RETHINKING NON-COMPETES AND THE FTC NON-COMPETE BAN: A PROPOSAL FOR A FEDERAL SALARY CAP TO PROTECT AMERICA'S LOW-WAGE WORKERS FROM NON-COMPETE AGREEMENTS

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INTRODUCTION

Sandwich-making, elder care, and bagging groceries are not the first occupations that come to mind as ones associated with trade secrets, or with the need for non-compete agreements. Yet for millions of working-class Americans—many of whom make minimum wage—this is the case.[1] In an article recently published by *The Financial Times*: Laura, after twenty-two years as a nurse in a Wisconsin hospital, simply wanted a change of work.[2] In the current economy[3] finding a job is a daunting enough task on its own,[4] however, Laura faced another obstacle: a non-compete clause in her employment contract prohibiting her from working for any competing hospital within a thirty-mile radius for at least two years.[5] The non-compete effectively forced Laura into a choice: remain in her current position at below-market pay, or accept a significantly longer commute to avoid violating the agreement.[6] Ultimately, she chose the latter, settling for a position that required an hour-and-fifteen-minute commute, so she would not violate the agreement.[7]

Another example is Michael Kenny, a single father trying to make ends meet.[8] He initially accepted an overnight security position at $11 per hour but resigned following a change in his childcare circumstances.[9] He subsequently secured a higher-paying daytime security job at $15 per hour, only to discover that he had unknowingly signed a two-year non-compete

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[1] Amelia Pollard, James Fontanella-Khan & Anjili Raval, *Millions of Workers Are Caught in a 'Non-Compete' Trap*, FIN. TIMES (Apr. 18, 2024), https://www.ft.com/content/d39a04ae-9e09-49cd-8fe9-90ba5c825fa7 [https://perma.cc/D8SY-XULY].

[2] Pollard et al., *supra* note 1.

[3] At the time of publication in 2026, the United States economy has experienced elevated inflation and increased cost-of-living pressures, following the COVID-19 pandemic in 2020. *See Consumer Price Index Summary*, U.S. BUREAU OF LAB. STAT. (Feb. 13, 2026), https://www.bls.gov/news.release/cpi.nr0.htm [https://perma.cc/6CK8-APLC]; *see also* Greg Iacurci, *Affordability is a Buzzword Right Now — These Charts Show Why*, CNBC (Dec. 24, 2025), https://www.cnbc.com/2025/12/24/affordability-is-a-buzzword-right-now-these-charts-show-why.html [https://perma.cc/3ZZQ-8W5F].

[4] *See* Pollard et al., *supra* note 1.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] Lauren Weber, *The Noncompete Clause Gets a Closer Look*, WALL ST. J. (July 21, 2021), https://www.wsj.com/business/the-noncompete-clause-gets-a-closer-look-11626872430?gaa_at=eafs&gaa_n=AWEtsqemWOPGSldAhs2PVj8dBDZqu5JuAp0lCgZDOta9vfDxSkNVqH8yuy4UAEJ8lcQ%3D&gaa_ts=698bac01&gaa_sig=3-CQrFgYpL2GvSBS7MRSnz3142-D7OjmClrjeIIvKx6c1KjVBGvqlwnUY8BwHjtXYkbSxCJiW0FGt0H11WucNQ%3D%3D [https://perma.cc/9J9P-DVAT].

[9] *Id.*

agreement.[10] After learning of this, his new employer let him go.[11] This wreaked havoc in Michaels's life, as the non-compete effectively shut down his ability to secure another job in security.[12] He eventually lost his car, filed for bankruptcy, and has not worked since.[13]

Neither Laura nor Michael's experiences are rare, instead, they are an unfortunate and devastating reality for millions of American workers.[14] An estimated thirty-million workers, which is about one in five, are subject to non-competes.[15] These agreements bar employees from working for competitors for a specified period and often within defined geographic limits.[16] Employers often justify non-competes usage as necessary to protect trade secrets, but their fairness and effectiveness are increasingly scrutinized, particularly when imposed on lower-wage workers whose roles often do not implicate such concerns.[17] That scrutiny has culminated in the Federal Trade Commission's ("FTC") proposal of a nationwide ban on non-competes.[18] Although the rule was ultimately struck down,[19] the FTC's effort has drawn significant attention to the harms caused by non-competes and can serve as a catalyst for further reform.

Recent judicial decisions, commentary, and the current political climate suggest that a sweeping national ban is unlikely to withstand a legal challenge.[20] Accordingly, this Note argues that the FTC should pursue a more limited and durable approach by adopting a federal salary threshold that restricts the use of non-compete agreements against low-wage workers.[21]

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[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Jeanne Sahadi, *Judge Delays Ban on Noncompete Agreements for Small Number of* Employers, CNN (July 3, 2024), https://www.cnn.com/2024/07/03/business/noncompete-clause-federal-judge-ruling [https://perma.cc/CH8P-E49U].

[16] Evan P. Starr, J.J. Prescott & Norman D. Bishara, *Noncompete Agreements in the US Labor Force*, 64 J. L. & ECON. 53, 53 (2021).

[17] Starr et al., *supra* note 16, at 53, 54.

[18] *FTC Announces Rule Banning Noncompetes*, F.T.C. (Apr. 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes [https://perma.cc/D9W4-Y4AN].

[19] *See* Ryan, LLC v. F.T.C., 746 F.Supp.3d 369 (N.D. Tex., 2024).

[20] *See Ryan*, 746 F.Supp.3d.; *see also* Marsh USA, Inc. v. Cook, 354 S.W.3d 764 (Tex. 2011) (challengeing the non-compete ban). Pending appeals of these cases have been dismissed prior to the publication of this Note.

[21] The ban as written contains a senior executive exemption for existing non-competes of salaries at higher waged salaries of $151,164 or greater. FTC Non-Compete Clause Rule 16 C.F.R. § 910 (2024). However, such an exception does not extend to new agreements, only previous ones. *Id.* Low-wage workers are often defined as someone who earns less than two-thirds of the median hourly wage for full-

Such provisions are already enacted in several states,[22] demonstrating that this is a more practical and feasible model for reform. Further, this Note argues that non-competes against lower-wage workers are particularly problematic, as they hinder workers' employment opportunities and, in most cases, are unnecessary to protect so-called trade secrets that low-wage workers may have.

Part I of this Note provides background on non-competes, including their historical development and their effects on lower-wage workers. Part II first examines the current state and federal regulatory landscape governing non-competes before turning to the FTC's proposed national ban and the constitutional challenges it faces. Part III considers how recent political developments and changes in executive leadership may influence the future of non-compete regulation. The Note concludes by proposing a salary threshold alternative to the FTC's non-compete ban and discusses additional potential solutions to limit the harmful use of non-competes.

I. BACKGROUND

A. Overview and History of Non-Compete Agreements

Non-competes are legally binding contracts between employers and employees that prevent workers from joining or starting a competing business within a specified period, geographic area, or engaging in specific work after leaving a company.[23] There are typically five parts of a non-compete agreement: duration, geography, scope, competitors, and damages.[24] These agreements are designed to protect trade secrets, proprietary information, and client relationships that employers might consider important to their competitive advantage.[25] While historically used for high-ranking employees with access to sensitive business information, non-compete agreements have

time workers or someone who makes less than $17. *Who is the Low-Wage Workforce*, WORKRISE (Oct. 2, 2023), https://workrisenetwork.org/feature/who-low-wage-workforce [https://perma.cc/VL78-5VXX]; DR. KAITLYN HENDERSON, THE CRISIS OF LOW WAGES: WHO EARNS LESS THAN $17 AN HOUR IN THE U.S. IN 2024 (2024). Other sources define a low-wage employee" as an employee who earns less than (1) $15 per hour or the state or local minimum wage, or (2) $31,200 per year. Mobility and Opportunity for Vulnerable Employees Act, S. 1504, 114th Cong. (2015).

[22] *State Noncompete Law Tracker*, ECON. INNOVATION GRP. (Jan. 13, 2026), https://eig.org/state-noncompete-map/ [https://perma.cc/5NCA-MZNY].

[23] Starr et al., *supra* note 16, at 53.

[24] Adam Hayes, *Non-Compete Agreements: Purpose, Requirements, and Recent Changes*, INVESTOPEDIA (Aug. 8, 2025), https://www.investopedia.com/terms/n/noncompete-agreement.asp [https://perma.cc/2EDZ-FU9A].

[25] Najah Farley, *FAQ on Non-Compete Agreements*, NAT'L EMP. L. PROJECT (May 18, 2022), https://www.nelp.org/insights-research/faq-on-non-compete-agreements/#_ftn29 [https://perma.cc/7HUU-ZVSR].

become increasingly common across various industries and worker levels, including low-wage sectors.[26]

Non-competes have a long, complex history, with their origins predating the founding of the United States. The first known legal dispute regarding this issue dates back to the year 1414.[27] Referred to as the *Dyer's Case*, the dispute involved an apprentice who promised his former employer that he would not work in the dyeing trade for six months.[28] When he violated the agreement, the employer sued him.[29] Ultimately, the court ruled in favor of the apprentice, holding that the common law did not recognize restraints on lawful trade.[30] The judge went so far to suggest that if the employer had tried to enforce the restriction more aggressively, he could have faced imprisonment.[31] This decision set a precedent for the general unenforceability of non-compete agreements for centuries to come.[32]

The framework shifted in *Mitchel v. Reynolds*, an English case from 1711, which introduced the idea that non-competes are enforceable only if they satisfy certain conditions.[33] This case recognized that non-competes could be valid if they were reasonable in scope (limited in duration and geographic reach) and necessary to protect legitimate business interests.[34] This decision laid the foundation for how courts would approach non-competes in the U.S.[35] This standard required that the agreement be narrowly tailored in geographic and temporal scope and serve to protect a legitimate business interest.[36] Today, this standard remains a core principle of anti-trust law.[37]

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[26] *Id.*

[27] *A Brief History of Noncompete Regulation,* FAIR COMPETITION L. (Oct. 11, 2021), https://faircompetitionlaw.com/2021/10/11/a-brief-history-of-noncompete-regulation [https://perma.cc/6QCR-KGL2].

[28] *Id.;* Dyer's Case, Y.B. Mich. 2 Hen. 5, f. 5, pl. 26 (C.P. 1414).

[29] Alexander MacDonald, *The FTC's Ahistorical Attack on Noncompetes*, THE FEDERALIST SOC'Y. (Jan. 24, 2023), https://fedsoc.org/commentary/fedsoc-blog/the-ftc-s-ahistorical-attack-on-noncompetes [https://perma.cc/4VDB-CWC3]; Stephen Fox, *Breaking the Non-Compete Cycle: A Legal and Economic Analysis of the FTC's Power Move,* 92 U. CIN. L. REV. 607, 612 (2023).

[30] Dyer's Case, Y.B. Mich. 2 Hen. 5, f. 5, pl. 26 (C.P. 1414); *A Brief History of Noncompete Regulation, supra* note 27.

[31] MacDonald, *supra* note 29.

[32] *Id.*; *see also* Ineo, LLC v. Lenehan, 66 Conn. L. Rptr. 72 (Conn. Super. Ct. Feb. 20, 2018) (discussing *Dyer's* case and its effect on the prohibition of non-competes and general unenforceability).

[33] MacDonald, *supra* note 31; Mitchell v. Reynolds, 24 Eng. Rep. 347 (K.B. 1711).

[34] *A Brief History of Noncompete Regulation, supra* note 27.

[35] *Id.*

[36] *Mitchel*, 24 Eng. Rep. at TK.

[37] *A Brief History of Noncompete Regulation, supra* note 27.

During the late nineteenth and early twentieth centuries, as the economy industrialized, employers increasingly sought to protect trade secrets, customer relationships, and investments in employee training, leading courts to recognize legitimate interests that justified non-compete agreements.[38] Thus, courts began to enforce non-competes more frequently, provided they met the "reasonableness" standard set forth in *Mitchel v. Reynolds*.[39] As these industries expanded and non-compete provisions became more common in protecting proprietary assets, employers increasingly incorporated non-compete provisions into standardized employment agreements across a broader range of industries.[40] For instance, the expansion of non-competes has increasingly impacted low-wage workers by making "take-it-or-leave-it" employment agreements more common.[41] This expansion has coincided with the increased prevalence of non-competes and the relative lack of bargaining power among low-wage workers when negotiating agreements.[42]

B. Consequences and Challenges of Non-Compete Agreements for Lower-Wage Workers

Non-competes can have devastating effects on lower-waged workers.[43] Their growing use among employees, such as fast-food workers and hairdressers, raises serious concerns about both their necessity and broader economic impact.[44] Non-competes suppress wages by restricting workers' ability to seek better employment opportunities and limiting upward mobility.[45] For instance, when Oregon stopped enforcing non-compete

[38] Stephen M. Hendricks, *Breaking the Bind: Rethinking Non-Compete Agreements in a Federal Framework,* 28 CHAP. L. REV. 241, 247 (2025).

[39] *Mitchel*, 24 Eng. Rep. at TK.

[40] U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-103785, NONCOMPETE AGREEMENTS: USE IS WIDESPREAD TO PROTECT BUSINESS' STATED INTERESTS, RESTRICTS JOB MOBILITY, AND MAY AFFECT WAGES 7 (2023).

[41] Elaine Dalrymple, *Would You Like Fries with That Non-Compete?: Why Restrictive Covenants Should Not Be Against Low Wage Workers*, 3 WAYNE STATE U.J. BUS. L. 69, 75 (2020).

[42] *See* Alexander Colvin & Heidi Shierhol, *Noncompete Agreements*, ECON. POL'Y INST. (Dec. 10, 2019), https://www.epi.org/publication/noncompete-agreements/ [https://perma.cc/E3BA-2WUM] (explaining that 88% of non-compete agreements are simply signed rather than negotiated).

[43] FED. RSRV. BANK MINNEAPOLIS, NON-COMPETE CONTRACTS HARM LOW-WAGE WORKERS (2021), https://www.house.mn.gov/comm/docs/kbsUqK55O0WKef1ix9ZsMw.pdf [https://perma.cc/EG5K-3YKM]; *see also* Tyler Boesch, Katherine Lim & Ryann Nunn, *Non-Compete Contracts Sideline Low-wage Workers*, FED. RSRV. BANK MINNEAPOLIS, https://www.minneapolisfed.org/article/2021/non-compete-contracts-sideline-low-wage-workers [https://perma.cc/D5M9-B4LZ] (explaining that non-competes can reduce pay for low-wage workers, reduce job mobility, and deter workers from better job opportunities).

[44] Dalrymple, *supra* note 41, at 75.

[45] MATT MARX, REFORMING NON-COMPETES TO SUPPORT WORKERS 2, 8 (2018), https://www.hamiltonproject.org/wp-

agreements for hourly workers, wages increased by 2-3%, with the largest gains occurring in industries where non-competes had been most prevalent.[46] These findings suggest that eliminating non-compete agreements would enable lower-paid workers to access higher-paying employment opportunities.[47]

Further, low-wage workers are particularly vulnerable to non-competes, as such agreements are often imposed after a job offer has been accepted, when bargaining power is diminished, are rarely negotiated, and in some cases may be agreed to unknowingly.[48] This suggests that employees may lack the information and leverage necessary to fully understand the scope or legal enforceability of such provisions. Although many non-competes are often associated with higher-wage, more-educated employees, evidence suggests widespread usage amongst lower-wage employees.[49] One survey found that 34.7% of respondents without a bachelor's degree had signed a non-compete agreement at some point, and 14.3% reported that they were currently bound by one.[50] These industries can include anything from a hairdresser to camp counselors, and even commercial cleaners.[51] Among workers earning $40,000 or less annually, 13.3% reported being currently subject to a non-compete, and 33% said they been bound by one at some point in their careers.[52] Alarmingly, only about 10% of employees who sign non-competes attempt to negotiate the terms.[53] Taken together, these figures suggest that many employees do not fully understand what they agree to or feel they lack the leverage to challenge these restrictions.[54] In practice, non-competes are often presented as a non-negotiable condition of employment, forcing workers to choose between signing the agreement or forfeiting the job opportunity altogether.[55] This dynamic reflects a classic contract of adhesion, in which the employer dictates the terms, and the employee has no

content/uploads/2023/01/reforming_noncompetes_support_workers_marx_policy_proposal.pdf [https://perma.cc/4JQM-BGDS] (The Hamilton Project); Tyler Boesch, Katherine Lim & Ryan Nunn, *Non-Compete Contracts Sidelines Low-Wage Workers*, FED. RSRV. BANK OF MINNEAPOLIS (Oct. 15, 2021), https://www.minneapolisfed.org/article/2021/non-compete-contracts-sideline-low-wage-workers [https://perma.cc/43LG-YBPM]

[46] *Id.*

[47] *Id.*

[48] Starr et al., *supra* note 16, at 53, 55, 60.

[49] *Id.* at 53.

[50] *Id.* at 64.

[51] Jacqueline A. Carosa, *Employee Mobility and the Law Wage Worker: The Illegitimate Use of Non-Compete Agreements*, 67 BUFFALO L. REV.D1 1,4 (2019).

[52] Starr et al., *supra* note 16, at 64.

[53] *Id.* at 53.

[54] Dalrymple, *supra* note 41, at 80.

[55] *Id.*

meaningful opportunity to negotiate, further demonstrating a lack of bargaining power.[56]

C. Regulatory Landscape

1. Federal Reform Efforts

In 2014, non-compete agreements made national headlines after reports revealed that Jimmy John's, a popular sandwich shop, imposed non-compete clauses on its low-wage employees.[57] The leaked agreements prohibited departing employees from accepting jobs with what were deemed to be competitors of Jimmy John's for two years after leaving the company and from working within two miles of a Jimmy John's location for any employer that derived more than 10% of its revenue from sandwich sales.[58] This revelation sparked speculation and concerns about whether such agreements were truly necessary to protect business interests.[59] Ultimately, after an investigation, the shop agreed to stop including non-compete agreements in its hiring documents once the New York Office of the Attorney General deemed the practice to be "unlawful."[60]

The Jimmy John's controversy, coupled with both growing research on the negative effects of non-compete agreements and active state reform, galvanized efforts for federal reform.[61] For instance, in 2015, Senators Elizabeth Warren and Chris Murphy introduced the Mobility and Opportunity for Vulnerable Employees Act ("MOVE Act").[62] The bill would have prohibited employers from requiring low-wage employees to enter into non-competes while also further requiring employers to notify candidates at the start of the hiring process of any requirement to sign a non-compete agreement.[63]

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[56] *Id.*

[57] *A Brief History of Noncompete Regulation,* FAIR COMPETITION L. (Oct. 11, 2021), https://faircompetitionlaw.com/2021/10/11/a-brief-history-of-noncompete-regulation [https://perma.cc/6QCR-KGL2].

[58] Sarah Whitten, *Jimmy John's Drops Noncompete Clauses Following Settlement*, CNBC (June 22, 2016), https://www.cnbc.com/2016/06/22/jimmy-johns-drops-non-compete-clauses-following-settlement.html [https://perma.cc/4UE7-JJ63].

[59] *Id.*

[60] In a statement following the settlement to drop the agreements, then New York State Attorney General, Eric Schneiderman, called "non-competes for low-wage workers unconscionable." *Id.* Further, stating: "They limit mobility and opportunity for vulnerable workers and bully them into staying with the threat of being sued. Companies should stop using these agreements for minimum wage employees." *Id.*

[61] *Id.*; *see generally* Starr et al., *supra* note 16, at 54.

[62] Mobility and Opportunity for Vulnerable Employees Act, S. 1504, 114th Cong. (2015).

[63] Rachel Powitzky Steely, *Employers Face Hurdles in Enforcing Non-Competes Against Lower-Wage Workers*, FOLEY & LARDNER LLP (Mar. 4, 2019),

Although the initial MOVE Act was unsuccessful,[64] in April 2018, Senator Murphy introduced another much broader bill, entitled "The Workforce Mobility Act of 2018."[65] This new bill aimed to prohibit all non-competes and force employers to communicate to employees that non-competes agreements would be considered illegal.[66] The new bill also set out provisions that would have allowed the U.S. Department of Labor to fine violators.[67] While the legislation carved out limited exceptions, such as agreements executed in anticipation of the sale of a business or upon the dissolution of a partnership, it also imposed strict limitations even in those circumstances, including a maximum duration of one year.[68] The bill was reintroduced in both 2019 and 2021, but failed to reach a committee vote,[69] likely due to a lack of bipartisan momentum and business opposition. The bill was reintroduced in 2023, where it likewise remained in committee and has not progressed further, effectively stalling federal legislative efforts to regulate non-competes.[70]

Additionally, in 2016, the Obama administration issued a report highlighting concerns about non-compete agreements and recommending federal-level reforms.[71] Subsequently, in 2021, the Biden administration issued an executive order encouraging the FTC to curtail the use of non-compete agreements in order to promote fair competition in labor markets and protect American workers.[72] The report called for amendments to non-

https://www.jdsupra.com/legalnews/employers-face-hurdles-in-enforcing-non-40277/ [https://perma.cc/ZS3A-3XMP].

64 Dalrymple, *supra* note 41, at 83.

65 Workforce Mobility Act, S. 2782, 115th Cong. (2018).

66 Eric B. Meyer, *A New Senate Bill Would Make Your Non-Compete Agreements Worth Less than the Paper on Which They're Printed*, THE EMPLOYER HANDBOOK (Apr. 30, 2018), https://www.theemployerhandbook.com/a-new-senate-bill-will-prohibit-the-use-of-non-compete-agreements/ [https://perma.cc/VJ4F-SQZT].

67 *Id.*

68 Steven J. Pearlman, Joseph O'Keefe, Alexandra Oxyer, Alyssa M. Cook & Daryl Leon, *Legislation Seeking to Ban Non-Competes Reintroduced in Congress*, L. & WORKPLACE (Feb. 10, 2023), https://www.lawandtheworkplace.com/2023/02/legislation-seeking-to-ban-non-competes-reintroduced-in-congress/ [https://perma.cc/2C8M-YWML].

69 *Id.*

70 Workforce Mobility Act, S. 220, 118th Cong. § 8 (2023).

71 White House, NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATE RESPONSES 1 (2016), https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf [https://perma.cc/4VJL-B2ZA].

72 *Fact Sheet: Executive Order on Promoting Competition in the American Economy*, WHITE HOUSE (July 9, 2021), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/ [https://perma.cc/CLH6-5FLW]; Clifford R. Atlas & Erik J. Winton, *Takeaways President Bidens Executive Order on Non-Competes*, JACKSON LEWIS (July 15, 2021), https://www.jacksonlewis.com/insights/takeaways-president-bidens-executive-order-non-competes [https://perma.cc/W3FE-D2PA].

compete agreements: "[to] make it easier to change jobs and help raise wages by banning or limiting non-compete agreements and unnecessary, cumbersome occupational licensing requirements that impede economic mobility."[73] This report helped spur the FTC's effort to ultimately propose sweeping limits on the use of non-compete agreements.[74]

2. State Regulation

States historically regulated non-compete agreements through case and common law.[75] In recent years, however, more than twenty states have enacted statutes that limit or regulate the enforceability of non-competes, reflecting a growing trend toward protecting workers' mobility.[76] These thresholds vary in structure and amount.[77] Some states tie enforceability to annual earnings, while others incorporate inflation adjustments or cost-of-living metrics.[78] For instance, Colorado requires employees to earn at least $123,750 before a non-compete can be enforced.[79] Meanwhile, other states set lower thresholds: Illinois uses at $75,000.[80] Other states set even lower salary thresholds that are closer to minimum wage standards.[81]

Meanwhile, New York has attempted to pass similar non-compete bans, but the effort has faced early setbacks.[82] In December 2023, Governor Kathy Hochul vetoed a proposed bill in New York that aimed to implement a broad ban on non-compete agreements, citing concerns that the scope of the bill was too broad and that the "legislature's one-size-fits-all approach" would not effectively handle the complexities of New York's labor market.[83] While

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[73] *Fact Sheet: Executive Order on Promoting Competition in the American Economy*, *supra* note 72.

[74] See *infra* Part I, D.

[75] Jeffrey S. Tenenbaum, *Employee Non-Compete Agreements: What Every Association Needs to Know in a Rapidly Evolving Legal and Regulatory Landscape*, A.B.A (May 17, 2023), https://businesslawtoday.org/2023/05/employee-non-compete-agreements-what-every-association-needs-to-know-rapidly-evolving-legal-regulatory-landscape/ [https://perma.cc/4S5C-QXHQ].

[76] Atlas & Winton, *supra* note 76.

[77] *Employment and Labor Insight: 2024 Salary Thresholds and Notice Requirements for Non-Competition and Non-Solicitation Provisions in Employment Agreements*, GUNDERSON DETTMER (Feb. 15, 2024), https://www.gunder.com/en/news-insights/insights/employment-and-labor-insight-2024-salary-thresholds-and-notice-requirements-for-non-competition-and-non-solicitation-provisions-in-employment-agreements [https://perma.cc/2QEY-EBTD].

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] Kenneth W. Taber, Rebecca C. Rizzo & Laura G. Killalea, *New York Non-Compete Agreements Are Safe—for Now,* PILLSBURY L. (Jan. 9, 2024), https://www.pillsburylaw.com/en/news-and-insights/ny-noncompete-agreements-safe-for-now.html [https://perma.cc/8B55-5TKR].

[83] Govenor Hochul Veto Message No. 133, S.3100-A, 2023-24 Leg., Reg. Sess (N.Y. 2023) (vetoing legislation prohibiting non-compete agreeements and certain restrictive covenants).

the veto was primarily driven by the desire to maintain the competitive edge of large businesses, the Governor expressed openness to revisiting the issue, particularly with regard to non-competes for low-wage workers, including through potential measures such as incorporating a salary threshold.[84]

The legislature subsequently revisited the bill, and on June 9, 2025, the New York State Senate passed S4641A, a bill that would ban most non-competes while preserving limited exceptions.[85] Specifically, the bill exempts non-compete connected to the sale of a business and those entered into with "highly compensated individuals," who are defined as those earning at least $500,000 annually (excluding health-related professionals), so long as they remain reasonable in time, geography, and scope.[86] Crucially, even these exempted agreements are tightly constrained: they may not extend beyond one year and must provide for salary continuation during the restricted period.[87] The bill now awaits further consideration by the Assembly Labor Committee, leaving employers uncertain whether to maintain, revise, or abandon existing non-compete agreements while anticipating potential changes.[88]

In addition to state-level bans on non-compete agreements for low-wage workers, some states have chosen to prohibit such agreements within specific job fields, most notably in health care.[89] The rationale behind this prohibition is the concern that restricting a health-care provider's ability to practice medicine could limit access to care, especially in rural or underserved areas.[90] Further, five states, California, Colorado, Oklahoma, North Dakota, and Minnesota, have very limited exceptions and some have banned non-compete agreements altogether.[91]

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[84] Taber et al., *supra* note 82.

[85] *New York Senate Passes Bill That Would Prohibit Most Non-Compete Agreements*, SULLIVAN AND CROMWELL (June 13, 2025), https://www.sullcrom.com/insights/blogs/2025/June/New-York-Senate-Passes-Bill-Restricting-Use-of-Non-Compete-Agreements [https://perma.cc/CJT6-2BP9].

[86] *Id.*

[87] *Id.* Current updates and progress can be viewed here: S.B. 4641A, 2025-2026 Leg. Sess. (N.Y. 2025).

[88] *See New York Senate Passes Bill that Would Prohibit Most Non-Compete Agreements, supra* note 85.

[89] Dalrymple, *supra* note 41, at 84.

[90] Tina Reed, *New Ban on Noncompetes Could Have Big Impact on Health Car*e, AXIOS (Apr. 24, 2024), https://www.axios.com/2024/04/24/ftc-noncompete-ban-vote-health-care-workers [https://perma.cc/RWY4-M9SC].

[91] Zachary Folk, *Which States Have Banned Non-Compete Clauses? Here's What to Know As New York Could Be Next,* FORBES (Dec 6. 2023), https://www.forbes.com/sites/zacharyfolk/2023/12/06/which-states-have-banned-non-compete-clauses-heres-what-to-know-as-new-york-could-be-next/#:~:text=Key%20Facts,%2C%20North%20Dakota%2C%20and%20Minnesota [https://perma.cc/HC4C-AS3C].

D. FTC Proposed Non-Compete Ban

The FTC[92] was established by the Federal Trade Commission Act in 1914.[93] The Commission was established as an independent agency with the authority to prevent unfair methods of competition and deceptive practices in commerce, with the goal of promoting fair competition and protecting consumers.[94] The FTC's final rule, issued in April 2024, aiming to ban non-competes nationwide and represented the most significant federal challenge to non-compete agreements.[95] The rulemaking process began on January 5, 2023, when the FTC issued its Notice of Proposed Rulemaking ("NPRM"), proposing the ban and soliciting public comment—ultimately receiving over 26,000 comments, more than 95% of which supported the proposed ban.[96]

Under the FTC's final rule, "existing non-competes for the vast majority of workers would have no longer been enforceable after the rule's effective date."[97] The final rule broadly bans all true non-compete clauses which are not limited to contractual terms but may include workplace policies,[98] whether they are written or oral.[99] Nonetheless, the rule did include some exceptions, such as allowing existing non-competes for senior executives, who represent less than 0.75% of the workforce.[100]

The FTC provided several justifications for the "final rule."[101] First, the agency estimated that the final rule would lead to new business formation, estimating a 2.7% annual increase, resulting in more than 8,500 new

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[92] *Our History,* FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/history [https://perma.cc/ZX4V-TWMK].

[93] *Id.*

[94] *Id.*

[95] *FTC Announces Rule Banning Noncompetes,* F.T.C. (Apr. 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes [https://perma.cc/D9W4-Y4AN].

[96] *Id.*; Andrew Turnbull, Eric Tate, Alexander Okuliar, Lisa M. Phelan & Megan E. Gerking, *FTC Proposes Sweeping Ban on Employee Non-Competes*, MORRISON & FOERSTER (Jan. 6, 2023), https://www.mofo.com/resources/insights/230106-ftc-proposes-sweeping-ban-employee-non-competes [https://perma.cc/67HX-5JE8]; Yeseul Hyun, Jee-Yeon Kim Lehmann & Shannon Seitz, *Anatomy of Public Comments: An Empirical Analysis of Comments on FTC's Proposed Ban of Employee Non-Competes*, ANTITRUST MAG., Apr 5, 2024, at 1; 16 C.F.R. § 910 at 3-4 (2023).

[97] *FTC Announces Rule Banning Noncompetes,* supra note 95.

[98] Workplace policies may include provisions embedded in employee handbooks, offer letters, or even verbal directives that bar post-employment competitive activity.

[99] *Press Release, F.T.C., supra* note 18; Clifford Atlas et al., *Federal Trade Comission's Sweepinig Final Rule to Ban Non-Competes: What You Need to Know*, JACKSONLEWIS (Apr. 24, 2024), https://www.jacksonlewis.com/insights/federal-trade-commissions-sweeping-final-rule-ban-non-competes-what-you-need-know [https://perma.cc/82RK-XKVD]; *Non-Compete Clause Rule*, 89 Fed. Reg. 38,342 (May 7, 2024).

[100] *Press Release, F.T.C., supra* note 18.

[101] *Id.*

businesses created each year.[102] The FTC also forecasted higher earnings for workers, estimating an additional $524 per year for the average worker.[103] Furthermore, the agency expected other benefits, such as lower health-care costs by up to $194 billion over the next decade.[104] In addition, the FTC projected that the ban would encourage innovation, leading to an estimated 17,000 to 29,000 more patents each year over the next ten years.[105]

The FTC asserted its authority to invoke the final rule under several provisions of the Federal Trade Commission Act ("FTC Act").[106] Specifically, Section 5 of the Act empowers the Commission to prevent "unfair methods of competition" and "unfair or deceptive acts or practices in or affecting commerce."[107] The FTC thus asserts that non-compete agreements constitute unfair methods of competition, as they directly and indirectly restrict workers from joining competitors or starting their own businesses.[108] As such, the FTC argued that non-compete agreements are unlawful and fall within its discretion to prohibit them. [109]

E. Judicial Challenges and FTC's Abandonment of the Non-Compete Ban

Three recent federal cases involved challenges brought by plaintiffs against the FTC's non-compete ban: *Ryan LLC v. Federal Trade Commission*,[110] *ATS Tree Services v. Federal Trade Commission*,[111] and *Properties of the Villages v. Federal Trade Commission*.[112] In *Ryan LLC v. Federal Trade Commission*, a Texas District Court set aside the FTC's proposed ban just days before it would have been enacted.[113] Plaintiff Ryan

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] 15 U.S.C. § 45 (2024).

[108] FED. TRADE COMM'N, THE FTC'S LEGAL AUTHORITY FOR BAN ON NON-COMPETES, https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-Legal-Auth-Ban-Noncompetes.pdf [https://perma.cc/TDZ3-74VW].

[109] *Id.*

[110] Ryan, LLC v. Fed. Trade Comm'n, 746 F.Supp.3d. 369 (2024).

[111] ATS Tree Servs., LLC v. Fed. Trade Comm'n, 2024 WL 3511630 (E.D. Pa. July 23, 2024); *see also FTC Avoids Preliminary Injunction of Non-Compete Ban*, DAVIS POLK (July 24, 2024), https://www.davispolk.com/insights/client-update/ftc-avoids-preliminary-injunction-non-compete-ban [https://perma.cc/8G85-T7K7] (discussing the denial of the preliminary injunction in *ATS Tree Services LLC v. FTC* and upholding FTC's statutory authority).

[112] Properties of the Villages, Inc. v. Fed. Trade Comm'n, 2024 WL 3870380 (M.D. Fla. Aug. 15, 2024).

[113] *Ryan, LLC*, 746 F.Supp.3d.

LLC, a global tax services firm that uses non-competes with its shareholder principals and other employees that have access to particularly sensitive business information, alleged that the final rule contravenes the FTC Act, violates the Constitution, and is "arbitrary, capricious, and otherwise unlawful."[114]

On August 20, 2024, the district court held that the FTC Act does not grant the FTC the power to issue broad, substantive rules, such as the final rule banning non-compete clauses.[115] Instead, the court held that the FTC Act largely restricts the agency's authority to regulate unfair competition through case-by-case adjudications.[116] The court held that the final rule violated the Administrative Procedure Act's ("APA) "arbitrary and capricious"[117] standard of review because the FTC did not provide adequate evidence to justify a blanket prohibition on non-compete agreements and failed to explore less restrictive alternatives.[118] The court also reasoned that a rule that would retroactively invalidate millions of contracts that were already in force was beyond the FTC's statutory authority.[119] Furthermore, the court found that the rule raised constitutional issues under the non-delegation doctrine.[120]

On October 18, 2024, the FTC filed a notice of appeal with the U.S. Court of Appeals for the Fifth Circuit, challenging the district court's decision in *Ryan LLC v. Federal Trade Commission*.[121] However, the FTC

[114] Nina T. Martinez, Jean F. Kuei, Laura G. Killalea, Kenneth W. Taber, & Alex Guerin, *District Court Ruling Bars Federal Trade Commission Non-Compete Rule for the Near Term*, PILLSBURY L. (Sep. 10, 2024), https://www.pillsburylaw.com/en/news-and-insights/us-district-court-federal-trade-commission-noncompete-rule.html [https://perma.cc/7BST-7X9E].

[115] Clifford R. Atlas & Erik J. Winton, *Battle Over/War Isn't: Employer Considerations Now That FTC Non-Compete Ban Is Set Aside*, JACKSON LEWIS (Aug. 29, 2024), https://www.jacksonlewis.com/insights/battle-overwar-isnt-employer-considerations-now-ftc-non-compete-ban-set-aside [https://perma.cc/4YSG-CXZR].

[116] Atlas & Winton, *supra* note 115.

[117] Arbitrary and capricious, a standard of review under the APA has been defined as "conduct [that] is willful and unreasoning action without consideration or regard for the facts and circumstances." APA, 5 U.S.C. § 706(2)(A). *See also* Boothe v. Roofing Supply, Inc. of Monroe, 893 So. 2d 123, 126 (La. App. 2d Cir. 2005) (defining arbitrary and capricious behavior as willful and unreasoning action without regard for the facts and circumstances).

[118] Atlas & Winton, *supra* note 115; *Ryan, LLC*, 746 F.Supp.3d. at 388.

[119] *Id.*

[120] *Nondelegation Doctrine*, LEGAL INFO. INST. https://www.law.cornell.edu/wex/nondelegation_doctrine [https://perma.cc/7GMV-Q9LN]; *Ryan, LLC*, 746 F.Supp.3d. at 382, Atlas & Winton, *supra* note 115.

[121] Helen He, Alexander Okuliar & David Shaw, *FTC Appeals Texas Court's Ruling Blocking FTC's Non-Compete Ban*, JDSUPRA (Oct. 22, 2024), https://www.jdsupra.com/legalnews/ftc-appeals-texas-court-s-ruling-1163443/ [https://perma.cc/44EV-X8QD].

subsequently voted 3-1 to dismiss its appeals on September 5, 2025.[122] As a result, the district court's order vacating the rule remains in effect, the non-compete ban is not federally enforceable, and is essentially moot.[123]

Prior to the dismissal of other appeals, other district courts reached differing conclusions regarding the rule.[124] In *Properties of the Villages v. Federal Trade Commission*, on August 14, 2024, the U.S. District Court for the Middle District of Florida granted a preliminary injunction prohibiting enforcement of the rule, based upon the major questions doctrine.[125] In contrast, in *ATS Tree Services v. Federal Trade Commission,* the court upheld the ban, denying plaintiff ATS's motion for a stay of preliminary injunction against the ban, holding that ATS did not establish irreparable harm or enough of a likelihood of success on the merits.[126] However, because the FTC dismissed the appeals, the final rule remains unenforceable nationwide.[127]

II. LEGAL ANALYSIS

A. Constitutional Limits Implicated by the FTC's Proposed Non-Compete Ban

In addition to the above critiques and recent cases, the final rule exposed substantial constitutional questions regarding the scope of agency authority and the limits of administrative rulemaking.[128] For instance, the decision by

[122] *Federal Trade Commission Files to Accede to Vacatur of Non-Compete Clause Rule,* FED. TRADE COMM'N (Sep. 5, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/09/federal-trade-commission-files-accede-vacatur-non-compete-clause-rule [https://perma.cc/LW8A-Z5AG].

[123] *Federal Trade Commission Files to Accede to Vacatur of Non-Compete Clause Rule*, *supra* note 122.

[124] Properties of the Villages, Inc. v. Fed. Trade Comm'n, 2024 WL 3870380 (M.D. Fla. Aug. 15, 2024);
Federal Trade Commission Files to Accede to Vacatur of Non-Compete Clause Rule, *supra* note 122; Mikayla Almeida & Courtney Wilson, *Florida Federal District Court Enjoins Enforcement of FTC's Non-Compete Rule Against Real Estate Broker*, LITTLER (Aug. 16, 2024), https://www.littler.com/news-analysis/asap/florida-federal-district-court-enjoins-enforcement-ftcs-non-compete-rule-against [https://perma.cc/H9WG-LG38].

[125] *Properties of the Villages,* 2024 WL 3870380, at 11; Almeida & Wilson, *supra* note 124. The major questions doctrine, is explored more in Part III of this note.

[126] ATS Tree Servs., LLC v. Fed. Trade Comm'n, 2024 WL 3511630 (E.D. Pa. July 23, 2024); *see also FTC Avoids Preliminary Injunction of Non-compete Ban*, DAVIS POLK (July 24, 2024), https://www.davispolk.com/insights/client-update/ftc-avoids-preliminary-injunction-non-compete-ban [https://perma.cc/Y5MC-YPBV] (explaining decision denying a preliminary injunction against the FTC's non-compete rule).

[127] *Federal Trade Commission Files to Accede to Vacatur of Non-Compete Clause Rule*, *supra* note 122.

[128] *FTC Non-Compete Ban: What You Need to Know*, SEYFARTH (June 11, 2024),

the district court in *Ryan LLC*[129] fits into the broader trend of conservative jurisprudence, which seeks to limit the authority of administrative agencies—especially when said agency is involved with sweeping regulatory actions.[130]

For decades, administrative agencies had expansive powers with less judicial scrutiny, supported by a principle established in the landmark case *Chevron, USA Inc. v. Natural Resources Defense Council,*[131] known for years as the "Chevron deference."[132] *Chevron* established a two-step framework for courts to evaluate agency interpretations of statutes, requiring deference to an agency's reasonable interpretation where congressional intent was ambiguous.[133] However, in 2024, the landmark decision *Loper Bright Enterprises v. Raimondo,*[134] the Court expressly overruled *Chevron*, holding that courts must exercise independent judgment when interpreting statutes and may not defer to an agency's interpretation simply because a statute is ambiguous.[135] In overruling *Chevron,* the Court significantly raised the bar for agencies seeking to regulate major national issues without explicit and clear congressional authorization.

The challenges to the rule also raised serious concerns under the major questions doctrine.[136] Under this doctrine, established in *West Virginia v. EPA*,[137] courts will not uphold agency actions addressing issues of "vast economic and political significance" unless Congress provides "clear congressional" authority.[138] Generally, the Court applies the major questions doctrine in circumstances where an agency claims "substantial regulatory

https://www.seyfarth.com/news-insights/ftc-non-compete-ban-what-you-need-to-know.html [https://perma.cc/8MHW-B63P].

[129] Ryan, LLC v. Fed. Trade Comm'n, 746 F.Supp.3d. 369 (2024); *see also* J. Mark Gidley et al., *White & Case Global Non-Compete Resource Center (NCRC)*, WHITE&CASE (Sep. 29, 2025), https://www.whitecase.com/insight-tool/white-case-global-non-compete-resource-center-ncrc [https://perma.cc/AB76-973N] (discussing the court's reasoning in *Ryan LLC v. FTC*).

[130] Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, TK (2023).

[131] *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984).

[132] *See id* at 843.

[133] *See id.*

[134] *See* Loper Bright Enter. v. Raimondo, 603 U.S. 369 (2024).

[135] *The Supreme Court's Double Hammer to Agencies: Loper Bright and Corner Post Set New Precedents for Challenging Federal Agency Action,* CROWELL (July 11, 2024), https://www.crowell.com/en/insights/client-alerts/the-supreme-courts-double-hammer-to-agencies-loper-bright-and-corner-post-set-new-precedents-for-challenging-federal-agency-action [https://perma.cc/KGX2-K37B].

[136] *FTC Non-Compete Ban: What You Need to Know*, *supra* note 128.

[137] West Virginia v. Env't Prot. Agency, 597 U.S. 697 (2022) (striking down EPA Affordable Clean Energy rules, pursuant to the "major questions doctrine," in certain extraordinary cases involving statutes that confer authority upon an administrative agency, the agency must point to clear congressional authorization for the authority it claims).

[138] *Id.* at 721; *FTC Non-Compete Ban: What You Need to Know*, *supra* note 128.

power"[139] in areas of important economic areas or in circumstances in which the regulation set forth would have a "substantial aggregate economic impact."[140]

The FTC's proposed ban, which would have affected roughly one in five U.S. workers and had an estimated economic impact of $400–488 billion over the next decade would likely have been deemed a "major question." By asserting this expansive new authority over millions of existing employment contracts, the rule invoked substantial regulatory power of the kind that would demand clear congressional authorization.[141] As such, the final rule implicated a major question and would have required unequivocal congressional authorization to survive judicial review.[142]

The rule also raised concerns under the non-delegation doctrine.[143] Rooted in Article I of the Constitution, the non-delegation doctrine holds that Congress cannot delegate its legislative and lawmaking powers to other entities.[144] Although Congress may authorize agencies to implement and enforce laws, such delegations must be accompanied by an "intelligible principle" to guide the agency's exercise of authority, as stated in the landmark case, *J.W. Hampton, Jr., & Co. v. United States*.[145] These intelligible principles must provide clear standards in order to guide the agency's exercise of authority.[146] Absent such standards, broader delegation risks enabling agencies to make law, exceeding the scope of the agency's authority. While the Supreme Court has historically upheld broad delegations under this standard,[147] it recently signaled renewed interest in enforcing constitutional limits on expansive agency authority, in *Gundy v. United States*, where several Justices expressed willingness to reconsider the scope of the doctrine.[148]

Therefore, in regard to the final rule, even if Congress intended for the FTC to regulate non-competes, the broad language in Section 5 of the FTC

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[139] *West Virginia*, 597 U.S. at 723.

[140] *FTC Non-Compete Ban: What You Need to Know*, *supra* note 128.

[141] *Id.*

[142] John Kerkhoff, *Major Questions over Non-Compete Clauses and Overtime Pay*, JDSUPRA (Feb. 22, 2024), https://www.jdsupra.com/legalnews/major-questions-over-non-compete-4757523/ [https://perma.cc/2KWH-E3DZ].

[143] *FTC Non-Compete Ban: What You Need to Know*, *supra* note 128.

[144] *Nondelegation Doctrine*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/nondelegation_doctrine [https://perma.cc/7GMV-Q9LN].

[145] J.W. Hampton, Jr., & Co. v. U.S., 276 U.S. 394, 409 (1928).

[146] Gundy v. United States, 588 U.S. 128, 129 (2019).

[147] *See generally* Mistretta v. United States, 488 U.S. 361 (1989); *see generally* Touby v. United States, 500 U.S. 160 (1991).

[148] *Gundy*, 588 U.S. at 128, 156 (2019) (Alito, J., concurring); *Id.* at 157-58 (Gorsuch, J., dissenting).

Act, which merely prohibits "unfair methods of competition" would have been likely too vague to satisfy the intelligible principle requirement.[149] In that respect, a categorical nationwide ban of this magnitude, particularly in light of the Court's expressed willingness to reconsider the scope of modern non-delegation doctrine, would likely not have survived constitutional scrutiny.[150]

B. Current Political Climate Affecting Appeals and Ban

The shift in executive policy under the Trump administration further contextualizes the final rule's abandonment.[151] One of the driving forces of the FTC's proposed ban on non-competes was President Biden's 2021 Executive Order on Promoting Competition in the American Economy, which directed the FTC to consider restrictions on the use of non-compete clauses.[152] As head of the Executive Branch, the President plays a crucial role in shaping agency policy through leadership appointments.[153] However, the election of Trump shifted the priorities and goals within the FTC.[154] Andrew Ferguson, the newly appointed FTC Chair, had previously criticized the Commission for overstepping its statutory authority and authored a dissent arguing that the non-compete ban exceeded the agency's lawful powers.[155] In that dissent, he described the rule as "by far the most extraordinary assertion of authority in the Commission's history," arguing that the FTC lacked clear statutory authorization to promulgate such a sweeping categorical ban.[156] His dissent also highlights at length the constitutional challenges he sees with the ban, including the major-questions doctrine, discussed at length earlier in this Note.[157]

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[149] 15 U.S.C. § 45.

[150] *FTC Non-Compete Ban: What You Need to Know*, *supra* note 128.

[151] Paul Mulholland, *Non-Compete Agreement Ban Is All but Dead Under Trump*, PLAN SPONSOR COUNCIL OF AM. (Jan. 28, 2025), https://www.psca.org/news/psca-news/2025/1/non-compete-agreement-ban-is-all-but-dead-under-trump [https://perma.cc/URR6-6DGY].

[152] John Kerkhoff, *Major Questions over Non-Compete Clauses and Overtime Pay*, JDSUPRA (Feb. 22, 2024), https://www.jdsupra.com/legalnews/major-questions-over-non-compete-4757523 [https://perma.cc/2KWH-E3DZ].

[153] *The Executive Branch*, THE WHITE HOUSE PRESIDENT BARACK OBAMA, https://obamawhitehouse.archives.gov/1600/executive-branch [https://perma.cc/L74R-T4MQ].

[154] *FTC to Shift Rulemaking Priorities in the Trump Administration,* BROWNSTEIN (Nov. 25, 2024), https://www.bhfs.com/insight/ftc-to-shift-rulemaking-priorities-in-the-trump-administration [https://perma.cc/DYV6-C564].

[155] Mulholland, *supra* note 151; FTC, Dissenting Statement of Commissioner Andrew N. Ferguson Joined by Commissioner Melissa Holyoak in the Matter of the Non-Compete Clause Rule 8 (2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf [https://perma.cc/QS9R-YRCX].

[156] FTC, Dissenting Statement, *supra* note 155156.

[157] *Id.*

Reflecting these changes, the federal government on March 7, 2025, filed motions in both the Fifth and Eleventh Circuit Court of Appeals, requesting a 120-day stay of proceedings in the challenges to the Biden Administration's appeals of the rule.[158] However, in this motion, Ferguson seemed more open to subsequent discussions of the rule than in his previous dissent, recognizing that unreasonable and broad non-compete agreements might harm competition in labor markets.[159] Thus, given Ferguson's stark views and dissent on the complete ban, it seems unlikely the ban will advance by any means.[160] As noted above, the Commission in September of 2025 ultimately dismissed its pending appeals and acceded to the vacatur of the rule.[161] In the meantime, the FTC has established a "Joint Labor Task Force" to prioritize enforcement against deceptive, unfair, or anticompetitive labor-market practices—including unreasonable non-compete clauses, non-solicitation, and no-hire agreements.[162] This task force provides some hope that, even with the appeals abandoned, there may still be room for meaningful and additional reform.

Although the FTC abandoned the final rule, it has continued to signal concern regarding non-competes. For instance, the FTC launched a public inquiry seeking input from various stakeholders, with a stated aim of "shin[ing] a light on unfair and anticompetitive agreements."[163] As part of this inquiry, interested parties were given sixty days to submit comments.[164] The FTC, after reading these comments, may consider further restrictions and

[158] Jesse M. Coleman & Eron Reid, *FTC Requests Stay of Appeals to Challenges to FTC Non-Compete Rule Citing New Administration*, SEYFARTH SHAW (Mar. 11, 2025), https://www.tradesecretslaw.com/2025/03/articles/ftcs-crackdown-on-non-competes/ftc-requests-stay-of-appeals-to-challenges-to-ftc-non-compete-rule-citing-new-administration/ [https://perma.cc/47V5-SSM8].

[159] Christine Bestor Townsend, Tobias E. Schlueter, & Zachary V. Zagger, *FTC Launches Task Force to Protect Competition in Labor Markets, Scrutinize Noncompete Agreements*, OLGETREE DEAKINS (Mar. 3, 2025), https://ogletree.com/insights-resources/blog-posts/ftc-launches-task-force-to-protect-competition-in-labor-markets-scrutinize-noncompete-agreements/?_gl=1*1vykgy3*_up*MQ..*_ga*MTI5NzQ0NDY3OS4xNzU2ODM3NTYy*_ga_V4WT9JNBFT*czE3NTY4Mzc1NjEkbzEkZzAkdDE3NTY4Mzc1NjEkajYwJGwwJGgw [https://perma.cc/PV7W-V8PR].

[160] Jonathan Crook, *Trump Announces Andrew Ferguson to Serve as New FTC Chair: FAQs for Employers*, FISHER PHILLIPS (Dec. 13, 2024), https://www.fisherphillips.com/en/news-insights/trump-announces-andrew-ferguson-to-serve-as-new-ftc-chair.html [https://perma.cc/L375-HHJM].

[161] *FTC Abandons Appeals of Decisions Striking Down Its Noncompete Rule, but Restrictive Covenants Remain an Enforcement Priority*, DUANE MORRIS (Sep. 9, 2025), https://www.duanemorris.com/alerts/ftc_abandons_appeals_decisions_striking_down_noncompete_rule_restrictive_covenants_remain_0925.html [https://perma.cc/VJT2-ATP7].

[162] Townsend et al., *supra* note 159.

[163] *FTC Abandons Appeals of Decisions Striking Down Its Noncompete Rule, but Restrictive Covenants Remain an Enforcement Priority*, *supra* note 161.

[164] *Id.*

policy initiatives targeting non-competes.[165] Thus, even though the FTC has essentially abandoned its efforts in a nationwide ban, the Commission has made clear it remains concerned about the restrictive effects of non-compete agreements on worker mobility and is open to future reform efforts.[166]

III. PROPOSAL

A. Salary Threshold Instead of Ban

As the foregoing analysis demonstrates, a categorical nationwide ban on non-compete agreements faces substantial constitutional and statutory obstacles.[167] For instance, the likely implication of the major questions doctrine, renewed scrutiny of agency authority following *Loper Bright*, and the non-delegation doctrine collectively made the final rule constitutionally vulnerable.[168] Moreover, section 5's broad prohibition of "unfair methods of competition" provides, at best, an ambiguous foundation for such a sweeping substantive regulation of this magnitude.[169]

Therefore, to address the widespread use of restrictive non-compete agreements in low-earning employees, this Note proposes the implementation of a federal salary threshold, in contrast to a complete federal ban. This proposal is built upon states' current salary thresholds and public comments on the ban.[170] While a categorical nationwide ban is unlikely to pass, a federal salary threshold remains more politically and constitutionally feasible. Over twenty states have successfully implemented such thresholds, and thirty-three states have enacted various restrictions on non-competes.[171] Of the approximately 26,000 comments submitted to the FTC, several urged the Commission to adopt an income-based threshold in lieu of a complete prohibition.[172] The rationale for a salary threshold is simple: non-competes are generally justified as a means of protecting trade secrets and other proprietary information.[173] Indeed, one of the primary critiques raised by those in opposition to the final rule was that the complete ban would

165 *Id.*

166 *Id.*

167 *See* infra Part II.

168 *Id.*

169 15 U.S.C. § 45.

170 *Employment and Labor Insight, supra* note 77.

171 *Id.*

172 Non-Compete Clause Rule, *supra* note 96.

173 U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-103785, NONCOMPETE AGREEMENTS: USE IS WIDESPREAD TO PROTECT BUSINESS' STATED INTERESTS, RESTRICTS JOB MOBILITY, AND MAY AFFECT WAGES 1 (2023), https://www.gao.gov/products/gao-23-103785 [https://perma.cc/6C8A-J5CV].

undermine their ability to safeguard business interests.[174] Thus, a salary-based threshold directly addresses these concerns by preserving protections for employees likely to access sensitive information, while reducing unnecessary restrictions on low-wage workers who, on average, do not possess such confidential data.[175]

B. Comparative State Models and Income-Based Approach

Of states that have adopted salary thresholds, they vary in their execution.[176] Some states, such as Colorado, Washington, Maine, Rhode Island, Oregon, and Virginia, as well as Washington D.C., have income restrictions that increase each year.[177] For instance, Washington's non-compete statute initially had a $100,000 salary threshold in order to be subject to a non-compete.[178] However, the Washington Department of Labor and Industries adjusts it annually to reflect inflation.[179] Thus, the 2025 salary threshold is $123,394.17.[180] Similarly, Colorado's salary threshold is currently at $127,091.[181] Of these states, some choose to base their salary thresholds on very specific metrics and data points.[182] Other states rely on the federal poverty level.[183] For example, Maine's salary threshold for non-competes is based on 400 % of the federal poverty level,[184] whereas Rhode Island ties its threshold to 250 % of the federal poverty level.[185] Finally, Oregon relies on the consumer price index ("CPI") for urban consumers in the western region, resulting in an inflation-adjusted threshold of $116,427 for 2025, up from $113,241.[186] While Illinois does not adjust for inflation and maintains a flat $75,000 threshold, some states, like New Hampshire,

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174 Hyun et al., *supra* note 96.

175 *Your New York State Minimum Wage*, N.Y. STATE DEP'T OF LAB. (Feb. 17, 2026), https://dol.ny.gov/minimum-wage-0 [https://perma.cc/KC4Z-B9XY].

176 John R. FitzGerald & Marcus C. Johnson, *Noncompete Agreements: Updated Income Thresholds for 2025* (Jan. 25, 2025), FOLEY AND LARDNER, https://www.foley.com/insights/publications/2025/01/noncompete-agreements-updated-income-thresholds-for-2025/ [https://perma.cc/2ZJQ-9AWA].

177 *Id.*

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.*

182 *Id.*

183 *Id.*

184 *Id.*

185 *Id.*; *see also Annual Update of the HHS Poverty Guidelines*, FED. REG. (Jan. 17, 2025), https://www.federalregister.gov/documents/2025/01/17/2025-01377/annual-update-of-the-hhs-poverty-guidelines (explaining that the federal poverty line is a federal threshold designed to determine poverty level by household size based on annual incomes).

186 FitzGerald & Johnson, *supra* note 176.

relate their threshold to their minimum wage.[187] Given these varying methodologies, the FTC has many factors to consider in proposing a national salary threshold. These may include inflation adjustments, regional cost-of-living variations, and economic benchmarks such as the federal poverty level or CPI.[188]

Therefore, a sensible approach would be a baseline federal salary threshold of $100,000, adjusted annually for inflation, at which employees are more likely to have access to proprietary data and trade secrets. According to the U.S. Bureau of Labor Statistics the median annual wage for business and financial occupations is approximately $79,050.[189] These occupations serve as a useful benchmark because they frequently involve access to confidential information and are amongst the sectors in which employers most commonly justify the use of non-competes. Setting the threshold above the median ensures that restrictions are reserved for higher-level employees who are more likely to possess competitively sensitive information.[190] This logic extends beyond finance and business to other industries in which access to proprietary data increases with seniority and compensation.[191] Therefore, $100,000 strikes a fair, yet realistic number that will protect lower-waged workers, modeled after state thresholds like Washington and Colorado.[192]

In addition to an income-based limitation, the proposal should include targeted carve-outs for health-care professionals. Even at higher salary levels, non-compete agreements in the health-care sector raise distinct public policy concerns.[193] Restricting physicians and other providers from practicing in certain geographic areas can dangerously limit access to care for patients, particularly in rural and underserved communities.[194]

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[187] *Id.*

[188] *Id.* (discussing factors used in determining salary thresholds for non-compete agreements).

[189] *Business and Financial Occupations* ,U.S. BUREAU OF LAB. STAT., https://www.bls.gov/ooh/business-and-financial/ (last updated Aug. 28, 2025) [https://perma.cc/V2P7-MXN9].

[190] NYC BAR TRADE SECRETS COMMITTEE, LEGISLATING FAIRNESS: REGULATING THE USE OF NONCOMPETES FOR LOWER-SALARY EMPLOYEES TK (2021), https://www.nycbar.org/reports/legislating-fairness-regulating-the-use-of-noncompete-agreements-for-lower-salary-employees/#:~:text=The%20Committee%20is%20recommending%20adoption%20of%20a,regime%2C%20the%20presumption%20of%20illegality%20would%20be [https://perma.cc/AH52-W8AV].

[191] *Id.* at TK.

[192] FitzGerald & Johnson, *supra* note 176.

[193] Reed, *supra* note 90.

[194] *See id.*

C. Geographic Aspect of Proposed Ban

Another possible approach is to consider different ranges for parts of the country dependent on the cost of living. This approach is similar to one in which different areas of a state may have tiered minimum wages, likely dependent on the cost of living.[195] For example, in New York State, the minimum wage is higher in New York City, Long Island, and Westchester due to the higher cost of living in these areas compared to the rest of the state.[196] Applying a similar geographic framework to a non-compete ban would ensure that restrictions account for the disproportionate economic burdens faced by workers in high-cost areas. For instance, the cost of living in New York City is approximately 140% higher than the national average.[197] Under this approach, the ban would consider lower thresholds for cheaper areas of living and higher thresholds for more expensive areas of living. Such tailoring would better reflect the stark differences in costs of living, while still protecting workers.

D. Other Rationales of a Salary Threshold

From a constitutional and statutory perspective, a salary threshold is far more likely to withstand judicial scrutiny than a categorical nationwide ban. As discussed above, the final rule encountered substantial obstacles under the major questions doctrine, renewed skepticism toward expansive agency authority following *Loper Bright*, and concerns regarding the scope of delegation under Section 5 of the FTC Act.[198] A federal salary threshold avoids many of these concerns. For instance, because it would have a more limited aggregate economic impact, it less likely to constitute a "major question."[199] Moreover, unlike a sweeping prohibition grounded solely in Section 5's broad prohibition of "unfair methods of competition,"[200] an income threshold represents a narrower and more incremental exercise of regulatory authority—one more plausibly tethered to the FTC's authority.

Further, a salary threshold opposed to a ban is less likely to implicate the non-delegation doctrine. The nondelegation doctrine prohibits Congress from delegating legislative power to agencies without providing an "intelligible principle" to guide their exercise of discretion. Although the

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195 *See* FitzGerald & Johnson, *supra* note 176.

196 *Your New York State Minimum Wage*, *supra* note 175.

197 *Cost of Living in New York*, APARTMENTS.COM, https://www.apartments.com/cost-of-living/new-york-ny/ (last updated Feb. 2026) [https://perma.cc/99LM-LXAC].

198 S*ee infra*-Part II; *see also* 15 U.S.C. § 45 (defining the FTC's authority to prohibit unfair methods of competition).

199 *See FTC Non-Compete Ban: What You Need to Know*, *supra* note 128.

200 15 U.S.C. § 45.

Supreme Court has not struck down a law on nondelegation grounds since 1935,[201] as mentioned, the Court has suggested a renewed judicial willingness to revisit the doctrine.[202] A salary threshold is less likely to implicate the doctrine because it provides a clear, administrable standard that cabins agency discretion and reduces the risk that the agency is effectively legislating through standalone, substantive policy decisions on their own.

CONCLUSION

In conclusion, the FTC implementing a federal salary threshold cap instead of the outright ban strikes a fair and realistic solution for lower-waged employees, balancing the interests of employers and employees. This is an especially critical time to pursue such a regulation, as non-compete agreements have received heightened national attention, and an urgent regulatory need remains following the FTC's abandonment of its appeals in relation to the final rule.[203] While the FTC believed they had the authority to pass such a swift act and, in the past, may have,[204] recent decisions such as *Ryan* and *AT*C,[205] display challenges of consistent scrutiny the ban would continue to face if resurfaced. These concerns are further amplified by the potential constitutional challenges discussed throughout this Note[206], as well as diminished political support under the new administration.[207]

Therefore, by setting a threshold of $100,000 in salary, non-compete clauses can be effectively utilized for individuals in higher-level positions, where the protection of proprietary information is relevant, and protect lower-wage employees who typically have limited access to confidential information and strategic decision-making authority, rendering the application of non-compete agreements both overbroad and counterproductive.[208] Low-wage employees also lack significant bargaining power, which makes them less likely to negotiate such agreements, leaving them particularly vulnerable to these types of coercive employment restrictions.[209]

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201 Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Gundy v. United States, 588 U.S. 128 (2019).

202 *Gundy*, 588 U.S. at 128.

203 *See Federal Trade Commission Files to Accede to Vacatur of Non-Compete Clause Rule*, *supra* note 122.

204 FTC, THE FTC'S LEGAL AUTHORITY TO BAN NONCOMPETES.

205 Ryan, LLC v. Fed. Trade Comm'n, 746 F.Supp.3d. 369 (2024); ATS Tree Servs., LLC v. Fed. Trade Comm'n, 2024 WL 3511630 (E.D. Pa. July 23, 2024).

206 *FTC Non-Compete Ban: What You Need to Know*, *supra* note 128.

207 Crook, *supra* note 160.

208 Starr et al., *supra* note 16, at 53, 55.

209 *Id.* at 81.

Moreover, a federal salary-based standard is far more likely to withstand judicial review than an outright ban, as more than thirty-three states have already adopted similar threshold-based approaches.[210] These states are a testament to the fact that a federal salary cap is politically palatable and does not hinder or weaken the individual economies in these states. Further, while a salary threshold may still face constitutional challenges, such as the major questions doctrine or non-delegation doctrine, the risks are lessened.[211] Most importantly, a threshold limits the harmful application of non-competes to low-wage workers, a practice that has been shown to suppress wages, restrict labor mobility, and undermine access to future employment opportunities.[212] This proposal, at its core, seeks to strike an appropriate balance between an employer's need to protect legitimate business interests and workers' rights to freely pursue career opportunities, aligned with the foundational values of fairness, economic freedom, and the American dream. If, however, a federal salary-threshold standard proves infeasible in the near term due to the legal and political challenges explored in this Note, the best alternative for states remains continued state-level regulation and enforcing restrictions on non-compete agreements to protect their workers.[213]

[210] *State Noncompete Law Tracker*, ECON. INNOVATION GRP. (Jan. 13, 2026), https://eig.org/state-noncompete-map [https://perma.cc/5NCA-MZNY].

[211] *See* Part III.

[212] Starr et al., *supra* note 16, at 54.

[213] This Note was primarily developed in 2024 and 2025. Because developments regarding non-competes continue to be ongoing, this Note may not reflect the most recent updates concerning the FTC's noncompete ban and ongoing updates in this area. For the latest information, please refer directly to the FTC and updated official information.