



**OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS**

**OVERUSE OF NON-COMPETITION AGREEMENTS:  
UNDERSTANDING HOW THEY ARE USED, WHO THEY HARM, AND  
WHAT STATE ATTORNEYS GENERAL CAN DO TO PROTECT THE  
PUBLIC INTEREST**

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## I. Introduction and Background

It is an axiomatic legal principle that the law generally disfavors contracts that restrain trade.<sup>1</sup> Non-competition agreements or covenants not to compete (non-competes) are just that: contracts that restrain an employee's ability to obtain subsequent employment in a particular market. Despite this, the law in a majority of states does not prohibit the use of non-competes, but balances the general public policy against restraints of trade with an employer's specific interest in having a non-compete enforced.<sup>2</sup> In these states, courts will uphold a non-compete in favor of the employer so long as the agreement is "reasonable."<sup>3</sup>

Courts generally apply one of several variations of the same legal test to analyze a non-compete's reasonableness, which considers: (1) whether the non-compete protects a legitimate business interest of the employer; (2) whether the restrictions imposed—specifically with respect to the activity restrained by the agreement and the geographic area and time to which those restrictions apply—are no greater than required to protect that interest; (3) whether the non-compete imposes an undue hardship on the employee; and (4) whether the non-compete is otherwise harmful to the public.<sup>4</sup> This inquiry is typically fact-intensive, examining in detail both the employer's stated business interest for the non-compete and the individual employee's job duties. Some state courts will also look to see if a non-compete is supported by adequate "consideration"—money or something else of value to compensate the employee for waiving certain rights.<sup>5</sup> Theoretically, this analysis accounts for the differential in bargaining power between employers and employees in forming a non-compete.<sup>6</sup>

The Illinois Attorney General's Office first began to look at these non-compete concerns in 2015 and since then we have spoken with restaurant employees, nurses and health care providers, hair stylists, massage therapists, salespeople, receptionists, and customer service personnel, among others, about their non-competes. We have conducted approximately a dozen investigations into specific employers for improper use of non-competes, two of which resulted in lawsuits.<sup>7</sup> The employers that were the subject of these investigations range from fast-food

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<sup>1</sup> *E.g.*, *Bishop v. Lakeland Animal Hosp., P.C.*, 644 N.E.2d 33, 35 (Ill. App. Ct. 1994); *see* RESTATEMENT (SECOND) OF CONTRACTS § 186 & ch. 8, topic 2, intro. note (1981).

<sup>2</sup> In a small minority of states—for instance, California, North Dakota, and Oklahoma—non-competes are prohibited entirely. *See, e.g.*, CAL. BUS. & PROFS. CODE § 16600; N.D. CENT. CODE § 9-08-06; OKLA. STAT. § 15-219A. Other states have enacted the common-law analysis into statute, with minor alterations. *See, e.g.*, FLA. STAT. § 542.335.

<sup>3</sup> J.J. Prescott et al., *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, 2016 MICH. ST. L. REV. 369, 379 (2016).

<sup>4</sup> *E.g.*, *Reliable Fire Equip. Co. v. Arredondo*, 965 N.E.2d 393, 396–97 (Ill. 2011); *see also* Norman D. Bishara & Michelle Westermann-Behaylo, *The Law and Ethics of Restrictions on an Employee's Post-Employment Mobility*, 49 AM. BUS. L.J. 1, 15 (2012).

<sup>5</sup> *E.g.* *Fifield v. Premier Dealer Servs., Inc.*, 993 N.E.2d 938, 942 (Ill. App. Ct. 2013).

<sup>6</sup> Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power Via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963, 969-76 (2006).

<sup>7</sup> *See* *People of the State of Ill. v. Check Into Cash of Ill., LLC*, No. 2017-CH-14224 (Cook County Cir. Ct. filed Oct. 25, 2017); *People of the State of Ill. v. Jimmy John's Enters., LLC*, No. 2016-CH-07746 (Cook County Cir. Ct. filed June 8, 2016).

and upscale restaurants to beauty salons, daycare centers, and title loan companies, among others.

Through this work we have observed numerous ways in which the actual usage of non-competes is incompatible with courts' traditional conceptions of their usage, leaving employees, particularly low- and moderate- wage employees, unprotected from harm. Admittedly, our observations are not necessarily representative of larger trends; employees who take the time to contact a government office about their non-compete are likely to be those who have experienced direct harm from a non-compete in some way.<sup>8</sup> However, the evidence that we have gathered through investigations and litigation is illustrative of the range of employees subject to non-competes, the types of restraints these agreements impose, and how non-competes can impact workers' employment options in very real ways, even when their terms are almost certainly illegal.

This paper discusses our investigative findings and proffers that state attorneys general may be well situated to promote policy solutions and investigate overuse of non-competes on behalf of the people of their respective states.

## **II. Understanding the Problem through Observations and Real Life Examples**

The Office of the Illinois Attorney General's investigations into the potentially unlawful use of non-competes have revealed several alarming trends. Although not a comprehensive summary of the many ways that the use of a non-compete might be improper or unlawful, the trends described below are those we have identified as key concerns from our various investigations.

### **A. Many Non-competes are Boilerplate and Used for All Employees, Suggesting they are Not Narrowly Tailored to Protect a Specific Business Interest.**

In most of our investigations, employers required all employees—from the lowest-wage hourly worker to more highly compensated management employees—to sign the same boilerplate non-compete with no variation for the employees' individualized circumstances. Indeed, several companies used the same non-compete *for all employees in every state in which they do business*. In one particularly egregious example, a childcare center required the same non-compete for groundskeepers, landscapers, maintenance staff, van or bus drivers, housekeepers, kitchen staff, support staff, assistant teachers, teachers, assistant lead teachers, lead teachers, and assistant directors. Through our investigation of Check Into Cash, a check-cashing and payday loan company, we learned that the lowest-level customer service representatives—who earn around \$12 an hour—were required to sign a non-compete that remained in effect even if they were promoted to the positions of assistant manager, store manager, or even to a regional management position with oversight of a large territory. Lack of job-specific differentiation between workers with such varying duties and responsibilities suggests that employers do not engage in a discrete analysis of whether a legitimate business interest exists to require a non-compete for different types of workers or job categories.

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<sup>8</sup> Indeed, academic research has noted the difficulty in comprehensively gauging the use of non-competes across the economy as a whole. Norman Bishara and Evan Starr, *The Incomplete Noncompete Picture*, 20 LEWIS & CLARK L. REV. 497, 537–40 (2016).

B. While the Law Demands that Non-compete Restrictions be Closely Matched to a Legitimate Business Interest, in Practice they may be Exceedingly Broad in Scope.

This lack of differentiation also suggests that employers are not limiting the scope of their agreements to be closely related to their business interests. Most non-competes we reviewed were broad in terms of the type of “competitive” activity they prohibited, the geographic area within which they prohibited that activity, and in duration.

Non-competes may define the kind of employment considered “competitive” so broadly as to be a meaningless limitation of the scope of prohibited employment. For example, one agreement prohibited employees from working for “any business similar or in competition with [the employer’s] business.”<sup>9</sup> In addition to being so deficiently vague as to be legally unenforceable, such breadth leaves employees without a clear understanding of what future employment is prohibited. For example, one high-end steakhouse prohibited employees from working for a restaurant that “features steaks, chops, and/or seafood and receives more than twenty-five percent (25%) of its gross sales from the sale of steaks or beef.” The average employee is in no position to ascertain what percentage of a prospective employer’s revenues are obtained through the sales of certain products and is thus unable to even determine which employment is prohibited by the non-compete.

Employers also may define the geographic area in which the employee is prohibited from working far more broadly than is legally permissible. One advanced practice nurse was prohibited from practicing within 25 miles of her former employer. She had worked in a small city in a relatively rural area, which meant that any hospital or medical facility that she could reasonably commute to from her home was off-limits. This left a stark choice of moving out of the area, switching careers, or waiting out the term of the non-compete. All options had enormous potential negative impacts on her financial situation and prospects for future earnings.

Several large, national employers have banned employees from working for a competitor located within a defined geographic distance of *any* of the locations where the business operates, not just the location where the employee actually worked. For example, between 2007 and 2012, Jimmy John’s non-compete applied within three miles of any Jimmy John’s Sandwich Shop anywhere in the country, regardless of where the employee worked. Similarly, Check Into Cash’s non-compete prohibits employees from working for any competitor located within 15 miles of any Check Into Cash location nationwide.<sup>10</sup>

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<sup>9</sup> The U.S. District Court for the Northern District of Illinois applied Illinois law in a recent case to strike a non-compete on a Motion to Dismiss because the non-compete broadly prohibited the employee from working in any capacity for any business that “offers a product or services in actual competition with Medix or . . . which may be engaged directly or indirectly in the Business of Medix.” *Medix Staffing Solutions, Inc. v. Daniel Dumrauf*, No. 17-CV-6648, 2018 WL 1859039 at \*1 (N.D. Ill. Apr. 17, 2018).

<sup>10</sup> Our complaint alleged that, since Check Into Cash has a presence in all of Illinois’ major metro areas, the non-competition agreement effectively precluded employment with any broadly defined competitor in all Illinois cities and towns containing more than 50,000 residents, not to mention metro areas in surrounding states. Complaint, *People of the State of Ill. v. Check Into Cash of Ill., LLC*, No. 2017-CH-14224 (Cook County Cir. Ct. Oct. 25, 2017).

Troublingly, most of the non-competes we have reviewed also purport to bind employees for a period of one or two years—a length of time that very few employees could afford to “sit out” without compensation.

C. Most Employees do not Negotiate the Terms of their Non-Compete and Receive Nothing in Exchange for Signing Them Beyond At-will Employment.

In theory, non-competes are fully negotiated contracts in which the employee and employer bargain over the terms and conditions of employment.<sup>11</sup> For certain high-skilled or high-earning employees with greater negotiating power and resources (such as legal counsel), this may well be the case. For the average worker, however, non-competes are rarely discussed or mentioned at the time of job offer or acceptance. Rather, the non-compete is generally one provision out of many in a longer employment contract, through which the worker clicked or skimmed on their first day as part of the “on boarding” process. Indeed some employees were not aware that they had even signed a non-compete until they later tried to leave the job or switch jobs.

Even those employees who were aware of the non-compete sometimes felt they had little choice but to sign the contract because it was an explicit term and condition of employment. One employee recalled her manager telling her that the company “doesn’t usually” enforce the non-compete, but that signing the agreement was nonetheless required if she wanted her job. When the employee went to leave, however, she was told that the company takes the non-compete “very seriously.” Because low- and moderate-wage employees rarely have the opportunity or bargaining power to meaningfully negotiate the terms of their employment, let alone their non-compete, they often get nothing in return for signing the non-compete.

The inability of these workers to realistically negotiate is shown by the minimal or complete lack of consideration they receive in exchange for signing. Despite the fact that Illinois courts have made clear that the prospect of at-will employment is not by itself sufficient consideration for a valid non-compete,<sup>12</sup> we have reviewed only one non-compete in which the employee received explicit consideration for signing. In that case, the “consideration” was a one-time payment of \$15 dollars – approximately one hour’s wages.

D. Employers Often Use Informal Mechanisms to Enforce Non-Competes, Creating a Chilling Effect for Employees that Avoids Judicial Scrutiny.

Most of the non-competes described above would be declared unlawful and unenforceable by a court upon review. Yet an unlawful non-compete can still cause harm to workers even if it could not be enforced in court. Most workers lack the resources or time necessary to hire an attorney and challenge their agreement.<sup>13</sup> Preliminary research suggests that

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<sup>11</sup> See Arnow-Richman, *supra* note 6, at 976 (discussing the nature of bargaining power in the non-compete context).

<sup>12</sup> See *Fifield v. Premier Dealer Servs., Inc.*, 993 N.E.2d 938, 942 (Ill. App. Ct. 2013); *cf. Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 946 (7th Cir. 1994).

<sup>13</sup> See, e.g., Conor Dougherty, *How Noncompete Clauses Keep Workers Locked In*, N.Y. TIMES (May 13, 2017).

the simple presence of a non-compete—regardless of its legality or actual enforcement in court—may nevertheless accomplish an employer’s goals by restricting worker mobility.<sup>14</sup>

Informal forms of non-compete enforcement can be highly effective. Employers can remind employees of their non-compete to dissuade them from applying for new jobs. Several employees of a small spa and hair salon complained of an employer who “bragged” on more than one occasion that she would sue anyone who left for a rival salon in the area, even brandishing court papers for a temporary injunction against a former employee. This behavior had the desired chilling effect on other employees afraid of being sued. Less extreme examples abound: employers can mention an existing non-compete during a reference check for a former employee to dissuade the prospective employer from hiring the employee in question. One steakhouse employee was told by a prospective employer that it could not offer him a job because of his non-compete, even though the prospective employer believed its business likely fell outside the scope of employment restricted by the agreement.

In those rare cases where a low- or moderate-wage worker does challenge their non-compete, the employer can easily moot out the legal challenge by conceding that it will decline to enforce the agreement against that individual worker. This prevents a court from ever making a decision about the non-compete’s legality. Other current and future workers continue to be bound. This exact scenario played out in a private wage-and-hour case brought against Jimmy John’s. The court denied the plaintiff workers’ request for a declaratory judgment as to their non-competes’ validity because the company had submitted affidavits stating it would not enforce those individual agreements.<sup>15</sup>

### **III. Overuse and Misuse of Non-Competes Harms the Public Interest**

Our observations are generally consistent with existing research on non-competes. This research suggests that boilerplate non-competes are common,<sup>16</sup> workers rarely negotiate their non-competes,<sup>17</sup> and informal enforcement is sufficient to chill employee mobility.<sup>18</sup> As such, from a legal standpoint, judicial treatment of non-competes must move beyond a purely individualized analysis and begin identifying and articulating a broader harm. In 2016, the

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<sup>14</sup> See, e.g., Evan Starr et al., *Noncompetes in the U.S. Labor Force* 28–31 (U of Mich., Law & Econ Research Paper No. 18-013, May 18, 2018); Prescott et al., *supra* note 3, at 462–63; Arnow-Richman, *supra* note 6, at 975.

<sup>15</sup> *Brunner v. Liautaud*, No. 14-CV-5509, 2015 WL 1598106, at \*10 (N.D. Ill. Apr. 8, 2015). Similarly, class action claims in a suit challenging Nordstrom Trunk Club, Inc.’s use of non-competes were dismissed without resolution when the named plaintiff settled her individual claim. See *Agreed Order Of Dismissal With Prejudice, Molly Christine Dowell v. Trunk Club, Inc.*, No. 17-CH-09876 (Cook County Cir. Ct. Feb. 5, 2018).

<sup>16</sup> Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637, 638–41 (2007).

<sup>17</sup> Starr et al., *supra* note 14, at 18–20.

<sup>18</sup> Evan Starr et al., *Noncompetes and Employee Mobility* 5–6 (U of Mich. Law & Econ. Research Paper No. 16–032, May 2, 2018).

Obama administration issued a report identifying the overuse of non-competes as “one institutional factor that has the potential to hold back wages and entrepreneurship.”<sup>19</sup>

The need to curb the use of non-competes has been recognized by policymakers. Since 2015, approximately twenty states have either enacted new laws regulating non-competes or considered legislation to do so.<sup>20</sup> In 2016, Illinois passed the “Freedom to Work Act” which banned the use of non-competes for low-wage workers, defined as employees earning minimum wage or less than \$13 an hour.<sup>21</sup> Measures that limit the abusive potential of non-competes are absolutely critical if employers are to be dissuaded from grossly overusing non-competes.

Such measures can face serious opposition, however, and employer groups have proven successful in defeating them. In Washington state, for instance, the technology industry was outspoken in its opposition to bills proposing to ban non-competes, and legislative efforts to do so failed in 2016 and 2017.<sup>22</sup> In Massachusetts, opposition from trade groups doomed then-Governor Deval Patrick’s efforts to prohibit non-competes,<sup>23</sup> and the conflicting stances of business interests on both sides of the debate have frustrated continuing efforts at reform since then.<sup>24</sup>

#### **IV. State Attorneys General Have Various Tools to Address Overuse of Non-Competes**

As various policy proposals make their way through state legislatures, state attorneys general should not ignore ways to leverage existing authority to address the illegal use of non-competes. While contractual issues are sometimes dismissed as private matters, the broader public impact of non-competes makes remedying their use a cognizable state interest. Harms suffered by individual workers are comparable to harms suffered by individuals bound by some unenforceable term buried in a “terms and conditions” agreement or privacy policy. The collective damage in either scenario creates a state interest, which state attorneys general are in a unique position to protect. To do so, state attorneys general should consider the following tools.

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<sup>19</sup> See THE WHITE HOUSE, NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATE RESPONSES 2 (2016).

<sup>20</sup> The enacted and proposed legislation largely addressed, in whole or in part, the seven areas in which non-competes are particularly detrimental to workers as identified by the White House. *Id.* at 8-15. For a state-by-state description of laws addressing non-competes, see BECK REED RIDEN, LLP, EMPLOYEE NONCOMPETES: A STATE BY STATE SURVEY (2017), available at <https://www.faircompetitionlaw.com/wp-content/uploads/2017/07/Noncompetes-50-State-Survey-Chart-20170711.pdf>.

<sup>21</sup> 820 ILCS 90/1 *et seq.*

<sup>22</sup> Monica Nickelsburg, *Effort to Kill Non-competes in Washington State Fails Again, Leaving Controversial Contracts Intact*, GEEKWIRE (Feb. 16, 2018), <https://www.geekwire.com/2018/effort-kill-non-competes-washington-state-fails-leaving-controversial-contracts-intact/>.

<sup>23</sup> Colin A. Young, *House Passes Bill Placing New Restrictions on Non-Compete Agreements*, WBUR.ORG (June 30, 2016), <http://www.wbur.org/bostonmix/2016/06/30/house-noncompete-bill>.

<sup>24</sup> Bishara and Starr, *supra* note 8, at 509 & nn.43–44.

## A. Education and Outreach

Without any legislative changes, state attorneys general can incorporate non-competes and other contractual employment issues into their outreach and education work. Just as state attorneys general routinely conduct outreach to inform constituents about issues to consider and questions to ask as a consumer (concerning, for example, mortgages, student loans, and identity theft), we can educate constituents about non-competes. Greater education will not equalize bargaining power, but it can lead to more informed decision-making and may help minimize the chilling effects of unenforceable agreements.

## B. Parens Patriae Authority

Although the statutory authority granted to state attorneys general varies, all state attorneys general act in some *parens patriae* capacity to defend and represent the public interest. The doctrine of *parens patriae* stands for the idea that the state acts “in its capacity as provider of protection to those unable to care for themselves.”<sup>25</sup> In *Louisiana v. Texas*, the U.S. Supreme Court held that Louisiana had standing as *parens patriae* to pursue claims against the state of Texas for preventing Louisiana residents from entering Texas due to a health quarantine because “the matters complained of affect her citizens at large.”<sup>26</sup> In this capacity, state attorneys general may have existing *parens patriae* authority to remedy unlawful non-competes that similarly affect their citizens at large.

*Parens patriae* authority may be used in particular where the violation is a matter of common law, rather than of a specific statutory provision. In Illinois and many states, the legal treatment of non-competes is a matter of common law, which many state attorneys general are empowered to enforce.<sup>27</sup> This authority includes representing the interests of the state purse and welfare, as well as “the broader interests of the State.”<sup>28</sup>

Other state attorneys general may have similar sources of authority to remedy general unlawfulness committed in their state. For example, a New York state statute authorizes the New York Attorney General to enjoin “repeated fraudulent or illegal acts...or persistent fraud or illegality in the carrying on, conducting or transaction of business.”<sup>29</sup> The New York Attorney General has asserted this authority to remedy violations of New York labor laws and to initiate and conduct investigations into non-compete usage.<sup>30</sup>

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<sup>25</sup> *Parens Patriae*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>26</sup> 176 U.S. 1, 19 (1900).

<sup>27</sup> For example, in *Fergus v. Russel*, the Illinois Supreme Court ruled that the Illinois Constitution’s directive that the Attorney General “perform such duties as may be prescribed by law” includes not only those powers prescribed by statute but also those that existed at common law. 110 N.E. 130, 143-44 (Ill. 1915).

<sup>28</sup> *People ex. rel. Hartigan v. E&E Hauling*, 607 N.E.2d 165, 170 (Ill. 1992).

<sup>29</sup> N.Y. EXEC. LAW § 63(12).

<sup>30</sup> See Aruna Viswanatha, *Sandwich Chain Jimmy John’s to Drop noncompete Clauses from Hiring Packets*, WALL ST. J. (June 21, 2016); Aruna Viswanatha, *Legal Publisher in Settlement to Drop Noncompete Pacts for Employees*, WALL ST. J. (June 15, 2016) (discussing settlement between New York Attorney General and Law360).

### C. Existing Statutory Provisions Governing Non-Competes

In addition to the common law, states may also have specific statutory provisions that regulate the use of non-competes and that could provide a basis for the attorney general to bring an action. California, North Dakota, and Oklahoma have entirely prohibited the use of non-competes by statute.<sup>31</sup> Other states have industry-specific restrictions or prohibitions, such as limitations on non-competes for broadcasters or doctors.<sup>32</sup> Statutes like these may provide explicit or implied authority for enforcement by state attorneys general. In Illinois, such provisions buttress our non-compete investigations in which the non-compete at issue likely violates both the common law and a specific statutory prohibition.

### D. Consumer Statutes

State consumer protection statutes may also provide a basis to examine overuse of non-competes. While consumer laws cannot generally be used to address individual employment issues, illegal non-competes applied broadly to all employees also impact and harm competitor businesses and state economies. This is a harm that state consumer statutes may be equipped to remedy. For example, the Illinois Consumer Fraud and Deceptive Business Practices Act prohibits “unfair methods of competition and unfair or deceptive acts or practices.”<sup>33</sup> An “unfair practice” is one that (1) offends public policy as established by statute, common law or otherwise, (2) is immoral, unethical, oppressive, or unscrupulous, or (3) causes substantial injury to consumers.<sup>34</sup> A non-compete that violates existing common law or statutory restrictions could satisfy each prong of this test, creating a cause of action in states with similar consumer protection statutes or strong unfair competition laws.

## V. **Conclusion**

There should be no doubt that many employers are using non-competes that may be unlawful with respect to some, or all, of their employees. While a body of law in theory exists to protect individual workers from such illegal agreements, practical realities—including the difficulties in workers’ asserting their legal rights, informal enforcement of such agreements, and the chilling effect occasioned simply by the agreements’ existence—can create harms for workers, competitor employers, and state economies that escape judicial scrutiny. In their capacity as representatives of the states and their peoples, state attorneys generals may be in the best position to elevate awareness of non-competes and to challenge their misuse through evolving awareness of the public harm that such agreements cause.

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<sup>31</sup> CAL. BUS. & PROFS. CODE § 16600; N.D. CENT. CODE § 9-08-06; OKLA. STAT. § 15-219A.

<sup>32</sup> See, e.g., 820 ILL. COMP. STAT. § 17/1 *et. seq.* (prohibiting use of non-competes in the broadcast industry).

<sup>33</sup> 815 ILL. COMP. STAT. § 505/2.

<sup>34</sup> *Robinson v. Toyota Motor Credit Corp.*, 775 N.E.2d 951, 961 (Ill. 2002) (citing *Fed. Trade Comm. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244–45 n.5 (1972)).