IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ATS TREE SERVICES, LLC, Plaintiff, v. FEDERAL TRADE COMMISSION; LINA M. KHAN, in her official capacity as Chair of the Federal Trade Commission; and REBECCA KELLY SLAUGHTER, ALVARO BEDOYA, ANDREW N. FERGUSON, and MELISSA HOLYOAK, in their official capacities as Commissioners of the FTC, Defendants.	Case No2:24-cv-01743-KBH

BRIEF OF AMICUS CURIAE COMMUNITY LEGAL SERVICES, INC., IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTEREST OF AMICUS CURIAE[1]

Community Legal Services, Inc., ("CLS") is the largest provider of free civil legal services in Philadelphia, representing over 11,000 low-income individuals every year. CLS's Employment Unit works to remove barriers to employment for CLS's clients, who are almost exclusively Philadelphians living in poverty. Through this work, CLS has discovered that low-wage workers are forced to sign non-compete clauses in order to obtain work in a wide variety of fields, from ambulance drivers and home health care aides, to part- time custodians and hairdressers, truck drivers making food deliveries, personal assistants, staffing agency callers, and many others.

As explained below, CLS's experience with non-compete clauses provides substantial evidence that, particularly with respect to low-wage workers, the growing trend of non-compete clauses for these workers restricts competition, limits choices for consumers, and damages low-wage workers' ability to earn a living. CLS supports the FTC Rule banning non-compete clauses for most workers and submitted a comment to the FTC when the Rule was proposed, setting forth CLS's experience and position. See Exhibit A, CLS Comment to FTC Non-Compete Clause Rulemaking (Apr. 19, 2023) ("CLS Comment"). Any delay in the implementation of the FTC's Rule would impede CLS's ability to assist its clients and harm thousands of low-wagkers n tPti c

provider within the geographic area in which the employee worked while at ATS for one year after leaving ATS." Servin Decl. ¶ 21, ECF 11-1 (emphasis added).

Whether and to what extent the ATS non-compete agreement is legally enforceable cannot be assumed. Both in the experience of CLS and as documented by the FTC in adopting the Final Rule, employers of low-wage workers routinely rely upon overly broad and facially unenforceable non-compete clauses—and do so successfully, because whether and to what extent a non-compete agreement is enforceable in Pennsylvania as in other states cannot be determined without litigation. CLS Comment at 3; Final Rule, 89 Fed. Reg. at 38378-79. For the vast majority of low-wage workers and the companies that might wish to employ them in the face of a former employer's assertion of a non-compete clause, the cost and risk of such litigation overshadows the benefit of the potential employment. CLS Comment at 3-4. As a result, non-competes operate merely by the threat of enforcement. CLS Comment at 4.

Restrictive covenants are not favored in Pennsylvania and have been historically viewed as a trade restraint that prevents a former employee from earning a living. Hess v. Gebhard & Co. Inc., 808 A.2d 912, 917 (Pa. 2002) (citing Jacobson & Co. v. Int'l Env't Corp., 235 A.2d 612 (Pa. 1967)). The Pennsylvania Supreme Court has acknowledged the economic harm caused by non-compete clauses and other restrictions on employment:

> Moreover, the no-hire provision undermines free competition in the labor market in the shipping and logistics industry, which creates a likelihood of harm to the general public. See, e.g., Donald J. Polden, Restraints on Workers' Wages and Mobility: No-Poach Agreements and the Antitrust Laws, 59 SANTA CLARA L. REV.

Pittsburgh Logistics Sys., Inc. v. Beemac Trucking, LLC, 249 A.3d 918, 936 (Pa. 2021) (invalidating agreement not to hire competitors' employees that was paired with non-compete clauses for the employees).

Nonetheless, non-compete clauses have been enforceable under Pennsylvania law if they are (1) incident to an employment relationship between the parties; (2) the restrictions imposed by the covenant are reasonably necessary for the protection of the employer; and (3) the restrictions imposed are reasonably limited in duration and geographic extent. Hess, 808 A.2d at 917; Sidco Paper Co. v. Aaron, 351 A.2d 250 (Pa. 1976); Morgan's Home Equip. Corp. v. Martucci, 136 A.2d 838 (Pa. 1957). There must be a close fit between the restrictions imposed and the protectable interests of the employer. Hess, 808 A.2d at 917 ("Our law permits equitable enforcement of employee covenants not to compete only so far as reasonably necessary for the protection of the employer.") (quoting Sidco Paper, 351 A.2d at 254.). When a non-compete agreement exceeds this scope, a court may partially enforce the agreement to the extent necessary for the protection of the employer's legitimate interests. But before enforcing the agreement to any degree, the court must balance the employer's protectible business interests against the interest of the employee in earning a living in his or her chosen profession, trade

does not disclose the actual terms of its non-competes, the Court has no way to evaluate the enforceability of those clauses and the weight of the interests that ATS asserts here such that ATS is not able to establish irreparable injury should the Final Rule go into effect.

III. The Injunction ATS Seeks Would Cause Enormous Harm to Low-Wage Workers in Pennsylvania and Beyond.

A. CLS's experience directly supports the FTC's argument that non-compete clauses are exploitative and coercive at the time of contracting.

Non-compete clauses are imposed on low-wage workers as a standard practice by companies with bargaining power without the opportunity for negotiation. As CLS explained in its comment to the FTC:

> We have never seen a case in which a low-wage worker was party to a non-compete agreement that was negotiated between the parties. Legitimate restrictive clauses ought to be negotiated between two parties of relatively equal bargaining power, both of whom recognize the subject of the agreement and can make a bargain that protects their mutual interests. In the case of low-wage workers, however, these clauses are invariably just included as boilerplate language in co.4 (ge)4 (i)-2w5-T4lude94lainvari asy3.ririe ge in cooro.4 (ge)k]TJ 0.002 Trmj2 (i

job security, as the employment for which they trade their future work options is almost always an at-will position from which they can be fired without cause at any time.

Not only are these clauses a bad deal for wage workers, these workers are often unaware that their employment agreement contains a non-compete clause until an employer uses it to prevent a worker from getting a new job. In CLS's experience, the most common time that low-wage workers learn they are subject to a non-compete is when, at the very end of the job, or after they have already separated from employment, they receive a threat that the non compete will be enforced against them. CLS Comment at 4. And if the worker does know that they have signed an agreement that includes a non-compete clause, they often do not understand its implications. As one example, CLS has assisted people who provided home care to their own parent or other close relative through a home health care agency, and who have tried to switch to a differ-4 (tt- [r110 (ar)tc)6 (h)2 (to)2 (a)6 (8d)-4 (e)6 (d)-8 (a)6 4 (8udor)3 (ott0.0

homehealth aideor administrativestafferwho is being madeto sign it. Partly as a result of the length and complexity of these agreements, workers do not actually read or understand them before signing them. CLS Comment at 2-3.

The FTC cites evidence that only a small fraction of workers actually bargains over their non-compete clauses. Final Rule, 89 Fed. Reg. at 38375. It remains true today that:

> "The average, individual employee has little but his labor to sell or to use to make a living. He is often in urgent need of selling it and in no position to object to boiler plate restrictive covenants placed before him to sign. To him, the right or kea nd-10 (eds)-1 (euppr)3 (k)-2 (

positioned to make those arguments. Thus, even clearly unlawful clauses are typically effective at restricting the worker's opportunities.

As CLS explained to the FTC in its comment:

> Most low-wage workers (and, in the home healthcare context, disabled Medicaid recipients who wish to have their home health aide remain as their caregiver) simply do not have the resources to fight lawsuits that seek to enforce non-compete clauses. Meanwhile, potential future employers and consumers lack incentives to fight these clauses—defending a lawsuit costs time and money, and low-wage workers can usually be replaced easily enough that it is not worth the effort to go to court in order to ensure the right to keep them.

CLS Comment at 3. As a result, non-compete clauses restrict low-wage workers' opportunities merely by the threat of enforcement—or, in some cases, by just the act of an employer filing suit and requesting a temporary restraining order. In one CLS case, a building maintenance contractor threatened to enforce a non-compete clause against Pamela Reed, a janitor who they had paid $10.00/hour for part-time work, and who had just been hired by a school where the company had previously held a cleaning contract. CLS argued to the new employer that the non-compete clause was unenforceable. The school's principal agreed but told CLS that they could not afford the risk that the contractor might file a suit, and consequently they terminated the worker. CLS Comment at 4. As that case demonstrates, the threatened use of a non-compete agreement, even an invalid or overbroad one, will usually be enough to prevent the worker from getting a new job. Ms. Reed's case was the unusual situation in which a low-wage worker had pro bono counsel before they lost a job—but she lost her job anyway, due to the new employer's reluctance to fight the case in court.

CLS has seen, over and over, clients only learning they were subject to a non-compete clause after they left their job when, attempting to find new employment, their former employer invokes it against them. Sometimes the old employer sends a threatening letter to the worker or their

a prospective new employer, or the former employer files a lawsuit in state court, seeking to enforce the clause and force the worker to pay heavy, unaffordable damages. The new

subsequent job at a school by the threat of enforcement of a non-compete, the clause she signed said that she could not go to work for a competitor of the cleaning contractor company. The job she took was as an in-house custodian for a high school—and high schools are not in economic competition with cleaning contractors. So, ultimately, it is highly likely that any court would have refused to enforce the terms of the clause. But the threat of possible litigation by the contractor was enough, by itself, to cause the school to terminate her employment. CLS Comment at 5.

This is not unusual. In nearly every case in which a client has sought CLS's help in dealing with a non-compete clause, often because they have already been threatened by their former employer, the legal enforceability of the clause is highly dubious, at best. CLS Comment at 5-6. In most cases, there is no legitimate business interest at stake which outweighs the harm to the worker. CLS Comment at 6. Nevertheless, the mere existence of the clauses succeeds in making CLS's clients fearful, and in raising risks for potential new employers, and – when the former employer actually files a lawsuit to enforce the clause – in forcing CLS's clients to deal with the time, energy, risks, and expense that comes with litigation. This is a risk that even higher-paid workers will face, since the clauses will often provide that the worker will have to reimburse the employer for any legal expenses incurred in enforcing the clause. Such punitive terms make any decision to go to court a risky one for the worker – there is always some chance that they will lose a court battle over the enforceability of a non-compete, and will be out of a job while also being on the hook for thousands of dollars in legal fees to their former employer (and possibly to their own attorney as well). CLS Comment at 6.

Gig workers—a growing segment of the workforce—fall into these traps, as well. Many of CLS's clients find work as drivers for ride-sharing companies or for package delivery

services, which can involve driving into neighboring states—especially New Jersey, which is just across the Delaware River from Philadelphia. Even these workers, who lack other employment protections because they are employed as independent contractors, can be required to sign a non-compete agreement and have it enforced against them. *See SkyHawke Technologies LLC v. Unemployment Compensation Bd. of Review*, 2011 WL 3839763, 27 A.3d 1050, 1056 (Pa. Cmwlth. Ct. 2011) (holding that worker could be required to sign an agreement which included an enforceable non-compete clause, and yet could also be classified as an independent contractor and, therefore, could be denied unemployment benefits when the job ended).

IV. The Balance of Equities and the Public I

CONCLUSION

For these reasons and those stated in Respondents' brief, CLS respectfully urges the Court to deny Plaintiff's Motion for a preliminary injunction to halt the effective date of the Final Rule.

Dated: June 7, 2024

Respectfully submitted,

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