24-13102

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

PROPERTIES OF THE VILLAGES, INC.,

Plaintiff-Appellee,

—v.—

FEDERAL TRADE COMMISSION,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR *AMICI CURIAE* BRAD LANDER, COMPTROLLER OF THE CITY OF NEW YORK, INTERFAITH CENTER ON CORPORATE RESPONSIBILITY AND ZEVIN ASSET MANAGEMENT IN SUPPORT OF DEFENDANT-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record certifies, pursuant to Fed. R. App. P.26.1 and 29 and 11th Cir. R. 28.2.1, none have a parent corporation, and no publicly held corporation holds ten percent of any of their stock. Brad Lander is the Comptroller of the City of New York ("Comptroller"). The Comptroller serves as the investment advisor to five New York City Retirement Systems, which collectively have over $280 billion in assets under management. Interfaith Center on Corporate Responsibility is a coalition of more than 300 institutional investors collectively holding over $4 trillion in assets under management. Zevin Asset Management is an investment manager with a global focus that integrates sustainability into active investment management.

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for *Amici* certifies that, to the best of her knowledge, the following list of persons and entities have an interest in the outcome of this appeal (as defined under the rule):

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National Employment Lawyers Association (Florida Chapter), Inc.

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National Federation of Independent Business

Small Business Legal Center, Inc.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

IDENTITY AND INTEREST OF AMICI CURIAE

Amici Brad Lander, Comptroller of the City of New York; Interfaith Center on Corporate Responsibility ("ICCR"); and Zevin Asset Management recognize that national policy on the economy and the workforce is one factor impacting the long-term value of their investments.[1]

Brad Lander is the Comptroller of the City of New York. In that capacity, he serves as the investment advisor to five New York City Retirement Systems, which collectively hold over $280 billion in assets under management on behalf of over 700,000 active members and retirees.

ICCR is a coalition of more than 300 institutional investors collectively holding over $4 trillion in assets under management. Its members are a cross section of religious investors, foundations, asset managers, pension funds, endowments, and other long-term institutional investors, most of which owe fiduciary duties to clients and beneficiaries.

Zevin Asset Management is an investment manager with global focus that integrates sustainability into professional active investment management for clients, including individuals, families, foundations, religious institutions, and non-profits.

[1] All parties consent to the filing of this motion. No counsel for a party authored this brief in whole or in part and no party, counsel for a party, or other person made a monetary contribution intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

SUMMARY OF THE ARGUMENT

Amici respectfully submit this brief in support of the Federal Trade Commission ("FTC"), urging reversal of the District Court's entry of a preliminary injunction.

Widespread concern about the impact of coercive noncompete agreements on labor mobility and fair competition led the FTC to adopt a national, uniform rule banning noncompete agreements (the "Noncompete Rule"). 16 C.F.R. § 910.1-6 (2024). This decision was supported by major institutional investors with collectively billions of dollars of assets under management because they recognize that noncompete agreements harm the economy: they depress wages, cause workers to stay in jobs that are not the best fit, prevent firms from accessing the best workers, and reduce innovation.

The FTC's creation of a comprehensive rule that allowed all firms to compete for workers on more equal footing has been deterred by a few businesses across the country. In the Middle District of Florida, a real estate broker challenged the rule. While the District Court for the Middle District of Florida found that the FTC has substantive rulemaking authority over methods of unfair competition, it also found that the Noncompete Rule implicated the major questions doctrine and its enactment exceeded the FTC's authority, and granted plaintiff a preliminary injunction.

Given the anti-competitive impact of noncompete agreements, their regulation is squarely within the wheelhouse of the FTC and does not implicate the major questions doctrine. Further, it was thoroughly considered and carefully tailored to address the problem at hand. From the perspective of *Amici*, the FTC's chosen approach of a national, uniform rule is critical to a fair and free economy and Plaintiff-Appellants' proposed alternative – case-by-case adjudication – is inadequate to address the problem. The Noncompete Rule is, accordingly, a standard exercise of the FTC's power to regulate anti-competitive behavior that should be upheld.

ARGUMENT

I. Human Capital Management & Workforce Policy Impact the Value of Long-Term Investments

Human capital management and workforce policy impact the value of long-term investments in publicly traded companies. For example, industry groups with greater investment in human capital are correlated with greater revenue generated through innovation, including new services and products and enhancing existing services and products.[2] Corporate value is increasingly based on the people, not

[2] S&P Global, How good human capital management creates competitive advantage (July 7, 2023), https://www.spglobal.com/esg/insights/featured/special-editorial/how-good-human-capital-management-creates-competitive-advantage.

physical property.[3] Long-term investors are therefore mindful of the efficient operation of labor markets and the ability of firms to obtain the best employees and employees to participate fully in the U.S. economy.

Investors have demonstrated their concern about human capital management and workforce policy's impact on long-term investments through their engagement on these issues. For example, in recent years there have been multiple lawsuits alleging breaches of fiduciary duty premised on failure to oversee compliance with employment or labor law.[4] Given the significance of these issues, it is therefore unsurprising that major investors and asset managers took an interest in the FTC's Noncompete Rule, with multiple submitting comment during the rule-making process.[5] They supported the Noncompete Rule because, in one *Amici*'s words, "it

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[3] *See, e.g.*, Ocean Tomo, Intangible Asset Market Value Study, www2.oceantomo.com/l/710293/2022-0329/6dwh16/710293/1648600589q2zQV1QZ/Ocean_Tomo_IAMV_Study_Report_03_28_22.pdf (finding that in the last fifty years, intangible assets have comprised a steadily increasing percentage of the value of S&P 500 companies, from 17% in 1975 to 90% in 2020).

[4] *See, e.g.*, *In re McDonald's Corp. S'holder Derivative Litig.*, C.A. 2021-0324-JTL (Del. Ch.); *In re Pinterest Derivative Litig.*, 20-cv-08331 (N.D. Cal.); *Rudi v. Wexner*, 20-cv-3068 (S.D. Ohio); *In re Alphabet S'holder Derivative Litig.*, 19-cv-341522 (Superior Court of Cal.).

[5] California State Teachers Retirement System, Comment Letter on Proposed Rule to Ban Non-Compete Clauses (Apr. 19, 2023), https://www.regulations.gov/document/FTC-2023-0007-20914; Zevin Asset Management, Comment Letter on Proposed Rule to Ban Non-Compete Clauses (Apr. 19, 2023), https://www.regulations.gov/document/FTC-2023-0007-21087; New York City Comptroller Brad Lander, New York City Council Majority Leader

will ensure that noncompete agreements will no longer limit workers' freedom to change jobs to raise their pay, obtain better working conditions, and/or achieve upward mobility in their careers."

Amici's concern about noncompete agreements and support for the Noncompete Rule is well-founded. The FTC estimates that 30 million workers, *18% of all workers*, are bound by noncompete agreements. They create an artificial restraint on labor mobility, to the detriment of workers, firms, and the national economy. Noncompete agreements prevail across all industries – from high-paid to low-wage workers, including hairstylists, engineers, CEOs, and Amazon factory workers.[6] Noncompete agreements inhibit the free flow of workers, keeping individuals in jobs they would otherwise prefer to leave and preventing them from

Keith Powers, and Chair Tiffany Cabán, Comment Letter on Proposed Rule to Ban Non-Compete Clauses (Apr. 19, 2023), https://www.regulations.gov/document/FTC-2023-0007-21025; Oregon State Treasury, Comment Letter on Proposed Rule to Ban Non-Compete Clauses (Apr. 12, 2023), https://www.regulations.gov/document/FTC-2023-0007-20917.

[6] *See, e.g.*, Julian Mark, Noncompete clauses are everywhere, even for dancers and hair stylists, Washington Post (Mar. 10, 2023), https://www.washingtonpost.com/business/2023/03/10/noncompete-agreements-ftc/; Andrea Hsu, Many workers barely recall signing noncompetes, until they try to change jobs, NPR (Jan. 13, 2023), https://www.npr.org/2023/01/13/1148446019/ftc-rule-ban-noncompetes-low-wage-workers-trade-secrets; Marty Stempniak, FTC bans most noncompete clauses, drawing praise from radiologists, Radiology Business (Apr. 24, 2024), https://radiologybusiness.com/topics/healthcare-management/healthcare-staffing/ftc-bans-most-noncompete-clauses-drawing-praise-radiologists.

taking a job where their skills and talent may be better utilized and they could achieve higher pay. The impact of noncompete agreements is not limited to the firms that choose to use them, but rather the spillover effects are felt nation-wide. As the U.S. Department of Treasury - Office of Economic Policy found, the "reduced job churn caused by non-competes is itself a concern for the U.S. economy" because it disrupts "achieving a better matching of workers and firms."[7] This artificial reduction in labor mobility has particularly pernicious effects on depressing wages and stifling innovation.

Wage Depression: Noncompete agreements depress wages market-wide. A Department of Treasury study found that stricter noncompete enforcement was "associated with both lower wage growth and lower initial wages."[8] This is unsurprising, given that these agreements keep workers in jobs they would prefer to leave, and reduce incentives for employers to offer more competitive pay to attract workers. Professor Eric Posner found that wages "generally decline rather than increase in states that enforce or strictly enforce noncompetes . . . Noncompetes

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[7] Office of Economic Policy of the U.S. Dep't of the Treasury, Non-compete Contracts: Economic Effects and Policy Implications (Mar. 2016) at 4, https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Econimic_Effects_and_Policy_Implications_MAR2016.pdf.

[8] *Id.* at 19.

straightforwardly harm workers by depriving them of possible future offers."[9] Additionally, one of the most significant ways that workers can increase their wages is to change jobs or threaten to do so; noncompete agreements remove that leverage.[10]

These effects are particularly significant for lower-wage workers. After noncompete agreements were banned in the state of Oregon, wages for hourly workers increased by 2.3% across the state and by 4.6% in the industries that had particularly high rates of noncompete usage prior to the ban.[11] They are also particularly significant for women and people of color who research has shown are more likely to abide by noncompete agreements, thus particularly undermining mobility and entrepreneurship in these communities.[12] And in addition to the wage

[9] Eric A. Posner, The Antitrust Challenge to Covenants Not to Compete in Employment Contracts, 83 Antitrust L.J. 165, 165 (2020).

[10] Evan Starr et al., Mobility Constraint Externalities, 30 Org. Sci. 961 (2019).

[11] Michael Lipsitz & Evan Starr, Low-Wage Workers and the Enforceability of Noncompete Agreements, 68 Mgmt. Sci. 143, 144 (2021).

[12] Matt Marx, Employee Non-compete Agreements, Gender, and Entrepreneurship, 33 Org. Sci. 1756 (2022); *see also* Matthew S. Johnson et al., The Labor Market Effects of Legal Restrictions on Worker Mobility (Dec. 2023), available at https://www.nber.org/system/files/working_papers/w31929/w31929.pdf; Ayesha Bell Hardaway, The Paradox of the Right to Contract: Noncompete Agreements as Thirteenth Amendment Violations, 39 Seattle U. L. Rev. 957 (2016).

impact, noncompete agreements can lock workers into hostile, discriminatory, or unsafe work environments, instead of allowing them to exit for better workplaces.

Stifled Innovation: Academic research has repeatedly demonstrated that noncompete agreements stifle innovation because they reduce the flow of information across firms, misallocate employes and firms, and deter entrepreneurship, among other reasons. This is borne out through studies of changes in rates of innovation before and after policy changes increasing the enforceability of noncompete agreements, often measured by frequency and quality of patenting behavior. The Johnson, Lipsitz, and Pei (2023) study found that increased enforceability of noncompete agreements reduced patenting by 16-19% in the subsequent decade and reduced rates of new business formation. These results have been corroborated in other studies including Reinmuth and Rockall (2023) (finding that increased noncompete enforceability reduces patenting by 11.8 percent); He (2021) (finding that patents filed after an increase in noncompete enforceability are less valuable than those filed before); and Mueller (2022) (finding that workers who change industries because of the enforceability of noncompete agreements are 30% less productive after the change, as measured by innovative output, whereas industry-movers who do so for other reasons unrelated to noncompete enforceability are 16% more productive).

II. A Uniform, National Approach is Necessary Due to the Inability of Individual Workers to Meaningfully Avoid or Challenge Noncompete Agreements

Amici support the FTC's decision to regulate noncompete agreements through a uniform national rule, rather than putting the onus on individual workers to avoid or challenge noncompete agreements on a case-by-case basis.

A national approach puts all companies on equal footing. It eliminates the negative spillover effects on businesses that choose not to use noncompete agreements. And it enhances the nation-wide flow of labor, allowing workers and firms to find the best matches.[13]

Moreover, individual workers cannot meaningfully avoid noncompete agreements. As noted above, their utilization is widespread across the economy, including across highly-varied job duties. Multiple studies have found that 30% or more of surveyed firms use noncompete agreements for *all* of their employees – regardless of their access to competitive information or trade secrets that could, potentially, justify the use of a noncompete agreement. *See, e.g.*, Colvin and Shierholz, Noncompete agreements, Economic Policy Institute (Dec. 10, 2019),

[13] In contrast, where noncompete agreements are utilized, researchers see a correlation with workers redirecting their search from competitor firms to noncompetitors – a choice driven not by choice or optimal matching of firms and employers but rather concern about violating a noncompete agreement. Evan Starr et al., The Behavioral Effects of (Unenforceable) Contracts, 36 J.L. Econ. & Org. 633 (2020).

https://www.epi.org/publication/noncompete-agreements/ (survey found that 31.8% of surveyed firms used noncompetes with all employees and 49.4% used them for some employees); Natarajan Balasubramanian et al. "Employment Restrictions on Resource Transferability and Value Appropriation from Employees." *Available at SSRN 3814403* (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3814403 (survey found that 29.5% of surveyed firms used noncompetes with all employees and 66.5% used them for some employees); U.S. Government Accountability Office, Noncompete Agreements (May 2023), https://www.gao.gov/assets/gao-23-103785.pdf (survey found that 55% of firms used noncompetes with some workers).

Nor can individual workers meaningful challenge noncompete agreements. Research shows that workers generally believe their noncompetes are enforceable, even when they have clearly illegal or overbroad characteristics.[14] Those beliefs and fear of breaking a contract or facing legal liability makes workers reluctant to challenge noncompete agreements. Indeed, even knowing that an agreement is unenforceable does not remove their chilling effect. A study using nationally representative data found that workers cited noncompete

[14] J.J. Prescott & Evan Starr, "Subjective Beliefs about Contract Enforceability." Forthcoming at *Journal of Legal Studies*.

agreements as a reason they turned down job offers from competitor firms at equal rates in states that did and did not enforce noncompete agreements – it was not the actual legal enforceability but rather the fear of potential liability that drove worker behavior, to their detriment.[15] Noncompetes are associated with workers redirecting their job search from competitor firms to noncompetitors, even when their noncompete is unenforceable.[16]

Unfortunately, many firms further worker misunderstanding. Firms in states that *do not enforce* noncompetes were twice as likely to remind workers about the terms of their noncompete after they get a job offer from a competitor.[17] Again, the fear of a lawsuit or the moral or reputational concern of violating a contract restrains worker mobility. Further, there is anecdotal evidence that firms are reluctant to hire workers bound by noncompete agreements, even when the agreement is likely unenforceable.

Given the impact on the economy as a whole, and the inability of individual workers to meaningfully avoid or challenge noncompete agreements, the FTC's approach of a uniform, national rule is warranted.

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[15] Evan Starr et al., The Behavioral Effects of (Unenforceable) Contracts, 36 J.L. Econ. & Org. 633 (2020).

[16] *Id.*

[17] J.J. Prescott & Evan Starr, "Subjective Beliefs about Contract Enforceability." Forthcoming at *Journal of Legal Studies*.

Conclusion

For the foregoing reasons, *Amici* respectfully requests that the Court reverse the lower court's decision and permit the Noncompete Rule to come into effect.

Date: November 12, 2024

<u>/s/ Molly J. Bowen</u>

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Certificate of Service

I hereby certify that on November 12, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished through the CM/ECF system.

Date: November 12, 2024

/s/ Molly J. Bowen
Molly J. Bowen

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