AMERICAN ECONOMIC LIBERTIES PROJECT

Before the Federal Trade Commission
Response to Notice of Public Rule Making
Docket ID FTC-2023-0007-0001

Written Comments from the American Economic Liberties Project
Non-Compete Clause Rule, RIN 3084-AB74

April 19, 2023

Dear Commissioners,

We are submitting this comment in response to the notice of public rulemaking related to non-compete clauses. American Economic Liberties Project ("AELP") is an independent nonprofit organization that works to promote competition, combat monopolistic corporations, and advance economic liberty for all. AELP submits this comment in support of the FTC's proposed rule and its authority to promulgate rules and regulations defining unfair methods of competition under Section 6(g) of the FTC Act.

I. Introduction

The Federal Trade Commission's January announcement of a regulation designating non-compete clauses as unfair methods of competition was overwhelmingly met with applause by the American public. The primary exception comes from the Chamber of Commerce and its members, whose criticism focuses not on the merits of such a rule but on the FTC's authority to engage in rulemaking in

the first instance. The Chamber and other opponents of the FTC have pointed to four bases for dismantling FTC's rulemaking authority – the "major questions" doctrine, the non-delegation doctrine, due process, and principles of federalism. Each of these fails with a plain reading of the FTC Act and Supreme Court precedent. There is clear congressional authorization for the FTC to make rules and regulations related to the unfair methods of competition that the agency is tasked with combatting, and the procedures being followed, including an extended public comment period, ensure adequate process is achieved both in implementing and enforcing the rule.

II. The FTC Act Satisfies the *Major Questions* Doctrine

In *West Virginia v. EPA*, the Supreme Court told the Environmental Protection Agency that "something more than a merely plausible textual basis for [challenged] agency action [wa]s necessary. The agency instead must point to 'clear congressional authorization' for the power it claims."[1] The language of the FTC Act could not be clearer in authorizing it to make implement rules defining unfair methods of competition. Section 5 of the FTC Act instructs that the FTC is "empowered and directed to prevent persons, partnerships, or corporations … from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."[2] Then, Section 6 empowers the agency "*to make*

[1] 142 S. Ct. 2587, 2609 (2022).

[2] 15 U.S.C. § 45(a)(1)

rules and regulations for the purpose of carrying out the provisions of this subchapter [the FTC Act]."[3]

The FTC Act was passed in 1914 when it became clear that a number of predatory and anticompetitive behaviors were beyond the reach of the predecessor Sherman Act. "Congress sought to provide broad and flexible authority to the Commission as an administrative body of presumably practical men with broad business and economic expertise in order that they might preserve business' freedom to compete from restraints."[4] Thus, the terms "unfair methods of competition" and "unfair or deceptive acts or practices" were left undefined and intentionally broad, and the Supreme Court has long recognized that "unfair competitive practices were not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws; nor were unfair practices in commerce confined to purely competitive behavior."[5] More importantly, the Supreme Court has expressly stated that "§ 5 empower[s] the Commission to define and proscribe an unfair competitive

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[3] *Id*. § 46(g).

[4] *E. I. Du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 136 (2d Cir. 1984); *see also Atl. Ref. Co. v. FTC*, 381 U.S. 357, 367 (1965) (quoting S. Rep. No. 592, 63d Cong., 2d Sess., 13) (Section 5 "empowers the Commission, in the first instance, to determine whether a method of competition or the act or practice complained of is unfair. The Congress intentionally left development of the term 'unfair' to the Commission rather than attempting to define 'the many and variable unfair practices which prevail in commerce ….'").

[5] *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws."[6]

Of course, the major questions doctrine could be read to demand an even more explicit grant of rulemaking authority than what is found in Section 5. That explicit, but equally broad language is found in Section 6(g) of the FTC Act, which empowers the agency "*to make rules and regulations* for the purpose of carrying out the provisions of this subchapter [the FTC Act]."[7] This language is far broader than the statutory language at issue in *West Virginia v. EPA*,[8] and in 1973, the D.C. Circuit held that it authorizes the FTC "to promulgate rules defining the meaning of the statutory standards of the illegality the Commission is empowered to prevent."[9] To hold otherwise "would render the Commission ineffective to do the job assigned it by Congress."[10]

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[6] *Id*. at 239.

[7] *Id*. § 46(g).

[8] There, the statute at issue instructed the EPA to "promulgate regulations establishing emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants." 42 U.S.C. § 7412(d)(1). "[I]n the parlance of environmental law, [this section] directs the Agency to impose '*technology-based* standard[s] for hazardous emissions." *West Virginia*, 142 S. Ct. at 2600. The court found that a rule requiring plant operators to shift from coal-fired power to cleaner sources beyond the scope of the EPA's rulemaking authority. *Id*. at 2602-04, 2616. And, importantly, the EPA had already conceded the rule was beyond its authority and abandoned it. *Id*. at 2604.

[9] *Nat'l Petroleum Refiners Ass'n*, *v. FTC*, 482 F.2d 672, 694 (D.C. Cir. 1973).

[10] *Id*. at 697.

Opponents of the so-called administrative state argue that the rulemaking authority created by Section 6(g) is impliedly limited to procedural rules or to the section of the FTC Act in which it is found. But as Justice Gorsuch reminded us in *Bostock v. Clayton County*, "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."[11] And employing a textualist approach to statutory construction, the express terms of Section 6(g) have clear and established meaning.

Black's Law Dictionary states that a "regulation" is "the act or process of controlling by rule or restriction."[12] Merriam-Webster similarly defines it as "a rule or order issued by an executive authority or regulatory agency of a government and having the force of law."[13] A "rule" is, according to Black's, "[a]n established standard, guide, or regulation; a principle or regulation set up by authority, prescribing or directing action or forbearance."[14] And Merriam-Webster concurrently defined it as a "prescribed guide for conduct or action" or a "regulation or bylaw governing procedure or controlling conduct."[15] So both "rules and regulations" connote imposing some measure of control that can be either substantive or procedural. In fact, the Code of

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[11] 140 S. Ct. 1731, 1737 (2020).

[12] *Regulation*, BLACK'S LAW DICTIONARY (9th ed. 2009)

[13] Merriam-Webster

[14] *Rule*, BLACK'S LAW DICTIONARY

[15] Merriam-Webster

Federal Regulations tells us that "[r]egulation and rule have the same meaning."[16] To the extent the terms can be parsed, the term "rule" usually refers to the control of procedural behavior, e.g. the Federal Rules of Civil Procedure while the term "regulation" refers to the control of substantive behavior, e.g. the Code of Federal Regulations. Again, Section 6(g) instructs the FTC to make both rules *and* regulations, so the procedural and substantive are both explicitly included.

The final clause of Section 6(g) states that these regulations are "for the purpose of carrying out the provisions of this subchapter."[17] It is undeniable that the term "subchapter" refers to the FTC Act as a whole, which spans Sections 41 through 58 of Title 15 of the U.S. Code. Thus, the only remaining question is the meaning of "carrying out". The Sixth Circuit recently examined this phrase in a different statute:

> The Oxford English Dictionary offers as a relevant definition of "carry out": "To bring (something) to completion or fruition; to bring to a conclusion" and "to put (something) into action or practice; to cause (something) to be implemented; to undertake." Merriam-Webster provides a similar entry, defining to "carry out" as "to put into execution" or "to bring to a successful issue." [18]

In other words, "carry out" has a broad meaning and is not strictly limited to procedure. Certainly, defining certain acts as "unfair method[s] of competition" serves the purpose bringing to consummation the prevention of "unfair method of

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[16] 1 C.F.R. § 1.1.

[17] 15 U.S.C. § 46(g). The subchapter referred to is the FTC Act, which encompasses Section 5. *See generally id*. §§ 41, *et seq*.

[18] *Saginaw Chippewa Indian Tribe v. Blue Cross Blue Shield*, 32 F.4th 548, 559 (6th Cir. 2022) (citations omitted); *see also Shirk v. United States*, 773 F.3d 999, 1005 (9th Cir. 2014) (same).

competition" and "bring[ing] to successful issue" the FTC's mission.[19] As the D.C. Circuit explained in *National Petroleum*, "Section 5 enforcement through adjudication w[ould] be expedited, simplified, and thus 'carried out' by use of [] substantive rule[s]."[20]

If court precedent and textualist readings were not enough, Congress's own view of the FTC's powers is telling. In 1975, Congress passed the Magnuson Moss Warranty—FTC Improvements Act, which created a complex process for enacting rules related to the "deceptive acts or practices" prong of Section 5. Magnuson-Moss was debated while *National Petroleum* was still being litigated. Congress was very much aware of that case and its import, and it was closely watching it to determine whether Magnuson-Moss needed to grant clearer rulemaking authority to the FTC. One of its sponsors

> pledged … to reintroduce legislation granting the Commission the power to promulgate legislative rules in the event of a decision by the courts which is adverse to the Commission on this issue. In other words, the deletion of rulemaking powers by the Committee is not to be read in any way as a reversal of the Senate's position in the 92d Congress, when it passed legislation by a vote of 72-2 which expressly conferred legislative rulemaking power upon the Commission.[21]

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[19] 15 U.S.C. § 45(a).

[20] 482 F.2d at 694.

[21] Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Sen. R. No. 93-151, at 32 (1973), *available at* https://library.nclc.org/sites/default/files/field_media_file/2019-02/SR93-151.pdf. *See also* Conf. R. on S. 356, at H12348 (Dec. 19, 1974) (Moss), *available at* https://library.nclc.org/sites/default/files/field_media_file/2019-02/CH121974.pdf ("In the Octane Rating case [*National Petroleum*], the court held that the Federal

Clearly, Congress viewed rulemaking authority as an important function of the FTC and intended to reaffirm that power if the court in *National Petroleum* found the existing delegation of authority in Section 6(g) insufficient. And so, with *National Petroleum* decided in favor of the FTC's authority, reaffirming the FTC's rulemaking authority in Magnuson-Moss became unnecessary. Instead, Congress created a complex procedural process for enacting rules related only to the "unfair or deceptive practices" prong of Section 5, and it included a savings clause clarifying that Magnuson-Moss's new procedural requirements "*shall not affect* any authority of the Commission to prescribe rules (*including interpretive rules*), and general statements of policy, with respect to unfair methods of competition."[22] Implicit in that carve out is the assumption that the FTC has substantive rulemaking authority in the first instance.

Of course, courts today take much more literal, and by extension restrictive, readings of statutes, so many legal scholars view *National Petroleum* as outdated and out of line with the major questions doctrine. But though the D.C. Circuit was skeptical of the "expressio unius est exclusio alterius" maxim of statutory

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Trade Act did confer authority to the FTC to issue substantive rules defining both unfair methods of competition and unfair or deceptive acts or practices to consumers. Under this interpretation, the FTC has the authority to Issue substantive rules which may affect an entire industry and, in some cases, a great number of Industries.").

[22] 15 U.S.C. § 57a(a)(2) (emphasis added).

construction,[23] it concluded that there was "particularly good reason *on the face of the statute* to reject such arguments" against FTC rulemaking authority.[24] And though the court engaged in a lengthy analysis of the FTC Act's legislative history, it likewise rejected the usefulness of that source for statutory construction, finding that the ambiguity and inconsistency in the legislative record made "the need to rely on the section's *language* [] obvious."[25] Thus, employing the *expression unius* doctrine, there is no language limiting Section 6(g) to matters of procedure, and it would be improper to impute such a limit absent such limiting language.[26]

The language of Section 6(g) is overt and consistent with the broader mandate of the FTC to prevent unfair methods of competition and unfair or deceptive acts or practices.[27] That "standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against

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[23] This means "[t]he expression of one thing implies the exclusion of another." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, at 96 (2012).

[24] *Nat'l Petroleum Refiners*, 482 F.2d at 676 (emphasis added).

[25] *Id*. at 709 (emphasis added). *See also id*. at 693 ("Ambiguous legislative history cannot change the express legislative intent."). Ironically, given the strict textualist approach advocated for by critics of the FTC, the district court ruling rejecting the FTC rulemaking authority relied heavily on legislative history. *Nat'l Petroleum Refiners Ass'n v. FTC*, 340 F. Supp. 1343, 1345-46 (D.D.C.1972).

[26] *Id*. at 675.

[27] *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986).

public policy for other reasons." As Justice Kagan stated so succinctly in her dissent to *Seila Law, LLC v. Consumer Financial Protection Bureau*:

> [T]he FTC's organic statute broadly "empowered and directed" the agency "to prevent persons" or businesses "from using unfair methods of competition in commerce." To fulfill that mandate, the agency could and did run investigations, bring administrative charges, and conduct adjudications. And if any person refused to comply with an order, the agency could seek its enforcement in federal court under a highly deferential standard. Still more, the FTC has always had statutory rulemaking authority, even though (like several other agencies) it relied on adjudications until the 1960s.[28]

The rulemaking reflects the Commission's judgment that non-compete agreements are anticompetitive, harmful, and unfair. It brings clarity to the elusive unfairness standard and correctly allows the FTC to "carry out" its statutory mandate, in accordance with Section 6(g).

III. Rulemaking Does Not Violate the Non-Delegation Clause

Opponents of the FTC also argue that any rulemaking authority Congress did delegate to the FTC violates Article I of the Constitution. "In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I of the Constitution vests 'all legislative Powers herein granted … in a Congress of the United States.' This text permits no delegation of those powers."[29] However, Congress can delegate decision-making authority to agencies

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[28] 140 S. Ct. 2183, 2239 n.10 (2020) (Kagan, J. dissenting).

[29] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001); U.S. CONST., art. I, § 1.

"[s]o long as [it] 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'"[30]

The "intelligible principle" standard is a loose one, so only two statutes have ever been struck down using the non-delegation clause.[31] FTC critics are quick to point out that one of those involved a section of the National Industrial Recovery Act (NIRA) that "authorize[d] the President to approve 'codes of fair competition.'"[32] But a slightly deeper dive into the facts surrounding *Schechter Poultry* and the basis for the Supreme Court's ruling reveal that the decision is inapposite, and actually supports upholding the FTC's rulemaking authority.

The *Schechter Poultry* plaintiffs were challenging a "Live Poultry Code" promulgated by the President of the United State under the NIRA.[33] That code was not subject to any sort of rulemaking or administrative procedures, government studies, or public comment period.[34] And the President held broad authority to reject or approve codes, modify them at will, create agencies for assistance, and reject or accept their recommendations.[35] The code was simply written and approved by the Roosevelt administration after receiving an application from a poultry-related trade

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[30] *Touby v. United States*, 500 U.S. 160, 165 (1991) (citation omitted).

[31] *Whitman*, 531 U.S. at 474.

[32] *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 521-22 (1935).

[33] *Id*. at 521-22.

[34] *Id*. at 533.

[35] *Id*. at 538-39.

group.[36] Because the statute authorizing creating of industry codes "supplie[d] no standards for any trade, industry or activity [and] … d[id] not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure," there was simply no intelligible principle, and the broad delegation of powers was "utterly inconsistent with the constitutional prerogatives and duties of Congress."[37]

In reaching its decision, the Supreme Court explicitly distinguished the NIRA from the FTC Act. It pointed out that the "[t]he 'fair competition' of the [NIRA] codes ha[d] a much broader range and a new significance" than the "unfair methods of competition" outlawed by the FTC Act.[38] Moreover, the FTC Act provides "for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the Commission is taken within its statutory authority."[39] In short, the Supreme Court expressly distinguished the FTC's authority to prevent "unfair methods of competition" under the FTC Act from the president's authority to unilaterally enact and enforce trade codes under the NIRA because of the many procedural requirements and judicial review imposed on the FTC. And those procedural

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[36] *Id*. 522-23 & n.4.

[37] *Id*. at 537, 541.

[38] *Id*. at 534.

[39] *Id*. at 533.

requirements have only gotten stricter and more formalized since *Schechter*, with the passage of the Administrative Procedures Act in 1946.[40]

The power to prevent "unfair methods of competition" and "unfair or deceptive trade practices" is no less clear than the former War Department's power to recover "excessive profits" from military contracts, the former Price Administrator's power to set "fair and equitable" commodity prices, or the FCC's power "to regulate broadcast licensing in the 'public interest,'" all of which survived non-delegation clause challenges in Supreme Court.[41] The FTC Act provides an intelligible principle, and there is no reason to abrogate the FTC's powers today than there was on the many occasions the Supreme Court has reviewed and upheld it in the past.[42]

IV. Due Process Is Preserved

The FTC's non-compete rule is not being casually implemented and imposed on the business community. It is based on empirical data and subject to a public rulemaking process that has given the public five months to consider and comment

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[40] 5 U.S.C. §§ 551–559. The APA requires a notice of public rulemaking that includes "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved" and "affords interested parties a reasonable opportunity to participate in the rulemaking process." *Id.* § 553(b); *Forester v. Consumer Prod. Safety Com.*, 559 F.2d 774, 787 (D.C. 1977).

[41] *Touby*, 500 U.S. at 165.

[42] *See id.* at 532-33 (collecting cases); Fed. Trade Comm'n, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, Commission File No. P221202 (Nov. 10, 2022), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

on the rule's probity. And even assuming the FTC passes the rule, it does not have final say over its correctness. If the FTC initiates an administrative proceeding against a person who violates the rule, they must still prove that the rule was in fact violated in either an administrative proceeding that includes discovery and a hearing or through a suit for injunctive relief in federal district court.[43] Then, the respondent will have an opportunity to appeal that decision to a federal court and argue that their conduct was not, in fact, an unfair method of competition.[44] In fact, under the recent decision in *Axon Enterprises v. FTC*, a respondent may be able to skip the FTC's adjudicative process challenge the rule before a hearing has even occurred.[45] This result is no different than if a non-compete rule did not exist and the FTC relied solely on enforcement. Perhaps more importantly, the non-compete clause rule brings clarity to the business community by creating a bright-line standard to which they can easily conform. It therefore achieves the "fair notice of what is prohibited" that due process requires in a way that case-by-case adjudication does not.[46]

V. Federalism Is Not Jeopardized

The final argument against the FTC's proposed non-compete clause rule is that it offends principles of federalism by intruding on what is traditionally the realm of the states. This argument is easily disposed of, in that the Commerce Clause is broad

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[43] 15 U.S.C. § 45(b), (m); 16 C.F.C §§ 3.1, *et seq*.

[44] 15 U.S.C. § 45(c).

[45] Nos. 21-86, 21-1239, ___ U.S. ___, 2023 U.S. LEXIS 1500, at *24 (Apr. 14, 2023)

[46] *FCC v Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

and the federal government's oversight of the employer-employee relationship has a long history.

Black's Law Dictionary defines "federalism" as "the legal relationship and distribution of power ... between the federal government and the state governments."[47] The metes and bounds of that relationship in the United States are defined by the Constitution, as interpreted by the Supreme Court. To begin, the Commerce Clause found in Article I grants Congress the power "[t]o regulate Commerce … among the several States."[48] At the same time, the Tenth Amendment tell us, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[49] Finally, the Supremacy Clause makes clear that any laws validly passed by Congress are the "supreme Law of the Land" and supersede any conflicting or inconsistent state laws.[50]

The Supreme Court first tackled the Commerce Clause in 1824 when it answered the question of what the power to regulate commerce is: "the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the

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[47] *Federalism*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[48] U.S. CONST., art. I, § 8, cl. 3.

[49] U.S. CONST., amend. X.

[50] U.S. CONST. art. VI, cl. 2.

constitution."[51] The Supreme Court has expounded on this countless times over the last century, but it has continued to view Congress's power as broad: "When Congress decides that the "'total incidence"' of a practice poses a threat to a national market, it may regulate the entire class."[52] And "'[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.'" [53] Certainly, non-compete clauses fall into the category of economic activity, and it is undisputed that they impact a wide swath of economic activity in the United States.[54]

Regardless, some still complain that non-compete clauses are historically the realm of state common law. But as the FTC's Notice of Public Rulemaking states, "non-compete clauses have always been considered proper subjects for scrutiny under the nation's antitrust laws."[55] Labor relations and employment matters have broadly been regulated by Congress and federal agencies for over a century. The National Labor Relations Act was passed in 1935,[56] and the landmark Fair Labor Standards Act, bringing minimum wage and maximum hour protections to the workplace and

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[51] *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824).

[52] *Gonzales v. Raich*, 545 U.S. 1, 17 (2005)

[53] *Id*. at 25 (quoting *United States v. Morrison*, 529 U.S. 598, 610 (2000)).

[54] Approximately 18% of the American workforce is subject to a non-compete clause, an eliminating them is expected to increase wages by nearly $300 billion. https://www.ftc.gov/sites/default/files/ftc_gov/images/NPRM_NoncompetesInfographic_EN.png

[55] *See* Non-Compete Clause Rule, Notice of Public Rule Making, FTC-2023-0007-0001_content, at 2 n.1 ( ), *available at* https://www.regulations.gov/document/FTC-2023-0007-0001 (collecting cases).

[56] 29 U.S.C. § 151, *et seq*.

placing restrictions on child labor, followed in 1938.[57] We also have the Equal Pay Act, Title VII of the Civil Rights Act of 1964, the Occupational Safety and Health Act, and numerous other labor and employment laws. In short, the federal government has a long history of regulating employers, and interstate commerce is clearly implicated, so notions of federalism are not offended.

VI. Conclusion

Congress lawfully gave the FTC sweeping power to regulate our economy and prevent unfair methods of competition. Its use of Section 6(g) today to stop some of the most anticompetitive conduct aimed at the American workforce is consistent the agency's mandate and is an important step in restoring competition in that market. AELP fully supports the proposed non-compete clause rule and encourages its implementation and enforcement in the future.

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[57] *Id*. § 201, *et seq*.