UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chairman

Prepared Remarks of Chairman Andrew N. Ferguson*

U.S. Federal Trade Commission

Moving Forward: Protecting Workers from Anticompetitive Noncompete Agreements

Washington, D.C.

January 27, 2026

Thank you, Kelse, for that introduction and thank you for your work putting this workshop together. This is our second attempt to get this workshop put on. The first one was obstructed by the shutdown a couple of months ago. The second one has been limited a little bit by the snow here in D.C., but Kelse did incredible labor to transition this from an in-person event to a virtual event. I'm really grateful for everything you've done in this workshop and as cochairman of the Joint Task Force here at the FTC.

As you all know, in September of last year, the FTC requested public comment on noncompete agreements.[1] Because I believe that many noncompete agreements likely violate our antitrust laws, I asked for the public to help us identify potentially illegal noncompete agreements as a first step toward enforcing the antitrust laws against those agreements. We have convened this workshop for a similar purpose: to improve the Commission's understanding of the real-world effects of noncompete agreements, and to ensure that the Commission prioritizes its enforcement resources against those noncompete agreements that cause the most damage to competition and America's workers.

Given the controversy surrounding the Biden Administration's proposed rule on noncompete agreements, I want to begin my remarks with a brief explanation of my principal objection to the proposed rule. Thereafter I will outline the historical development of the principles that our own courts use to evaluate noncompete agreements. Finally, I will conclude by explaining how those principles will inform future FTC enforcement.

The Biden Administration's Rule on Noncompete Agreements

On April 23, 2024, my predecessor, joined by two of her fellow Commissioners, promulgated the Non-Compete Clause Rule.[2] In response, Commissioner Holyoak and I wrote

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* 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.

[1] Request for Information Regarding Employee Noncompete Agreements, FTC (Sept. 4, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/2025-Noncompete-RFI.pdf.

[2] Final Rule, Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024).

vigorous and lengthy dissents.[3] For my part, I did not object to the majority Commissioners' claim that noncompete agreements can have anticompetitive effects. That much is plain. Instead, I objected to their unconstitutional seizure of power in pursuit of preventing the potentially anticompetitive effects of noncompete agreements.[4] Why?

Well, the Biden Administration's proposed rule would have banned almost *all* noncompete agreements, invalidated over thirty million existing contracts across the nation, redistributed over half a trillion dollars of wealth, and preempted 46 state laws addressing the use of noncompete agreements. It was an extraordinary and unprecedented assertion of regulatory authority, and it rested on a century-old statute that no one had ever claimed included the power to impose a nationwide ban on any sort of contract—much less a contract that all 50 States treated as lawful when Congress adopted that statute.[5]

Defenders of the proposed rule ask us to ignore all of this as legal formalism. Instead, they focus on the merits of the rule as a matter of public policy. But the rule of law rests on following the formalities of the law. The Commission does not have power to enact whatever policy it decides is good. We have only the limited powers Congress has conferred on us. There were no good arguments that the rule was consistent with that limited conferral of power. I therefore objected to the Biden Administration's assertion of *extraordinary power* rather than its assertion about the beneficial effects of the proposed rule.[6]

Really, my objections were about whether we are a self-governing people. When unelected bureaucrats assert the power to "prescribe general rules for the government of society," which is the essence of lawmaking, they appropriate a power that our Constitution vests exclusively in Congress.[7] Because we elect individuals to represent us in Congress, its members are answerable to the electorate. The electorate therefore can expect that the laws Congress passes will reflect the electorate's interests and priorities. If not, we can vote them out. This is government for the people and by the people. But if unelected bureaucrats can appropriate to themselves the power of lawmaking, we no longer have a government for the people and by the people; instead, we have government for the government and by the government.[8]

The Biden Administration's proposed rule was pure lawmaking. It was undeniably general in its application, it pre-empted state laws, it would have had a massive effect on the nation's economy, and it would have enacted a nationwide ban on noncompete agreements that Congress

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[3] Dissenting Statement of Comm'r Andrew N. Ferguson, Joined by Comm'r Melissa Holyoak, *In re the Non-Compete Clause Rule*, Matter No. P201200 (June 28, 2024) ("Ferguson Noncompete Rule Dissent"); Dissenting Statement of Comm'r Melissa Holyoak, Joined by Comm'r Andrew N. Ferguson, *In re the Non-Compete Clause Rule*, Matter No. P201200 (June 28, 2024) ("Holyoak Noncompete Rule Dissent").

[4] Ferguson Noncompete Rule Dissent, at 20–34.

[5] *Id*. at 1.

[6] See *id*. at 7–20 (explaining that the FTC Act did not provide authority for the Rule); *id*. at 20–34 (explaining that, even if the statute provided authority for the Rule, Congress could not have delegated its authority to legislate through the statute); *id*. at 34–45 (explaining that, in any event, the Rule violated the Administrative Procedure Act).

[7] See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810) ("It is the peculiar province of the legislature to prescribe general rules for the government of society….").

[8] Remarks of Chairman Andrew N. Ferguson, Meeting of the National Automobile Dealers Ass'n, at 3 (Sept. 10, 2025) ("Our great national debates should be settled in the halls of Congress, not in agency conference rooms.").

has frequently considered adopting, but has never actually done so.[9] It is as if Biden regulators thought to themselves: if Congress, the courts, and state legislatures will not do the right thing on noncompete agreements, we will do it for them. Like so many other actions in the Biden Administration, it was an unlawful power grab.[10] In the end, the courts checked the extraordinary hubris of Biden regulators.[11] For all the past administration's bluster surrounding this rule, it never even went into effect. It never protected a single worker. Years of time and energy were wasted on what effectively amounted to a political stunt.[12]

My disagreement with my colleagues has always been simple. As I explained in my dissent, I agree that noncompete agreements can have anticompetitive effects.[13] I disagreed that we should abuse our power to prevent anticompetitive effects.[14]

"Moving Forward"

Today's event is titled "Moving Forward." We are here today because I believe we can chart a course toward protecting American workers from unlawful noncompete agreements by using the tools Congress actually gave us, rather than arrogating to ourselves new powers that Congress has denied us.[15]

Indeed, we *do* have the power to prosecute anticompetitive noncompete agreements. Consequent to our request for public comment on noncompete agreements, the FTC has filed two complaints against companies whose restrictive employment agreements are anticompetitive and harmful to American workers.[16] In each case, we found that these agreements not only harmed employees by denying them the ability to seek better job opportunities, but also harmed competing companies and consumers who would benefit from greater mobility of workers.[17]

This is an important point: unlawful noncompete agreements are anticompetitive, not just for workers, but for rival companies and consumers as well.[18] That's why our complaints did not simply allege the existence of a noncompete agreement that limited competition in the labor

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[9] Ferguson Noncompete Rule Dissent at 1–5, 14.
[10] E.g. *Biden v. Nebraska*, 600 U.S. 477 (2023) (holding the Department of Education lacked statutory authority to cancel roughly $430 billion of federal student loan balances); *Nat'l Fed'n of Ind. Bus. v. Dep't of Labor*, 595 U.S. 109 (2022) (staying OSHA's imposition of vaccine mandate for employers with more than 100 employees); *Alabama Ass'n of Realtors v. Dep't of Health and Human Servs.*, 594 U.S. 758 (2021) (holding CDC lacked statutory authority to impose a nationwide eviction moratorium).
[11] *Ryan, LLC v. FTC*, 746 F. Supp. 3d 369 (N.D. Tex. 2024); see also *Properties of the Villages, Inc. v. FTC*, 2024 WL 3870380 (M.D. Fla. Aug. 15, 2024).
[12] Statement of Chairman Andrew N. Ferguson, Joined by Comm'r Melissa Holyoak, *Ryan, LLC v. FTC*, at 2 (Sept. 5, 2025) ("Ferguson Noncompete Rule Vacatur Statement").
[13] Ferguson Noncompete Rule Dissent at 2–3.
[14] *Id*. at 7–20.
[15] See Statement of Chairman Andrew N. Ferguson, Joined by Comm'r Melissa Holyoak, *In re Gateway Pet Memorial Servs.*, Matter No. 2210170, at 2–3 (Sept. 4, 2025) ("Ferguson Gateway Statement").
[16] Complaint, *In re Adamas Amenity Servs.*, Matter No. 2410081 (Dec. 19, 2025) ("Adamas Complaint"); Complaint, *In re Gateway Pet Memorial Servs.*, Matter No. 2210170 (Sept. 4, 2025) ("Gateway Complaint").
[17] Adamas Complaint at ¶¶ 13–14; Gateway Complaint at ¶¶ 15–17.
[18] See Ferguson Gateway Statement at 5.

market, but also alleged that these agreements did not serve any pro-competitive purpose or could have accomplished such a purpose with a less restrictive noncompete agreement.[19]

In taking this approach, we did nothing more than apply the traditional, commonsense rules governing noncompete agreements that are enshrined in the common law and applied by courts across the country.[20] To implement an effective strategy for prosecuting anticompetitive noncompete agreements on a case-by-case basis, we need to build on the historical development of those principles—derived from centuries of practical experience—that have long ensured that noncompete agreements were fair, equitable, and promoted the common interest in a vibrant, competitive economy. In this case, "Moving forward" requires "looking backward," recovering the wisdom of the past and applying it to new cases and circumstances.[21]

With that in mind, I'd like to give a brief history of noncompete agreements and the development of some general principles devised to ensure they were fair and equitable.

Noncompete Agreements: A History

A noncompete agreement is just what it sounds like: an agreement between an employer and a worker where the worker promises to not work for a competitor or operate his own competing business. Typically, the agreement is limited to some discrete time period or geographic area. Such agreements have been around for centuries.[22] In the earliest known case—Dyer's Case from 1414—the judge refused to enforce what amounted to a six-month noncompete agreement as infringing on the right of a worker to practice his trade.[23] As time went on, however, and the economy changed and grew more complex, courts and lawmakers began to look more closely at the circumstances of these agreements and began to consider their justifications.[24] If someone wished to buy a business from someone else, for instance, the purchaser wanted assurances that the former owner would not immediately establish a competing business. Without those assurances, the owner would find it hard to sell his business. After all, who would buy a business if the seller would immediately open a competitor, potentially swiping back all the customers that made the business valuable in the first place? Courts began to understand that some noncompete agreements—like this one—can be reasonably necessary for certain productive activity to occur in the first place.[25] Accordingly, noncompete agreements in some situations can actually promote individuals' ability to practice a trade and keep for themselves the fruits of their labor.[26]

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[19] Adamas Complaint at ¶ 15; Gateway Complaint at ¶ 18.
[20] See Ferguson Gateway Statement at 5–6.
[21] *Id*.
[22] Ferguson Noncompete Rule Dissent at 2–5.
[23] *Dyer's Case*, Y.B. Mich. 2 Henry 5, f. 5, pl. 26 (C.P. 1414); see also Charles E. Carpenter, Validity of Contracts Not to Compete, 76 U. Pa. L. Rev. 244, 244–45 (1928) (discussing reported cases addressing species of noncompete agreements dating back to the fourteenth and fifteenth centuries).
[24] See *Alger v. Thacher*, 36 Mass. 51, 52–53 (1837) (describing early seventeenth century cases approving of limited noncompete agreements after "the most ancient rules of the common law" forbidding such agreements had "continued unchanged and without exceptions" "[f]or two hundred years.").
[25] See, e.g., *Mitchel v. Reynolds*, 24 Eng. Rep. 347 (Q.B. 1711).
[26] See Ferguson Noncompete Rule Dissent at 3, 37–38.

What emerged in the common law was a reasonableness test that considered whether the noncompete agreement was limited to the "fair protection" of the interests of one party to the contract and "not so large as to interfere with the interests of the public."[27] Notably, one of the early opinions applying the Sherman Act summarized this history. Then-Judge William Howard Taft for the Sixth Circuit in *Addyston Pipe* related noncompete agreements' treatment at common law to Sherman Act principles, describing an approach that looked to the facts of each situation to determine whether the agreements were reasonably necessary to some procompetitive purpose.[28] In practice, this resulted in courts enforcing noncompete agreements where they accompanied a sale of a business, partnership, or were otherwise shown to be reasonably necessary to protect an employer's confidential information.[29]

Subsequently, and in parallel to the development of the Rule of Reason in antitrust law,[30] American state courts adapted the common law approach to noncompete agreements with their own reasonableness tests. The precise formulation of this reasonableness test varies from State to State, but they generally balance the harms to the parties to the contract, and the interests of the public at large. They do so by assessing (1) whether the non-compete is broader than needed to protect an employer's legitimate interests, and (2) whether an employer's legitimate interests are outweighed by hardship to the worker, and may occasionally consider injury to the broader public.[31] Though noncompete agreements have always been considered a "contract . . . in restraint of trade" subject to the Sherman Act,[32] most have been evaluated under these state-level balancing tests.[33]

Now, these tests all focus on justifications for the restraints because, on the face of it, there seems to be something wrong with noncompete agreements. One does not speak about a provision being "narrowly tailored" to achieve its purpose or an action "proportioned" to its end *unless* there is some concern that the provision or action itself has the potential to cause some harmful effects. Let's not forget they're called "*noncompete agreements*." In other words, *because* the provision or action is a potential cause of some harmful effects, the provision or action should be limited to

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[27] *Horner v. Graves*, 131 Eng. Rep. 284, 287 (C.P. 1831).

[28] *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899) (collecting cases).

[29] *Addyston Pipe*, 85 F. at 281; *see also* William Howard Taft, The Anti-Trust Act And The Supreme Court, 8–11 (1914) (summarizing doctrine; "When no other purpose than one of these [exceptions] has been manifested in the contract [a non-compete] has always been unenforceable at common law."); *Mitchel v. Reynolds*, 124 Eng. Rep. 347, 351 (Q.B. 1711) (analyzing non-compete agreement accompanying the sale of a bakery and presuming noncompete agreements "*prima facie* to be bad" unless shown otherwise).

[30] Kenneth G. Dau-Schmidt, Xiaohan Sun & Phillip J. Jones, The American Experience with Employee Noncompete Clauses: Constraints on Employees Flourish and Do Real Damage in the Land of Economic Liberty, 42 Compar. Lab. L & Pol'y J. 585, 592 n. 35 (2022) (noting that "[t]he 'rule of reason' has developed somewhat differently in its many applications under American law," distinguishing the tests under state employment law from that under the Sherman Act); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 688 (Tex. 1990) ("Rule of reason analysis under antitrust laws must not be confused with reasonableness analysis under the common law.").

[31] Restatement (Second) of Contracts § 188 (1981); *see also* 15 Corbin on Contracts § 80.6 (2025).

[32] See, e.g., *Addyston Pipe*, 85 F. at 281–82; *Newburger, Loeb & Co.* v. *Gross,* 563 F.2d 1057, 1082 (2d Cir. 1977) ("Although such issues have not often been raised in the federal courts, employee agreements not to compete are proper subjects for scrutiny under section 1 of the Sherman Act.").

[33] Ferguson Noncompete Rule Dissent at 3–4.

what is necessary to achieve its purpose or end.[34] So, what are the potentially harmful effects of noncompete agreements? Let me mention just two.

First, noncompete agreements reduce an employee's bargaining power vis-à-vis his or her employer.[35] Because the noncompete agreement reduces the risk that an employee might leave for better compensation or working conditions elsewhere, an employer has less incentive to provide, and an employee has less leverage to demand, better compensation or working conditions. Thus, we can reasonably assume that noncompete agreements will tend to decrease employee wages, benefits, and working conditions.[36] And, indeed, empirical evidence bears out this assumption in at least some circumstances.[37]

Second, because noncompete agreements prohibit an employee from working for a rival business and from forming a new competing business, they reduce competition by raising barriers to entry or expansion for potential rivals.[38] Put differently, noncompete agreements tend to suppress competition by limiting the supply of skilled labor needed to make a rival business competitive. And because a noncompete agreement restricts the supply of skilled labor *by lawfare* rather than by providing better pay or working conditions than a competitor, it works to the disadvantage of employees, for reasons already mentioned. But it also works to the disadvantage of consumers because it impedes the formation or expansion of rival businesses, which would potentially reduce prices, increase innovation and choice, and improve quality.[39] Thus, it is reasonable to presume that noncompete agreements will tend to suppress competition, to the detriment of workers and consumers alike.[40]

Thus, in view of the likely adverse effects of noncompete agreements for workers and consumers, courts often demand, quite reasonably, that these agreements not only advance a legitimate interest of the employer, but also that the agreements be necessary to protect that interest.[41] And here we should be clear: suppression of competition with actual or potential rivals is *not* a legitimate interest of an employer.

Let me give an example from a recent complaint filed by our agency against noncompete agreements used by the country's largest pet cremation firm. According to our complaint, the employer acknowledged that his company "could get comfortable with the risk" of not having

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[34] See Ferguson Gateway Statement at 5.

[35] See Gateway Complaint ¶ 15 ("The Non-Compete Agreements are anticompetitive because they alter the bargaining position between employees and Gateway. Employees under Non-Compete Agreements occupy a worse position to negotiate for better terms of employment in the pet cremation services industry.").

[36] Prepared Remarks of Chairman Andrew N. Ferguson, Seoul Int'l Competition Forum, at 4–5 (Sept. 3, 2025) ("Ferguson Seoul Remarks").

[37] E.g. Michael Lipsitz & Evan Starr, Low-Wage Workers and the Enforceability of Noncompete Agreements, 68 Mgmt. Sci. 143, 143 (2021); Matthew S. Johnson, Kurt Lavetti, & Michael Lipsitz, The Labor Market Effects of Legal Restrictions on Worker Mobility, at 2 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381; Evan Starr, Consider This: Training, Wages, and the Enforceability of Non-Compete Clauses, 72 I.L.R. Rev. 783, 799 (2019).

[38] See Ferguson Gateway Statement at 5 ("All of these facts combined to curtail worker mobility and workers' ability to negotiate better employment terms, and present an entry barrier in the pet cremation industry.").

[39] See Adamas Complaint at ¶¶ 13–14; Gateway Complaint at ¶¶ 15–17.

[40] Ferguson Seoul Remarks at 5.

[41] See 15 Corbin on Contracts § 80.7 (2025).

noncompete agreements in a particular market because competitors in that market were at a "smaller scale and less of a threat."[42] Such language makes it clear that the alleged *purpose* of the noncompete agreement was to mitigate the risk of competition from actual or potential rivals in a particular market, rather than to protect the firm's socially beneficial interests. Similarly, that same employer allegedly stated that they should execute a noncompete agreement with an employee because of the "risk" that employee would leave for a competitor and the increased financial costs of dealing with such "competitive concerns."[43] Again, the alleged *purpose* of the noncompete agreement was to shield the employer from having to compete for workers with rival businesses by providing them with higher salaries or benefits.[44] Both of the employer's statements make clear that the noncompete agreements were not protecting a legitimate interest of the employer, but instead were suppressing competition to the detriment of workers, rival businesses, and consumers.

So what can the FTC do about noncompete agreements? In keeping with the authority conferred on us by Congress and with the centuries of tradition and experience accrued in addressing noncompete agreements, we must proceed on a case-by-case basis, acting against specific noncompete agreements that clearly lack justification and likely have adverse effects.[45] That's why we've asked the public to submit specific examples and information on noncompete agreements they believe cause harm to workers, rival businesses, and consumers.[46] With that information in hand, we can make informed decisions about enforcement, as we did recently against anticompetitive noncompete agreements in the pet cremation industry and no-hire agreements in the building services industry.[47]

Now, some will object that this is a too piecemeal approach to be an effective solution to the problem of noncompete agreements. To such critics, only a blanket ban on noncompete agreements can prevent their harmful effects.[48] They might be right, but the objection is beside the point for a couple reasons. For one thing, the Commission lacks the power to issue such a rule. Congress has given us relatively extensive rulemaking authority over unfair or deceptive acts and practices,[49] but withheld that authority for unfair methods of competition.[50] The Commission attempted to read that authority into an ancillary procedural provision of our organic act, but that effort was obviously and patently unlawful.[51] The power Congress has given us over unfair methods of competition is the case-by-case enforcement approach. That is how we have policed anticompetitive conduct from our inception. Those who want alphabet-soup bureaucrats to impose

[42] Gateway Complaint ¶ 12.
[43] *Id*. ¶ 13.
[44] *Id*. ¶ 15–17.
[45] Ferguson Noncompete Rule Vacatur Statement at 3.
[46] Request for Information Regarding Employee Noncompete Agreements, FTC (Sept. 4, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/2025-Noncompete-RFI.pdf.
[47] Gateway Complaint ¶ 15–18; Adamas Complaint ¶ 13–15.
[48] E.g. Statement of Chair Lina M. Khan, Joined by Comm'r Rebecca K. Slaughter and Comm'r Alvaro M. Bedoya, *In re the Non-Compete Clause Final Rule*, Matter No. P201200, at 11 (Dec. 31, 2024).
[49] Magnuson-Moss Warranty—Federal Trade Commission Improvements Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975); see also Holyoak Noncompete Rule Dissent at 10 (describing the Magnuson-Moss Warranty Act as "impos[ing] strict requirements for legislative rulemaking regarding unfair or deceptive acts or practices.").
[50] Ferguson Noncompete Rule Dissent at 18–19; Holyoak Noncompete Rule Dissent at 9–14; *Ryan, LLC v. FTC*, 746 F. Supp. 3d 369, 384–87 (N.D. Tex. 2024).
[51] Ferguson Noncompete Rule Dissent at 11–14, 21–32.

a nationwide ban on noncompete agreements when Congress has refused to do so should take their arguments to Congress, not to me.

Second, and setting aside the obvious problem that we lack the power to ban noncompete agreements categorically, I am convinced that the traditional, case-by-case enforcement approach will be effective in limiting unjustified, overbroad, unfair, or anticompetitive noncompete agreements.[52] For one thing, the law has almost always considered the lawfulness of noncompete agreements in light of their unique circumstances. That is how the common law developed, and that remains the approach of the overwhelming majority of States.[53] For another thing, the U.S. antitrust laws—adopted against the background of centuries of the common law[54]—generally do not condemn as unlawful any agreement unless its anticompetitive effects outweigh its procompetitive justifications.[55] Taking a case-by-base enforcement approach, then, is consistent with the power Congress has given us, with centuries of legal tradition, and with the antitrust laws.

The case-by-case approach will have effects beyond each individual case. Once firms see that unjustified or overbroad noncompete agreements increase the risk of FTC enforcement, they will not enter into those agreements without giving serious consideration to whether those agreements are necessary to advance some legitimate business interest and whether a less restrictive agreement could achieve that same end.[56] Basically, it is education through enforcement. By bringing enforcement actions against specific businesses executing unjustified, overbroad, unfair, or anticompetitive noncompete agreements, others will take notice and adjust their agreements accordingly.[57] For anyone like me who has worked in a big law firm, lots of client alerts will be sent out from law firms every time the FTC brings an enforcement action, explaining to clients the risk in light of the way the FTC understands the law and its planned enforcement policies.

With that in mind, let me turn now to provide some initial thoughts on how these traditional, common-law principles might inform the FTC's approach to the enforcement of unjustified or overbroad noncompete agreements.

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[52] Ferguson Seoul Remarks at 4–5.
[53] Ferguson Noncompete Rule Dissent at 3–5.
[54] Ferguson Gateway Statement at 5–6.
[55] Ferguson Noncompete Rule Dissent at 35–37; see also *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 60 (1911) (announcing the rule of reason). Although the antitrust laws treat as per se unlawful a handful of agreements, they do so only because extensive judicial experience has taught that those agreements "have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997); see also *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) ("Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused.").
[56] See Ferguson Gateway Statement at 2–3.
[57] *Id*.

Noncompete Agreements: Principles of Future Enforcement

As I described previously, courts throughout history have differed somewhat in their approaches to noncompete agreements.[58] But there is a throughline from the common law tradition to today. When evaluating the reasonableness of noncompete agreements under any authority, courts look to (1) whether the agreement advances a legitimate end of the employer and (2) whether the agreement is narrowly tailored to achieve that end.[59]

Let's begin with whether the agreement advances a legitimate end of the employer. From the perspective of our antitrust laws, "competition" is the primary social goal.[60] Why? Because we believe that robust forms of economic competition promote the common good by decreasing prices and increasing innovation, productivity, product quality, business creation, and wages.[61] At a minimum, then, we can say that a noncompete agreement that advances some anticompetitive purpose of the employer is *not* legitimate *because* it impedes the realization of the forces of competition that benefit the common good.[62]

Instead, the noncompete agreement must advance some procompetitive interest of the employer, thereby advancing the common good that competition is intended to serve.[63] That is, the noncompete agreement should be necessary to sustain or increase the employer's capacity to compete: to innovate, to improve their product, to attract and train a more skilled workforce, etc.[64] Indeed, for centuries common-law courts enforced noncompete agreements where they were necessary to ensure that the buyer of some business would have some limited time or space to develop its competitive capacities vis-à-vis potential rivals, including, most especially, the seller of that business.[65] Similarly, a business may have legitimate, procompetitive interests in protecting against the transmission of competitively sensitive information to its competitors—information regarding technological innovation, pricing, wages, business practices, or trade secrets—because preserving the confidentiality of this knowledge is essential to the capacity of the business to compete against its rivals and to ensure that the market rewards merit rather than espionage.[66] It may also be legitimate for a business to wish to protect its investment in training its employees to

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[58] Ferguson Noncompete Rule Dissent at 3–5; see also *Arthur Murray Dance Studios of Cleveland v. Witter*, 105 N.E.2d 685 (Ohio Com. Pl. 1952) ("This is not one of those questions on which the legal researcher cannot find enough to quench his thirst. To the contrary there is so much authority it drowns him. It is a sea—vast and vacillating, overlapping and bewildering.").

[59] 15 Corbin on Contracts § 80.7 (2025).

[60] *Nat'l Soc. of Prof. Engineers v. United States*, 435 U.S. 679, 694–96 (1978).

[61] Prepared Remarks of Chairman Andrew N. Ferguson, Competition in the 21st Century: Heeding the Rallying Cry for Deregulation, at 2–4 (May 7, 2025).

[62] See C*rom, LLC v. Preload, LLC*, 380 F. Supp. 3d 1190, 1202 (N.D. Fla. 2019) ("[A] restriction may not exist solely as a tool to eliminate competition or merely to prevent an employee from 'working with a competing employer in any capacity.'") (quoting *Edwards v. Harris*, 964 So.2d 196, 198 (Fla. Dist. Ct. App. 2007)).

[63] See, e.g., *Preferred Sys. Sols., Inc. v. GP Consulting, LLC*, 732 S.E.2d 676, 681 (Va. 2012) ("Restraints on trade are not favored in Virginia; hence, contracts in restraint of trade are enforceable only if 'narrowly drawn to protect the employer's legitimate business interest….'") (quoting *Omniplex World Servs. v. U.S. Investigations Servs.*, 618 S.E.2d 340, 342 (Va. 2005).

[64] 15 Corbin on Contracts § 80.15 (2025).

[65] *Id*. § 80.7 (2024); see also *Mitchel v. Reynolds*, 24 Eng. Rep. 347 (Q.B. 1711).

[66] 15 Corbin on Contracts § 80.16 (2025); see also *id.* n.2 (collecting cases).

acquire a skillset unique to that business if that training and skillset is essential to its capacity to compete with its rivals.[67]

In both cases, the aims that may motivate noncompete agreements may be justified. But the assertion of a procompetitive justification is not enough. As is true in other antitrust contexts,[68] we must consider whether the noncompete agreement is narrowly tailored to achieve a procompetitive purpose sought by the employer.[69]

The easiest way to answer this is to ask whether a less restrictive type of restraint could accomplish the goal or goals that the noncompete is purportedly meant to promote. We have heard time and again that employers use noncompete agreements to prevent workers from soliciting their customers.[70] At the same time, those same employers use non-solicitation agreements which, as their name suggests, are directly targeted to address that concern.[71] The same is true for non-disclosure agreements—and trade secret law—which can promote investments in confidential information.[72]

That is not to say that those alternatives will be adequate substitutes for noncompete agreements in every case. In some circumstances, a noncompete agreement may be the only way to achieve the employer's procompetitive objectives efficiently.[73] But that is the question we should be asking: Can the employer achieve its procompetitive goal through some less restrictive means than a summary prohibition on competition?

Even where no less restrictive alternative is available, the scope and duration of the noncompete agreement still must be limited to what is necessary to advance the employer's procompetitive interest.[74] It is hard to imagine any case in which a noncompete of unlimited duration or nationwide geography, for example, is reasonably necessary to promote an interest or transaction that cannot be achieved through a more tailored restraint.[75]

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[67] *Id*. n.8 and accompanying text.

[68] *Ohio v. American Express Co.*, 585 U.S. 529, 541–42 (2018) (in the third step of a rule-of-reason analysis, "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.").

[69] E.g. *Preferred Sys. Sols., Inc. v. GP Consulting, LLC*, 732 S.E.2d 676, 681 (Va. 2012); see also *Cabela's LLC v. Highby*, 362 F. Supp. 3d 208, 217 (D. Del. 2019) (a covenant not to compete cannot be "greater than is reasonably necessary to protect the employer in some legitimate interest….").

[70] See, e.g., *Gehrke v. Merritt Hawkins & Assocs.*, 2020 WL 400175, at *3 (Tex. App. Jan. 23, 2020).

[71] See 15 Corbin on Contracts § 80.16 n.4 (2025) (collecting cases regarding the use of non-solicitation provisions).

[72] See *id*. § 80.16 ("Trade secrets are often protected without any restrictive covenant.").

[73] Ferguson Noncompete Rule Dissent at 12–13.

[74] 15 Corbin on Contracts § 80.15 (2025) ("Courts find post-employment restrictions excessive and thus unreasonable and unenforceable if the restriction is broader in either scope of activity or space or time than is necessary to protect a legitimate business interest of the employer.").

[75] See, e.g., *Shores v. Global Experience Specialists, Inc.*, 422 P.3d 1238, 1241 (Nev. 2018) ("The geographical scope of a restriction must be limited to areas where the employer has 'established customer contacts and good will.'") (quoting *Camco, Inc. v. Baker*, 936 P.2d 829, 834 (Nev. 1997)); *Prof'l Bldg. Servs. of the Quad Cities, Inc. v. DeClerck*, 2002 WL 1058888, at *5 (S.D. Iowa May 23, 2002) ("Generally, restrictive covenants range from two to three years in duration…. Covenants extending beyond five years have not been enforced in Iowa.").

My view, then, is that the FTC should focus its enforcement resources on those noncompete agreements that do not advance a procompetitive purpose or else are not narrowly tailored to advance a procompetitive purpose.

Today's workshop will help us better understand how to implement this general principle. We want our enforcement actions to have maximum effect. We want each enforcement action to protect as many workers as possible. We want to focus on the industries most burdened by noncompete agreements. And we want to bring enforcement actions that will communicate a strong message about how the FTC understands the law to firms beyond merely the targets of our enforcement. The panels today will illuminate these topics and inform our enforcement agenda in the coming months and years.

Conclusion

Under the Trump-Vance FTC, companies with unjustified or anticompetitive noncompete agreements will incur a significant risk of legal action. If a firm imposes a noncompete agreement that is not tailored to achieve a procompetitive objective; that is intended to suppress competition or the bargaining power of workers; or that contains an unlimited scope or duration, then the FTC will enforce the antitrust laws against that firm. To mitigate this risk, it would be prudent for all companies to review all their existing noncompete agreements in light of the principles I've laid out here today and to apply them to any future employment agreements.

The days of unreflective, unjustified, and anticompetitive noncompete agreements are over. If a company wants to execute a noncompete agreement, they better be prepared to defend it.

Thank you again to everyone participating in today's workshop. I look forward to learning from you all.