March 8, 2023

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: Comments on the Proposed Non-Compete Clause Rule, 16 CFR Part 910, RIN 3084-AB74, Matter No. P201200

The Fort Worth Chamber of Commerce is pleased to submit these comments to the Federal Trade Commission ("FTC") in response to its proposed Non-Compete Clause Rule, 16 CFR Part 910, RIN 3084-AB74.

We strongly oppose the proposed rule. *First*, non-compete clauses are, and for more than a century have been, an issue of state law, not federal regulation. The citizens of Texas have made a policy choice to recognize reasonable non-compete clauses and courts have upheld that policy choice as entirely legitimate and pro-competitive. Without clear direction from Congress, a federal agency has no business intervening in state law and interrupting state-governed contract law. *Second*, and relatedly, the FTC lacks the statutory or constitutional authority to issue this rule. Congress never gave the FTC the necessary statutory authority and, under the Constitution, a federal agency cannot issue such a sweeping rule without express authorization. *Third*, non-compete clauses, when appropriately used, help our state's economy, businesses, and employees. Studies have shown that non-compete clauses can lead businesses to invest more in their employees and allow them to better protect their intellectual property. Many businesses and workers choose to locate in our state because of our friendly economic climate, yet this rule would damage competition within our state.

I. Non-Compete Clauses are and Should Remain an Issue of State Law, Not Federal Regulation

Throughout American history, non-compete clauses have been treated as an issue of state contract law. This treatment comports with both the history and text of the Constitution, which affords the states broad police powers to protect their citizens. Consistent with this history, and with principles of federalism, the Tenth Amendment states that, "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."

The states have exercised these powers in ways that they see fit and in accordance with the views of their citizens. As the FTC acknowledges in its Notice of Proposed Rulemaking (NPRM), forty-seven states, or 94% of them, permit non-competes in some capacity, while only three states prohibit them entirely. Moreover, as the NPRM also notes, "[s]tates have been particularly active in restricting non-compete clauses in recent years" to combat unreasonable non-competes and to ensure procedural safeguards. In other words, the States are actively monitoring and adjusting their non-compete

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policies consistent with both the Constitution and principles of democratic governance.

II. The FTC Lacks the Statutory or Constitutional Authority to Issue a Non-Compete Rule

Setting aside the Tenth Amendment and principles of federalism, the FTC Act's text, structure, and history, as well as recent guidance from the Supreme Court, all point in the same direction: the FTC lacks the statutory or constitutional authority to issue a rule banning non-compete clauses.

In the first place, Congress never granted the FTC the statutory authority to issue rules regulating competition, such as the contractual relationship between employers and employees. In contrast, Congress expressly gave the FTC statutory authority to issue rules to protect consumers, such as to prevent fraud and false advertising. The FTC has not even attempted to promulgate a competition rule for fifty years, across eight presidential administrations of both political parties. Indeed, such a broad grant of statutory authority would have been extraordinary, as it would have allowed a majority of just three commissioners, independent of and with little guidance from the President or Congress, to dictate commercial practices, and override state laws, across virtually the entire U.S. economy. If the FTC were to be allowed to write this rule, there would be no limit to additional rules it might write in the name of "promoting competition."

III. Non-compete Clauses Benefit the Texas Economy, Businesses, and Employees

On the merits, the FTC's blanket ban on non-compete clauses likely will harm both Texas' business community and employees. Courts, scholars, and economists all have found that non-competes encourage investment in employees and help to protect intellectual property. As the FTC itself acknowledges, two studies have found that "non-compete clauses increase employee training and other forms of investment." Another study, in the financial services sector, found that the suspension of non-competes led to higher prices and worse service for consumers.

Many experts agree that non-compete clauses can foster competition. For example, at the FTC's Hearing on *Competition and Consumer Protection in the 21st Century* (Oct. 16, 2018), Professor Alan Krueger testified that non-compete restrictions "may be justified in a limited number of cases to protect returns to specific training or trade secrets." Likewise, Professor Marty Gaynor argued that "for highly skilled people like, say, doctors, engineers, whatever, we think, well, there may be some real efficiencies" to non-compete clauses. Professor Evan Starr noted that non-competes can lead to higher wages; as he explained, two studies "find that the use of non-competes is associated with higher wages and longer tenure."

Here in Texas, many of our members use non-compete clauses on a limited basis to protect their intellectual property. Without the availability of non-

compete clauses, our members would face difficulties protecting such valuable assets as trade secrets and client lists. Moreover, the availability of non-compete clauses provides our members with an incentive to invest more in their employees, both in training and in compensation.

This evidence repudiates the rationale for a blanket ban on non-compete clauses.

We thank you for the opportunity to share our views.

Sincerely,

Kyle Jacobson
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Fort Worth Chamber of Commerce