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BREAKING THE NON-COMPETE CYCLE: A LEGAL AND ECONOMIC ANALYSIS OF THE FTC'S POWER MOVE

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I. INTRODUCTION

On January 5, 2023, the Federal Trade Commission ("FTC") proposed a groundbreaking new rule that would prohibit the use of non-compete agreements.[1] The FTC believes this move could create thirty million jobs for Americans and increase wages across the country by over $300 billion.[2] Non-compete agreements are a type of employment agreement or contract clause stating that an employee may not compete with their current employer after their employment term ends.[3] Between 27% to 46% of private sector workers are encumbered by these agreements.[4] These agreements have stirred controversy because they negatively impact wages by restricting labor mobility.[5]

Non-compete agreements affect the economy by interfering with labor markets.[6] In a properly functioning labor market, workers look to the market for better job opportunities.[7] This results in competition between current and prospective employers who must compete for a limited number of employees.[8] Additionally, when non-competes do not interfere with the economy, the labor market creates competition for workers because they must compete against each other for their desired employment opportunities.[9] When employers compete for workers, and workers compete for employment opportunities, there are higher earnings for workers, more productivity for employers, and better economic

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1. *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, FED. TRADE COMM'N (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition [https://perma.cc/C8MM-D769].

2. *Id.*

3. Adam Hayes, *What Is a Non-Compete Agreement? Its Purpose and Requirements*, INVESTOPEDIA (Aug. 13, 2022), https://www.investopedia.com/terms/n/noncompete-agreement.asp [https://perma.cc/LJ9Z-LWH3].

4. ALEXANDER J.S. COLVIN & HEIDI SHIERHOLZ, ECON. POL'Y. INST., NONCOMPETE AGREEMENTS 10 (2019).

5. *Infra* Part III.C.

6. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3484 (Jan. 19, 2023) (to be codified at 16 C.F.R 910).

7. *Id*.

8. *Id*. at 3484-85.

9. *Id*. at 3845.

outcomes.[10] Non-compete agreements, however, constrain this dynamic.[11] By restricting the mobility of workers, non-competes can push the market out of equilibrium.[12] When workers and employers are encumbered by non-compete agreements, they are prevented from finding their optimal matches, lowering economic productivity.[13]

Often, employees have little say in whether they are subject to a non-compete agreement.[14] Employers are essentially able to mandate the use of non-competes because of the disparity in bargaining power within the employee-employer relationship.[15] Employers hold much of the bargaining power over workers, so workers can find it quite difficult to avoid these agreements.[16] An infamous example of the predatory use of non-competes occurred in 2016 when the Second Circuit forced the sandwich chain Jimmy John's to stop using non-competes for its low wage workers.[17] In that case, the New York Attorney General investigated the chain's "unconscionable" use of non-competes.[18] The Attorney General's office determined the non-compete agreements' restraints on employee mobility were greater than any legitimate business interest and should not be enforced.[19]

The FTC's proposal to ban non-compete agreements would have a drastic effect on our workforce and redistribute power to employees.[20] This Comment examines the monumental consequences of a potential FTC ban on non-compete agreements and whether the FTC has the authority to pass such a rule.[21] Section II provides a general background

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Sandeep Vaheesan & Matthew Jinoo Buck, *Non-Competes and Other Contracts of Dispossession*, 2022 MICH. ST. L. REV. 113, 128.

15. *Id.* at 129.

16. *Id*. at 134.

17. Sarah Whitten, *Jimmy John's Drops Noncompete Clauses Following Settlement*, CNBC (June 22, 2016), https://www.cnbc.com/2016/06/22/jimmy-johns-drops-non-compete-clauses-following-settlement.html [https://perma.cc/75ZA-P3PP].

18. *Id.*

19. Aruna Viswanatha, *Sandwich Chain Jimmy John's to Drop Noncompete Clauses from Hiring Packets*, WALL ST. J. *(*June 21, 2016), https://www.wsj.com/articles/sandwich-chain-jimmy-johns-to-drop-noncompete-clauses-from-hiring-packets-1466557202 [https://perma.cc/D8NT-VBJP].

20. Noam Scheiber, *U.S. Moves to Bar Noncompete Agreements in Labor Contracts*, N.Y. TIMES (Jan. 5, 2023), https://www.nytimes.com/2023/01/05/business/economy/ftc-noncompete.html#:~:text=A%20sweeping%20proposal%20by%20the,to%20work%20for%20a%20rival [https://perma.cc/6RTD-4UXP].

21. Although non-compete agreements are similar to other employment contracts, this Comment does not involve non-competes' close relatives: non-poaching and non-solicitation agreements. Non-poaching agreements are contracts in which employers agree not to hire each other's employees. Charles Sullivan, *Poaching*, 71 AM. U.L. REV. 649, 651 (2021). Non-solicitation agreements prevent employees from inviting workers and customers from their previous job to become a worker or customer of their new

of the history and modern trends of non-compete agreements. It also examines the FTC and its enforcement authority under the Federal Trade Commission Act. Section III argues the FTC has the authority to pass a non-compete ban and—for that reason—any legal challenges to an FTC action should fail. Section III also argues the net gain of a non-compete ban will outweigh any negative impact felt by employers who could no longer implement these agreements.

II. BACKGROUND

Employers utilize non-compete agreements for a variety of business reasons.[22] Employers may seek to secure trade secrets, reduce employee turnover, or improve leverage in future employment negotiations.[23] Non-competes protect trade secrets by preventing employees from joining new firms and disseminating valuable information obtained from their previous employer.[24] Additionally, an employer who invests heavily in staff training may wish to prevent its workforce from leaving to join a competitor, and thus implements a non-compete agreement to reduce employee turnover.[25]

Non-competes also appear across a number of industries.[26] They are commonly used in both low and high wage fields that require varying levels of training and education.[27] Their existence can be partially attributed to the power dynamic between an employer and a prospective employee.[28] During employment negotiations, employers possess substantially greater bargaining power than the employee, especially when the employee is not a highly skilled worker.[29] Non-competes are undeniably a disadvantage for employees, but because of the little

employer. Charles Graves, *Questioning the Employee Non-Solicitation Covenant*, 55 LOY. L.A. L. REV. 959, 962 (2022). These types of agreements, like non-competes, aim to maintain an employer's share of the labor market, but achieve that aim through different means.

22. OFF. OF ECON. POL'Y U.S. DEP'T OF TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 3 (2016) [hereinafter NON-COMPETE CONTRACTS: ECONOMIC EFFECTS], https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Econimic_Effects_and_Policy_Implications_MAR2016.pdf [https://perma.cc/X7UZ-H2FE].

23. *Id.*

24. *See infra* Part III.C.

25. *Id.*

26. *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, *supra* note 1.

27. *Id.*

28. See *infra* Part II.A.

29. *Id.*

leverage employees possess, approximately only 10% of non-compete signers attempt to negotiate their employment contract.[30]

Part A of this Section provides a general overview of non-compete agreements and their functions. Part B of this Section introduces the legal history of non-competes. Part C analyzes the currently varied treatment of non-competes among the different states. Part D discusses attempts to challenge non-competes under antitrust law. Part E describes the formation of the FTC and the powers it possesses. Part F outlines prior and current congressional attempts to ban non-compete agreements. Lastly, Part G describes the public reception of the 2023 FTC proposed rule.

A. Overview of Non-compete Agreements

Non-compete agreements are contracts generally formed between an employer and an employee that govern the employee's actions upon termination of the relationship.[31] The agreement may restrict the ex-employee from performing services for a competing business or opening their own business in the same industry.[32] These contracts must also specify the amount of time the ex-employee is prohibited from taking these actions.[33]

An employer deploys these agreements with the intent to maintain their position in the market.[34] Employers do not wish to train employees to develop valuable skills or learn trade secrets, just to then have the employees leave and use their new knowledge to join an existing competitor or start one of their own.[35] When information is leaked in such a way, a business could be outperformed by competitors and lose its advantage in the market.[36]

Although non-compete agreements occur most often in positions that require higher education, they span across the entire labor spectrum.[37] Further, the higher paying the role, the more likely the employer will require that an employee sign a non-compete for their position.[38] This link

30. Evan Starr et al., *Noncompete Agreements in the U.S. Labor Force*, 64 J. L. & ECONS. 53, 69 (2020).

31. NEVADA BUSINESS AND COMMERCIAL LAW § 3.05, (2022), LexisNexis.

32. *Id.*

33. *Id.*

34. Hayes, *supra* note 3.

35. *Id.*

36. *Id.*

37. COLVIN & SHIERHOLZ, *supra* note 4, at 2.

38. EVAN STARR, ECON. INNOVATIONS GROUP, THE USE, ABUSE, AND ENFORCEABILITY OF NON-COMPETE AND NO-POACH AGREEMENTS: A BRIEF REVIEW OF THE THEORY, EVIDENCE, AND RECENT REFORM EFFORTS 5 (2019).

reflects the fact that higher educated and salaried jobs typically require more specialized training and access to highly confidential trade secrets, and therefore heighten the employer's desire to protect their business through a non-compete agreement.[39]

Since workers constrained by a non-compete lose out on higher earnings, an individual with a basic understanding of these contracts would likely wonder why a prospective employee would ever sign such a contract. The answer to this question is simple: the employer-employee relationship is dictated by bargaining power.[40] In an employment relationship, the employer almost always holds greater bargaining power than the employee.[41] Individuals seeking employment often do not have multiple streams of income, thus increasing an individual's desire to be employed.[42] This dynamic creates a power imbalance weighing greatly in favor of the employer.[43] Additionally, due to the inherent competitiveness of the employment market, there is almost always another individual who could step in and take the role of a worker who refuses the terms of a non-compete.[44] Because they possess little leverage in the employment relationship, workers are left little choice but to accept the terms proposed by their prospective employer, which often include a non-compete agreement.[45]

Employers also tactically deploy these agreements to bind their employees and elevate their own bargaining power even further.[46] Employers can expand their bargaining power when they make an individual's employment contingent on signing a non-compete and by waiting to propose the agreement until the employee's first day of work when the employee is already reasonably committed to the employer.[47] This puts the employee at a disadvantage because the employee likely has already turned down other offers, leaving only one employment option.[48] Furthermore, the employer often does not further compensate the prospective employee for their consideration in the agreement, such as increasing the employee's salary for their postemployment concession.[49]

39. *Id.* at 8.
40. *Id.* at 7.
41. Vaheesan & Buck, *supra* note 14, at 128.
42. *Id.* at 129.
43. *Id.*
44. *Id.*
45. *Id.* at 135.
46. STARR, *supra* note 38, at 7.
47. *Id.*
48. *Id.*
49. *Id.*

B. The Legal History of Non-compete Agreements

The legal discussion surrounding the enforceability of non-compete agreements can be traced back to English common law.[50] *Dyer's Case*, decided in 1414, was the first reported case ruling on such an issue.[51] John Dyer, a clothing dyer, entered into a non-compete with his apprentice.[52] Dyer forbade his apprentice from dying goods in the same town for six months after the conclusion of his employment.[53] Dyer brought a claim after the apprentice allegedly violated the agreement, but the judge found the agreement unenforceable because it placed an unnecessary restraint on the apprentice's pursuit of employment.[54]

In the seventeenth century, however, English courts began to legally recognize and accept non-compete agreements outlining partial restraints, while maintaining that agreements for complete restraints were still unlawful.[55] Partial restraints, which limit post-employment opportunities to a specific region or timeframe, were judicially recognized and became legally enforceable.[56] Complete restraints however, remained per se invalid.[57]

The court in *Mitchel v. Reynolds* expanded on this distinction by adopting the reasonableness standard.[58] The dispute in *Mitchel* concerned a non-compete agreement that barred a baker from operating within a city for five years after the end of employment.[59] The court reiterated that complete restraints were per se invalid, but partial restraints could be enforced if they were reasonable and supported by "valuable consideration."[60] When conducting a reasonableness analysis, the court looked to the negative effect on the livelihood of the worker, restriction on trade, and the way in which the community would be impacted by the loss of a potentially valuable worker.[61]

50. 1 WILLIAM CONSTANGY, NONCOMPETE LAW § 1.03 (2022), LexisNexis.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. EARL W. KINTNER & WILLIAM P. KRATZKE, FEDERAL ANTITRUST LAW § 2.7 (2022), LEXISNEXIS.

59. *Id.*

60. 1 CONSTANGY, *supra* note 50.

61. *Id.*

C. State Treatment of Non-compete Agreements

In modern America, there is a nationwide lack of uniformity regarding the treatment of non-compete agreements.[62] States struggle with balancing workers' right to contract against the free movement of labor and general market health.[63] This balancing act has resulted in a wide spectrum of states' treatment of non-compete agreements.[64] Some states have enacted statutes that find all non-competes unenforceable,[65] while other state legislatures have determined that non-competes should be enforceable if certain conditions are met.[66]

California falls on the side of states who have banned the use of non-compete agreements.[67] *Edwards v. Arthur Andersen LLP*, a California State Supreme Court decision, outlines the blanket non-enforcement policy.[68] Raymond Edwards II received an employment offer from Arthur Andersen LLP ("Andersen") that was contingent on Edwards signing a non-compete agreement.[69] The agreement had two main provisions.[70] First, that Edwards may not provide accounting services for any of Andersen's clients for eighteen months after his employment ceased with Andersen. Second, that Edwards was forbidden from soliciting any of Andersen's customers for a year following the termination of his employment.[71] As Andersen decided to downsize its firm, it sold a section to another business, HSBC Bank USA, Inc. ("HSBC"), which offered to employ Edwards.[72] However, before Edwards could begin work at HSBC, HSBC required Edward sign a release agreement that required him to preserve confidential information, avoid disparaging Andersen, cooperate with Andersen on any investigation or litigation, release Andersen from any claims stemming from his employment term, but would also release Edwards from his non-compete agreement.[73] Ultimately, Edwards refused to sign the release.[74] Due to this, HSBC withdrew its offer and Andersen terminated Edwards's employment.[75]

62. Viva Moffat, *Making Non-Competes Unenforcea*ble, 54 ARIZ. L. REV. 939, 943 (2012).
63. STARR, *supra* note 38, at 6.
64. *Id.*
65. *See, e.g.*, CAL. BUS. & PROF. CODE § 16600 (Deering 2023).
66. FLA. STAT. ANN. § 542.33 (LexisNexis 2023).
67. Edwards v. Arthur Andersen LLP, 189 P.3d 285, 288 (Cal. 2008).
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 289.
73. *Id.*
74. *Id.*
75. *Id.*

Edwards filed a claim against Andersen and HSBC, stating that his non-compete clause with Andersen violated California state law.[76] In its decision, the court acknowledged that through the California Business & Professional Code § 16600, which states "[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void," the California legislature sought to promote competition and employee mobility.[77] The court ruled in favor of Edwards and invalidated the non-compete agreement with Andersen.[78] The two main provisions in the non-compete unrightfully hindered Edwards's ability to practice his profession and the contract was therefore void.[79]

On the other end of the spectrum, states like Florida are more receptive to non-compete enforcement.[80] These more lenient states generally analyze non-compete agreements under a reasonableness test.[81] In *Environmental Services v. Carter*, the Florida Fifth District Court of Appeals reversed a trial court ruling that held a non-compete agreement invalid.[82] In the case, Environmental Services Inc. ("ESI"), an environmental consulting firm, filed a claim for injunctive relief against its former employees.[83] Two of its employees had previously signed non-compete agreements relating to their employment at ESI.[84] The agreements required the employees to not engage in any outside business activity related to environmental consulting while employed with the firm.[85] The agreements also prohibited the employees, if their employment was to terminate, from working with any former or potential customers of ESI for one year.[86]

While still employed by ESI, the employees performed some consulting work for an engineering firm, LAN Associates ("LAN").[87] The employees discussed their current compensation with LAN, resulting in LAN offering, and the employees accepting, a higher compensation proposal from the rival business.[88] Simultaneously, the employees also

76. *Id.*
77. *Id.* at 290-91 (citing CAL. BUS. & PROF. CODE § 16600).
78. *Id.* at 292-93.
79. *Id.*
80. Env't. Servs. v. Carter, 9 So. 3d 1258, 1260 (Fla. Dist. Ct. App. 2009).
81. Moffat, *supra* note 62, at 947.
82. *Env't. Servs.*, 9 So. 3d at 1260.
83. *Id.*
84. *Id.* at 1261.
85. *Id.* at 1263.
86. *Id.*
87. *Id.* at 1260.
88. *Id.*

considered starting their own environmental consulting business, which LAN ultimately agreed to fund.[89]

Under certain conditions, Florida Statute § 542.335 states that post-employment restrictive covenants are enforceable restraints of trade.[90] The term "post-employment restrictive covenant" is an umbrella term that includes several employment covenants, including non-compete agreements.[91] Under the statute, non-competes are enforceable as long as they are "reasonable in time, area, and line of business."[92] Non-competes must also be reasonably necessary to protect legitimate business interests.[93] If, however, the plaintiff-employee proves the restraint is overbroad or unreasonable to support the interest, the court may modify the provision and narrow it so that it only reasonably protects the employer's stated business interest.[94]

In analyzing the non-compete in *Environmental Services v. Carter*, the court found the restrictions to be enforceable under Florida law.[95] The court held that by including language related to employees working with ESI customers, the provision fulfilled the legitimate business interest requirement listed in the statute.[96] The language also did not restrict the former employees from performing services for anyone, rather just customers that had "business-related contact" with ESI.[97] Additionally, the court found the non-compete agreement satisfied the reasonableness test by placing restrictions on the employees for only one year after the termination of their tenure with ESI.[98]

Interestingly, no state in America takes a completely laissez faire approach to non-compete agreements.[99] Every state government has enacted statutes restricting the enforceability of these agreements or allowed the courts to develop their own methods through common law.[100] This pattern suggests a modern policy sentiment that non-competes cannot go completely unchecked without government oversight.

89. *Id.*

90. *Id.* at 1261-62 (citing FLA. STAT. § 542.335 (2023)).

91. *Id.* at 1262.

92. FLA. STAT. § 542.335 (2023).

93. *Env't. Servs.*, 9 So. 3d at 1262.

94. *Id.*

95. *Id.* at 1267.

96. *Id.* at 1263.

97. *Id.*

98. *Id.* (stating that under FLA. STAT. § 542.335 (2023), courts shall presume that any restraint that is six months long or shorter is reasonable; any restraint lasting two years or longer shall be presumed unreasonable).

99. *Restrictive Covenants in Employment*, HEINONLINE, https://heinonline.org/HOL/NSSL?collection=nssl&law=RESTRICTIVE%20COVENANTS%20IN%20EMPLOYMENT&edition=Interim [https://perma.cc/5XHY-PRRT] (last visited Apr. 28, 2023).

100. *Id.*

D. Non-compete Agreements Under the Sherman Act

In 1890, Congress passed America's first federal antitrust law, the Sherman Act.[101] Section 1 of the Sherman Act prohibits "[e]very contract . . . in restraint of trade or commerce."[102] Because non-compete agreements are contracts in restraint of trade, they are subject to scrutiny under Section 1.[103] The FTC has identified seventeen cases in which a non-compete agreement was challenged under the Sherman Act or a comparable state statute.[104] However, of these seventeen cases, in only two did the plaintiffs successfully allege a non-compete violated Section 1.[105] In the first case, *United States v. Tobacco Co.*, the Supreme Court found that the American Tobacco Company violated the Sherman Act through its "constantly recurring" use of non-competes.[106] In the second case, *Signature MD, Inc. v. MDVIP, Inc.*, the California Central District Court denied MDVIP's motion to dismiss. The court held that Signature MD had successfully pled antitrust injury under the Sherman Act due to MDVIP's non-competes that contained an "unreasonably large liquated damages provision."[107]

The other fifteen attempts to challenge non-compete agreements under the Sherman Act were unsuccessful for the plaintiffs.[108] There are three primary reasons why these claims were unsuccessful.[109] First, some parties challenging a non-compete agreement argued that the non-competes were a per se violation of Section 1.[110] A per se analysis is appropriate when the challenged business conduct is inherently anticompetitive and lacks any redeeming value, such as serving a legitimate business function.[111] However, Section 1 violations are traditionally analyzed under a "rule of reason" standard rather than a per se analysis.[112] Under this standard, the fact finder simply determines whether specific conduct imposes an unreasonable restraint on trade.[113]

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101. *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/H9BC-WGS9] (last visited Apr. 13, 2023).

102. 15 U.S.C. § 1.

103. Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1082 (2d Cir. 1977).

104. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3496 (Jan. 19, 2023) (to be codified at 16 C.F.R. 910).

105. *Id.*

106. United States v. Am. Tobacco Co., 211 U.S. 106, 183 (1911).

107. Signature MD, Inc. v. MDVIP, Inc., 2015 U.S. Dist. LEXIS 74795, at *16 (C.D. Cal. Apr. 21, 2015).

108. Non-Compete Clause Rule, 88 Fed. Reg. at 3496.

109. *Id.*

110. *Id.*

111. Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 (1977).

112. *Id.* at 49.

113. *Id.*

In the cases in which the plaintiff-employees challenged a non-compete as a per se violation, the courts found that the agreements served legitimate business functions and therefore did not violate Section 1.[114]

The second reason these challenges were unsuccessful is that the moving parties did not allege that the non-compete agreements negatively impacted competition.[115] This distinction is a critical element, as establishing a negative impact on competition is required in a Section 1 claim.[116] Lastly, non-compete challenges under Section 1 have failed because courts have reasoned that employers are not capable of conspiring to restrict trade with their own employees.[117]

Parties have also attempted to challenge non-compete agreements under Section 2 of the Sherman Act, which punishes entities who "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce."[118] However, a plaintiff has not yet successfully challenged an employer's non-compete agreement on Section 2 grounds.[119]

E. The FTC and its Rulemaking Authority

In 1914, the United States Congress created the FTC through codifying 15 U.S.C. § 41, also known as the Federal Trade Commission Act ("FTCA").[120] In creating the FTC, Congress proclaimed that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."[121] Under the FTCA, the FTC has the duty of preventing businesses and individuals "from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."[122] Today, its main mission is to shield the American public from unfair business practices and to promote competition in the market.[123]

In pursuing these objectives, the FTC employs over a thousand

114. Non-Compete Clause Rule, 88 Fed. Reg. at 3496.

115. *Id.*

116. *Id.*

117. Borg-Warner Protective Servs. Corp. v. Guardsmark, Inc., 946 F. Supp. 495, 499 (E.D. Ky. 1996).

118. *Id.*; *see* 15 U.S.C. § 2.

119. Non-Compete Clause Rule, 88 Fed. Reg. at 3496-97.

120. 15 U.S.C. § 41.

121. 15 U.S.C. § 45(a)(1).

122. 15 U.S.C. § 45(a)(2).

123. *Mission*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/mission [https://perma.cc/CC6L-7S7C] (last visited Apr. 4, 2023).

employees[124] who are led by five commissioners.[125] These commissioners are appointed by the President and confirmed by the Senate.[126] The FTC also has three primary types of authority: investigative authority, enforcement authority, and rulemaking authority.[127] To carry out its investigative authority, the FTC may "prosecute any inquiry" which helps it satisfy its duties.[128] Additionally, the FTCA allows the FTC to conduct investigations into any person or entity that affects commerce.[129] The FTC conducts investigations through means such as reporting, subpoena power, and sharing confidential information.[130]

Next, the FTC's enforcement authority grants it the discretion to carry out an enforcement action following an investigation.[131] These actions may manifest through judicial or administrative proceedings if the investigations lead the FTC to believe a law was violated.[132] Specifically, if the FTC were to enforce a law banning non-competes, it would likely do so through its Bureau of Competition, which is tasked with upholding the nation's antitrust laws.[133] Historically, the FTC has used its powers to punish companies for anticompetitive practices such as blocking price fixing in the cement industry,[134] or barring hospitals from acquiring too much of the regional market share.[135]

Unlike its enforcement authority, the FTC's rulemaking authority allows it to spur widespread change against anticompetitive practices instead of only targeting individual violators.[136] The provisions of FTCA grant the FTC the ability "to make rules and regulations for the purpose of carrying out the provisions of [the] Act."[137] Before a new rule is adopted and made federal law, the first step in the process is for the FTC

124. *Federal Trade Commission (FTC)*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/federal-sector/federal-trade-commission-ftc [https://perma.cc/R877-VDRQ] (last visited Apr. 28, 2023).

125. *Commissioners*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/commissioners-staff/commissioners [https://perma.cc/AM4R-D2DJ] (last visited Apr. 28, 2023).

126. *Id.*

127. *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N (May 2021), https://www.ftc.gov/about-ftc/mission/enforcement-authority [https://perma.cc/N98F-LGSB].

128. 15 U.S.C. § 43.

129. *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 127.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. FTC v. Cement Inst., 333 U.S. 683, 688 (1948).

135. FTC v. Univ. Health, Inc., 938 F.2d 1206, 1210 (11th Cir. 1991).

136. *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 127 (citing 15 U.S.C. § 46(g)).

137. 16 U.S.C. § 46(g).

to commence the Notice and Comment rulemaking period.[138] This process starts when the FTC commissioners vote on whether to publish a Notice of Proposed Rulemaking.[139] If the vote passes, the FTC posts a public notice that includes the proposed language of the rule.[140] The public is invited to comment on the proposed rule through an easily accessible online portal.[141] These comments are reviewed and may persuade the FTC to make changes to the rule or further analyze the issue.[142]

A specific source of the FTC's legal strength is also found in Section 5 of the FTCA, which plainly prohibits "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[143] Section 5 has two main goals: to curtail the use of anticompetitive behavior, and to protect consumers from unfair and deceptive business actions.[144] In its pursuit to prohibit unfair methods of competition, Congress intentionally left the language of Section 5 vague to allow the FTC to determine which practices are fair.[145] Congress acknowledged that defining every unfair practice at the time of drafting would be an impossible task, and also acknowledged that new practices would continue to develop as the economy evolved.[146] This flexibility allows the FTC to use its rulemaking and enforcement powers to identify and prevent new methods of unfair competition.[147]

The latter half of Section 5 pursues consumer protection through the prohibition of "unfair or deceptive acts or practices in or affecting commerce."[148] An unfair act or practice under the FTCA is defined as one that (1) is likely to cause or causes substantial injury to consumers; (2) cannot be reasonably avoided; and (3) is not outweighed by other benefits.[149] A deceptive act is (1) a representation, omission, or practice

138. *Public Participation in the Rulemaking Process*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/rulemaking/public-participation-rulemaking-process [https://perma.cc/BB7E-TAKF].

139. *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, *supra* note 1.

140. *Public Participation in the Rulemaking Process*, *supra* note 138.

141. *Non-Compete Clause Rule (NPRM)*, REGULATIONS.GOV, (Jan. 9, 2023), https://www.regulations.gov/docket/FTC-2023-0007/document [https://perma.cc/5T5U-ZQBC].

142. *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, *supra* note 1.

143. 15 U.S.C. § 45(a)(1).

144. *Id.*

145. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 240 (1972).

146. *Id.*

147. 15 U.S.C. § 45(a)(2).

148. 15 U.S.C. § 45(a)(1).

149. DIV. OF CONSUMER & CMTY. AFFS., CONSUMER COMPLIANCE HANDBOOK 1(12/16), https://www.federalreserve.gov/boarddocs/supmanual/cch/cch.pdf [https://perma.cc/M5DS-4NT9] (last visited Apr. 14, 2023).

that is likely to or misleads a consumer in which (2) the consumer's interpretation is reasonable; and (3) the misleading action is material.[150] The FTCA also allows the FTC to define specific practices that fall within these categories to expand and update with modern trends.[151]

In 2022, the FTC released a policy statement arguing that its Section 5 authority extends beyond the Sherman Act and allows it to target other methods of unfair competition, including non-competes.[152] This recent policy initiative likely led the FTC to pursue a ban on non-compete agreements.[153] This is a stark contrast from past FTC practices, which have relied on combatting unfair methods of competition through a case-by-case basis instead of through a proactive policy approach under its rulemaking authority.[154] This interpretation of Section 5 has led to some controversy, but, despite critical views, the FTC's interpretation is well founded and properly enables it to lawfully carry out its proposal.[155]

F. Congressional Attempts to Ban Non-compete Agreements

While the FTC's 2023 proposal is the FTC's first attempt to ban non-compete agreements, both Democrat and Republican members of Congress have sought to accomplish the same task multiple times.[156] Senator Christopher Murphy, a Democrat from Connecticut, introduced the Workforce Mobility Act of 2018.[157] This bill would have prohibited individuals from entering into or enforcing non-compete agreements while still allowing employers to require non-disclosure agreements to maintain trade secrets.[158] The bill also tackled other problems surrounding non-compete agreements.[159] First, it would have required employers to

150. *Id.*

151. 15 U.S.C. § 57(a)(1).

152. POL'Y STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FED. TRADE COMM'N ACT COMM'N FILE NO. P221202 at 1 (Nov. 10, 2022) [hereinafter POL'Y STATEMENT], https://www.ftc.gov/legal-library/browse/policy-statement-regarding-scope-unfair-methods-competition-under-section-5-federal-trade-commission [https://perma.cc/KSN7-P3FK].

153. Josh Sisco & Nick Niedzwiadek, *Biden's Regulators Propose Banning Non-Competes*, POLITICO (Jan. 5, 2023), https://www.politico.com/news/2023/01/05/biden-ftc-regulations-employment-noncompetes-00076444 [https://perma.cc/AUM7-NJX8].

154. *See* Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 365 (2020) (arguing for the FTC to begin to use its rulemaking authority to limit "unfair methods of competition").

155. *About Us*, U.S. CHAMBER OF COM., https://www.uschamber.com/about [https://perma.cc/898U-VV76] (last visited Apr. 28, 2023).

156. Workforce Mobility Act, S. 2782, 115th Cong. (2018).

157. *Id.*

158. *Id.*

159. *Id.*

post the provisions of the bill in the workplace.[160] The public display of such a bill would educate workers about their rights and disincentivize employers from utilizing non-competes in prohibited circumstances. Second, the bill would have imposed fines and detailed the relief employees could seek if they were affected by a violation of the bill.[161] The bill failed to make it through the committee stage, but similar versions were reintroduced in 2021 and 2023, though neither became law.[162]

In a showing of bipartisan support for the ban of non-competes, Senator Marco Rubio, a Republican from Florida, introduced the Freedom to Compete Act of 2019.[163] Unlike the Workforce Mobility Act, the Freedom to Compete Act sought to directly amend the Fair Labor Standards Act of 1938.[164] The Freedom to Compete Act did not seek to impose fines on violators, but rather stated that violators would be liable for equitable relief "appropriate to effectuate the purposes of [the law]."[165] Similar to the Workforce Mobility Act though, this bill failed to make it through the committee stage and has since been reintroduced twice—both times without success.[166]

G. Public Perception of an FTC Ban on Non-compete Agreements

The FTC's 2023 proposed ban on non-compete agreements received polarized views, with advocates hailing from an array of professional fields. There are powerful supporters of the proposal, with the most noteworthy being in the White House.[167] In 2021, President Joseph Biden issued Executive Order 14036, entitled Promoting Competition in the American Economy.[168] It cited the consolidation of employers as the reason behind stagnating wages, as greater consolidation increases employer leverage over the terms of employment for employees.[169] The order specifically called on the Chair of the FTC to utilize its rulemaking powers and reduce the use of unfair non-compete agreements.[170]

160. *Id.*

161. *Id.*

162. Workforce Mobility Act, S. 483, 117th Cong. (2021). At the time of this writing, the Workforce Mobility Act of 2023 had been read twice and referred to the Committee on Health, Education, Labor, and Pensions. Workforce Mobility Act, S. 220, 118th Cong. (2023).

163. Freedom to Compete Act, S. 124, 116th Cong. (2019).

164. *Id.*

165. *Id.*

166. *Id.*

167. Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 9, 2021).

168. *Id.*

169. *Id.*

170. *Id*. at 36992.

Additionally, professionals in industries like healthcare are eager to see the rule enacted.[171] Healthcare providers regularly utilize non-compete terms in their contracts with employees, restricting them from working within the region for years after their employment with a given provider.[172] This trend is plainly detrimental to the public and causes doctors to move entire cities if they wish to continue practicing.[173] In other fields, professionals like teachers, home caretakers, and veterinarians have also advocated for a non-compete ban.[174]

However, the FTC's proposal has received a significant share of criticism.[175] Most notably, the United States Chamber of Commerce (the "Chamber") strongly opposed the proposal.[176] The Chamber is the largest group of businesses on the planet.[177] The organization advocates for policies to improve the American economy and labor market.[178] Unlike the FTC, the Chamber believes that non-compete agreements bolster competition and innovation.[179] After the FTC announced its proposal, the Chamber's president, Suzanne Clark, called the proposal "blatantly unlawful" and stated she was prepared to sue the FTC if it carried out its plan.[180] The Chamber claimed the FTC did not have the authority to enact the ban and was unlawfully extending its powers beyond those granted to it by Congress.[181] Specifically, Clark challenged the FTC's interpretation of Section 5 of the FTCA, which grants the authority to curb "unfair methods of competition."[182] Clark argued that if this interpretation of

171. Shannon Pettypiece, *Biden's Push to Ban Noncompete Agreements Could Have Big Implications for Health Care*, NBC NEWS (Feb. 13, 2023), https://www.nbcnews.com/politics/economics/biden-ban-non-compete-agreements-health-care-industry-rcna70099 [https://perma.cc/EDM8-8FJ9].

172. *Id.*

173. *Id.*

174. Leah Nylen, *FTC Non-Compete Ban Slammed by Business Groups as 'Unworkable'*, BLOOMBERG L. (Feb. 16, 2023), https://news.bloomberglaw.com/antitrust/ftc-non-compete-ban-slammed-by-business-groups-as-unworkable [https://perma.cc/UGR6-2BXQ].

175. *The FTC's Noncompete Rulemaking Is Blatantly Unlawful*, U.S. CHAMBER OF COM., (Jan. 5, 2023), https://www.uschamber.com/finance/antitrust/the-ftcs-noncompete-rulemaking-is-blatantly-unlawful [https://perma.cc/YX94-3HUB].

176. *Id.*

177. *About Us*, *supra* note 155.

178. *Id.*

179. *The FTC's Noncompete Rulemaking Is Blatantly Unlawful*, *supra* note 175.

180. Chelsey Cox, *U.S. Chamber of Commerce Threatens to Sue the FTC Over Proposed Ban on Noncompete Clauses* (Jan. 12, 2023), https://www.cnbc.com/2023/01/12/us-chamber-of-commerce-threatens-to-sue-the-ftc-over-proposed-ban-on-noncompete-clauses.html [https://perma.cc/PR7C-XTWS].

181. *The FTC's Noncompete Rulemaking Is Blatantly Unlawful*, *supra* note 175.

182. *Id.*

Section 5 was upheld, the FTC would be granted the overbroad ability to ban any business tactic with which it disagrees.[183]

III. DISCUSSION

As the partisan divide in America grows, making it less likely for groundbreaking legislation to successfully make its way through Congress, it is critical to acknowledge that the FTC has the authority to ban non-compete agreements. Part A of this Section argues the FTC has the authority, under Section 5 of the FTCA, to institute a national ban on non-competes. Part B discusses the potential negative economic impacts of a federal non-compete ban. Part C argues that the economic gain that would result from a federal non-compete ban outweighs any negative effects such a ban might have on individual employers.

A. The FTC has the Authority to Pass a Non-compete Ban Under Section 5 and 6

An attempt to strike down the FTC's proposal should fail in light of the FTC's rulemaking authority. Section 6(g) of the FTCA states that the FTC has the power to "make rules and regulations for the purpose of carrying out the provisions of [the] Act."[184] The D.C. Circuit, in *National Petroleum Refiners Association v. FTC*, held that Section 6(g) provides a broad grant of power.[185] In the case, the court overturned a district court ruling which found that the FTC did not have the authority to pass "substantive rules of business conduct."[186] In the opinion, the D.C. Circuit looked to the legislative intent behind the FTCA.[187] The court determined the drafters of the FTCA intended to vest the authority to regulate a complex economic system in an agency staffed by economic professionals, and not in a court system with limited experience settling economic questions.[188] By allowing the FTC to pass substantive business regulations, the court sought to help the FTC create rules that could promote judicial efficiency and consistent rulings.[189]

Additionally, those that assert the FTC's rulemaking authority does not allow a ban on non-competes simply ignore the plain language of Section 6. A non-compete ban is undoubtedly a substantive rule of business

183. *Id.*
184. 15 U.S.C. § 46(g).
185. Nat'l Petrol. Refiners Ass'n v. FTC, 482 F.2d 672, 674 (D.C. Cir. 1973).
186. *Id.* at 673.
187. *Id.* at 689.
188. *Id.*
189. *Id.* at 690.

conduct, therefore, courts should give discretion to the FTC and allow it to attack the anticompetitive business practices it was created to prevent.[190]

Even though the FTC has the rulemaking authority to enact a ban on an unfair method of competition, the conduct targeted by an FTC rule must be both a method of competition and unfair.[191] For conduct to constitute a method of competition under Section 5, an entity must undertake the conduct in the market.[192] This conduct must also implicate competition in some capacity.[193] An FTC non-compete ban easily satisfies both of these requirements. Non-compete agreements are widely used by numerous industries and employers in the market to affect labor competition.[194] Additionally, the use of non-competes also satisfies the competition requirement. "Compete" is in the name of the contract itself, and their use restricts employees from directly competing with their employers. Therefore, this aspect of the Section 5 analysis is unlikely to face contention.

Next, for an FTC non-compete ban to be lawful, it must also be able to classify non-competes as an unfair method of competition. In *FTC v. Brown Shoe Company*, the Supreme Court noted that the FTC has the broad authority to declare trade practices unfair.[195] The Court held that this power is especially evident when operating on the same anticompetitive sentiment shown in the Sherman and Clayton Acts,[196] but the practice does not actually have to directly violate these laws to be deemed unfair.[197] The policy incentives behind a non-compete ban do not fall cleanly within the goal to prohibit the restraint of trade and commerce outlined in the Sherman and Clayton Acts.[198] However, the FTC's authority still stands as *Brown Shoe Company* plainly stated that non-competes simply need to conflict with the "basic policies of the Sherman and Clayton Acts" to be deemed unfair.[199]

Additionally, the Supreme Court has granted deference to the FTC in determining what business tactics are unfair.[200] In *FTC v. International Federation of Dentists*, the Supreme Court held the unfairness standard is

190. *See id.* at 673 (stating the FTC is empowered to prevent unfair methods of competition).

191. POL'Y STATEMENT, *supra* note 152, at 8.

192. *Id.* (citing E. I. Du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 139 (2d Cir. 1984)).

193. *Id.*

194. *Supra* Part II.A.

195. FTC v. Brown Shoe Co., 384 U.S. 316, 321 (1966).

196. The Sherman and Clayton Acts are two of America's primary antitrust laws. *The Antitrust Laws*, *supra* note 101.

197. *Brown Shoe Co.*, 384 U.S. at 321.

198. 15 U.S.C. § 1; 15 U.S.C. § 12.

199. *Brown Shoe Co.*, 384 U.S. at 321.

200. FTC v. Indep. Fed'n of Dentists, 476 U.S. 447, 454 (1986).

intentionally broad.[201] Therefore, what "unfairness" encompasses includes not only the unfair practices outlined in the Sherman and Clayton Acts, but also practices that the FTC deems unfair due to public policy concerns.[202] Furthermore, the Court held that defining unfair methods of competition should primarily be left to the FTC.[203] By tracing the legislative history of the FTCA, the Court found that Congress's intent in passing the Act was to create a practical administrative body to apply the rules enacted by Congress.[204] Because the Supreme Court granted such wide discretion to the FTC, legal challenges disputing the FTC's conclusion that non-compete agreements are unfair methods of competition will likely fail.

B. The Underlying Risks to an FTC Ban on Non-compete Agreements

Even though Section 5 gives the FTC authority to enact a rule that bans non-compete agreements, it is important to consider the political and economic risks that may result from such a rule. First, the FTC may infringe on the freedom to contract when it restricts employees' ability to engage in non-competes.[205] The freedom to contract is the ability to consent on the terms of an agreement without government interference.[206] Advocates of a free market see the freedom to contract as a pivotal element in a successful economy.[207] An FTC ban on non-competes would surely infringe on this right and could be potentially detrimental to the free market.

Secondly, a non-compete ban could harm the productivity of the United States' economy.[208] Under a non-compete ban, employers may be unwilling (or simply less willing) to invest in training their employees.[209] For example, an employer may hesitate to train a software engineer to learn a new code language out of fear that the employee could use this newly learned skill and leverage it to seek a higher paying position elsewhere. The potential stagnation in human capital development which

201. *Id.*

202. *Id.*

203. FTC v. Texaco, 393 U.S. 223, 225 (1968).

204. *Id.*

205. *Freedom of Contract*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/freedom_of_contract (last visited Apr. 10, 2023).

206. *Id.*

207. 15 ARTHUR CORBIN & JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 79.4 (2022), LexisNexis.

208. Jonathan M. Barnett & Ted Sichelman, *The Case for Noncompetes*, 87 U. CHI. L. REV. 953, 1042 (2020).

209. *Id.*

could result from a non-compete ban should be taken seriously, as human capital growth directly correlates with economic growth.[210]

Lastly, the non-compete ban proposed by the FTC could prove to be too broad and difficult to implement for employers.[211] A blanket ban on non-competes could bleed into employment contracts with favorable terms to the employee, such as contracts that include a gardening leave clause.[212] A gardening leave can be a clause of a employment contract in which the employer continues to pay an employee after their employment term has ended in a "cooling off" period.[213] The employee is still on the company payroll but is not permitted to do any work for their prior employer or a new one.[214] These clauses are undeniably more favorable to employees while still allowing employers to maintain some of the employee requirements found in non-compete agreements, such as not disclosing trade secrets.[215] Since gardening leave clauses are similar to non-competes, a broad FTC ban on non-competes could eliminate gardening leave or other related contract terms favorable to employees. This impact could negatively affect employees who agreed to their employment because of these advantageous clauses.

C. How the Benefits of an FTC Rule Banning Non-compete Agreements Outweigh the Potential Risks and Challenges

Despite concerns over the economic breadth and impact of an FTC rule banning non-competes, arguments against an FTC action are ultimately unpersuasive. The drastic benefits employees would see under the rule would greatly overshadow any potential downsides. First, in opposition to the stance of freedom to contract advocates, the Supreme Court has historically considered the freedom to contract as a qualified right, but not an absolute one.[216] The Court seeks to pursue liberty by dissolving arbitrary restraints, not eliminating reasonable regulations.[217] When

210. Human capital is the economic value of a worker's skill and experience. Will Kenton, *=Human Capital Definition: Types, Examples, and Relationship to the Economy*, INVESTOPEDIA (Mar. 22, 2023), https://www.investopedia.com/terms/h/humancapital.asp#:~:text=Human%20capital%20allows%20an%20economy,which%20contribute%20to%20economic%20growth.

211. Nylen, *supra* note 174.

212. *Id.*

213. *Id.*

214. Julia Kagan, *Garden Leave: What it Is, Pros and Cons for Employers, Employees*, INVESTOPEDIA, (Aug. 16, 2022), https://www.investopedia.com/terms/g/gardening-leave.asp [https://perma.cc/FNU3-WRS8].

215. *Id.*

216. Chi., Burlington, & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 567 (1911).

217. *Id.*

analyzing a situation involving the freedom to contract, courts may prioritize other public policy concerns over preserving the freedom to contract.[218] In the issue at hand, the positive effects of banning non-competes outweigh the incentives to preserve the right to contract. Additionally, although first seen as pivotal to a free market, the freedom to contract movement has conceded ground over the past century.[219] Although an argument against a non-compete ban might have passed muster 150 years ago, the argument carries little weight among courts today.[220]

Second, and potentially most importantly, non-compete agreements hamper employee wages.[221] In 2016, the Department of Treasury released calculations indicating that harsher enforcement of non-competes directly correlates with lower initial wages and lower wage growth.[222] This trend likely stems from the importance of job mobility through the course of a professional's career, as there is a very strong correlation between switching jobs and wage growth.[223] To see continued wage growth, workers should strategically move to new employers when higher paying positions become available, as employees who remain at their current jobs tend to see stagnating wages compared to those who change employers.[224] However, non-competes stand as an obvious obstacle to the mobility of any employee. A study analyzing the impact of the Michigan legislature's repeal of its non-compete ban found the that the reversal decreased some workers' chance of changing employers by 16%.[225] Conversely, a Hawaii ban on non-competes for tech workers increased mobility for these workers by over 12% compared to other states, while also increasing new employee monthly earnings by 4.2% within the tech industry.[226] Simply put, decreasing the enforcement of non-competes will increase worker

218. CORBIN & PERILLO, *supra* note 207.

219. *Id*

220. *Id.*

221. *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, *supra* note 1.

222. NON-COMPETE CONTRACTS: ECONOMIC EFFECTS, *supra* note 22, at 19.

223. *See generally* R. Jason Faberman & Alejandro Justiniano, *Job Switching and Wage Growth*, Chicago Fed. Letter, no. 337, 2015.

224. *See generally* RAKESH KOCHAR ET AL., PEW RSCH. CTR., MAJORITY OF U.S. WORKERS CHANGING JOBS ARE SEEING REAL WAGE GAINS, (2022), https://www.pewresearch.org/social-trends/2022/07/28/majority-of-u-s-workers-changing-jobs-are-seeing-real-wage-gains/ [https://perma.cc/YNA7-CQXQ].

225. Matt Marx et al., *Mobility, Skills, and the Michigan Non-Compete Experiment*, 55 MGMT. SCI. 875, 887 (2009) (finding that highly technologically specialized employees were 16.2% less likely to change employers after the Michigan legislature repealed its ban on non-compete agreements).

226. Natarajan Balasubramanian et al., *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers*, 58 J. HUM. RES. 1, 3 (2020) (finding that Hawaii's non-compete ban on tech workers increased tech worker mobility by 12.5% compared to other states).

mobility, which in turn will likely increase both wages and wage growth.[227]

Additionally, banning non-competes would not only benefit the workers they stifle, but could also increase market productivity.[228] Employers that require highly skilled workers generally congregate in the same geographic areas.[229] The concentration of companies that produce similar goods and services and require a specialized labor pool forms an agglomeration economy, which creates positive externalities for surrounding areas.[230] Firms located in these economies benefit from the information spillover that comes with new employers.[231] The greater the labor mobility in the given area, the greater the chance that valuable industry knowledge will disseminate across firms and increase the overall productivity of the industry market.[232] Although this may not seem appealing to individual employers, consumers can reap the benefits of this agglomeration effect through increased market productivity.[233]

Additionally, employers' concerns that they would lose valuable trade information to competitors may be better solved through the use of non-disclosure agreements, rather than the use of non-competes.[234] Non-disclosure agreements do not generally restrict the mobility of a worker.[235] Instead, these agreements can make specific information confidential so that trade secrets cannot be shared with a new employer.[236] Some employers may even see a greater benefit when using non-disclosure agreements, as they are unambiguous documents stating that certain information must remain confidential, as opposed to non-

227. NON-COMPETE CONTRACTS: ECONOMIC EFFECTS, *supra* note 22, at 21.

228. *Id.* at 22.

229. An example of the highly skilled workers congregating in the same are tech workers gathering in Silicon Valley. *Id.*

230. Agglomeration economies are the economic forces that attract firms to the same geographic region. KATHLEEN BOLTER & JIM ROBEY, W.E. UPJOHN INST. FOR EMP. RSCH., AGGLOMERATION ECONOMIES: A LITERATURE REVIEW 5 (2020), https://research.upjohn.org/cgi/viewcontent.cgi?article=1256&context=reports#:~:text=Agglomeration%20results%20in%20a%20larger,to%20the%20needs%20of%20firms.&text=Agglomeration%20creates%20knowledge%20spillovers%20in,workers%20learn%20from%20each%20other [https://perma.cc/T5PM-X2XZ].

231. NON-COMPETE CONTRACTS: ECONOMIC EFFECTS, *supra* note 22, at 22.

232. *Id.*

233. *Id.*

234. Randall Thomas et al., *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 20 (2015) (discussing the use of non-disclosure agreements in place of non-compete agreements).

235. *Id.*

236. Alexandra Twin, *Non-Disclosure Agreement (NDA) Explained, With Pros and Cons,* INVESTOPEDIA (Mar. 30, 2023), https://www.investopedia.com/terms/n/nda.asp [https://perma.cc/ZH36-SRAU].

competes, which aim to discourage the spreading of information simply by controlling a worker's next employer.[237]

An FTC ban on non-competes would also preempt state laws and provide much needed uniformity to the legal treatment of these agreements across the country.[238] Currently, treatment varies greatly from state to state and a non-compete ban would provide one rule that all jurisdictions would follow.[239] The current reasonableness test employed by many states creates the potential for varied results and can make it difficult to determine whether a specific non-compete is enforceable.[240] An FTC action banning non-competes could also help mitigate workers' confusion about these contracts.[241] This confusion can lead to employees not fully understanding their rights when faced with a non-compete agreement.[242] For example, California workers are more likely to operate under non-competes when compared to the national average.[243] However, non-competes are mostly unenforceable in the state, showing that employers may prey on prospective employees who are ignorant of their rights.[244] A federal ban on non-competes would create a bright line rule that both employers and employees can work under, thus ensuring transparency.

IV. CONCLUSION

An FTC ban on non-compete agreements would be a monumental step towards empowering workers and equalizing the bargaining power disparity seen in the employee-employer relationship. A policy action this impactful may be unheard of, but the FTC's authority to enact such a rule is well established under the FTCA. The success of a non-compete ban could have widespread positive implications for the American economy. Workers would see increased wages, markets would see increased productivity, and workers would experience greater flexibility as they pursue their careers. Simply put, failing to acknowledge the FTC's

237. Lauren E. Aydinliyim, *The Case for Ethical Non-Compete Agreements: Executives Versus Sandwich-Makers*, 175 J. BUS. ETHICS 651, 665 (2020).

238. Chris D. Linebaugh & Jay B. Sykes, Cong. Research Service, THE FTC'S PROPOSED NON-COMPETE RULE 2 (2023).

239. *Supra* Part II.C.

240. *Supra* Part II.C.

241. NON-COMPETE CONTRACTS: ECONOMIC EFFECTS, *supra* note 22, at 25 (discussing worker confusion surrounding non-compete agreements).

242. *Id.* at 4 (discussing how firms ask employees to sign non-compete agreements in jurisdictions that do not enforce them).

243. *Id.*

244. *Id.*

authority to act on this matter could be incredibly detrimental both to our nation's workers and to its very economic growth.