



UNITED STATES OF AMERICA
Federal Trade Commission

PREPARED REMARKS

**Non-Compete Clauses in the Workplace: Examining Antitrust and
Consumer Protection Issues**

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Good afternoon. Today's workshop is a great example of one this agency's most important functions: convening experts to inform policy-making about competition and consumer protection issues impacting the American economy.

It's great to see familiar faces like Professors Orly Lobel and Evan Starr, and to learn from them and the rest of the incredible group gathered here today. Thanks to all our presenters and to Bilal, Sarah and the rest of the staff behind this workshop.

This workshop comes at a critical time. America has a labor mobility problem. Over the past several decades, American workers have been increasingly *unlikely* to move to new places and start new jobs,² or even to switch jobs in the

¹ The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other commissioner.

² Steven J. Davis & John Haltiwanger, *Labor Market Fluidity and Economic Performance* (Nat'l Bureau of Econ. Research, Working Paper No. 20479, Dec. 2014), <https://www.nber.org/papers/w20479>; Ryan Nunn, *Americans Aren't Moving to Economic Opportunity*, THE HAMILTON

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same location.³ The New York Times' Sabrina Tavernise recently reported, citing data from the Census Bureau, that Americans are moving at the lowest rate since the government started keeping track, in the 1940s.⁴ In a world of declining transportation and communications costs, where moving ought to be easier, those are surprising—and, I think, troubling—facts.

Labor mobility is good for the economy. It helps businesses, by allowing labor to allocate itself more efficiently. As David Schleicher describes in his article “Stuck!”, it allows the federal economic policies we choose—whatever they are—to work better.⁵ And, critically, labor mobility helps workers. Evidence shows that people get bigger raises when they switch jobs than they do when they stay where they are.⁶ But labor mobility isn't just about leaving for the job you want tomorrow—it's about making the job you have today better. A.O. Hirschman described three responses employees have to declining working conditions: exit, voice, and loyalty.⁷ When you can exit a job, you have greater leverage to improve

PROJECT: BLOG (Nov. 19, 2018), <https://www.hamiltonproject.org/blog/americans-arent-moving-to-economic-opportunity>.

³ David W. Perkins, *Declining Dynamism in the U.S. Labor Market*, CONG. RESEARCH SERV. INSIGHTS (June 15, 2016), <https://fas.org/sgp/crs/misc/IN10506.pdf> (showing “churn” rates are in long-term decline).

⁴ Sabrina Tavernise, *Frozen in Place: Americans Are Moving at the Lowest Rate on Record*, N.Y. TIMES (Nov. 20, 2019), <https://www.nytimes.com/2019/11/20/us/american-workers-moving-states.html>.

⁵ See, generally, David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 1 (2017).

⁶ Bourree Lam, *The Special Few Who Are Getting Raises in this Economy*, THE ATLANTIC (Feb. 8, 2016), <https://www.theatlantic.com/business/archive/2016/02/job-switchers-raise/460044/>.

⁷ See, generally, ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSE TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

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the terms of your employment. It is therefore unsurprising that scholars point to declining labor mobility as a culprit in slow wage growth.⁸

The story of declining labor mobility is a complex one, and the non-compete clauses we are discussing today are, I believe, a part of it. As we at this agency well know, competition matters a great deal, and labor markets are no exception. The more mobile workers are, the more firms effectively compete for their labor. Policies that favor labor mobility increase that competition; practices that inhibit it—including non-competes—reduce it, and prevent work from getting to where it needs to go.

Over the past several years, empirical research, by Professor Starr and others, has advanced our understanding of the prevalence and potential effects of non-compete clauses. We do not know if non-competes have been increasing in frequency, but they are certainly more ubiquitous than many thought.⁹ And they appear in contexts where the traditional justifications for non-competes are not obvious: for example, some twelve percent of workers earning less than \$40,000 per

⁸ See, e.g., Alan Krueger, Opening Remarks at the Federal Trade Commission Hearings on Competition and Consumer Protection in the 21st Century, No. 3: Multi-Sided Platforms, Labor Markets, and Potential Competition (Oct. 16, 2018), <https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century>. People already working in an industry protected by occupational licensing regulations will typically earn higher wages. See e.g., Ryan Nunn, *How Occupational Licensing Matters for Wages and Careers*, THE HAMILTON PROJECT (Mar. 2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_3152018_how_occupational_licensing_matters_for_wages_and_careers.pdf. However, all those who are unable to enter the field are hurt. Non-compete agreements also result in reduced wages. See Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Non-Compete Agreements* (Sept. 10, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3452240.

⁹ See, e.g., Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes in the U.S. Labor Force* 17 (Univ. of Michigan Law & Econ. Research, Paper No. 18-013, Sep. 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714.

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year,¹⁰ or seasonal Amazon warehouse workers.¹¹ They also appear where they are not allowed or are not enforced. All that concerns me. At the same time, non-competes can serve good purposes, incentivizing investment in workers and protecting trade secrets—worthy goals in our increasingly knowledge-driven economy. Evidence on the effects of non-competes seems to tell both sides of the story, indicating harms to workers,¹² but also benefits in some contexts.¹³

Today, federal and state legislators, Republicans and Democrats alike, are grappling with how to address non-compete agreements. I was honored in October to testify before the House Subcommittee on Antitrust, Commercial, and Administrative Law about competition in labor markets, and I focused on the role of non-competes.¹⁴ Above all, I hope today's workshop informs that policy-making process.

¹⁰ U.S. DEP'T OF THE TREASURY, COUNCIL OF ECON. ADVISORS & DEP'T OF LABOR, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICY MAKERS 3 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf.

¹¹ Spencer Woodman, *Exclusive: Amazon makes even temporary warehouse workers sign 18-month non-competes*, THE VERGE (Mar. 26, 2015), <https://www.theverge.com/2015/3/26/8280309/amazon-warehouse-jobs-exclusive-noncompete-contracts>.

¹² See, e.g., Lipsitz & Starr, *supra* note 8. U.S. DEP'T OF THE TREASURY, COUNCIL OF ECON. ADVISORS & DEP'T OF LABOR, *supra* note 10 at 19.

¹³ See, e.g., Evan Starr, *Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete*, 72 CORNELL INDUS. REL. REV. 783, 785 (2019); Starr, et al., *supra* note 9 at 8 (note that the authors find that there is only an increase in training when workers are notified of the non-compete before accepting the job offer). For a thorough and current review of the economic literature on non-competes, see John M. McAdams, *Non-Compete Agreements: A Review of the Literature* (Dec. 31, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3513639.

¹⁴ *Antitrust and Economic Opportunity: Competition in Labor Markets: Hearing Before the Subcomm. on Antitrust, Commercial, and Administrative Law of the H. Comm. on the Judiciary*, 116th Cong. (2019) (statement of Noah Joshua Phillips, Commissioner, Federal Trade Commission).

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Do non-competes present a policy problem? If so, is law enforcement or changing the law the way to address it? Federal or state law? Are there grounds for a blanket prohibition? Or, how and where should the law demarcate legality and illegality—or tip the scales through legal presumptions? Would disclosure requirements increase the likelihood that workers share in the benefits that non-competes can foster?

While legislators consider these questions, some stakeholders are pushing for the FTC itself to address non-competes through a rulemaking. We heard some of those calls this morning. We heard a little less, however, about the legal basis for doing so. This is a real issue which gives me—someone concerned about non-competes—pause, and about which I want to learn more. To the extent the rulemaking in question regards “unfair methods of competition”, how we proceed may implicate not only the policy of non-compete clauses, but also more fundamental questions about the Constitution and its separation of powers.

The FTC has issued a competition rule just once in its history, in the 1960s.¹⁵ That rule, which was never enforced and was withdrawn in the 1990s,¹⁶ proscribed conduct barred by the Robinson-Patman Act.¹⁷ To reach non-competes, by contrast,

¹⁵ FTC Men’s and Boy’s Tailored Clothing Rule, 16 C.F.R. § 412 (1968).

¹⁶ Notice of Rule Repeal, 59 Fed. Reg. 8527 (1994).

¹⁷ That language, which the Robinson-Patman Act added to the Clayton Act, prohibits upstream firms from discriminating—in terms of payments, facilities, services, or other support—among downstream distributors and resellers of the upstream firms’ products. *See* 15 U.S.C. § 13(d), (e) (2012).

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we would have to rely, for the first time, *solely* on the FTC Act’s prohibition of “unfair methods of competition”.

That broad language raises the specter of the non-delegation doctrine, which requires Congress to provide “an intelligible principle” to guide the agency to which it has delegated legislative discretion.¹⁸ As Justice Gorsuch wrote in his recent dissent in *Gundy v. United States*, enforcing the Constitution’s separation of powers to prohibit unconstitutional delegations of legislative power is “about respecting the people’s sovereign choice to vest the legislative power in Congress alone . . . it’s about safeguarding a structure designed to protect their liberties, minority rights, fair notice, and the rule of law”.¹⁹ Justice Gorsuch cited the *Schechter Poultry* case, in which the Supreme Court struck down Congress’s delegation under the National Industrial Recovery Act, the New Deal law that gave the President authority to approve “codes of fair competition”—almost the exact wording at issue here.²⁰ Justice Cardozo dubbed it “delegation running riot”.²¹ In *Schechter Poultry*, the Court explicitly distinguishes the NIRA from the FTC Act.²² But the key distinction that saved the FTC was its *adjudicative* process, in which the Commission, acting as “a quasi judicial body”, determines what are unfair methods of competition “in particular instances, upon evidence, in light of particular competitive conditions”

¹⁸ *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

¹⁹ *See Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting).

²⁰ *Id.* at 2137–38 (Gorsuch, J., dissenting) (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

²¹ *Schechter Poultry*, 295 U.S. at 553 (Cardozo, J., concurring).

²² *Id.* at 531–34.

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via a process of formal complaint, fair notice and hearing, and findings supported by evidence—all subject to judicial review.²³

That is different from rulemaking. Non-delegation concerns may also be exacerbated by other factors here, including the lack of clarity in the rulemaking authority, the traditional commitment of the issue to the states, the fact that neither the FTC nor any court has found non-competes to violate the FTC Act's prohibition against "unfair methods of competition", and the lack of a good historical precedent.

All of that concerns me as well, and I hope to hear more. Today's proceedings have been great in general. I look forward to hearing what the upcoming presenters have to say on all of these important questions, as well as to reviewing comments that are submitted.

²³ *Id.* at 532–34.