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April 19, 2023

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Ave NW
Washington, DC 20580

RE: Non-Compete Clause Rule (RIN 3084-AB74)

Dear Chair Khan:

Restaurant Opportunity Centers United (“ROC United”) appreciates the opportunity to comment in support of the Federal Trade Commission’s Proposed Rule regarding non-compete clauses.¹ The Proposed Rule would, among other things, provide that it is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; to maintain with a worker a non-compete clause; or, under certain circumstances, to represent to a worker that the worker is subject to a non-compete clause. Non-Compete Clause Rule, 88 Fed. Reg. 3482 (Jan. 19, 2023) (to be codified at 16 C.F.R. 910). We strongly support this rulemaking by the Federal Trade Commission (“FTC”), which should significantly reduce the use of non-compete clauses in the food preparation and service industry.

ROC United was founded after September 11, 2001, as a worker relief center for affected restaurant workers and their families in New York City. ROC United has grown into a national organization powered by local chapters throughout the U.S. The restaurant industry is one of the largest and fastest-growing industries in the United States, employing more than 9 percent of the total private sector workforce—13.5 million people in 2019. ROC United serves and represents all workers in the industry, from traditional back and front-of-the-house occupations in fine dining full-service restaurants to combined food prep and serving workers in quick service to the growing segment of app-based delivery. ROC United has offices in Los Angeles, Oakland, Minneapolis, Chicago, Detroit, Pittsburgh, Philadelphia, New York, New Orleans, Jackson, Mississippi, and Washington, D.C. ROC United has an interest in ensuring that all restaurant workers are able to achieve mobility within their industry of choice, are not unduly burdened by non-compete agreements, and can pursue employment that maximizes their efficiency and productivity. We believe the Proposed Rule, when finalized, will bolster food preparation and service workers’ ability to make a good living and advance their careers with more autonomy. This comment highlights some of the most common harms that non-compete agreements cause

¹ If you have any questions, please contact our counsel for submission of this comment, Breanne Palmer, Democracy Forward Foundation, bpalmer@democracyforward.org.

in the food preparation and service industry, and shares a selection of the critical perspectives ROC United members and workers have on the FTC's Proposed Rule.

I. Non-compete agreements in the food preparation and service industry pose significant threats to worker mobility, hinder entrepreneurship, and prevent workers from earning higher wages.

Food preparation and service industry workers make up an essential, and lucrative part of the U.S. economy—an industry comprising more than 15 million workers across the country, with a forecasted \$997 billion in sales for 2023.² The majority of these workers are women and people of color.³ According to a 2021 study surveying almost seventy thousand workers, one in six food preparation and service workers in the United States has signed a non-compete agreement with their employer.⁴ This means as many as 1.4 million food and service workers may be bound by a non-compete agreement.⁵ Making matters worse, only ten percent of employees negotiate over non-compete terms, and one-third of employees are asked to sign non-compete clauses *after* accepting employment.⁶ In ROC United's experience, non-compete clauses are often buried in the fine print of employment contracts and in many cases are not flagged by employers; many workers do not even recall signing a non-compete agreement until an employer attempts to enforce it.⁷

The use of non-compete agreements has become more popular for low-wage positions, like many of those in the food preparation and service industry. An Economic Policy Institute study conducted in 2019 shows that about thirty percent of workplaces paying less than \$17 per hour require non-competes.⁸ In the leisure and hospitality industries, twenty-five percent of workplaces use non-competes, and one in seven survey respondents use non-competes for all of their workers.⁹ Even where non-compete clauses cannot be enforced (or are often not enforced), it is ROC United's experience that the mere threat of being sued by an employer can deter workers from leaving their jobs. This is even more true for those who cannot afford legal fees for their defense, which includes—almost by definition—most low wage workers.¹⁰

² Nat'l Rest. Ass'n, *National Statistics*, <https://restaurant.org/research-and-media/research/industry-statistics/national-statistics/> (last visited Apr. 17, 2023).

³ ROC United, *2020 State of the Restaurant Workers* 1 (2020), <https://stateofrestaurantworkers.com/>.

⁴ Natarajan Balasubramanian et al., *Employment Restrictions on Resource Transferability and Value Appropriation from Employees* (Jan. 31, 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3814403.

⁵ *Top Iowa Brewery Sues Former Worker, Seeking to Topple Rival*, Associated Press (July 30, 2018), <https://apnews.com/article/17875dc03ee243d78ae0d7ddd262dfef>; U.S. Bureau of Lab. Stat., *Occupational Outlook Handbook: Food & Beverage Serving & Related Workers*, <https://www.bls.gov/ooh/food-preparation-and-serving/food-and-beverage-serving-and-related-workers.htm> (last updated Sept. 8, 2022).

⁶ Evan P. Starr et al., *Noncompete Agreements in the U.S. Labor Force*, 64 J. L. & Econ. 53, 57 tbl. 1 (2021), https://www.journals.uchicago.edu/doi/pdf/10.1086/712206?casa_token=LRcXxGIFIOUAAAAA:g5rrOGpMpGRsTAgsFWnI9WlOO4jJjOITIK1Pzdg0RzoDMGTmM_ucS7bOvgp02n9TqfcktNDdwKzN.

⁷ 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>.

⁸ Alexander J.S. Colvin & Heidi Shierholz, Econ. Pol'y Inst., *Noncompete Agreements*, at 8 tbl. 4 (2019), <https://www.epi.org/publication/noncompete-agreements/>.

⁹ *Id.* at 6.

¹⁰ Hsu, *supra* n. 7.

The sandwich chain Jimmy John's provides an infamous example of the use of non-compete clauses by fast food restaurants, as uncovered by The Huffington Post in 2014.¹¹ Jimmy John's employment contracts used a broad non-compete that restricted former employees from future employment at any company that "derives more than ten percent (10%) of its revenue from selling submarine, hero-type, deli-style, pita, and/or wrapped or rolled sandwiches and which is located within three (3) miles of" any Jimmy John's store location in the United States.¹² Jimmy John's has more than 2,000 locations nationwide, essentially prohibiting former Jimmy John's workers from seeking employment at a wide range of restaurants across the country.¹³ To illustrate the issue, Jimmy John's has 80 locations in the state of Florida, 53 locations in Georgia, and 92 locations in Ohio.¹⁴ Jimmy John's dropped the non-compete clauses from their contracts in 2016, following an investigation by the New York Attorney General's office.¹⁵ ROC United is encouraged that the Proposed Rule makes direct reference to Jimmy John's non-compete clauses.¹⁶

The COVID-19 pandemic has made non-competes use by fast food chains especially pernicious. As fast food service workers were increasingly deemed "essential workers," many fast food chains began raising wages, but workers who were bound by non-compete agreements could not take advantage of higher wages by moving to another employer within the industry.¹⁷ Even the U.S. Chamber of Commerce, a staunch defender of non-compete agreements, has noted that "a noncompete agreement used to make sure a fast food worker, making minimum wage, doesn't leave to work across the street at a competing restaurant that is willing to pay more is very likely a problem."¹⁸

¹¹ Dave Jamieson, *Jimmy John's Makes Low-Wage Workers Sign 'Oppressive' Noncompete Agreements*, HuffPost (Oct. 15, 2014), https://www.huffingtonpost.com/2014/10/13/jimmy-johns-non-compete_n_5978180.html.

¹² Open Markets Inst. et al., *Petition for Rulemaking to Prohibit Worker Non-Compete Clauses 6* (Mar. 20, 2019), <https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5eaa04862ff52116d1dd04c1/1588200595775/Petition-forRulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf>.

¹³ See Jimmy John's, *Locations*, <https://locations.jimmyjohns.com/> (last visited on Apr. 18, 2023); Student Borrower Prot. Ctr., *Trapped at Work* 11 (2022), https://protectborrowers.org/wp-content/uploads/2022/07/Trapped-at-Work_Final.pdf.

¹⁴ See Jimmy John's, *Locations*, *supra* n. 13 (select states "Florida," "Georgia," and "Ohio" from the list of states).

¹⁵ 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>.

¹⁶ 88 Fed. Reg. at 3483.

¹⁷ Claire Kelloway, *How the FTC's Noncompete Ban Would Affect Food Workers*, Food & Power (Jan. 26, 2023), <https://www.foodandpower.net/latest/ftc-noncompetes-rule-jan-26-23>.

¹⁸ U.S. Chamber of Commerce (last accessed April 17, 2023) <https://www.uschamber.com/article/2-rule-or-statute-non-compete-agreements-should-be-made-presumptively-unlawful>; Peter Coy, *Why Are Fast Food Workers Signing Noncompete Agreements?*, N.Y. Times (Sept. 29, 2021), <https://www.nytimes.com/2021/09/29/opinion/noncompete-agreement-workers.html>.

Outside of fast food chain employers, noncompetes also impact chefs,¹⁹ white-collar food service managers,²⁰ food safety and science specialists,²¹ and more across the industry. In one case, a chef employed in New York moved to Berlin, Germany, to wait out the expiration of a broad non-compete clause that forbade him from working at any food service establishment in New York City for one year after resignation.²² The head brewer of a brewery in Iowa moved 100 miles away from a former employer to seek new employment, but was sued by the former employer whose non-compete dictated that the brewer could not work at a competitor within 150 miles for two years.²³ After a fine dining restaurant closed in Chicago in 2018, the restaurant's former owner tried to enforce a non-compete with the former chef and general manager, preventing them from opening a new restaurant in Chicago for at least one year.²⁴ One of the authors of a 2021 study on non-competes and other employment restrictions aptly summarizes what non-competes look like for restaurant workers:

If you work at a restaurant, and you have a non-compete, and you want to get hired by another restaurant down the street, or you want to start a restaurant, this non-compete would prevent you from doing this immediately. You would have to either leave the area or sit out the market for whatever the period of your non-compete is and then re-enter. The key idea is that it's going to [get] workers to stay longer, stunt their mobility, prohibit them from taking better jobs in their chosen field, and reduce entrepreneurship.²⁵

Additionally, one study has found that, where employment restrictions like non-competes are enforced, entrepreneurship decreases: new firm entry into an industry declines as much as twelve percent.²⁶ Workers in the food preparation and service industry who are bound by non-competes cannot create jobs, innovate, or meaningfully compete with existing players to move the industry forward. Recent studies have found that non-compete agreements

¹⁹ Jessica Sidman, *Mirabelle Owner Settles Non-Compete Lawsuit With Ex-Chef Frank Ruta*, Washingtonian (Feb. 21, 2020), <https://www.washingtonian.com/2020/02/21/mirabelle-owner-settles-non-compete-lawsuit-with-ex-chef-frank-ruta/>; Andrea Strong, *Non-Compete Agreements Can Be Crippling for Chefs*, Eater (Oct. 13, 2017), <https://www.eater.com/2017/10/13/16459044/non-competes-chefs-how-do-they-work>.

²⁰ Anonymous Comment on Notice of Proposed Rulemaking on the Non-Compete Clause Rule (Jan. 11, 2023), available at <https://www.regulations.gov/comment/FTC-2023-0007-0358>.

²¹ Madisound Speaker Components, Inc., Comment on Notice of Proposed Rulemaking on the Non-Compete Clause Rule (Jan. 13, 2023), available at <https://www.regulations.gov/comment/FTC-2023-0007-1286>; Anonymous Comment on Notice of Proposed Rulemaking on the Non-Compete Clause Rule (Jan. 10, 2023), <https://www.regulations.gov/comment/FTC-2023-0007-0214>; Dylan Baker, Comment on Notice of Proposed Rulemaking on the Non-Compete Clause Rule (Jan. 18, 2023), <https://www.regulations.gov/comment/FTC-2023-0007-2927>.

²² Strong, *supra* n. 19.

²³ *Top Iowa Brewery Sues Former Worker*, *supra* n. 5.

²⁴ Kristen Hawley, *How Biden's Recent Executive Order Could Help Restaurant Workers Find Better Jobs*, Food & Wine (July 14, 2021), <https://www.foodandwine.com/news/restaurant-noncompete-clauses-biden-antitrust-executive-order>; Ashok Selvam, *Ex-Grace Chef and GM Sue Owner Two Months After Sudden Shutter*, Chicago Eater (Feb. 22, 2018), <https://chicago.eater.com/2018/2/22/17040314/grace-lawsuit-chicago-michelin-star-noncompete-duffy-muser>.

²⁵ Jessica Fu, *Biden Is Targeting Non-Compete Agreements with an Executive Order. Here's What That Could Mean for the Restaurant Industry*, The Counter (July 13, 2021), <https://thecounter.org/biden-targeting-non-compete-agreements-executive-order-push-workers/>.

²⁶ Jessica S. Jeffers, *The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship*, at 18 (Oct. 28, 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3040393.

systematically drive down wages, even for workers who are not bound by them.²⁷ Workers who are trapped in their jobs by non-competes represent positions that do not open up for someone else—and if employers know their workers cannot leave, there are few incentives to offer competitive pay and benefits.²⁸ In all respects, non-compete clauses in the food preparation and service industry impose significant burdens and harms on workers who would otherwise seek gainful employment that better serves their needs and talents, or who would start their own businesses.

II. Collected stories from food preparation and service industry workers vividly illustrate the need for the FTC’s proposed ban on non-compete agreements.

In direct response to FTC Commissioners Rebecca Kelly Slaughter and Alvaro M. Bedoya’s joint request for the lived experiences of workers, ROC United solicited anonymous worker stories from across the food preparation and service industry. Below are excerpts of some of these worker narratives, which highlight the harms that non-competes inflict in that industry specifically.

- “I have worked for both a corporate-owned and franchise-owned McDonald’s restaurants for over ten years. I am a single parent, struggling to make ends meet. But I didn’t have any opportunities to raise my income because I unknowingly entered into an agreement that forbids hiring me for other locations or other jobs that are a ‘competitor’ of McDonald’s. I didn’t know about non-compete terms because they were not explained to me during the hiring process. The FTC proposed rule on banning non-competes would allow me to grow and increase my wages to support myself and my child. I would no longer suffer from reduced wages and loss of potential growth opportunities.”
- “During the pandemic, as an essential worker, I was stuck at my job, earning \$2.13 per hour, because of the non-compete clause that I agreed to have in my contract. I didn’t know that it would affect my wages and my life greatly. As a hardworking father, I risked my own life and the health of my family so that people could eat or bring food to their tables. But at that time, there were other employers that saw how important our job was, and they were hiring for higher wages and better benefits. Yet, I couldn’t leave my job because of the non-compete terms. I believe that the FTC proposed rule on banning non-compete terms would help me and millions of restaurant workers who may be in a similar situation.”
- “[T]he only sense [non-compete agreements] make for food-service jobs is to strengthen employers’ upper hand in dominating underpaid workers. They are grossly unfair to the workers.”

²⁷ Matthew Lipsitz et al., *The Labor Market Effects of Legal Restrictions on Worker Mobility* (Oct. 12, 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381; Lina M. Khan, *Noncompetes Depress Wages and Kill Innovation*, N.Y. Times (Jan. 9, 2023), <https://www.nytimes.com/2023/01/09/opinion/linakhan-ftc-noncompete.html>.

²⁸ Khan, *supra* n. 27.

- “I wholeheartedly support a proposed ban of non-compete agreements between employers and workers. What excites me the most is that the proposed rule would also require employers to rescind any existing non-compete agreements with current and former workers. These non-compete agreements slow down wage growth for the most low-income workers in America.”
- “Non-compete clauses prevent our economy from working as it should...[by allowing employers] to maintain jobs that have working conditions and pay that do not reflect the value of the workers to the employer.”
- “No one in the food industry, whether you work at McDonald's or a fancy restaurant, should be subject to a non-compete agreement. Non-competes contribute to gender and racial-based wage gaps and suppress an individual's income after that person leaves a particular employment (or worse, is fired). If lawyers in New York cannot be held to a non-compete agreement, why should a restaurant worker be?”
- “Among many issues with them [...] non-compete terms are harmful to the economy, as skilled workers are removed from the workforce for purely economic reasons - or at least that was my experience, when my former boss decided that he didn't want to pay for experienced workers and forced me to quit work, on the terms that I would not work in my field for three years.”
- “Workers making survival wages should not be subject to such restrictive clauses as a non-compete. The corporate ‘secrets’ of the restaurant world seems like an excuse to prevent movement to better opportunities.”
- “Non-compete clauses make it harder for people to switch jobs in order to get better wages. As a result, employers can continue to pay poorly because they know their employees won't quit. Knowing their workers could leave for jobs that pay better is [an] incentive for companies to pay their employees well. In the end, everybody benefits because workers have more to spend, and thus stimulate the economy.”
- “Non-compete clauses can trap workers with a specific skill-set in a toxic workspace because moving outside of the non-compete zone is expensive and can impact entire families who have to uproot or take a pay cut to learn a new skill in a new industry. Having non-compete clauses means the employers have no incentive to provide competitive wages in their area.”

III. The Commission’s justification for the Proposed Rule accurately acknowledges the experiences of food preparation and service workers hindered by non-compete agreements.

ROC United strongly supports the Proposed Rule’s ban on non-compete agreements. The Final Rule would be a critical intervention that will benefit millions of people in the food and restaurant industry, facilitating the narrowing of racial and gender-based wage gaps, and

promoting worker mobility and increased income.²⁹ According to Professor Sachin Panya of the University of Connecticut, “Laws to restrict non-compete agreements are less effective if they depend on the individual worker to enforce them, because workers—especially low-wage workers—are less likely to risk being sued or hiring a lawyer. A government agency like the FTC has more power and resources to identify and sue employers who use illegal non-compete clauses, and thereby better deter other employers from using them, too.”³⁰

ROC United agrees with experts that the FTC is well suited to take action and enforce a federal ban on non-compete agreements. Such a nationwide ban is crucial, moreover, because the harms from non-competes can and do flow across state lines.³¹ We also applaud the FTC for including a notification provision in the Proposed Rule, recognizing that some employers continue to use non-compete agreements in states that disallow such agreements.³² The Proposed Rule will not only prohibit employers from telling workers they are bound by a non-compete clause, but it will also helpfully require that employers actively notify workers that existing non-compete clauses are null and void.

Thank you for your consideration of our comments. We encourage the FTC to finalize the Proposed Rule promptly.

Sincerely,

Dr. Lawren M. Long
National Policy Coordinator
ROC United

²⁹ 88 Fed. Reg at 3488.

³⁰ ROC United, *Ban Non-Compete Clauses*, <https://rocunited.org/ban-noncompetes/> (last visited Apr. 18, 2023).

³¹ 88 Fed. Reg. at 3537-38.

³² *Id.* at 3537.