

TECH FREEDOM

Comments of

TechFreedom

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In the Matter of

Request for Public Comment Regarding Contract Terms That May Harm Fair Competition

Docket ID: FTC-2021-0036

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I. Background

TechFreedom files these comments in response to the FTC’s request for comment in the above-referenced Docket.¹ This request for comment references the Petition for Rulemaking filed by Open Markets Institute (OMI) and a group of other organizations and individuals in March, 2019,² and following the FTC’s workshop on such matters, held January 9, 2020.³ In these comments, TechFreedom focuses on the state of understanding of the use and impact of non-compete agreements in the tech sector, and warns that insufficient study has been done for the FTC to proceed to a rulemaking proceeding aimed at declaring all non-compete agreements a *per se* violation of the nation’s antitrust laws – the harshest category of violations, traditionally reserved for only the most egregious forms of illegal trade practices.

A. About TechFreedom

Founded in 2010, TechFreedom is a non-profit think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere.

We have weighed in on significant issues over which the FTC has jurisdiction over the past decade:

- We’ve championed a reasoned discussion to COPPA enforcement that doesn’t destroy the creative community or tech industry;⁴

¹ See Solicitation for Public Comments on Contract Terms That May Harm Competition, Federal Trade Commission, FTC-2021-0036-0022 (Aug. 05, 2021), <https://www.regulations.gov/document/FTC-2021-0036-0022>.

² Open Markets Institute, et al., Petition for Rulemaking, filed March 20, 2019 (hereinafter “OMI Non-Compete Petition”), available at <https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5eaa04862ff52116d1dd04c1/1588200595775/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf>.

³ Press Release, Federal Trade Commission, Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues (Jan. 9, 2020), <https://www.ftc.gov/news-events/events-calendar/non-competes-workplace-examining-antitrust-consumer-protection-issues>.

⁴ We hosted an event in the U.S. Capitol on January 13, 2020, bringing together the YouTube creator community with staffers to discuss the impact of the FCC’s settlement with YouTube. See TechFreedom, *Will Kids’ Privacy Crackdown Break the Internet? Watch the 1/13 event* (Jan. 13, 2020), <https://techfreedom.org/save-the-date-will-kids-privacy-crackdown-break-the-internet/>. We also hosted a Capitol Hill panel discussion on COPPA in 2011, see <https://techfreedom.org/reminder-techfreedomfoscoppa-event-in-dc/>, and appeared at the FTC’s workshop on COPPA. See Press Release, Federal Trade Commission, The Future of the COPPA Rule: An FTC Workshop (Oct. 07, 2019) (General Counsel James E. Dunstan appeared on Panel 2: Scope of the COPPA Rule), [https://www.ftc.gov/news-events/](https://www.ftc.gov/news-events/events-)

- We've urged caution in rescinding prior FTC Policy Statements without thorough examination and something to fill the void;⁵
- We've analyzed the pros and cons of the FTC and DOJ's 2020 Vertical Merger Guidelines;⁶
- We've challenged the notion that the FTC Act requires plaintiffs to utilize the FTC's in-house adjudicatory process when bringing constitutional claims against the agency;⁷ and,
- We've encouraged the Supreme Court to limit the FTC's remedy powers to those that are explicitly granted by the FTC Act⁸

We welcome the opportunity to once again comment on rulemakings under Section 5 of the FTC Act's unfair methods of competition authority, specifically regarding a ban on non-compete agreements.

B. Non-Compete Agreements Historically Are a Creature of State Law

Non-compete agreements⁹ historically are creatures of state law.¹⁰ At least 25 states currently have statutes governing (or in some cases prohibiting) the use of non-compete agreements, and virtually every state has a long line of judicial decisions related to non-compete agreements.¹¹ These state laws, as well as hundreds of years of common law case

calendar/future-coppa-rule-ftc-workshop. *See also* Comments of TechFreedom in COPPA Rule Review, Project No. P195404, Docket ID: FTC-2019-0054 (Dec. 11, 2019), <https://techfreedom.org/wp-content/uploads/2019/12/TechFreedom-Comments-COPPA-12-11-19.pdf>.

⁵ *See* TechFreedom, Letter to Chair Lina Kahn regarding Comments for July 1 Open Commission Meeting in re Unfair Methods of Competition Policy Statement (June 30, 2021), <https://techfreedom.org/wp-content/uploads/2021/07/TechFreedom-FTC-Open-Meeting-Comments-6.30.21-UMC-Policy-Statement-1.pdf>.

⁶ *TechFreedom Praises, Critiques New Vertical Merger Guidelines*, TECHFREEDOM (June 30, 2020), <https://techfreedom.org/techfreedom-praises-critiques-new-vertical-merger-guidelines/>.

⁷ *Axon: Can Defendants Raise Constitutional Defenses in Court Before the FTC Forces them to Settle?*, TECHFREEDOM (May 12, 2020), <https://techfreedom.org/axon-can-defendants-raise-constitutional-defenses-in-court-before-the-ftc-forces-them-to-settle/>.

⁸ *SCOTUS Should Apply Congressional Limits Placed On FTC's Remedy Power*, TECHFREEDOM (Oct. 2, 2020), <https://techfreedom.org/scotus-should-apply-congressional-limits-placed-on-ftcs-remedy-power/>.

⁹ Non-compete agreements go by a number of different names, including "noncompete agreements," "non-competes," and "NCAs."

¹⁰ For a state-by-state breakdown of their laws on non-compete agreements, *see* Irvine Legal, *Employee Noncompete: A State by State Survey* (Jan. 13, 2019), <https://static1.squarespace.com/static/5876a3c320099e396b9d27df/t/5ffde306fbd07a1ee527a07c/1610474247563/State+Survey+Chart+-+Non-compete.pdf>.

¹¹ *Id.*

law,¹² have defined the metes and bounds of non-compete agreements. State-developed non-compete law sets forth the limitations on such agreements, including the duration, geographic extent, and relevant competitive businesses to which the restriction applies.¹³ In almost all cases, both the statute and the case law weigh the *reasonableness* of the agreement.¹⁴ In antitrust parlance, the analysis is always a “rule of reason,” weighing the purported benefits of such agreements against the burdens they impose on employees.

The first question the FTC must ask, as a fundamental matter of federalism, is whether this is an area of the law over which the federal government has preeminence, and whether, after over 100 years of sitting on the sidelines, the FTC can now swoop in, preempt state law, and declare that all (or even some) non-compete agreements are *per se* antitrust violations as an unfair method of competition (“UMC”). Any rule which may result from this proceeding will face such a challenge in court.

C. Non-Compete Agreements Are Part of the Toolset Technology Companies Use to Protect Vital Intellectual Property

Non-compete agreements are just one of the many tools companies use to protect their assets. For technology companies, the “secret sauce” that has propelled American businesses into the Digital Revolution is intellectual property. To protect their investments, technology companies use invention assignment agreements, non-disclosure and non-solicitation agreements, and in some cases, non-compete agreements. Those are the “sticks” technology companies use to protect their vital intellectual property. The “carrots” used to attract top talent include higher wages, stock ownership or options, and revenue sharing arrangements, all designed to provide employees with an upside in the event the company is successful. Technology companies must choose the proper mix of “carrots” and “sticks” in order to acquire and retain the best talent. In Silicon Valley, as elsewhere, the model of top-down management control over laborers has long since been abandoned, replaced with a much “flatter” organizational structure which provides employees “skin in the game,” and has

¹² The first litigated non-compete agreement may well date back over 600 years. *John Dyer’s Case*, Y.B. 2 Hen.5, fo. 5, pl. 26 (C.P. 1414); See <https://tagsearch.com/insights/articles/a-current-look-at-the-noncompete-agreement-one-of-the-worlds-oldest-business-practices>. Early U.S. non-compete jurisprudence (and antitrust cases in general), relied heavily on English precedent. See, e.g., *Addyson Pipe & Steel Co. v. United States*, 85 F. 271 (6th Cir. 1898), *aff’d*, 175 U.S. 211 (1898) (relying heavily on *Mitchel v. Reynolds*, 1 P. Wms. 181, 24 E.R. 347 (Q.B. 1711)).

¹³ For a good discussion of the development of non-compete law and the various approaches to “reasonableness,” see Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 Am. Bus. L.J. 107 (2008).

¹⁴ See, generally, J. Barnett & T. Sichelman, *The Case for Noncompetes*, 87 UNIV. OF CHICAGO L. REV 953, 958 (2020) (46 states adjudicate disputes over non-compete agreements pursuant to varying forms of a “reasonableness” common law standard dating back to 1711).

produced so many Generation X and Y millionaires, and if we allow the marketplace to work properly, it will produce millionaires in Generation Z as well.

In one example of the disconnect between the old way of doing business and the new entrepreneurial approach to business is exemplified by this Twitter exchange:¹⁵



Can non-competes be abused? Absolutely. Should non-competes be enforced against low-wage employees who aren't provided any upside in exchange for the non-compete? Probably not, and state courts rarely enforce non-competes in such situations.¹⁶ But conversely, should a company which pays millions to a CEO expect her to "sit on the sidelines" for some period of time upon leaving the company, rather than taking her name and stature (acquired or enhanced with the support of the company) immediately to a competitor? Quite possibly. Should a computer software company which brings in a senior engineer and reveals to her the secrets of its revolutionary game engine expect to be able to keep her from taking those secrets to a competitor the week after her stock options vests and she leaves? A well-functioning marketplace would say yes.

¹⁵ @elonmusk, TWITTER (Sep. 09, 2020 1:15 PM) (in response to @RBReich), TWITTER (Sep. 08, 2020 12:32 AM), <https://twitter.com/RBReich/status/1303189563188244480>, <https://twitter.com/elonmusk/status/1303743774330441728>.

¹⁶ The "poster child" for unreasonable non-compete agreements, and cited extensively in the OMI Petition, is the sandwich chain Jimmy John's requiring its hourly workers to agree not to work for any other sandwich shop within a three-mile radius. Both the Illinois and New York Attorneys General sued the chain, and settlements were reached whereby Jimmy John's would not enforce its non-compete agreements in those states. *See* OMI Petition at 7-8.

In all instances, state law currently measures each of these instances under a reasonableness standard (with limited exceptions).

D. The OMI Petition

This proceeding flows from the Petition for Rulemaking filed by OMI in March of 2019.¹⁷ The Petition paints a bleak picture of employment in America, where evil companies attempt to lash employees to the corporate wheel, denying them the benefits they deserve, and subjecting them to all manners of workplace abuse, and even death, all because non-compete agreements make them virtual slaves.¹⁸ The Petition lacks any substantial evidence to support its claims. The best it can cite to is a study indicating that workers with non-competes have an 11% longer tenure at companies than employees without them.¹⁹ Even such a statistic, showing a relatively small effect, is ambiguous: it does not show that workers are actually made worse off by non-compete agreements because the metric of time spent on a job does not reflect higher compensation provided to employees subject to non-compete agreements (especially those paid to stay on after their companies have been acquired) or other benefits employees may receive, such as training that increases their market value—training they likely would not receive if they could immediately leave with such training to work at a competitor.

In addition, the Petition acknowledges that there is evidence in the literature suggesting a positive correlation between non-compete agreements and increased wages. Two studies have found evidence of a compensating wage premium for workers who accept non-compete clauses. In one study, physicians in group practices that used non-compete clauses had higher incomes and income growth over time than their peers in groups that did not use non-competes. Looking at all workers, another analysis found a 10% wage premium for workers who receive a non-compete before they accept a job offer.²⁰

¹⁷ See *supra*, note 2.

¹⁸ See OMI Petition at 36 (“Non-competes can also force workers to remain at jobs with unsafe or dangerous working conditions. In 2017 in the United States, 5,147 workers died from traumatic injuries on the job, which means that fatal job injuries occurred at a rate of 3.5 per 100,000 workers.”); see also OMI Petition at 26 (“Non-competes can also compel workers to stay in a job where they are subject to gender or racial discrimination, sexual harassment, or other forms of mistreatment on the job or exposed to threats to their health and safety.”). As with much of the OMI Petition, these statements are not supported by any citations or evidence.

¹⁹ *Id.* at 29. Of course, this study does not state whether there were other factors that kept the employees there, including better wages, or stock options that required the employee to stay in order to vest and become a real asset to the employee.

²⁰ *Id.* at 34 (footnotes omitted).

Most disturbing, the Petition alleges that there are virtually no benefits of non-competes outside of the power they give to ruthless companies. In doing so, the Petition actually argues that society should not protect the intellectual property companies spend billions to develop. “This justification mistakenly ignores how the dissemination and sharing of information can often benefit society.”²¹ Not content to stop there, the Petition states “The sharing of information among individuals and firms is often desirable for society and should not be indiscriminately restricted through restraints such as non-competes.”²²

From this parade of horrors, the Petition calls for an outright ban on non-competes, calling on the FTC to declare them a *per se* UMC.²³

II. The FTC Has No Authority to Establish Substantive Rules on Non-Compete Agreements as Unfair Methods of Competition

The OMI Petition calls upon the FTC to issue specific substantive rules under the Administrative Procedure Act proscribing certain practices as unfair methods of competition.²⁴ But the FTC has no such power. The Petition invokes Section 6(g) of the FTC Act, one of the “additional powers” conferred upon the FTC in the original FTC Act of 1914.²⁵ However, if Congress had intended the FTC to make substantive or legislative rules — rules with the force and effect of law — it would have provided that violations of such rules could be punished with some kind of sanction. Such was the convention guiding Congress in how it distinguished grants of substantive rulemaking authority from grants of purely procedural rulemaking authority, according to the exhaustive study of legislation enacted in the Progressive and New Deal eras conducted by Columbia Law Professor Thomas Merrill, one of America’s leading administrative law scholars.²⁶ In fact, the original FTC Act did not even authorize sanctions for violations of the Act itself; instead, the FTC could issue only a cease-

²¹ *Id.* at 40 (The Petition goes on: “For example, copyright and patent law, while creating a property right over intangibles, recognize this logic and accordingly limit the scope of protection. Through noncompetes, employers effectively expand intellectual property protection and disrupt the balance that Congress has attempted to strike.”). Of course, trade secret law is a creature of the common law, not Congress. The OMI Petition thus argues that there should be no trade secret protection for companies, and that there is a “benefit” to “society” of the leaking of trade secrets to competitors. *Id.*

²² *Id.*

²³ *Id.* at 49.

²⁴ *Id.* at 4 (citing *Nat’l Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973)).

²⁵ FTC Act of 1914, H.R. 15613, 63d Cong. § 6(g) (1914); 15 U.S.C. § 6(g).

²⁶ See Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: the Original Convention*, 116 Harv. L. Rev. 467 (2002), <https://bit.ly/3D0yoSd>.

and-desist order — which is no sanction at all. The FTC could not even enforce that order itself; it must ask a court to do so.

As our attached comments further explain, to read Section 6(g) as a grant of substantive rulemaking power would broadly flout both the Act’s context and the Constitution. When Congress passed the FTC Act in 1914, both the non-delegation doctrine (barring Congress from handing legislative power to executive agencies) and the removal power (ensuring that the president has broad authority to remove executive-branch officers at will) were broader and more rigid than they are today. Even aside from Section 6(g), the FTC Act tested these boundaries by letting the FTC enforce a broad “unfair methods” standard case-by-case and by granting the FTC’s commissioners “for-cause” removal protection. The portion of Section 6(g) at issue here, meanwhile, lies buried in a long section detailing the FTC’s power simply to gather and report information in furtherance of its duties. As a matter of statutory interpretation, therefore, to read Section 6(g) as a grant of substantive (*i.e.*, legislative) rulemaking authority is to assume that Congress, in a statute already at risk of bursting multiple constitutional seams, implanted, in a single vague sentence in an otherwise unrelated section, a sweeping assault on the non-delegation doctrine. That’s an untenable assumption. And as a matter of constitutional law, the proposed reading of Section 6(g) *still* violates the non-delegation doctrine, a conclusion made all the clearer by the Supreme Court’s recent decision in *Gundy v. United States*.²⁷

Our comments distinguish from the FTC Act each of the statutes at issue in the cases cited by *National Petroleum Refiners*, the principal case invoked by those who claim Section 6(g) confers substantive rulemaking powers. We also explain the irrelevance of amendments to the FTC Act made after *National Petroleum Refiners*. The only relevant Congressional action confirms that Congress understood a statute exactly parallel to FTC Act *not* to confer substantive rulemaking authority.

Ultimately, we conclude Section 6(g) confers no power to issue “substantive” or “legislative” rules — only “procedural” and “interpretive” rules. The Administrative Conference of the United States, the official organ of the federal judiciary, has been clear: “An agency should not use an interpretive rule to create a standard independent of the statute or legislative rule it interprets. That is, noncompliance with an interpretive rule should not form an independent basis for action in matters that determine the rights and obligations of any member of the public.”²⁸ Thus, the FTC cannot issue the substantive rule the petitioners seek.

²⁷ 139 S. Ct. 2116 (2019).

²⁸ ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, AGENCY GUIDANCE THROUGH INTERPRETIVE RULES (2019), available at <https://bit.ly/3F0FrffH>.

III. There is Insufficient Evidence of the Dangers of Non-Competes for the FTC to Institute a Rulemaking Proceeding at this Time

The Petition tries to argue that the evidence of the harms of non-compete are so complete and compelling that the FTC can move forward with a notice of proposed rulemaking in order to adopt a *per se* prohibition on the use of all non-competes. Nothing can be further from the truth. As one set of scholars stated in 2016:

In fact, we know surprisingly little about the frequency, scope, and strength of noncompetition agreements in this country. We know even less about how differences across jurisdictions in the law of noncompetes and in enforcement behavior relate to the prevalence and content of such agreements. Notwithstanding this dearth of basic information, there has been a near explosion in the attention being paid to noncompetes and their effects. Policymakers and commentators have been engrossed. Researchers, for their part, have published many provocative, but ultimately limited, exploratory studies about the many roles that noncompetes play in employment relationships and the economy. Much of this chorus has been fueled by unsupported assumptions and by high-profile anecdotal evidence of purportedly abusive practices involving noncompetes.²⁹

In addressing the state of scholarship buttressing those who would ban non-competes, the authors continue: “Nevertheless, it is clear that--for the most part--this literature comprises unconnected, piecemeal, and often abstract articles. These articles do not have a basic, foundational understanding of noncompete contracting behavior ‘on the ground’ or even a full sense of state-by-state noncompete enforcement realities.”³⁰ Finally, these authors question whether a nationwide ban on non-competes would actually change the labor markets. “Curiously, we find little credible evidence of any relationship between the strength of enforcement at the state level and employer noncompete use by state, raising questions about the practical significance of standard reform efforts.”³¹

The FTC attempted to “close the knowledge gap” concerning non-competes by seeking comments and holding a workshop on January 9, 2020.³² Yet the presentations at that workshop did little to provide an adequate evidentiary record sufficient to warrant the FTC to take action immediately. Ryan Nunn, for example, pointed to the lack of empirical studies

²⁹ James J. Prescott, et. al., *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, 2016 MICH. ST. L. REV. 369, 371.

³⁰ *Id.* at 373.

³¹ *Id.* at 377.

³² *See supra*, note 6.

on the impact of non-competes on the labor market,³³ especially given the decline of union membership in the private sector from 24 percent 50 years ago to less than six percent today.³⁴ He also noted that non-compete agreements can serve as a valuable tool to protect trade secrets.

The trade secret justification starts with this premise that trade secrets litigation is protracted, it's costly, it's difficult for employers to win. Non-competes may be a more effective or at least lower cost way to prevent the theft of trade secrets than would a more narrowly targeted law that simply sanctions the exposure of the secrets themselves. I think the underlying idea here is that it's necessary to prevent those trade secrets from being divulged in order to induce the employer to share that information in the first place, the idea being that the employer shares the trade secrets with their worker, it facilitates their joint production and contributes to social welfare, because the employer knows that that information won't be divulged outside the firm."³⁵

Mr. Nunn indicated that there is "limited evidence," but it appears that non-compete agreements correlate at least loosely to labor impacts that cut in both directions.³⁶

Professor Kurt Lavetti of Ohio State University similarly reported that evidence is still lacking, with the current study conclusions "[s]till far from reaching a scientific standard for concluding NCAs are bad for overall welfare," and we "[a]lso don't yet fully understand the distribution of effects on workers."³⁷ He noted "in some contexts there is evidence they systematically increase earnings."³⁸ His ultimate conclusion is that "[m]ore empirical

³³ Ryan Nunn, Policy Director, Hamilton Project, Fellow in Economic Studies, Brookings Institution, Non-compete Contracts: Potential Justifications and the Relevant Evidence (Jan. 09, 2020), <https://www.brookings.edu/testimonies/non-compete-contracts-potential-justifications-and-the-relevant-evidence/>; Federal Trade Commission, Slide Deck for the Non-Compete Clauses in the Workplace: Examining Antitrust and Consumer Protection Issues Workshop at 40 (Jan. 09, 2020) (hereinafter "Non-Compete Workshop Slides"), https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete-workshop-slides.pdf; Federal Trade Commission, Transcript of NON-COMPETES IN THE WORKPLACE: EXAMINING ANTITRUST AND CONSUMER PROTECTION ISSUES at 122-23 (Jan. 09, 2020, 8:30 AM) (hereinafter "Non-Compete Workshop Transcript").

³⁴ Non-Compete Workshop Slides at 38; Non-Compete Transcript at 120-22.

³⁵ Non-Compete Workshop Slides at 42; Non-Compete Workshop Transcript at 123. The flip side of these findings is the fact that "[s]everal studies have shown NCAs to be common among workers with low pay and/or educational attainment, for whom [trade secrets] are often not relevant."

³⁶ Non-Compete Workshop Slides at 48; Non-Compete Workshop Transcript at 131-32. Non-competes correlate to more worker training and more company investment, but also diminished firm entry and lower age-wage profiles.

³⁷ Non-Compete Workshop Slides at 55; Non-Compete Workshop Transcript at 138-39.

³⁸ Non-Compete Workshop Slides at 59 (studies of corporate executives and physicians); Non-Compete Workshop Transcript at 144-45; *see also* Non-Compete Workshop Slides at 61 (study of financial advisors

evidence is necessary before comprehensive curtailing of NCAs in all contexts.”³⁹ He also went on to argue that while some argue that wage depression can be linked to non-competes, such an attempted correlation “is oversimplification—many factors have contributed to this.”⁴⁰ He pushed back further on the current momentum leaning toward an outright ban on non-competes, noting that non-compete agreements “have been used for centuries, and empirical evidence on effects is relatively nascent.”⁴¹

While the OMI Petition points to the most egregious use of non-competes,⁴² Professor Evan Starr of the Robert H. Smith School of Business at the University of Maryland, indicated that only about 18-28 percent of the U.S. labor force is subject to a non-compete agreement, and that they are “more frequently found in high paying, more technical jobs.”⁴³

Invariably, the conclusion from virtually all the presenters, faced with the current body of literature, is that evidence points in multiple directions. Prof. Star sums it up best in addressing the question of whether non-competes boost investment, with some studies showing that enforcing non-compete agreements hurt investment and innovation, while other indicate that they encourage more investment. “Which is correct? Important avenue for future work.”⁴⁴

Questions regarding the impact of non-competes remain to this day. In its report on “Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: An FTC Study,” released on September 15, 2021,⁴⁵ FTC staff found:

More than 75% of transactions included non-compete clauses for founders and key employees of the acquired entities, with relatively small variation in the

showed that in states where non-competes are banned or not enforced, because of the threat of an advisor leaving and taking valuable clients with them, firms are forced to put up with higher misconduct, including higher fees charged to clients); Non-Compete Workshop Transcript at 147-49.

³⁹ Non-Compete Workshop Slides at 66; Non-Compete Workshop Transcript at 151-52.

⁴⁰ Non-Compete Workshop Slides at 67 (concluding that “[e]mpirical evidence is even more sparse on the firm and consumer sides.”); Non-Compete Workshop Transcript at 152-53.

⁴¹ Non-Compete Workshop Slides at 68; Non-Compete Workshop Transcript at 153-54.

⁴² OMI Petition at 07-08.

⁴³ Non-Compete Workshop Slides at 73; Non-Compete Workshop Transcript at 159-60. Prof. Starr did indicate, however, that one study shows that 14% of workers making less than \$40,000 per year were subject to non-compete agreements, and 53% of workers under non-competes were paid by the hour.

⁴⁴ Non-Compete Workshop Slides at 81; Non-Compete Workshop Transcript at 168; *see also* Non-Compete Workshop Slides at 86; Non-Compete Workshop Transcript at 173-75 (outlining “other directions for future work” which clearly intimate that much more study is necessary in this field).

⁴⁵ Available at <https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf>.

percentage of transactions that had non-compete clauses across the five respondents. Higher value transactions were more likely to use non-compete clauses.⁴⁶

Note that this study found that in these transactions, non-competes applied to “founders and key employees,” and that as those founders and key employees received more money from the transaction, they were more likely to agree to non-compete agreements. This is not evidence of a draconian misuse of non-competes, but rather that the transaction market takes into account the value of non-competes and fully compensates those that agree to enter into such agreements with higher (millions of dollars more) transaction payments.

This is all to say that much more study is necessary on the issue of non-competes before the FTC moves forward with a notice of proposed rulemaking (to the extent it can at all). There is simply too little data and too much hyperbole and speculation driving the instant push for an outright ban on non-competes on a nationwide basis. Yes, the FTC should continue to study the issue, but “setting sail” on a rulemaking proceeding at this stage is highly ill-advised.⁴⁷

IV. Adopting a Rule Declaring Non-Competes a *Per Se* Violation of the Antitrust Laws Would Engender *More* Employer-Employee Litigation

The final problem with the OMI Petition, and one which the FTC must study, is the Petition’s assertion that whatever legitimate interest companies might have to enforce their intellectual property rights can be enforced through the use of invention assignment and nondisclosure agreements.⁴⁸ Barring all non-compete agreements (or even a significant percentage of them) would, however, *increase* litigation in all respects.

Take our example above about the senior software engineer brought in to work on a computer game company’s new game engine. She stays the required two years for her stock

⁴⁶ *Id.* at 37. The study further found that in almost every transaction over \$25 million, non-competes were involved.

⁴⁷ Even if the FTC could convince an appellate court that it had substantive rulemaking authority under Section 6(b), the court could still question whether the FTC is an “expert agency” deserving of *Chevron* deference. Courts have noted instances where agencies have gone beyond their normal areas of expertise to adopt rules that should not be granted “expert” deference. *De La Mota v. U.S. Dep’t of Educ.*, 412 F.3d 71, 80 (2d Cir. 2005) (holding that the interpretation did not reflect agency expertise); *Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1069 (9th Cir. 2003) (agency decision did not “reflect the product of specialized agency expertise”); *Hall v. EPA*, 273 F.3d 1146, 1156 (9th Cir. 2001) (holding that EPA’s decision did not reflect expertise).

⁴⁸ OMI Petition at 46 (“Employers can protect their intangibles through trade secret law and non-disclosure agreements that prevent employees and former employees from sharing or publicizing protected information.”).

options to vest, but the engine is delayed and not rolled out before she is lured away to join a competing firm. Within a year, that competing firm releases its own game engine, which competes for, and take a significant market share away, from her original employer.

In Scenario 1, the engineer signed a non-compete agreement that limited her ability to move to a competing game software company for a period of one year. In that instance, she either would not have been employed by the new company for the year, or the company would have to assume the risk that it would be sued along with her. In scenario 2, she did not have a non-compete, but she *did* sign an inventions assignment agreement, a non-disclosure agreement.

In either case, there is going to be litigation. In the first scenario, a court would need to determine, as a matter of law, whether the metes and bounds of the non-compete was reasonable. Was one year a reasonable period? Was restricting employment to a competing computer game company narrowly tailored? Presumably, the new company would support her efforts to avoid enforcement of the non-compete. Generally speaking, the case could probably be decided on summary judgment.

In scenario 2, however, the litigation will turn on the highly factual analysis of whether she violated her nondisclosure agreement. Did she use any of the trade secrets acquired during her employment with company one, or only common knowledge? Experts on both sides would have to pour over thousands of lines of computer code to determine functional similarities, and if similarities were found, whether those similarities represent trade secrets that she revealed. That case would be headed for a full trial, and probably would take years to resolve.

The moral of that story is that eliminating non-compete agreements, in some cases, will increase both the amount of litigation, and certainly the cost and complexity of litigation. Non-compete agreements may be a “dull tool,” in the intellectual property tool belt, but they are much simpler for everyone to understand, employer, employee, *and* future employer. A labor market without non-competes thus becomes far more complex and costly to all involved.

V. Conclusion

There may be instances, possibly many instances, where non-compete agreements are not appropriate. There may even be situations where state law has failed, and there is a need for a national policy limiting non-competes. That doesn't mean, however, that the FTC should jump immediately into the fray and declare non-competes a UMC on a blanket basis. Much more study and work is necessary, and in our view, it should be Congress that ultimately

decides such “major questions.”⁴⁹ Congress never intended to delegate this power to the FTC, especially to make rules of general applicability, as opposed to making findings on a case-by-case basis that a particular company has engaged in an unfair method of competition in requiring its employees to sign non-compete agreements. We urge the FTC to proceed cautiously here, and not move forward with the issuance of a notice of proposed rulemaking.

Respectfully submitted,

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⁴⁹ Given the prevalent use of non-compete agreements, as outlined in the OMI Petition, suddenly outlawing such agreements would have a significant impact on the U.S. economy. Such a significant change of law must be analyzed under the “major questions” doctrine, which states that policy changes impacting such a significant percentage of the economy may not be made by an agency absent a clear and specific delegation by Congress. The doctrine requires “Congress to speak clearly if it wishes to assign to an agency, decisions of vast ‘economic and political significance.’” U.A.R.G., 134 S. Ct. at 2444 (quoting *Brown & Williamson*, 529 U.S. at 160). Put differently, when evaluating how administrative agencies make such decisions, courts ought not presume Congress intended to delegate the matter to agencies implicitly. Rather, Congress must expressly have authorized the agency to do so. *See, e.g.*, *King v. Burwell*, 135 S. Ct. 2480 (2015) (“In extraordinary cases ... there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.”) (quoting *Brown & Williamson*, 529 U.S. at 159); U.A.R.G., 134 S. Ct. at 2444 (recognizing for questions of vast economic and political significance, courts expect Congress to speak clearly); *MCI Telecommunications Corp. v. Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994).