

Competing Perspectives: How the FTC’s Noncompete Ban is Under Attack

Olivia Bartell & Zahrah Khan
Student Fellows
Institute for Consumer Antitrust Studies
Loyola University Chicago School of Law

Introduction

In April of 2023, the Federal Trade Commission (“FTC”), under the leadership of former FTC Chair Lina Khan, announced a ban on most noncompete clauses between employees and employers, asserting that such clauses are an unfair method of competition that violates Section 5 of the FTC Act.¹ While the FTC is given rulemaking authority, its non-compete ban did not come without opposition.

The Rule prohibits employers from entering into post-employment non-competes and bars the enforcement of most non-compete agreements established before the Rule’s effective date. It allows for three exceptions: (1) agreements involving senior executives, (2) agreements related to the sale of a business, and (3) agreements between franchisors and franchisees. Almost immediately after its announcement, the ban was challenged by opponents who contended that the FTC acted beyond its scope of authority by implementing the new Rule.²

The opponents of the Rule proved to be successful. In August, a federal judge in Texas struck down the Rule, because the “role of an administrative agency is to do as told by Congress, not to do what the agency think[s] it should do.”³

¹ Federal Trade Comm’n, *Noncompete Rule* (last accessed January 23, 2025), <https://www.ftc.gov/legal-library/browse/rules/noncompete-rule>.

² J. Edward Moreno, *Business Groups Sue to Stop F.T.C. from Banning Noncompete Clauses*, N.Y. Times (Apr. 24, 2024), <https://www.nytimes.com/2024/04/24/business/lawsuit-ftc-noncompete-ban.html>; see also Andrea Hsu, *Federal judge throws out U.S. ban on noncompetes* (Aug. 21, 2024), <https://www.npr.org/2024/08/21/g-s1-18376/federal-judge-tosses-ftc-noncompetes-ban> (noting that plaintiffs in the lawsuit challenging the rule argued that the ban would cause irreparable injury to employers, such as putting confidential information at risk and allowing competitors to poach employees).

³ *Id.*

Proponents Say the Ban Will Boost Workers and Innovation

Khan has emphasized the FTC’s motivation for announcing the ban by stating, “[t]he freedom to change jobs is core to economic liberty and to a competitive, thriving economy.”⁴ The agency underscored the “exploitative” nature of non-compete agreements, which it argues ultimately disadvantages workers by stifling their ability to start new jobs or businesses.⁵ While the ban comes with the aforementioned exceptions, the Rule potentially affected about 30 million workers who are already subject to a non-compete.⁶ Those who champion the Rule do so on the premise that non-competes “[limit] the number of qualified individuals” who can provide critical services, such as healthcare services, and create an uneven playing field.⁷ Without non-competes, workers can benefit, according to the FTC, from increased wages, which gives them more flexibility to entertain offers from other competitors without fear of violating their employment contract.⁸ The FTC asserted that more freedom will result in business formation, lower healthcare costs, and will “help drive innovation.”⁹

Support for a ban on non-competes spans across a range of states. Several, including traditionally liberal states like California and Minnesota, as well as conservative ones like Oklahoma and North Dakota, have already implemented such bans, and a number of other states prohibit them amongst lower-paid employees.¹⁰ However, some argue that state law may lack the

⁴ See Andrea Hsu, *Millions of workers are subject to noncompete agreements. They could soon be banned*, NPR, (Jan. 5, 2023), <https://www.npr.org/2023/01/05/1147138052/workers-noncompete-agreements-ftc-lina-khan-ban>

⁵ *FTC Announces Rule Banning Noncompetes* (April 23, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes>.

⁶ *Id.*

⁷ Pietje Kobus, *The Arguments For and Against Noncompete Agreements*, *Healthcare Innovation Group* (May 23, 2024), <https://www.hcinnovationgroup.com/policy-value-based-care/news/55042327/the-arguments-for-and-against-noncompete-agreements>; see also Winston Cho, *A Ban on Noncompetes Could Raise Pay-and Compliance Contracts-in Hollywood*, *The Hollywood Reporter* (April 23, 2024).

⁸ *Id.*

⁹ *FTC Announces Rule Banning Noncompetes*, *supra*, note 5.

¹⁰ *Millions of workers are subject to noncompete agreements. They could soon be banned*, *supra*, note 4.

enforcement power needed, particularly because lower-paid employees are less likely to resist an employer requiring non-competes.¹¹

The politics surrounding non-compete agreements also cut across party lines, and Trump appointees themselves are divided on the issue. On the one hand, the Texas federal judge who blocked the FTC's ban was a Trump appointee, and Andrew Ferguson, the newly appointed FTC Chair, has openly criticized Rule.¹² On the other hand, former Florida Congressman Matt Gaetz, and until recently, Trump's pick for Attorney General, does not support noncompete clauses.¹³ Vice President-Elect JD Vance has spoken positively of Lina Khan, although his view on the non-compete ban remains unclear.¹⁴

Constitutionality of the Rule and Opponents of the Ban

Litigation began within hours of the issuance of the final rule, with challenges primarily centered on whether the FTC has the statutory authority to enact this kind of substantive rule. Recent Supreme Court decisions regarding the major questions and non-delegation doctrines also may have implications for the rule's constitutionality. One argument against the Final Rule is that it may exceed the FTC's statutory authority.¹⁵ Section 6(g), of the FTC Act, which the agency cites as the basis for its rulemaking authority, has traditionally been interpreted as allowing the FTC to establish procedural or internal agency rules rather than substantive ones addressing unfair methods of competition directed at private parties.¹⁶ Unlike Section 5, Section

¹¹ *Id.*

¹² *Dissenting Statement of Comm'r Andrew N. Ferguson, Regarding the Matter of the Non-Compete Clause Rule*, Matter No. P201200 (June 28, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf.

¹³ See Amicus Brief of U.S. Representative Matt Gaetz in Support of Defendant Federal Trade Commission, *Ryan, LLC v. Federal Trade Commission* (June 4, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/US-Representative-Matt-Gaetz-ND-Tex-June-4-2024.pdf.

¹⁴ See Rebecca Klar, Vance: Biden FTC chief is 'doing a pretty good job', *The Hill* (Feb. 27, 2024), <https://thehill.com/policy/technology/4491363-vance-biden-ftc-chief-is-doing-a-pretty-good-job/>.

¹⁵ *Ryan, LLC v. Fed. Trade Comm'n*, No. 3:24-CV-00986-E, 2024 WL 3879954, at *9 (N.D. Tex. Aug. 20, 2024).

¹⁶ *Id.*

6(g) does not include a statutory penalty, which some contend suggests that Congress did not intend to grant the FTC substantive rulemaking power.¹⁷

Another challenge focuses on the “major questions” doctrine, which reserves decisions of “vast economic and political significance” to Congress and prohibits unconstitutional delegations of legislative authority.¹⁸ Congress must explicitly authorize the agency to act for such significant actions, and courts will not defer to the FTC’s interpretation of its enabling statute.¹⁹ Historically, non-competes have been regulated at the state level, and the FTC has rarely challenged noncompete agreements before proposing the Final Rule.²⁰ Therefore, opponents argue that the Final Rule falls under this doctrine, as it represents a sweeping expansion of the agency’s regulatory authority in this space.²¹

Some challengers further assert that even if the FTC were found to possess authority to engage in this rulemaking, the Rule nonetheless constitutes an impermissible delegation of legislative authority under the non-delegation doctrine.²² This doctrine prohibits Congress from transferring powers that are “strictly and exclusively legislative” to another branch. While Congress may grant agencies the authority to implement and adjudicate laws, it cannot delegate its core legislative powers, such as the creation of broad regulations. Finally, with the Supreme Court’s overturning of *Chevron* deference, judicial deference to the FTC’s claimed rulemaking

¹⁷ *Id.* at *10.

¹⁸ *Dissenting Statement of Comm’r Andrew N. Ferguson, supra*, note 12, at 10.

¹⁹ *Id.*

²⁰ Wendy K. Arends et al., *FTC Proposes Nationwide Ban on Non-Compete Agreements*, HUCSH BLACKWELL (Jan. 09, 2023), <https://www.huschblackwell.com/newsandinsights/ftc-proposes-nationwide-ban-on-non-compete-agreements>.

²¹ *Id.*; *Dissenting Statement of Comm’r Andrew N. Ferguson, supra*, note 12, at 10.

²² *Dissenting Statement of Commissioner Christine S. Wilson, Regarding the Notice of Proposed Rulemaking for the Non-compete Clause Rule*, Commission File No. P201200-1 (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf.

authority appears highly unlikely.²³ Without *Chevron* to bolster its position, the FTC will face an uphill battle defending the Rule’s legality.²⁴

Circuit Split Emerges on FTC’s Authority

In *Ryan LLC v. Federal Trade Commission*, Judge Ada Brown, a Trump appointee, of the Northern District of Texas, enjoined the FTC from implementing its ban on noncompete agreements against the plaintiffs.²⁵ The court cited *Loper Bright* and held that the FTC lacked the authority to enforce “substantive” rules, and the Rule was “arbitrary and capricious” because it lacked a reasonable basis.²⁶ In *Properties of the Villages, Inc. v. Federal Trade Commission*, Judge Timothy Corrigan of the U.S. District Court for the Middle District of Florida, an appointee of President George W. Bush, joined the Northern District of Texas in issuing a preliminary injunction against the noncompete ban.²⁷ Judge Corrigan ruled that the ban exceeded the FTC’s rulemaking authority.²⁸ Like in *Ryan*, the court limited the injunction to the named plaintiff, declining to issue a nationwide injunction.²⁹ In his decision, Judge Corrigan emphasized that the FTC had never exercised its Section 6(g) rulemaking authority “in the scope and manner” it sought with the non-compete ban, underscoring the agency’s overreach.³⁰

By contrast, in *ATS Tree Services, LLC v. Federal Trade Commission*, a federal district court in Pennsylvania reached the opposite conclusion, upholding the agency’s authority to implement the rule.³¹ Despite the *ATS* decision setting up a potential circuit split, the non-

²³ *Ryan, LLC*, 2024 WL 3879954, at *7, *supra*, note 15.

²⁴ *Id.*

²⁵ *Id.* at * 14.

²⁶ *Id.* at *9-13.

²⁷ *Properties of the Villages, Inc. v. Federal Trade Commission*, No. 5:24-CV-316-TJC-PRL, 2024 WL 3870380, at *11 (M.D. Fla. Aug. 15, 2024).

²⁸ *Id.* at *9.

²⁹ *Id.* at *11.

³⁰ *Id.* at *9.

³¹ *ATS Tree Servs., LLC v. Fed. Trade Comm’n*, No. CV 24-1743, 2024 WL 3511630, at *19 (E.D. Pa. July 23, 2024).

compete Rule is unlikely to reach the Supreme Court for an ultimate ruling on its validity as a newly constituted FTC under a second Trump administration is likely to effectively kill the rule.

The Future of the FTC Noncompete Ban Under Trump

The FTC has made a last-ditch effort to preserve its noncompete ban ahead of the Trump administration's return to power. On January 2, 2025, the agency filed its brief in the Fifth Circuit appealing Judge Ada Brown's order setting aside the ban. Its appeal focuses primarily on three arguments: 1) that the agency was within its authority to enforce the non-compete rule, 2) the agency reasonably concluded that non-competes are unfair methods of competition, and 3) constitutional and equitable principles require limiting the district court's universal vacatur of the ban.³² The FTC is simultaneously pursuing an appeal in the Eleventh Circuit to reverse the Florida District Court's preliminary injunction.³³

The ban has not been met with the same fate throughout the country. For example, in October 2024, a Pennsylvania company dropped its challenge to the ban after a federal judge refused to enjoin the FTC for its rule.³⁴ While the FTC may not have to consider an appeal in the Third Circuit, the ban's prospects still appear increasingly bleak as political, legal, and administrative realities mount. Both the Fifth and Eleventh Circuits are widely expected to affirm the Texas and Florida District Court rulings, thereby leaving the injunctions in place.

Beyond the judiciary, the ban faces significant challenges under a second Trump administration. With the appointment of current FTC Commissioner Andrew Ferguson as the

³² See Opening Brief for the Federal Trade Commission, *Chamber of Commerce of the United States of America, et al., v. FTC*, No. [24-10951] (filed Jan. 2, 2025),

<https://assets.law360news.com/2279000/2279088/01.02.2025%20ftc%20noncompete%20opening%20brief.pdf>.

³³ See Matthew Perlman, *FTC Defends Noncompete Ban in 11th Circuit Appeal*, Law 360 (Nov. 5, 2024),

<https://www.law360.com/articles/2257092/ftc-defends-noncompete-ban-in-11th-circ-appeal>.

³⁴ Christine Bestor Townsend & Zachary V. Zagger, *Pennsylvania Company Drops Challenge to FTC Noncompete Ban After Injunction Denial* (Oct. 9, 2024), <https://ogletree.com/insights-resources/blog-posts/pennsylvania-company-drops-challenge-to-ftc-noncompete-ban-after-injunction-denial/>.

new chair of the FTC and the eventual replacement of current Chair Lina Khan with Mark Meador, legal analysts predict the ban's likely demise.³⁵ Commissioner Ferguson's appointment as Chair does not require Senate approval, although Meador's appointment as a new Commissioner will. Commissioner Ferguson's dissenting statement upon the issuing of the Final Rule, in which he argued that the rule widely exceeded the FTC's authority, leaves little room for interpretation.³⁶ He contends that administrative agencies are limited to the powers explicitly granted by the legislature.³⁷

Ferguson argues that Section 6(g) only permits the FTC to establish rules for internal operations, not broad regulations governing private conduct, thereby barring the agency from issuing the Final Rule.³⁸ He also asserts that Section 5 does not grant the FTC authority for substantive rulemaking.³⁹ In a dissenting statement hinting at the potential reversal of the Final Rule, Ferguson criticized the Biden-Harris administration's decision to update the FTC antitrust guidance shortly before the Trump-Vance administration took office, claiming that the Biden-Harris FTC "has no future."⁴⁰ With Ferguson as Chair, the Rule is likely to be overturned, and the FTC is expected to return to its previous case-by-case approach.

Scenarios for the Ban's Demise

With Lina Khan's departure as FTC Chair, Commissioner Ferguson is likely to direct the Department of Justice to withdraw the pending appeals in the Fifth and Eleventh Circuits and

³⁵ See John Hendel, *Trump picks FTC Commissioner Andrew Ferguson to lead the agency*, POLITICO (Dec. 10, 2024), <https://www.politico.com/news/2024/12/10/andrew-ferguson-ftc-chair-trump-00193517>.

³⁶ See *Dissenting Statement of Comm'r Andrew N. Ferguson*, *supra*, note 12.

³⁷ *Id.* at 7-8; see also Bennett Matson, *The Future of Non-Competes Under Ferguson*, American Bar Association, (Jan. 29, 2025), https://www.americanbar.org/groups/health_law/resources/esource/2025-january/the-future-of-non-competes-under-ferguson/.

³⁸ *Id.* at 8.

³⁹ See *The Future of Non-Competes Under Ferguson*, *supra*, note 37.

⁴⁰ *Dissenting Statement of Comm'r Andrew N. Ferguson, Regarding the Antitrust Guidelines for Business Activities Affecting Workers*, Matter No. P251202 (Jan. 16, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/at-guidelines-for-business-activities-affecting-workers-ferguson-holyoak-dissent.pdf; see also *The Future of Non-Competes Under Ferguson*, *supra*, note 37.

abandon the rule.⁴¹ Such a move would leave the Texas federal court's injunction intact. Alternatively, the FTC could allow the appeals to proceed, with the expectation that higher courts, including the U.S. Supreme Court, would permanently strike down the ban in the unlikely event of a Circuit split, and set a precedent of limiting the FTC's rulemaking authority.

A more likely scenario is that the FTC's new leadership could vote to rescind the rule entirely; Commissioners Ferguson and Melissa Holyoak both opposed the ban when it was passed and would undoubtedly do so again if presented with another opportunity. Regardless of the chosen path, the chances are small that the proposed ban will ever be enacted. Although amending the Rule remains a possibility, such a process would be lengthy and require public input through the notice-and-comment procedure. FTC enforcement actions on a case-by-case basis against individually egregious uses of non-compete clauses also remains a possibility.

The State-Led Future of Noncompete Regulation

Without a federal rule, regulation will revert to a patchwork of state laws, as was the case prior to the FTC's intervention.⁴² Some states, such as California, have long prohibited noncompete provisions, while others impose varying levels of restrictions. Currently, only four states fully prohibit ban non-compete agreements, while 33 states and Washington D.C. have laws limiting their use.⁴³

A handful of states are also pursuing efforts to implement their own rules banning noncompete agreements. Currently, six states and New York City have pending legislation that, if enacted, will prohibit employee noncompete agreements. These jurisdictions include Illinois, Maine, Massachusetts, Michigan, Rhode Island, Wisconsin, and New York City.

⁴¹ *Id.*

⁴² See *FTC Proposes Nationwide Ban on Non-Compete Agreements*, *supra*, note 20.

⁴³ California, Minnesota, North Dakota, and Oklahoma prohibit employment non-compete agreements with limited exceptions, such as those related to the sale of a business.

Such initiatives have yielded mixed results, highlighting the challenges of achieving uniformity in this area. For instance, in 2023, New York Governor Kathy Hochul vetoed a bill that sought to prohibit all new non-compete agreements for workers in the state, citing concerns about its scope.⁴⁴ Similarly, both Maine and Rhode Island passed noncompete bills in 2024, but the governors in each state ultimately vetoed the proposals.⁴⁵ In contrast, Washington State has successfully strengthened protections for workers by amending its existing non-compete law to provide greater safeguards.⁴⁶

These varied outcomes suggest that state-level efforts may lead to a fragmented and decentralized regulatory landscape rather than a cohesive, nationwide approach the Final Rule offered. Such fragmentation is bound to pose ongoing compliance challenges for employers across jurisdictions. Given the legal challenges to the Final Rule and the Supreme Court's recent limitations on agency authority, the next best hope for a nationwide standard lies with Congress. However, past legislative efforts have failed, and it remains to be seen whether lawmakers will act to establish a clear and consistent federal framework for noncompete agreements.⁴⁷

⁴⁴ See Luis Ferré-Sadurní, *Hochul Vetoes Ban on Noncompete Agreements in New York*, N.Y. Times (Dec. 22, 2023), <https://www.nytimes.com/2023/12/22/nyregion/kathy-hochul-veto-noncompete.html>.

⁴⁵ See *Maine Governor Vetoes Restrictions on Non-Competition Agreements*, Jackson Lewis (Apr. 2, 2024), <https://www.jacksonlewis.com/insights/maine-governor-vetoes-restrictions-non-competition-agreements>; see also *Rhode Island Prohibits Use of Non-Competition Agreements With Nurses; Governor Vetoes Broader Ban*, Jackson Lewis (Jul. 3, 2024), <https://www.jacksonlewis.com/insights/rhode-island-prohibits-use-non-competition-agreements-nurses-governor-vetoes-broader-ban>.

⁴⁶ See *Washington State Expands its Noncompete Law*, Morgan Lewis (June 10, 2024), <https://www.morganlewis.com/pubs/2024/06/washington-state-expands-its-noncompete-law#:~:text=The%20bill%20expands%20the%20language,accepts%20an%20offer%20of%20employment>.

⁴⁷ S. 2614, 116th Cong. § 3 (2019), *Workforce Mobility Act of 2019*, <https://www.congress.gov/bill/116th-congress/senate-bill/2614/text>.