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April 14, 2023

The Honorable Lina M. Khan, Chair
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW, Ste. CC-5610 (Annex C)
Washington, DC 20580

Dear Madam Chair:

RE: Federal Trade Commission Notice of Proposed Rulemaking Titled "Non-Compete Clause Rule," RIN 3084-AB74, 88 *Fed. Reg.* 3482 (January 19, 2023), 88 *Fed. Reg.* 20441 (April 6, 2023) (comment period extension)

The National Federation of Independent Business (NFIB)[1] submits these comments in response to the notice of proposed rulemaking titled "Non-Compete Clause Rule" (NPRM) published by the Federal Trade Commission (FTC or the Commission) in the *Federal Register* of January 19, 2023.[2] NFIB requests that the FTC withdraw the NPRM and proceed no further with regulating worker non-compete clauses.

The FTC-proposed rule would impose a sweeping ban on non-compete clauses in worker contracts. NFIB requests withdrawal of the proposed rule for four reasons. First, the proposed rule exceeds the FTC's statutory authority. Second, the proposed rule will adversely affect the economy by discouraging business investment in workers and jeopardizing the security of critical competitive business information. Third, the proposed rule represents a major departure from legal precedent and invades an area of law already appropriately governed by states. Finally, the proposed rule fails to take

[1] NFIB is an incorporated nonprofit association representing small and independent businesses. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and ensures that governments of the United States and the fifty States hear the voice of small business as they formulate public policies.

[2] 88 *Fed. Reg.* 3482.

into account the needs of small businesses. Each of these reasons is discussed in greater detail below.

1. Regulation of Non-Compete Clauses Exceeds the FTC's Authority

An agency has no power unless Congress has conferred the power on the agency by statute.[3] Moreover, when an agency claims power to make decisions "of vast economic and political significance," such as the power to bar non-compete clauses, rescind millions of existing contractual agreements, and supersede any state statute, regulation, order, or interpretation that is inconsistent with the NPRM, the agency must show a clear congressional authorization in law that grants such a power to the agency.[4] There is no such clear congressional authorization and, therefore, the FTC has no such legal authority.

The NPRM would prohibit an employer from (1) entering into, or attempting to enter into, new non-compete agreements, (2) maintaining existing non-compete agreements, or (3) representing under certain circumstances that a non-compete agreement is in place.[5] To support its rulemaking authority, the FTC cites[6] Sections 5 and 6(g) of the Federal Trade Commission Act (the FTC Act).[7]

Section 5 of the FTC Act broadly prohibits "unfair methods of competition" and directs the Commission to prevent the use of unfair methods of competition "in or affecting

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[3] *NFIB v. Department of Labor, OSHA*, 142 S. Ct. 661, 665 (2022) ("Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided."); *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 374 (1986) ("First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.").

[4] *NFIB v. Department of Labor, OSHA*, *supra* n. 3, at 665; *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2609 (2022) ("Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].' Nor does Congress typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme. Agencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.' We presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.' Thus, in certain extraordinary cases, 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." (citations omitted)). Courts often call this requirement for a clear statement in law the "Major Questions Doctrine."

[5] 88 *Fed. Reg.* 3535, col. 2-3.

[6] 88 *Fed. Reg.* 3499, col. 1.

[7] 15 U.S.C. §§ 41-58.

commerce."[8] Section 6 of the FTC Act authorizes the Commission to implement rules and regulations necessary to carry out the FTC Act's purposes, including the prohibition against unfair competition.[9] Neither section of the Act confers authority on the FTC to institute a ban on non-compete clauses.[10]

First, the reasoning offered by the FTC fails to justify a finding that non-compete agreements are intrinsically unfair pursuant to Section 5. Under Section 5, the FTC can declare a practice unlawful on the grounds that it is an unfair method of competition if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[11] But the use of non-compete agreements cannot be a per se unfair method of competition under Section 5 particularly with evidence to contrary.[12] Section 5 calls for fact-specific determinations focused on consumer welfare.[13]

Not only is there insufficient evidence showing non-compete agreements are intrinsically unfair pursuant to Section 5, but the FTC's intrusion into the employment arena opens the NPRM to further legal infirmity. According to the FTC's website: "[w]hen the FTC was created in 1914, its purpose was to prevent unfair methods of competition in commerce as part of the battle to 'bust the trusts.'"[14] To that end, the FTC's underlying mission "[p]rotecting the public from deceptive or unfair business practices and from unfair methods of competition through law enforcement, advocacy, research, and education"[15] has been singularly focused on promoting competition to lower consumer prices. While Congress has added additional *consumer* protections to FTC oversight, the Commission lacks the authority to single-handedly void millions of employment contracts. Such action unilaterally and illegally reinterprets Section 5's "unfair methods of competition."

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[8] 15 U.S.C. § 45.

[9] 15 U.S.C. § 46(g).

[10] The "Legal Authority" section of the NPRM spans only two paragraphs. 88 *Fed. Reg.* 3499, col. 1-2.

[11] 15 U.S.C. § 45(n).

[12] For instance, a 2021 study found that not enforcing non-compete clauses harmed consumers. This study examined an agreement among financial advisory firms to not enforce post-employment contracts. The study concluded that clients of these firms "paid higher fees and experienced higher levels of broker misconduct." Umit G. Gurun et al., *Unlocking Clients: The Importance of Relationships in the Financial Advisory Industry*, 141 J. Fin. Econ. 1218 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3132127 (accessed April 5, 2023).

[13] 15 U.S.C. § 45 (setting forth detailed guidelines for proceedings before the Commission to determine whether unfair competition has occurred).

[14] *About the FTC*, https://www.ftc.gov/about-ftc (accessed April 4, 2023).

[15] *Id.*

Neither does Section 6(g) give the FTC authority for the proposed rule. The text of 6(g) does not provide authority to make *any* substantive rules under the FTC Act.[16] That provision authorizes the FTC to make procedural or ministerial rules consistent with Section 6's focus on the FTC's investigative powers.[17] Attempting to alchemize substantive rulemaking authority from a procedural provision would improperly "allow a small statutory tail to wag a very large dog."[18] Indeed, that has been the FTC's own view throughout almost all of its history. And Congress's subsequent actions confirm that Section 6 provides no general substantive rulemaking authority.[19]

The NPRM exceeds the FTC's statutory authority and intrudes on a policy area outside its expertise and jurisdiction. Such a far-reaching intrusion into an area of law that has long been controlled by state legislatures warrants challenge.[20] Moreover, even if the FTC's reading of the FTC Act were plausible, it is a new and surprising exercise of extraordinary power. Thus, under the major questions doctrine, Congress's authorization must be clearly stated before the interpretation is adopted. No clear statement exists here. As the Supreme Court pronounced in *West Virginia v. EPA*, an agency that wishes to regulate an issue of major national significance must show clear congressional authorization.[21]

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[16] 15 U.S.C. § 46.

[17] *Id. United States v. Two Hundred Barrels of Whiskey*, 95 U.S. 571, 576 (1877) ("The regulations of the department cannot have the effect of amending the law. They may aid in carrying the law as it exists into execution, but they cannot change its positive provisions."); *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F. 4th 359, 368 (D. C. Cir. Aug. 12, 2022) (" ... [A]n agency may not rely on a 'necessary and appropriate' clause to claim implicitly delegated authority beyond its regulatory lane or inconsistent with statutory limitations or directives."), pet'n for cert. pending, No. 22-451; *New York Stock Exchange LLC v. SEC*, 962 F. 3d 541, 554 (D.C. Cir. June 16, 2020) ("In *Michigan v. EPA*, the Court makes it plain that the mere reference to 'necessary' or 'appropriate' in a statutory provision authorizing an agency to engage in rulemaking does not afford the agency authority to adopt regulations as it sees fit with respect to all matters covered by the agency's authorizing statute. . . . Merely because an agency has rulemaking power does not mean that it has delegated authority to adopt a particular regulation.").

[18] *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1348 (2021).

[19] See 15 U.S.C. § 57a; 15 U.S.C. § 45(n).

[20] Dissenting Member Wilson outlines at least three grounds for possible legal challenge: (1) the FTC lacks authority to engage in "unfair methods of competition" rulemaking; (2) the "major questions doctrine" explained in *West Virginia v. EPA* applies as the FTC lacks clear congressional authorization to issue the proposed rule; and (3) the FTC's action constitutes an impermissible delegation of legislative authority under the non-delegation doctrine. Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule, Comm'n File NO. P201200-1 (January 5, 2023), p. 10-12, https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf (accessed April 4, 2023).

[21] See *supra* n. 4.

Finally, the NPRM is arbitrary and capricious, violating the Administrative Procedure Act's mandate that agencies may not ignore any important aspects of the problem.[22] Despite Section 5's emphasis on the centrality of *consumer* injury, the FTC seems to focus mostly on how non-compete agreements affect *workers*. An outright ban on non-competes is impermissibly contrary to the weight of the evidence concerning the effect on competition. The FTC fails to offer reasoned decision-making when it relies on strained logic and does not adequately justify its switch to rulemaking after a decades-long practice of relying solely on adjudications.

2. The FTC Fails to Consider Adverse Impacts on the American Economy

The NPRM would have a substantial adverse impact on the country's employers. The NPRM would not only prohibit employers from instituting new non-compete clauses with all workers, but it would also invalidate existing non-compete agreements.[23] A ban on nearly all non-compete clauses has potential to disrupt approximately one-fifth of all employment contracts and would render millions of contracts unenforceable in whole or in part.[24]

The far-reaching proposal includes broad definitions of employer, worker, and non-compete clause. An "employer" includes any natural person, partnership, corporation, association, or other legal entity, including any person acting under color or authority of state law, that hires or contracts with a worker to work for the person.[25] "Worker" is also defined broadly. It would include both paid and unpaid employees, independent contractors, externs, interns, volunteers, apprentices, and sole proprietors.[26] The NPRM makes no distinction based on a worker's income or job status, asserting "non-compete clauses obstruct labor market competition in a similar way for all workers, regardless of a worker's income or job status."[27] Under the proposal, nearly every paid and unpaid worker in the United States, from CEOs to unpaid volunteers, would fall under the rule's coverage.

The NPRM's broad definition of "non-compete" touches other agreements, too. While the proposal does not explicitly prohibit other restrictive covenants, the rule prohibits the use of any form of agreement that has the effect of prohibiting workers from seeking or accepting new employment. For example, the proposed rule includes agreements that prevent employees from working in the same line of business after separation or which

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[22] 5 U.S.C. 706. See *Motor Vehicle Manufacturers Assn. of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem . . . .").

[23] *88 Fed. Reg.* 3535, col. 3.

[24] 88 *Fed. Reg.* 3485, col. 2-3.

[25] 88 *Fed. Reg.* 3535, col. 2.

[26] *Id.*

[27] 88 *Fed. Reg.* 3518, col. 3.

require workers to reimburse an employer for the cost of training if their employment ends within a specific time.[28] Thus, retention bonus agreements and training reimbursement agreements could be barred under the NPRM.

Finally, in a particularly bold move, the FTC announces that the NPRM is not just prospective; it would require an organization to rescind already-existing non-compete obligations and notify current and former workers in an "individualized communication," on paper or in digital format, that such provisions or agreements are no longer in effect.[29]

The FTC, without either congressional authorization or expertise on employment issues, asserts that virtually all employment and contractor agreements containing non-compete clauses constitute unfair methods of competition and are unenforceable. To the contrary, there are appropriate situations for employers and workers to enter into contracts that include non-compete clauses. Most businesses that use non-compete clauses do so in limited situations under the guidance of state laws. In those limited situations, non-compete clauses protect intellectual property or other confidential information that could cause economic and sometimes reputational harm to a business. Also, states often impose by statute or judicial decision pro-competition limitations on non-compete clauses, such as limits on duration or geographic reach.

Furthermore, non-compete clauses encourage businesses to invest in their workers through specialized training that, if put to work for a competitor business, would put the company that provided the training originally at a competitive disadvantage. A recent report by the U.S. Department of the Treasury explains how non-competes can encourage investment in workforce development:

> [F]irms and workers use non-competes to encourage more investment in workers. In general, firms are reluctant to pay for training that improves a worker's "general" skills and makes her more valuable to it and other firms alike. Economists usually think of general training as occurring when workers accept wage cuts to compensate their employer for its expenses in providing the training. For various practical reasons, however, workers may be unwilling to pay for training. Non-competes offer an alternative: firms get an assurance that workers are unlikely to leave for some period of time, allowing the firm to capture more of the increased productivity from costly training it provides, and workers receive more training than they otherwise would.[30]

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[28] 88 *Fed. Reg.* 3535, col. 2.

[29] *Id.* at col. 3.

[30] Office of Economic Policy, U.S. Department of the Treasury, *Non-Compete Contracts: Economic Effects and Policy Implications* (March 2016), https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Econimic_Effects_and_Policy_Implications_MAR2016.pdf, (accessed April 4, 2023).

One of the biggest challenges for small businesses emerging from the Covid-19 pandemic has been the unprecedented labor shortage. President Biden has acknowledged the country's ongoing workforce shortage and skills gap: "It's the first time we have high-paying jobs and not enough people to do them."[31] Overall, labor shortage continues to be a major concern for small businesses, with nearly all owners trying to hire reporting no or few qualified applicants. In NFIB's most recent *Jobs Report*, 43% of small business owners reported job openings they could not fill in the current period.[32] The percent of small business owners reporting labor quality as their top small business operating problem remains elevated at 23%.[33] The labor crisis has created staffing problems and hindered economic recovery for small businesses across the nation. The FTC's misguided proposal will further exacerbate the labor shortage by decreasing investment in workforce training at a time when the country needs workers with more skills.

3. The FTC Should Defer to State Regulation of Non-Compete Agreements

FTC regulation on worker non-compete clauses is unnecessary due to extensive state legislative and judicial action. Forty-seven states now regulate non-compete agreements with most states generally allowing such clauses if they are not unreasonable in duration and scope.[34]

Regulation and oversight of worker and employee agreements is not an area where the states are powerless to act. Nearly every state has enacted restrictions, and non-compete bills are being debated in states this legislative season.[35] These bills frequently include provisions directed at the alleged abusive practices the FTC reports on. Elected representatives are the proper individuals to debate and impose restrictions; they can ascertain what policies industries, workers, and employers require in their state. Also, elected representatives can be held accountable by their constituents.

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[31] Austin Landis, *'A 21st century workforce': Biden puts focus on effort to boost infrastructure training, jobs*, Spectrum News NY1 (November 2, 2022), https://www.ny1.com/nyc/all-boroughs/news/2022/11/02/biden-puts-focus-on-effort-to-build-infrastructure-workforce (accessed April 4, 2023).

[32] *NFIB (March 2023) Jobs Report* (April 6, 2023), https://www.nfib.com/foundations/research-center/monthly-reports/jobs-report/ (accessed April 9, 2023).

[33] *Id.*

[34] 88 *Fed. Reg.* 3494-95.

[35] Ogletree Deakins, *States Continue to Target Restrictive Covenants* (February 20, 2023) https://ogletree.com/insights/states-continue-to-target-restrictive-covenants/ (accessed April 4, 2023).

4. The FTC Must Consider Needs of Small Business

Congress has by law made clear the importance of taking careful account of the needs of small businesses in agency rulemaking. The Regulatory Flexibility Act (RFA),[36] as amended by the Small Business Regulatory Enforcement Fairness Act,[37] gives small businesses a voice in the federal rulemaking process. For federal rules expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The NPRM states that "[t]he Commission does not expect the proposed rule, if adopted, would have a significant impact on a substantial number of small entities."[38] NFIB disagrees with this statement and believes the NPRM will have a substantial adverse financial impact on small businesses. The FTC should conduct and publish for comment a thorough, supplemental Initial Regulatory Flexibility Analysis (IRFA) under the RFA to take proper account of the potential impact of the rule proposed by the NPRM on small businesses. As noted by the Small Business Administration's Office of Advocacy's letter expressing concern with the NPRM,[39] the initial analysis published in the NPRM did not take full account of the costs the proposed rule would impose on small businesses and offers disputed benefits. The FTC's IRFA estimates that 2.94 million small firms, which includes 3.8 million small establishments, use non-compete clauses and therefore will be impacted by the proposed rule.[40] The IRFA estimates that the direct costs of the rule would be limited to "updating contractual practices" and estimates the costs at between $317.88 to $563.84 for single establishment firms.[41]

NFIB disagrees with the FTC's conclusion that the costs of the NPRM are confined to the costs of altering contracts. By the FTC's own estimation, "at least one in five American workers—or approximately 30 million workers—is bound by a non-compete clause."[42] The impact of rescinding millions of non-compete clauses will be immense.

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[36] 5 U.S.C. § 601 et seq.

[37] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in 5 U.S.C. § 601 et seq.).

[38] 88 *Fed. Reg.* 3531 col. 2.

[39] Letter from Office of Advocacy on the Federal Trade Commission's Non-Compete Clause Rule RIN: 3084-AB74 (March 20, 2023), https://advocacy.sba.gov/wp-content/uploads/2023/03/FTC-Noncompete-Clause-Comment-Letter-Filed.pdf (accessed April 5, 2023).

[40] 88 *Fed. Reg.* 3531-32.

[41] *Id.* at 3532.

[42] 88 *Fed. Reg.* 3501, col. 2.

Conclusion

For the foregoing reasons, NFIB requests that the FTC withdraw its notice of proposed rulemaking "Non-Compete Clause Rule" published in the *Federal Register* January 19, 2023.

Sincerely,

Ea Milito

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Approved for filing:

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