

United States Senate

WASHINGTON, DC 20510

February 27, 2023

Suzanne P. Clark
President and Chief Executive Officer
U.S. Chamber of Commerce
1615 H St. NW
Washington, DC 20062

Dear Ms. Clark:

We are writing today regarding the Chamber's recent statements opposing the Federal Trade Commission (FTC) proposed rule banning employers' use of noncompete agreements.¹ This rule would drastically improve conditions for workers, small businesses, and the entire economy, benefiting all Americans. But the Chamber, which purports to believe in a "future . . . [that] gives everyone the opportunity to build a better future for themselves,"² is already saber-rattling about opposing a simple rule that would allow America's workers, businesses, and entrepreneurs the freedom to build that future.

The Chamber's threat to sue the FTC³ to stop this important rule represents exactly the type of "frivolous litigation" that your organization claims to oppose,⁴ and if you follow through with this threat, you owe your member companies – and those members' customers and workers – an explanation for undermining your stated values by opposing this business-, worker-, and consumer-friendly policy.

The Chamber's description of noncompete agreements as a tool for "fostering innovation and preserving competition"⁵ is demonstrably false, and represents exactly the kind of Washington-insider doublespeak that big business has been using for years to justify anti-worker and anti-consumer policies. Noncompete agreements are legal contracts prohibiting workers from taking similar positions with new employers or starting their own businesses.⁶

¹ Semafor, "Federal regulators move to ban noncompetes — and set up a massive legal battle," Jordan Weissmann, January 5, 2023, <https://www.semafor.com/article/01/05/2023/ftc-noncompete-rule>; Wall Street Journal, "The Chamber of Commerce Will Fight the FTC," Suzanne P. Clark, January 22, 2023, <https://www.wsj.com/articles/chamber-of-commerce-will-fight-ftc-lina-khan-noncompete-agreements-free-markets-overregulation-authority-11674410656?st=ykveqsofgob7fuo>.

² U.S. Chamber of Commerce, "About Us," <https://www.uschamber.com/about>.

³ Wall Street Journal, "The Chamber of Commerce Will Fight the FTC," Suzanne P. Clark, January 22, 2023, <https://www.wsj.com/articles/chamber-of-commerce-will-fight-ftc-lina-khan-noncompete-agreements-free-markets-overregulation-authority-11674410656>.

⁴ U.S. Chamber of Commerce, "Lawsuits," <https://www.uschamber.com/lawsuits>.

⁵ U.S. Chamber of Commerce, "The FTC's Noncompete Rulemaking is Blatantly Unlawful," press release, January 5, 2023, <https://www.uschamber.com/finance/antitrust/the-ftcs-noncompete-rulemaking-is-blatantly-unlawful>.

⁶ Semafor, "Federal regulators move to ban noncompetes — and set up a massive legal battle," Jordan Weissman, January 5, 2023, <https://www.semafor.com/article/01/05/2023/ftc-noncompete-rule>; Federal Reserve Bank of Minneapolis, "Non-compete contracts sideline low-wage workers," Tyler Boesch, Katherine Lim, and Ryan Nunn, October 15, 2021, <https://www.minneapolisfed.org/article/2021/non-compete-contracts-sideline-low-wage-workers>.

In your op-ed opposing the FTC’s proposed rule, you warned that the FTC’s legitimate use of its authority under Section 5 of the FTC Act undermined the agency’s structure for “preserving innovation in a free market.”⁷ This assertion is absurd. These noncompetes do nothing but stifle competition for workers, businesses seeking to hire them, and entrepreneurs starting their own businesses. They depress competition, and make our economy less innovative and dynamic, an obvious conclusion backed up by the Federal Reserve Bank of Minneapolis, which found that “non-compete contracts limit our economy’s potential” by making it more difficult for employers and entrepreneurs to recruit new workers or start new businesses.⁸

Noncompete agreements – and the role they play in stifling competition – disproportionately harm entrepreneurs and new businesses.⁹ Noncompetes and other factors have led to a dramatic decrease in new business formation, which “has fallen by almost 50% since the 1970s as large businesses make it harder for Americans with good ideas to break into markets,” depressing new job creation and preventing market growth.¹⁰ This lack of competition in the labor market has widespread consequences, causing wider income inequality¹¹ and “slower productivity growth.”¹²

Noncompete agreements also directly harm competition in the job market by driving down wages and forcing workers into worse jobs or even unemployment.¹³ Noncompetes are used throughout the economy, with one expert calling their overuse “silly, pernicious, and harmful to competition.”¹⁴ The Minneapolis Federal Reserve analysis found that “more than one in seven workers [...] have non-compete contracts with their current or most recent employer,” including 12 percent of workers earning \$20 an hour or less.¹⁵ Noncompete clauses restrict the freedom of

⁷ Wall Street Journal, “The Chamber of Commerce Will Fight the FTC,” Suzanne P. Clark, January 22, 2023, <https://www.wsj.com/articles/chamber-of-commerce-will-fight-ftc-lina-khan-noncompete-agreements-free-markets-overregulation-authority-11674410656>.

⁸ Federal Reserve Bank of Minneapolis, “Non-compete contracts sideline low-wage workers,” Tyler Boesch, Katherine Lim, and Ryan Nunn, October 15, 2021, <https://www.minneapolisfed.org/article/2021/non-compete-contracts-sideline-low-wage-workers>.

⁹ Federal Reserve Bank of Minneapolis, “Non-compete contracts sideline low-wage workers,” Tyler Boesch, Katherine Lim, and Ryan Nunn, October 15, 2021, <https://www.minneapolisfed.org/article/2021/non-compete-contracts-sideline-low-wage-workers>.

¹⁰ White House, “FACT SHEET: Executive Order on Promoting Competition in the American Economy,” press release, July 9, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>.

¹¹ Organisation for Economic Co-operation and Development, “Inequality: A Hidden Cost of Market Power,” Sean Ennis, Pedro Gonzaga, and Chris Pike, 2017, <https://www.oecd.org/daf/competition/Inequality-hidden-cost-market-power-2017.pdf>.

¹² Organisation for Economic Co-operation and Development, “Testimony to the Hearing on ‘Market Concentration,’” Jason Furman, June 7, 2018, [https://one.oecd.org/document/DAF/COMP/WD\(2018\)67/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)67/en/pdf).

¹³ Federal Reserve Bank of Minneapolis, “Non-compete contracts sideline low-wage workers,” Tyler Boesch, Katherine Lim, and Ryan Nunn, October 15, 2021, <https://www.minneapolisfed.org/article/2021/non-compete-contracts-sideline-low-wage-workers>.

¹⁴ Philadelphia Inquirer, “More workers in Pa. could change jobs for better pay under the FTC’s proposed noncompete ban,” Lizzy McLellan Ravitch, January 7, 2023, <https://www.inquirer.com/jobs/labor/ftc-proposed-rule-noncompete-pennsylvania-20230107.html>.

¹⁵ Federal Reserve Bank of Minneapolis, “Non-compete contracts sideline low-wage workers,” Tyler Boesch, Katherine Lim, and Ryan Nunn, October 15, 2021, <https://www.minneapolisfed.org/article/2021/non-compete-contracts-sideline-low-wage-workers>.

warehouse workers, fast-food workers,¹⁶ and even interns to find new and better jobs, or to start their own businesses.¹⁷

The pervasive use of noncompetes has widespread consequences, and in states where they have been banned, the prohibition has helped workers and increased competition in the labor market. After Oregon banned noncompetes at the state level in 2008, hourly workers' wages rose by 2-3 percent across the board, with those actually bound by noncompetes seeing estimated increases as high as 14-21 percent.¹⁸ Similarly, a 2015 Hawaii ban on noncompete agreements for high-tech workers found "an 11% increase in job moves and a 4% increase in new-hire salaries."¹⁹ This dynamism and innovation by workers is exactly the type of economic activity that the Chamber should support.

Notwithstanding the Chamber's doomsday predictions²⁰ and threats to sue to overturn the law, the FTC's proposed rule would help workers, small businesses, and the entire economy, and the agency has the legal right to impose this rule. The FTC's authority is rooted in Section 5 of the FTC Act, which prohibits *both* "unfair or deceptive acts or practices in or affecting commerce" (UDAP) and "unfair methods of competition"²¹ (UMC), and the statute gives the agency tools to end such practices. The Chamber has mendaciously argued that a 1975 amendment to the FTC Act creating the separate Magnuson-Moss ("Mag-Moss") process for UDAP rules bars the FTC from issuing rules under its UMC authority.²² But the Chamber ignores the fact that that same amendment states that the Mag-Moss process "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."²³

In November 2022, the FTC issued a policy statement clarifying that under Section 5 of the FTC Act, the agency could "proceed against a broader range of anticompetitive conduct than can be reached under the Clayton and Sherman Acts," including unfair methods of competition that are "coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic

¹⁶ The Verge, "EXCLUSIVE: AMAZON MAKES EVEN TEMPORARY WAREHOUSE WORKERS SIGN 18-MONTH NON-COMPETES," Spencer Woodman, March 26, 2015, <https://www.theverge.com/2015/3/26/8280309/amazon-warehouse-jobs-exclusive-noncompete-contracts>.

¹⁷ The Wall Street Journal, "Interns' Job Prospects Constrained by Noncompete Agreements," Harriet Torry, June 29, 2019, <https://www.wsj.com/articles/interns-job-prospects-constrained-by-noncompete-agreements-11561800600>.

¹⁸ Management Science, "Low-Wage Workers and the Enforceability of Non-Compete Agreements," October 19, 2020, Michael Lipsitz and Evan Starr, p.1, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3452240.

¹⁹ Wall Street Journal, "FTC Plan to Ban Noncompete Clauses Shifts Companies' Focus," Lauren Weber, January 17, 2023, <https://www.wsj.com/articles/ftc-plan-to-ban-noncompete-clauses-shifts-focus-to-deferred-pay-nondisclosure-agreements-11673904728>.

²⁰ U.S. Chamber of Commerce, "The FTC Fails to Show Its Work on Noncompete Math Calculations," Curtis Dubay, January 26, 2023, <https://www.uschamber.com/finance/antitrust/the-ftc-fails-to-show-its-work-on-non-compete-math-calculations>.

²¹ 15 U.S.C. Sec. 45(a)(1)

²² Letter from the U.S. Chamber of Commerce to the Federal Trade Commission, September 29, 2021, https://www.uschamber.com/assets/documents/210927_comments_noncompete_clauses_ftc.pdf.

²³ 15 U.S.C. 57a(2)

power of a similar nature.”²⁴ Noncompete agreements, which actors use to harm competition in the labor market and depress opportunities for workers, are clearly covered under the law.

The Chamber owes its member organizations, and the American public, an explanation for its intention to oppose this rule and defend a deeply exploitative and unfair method of competition that harms workers and businesses. Given our concerns about this opposition, we are requesting answers to the following questions no later than March 13, 2023:

1. How did the Chamber determine that it would oppose the non-compete rule, and that it would sue to stop it?
 - a. Does this opposition represent the view of each of your member companies?
 - b. Specifically, does it represent the views of your small business members?
2. Which Chamber members have donated to the Chamber’s efforts to challenge this rule?
 - a. Please provide a list of all corporations participating in this effort and the amount of money pledged from each.
3. Does the Chamber provide any guidance for member organizations regarding the use of abusive or unenforceable noncompete agreements?
4. Which of the Chamber of Commerce’s large corporate members use non-compete agreements?
5. How many of the Chamber’s small business members use such agreements?

Sincerely,



Elizabeth Warren
United States Senator



Sheldon Whitehouse
United States Senator

²⁴ Federal Trade Commission, “Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act Commission File No. P221202,” November 10, 2022, https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.