UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RYAN, LLC, Plaintiff, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*, Plaintiff-Intervenors, v. FEDERAL TRADE COMMISSION, Defendant.	CASE NO.: 3:24-CV-986-E

[PROPOSED] BRIEF *AMICUS CURIAE* OF AMERICAN ACADEMY OF EMERGENCY MEDICINE IN SUPPORT OF DEFENDANT AND IN OPPOSITION TO PLAINTIFF'S AND INTERVENORS' MOTIONS FOR STAY OF EFFECTIVE DATE AND PRELIMINARY INJUNCTION

Brandon Elledge,
Don't Fret (Yet): Trade Secrets, NDAs and Non-Solicits After the FTC Non-Compete Rule, Holland & Knight, https://perma.cc/K7T4-82Q 18

Brett Kelman and Blake Farmer,
Doctors Are Disappearing From Emergency Rooms as Hospitals Look to Cut Costs, KFF HEALTH NEWS (Feb. 13, 2023), https://perma.cc/7NHZ-RX 9

Dr. David Farcy,
Letter Re: Fed Trade Comm'n: Non-Competes in The Workplace: Examining Antitrust and Consumer Protection Issues (Mar. 2, 2020) https://perma.cc/5D6Q-52L 16

Dr. Jane M. Zhu, Hayden Rooke-Ley, Erin Fuse Brown,
A Doctrine in Name Only – Strengthening Prohibitions against the Corporate Practice of Medicine, 398 New Eng. J. Med. 11 12

Dr. Jennifer Gholson,
Hearing on The Collapse of Private Practice: Examining the Challenges Facing Indep. Med. Before the Subcomm. on Health of the House Ways & Means Comm., 118th Cong. (May 23, 2024) 10

Fred Schulte,
Sick Profit: Investigating Private Equity's Stealthy Takeover of Health Care Across Cities and Specialties, KFF Health News (Nov. 14, 2022), https://perma.cc/H9GM-C6ZN 12

Katie Arcieri,
UFC Fighters Ask Court to Approve $335 Million Cash Settlement, Bloomberg Law, May 2024, https://perma.cc/2Z-JE8LJ 17

Sandeep Vaheesan and Matthew Buck,
Non-Competes and Other Contracts of Dispossessions n

TEX. DEP'T OF HEALTH AND HUM. SERV., PHYSICIAN SUPPLY AND DEMAND PROJECTIONS

The Final Rule, as written and issued by the FTC, serves the public interest and our members. As for our members, a stay of the Rule would be harmful. Purported justifications for non-compete clauses are not present for our profession and forcing our members to challenge unreasonable non-compete agreements through litigation or, a case-by-case basis, would be unduly time-consuming and expensive. This is true even for the relatively high-paid emergency room physicians we represent.

LEGAL STANDARD

A preliminary injunction is an extraordinary remedy that should only be granted upon a clear showing of: (i) a "substantial likelihood of success on the merits"; (ii) a "substantial threat" of irreparable harm absent an injunction; (iii) a balance of hardships in the movant's favor; and (iv) no "disserv[ice] to the public interest." Planned Parenthood of Hous. v. Sanchez, 403 F.3d 324, 329 (5th Cir. 2005). In addition, the "[i]ssuance of a preliminary injunction is to be treated as the exception rather than the rule." Foley v. Biden, 2021 WL 7708477 at *1 (N.D. Tex. Oct. 6, 2021). If a movant fails to meet the balance of equities and overall public interest requirement, the request for preliminary injunctive relief must be denied. See, e.g., Winter v. NRDC, 555 U.S. 7, 26 (2008) (Supreme Court overturning a preliminary injunction against the government because "the balance of equities and consideration of the overall public interest" weighed in the government's favor).

Challenges Facing Indep. Med. Before the Subcomm. on Health of the House Ways & Means Comm., 118th Cong. (May 23, 2024) ("For instance, when I was considering selling my practice, I considered going to work for the hospital, but I would have been under a non-compete. Due to the expanse of where they had practices and outlying hospitals, if I were to break that non-compete, I think I would be 80 miles away from where I live, and I would have had to uproot my family."); see also Am. Coll. of Emergency Physicians, Comment on Proposed Non-Compete Clause Rule, 89 Fed. Reg. 38,342 (Mar

Our members have reported significant issues with the PE staffing model, including being required to treat a higher number of patients than is safe, breaks from ordinary safety protocols, and a lack of hospital beds. See, e.g., Testimony of Dr. Jonathan Jones, Fed. Trade Comm'n, Transcript of "Private Capital, Public Impact: An FTC Workshop on Private Equity in Health Care" (Feb. 7, 2024), https://perma.cc/GQS4-7GNE ("I've worked at multiple hospitals and under multiple employment models, and I can definitely say that working under a private equity backed managed group has been the worst experience of my professional life. More importantly, it's also been the worst possible experience for my patients."). But if our members want to leave these PE-backed groups out of concern for patient safety, they risk upending their family lives due to geographically restrictive non-competes. See, e.g., Am. Coll. of Emergency Physicians, Comment on Proposed Non-Compete Clause Rule, 89 Fed. Reg. 38,342 (Mar. 7, 2023), https://perma.cc/V9ND-KJHH. Additionally, the state licensure, credentialing and insurance requirements of our

Consolidation in Healthcare Markets: Docket No. ATR 102 (May 2, 2024), https://perma.cc/6PBJ-3L6. Non-competes, therefore, effectively prevent our members from speaking out about patient safety issues. Am. Acad. of Emergency Med., Comment on Proposed Non-Compete Clause Rule (Apr. 13, 2023), https://perma.cc/9RT9-ZRD.

As Professor Erin Fuse Brown explained at a recent FTC workshop, non-competes can be used to prevent physicians and clinical staff from leaving if they have concerns about how their practice groups operate or the quality of patient care. Professor Fuse Brown testified that management services organizations use agreements with hospitals and doctors to exert "control over hiring, firing, scheduling, contracting, billing, coding, all of which can threaten professional autonomy, cause burnout and moral injury while using non-competes and gag clauses to prevent physicians and clinical staff from leaving or speaking out if they have concerns about these practices or about the quality of patient care." Testimony of Erin Fuse Brown, Fed Trade Comm'n, Transcript of "Private Capital, Public Impact: An FTC Workshop on Private Equity in Health Care" (May 2, 2024), https://perma.cc/45PN-45V3.

Non-compete clauses intimidate the emergency physician into unquestioning servitude to business interests. Given physicians' ethical obligation to patients, many continue to speak out for patient safety; however, knowing that they can be forced to

relocate their family to another city or state and doubtedly has a chilling effect on physician advocacy for their patients, their communities, and themselves. See, e.g., Am. Coll. of Emergency Physicians, Comment on Proposed Non-Compete Clause Rule, 89 Fed. Reg. 38,342 (Mar. 7, 2023), https://perma.cc/V9ND-KJHH.

C. Overall Innovation in the Health Care Sector

Quality patient care and safety is enhanced when hospitals and physician groups have to compete for contracts. Am. Acad. of Emergency Med., Comment on Proposed Non-Compete Clause Rule (Apr. 13, 2023),

would be unduly time-consuming and expensive. This is true even for AAFP EM's relatively high-paid emergency room physician membership.

Arguments used to try and justify non-compete agreements are not present for

which our members could instead spend providing emergency care to patients. For example, nearly a decade ago, a class of Ultimate Fighting Championship (UFC) fighters sued their employer alleging they had been bound by an overly restrictive noncompete agreement. Katie Arcieri, UFC Fighters Ask Court to Approve $335 Million Cash Settlement, Bloomberg Law, May 2024, https://perma.cc/2ZJH-8LJ. That litigation only concluded this year, after many expensive hours of attorney and expert witness work. Id.

Similarly, it is not uncommon for physicians to have to spend multiple years litigating their noncompete agreements. See, e.g., Murfreesboro Med. Clinic, P.A. v. Udom, 166 S.W.3d 674 (Tenn. 2005); Statesville Med. Grp. v. Dickey, 424 S.E.2d 922 (N.C. Ct. App. 1992); Iredell Digestive Disease Clinic v. Petrozza, 373 S.E.2d 449 (N.C. Ct. App. 1988); Duneland Emergency Physicians' Med. Grp. v. Brunk, 723 N.E.2d 963 (Ind. Ct. App. 2000); Mohanty v. St. John Heart Clinic, S.C., No. 101251, 225 Ill. 2d 52 (2006) (Physicians litigating their non-crmpet v ae emetis (un) 8.3 dearpgregaing t vaenar (,) 6.1 (w(h) 8.2 sic) 12.1 h(n) 827 (e) 3.6 ce e se a(e)

II. The Final Rule Serves the General Public Interest and Is Well-Supported by the Evidentiary Record

Our membership's experience makes clear that non-compete agreements are not appropriate, even for high-skill, high-wage workers like the physicians we represent. Competition benefits the public, and contractual terms that hinder competition harm the public. All workers should have the freedom to seek and hold employment across the United States, undeterred by non-compete clauses. We enthusiastically agree with the FTC that the freedom to change jobs is core to economic liberty and that non-compete clauses hamper innovation. The Final Rule will significantly enhance job mobility, foster greater job flexibility, help address labor shortages, and create new opportunities within the healthcare industry. Additionally, to the extent purported justifications may be credited, other means are available to achieve the purported goals served by non-compete agreements, such as non-disclosure agreements and trade secrets law. *See, e.g.*, Brandon Elledge, *Don't Fret (Yet): Trade Secrets, NDAs and Non-* -Cw 18 (om)-8.5 (be)-14.0 (r)-8.1 (e)0.004 TR (e)9njule, Holland & Knight, https://pema.cc/K7T4-U82Q ("Simply put, in addition to trade secret statutory relief, NDAs and Non-Solicitation agreements are alive and well under the new FTC rule, even if the rule ultimately takes effect in its current form, provided they don't functionally operate as a non-compete to sideline a worker from taking another job.").

evidence and tens of thousands of public comments—Non-Compete Clause Rule, 89 Fed. Reg. 38,342 (May 7, 2024). We agree with the Commission that "non-competes are restrictive and exclusionary conduct that tends to negatively affect competitive conditions in labor markets and markets for products and services [and that] non-competes are exploitative and coercive." *Id.* In line with the FTC's evidentiary record and our membership's experience, the costs associated with staying the rule and forcing our members to engage in case-by-case adjudication—among other harms explained above—weigh strongly in favor of implementing the FTC's rule-based approach without delay.

III. Staying the Effective Date of the

CERTIFICATE OF WORD COUNT

This document complies with the Court's word count requirement because it contains 3,172 words.

Dated: June 5, 2024

Respectfully submitted,

/s/ Amanda G. Lewis
Amanda G. Lewis
(pro hac vice pending)
CUNEO GILBERT & LADUCA, LLP
4725 Wisconsin Avenue NW, Suite 200
Washington, DC 20016
(202) 789-3960
alewis@cuneolaw.com

CERTIFICATE OF SERVICE

I hereby certify that, on June 5, 2024, I electronically filed this document using the ECF System, which will send notification to the ECF counsel of record.

Dated: June 5, 2024

Respectfully submitted,

/s/ Amanda G. Lewis

Amanda G. Lewis
(pro hac vice pending)
CUNEO GILBERT & LADUCA, LLP
4725 Wisconsin Avenue NW, Suite 200
Washington, DC 20016
(202) 789-3960
alewis@cuneolaw.com