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**Comments of**

**TechFreedom**

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**In the Matter of**

*Non-Compete Clause Rulemaking*

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On February 16, 2023, two of TechFreedom's legal scholars delivered remarks at the FTC's Public Forum for the Proposed Rule on Noncompetes. Their oral remarks are presented here, lightly edited for clarity.

## I. The FTC Lacks UMC Rulemaking Authority (Comments of Berin Szóka)

This proceeding presumes that Section 6(g) of the FTC Act[1] authorizes rules defining unfair methods of competition. The D.C. Circuit said so in 1973,[2] and the Supreme Court has said so of seemingly similar statutes.[3]

Like 6(g), the Communications Act says the FCC may "make rules and regulations for the purpose of carrying out the provisions of the Act."[4] But there's a key difference: that act also authorized heavy sanctions for violations of FCC rules.[5] The original FTC Act authorized no sanctions whatsoever, only injunctive relief.[6]

In the Progressive Era, as scholars Tom Merrill and Kathryn Watts explain, "If the statute prescribed a sanction, then the authority to make 'rules and regulations' included the authority to adopt legislative rules having the force of law. If the statute did not include a sanction, [such] authority encompassed only interpretive or procedural rules."[7] The Supreme Court's 1911 *Grimaud* decision says just that.[8] The FTC Act can only be understood in this context.

If 6(g) had authorized substantive rulemakings, the Act would have marked a constitutional revolution. It would have handed unprecedented legislative power to assess "fairness" to unprecedentedly insulated, independent executive officers without safeguards for

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[1] 15 U.S.C. § 46(g) (among other "additional powers," the Commission "shall . . . have power to . . . [f]rom time to time classify corporations and . . . to make rules and regulations for the purpose of carrying out the provisions of [the Act].").

[2] *Nat'l Petroleum Refiners Ass'n. v. FTC*, 482 F.2d 672 (1973).

[3] See, e.g., *ATT Corp. v. Iowa Utilities Bd*, 525 U.S. 366, 377 (1999).

[4] 47 U.S.C. § 201(b).

[5] 47 U.S.C. § 312(a)(4) (revocation of broadcast licenses and construction permits).

[6] Federal Trade Commission Act of 1914, Pub. L. No. 203, § 5(b).

[7] Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 493 (2002), https://bit.ly/3D0yoSd.

[8] *United States v. Grimaud*, 220 U.S. 506, 517-18 (1911) (stating that, "[f]rom the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations — not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations, *the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done*.") (emphasis added).

rulemaking procedures or judicial supervision.[9] Congress would have created an unaccountable mini-legislature—without anyone noticing … for decades.

But "Congress," the Supreme Court reminds us, "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not … hide elephants in mouseholes."[10] Section 6(g) is a mousehole: just one half of a one-sentence subsection on "additional powers." The FTC reads 6(g) as a mighty elephant: the power to legislate fairness across most of the economy. But, the Supreme Court has said, agencies cannot decide "major questions" of vast "'economic and political significance" without "clear congressional authorization."[11] Section 6(g) provides no such clear statement. Even if it did, the FTC's reading would violate the nondelegation doctrine as understood in 1914[12] and as the Supreme Court understands it today.[13]

Simply put, *National Petroleum Refiners*, the case on which this entire rulemaking rests,[14] is a pile of sand. The Commission should end this rulemaking and leave the "major question" of noncompetes to the states and Congress.

## II. The Proposed Rule Raises Complex Issues; Alternatives Do Not and Are More Consistent with FTC Authority and Practice (Comments of Bilal Sayyed)

The Commission's proposal to ban most labor non-compete agreements faces many legal hurdles and raises complex federal/state issues. I note that if the agency has the power it claims, it should put the force of rule behind its multi-decade campaign to limit unnecessary occupational licensing requirements.[15]

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[9] See also Berin Szóka & Corbin Barthold, *The Constitutional Revolution that Wasn't: Why the FTC Isn't a Second National Legislature* (June 2022), https://techfreedom.org/wp-content/uploads/2022/06/FTC-UMCRulemaking-Authority-TF-Version.pdf

[10] *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

[11] *West Virginia v. Env't Prot. Agency*, No. 20-1530, slip op. (S. Ct. 2021 June, 30, 2022).

[12] "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field v. Clark*, 143 U.S. 649, 692 (1892). Even where the Court upheld limited delegations, it held that delegations of legislative power were "never to be implied." *ICC v. Ry Co*., 167 U.S. 479, 494 (1897). This decision "suggests a nondelegation canon in the form of an 'express statement' rule: all grants of rulemaking authority confer only housekeeping powers, unless Congress expressly confers the power to make legislative rules." Merrill & Watts, *supra* note 7, at 491.

[13] See *Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (dissenting opinion of Gorsuch, J.); see also Berin Szóka & Corbin Barthold, *supra* note 9, at 13-14.

[14] See *supra* note 2.

[15] The FTC has a long history of urging policymakers to reduce or eliminate unnecessary occupational licensing requirements imposed by state law or rules. See, e.g., Federal Trade Commission, *Selected Advocacy*

The Commission's attempt to couch the proposal as a response to anticompetitive effects of non-compete agreements fails. The NPRM does not identify an anticompetitive effect of such agreements sufficient to support a near total ban on their adoption or enforcement.[16] The thousands of comments received to date identify the complexity of the issue, even as they themselves do not provide a basis for the proposed rule.[17]

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*Relating to Occupational Licensing*, listing many (but not all) comments and papers, https://www.ftc.gov/policy/advocacy-research/advocacy/economic-liberty/selected-advocacy-relating-occupational-licensing; See also Federal Trade Commission, *State-Based Initiatives: Selected Examples*, https://www.ftc.gov/policy/advocacy-research/advocacy/economic-liberty/state-based-initiatives-selected-examples. See also Federal Trade Commission, *Transcript, Streamlining Licensing Across State Lines: Initiatives to Enhance Occupational License Portability* (July, 2017), https://www.ftc.gov/system/files/documents/public_events/1224893/ftc_economic_liberty_roundtable_-_license_portability_transcript.pdf; Federal Trade Commission, *Policy Perspectives: Options to Enhance Occupational License Portability* (Sept. 2018), https://www.ftc.gov/system/files/document`s/reports/options-enhance-occupational-license-portability/license_portability_policy_paper_0.pdf.

[16] Mere labor mobility issues are not a competition problem. There is no credible theory or evidence in the docket or the NPRM that non-competes raise competitor's costs sufficient to give a firm power over price (of labor or products) and there is no evidence of collusive behavior sufficient to affect any market for labor; nor is there credible evidence that firms have market power over labor in most labor markets in the United States or smaller geographic areas. See, e.g., John M. McAdams (Federal Trade Commission), *Non-Compete Agreements: A Review of the Literature* (Dec. 31, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3513639; for a discussion of the mixed effects of non-compete agreements, see Ryan Nunn, Testimony, *Non-Compete Contracts: Potential Justifications and the Relevant Evidence* (Jan. 9, 2020), https://www.brookings.edu/testimonies/non-compete-contracts-potential-justifications-and-the-relevant-evidence/. See also Daniel Gilman & Brian Albrecht, *FTC Proposal Jumps the Gun on Banning Noncompetes* (Jan. 19, 2023), https://laweconcenter.org/wp-content/uploads/2023/01/Law360-FTC-Proposal-Jumps-The-Gun-On-Banning-Noncompetes.pdf. States are largely, but not entirely, challenging these as unfair acts.

[17] I have reviewed all of the comments to the 2020 Commission workshop on non-competes, the 2021 Commission/DOJ public discussion on labor issues, many thousands of the comments published in response to the NPRM, and the materials in the three recent complaints and settlements. The record, to date, does not provide even the barest evidence, even anecdotal evidence, suggesting an effect on competition in any relevant market supportive of the near total ban the Commission proposes. For a review of some relevant discussion from the FTC's 2020 workshop, see Clifford Atlas, et. al., *Against the Evidence: How the FTC Cast Aside the Input of Experts at its Own Non-Compete Workshop* (Feb. 7 2023), https://www.jacksonlewis.com/publication/against-evidence-how-ftc-cast-aside-input-experts-its-own-non-compete-workshop. The transcript for the 2020 Commission workshop (Jan. 9, 2020) is available at https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete-workshop-transcript-full.pdf; presentations are available at https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete-workshop-slides.pdf. To the extent that the NPRM relies on exploitative or coercive conduct in support of a ban on noncompete agreements, the difficulties of reliance on these considerations are discussed in Christine Wilson, *Dissenting Statement, Regarding the Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmt.pdf; and, Dissenting Statement, Regarding Notice of Proposed Rulemaking for the Non-Compete Clause Rule (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf.

What they do suggest, often, is opportunistic behavior: employers may obtain employee agreement to a non-compete covenant after an employee has made some hard-to-reverse commitment to his prospective or actual new employer and employees wishing to be excused from a non-compete agreement after recognizing its potential effect on their future job prospects, perhaps even if the covenant was entered into willingly.[18]

Such opportunistic behavior can be ameliorated through a rule issued under the authority conferred by the Magnuson-Moss Act governing unfair and deceptive act practices—rather than attempting to make a rule governing unfair methods of competition. A UDAP rule could require disclosure of post-employment constraints in conjunction with an offer of employment, including a statement of the relevant state law governing enforceability of such contracts, and reference to FTC "Frequently Asked Questions" on enforceability of such agreements, alternatives to a non-compete, and some general principles an employee should consider prior to agreeing to such contracts. Perhaps, too, a Mag-Moss rule identifying as an unfair practice (rather than an unfair method of competition) the enforcement of such an agreement when an employee is terminated for reasons other than cause and identifying as an unfair practice an employer's attempt to enforce agreements of the type found unenforceable by the highest court in the state.

Finally, the Commission should, before the end of February, extend the comment period an additional 90 to 120 days, given the extraordinary complexity of this issue.[19]

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[18] Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521 (1981), https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=3442&context=mlr.

[19] The Commission may not have the authority to issue substantive competition rules, and the proposed rule may be inconsistent with the so-called major questions doctrine and may also run afoul of the non-delegation doctrine. The proposal would also preempt the legislative decisions of many states to allow, under certain conditions, the enforceability of non-compete agreements. It disregards the history of judicial analysis of which such covenants are enforceable and which are not. And the proposal raises issues of institutional competence—the Commission does not have much experience with the workings of labor markets. In addition, states are recently and presently debating the proper scope, if any, of non-compete agreements. The FTC's proposed rule prevents that debate from reaching whatever conclusion elected state legislators and governors determine is an appropriate balance for their state. See, e.g., the following chapters in Dan Crane (ed). *Rulemaking Authority of the U.S. Federal Trade Commission* (2002) (Concurrences); Alden F. Abbott, *Legal Constraints on FTC Competition Rulemaking*; Maureen K. Ohlhausen & James F. Rill, *Pushing the Limits? A Primer on FTC Competition Rulemaking*; Maureen K. Ohlhausen & Ben Rosen, *Dead-End Road: National Petroleum Refiners Association and FTC 'Unfair Methods of Competition' Rulemaking*; Richard J. Pierce, Jr., *Can the Federal Trade Commission Use Rulemaking to Change Antitrust Law?*; and see Berin Szóka & Corbin Barthold, *The Constitutional Revolution That Wasn't: Why the FTC Isn't a Second National Legislature*, supra note 9. For other writers identifying substantive issues with respect to the issue of non-competes, including but not limited to FTC rulemaking authority, see, e.g., Jonathan M. Barnett & Ted Sichelman, *The Case for Noncompetes*, 87 U. OF CHIC. L. REV. 953 (2020), Corbin K. Barthold, *No, Chevron Deference Will Not Save the FTC's Noncompete Ban* (Feb. 14, 2023); Alan J. Meese, *Don't Abolish Employee NonCompete Agreements*, 57 WAKE FOREST L. REV. 631 (2022), Thomas W. Merrill, *Antitrust Rulemaking: The FTC's Delegation Deficit*, ADMINISTRATIVE LAW REVIEW,

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Columbia Public Law Research Paper (Feb. 1, 2023), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID4344807_code244408.pdf?abstractid=4344807&mirid=1; Merrill & Watts, supra note 7. See also Alden Abbott, *The FTC's NPRM on Noncompete Clauses: Flirting with Institutional Crisis* (Jan. 10, 2023), https://truthonthemarket.com/2023/01/10/the-ftcs-nprm-on-noncompete-clauses-flirting-with-institutional-crisis/; Jonathan M. Barnett, *Regulatory Rents: An Agency-Cost Analysis of the FTC's Rulemaking Initiative,* James Cooper, *Privacy Rulemaking at the FTC*, Dan Crane, in *FTC Independence after Seila Law*, and Aaron L. Nielson, *What Happens if the FTC Becomes a Serious Rulemaker* (suggesting caution in the FTC's attempt to become a more aggressive rulemaker). These essays appear in Dan Crane (ed). *Rulemaking Authority of the U.S. Federal Trade Commission* (2002). See also Comments of the Antitrust Law Section of the American Bar Association in Connection with the Federal Trade Commission Workshop on "Non-Competes in the Workplace: Examining Antitrust And Consumer Protection Issues" (April 24, 2020) (Project No. P201200) (FTC-2019-0093). See generally the discussion moderated by TechFreedom, Does the FTC Have Authority to Issue Competition Rules? https://www.youtube.com/watch?v=wn7JOVXQ7bc. On State/Federal issues, see James E. Dunstan, *Comments of TechFreedom, In the matter of Request for Public Comment Regarding Contract Terms That May Harm Fair Competition* (Sept. 30, 2021) (Docket ID: FTC-2021-0036). In addition, states are recently and presently debating the proper scope, if any, of non-compete agreements. See, e.g., Dawn Mertineit, *Non-Compete Regulation Should be Left to the States, Not the FTC* (Feb. 3, 2023), https://news.bloomberglaw.com/us-law-week/non-compete-regulation-should-be-left-to-the-states-not-the-ftc; Akin Gump, *Labor and Employment Alert, Washington, D.C.'s New Non-Compete Law is Now in Effect* (Oct. 5, 2022), https://www.akingump.com/a/web/oHJEvVmrs8ZWJByetVUxNW/4skM8i/labor-and-employment-alert.pdf; Leah Shepherd, *More States Block Non-Compete Agreements* (Sep. 15, 2022), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/states-restrict-noncompete-agreements-colorado.aspx; Teresa Lewi, et. al., *Recent Federal and State Laws Restrict Use of Employee Non-Competition Agreements by Government Contractors and Other Employers* (Aug. 19, 2021), https://www.insidegovernmentcontracts.com/2021/08/recent-federal-and-state-laws-restrict-use-of-employee-non-competition-agreements-by-government-contractors-and-other-employers/; Chris Marr, Bloomberg News, *Employee Non-Compete Clause Limits Adopted by Three More States* (Jun. 219, 2021), https://news.bloomberglaw.com/daily-labor-report/employee-noncompete-clause-limits-adopted-by-three-more-states (detailing existing and recent state efforts with respect to non-competes). The FTC's proposed rule preempts this ongoing state (and federal) legislative debate. See Senator Chris Murphy, Press Release, *Murphy, Young Reintroduce Bill to Protect American Workers*, *Limit Non-Compete Agreements* (Feb. 1, 2023), https://www.murphy.senate.gov/newsroom/press-releases/murphy-young-reintroduce-bill-to-protect-american-workers-limit-non-compete-agreements.