to explain a (permissible) non-disclosure agreement but makes the prohibition sound like an (impermissible) noncompete trigger the ban? *Id.* at 3510. Or when it comes to limits on reimbursing employers when an employee leaves, what is the line between a training program “reasonably related to the costs the employer incurred for training the worker” and one that is not? *Id.* at 3535-36. Combined with the threat of liability under a per se rule, confusion in these and other areas will deter employers from including even procompetitive provisions in their contracts with employees.

The Commission also asks commenters whether it should consider a “rebuttable presumption of unlawfulness” instead of a uniform ban. 88 Fed. Reg. at 3516. Going this route would make the vagueness problem worse. Right now, employees and employers can rely on state law developed over decades and centuries to determine the factors that do or do not make a noncompete enforceable. A new, federal rebuttable presumption would either be a categorical ban dressed up in different clothes, or else invite even more confusion as businesses and workers nationwide start trying to discern its limits from scratch.

* * * *

The Rule substitutes the States’ largely case-by-case inquiry for a too-blunt categorical approach that lacks both statutory and empirical support. Indeed, the Commission’s second proposed alternative gives the game away: An “exemptions or different standards for different categories of workers” model, 88 Fed. Reg. at 3516, really just describes the current state-based system—but worse. On the one hand, adopting this alternative would recognize that a categorical ban goes too far. But on the other, it would presumably replace case-specific flexibility with a general “no,” subject to a list of inflexible exemptions. The majority of the States’ experience teaches that even if there may be value in taking *some* kinds of noncompetes wholly off the table, courts should be able to apply a principles-based approach when evaluating the rest of them.

Particularly when the States are already on the job, the Commission has little reason to introduce potential arbitrariness or uncertainty from newly drafted carve outs. Instead, the FTC should stick to the “combination of legal tools” it already has and “clearly has the power to use”—“issuance of interpretive rules and policy statements coupled with a few well-chosen enforcement actions.” Richard J. Pierce Jr., *Can the FTC Use Rulemaking to Change Antitrust Law?*, TRUTH ON THE MKT. (Apr. 28, 2022), <https://tinyurl.com/4wkfyzyb>. And while the Commission stays in its lane, the States can continue doing their part responding to the complexities that noncompetes pose from theirs.

Sincerely,



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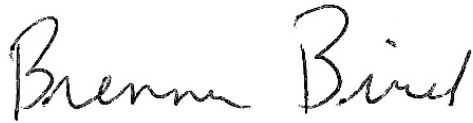
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April 19, 2023
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A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive style with a large, prominent initial "K".

Ken Paxton
Texas Attorney General