United States Senate
WASHINGTON, DC 20510

March 20, 2019

Mr. Joseph Simons
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chairman Simons:

We write to urge the Federal Trade Commission to use its rulemaking authority, along with other tools, in order to combat the scourge of non-compete clauses rigging our economy against workers.

Non-competes are legal clauses, often hidden in the fine print of employee contracts, which bar employees from founding or working for a competing business.[1] Powerful companies have forced workers in almost every industry – from the drilling rig business, to sales and marketing, to sandwich making – to sign these insidious little clauses.[2] In all, an estimated 30 million American employees and independent contractors are currently subject to a non-compete clause.[3]

At a time of gaping economic inequality, we can ill afford to leave non-competes unaddressed. Non-compete clauses harm employees by limiting their ability to find alternate work, which leaves them with little leverage to bargain for better wages or working conditions with their immediate employer. It is therefore no surprise that a study by the Department of the Treasury found that non-compete clauses are "associated with both lower wage growth and lower initial wages."[4] In addition, one expert in this area found that the restraints imposed by non-competes are particularly harmful to women who often have limited job mobility to begin

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[1] *See* Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes in the U.S. Labor Force* 1-2, 15 (updated Jan 12. 2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714.

[2] *See* Conor Dougherty, *How Noncompete Clauses Keep Workers Locked In* N.Y. Times (May 13 2017) https://www.nytimes.com/2017/05/13/business/noncompete-clauses.html (regarding a drilling rig operator and magazine sales and marketing worker bound by non-compete clauses); Evan Starr *supra* note 1 at 1 (regarding sandwich makers bound by non-compete clauses).

[3] Ross Eisenbrey, *White House Issues Call to Action on Non-Compete Clauses* Economic Policy Institute (Oct. 25 2016) https://www.epi.org/blog/white-house-issues-call-to-action-on-non-compete-clauses; Evan Starr *supra* note 1 at 2.

[4] Office of Economic Policy, *Non-Compete Contracts: Economic Effects and Policy Implications* U.S. Dep't of Treasury (Mar. 2016) 19 https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf

with, given the "need to coordinate dual careers, family geographical ties and job market re-entry after family leave."[5]

Thanks to years of research and advocacy, there now appears to be a bipartisan consensus at the Federal Trade Commission that non-competes are harmful to workers. In response to questions from Senator Blumenthal, at least three of the Federal Trade Commission's five commissioners have noted that they are deeply troubled by non-competes. For example, Federal Trade Commissioner Noah Phillips, a Republican appointee, stated that "various labor restrictions" – including non-compete clauses – "may be combining to stifle worker mobility, and with it potentially wages and opportunities, as well."[6] Commissioners Chopra and Slaughter – two Democratic appointees – have both noted their strongly held concerns about non-competes as well.[7] We are unaware of any definitive comments from either yourself or Commissioner Wilson about whether non-compete clauses are harmful to workers.

The bipartisan concern over the use of non-competes extends to Congress, where there are proposals from both Republicans and Democrats to broadly restrict the use of non-competes. Given this bipartisan consensus, now is the time for action. A coalition of over 15 unions and consumer protection groups and over 45 academics has filed a thoughtful and well-considered petition for rulemaking to prohibit worker non-compete clauses with the Federal Trade Commission. Although the Federal Trade Commission's rulemaking authority is disputed in some areas, its authority to define "unfair methods of competition" through administrative rulemaking is clear.[8] Until such time as Congress passes legislation restricting the use of non-competes, we urge the Federal Trade Commission to use this authority to promulgate a rule that limits the use of non-compete clauses going forward.

While case-by-case adjudication is an appropriate tool to address some anticompetitive harms, we believe that rulemaking would be a particularly effective way of combating non-competes for two reasons. First, in states that enforce non-competes, workers have little power to fight back against non-compete clauses on their own. On top of generally having the power to impose non-competes on workers, employers often strategically coerce workers into signing these non-compete clauses by springing them on workers when they are most vulnerable, such as

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[5] Orly Lobel, *Companies Compete But Won't Let Their Workers Do The Same* N.Y. Times (May 4 2017) https://www.nytimes.com/2017/05/04/opinion/noncompete-agreements-workers.html.

[6] Noah Joshua Phillips, *Responses for the Questions for the Record – Senate Commerce Subcommittee Hearing: "Oversight of Federal Trade Commission"* (Nov. 27 2018).

[7] *See* Rebecca Kelly Slaughter, *Responses for the Questions for the Record – Senate Commerce Subcommittee Hearing: "Oversight of Federal Trade Commission"* (Nov. 27 2018) ("Non-compete clauses are anticompetitive and unfair for the vast majority of workers in our country, and unequivocally for those who have little or no bargaining power when negotiating employment contracts."); Rohit Chopra, *Responses for the Questions for the Record – Senate Commerce Subcommittee Hearing: "Oversight of Federal Trade Commission"* (Nov. 27 2018) ("The prevalence of non-compete clauses are a significant concern. Firms may be using these clauses to suppress wages and impede a competitive labor market.");

[8] *See e.g.* Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645 (2017) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2830702 (regarding the Federal Trade Commission's rulemaking authority); Rohit Chopra, *Comment of Federal Trade Commissioner Rohit Chopra*, FTC-2018-0074, 12-14 https://www.ftc.gov/system/files/documents/public_statements/1408196/chopra_-_comment_to_hearing_1_9-6-18.pdf (same).

on their first day at work.[9] In addition, workers bound by forced arbitration agreements can only challenge their non-compete clauses if they seek to vindicate their rights in a secret dispute system that is stacked against them.[10] Since workers cannot effectively litigate their own non-competes, a case-by-case approach is unlikely to succeed in combating non-competes.[11] Rulemaking is therefore warranted. Second, given the ways in which non-competes are lowering wages and harming workers, we believe the need for action is urgent. A rule would be an efficient way to put all employers nationwide on notice about the legality of non-competes going forward.

The Federal Trade Commission has a duty to protect not only consumers, but also workers.[12] Currently, workers are suffering serious anti-competitive harms from the proliferation of non-competes in the economy. It is not enough that the Federal Trade Commission shares our concerns about these actions. It must act decisively to address them.

We therefore respectfully request that you respond within 30 days to keep us appraised of any actions the Federal Trade Commission is taking to address non-compete clauses. We also welcome responses from individual commissioners who may wish to respond to this letter. Thank you for your consideration.

Sincerely,

RICHARD BLUMENTHAL
United States Senate

BENJAMIN L. CARDIN
United States Senate

SHERROD BROWN
United States Senate

ELIZABETH WARREN
United States Senate

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[9] Matt Marx, *The Firm Strikes Back: Non-Compete Agreement and the Mobility of Technical Professionals* 76 American Sociological Review 695, 696 (2011) https://media.wix.com/ugd/30296c_24d90c6ee5de4e0297b9485347f726ca.pdf

[10] *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2815 (2015) (noting that "almost no . . . employees 'do' arbitration at all"); Rohit Chopra *supra* note 8 at 10-11.

[11] *See* Rohit Chopra *supra* note 8 at 9-11.

[12] *See e.g.* Joseph Simons, *Senate Committee on the Judiciary "Oversight of the Enforcement of Antitrust Laws* (Nov. 6 2018) 19-21 https://www.judiciary.senate.gov/imo/media/doc/Simons%20Responses%20to%20QFRs1.pdf (regarding the Federal Trade Commission's role in protecting workers).

EDWARD J. MARKEY
United States Senate

CHRIS VAN HOLLEN
United States Senate

AMY KLOBUCHAR
United States Senate