EXECUTIVE SUMMARY:

On January 13, 2023, Slate's What Next podcast published an interview with Elizabeth Wilkins, the Federal Trade Commission's ("FTC") Director of the Office of Policy Planning. The interview was conducted by Lizzie O'Leary. The podcast[1] and transcript[2] are publicly available on Slate's website, and the transcript is included in this memorandum below this summary. The interview concerned the FTC's proposed Non-Complete Clause Rule, 88 Fed. Reg. 3482 (Jan. 19, 2023) ("Proposed Rule").

Ms. O’Leary asked why the FTC decided to propose this rule now. Ms. Wilkins responded that

know, it is a tool for employers to gain leverage over their employees. And so I don't want to suggest that these are kind of I don't know what sort of nothing burgers in the contract. They have real consequences for workers.

Lizzie O'Leary: One of the things that is in this proposed rule is the idea that, you know, not only will this be banned, but that let's say they exist already and employers got to go track down maybe a past employee and say, okay, you are no longer bound by this. Like, how do you guys expect that part to happen? That seems tricky.

Elizabeth Wilkins: There's a couple of things in the proposal that try and make this burden easier. We have a sample notice that we're clear. Kind of would suffice so you don't have to work fromW nBT12 -0 0 (t)5.3 (o go t)5.3

shock. We are proposing a long term rule that would change the relationship between workers and employers in in the labor market. We are regulating not for this moment only, but for into the future.

Elizabeth Wilkins: And while this has been a kind of disruptive moment for employers to understand how to manage through this labor market, just as you say, this has been really good for workers and workers ability to raise their wages and their working conditions and most importantly, to match better with employment that they're better suited for.

Elizabeth Wilkins: And in the long term, there's evidence that increasing job mobility and the ability of workers and employers to match to kind of the optimum situation for both parties is both good for employers in terms of the workplace that they are able to to run and good overall for the productivity of the economy.

Lizzie O'Leary: Is it good for employers, though, if we see, you know, some I don't know, macro softening and economic slowdown and they are still in a position where they're paying higher wages that maybe they're not able to support in a less gangbusters economy.

Elizabeth Wilkins: This is employers competing against each other. It's employers competing on a range of things, right. Wages, benefits, workplace environment, etc.. So, you know, yes, I think it is beneficial to employers to figure out within the constraints that they have how to attract and retain the workers that they need and that in the long term they're going to have a workforce that is better suited to their situation and better suited to productivity in the long term.

Lizzie O'Leary: One argument for non competes is that they help safeguard trade secrets, that there's some research also that they spur innovation. And I guess I, I wonder how you all make sure that that that doesn't happen that there aren't these unintended consequences.

Elizabeth Wilkins: Those are the commonly cited reasons for why employers use some compete. I'll repeat again, some of them seem fairly unjustifiable by those standards, but some some are. Couple of things. One. Employers do have other options. There are nondisclosure agreements and trade secret law which help employers protect confidential information. And, of course, if what a employer really wants to do is retain their workers and protect their training investments, they can do so by offering better wages and better working conditions rather than curtailing the liberty of their of their workers.

Elizabeth Wilkins: The other thing is, yes, there are some arguments that constraining workers to stay in one place and therefore investing more and in confidential information in them could spur innovation. But there's also evidence the other way that allowing workers to switch between firms promotes the appropriate sharing of knowledge in a way that spurs innovation. It also spurs entrepreneurship and business dynamism. So some of the best and healthiest new companies in an industry are what we call spinoffs. Workers that leave one company in an industry and then start a new business in that same industry. And that's the kind of thing and the kind of competition that we think spurs, like I said, business dynamism and most importantly, innovation and better quality products for consumers.

Elizabeth Wilkins: We cite, I kind of think, a range of of evidence in the proposal. And we think that the the evidence that innovation has actually spurred is is pretty strong. The last thing I'd say is, obviously, you know, California is an economy that hasn't had non competes for over a hundred years. And I don't think anybody would say that that's an economy that is starved for for innovation.

Lizzie O'Leary: You mentioned California and some other states. And I think one question people have is why if you do have states with with various state provisions, why there's a need for a federal ban.