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Comment on Proposed Non-Compete Clause Rule

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Summary

The Commission’s proposed non-compete rule (the “Proposed Rule”) goes beyond the Commission’s enabling act, Section 5 of the FTC Act,¹ and is otherwise legally deficient.

First, the Proposed Rule violates the Major Questions Doctrine. Through the Proposed Rule, the Commission seeks to regulate a significant portion of the United States economy without a clear directive from Congress. Nothing in Section 5 of the FTC Act authorizes the Commission to regulate employment relations such as non-compete agreements. That is manifest in the fact that in the 109 years since Section 5 was enacted, the Commission has never tried to engage in such an expansive power grab. Further, the Proposed Rule invades—and invalidates—employment contracts traditionally governed by the states without explicit congressional approval. For a federal law to preempt state law, Congress must have expressed its intent to do so. The Commission—and not Congress—seeks to enact the Proposed Rule. Thus, the Proposed Rule violates the Major Questions Doctrine.

Second, the Commission’s determination that non-compete agreements are unfair methods of competition in or affecting interstate commerce is not supported by the precedent interpreting the Commission’s authority. Thus, the Commission has exceeded its statutory authority.

Third, although the Commission may rely on established public policy for its determinations, public policy cannot be the primary factor. Rather than rely on public policies established by the state legislatures and courts, the Commission has primarily relied on its new public policy determination that non-compete agreements are bad for employees. Thus, the Proposed Rule is arbitrary and capricious.

Fourth, the proposed *de facto* test does not adequately provide notice of what agreements are considered a *de facto* non-compete. Laws, rules, and regulations must be sufficiently clear, so that the regulated entities know what conduct is acceptable and what is not. Without such definiteness, the *de facto* non-compete test subjects the regulated parties to uncertainty and arbitrary enforcement. Thus, the *de facto* non-compete test is void for vagueness.

I. The Proposed Rule violates the Major Questions Doctrine—only Congress can resolve a matter of great political significance, regulate a significant portion of the American economy, and intrude into an area of state law.

Article I of the Constitution vests all legislative power in Congress. The Supreme Court “expect[s] Congress to speak clearly when authorizing an agency to exercise powers of ‘vast economic and political significance.’”² When an agency (A) claims the power to resolve a matter of great “political significance,” (B) “seeks to regulate a significant portion of the American economy,” or (C) “seeks to ‘intrud[e] into an area that is the particular domain of state law,’” the Major Questions Doctrine

¹ Codified at 15 U.S.C. § 45.

² *Alabama Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

applies.³ The Proposed Rule falls into all three categories.

A. The Commission seeks to resolve a matter of great political significance.

A matter is of great political significance when Congress has “conspicuously and repeatedly declined to enact” the proposed regulation through statute.⁴ As the Commission has acknowledged, “rather than attempt to define through statute the various unlawful practices,” Congress delegated to the Commission its responsibility to define an unfair method of competition.⁵ In doing so, Congress provided no guidance concerning the definition of an unfair method of competition. Congress may not “‘delegate’ such a sweeping and consequential authority ‘in so cryptic a fashion.’”⁶ If Congress wishes to ban non-compete agreements, it must do so through legislation that outlines the limits of non-compete agreements or that expressly directs the Commission to ban non-compete agreements. And Congress’ failure to do so indicates that the matter is of great political significance.

A matter is also of great political significance when the agency “‘claim[s] to discover in a long-extant statute an unheralded power’ representing a ‘transformative expansion in [its] regulatory authority.’”⁷ In changing how the Commission interprets Section 5, authorizing the Proposed Rule, the Commission has exponentially expanded its regulatory authority.

Historically, the Commission has only used its stand-alone Section 5 unfair methods of competition authority in a few cases.⁸ The Commission had focused its “‘unfair methods’ *enforcement* efforts on conduct that threatens competition or the competitive process, not conduct that conflicts with other public policy goals.”⁹ Until recently, the Commission has

consistently grounded its exercise of that authority “in the spirit” of the antitrust laws. In particular, it has confined its Section 5 cases to conduct that diminishes consumer welfare by harming competition or the competitive process, as opposed to conduct that merely harms individual competitors or poses public policy concerns unrelated to competition.¹⁰

The Commission now exceeds its recognized Section 5 authority and tries to regulate employment decisions without congressional authorization. The Commission has not attempted to regulate employment decisions in the past. In fact—until the Proposed Rule—the Commission had not

³ *West Virginia v. EPA*, 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring).

⁴ *Id.* at 2610; Russell Beck, *A Brief History of Noncompete Regulation*, Fair Competition Law (Oct. 11, 2021), <https://faircompetitionlaw.com/2021/10/11/a-brief-history-of-noncompete-regulation/> (outlining the history of failed non-compete bills).

⁵ Fed. Trade Comm’n, No. P210100, *Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act 3* (2021).

⁶ *West Virginia*, 142 S. Ct. at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

⁷ *Id.* at 2610 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

⁸ Fed. Trade Comm’n, *Address by FTC Chairwoman Edith Ramirez 2* (2015), www.ftc.gov/system/files/documents/public_statements/735411/150813section5speech.pdf.

⁹ *Id.* (emphasis added).

¹⁰ *Id.* at 4–5.

even attempted to use its Section 5 enforcement authority to prevent or regulate non-compete agreements.¹¹ And it has never done so because employer-employee relations are not “methods of competition” in or affecting interstate commerce. As at least one FTC commissioner recognized, the Commission has no experience in regulating non-compete agreements.¹² And that is telling because “just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.”¹³ Only once has the Commission issued a rule defining an unfair method of competition.¹⁴ And that rule only implemented guidelines that did “not have the force of law.”¹⁵ Here, the Commission has decided not to exercise its authority in the spirit of the antitrust laws—as it has always done—but instead exercises its authority to prohibit employment decisions that, in many cases, do not even indirectly affect competition in commerce. Such a “transformative expansion [of] regulatory power” must be clearly expressed by Congress—and here it is not.

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

The Commission has provided an incomplete cost-benefit analysis.¹⁶ Without a complete cost-benefit analysis, the Proposed Rule’s full economic impact cannot be ascertained, which creates an independent ground for invalidating the Proposed Rule, but which is also relevant to the Major Questions Doctrine.

The Commission’s superficial cost-benefit analysis focuses on the benefits to employees and ignores the costs to employers, which likely indicates that the Commission has underestimated the policy’s true costs. The Commission has provided one study on the physician markets to support its claim that non-compete agreements create higher prices for consumers.¹⁷ That study found that “greater concentration *may or may not* lead to greater prices in all situations and *may* arise for reasons which simultaneously caused higher prices”¹⁸ The Commission also noted that “there is no additional direct evidence on the link between non-compete clauses and consumer prices . . .” and instead relied on “theoretically plausible” connections.¹⁹

The Commission’s superficial, incomplete, and flawed analysis estimates that the Proposed Rule will affect at least 30 million workers²⁰ and their earnings by \$250 to \$298 billion per year.²¹ It

¹¹ Fed. Trade Comm’n, No. P201200, *Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule 4–7* (2023).

¹² *Id.*

¹³ *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 352 (1941).

¹⁴ Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 C.F.R. pt. 240 (2014).

¹⁵ *Id.*

¹⁶ See *Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule*, *supra*, at 8–9.

¹⁷ Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3490, (proposed on Jan. 19, 2023) (to be codified at 16 C.F.R. 910).

¹⁸ *Id.* (emphasis added).

¹⁹ *Id.*

²⁰ *Id.* at 3485.

²¹ *Id.* at 3501.

therefore claims that it has shown that non-compete agreements “burden[] ‘a not insubstantial portion of commerce.’”²² The Commission thereby acknowledges that the Proposed Rule has vast economic significance and regulates a significant portion of the economy. The Commission must provide a complete cost-benefit analysis and explain why the Proposed Rule’s major economic impact does not trigger the Major Questions Doctrine.

C. The Proposed Rule intrudes on an area of state law by preventing the formation of employment contracts.

Many employment regulations are traditionally governed by state law and lie within the States’ police powers.²³ The Commission recognizes that state policies regarding non-compete agreements differ—with 47 states allowing some type of non-compete agreements.²⁴ Every such state has different non-compete laws. And state and federal courts have interpreted those laws differently. By attempting to supersede state law and require the rescission of contracts entered into under state law, the Proposed Rule violates a State’s right to regulate employment conditions within its borders. The Commission has not adequately considered the Proposed Rule’s impact on contractual arrangements and the state laws that govern them.

In all preemption cases—and particularly those concerning legislation in fields traditionally occupied by the states—the courts “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest* purpose of Congress.”²⁵ The Commission has not identified any such “clear and manifest” congressional purpose to supersede the states’ traditional regulation of non-compete agreements. “If Congress thought state [laws regarding non-compete agreements] posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision [on that subject].”²⁶ Unless and until the Commission can satisfy its burden to identify the clear and manifest congressional purpose, it must abandon the Proposed Rule.

The Commission’s Proposed Rule attempts to resolve a matter of great political significance, regulate a significant portion of the economy, and invade a traditional area of state law without authority from Congress. The Proposed Rule therefore violates the Major Questions Doctrine.

II. The Proposed Rule exceeds the Commission’s statutory authority and violates the Administrative Procedure Act.

Under the Administrative Procedure Act, agency action “in excess of statutory jurisdiction,

²² *Id.* at 3500 (quoting *Atlantic Refining Co. v. FTC*, 381 U.S. 357,370–371 (1965)).

²³ *E.g.*, *Bedoya v. Am. Eagle Express Inc.*, 914 F.3d 812, 818 (3d Cir. 2019); *McDaniel v. Wells Fargo Invs., LLC*, 717 F.3d 668, 675 (9th Cir. 2013); *Chae v. SLM Corp.*, 593 F.3d 936, 944 (9th Cir. 2010) (“Contract and consumer protection laws have traditionally been in state law enforcement hands”).

²⁴ Non-Compete Clause Rule, 88 Fed. Reg. at 3494–495, (proposed on Jan. 19, 2023) (to be codified at 16 C.F.R. 910).

²⁵ *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (emphasis added) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

²⁶ *Id.* at 574.

authority, or limitations, or short of statutory right” must be held unlawful and set aside.²⁷ Even under the Commission’s broad reading of its Section 5 authority, for an action to be an unfair method of competition, the “conduct must implicate competition” in interstate commerce.²⁸ Non-compete agreements generally do not implicate competition in commerce. Congress, the courts, and the Commission have previously been concerned with unfair practices violating the spirit of the antitrust laws—i.e., practices that prevent a competing organization from continuing to be a competing organization. Non-compete agreements do no such thing. They do not prevent an organization from continuing in the industry in which it competes.

A. The Commission’s cited authority does not support an “unfair” determination.

The Commission has historically restricted its Section 5 authority to enforcing unfair methods of competition in the “spirit” of the antitrust laws. With its new—expansive—interpretation, the Commission has an obligation to support its peculiar interpretation of Section 5 with valid, on-point legal authority that justifies the Proposed Rule. The Commission has not done so. Instead, the Commission has cited cases that do not support the assertion that non-compete agreements are an unfair method of competition.

The Commission first cites *Atlantic Refining Co. v. FTC* for the notion that “‘a full-scale economic analysis of competitive effect’ was not required,” and that the Commission “merely needed to show that the conduct burdened ‘a not insubstantial portion of commerce.’”²⁹ But the Court’s statements in *Atlantic* come after it had already explained that the extensive antitrust violations by the involved companies “effectively sew up large markets.”³⁰

In *Atlantic*, Goodyear and Atlantic entered into an agreement whereby Atlantic would promote Goodyear’s products to Atlantic’s wholesalers and dealers in return for a commission. Through the agreement, Atlantic could obtain payment by coercing its wholesalers and dealers into purchasing and reselling more Goodyear products. When wholesalers and dealers refused to go along with the plan, Atlantic and Goodyear conspired to coerce them into signing up. Atlantic controlled the wholesalers’ and dealers’ lease and equipment loan contracts, with their cancellation and short-term provisions; the supply of gasoline and oil to its wholesalers and dealers; and exercised extensive control of all advertising on the premises of its dealers.

Atlantic’s control over its wholesalers and dealers, the conspiratorial agreement between Atlantic and Goodyear, and the overt threats to Atlantic’s wholesalers and dealers are classic antitrust behavior. The Court even noted that “[w]hen conduct does bear the characteristics of recognized antitrust violations, it becomes suspect, and the Commission may properly look to cases applying

²⁷ 5 U.S.C. § 706(2)(C).

²⁸ Fed. Trade Comm’n, No. P221202, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* 8 (2022).

²⁹ Non-Compete Clause Rule, 88 Fed. Reg. at 3500, (proposed on Jan. 19, 2023) (to be codified at 16 C.F.R. 910) (quoting *Atlantic Refining Co.*, 381 U.S. at 370–371).

³⁰ *Atlantic Refining Co.*, 381 U.S. at 371.

those laws for guidance.”³¹ Unlike non-compete agreements, the effects on competition in commerce in *Atlantic* were apparent. “Wholesalers and manufacturers of competing brands, and even Goodyear wholesalers who were not authorized supply points, were foreclosed from the Atlantic market.”³² “Firestone and Goodyear were excluded from selling to Atlantic’s dealers in each other’s territories.”³³ And Atlantic wholesalers and retailers “had to compete with other wholesalers and retailers who were free to stock several brands, but they were effectively foreclosed from selling brands other than Goodyear.”³⁴

Although, as the Commission notes, the Court did not require overt coercion in *FTC v. Texaco, Inc.*, the facts of that case were essentially the same as *Atlantic*.³⁵ Two dominant companies in one market conspired to influence dependent companies and “to curtail competition in another” market.³⁶ Again, the Court focused on the antitrust aspect of the companies’ agreements in the sale of goods.

The Commission also cites *FTC v. R.F. Keppel & Bro.*, which focused again on the sale of goods.³⁷ The Court upheld the determination that a marketing scheme aimed at children—to sell them low quantity or quality goods—was an unfair method of competition because scrupulous manufacturers could not compete. By citing *R.F. Keppel & Bro.*, the Commission superficially compares a marketing scheme aimed at children to sell inferior products and non-compete agreements between working adults and their employers. Non-compete agreements’ supposed effects on the market are not reasonably related to a scheme directly affecting the sale of goods.

Non-compete agreements are not contracts within the spirit of the antitrust laws. The Commission cannot point to any non-compete agreements that coerce a third party. Nor does the Commission reasonably explain how non-compete agreements affect competition in commerce on a *per se* basis. And “[a]s the Commission moves away from attacking conduct that is either a violation of the antitrust laws or collusive, coercive, predatory, restrictive or deceitful, and seeks to break new ground by [banning] otherwise legitimate practices, the closer [judicial scrutiny of its rules] must be . . .”³⁸ The Commission’s attempt to regulate employment contracts is not supported by the Court’s precedent interpreting the Commission’s Section 5 authority to determine an unfair method of competition in or affecting commerce. The Commission has not justified its Proposed Rule sufficiently to survive close judicial scrutiny. The Proposed Rule is the epitome of “arbitrary or capricious administration of Sec. 5.”³⁹

³¹ *Id.* at 369–370.

³² *Id.* at 370.

³³ *Id.*

³⁴ *Id.*

³⁵ *FTC v. Texaco, Inc.*, 393 U.S. 223 (1968).

³⁶ *Id.* at 230.

³⁷ *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304, (1934).

³⁸ *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 137 (2d Cir. 1984)

³⁹ *Id.* at 138.

B. The Proposed Rule exceeds the Commission’s statutory authority to regulate interstate commerce.

The Proposed Rule exceeds the Commission’s statutory authority and is therefore unlawful. The Federal Trade Commission’s statutory authority rests on the Constitution’s Interstate Commerce Clause.⁴⁰ In the Commission’s enabling act, Congress declared unlawful “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce . . . ,”⁴¹ and defined “‘Commerce’ [to] mean[] commerce among the several States”⁴² That means that the Commission’s authority is limited to regulating commercial activities among the several States.

The Commission has failed to explain, however, how and to what extent the Proposed Rule regulates non-compete agreements affecting interstate commerce as distinguished from non-compete agreements with a purely intrastate effect.⁴³ Such analysis and explanation are necessary because when the Commission purports to regulate both interstate and intrastate activity, interested parties—e.g., affected states, affected businesses, affected employees, and Congress—have a right to understand all the consequences of the regulation. Given Congress’ responsibilities under the Congressional Review Act,⁴⁴ it is entitled to fully understand how the Proposed Rule will affect constituents. Without this vital information, Congress and the courts may rightly reject the Proposed Rule for exceeding the Commission’s statutory and constitutional authority to regulate non-compete agreements.

III. The Proposed Rule is arbitrary and capricious because it relies on new public policy considerations and ignores well-established policies in 47 states.

Under the Administrative Procedures Act, agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” must be declared unlawful and set aside.⁴⁵ As part of the required cost-benefit analysis for “determining whether an act or practice is unfair, the Commission may consider *established* public policies as evidence to be considered with all other evidence.”⁴⁶ The statute does not allow the Commission to consider new non-established public policies. But, even well-established and proven “public policy considerations may not serve as a primary basis for such determination.”⁴⁷ Indeed, “[n]ormally, an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency”⁴⁸ The Commission “*must* examine the relevant data and articulate a satisfactory explanation

⁴⁰ See U.S. Const. art. I, § 8, cl. 3; 15 U.S.C. § 44.

⁴¹ 15 U.S.C. § 45(a).

⁴² 15 U.S.C. § 44.

⁴³ See Non-Compete Clause Rule, 88 Fed. Reg. at 3538, (proposed on Jan. 19, 2023) (to be codified at 16 C.F.R. 910).

⁴⁴ 5 U.S.C. § 801.

⁴⁵ 5 U.S.C. § 706(2)(A).

⁴⁶ 15 U.S.C. § 45(n) (emphasis added).

⁴⁷ *Id.*

⁴⁸ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

for its action, including a ‘rational connection between the facts found and the choice made.’”⁴⁹ The Commission has violated these basic principles.

The Proposed Rule ignores the established public policies implemented by 47 states. Some have been formalized in state statutes, and others have developed as part of the states’ common law. These policies have weighed the rights of the employers and employees and the need to protect confidential information, proprietary training, and employers’ trade secrets. Non-compete agreements can also result in higher wages—or even severance payments—for those signing them.⁵⁰ Ignoring these established public policies and primarily relying on the Commission’s own new policy is therefore “arbitrary and capricious” and violates the Administrative Procedures Act.

A. The Commission must consider and balance many public policies before regulating non-compete agreements.

Forty-seven states allow non-compete agreements to varying degrees, with only three states prohibiting such agreements—and for different reasons. State and federal courts have reviewed the state-specific laws governing various types of non-compete agreements. Entire treatises have been written on non-compete agreements and their complexities.⁵¹ And tens of thousands of reported cases have addressed the wide range of non-compete terms tailored to fit specific situations, comport to specific state laws, and bind specific employees. Courts and state legislatures have rejected a one-size-fits-all approach and have determined, for example, that non-compete agreements are more likely appropriate when the employees entering into them are sophisticated employees who have been compensated for agreeing not to compete. Courts have analyzed the types of compensation for entering these agreements,⁵² and they have distinguished between non-compete agreements signed at the commencement of employment and those that are ancillary to employment.⁵³ For their part, states have sometimes limited the geographic scope of non-compete agreements in light of an employee’s proprietary or confidential information.⁵⁴ The Commission, by contrast, performed no similar analysis of these situations, state laws, and employee types before adopting a one-size-fits-all regulation. Instead, the Commission’s incomplete analysis effectively adopted California’s approach,⁵⁵ replaced all other states’ policy judgments with its own without justification, and cannot support the Proposed Rule.

⁴⁹ *Id.* (emphasis added) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

⁵⁰ This is evidenced by the examples cited by Commission. In *AK Steel Corp. v. ArcelorMittal USA, L.L.C.*, 55 N.E.3d 1152, 1157–58 (Ohio Ct. App. 2016), cited by the Commission, the Ohio appeals court found that the trial court erred by failing to consider additional resources in determining whether the noncompete provision was an undue hardship. “The record here supported a finding that Howell was a highly sought after senior executive of a major steel company, and was recruited by an even-larger competitor. Although there was testimony that Howell had a family that depended on his income, there was also testimony that Howell had a large, vested retirement plan from AK Steel, and his new employment with ArcelorMittal would include a \$900,000 signing bonus.” *Id.*

⁵¹ Brian M. Malsberg, *Covenants Not to Compete: A State-by-State Survey* (2013).

⁵² See 51 A.L.R.3d 825 (Originally published in 1973).

⁵³ See 152 A.L.R. 415 (Originally published in 1944).

⁵⁴ See, e.g., *Lake Land Emp. Grp. of Akron, LLC v. Columber*, 804 N.E.2d 27, 30 (Ohio 2004).

⁵⁵ See, e.g., Non-Compete Clause Rule, 88 Fed. Reg. at 3494, (proposed on Jan. 19, 2023) (to be codified at 16 C.F.R. 910).

B. The Commission relied on its own new policy preference instead of established public policy.

The Proposed Rule relies on the Commission’s new public policy preference for ensuring that employee wages always increase whenever an employer makes a business decision. That new policy preference ignores the established policy considerations—and reasonableness factors for non-compete agreements⁵⁶—that state legislatures and courts have developed and thoroughly examined over decades. The Commission has substituted its own public policy preference for those carefully considered by the states. The Proposed Rule therefore is arbitrary and capricious, and must be set aside.

Courts will sometimes defer to agencies when the “agencies are technical experts in the fields they are charged with regulating.”⁵⁷ But the Commission has no experience regulating non-compete agreements and has no relevant technical expertise.⁵⁸ The Commission must demonstrate that it has at least one if not both to justify its newfound interest in exerting regulatory control in this area. And even if it had the necessary experience and expertise, the Commission must still demonstrate that its policy preferences comport with those of Congress. The Commission has made no such showing.

IV. The Commission’s proposed *de facto* test is void for vagueness.

Courts will hold a rule or statute “void for vagueness” if its prohibitions are not clearly defined,”⁵⁹ and “men of common intelligence must necessarily guess at its meaning and differ as to its application.”⁶⁰ To overcome a federal void for vagueness challenge, the rulemaking authority must “establish minimal guidelines to govern law enforcement.”⁶¹ The Proposed Rule has failed to establish those guidelines insofar as it would regulate “*de facto* non-compete agreements” without adequately defining such agreements. According to the Proposed Rule:

Proposed § 910.1(b)(2) would state that the term non-compete clause includes a contractual term that is a *de facto* non-compete clause because it has the effect of prohibiting the worker from seeking or accepting work with a person or operating a business after the conclusion of the worker's employment with the employer.⁶²

The Proposed Rule provides examples of *de facto* non-compete agreements, but it does not define a *de facto* non-compete agreement, leaving employers and employees unable to protect their

⁵⁶ See, e.g., *Lake Land Emp. Grp. of Akron, LLC*, 804 N.E.2d at 30 (“Such an agreement does not violate public policy, ‘being reasonably necessary for the protection of the employer’s business, and not unreasonably restrictive upon the rights of the employee.’” (citation omitted)).

⁵⁷ *Scenic Am., Inc. v. Dep’t of Transp.*, 138 S. Ct. 2, 2 (2017) (Gorsuch, J., respecting the denial of certiorari).

⁵⁸ *Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule*, *supra*, at 5–7.

⁵⁹ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

⁶⁰ *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

⁶¹ *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

⁶² Non-Compete Clause Rule, 88 Fed. Reg. at 3509, (proposed on Jan. 19, 2023) (to be codified at 16 C.F.R. 910).

interests or freely negotiate contracts without fearing liability. The Proposed Rule’s vagueness on this point would allow the Commission to enforce it arbitrarily.

It is also not clear that the Commission adequately accounted for how the *de facto* test risks harming employees, employers, and consumers. Uber and Lyft drivers, for example, contract with Uber and Lyft.⁶³ For safety reasons, and to comply with some state laws, both companies limit the number of hours drivers may drive during a set period.⁶⁴ These restrictions help prevent driver fatigue that could cause traffic accidents.⁶⁵ To circumvent these limits, however, some drivers will work for both companies. The broad language of the Proposed Rule’s *de facto* non-compete test would prevent Uber and Lyft from limiting the number of hours a day their drivers drive for *any* company. Because such a restriction would force drivers to choose which company to work for or risk being fired, it may or may not be a *de facto* non-compete agreement under the Proposed Rule. And that is a problem because it means that the *de facto* test is vague and therefore void.

The Commission must make its rules clear, understandable, and not subject to arbitrary enforcement. The Proposed Rule does not and is therefore void for vagueness.

Conclusion

The Proposed Rule violates Section 5 of the FTC Act, exceeds the Commission’s constitutional authority to regulate interstate commerce, supplants well-established state policy preferences, and undermines federal due process protections. As Commissioner Christine Wilson noted, “numerous and meritorious legal challenges that undoubtedly will be launched against the [Proposed] Rule” will result in the Commission “essentially . . . directing staff to embark on a demanding and futile effort”⁶⁶ to defend it. The Commission has not—and cannot—justify the Proposed Rule, and it should be withdrawn in its entirety.

⁶³ Grant E. Brown, *An Uberdilemma: Employees and Independent Contractors in the Sharing Economy*, 75 Md. L. Rev. Endnotes 15, 17 (2016).

⁶⁴ See Diver, Uber, <https://tinyurl.com/UberDriverReqs> (last visited Mar. 2, 2023).

⁶⁵ Sachin Kansal, *Another step to prevent drowsy driving*, Uber (Feb. 12, 2018), <https://tinyurl.com/26zynywn>.

⁶⁶ *Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule*, *supra*, at 10.

About The Buckeye Institute

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