# THIS IS AN INTERVENTION: THE ROLE OF FEDERAL COURTS IN SUPPRESSING NON-COMPETE AGREEMENTS

## TABLE OF CONTENTS


INTRODUCTION . . . . . 854
I. BACKGROUND . . . . . 857
*A. A Brief History of the Non-Compete* . . . . . 858
*B. The Big Ban: The FTC's Rule* . . . . . 859
*C. The Preliminary Injunction Analysis* . . . . . 860
II. THE PUBLIC INTEREST . . . . . 862
*A. When the Public Interest Does Not Favor Non-Competes: Overbroad Contracts, Competition, and Public Welfare* . . . . . 863
*B. When the Public Interest Favors Non-Competes: Reasonableness, Business Interests, and Freedom of Contract* . . . . . 866
III. THE ROLE OF FEDERAL COURTS IN STRIKING DOWN NON-COMPETES . . . . . 867
*A. Courts Should Find Non-Competes Are No Longer in the Public Interest* . . . . . 868
IV. COUNTERARGUMENTS ADDRESSED . . . . . 871
*A. No More Blue Penciling* . . . . . 871
*B. Why We Cannot Leave It Up to the States* . . . . . 874
*C. Upholding Non-Competes Does Not Preserve the Status Quo* . . . . . 877
*D. The Public Interest Still Matters* . . . . . 878
CONCLUSION . . . . . 880

## INTRODUCTION

"They just told us, 'It's just a formality, sign here, here, here.'"[1] "I don't remember exactly signing a noncompete, because there are a lot of forms you have to sign when you get hired."[2] Janitors,[3] camp counselors,[4] recent college graduates,[5] and sandwich makers[6] are among the approximately thirty million American workers who may or may not know that they are bound by a non-compete agreement.[7] For many, the consequences of breaching a non-compete can be expensive and potentially disastrous.[8] States are increasingly passing and amending laws to make non-competes unenforceable, but political stalling and other practical hurdles have made state law a slow solution to this growing problem.[9] At the judicial level, courts can remove unenforceable provisions from an agreement, but this comes at great financial and personal cost to parties.[10]

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1. Sophie Quinton, *These Days, Even Janitors Are Being Required to Sign Non-Compete Clauses*, USA TODAY (May 27, 2017, 8:28 AM), https://www.usatoday.com/story/money/2017/05/27/noncompete-clauses-jobs-workplace/348384001/ [https://perma.cc/W5F5-CSMC].

2. Andrea Hsu, *Many Workers Barely Recall Signing Noncompetes, Until They Try to Change Jobs*, NPR (Jan. 13, 2023, 5:00 AM), https://www.npr.org/2023/01/13/1148446019/ftc-rule-ban-noncompetes-low-wage-workers-trade-secrets [https://perma.cc/K8SR-XM3X].

3. *See* Quinton, *supra* note 1.

4. *See* Steven Greenhouse, *Noncompete Clauses Increasingly Pop Up in Array of Jobs*, N.Y. TIMES (June 8, 2014), https://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html [https://perma.cc/A5MG-QDDL].

5. *See* Hsu, *supra* note 2.

6. *See* Neil Irwin, *When the Guy Making Your Sandwich Has a Noncompete Clause*, N.Y. TIMES (Oct. 14, 2014), https://www.nytimes.com/2014/10/15/upshot/when-the-guy-making-your-sandwich-has-a-noncompete-clause.html [https://perma.cc/F843-D5K3].

7. *See FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, FED. TRADE COMM'N (Jan. 5, 2023) [hereinafter *FTC Proposes Rule*], https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition [https://perma.cc/S689-Z4P7] (estimating that thirty million workers in the U.S., roughly 18 percent of the workforce, are covered by non-competes).

8. *See, e.g.*, Luis Ferré-Sadurní, *Should Your Ex-Boss Get a Say in Your New Job? Wall Street Says Yes.*, N.Y. TIMES (Nov. 12, 2023), https://www.nytimes.com/2023/11/12/nyregion/noncompete-ban-ny.html [https://perma.cc/49V4-49LR] (detailing how a young tattoo artist got caught in unexpected litigation over the non-compete that forced her to pay $15,000 in liquidated damages and effectively move out of the city she worked in).

9. *See infra* Part IV.B.

10. *See infra* Part IV.A.

Then, on May 7, 2024, the Federal Trade Commission (FTC) published a final rule banning virtually all non-compete agreements between employers and workers, effectively rendering moot all of these concerns.[11] With very limited exceptions, this rule not only prevented the creation of *new* non-compete agreements but also invalidated *previously existing* agreements.[12] This rule was a sweeping ban on what the FTC believes are unfair methods of competition that restrict employees from taking up new employment in other states or opening their own businesses.[13]

The final rule was slated to take effect on September 4, 2024, but many predicted that the enacted rule would be enjoined in court before then.[14] It was. On August 20, 2024, the Northern District of Texas struck down the FTC's non-compete rule and prohibited the FTC from enforcing the rule nationwide.[15] The court concluded that "the text and the structure of the FTC Act reveal the FTC lacks substantive rulemaking authority with respect to unfair methods of competition."[16] This decision came on the heels of the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, which upended federal agencies' discretion to interpret ambiguous laws and pass substantive rules.[17] After nearly two years since the rule was first announced in January 2023, the FTC's rule banning non-competes met the same fate as previous agency rules that passed

11. *See* Non-Compete Clause Rule, 16 C.F.R. § 910.2 (2024).

12. *See id.*

13. *See id.*

14. *See, e.g.*, Chamber of Com. of the U.S., Comment Letter on Proposed Rule to Ban Noncompete Clauses (Apr. 17, 2023), https://www.uschamber.com/assets/documents/FTC-Noncompete-Comment-Letter_FINAL_04.17.23.pdf [https://perma.cc/38RS-X2JR] (arguing that the FTC lacks the legal authority to rule that all worker noncompete agreements are unfair); Andrea Hsu, *Millions of Workers Are Subject to Noncompete Agreements. They Could Soon Be Banned*, NPR (Jan. 5, 2023, 3:13 PM), https://www.npr.org/2023/01/05/1147138052/workers-noncompete-agreements-ftc-lina-khan-ban [https://perma.cc/365A-PR54] ("The FTC will likely face legal challenges, including on whether it even has the power to regulate noncompete agreements."); Allen Smith, *Will the FTC Finalize a Complete Ban on Noncompetes?*, SHRM (Feb. 5, 2024), https://www.shrm.org/topics-tools/employment-law-compliance/will-ftc-ban-noncompetes [https://perma.cc/289T-MCKP] (speculating that "[a]ny litigation challenging the FTC's rulemaking authority will face an uphill battle" in court).

15. Ryan LLC v. FTC, No. 3:24-CV-00986-E, 2024 WL 3879954, at *1 (N.D. Tex. Aug. 20, 2024).

16. *Id.* at *12.

17. *See* 144 S. Ct. 2244, 2273 (2024).

notice-and-comment rulemaking but were later enjoined in court and effectively struck down.[18]

Notwithstanding the FTC rule, there is a discernible trend around the country on the state and local level disfavoring pure non-competes. There are states that completely prohibit enforcing a non-compete, and there are other states that have significantly limited the enforceability of non-competes.[19] The number of states in either group only continues to grow.[20] As discussed in the supplementary information for the FTC's rule, there have been "growing concerns regarding the harmful effects of non-competes" for years and "evidence of harms" has only continued to "increase[ ] substantially."[21] Of the 26,000 public comments the FTC received in response to the notice for public rulemaking, over 25,000 expressed support for a categorical ban on non-competes.[22] Employees across various industries have been speaking out against the harmful effects of non-competes for years.[23] Beyond the actions of one federal agency, there is a greater public interest in seeing the end of, or at least a significant limitation on, the non-compete as we know it.

Because an agency-led solution to non-competes may never survive in courts, this Note argues that federal courts[24] will play an even more critical role in regulating and striking down abusive non-competes. This Note also argues that, in cases where an employer is seeking a preliminary injunction to enforce a non-compete, a court should seriously weigh the public interest factor against granting the injunction.[25] The FTC's rule and evolving state policies make clear that lawmakers are growing more hostile toward non-

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18. *See, e.g.*, West Virginia v. EPA, 577 U.S. 1126 (2016) (enjoining the EPA's Clean Power Plan from going into effect while the D.C. Circuit reviewed the merits of the case).

19. *See infra* notes 36-37 and accompanying text.

20. *See* Paul Starkman & Daniel Kinsella, *States Are Charting Their Own Course on Employment Noncompetes*, BLOOMBERG LAW (Apr. 24, 2024, 10:58 AM), https://news.bloomberglaw.com/us-law-week/states-are-charting-their-own-course-on-employment-noncompetes [https://perma.cc/E7QB-HQUJ].

21. Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38343 (May 7, 2024) (codified at 16 C.F.R. § 910).

22. *Id.* at 38344.

23. *See supra* notes 1-8 and accompanying text.

24. This Note only looks at the preliminary injunction analysis under Federal Rule of Civil Procedure 65, and thus discussion around the enforceability of non-competes is limited to federal cases.

25. *See* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 23-24 (2008).

competes. The FTC's rule and the thousands of public comments it generated indicate that the non-compete is, at best, a hot-button issue and, at worst, quickly falling out of the public favor.[26]

Part I of this Note will provide background information on non-compete agreements, focusing primarily on those executed in conjunction with employment.[27] Part I will also provide background on the FTC's rule and the preliminary injunction analysis. Part II will explore how different jurisdictions treat the public interest factor when analyzing whether to enforce a non-compete. Part III will examine how the FTC's rule has already impacted the public interest analysis in court. Finally, Part IV will address potential challenges to this proposal and argue why federal courts—as opposed to state legislatures, for example—are in the best position to protect workers from the harms of non-competes. This Note ultimately proposes that, when examining the public interest factor in light of the FTC's rule and shifting state policies, there is hardly a public interest in using an extraordinary remedy like the preliminary injunction to uphold an agreement as restrictive as the non-compete.

## I. BACKGROUND

Before addressing non-competes and federal courts' role in striking them down, it is important to understand the scope of this issue. This requires understanding what a non-compete is and what the FTC is trying to do about it. This Part also dissects the preliminary injunction analysis, specifically what the standard for granting injunctive relief is, what a party requesting an injunction must

26. During its public comment period, the proposed rule drew almost 27,000 comments in just under four months. *See* FTC, *Non-Compete Clause Rule (NPRM)*, REGULATIONS.GOV (Jan. 9, 2023), https://www.regulations.gov/document/FTC-2023-0007-0001 [https://perma.cc/ZPQ5-7Q3H]. Perhaps an indication of the uproar the proposed rule caused when it was first announced, the FTC voted to extend the public comment period from March 20, 2023, to April 19, 2023. *See FTC Extends Public Comment Period on Its Proposed Rule to Ban Noncompete Clauses Until April 19*, FED. TRADE COMM'N (Mar. 6, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-extends-public-comment-period-its-proposed-rule-ban-noncompete-clauses-until-april-19 [https://perma.cc/E8S5-74XQ].

27. Although non-competes arise in other contexts, such as from the sale of a business, this Note will focus almost exclusively on non-competes executed between employers and employees.

show, and the approaches that different jurisdictions take in weighing the different parts of the analysis. Finally, this Part will show that there is a common element spurring the non-compete's evolution, the FTC's rule, and the various ways courts approach the preliminary injunction analysis: disjointed state action.

### *A. A Brief History of the Non-Compete*

Like today's controversial non-compete, "covenants not to compete" have a long and storied history.[28] Under English common law, the non-compete was per se unenforceable because prohibiting workers from practicing their trade under people other than their original employers was viewed as a deprivation of their right to earn a living.[29] Courts were candid about their distaste for the non-compete. One court in the 15th century was asked to enforce a non-compete and observed that "[t]he obligation is void because the condition is against the common law, and by God, if the plaintiff were present he should rot in [jail] till he paid a fine to the King."[30]

Over time, the non-compete came to be accepted as national economies developed, and the balancing test replaced the per se rule of unenforceability.[31] The most often applied test to determine if a non-compete is enforceable looks at whether the non-compete protects a legitimate business interest and is reasonable both in geographic scope and time.[32]

Today, the non-compete is not so straightforward. Only a small handful of states outright ban most non-competes.[33] Other states will only enforce "reasonable" non-competes, while some refuse to enforce non-competes in any fashion as a matter of public policy.[34]

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28. See Hess v. Gebhard & Co., 808 A.2d 912, 917-18 (Pa. 2002), for an exploration of the history of non-compete law.

29. *Id.* at 917.

30. *Id.*

31. *See id.* at 917-18.

32. *See id.* at 918.

33. Only four states ban most non-competes: California, Minnesota, North Dakota, and Oklahoma. *See State Noncompete Law Tracker*, ECON. INNOVATION GRP. (Oct. 11, 2024), https://eig.org/state-noncompete-map/ [https://perma.cc/DZW9-92A4]. Outside of these four states, non-competes are permitted in a number of ways. *See infra* Part II.A.

34. *See* Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 677 (2008).

Other states fall somewhere in the middle, subjecting non-competes to more careful scrutiny and severely limiting the types of non-competes that are enforceable.[35] While some states are shifting their policies to ban all non-competes,[36] non-competes in some form remain enforceable in most of the country.

### *B. The Big Ban: The FTC's Rule*

This Part briefly explains what the FTC's rule entailed. The rule was an exercise of the FTC's authority to prevent unfair methods of competition.[37] It was also an attempt to bridge the disparities between state laws on non-competes by passing a sweeping ban on and recission of almost all non-competes and functionally equivalent contracts.[38] This rule was based on the FTC's finding that non-competes are an unfair method of competition and therefore violate § 5 of the FTC Act.[39] In the notice of proposed rulemaking, the FTC said it was trying to "ensure competition policy is aligned with the current economic evidence about the consequences of non-compete clauses" because existing non-compete laws "allow serious anticompetitive harm to labor, product, and service markets to go unchecked."[40]

In particular, non-competes reduce wages and hinder economic liberty by blocking people from working for a competing employer,

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35. *See* Gillian Lester & Elizabeth Ryan, *Choice of Law and Employee Restrictive Covenants: An American Perspective*, 31 COMP. LAB. L. & POL'Y J. 389, 392 (2010) ("[S]tates vary widely in their friendliness to employee non-compete agreements. A few states, such as California, have such a strong policy favoring employee mobility that they either prohibit or very strictly limit such agreements.").

36. Shortly after the FTC's proposed rule was announced, the New York State Legislature passed a now-defeated bill that would have banned non-competes and other types of restrictive covenants. *See* S. 3100A, 2023-24 Reg. Sess. (N.Y. 2023). A few months after New York passed its bill, California enacted legislation that expanded its current ban on non-competes to cover non-competes entered into outside of California. *See* CAL. BUS. & PROF. CODE § 16600.1 (2024). Minnesota's near-total ban on non-competes was signed into law on May 24, 2023, just four months after the FTC announced its proposed rule. MINN. STAT. § 181.988 (2023).

37. *See* Non-Compete Clause Rule, 16 C.F.R. § 910 (2024) (citing its authority as 15 U.S.C. §§ 45, 46(g)).

38. *See FTC Proposes Rule*, *supra* note 7.

39. *See id.*

40. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3482 (proposed Jan. 19, 2023) (codified at 16 C.F.R. § 910).

starting a competing business, or otherwise pursuing better employment opportunities that offer higher pay or better working conditions.[41] Non-competes also harm businesses and other employers by stifling innovation that might otherwise occur when workers are able to move around and share their ideas with new companies.[42] This stifling effect on innovation has a cost that gets passed onto consumers. In markets where there are fewer new employees, like the health care market, consumers pay a higher price to receive essential services.[43]

The FTC rule would have applied to all workers, both paid and unpaid.[44] This included employees, independent contractors, interns, and even volunteers.[45] The FTC created few exceptions to the rule. Based on the definition of "worker" as a natural person, the rule does not cover a franchisee but does cover someone who works for the franchisee or franchisor.[46] The rule also contained a sale-of-business exception.[47]

By passing this rule, the FTC made its stance clear: non-competes are unfair methods of competition that have wide-ranging consequences on workers, employers, and the economy as a whole.

### *C. The Preliminary Injunction Analysis*

States and federal agencies are not the only actors involved in governing non-competes. Federal courts can also decide not to enforce non-competes on a motion for a preliminary injunction. The preliminary injunction is an equitable remedy, so determining whether a party is entitled to one is a question of whether the balance of equities tips in their favor and whether the court must intervene to preserve the status quo until the court can consider the

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41. *FACT SHEET: FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, FED. TRADE COMM'N (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete_nprm_fact_sheet.pdf [https://perma.cc/2XDP-EJ9G].

42. *Id.*

43. *Id.*

44. Non-Compete Clause Rule, 16 C.F.R. § 910.1 (2024).

45. *Id.*

46. *See id.*

47. *Id.* § 910.3(a) (allowing non-compete clauses "entered into by a person pursuant to a bona fide sale of a business entity, of the person's ownership interest in a business entity, or of all or substantially all of a business entity's operating assets").

merits of the underlying claim.[48] In the context of a non-compete, a preliminary injunction motion might look like a company seeking the court's intervention in stopping a former employee from soliciting the company's customers and allegedly breaching the non-compete clause of their employment agreement.

Under the federal scheme, Rule 65 codifies the requirements for a preliminary injunction.[49] However, federal courts have set the standards for analyzing and granting an injunction. First, a preliminary injunction is "an extraordinary remedy"[50] and accordingly should only be granted "sparingly and in limited circumstances."[51] The purpose of an injunction is generally to protect the movant from future injury, which means that the movant bears a heavy burden to prove that the sparingly granted preliminary injunction is necessary to protect them from irreparable injury.[52] Next, the movant must establish four things to get a preliminary injunction: (1) they are likely to succeed on the merits of their underlying claim, (2) they are likely to suffer irreparable harm in the absence of preliminary injunctive relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest.[53]

From here, circuits take different approaches to applying these factors and are split on what kind of test these factors create. There are three basic tests that courts have come up with: (1) the sequential test, (2) the sliding scale test, and (3) the gateway factor test.[54] First, some circuits apply a sequential test, which requires a movant to prove each factor in turn.[55] All factors are necessary to grant injunctive relief, and failure to prove one factor will result in the

48. *See* Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981).

49. *See* FED. R. CIV. P. 65(a).

50. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008).

51. MicroStrategy, Inc. v. Motorola, Inc., 245 F.3d 335, 339 (4th Cir. 2001) (quoting Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 816 (4th Cir. 1991)).

52. *See, e.g.*, United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953) ("The purpose of an injunction is to prevent future violations."); Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per curiam) (explaining that the movant bears the burden of making a clear showing of entitlement to such extraordinary relief).

53. *Winter*, 555 U.S. at 20.

54. Taylor Payne, *Now Is the* Winter *of Ginsburg's Dissent: Unifying the Circuit Split as to Preliminary Injunctions and Establishing a Sliding Scale Test*, 13 TENN. J.L. & POL'Y 15, 18 (2018).

55. *See id.*

preliminary injunction being denied.[56] Second, the sliding scale test balances all four factors and permits courts to grant injunctive relief even when one factor is weak or not present.[57] Under this test, a higher showing on one factor can make up for a lesser showing on another factor.[58] Third, circuits that apply the gateway factor test require that the first two factors—likelihood of success on the merits and likelihood of irreparable harm—be met before the remaining factors can be considered.[59] If either of the first two factors are not met, injunctive relief will be denied.[60]

As shown, there is variety not only in states' non-compete laws but also in the tests that federal circuits use to interpret the law. The result is that non-compete law, when analyzed by a federal court exercising diversity jurisdiction, is messy and unpredictable.

## II. THE PUBLIC INTEREST

This Part addresses the last, and perhaps most ambiguous, factor in the preliminary injunction analysis: the public interest. This factor allows a court to determine whether the injunction is in the public interest or not. It is important to dedicate this section to pinning down what "public interest" means because, as this Note will argue, federal courts have the power to not enforce non-competes on the grounds that they are not in the public interest.[61]

"Public interest" manages to mean something different across different jurisdictions. This is because federal courts look to state substantive law for the answer when their jurisdiction comes from diversity.[62] And, as discussed previously, states have adopted different policies when it comes to enforcing non-competes.[63] So when state substantive law on non-competes is inconsistent, determining whether an injunction enforcing a non-compete is in the public interest becomes a state-by-state, jurisdiction-by-jurisdiction question.

56. *See id.*
57. *See id.* at 19.
58. *See id.*
59. *See id.*
60. *See id.*
61. *See infra* Part III.
62. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79-80 (1938).
63. *See supra* notes 33-35 and accompanying text.

As will be explored below, there are a few public policy objectives that are common across various jurisdictions when courts have analyzed the public interest, such as the goal of enforcing valid contracts wherever possible.[64] However, the weight that courts give to these objectives seems to vary on the facts of each case and, in particular, on the restrictiveness of the non-compete at issue. It is therefore necessary to spend some time tracking how the public interest factor is defined in different jurisdictions to understand if enforcing a non-compete is still in the "public interest."

### *A. When the Public Interest Does Not Favor Non-Competes: Overbroad Contracts, Competition, and Public Welfare*

Courts have denied preliminary injunctions in cases where the non-compete clauses at issue contribute to contracts that are overbroad and thus invalid. In these jurisdictions, the public interest did not favor enforcing overly restrictive or improperly drafted agreements.[65] There, injunctions were denied because the non-competes were overbroad and thus invalid contracts.[66] In *Corky Wells Electric, Inc. v. Pratt*, the court refused to issue an injunction because the employment agreements contained terms exceeding what was necessary to protect the employer's legitimate business interests.[67] The restrictive covenants were overbroad in defining both the scope of prohibited work ("general engineering business") and the scope of prohibited territory ("the States in which the Company Business has been, is currently being conducted, and those in which Company business is being conducted during the term of this Agreement").[68] As a result, it would be unfair to the former employee defendants and contrary to West Virginia law to enforce employment agreements that used "broad sweeping and unspecific language" instead

64. *See infra* note 83 and accompanying text.

65. *See* Tech. Partners, Inc. v. Hart, 298 F. App'x 238, 244 (4th Cir. 2008) ("[I]t is a matter of public interest to see that non-compete agreements that are likely invalid do not receive the extraordinary relief of a preliminary injunction.").

66. *See id.* at 243-44.

67. No. 1:19-CV-158, 2019 WL 10056967, at *16 (N.D.W. Va. Dec. 5, 2019).

68. *Id.* at *12-13.

of language crafted for specific employees and specific business enterprises.[69]

Other jurisdictions have found that the public interest lies in preserving competition—both wholesale and for individual employees. At least one court has expressed allegiance to the notion of a truly free market, holding that an injunction was inappropriate partly because the public at large benefits when companies are allowed to compete freely.[70] This same court also found that without evidence of the employee defendant improperly using or disclosing the company's confidential information, the public interest factor weighed in favor of denying an injunction that would otherwise limit the employee's ability to compete.[71] Interestingly, the court also considered the COVID-19 pandemic and the larger economic downturn when deciding that the injunction was not in the public interest.[72] These examples capture the malleable and reflective nature of the public interest factor: it can be used not only to defend an individual employee's right to compete but also to reflect global, socioeconomic forces at work.

Other societal interests can factor into courts' decisions to deny an injunction. One case from the District of Maryland involving a franchisor-franchisee relationship reflects the court's endeavor to balance the franchisor's legitimate business interests against the franchisee's ability to continue operating a daycare.[73] Among other goals of the injunction, the franchisor wanted to enjoin the franchisee from operating a competing business and using confidential information in violation of the franchise agreement.[74] The court denied the injunction partly because the franchisor did not show that keeping the daycare open and in the franchisee's control would prevent parents from finding "good quality daycare for their children."[75] The significance of childcare to the public played an explicit

69. *See id.* at *13, *16.

70. *See* Schuylkill Valley Sports, Inc. v. Corp. Images Co., No. 5:20-CV-2332, 2020 WL 3167636, at *18 (E.D. Pa. June 15, 2020).

71. *Id.* at *19.

72. *See id.* (noting that the movant company laid off employees amidst the "highest unemployment rates in more than seven decades").

73. *See* Kiddie Acad. Domestic Franchising LLC v. Faith Enters. DC, LLC, No. WDQ-07-0705, 2008 WL 11363662, at *2 (D. Md. June 18, 2008).

74. *See id.*

75. *Id.* at *3.

role in the court's decision to deny the injunction and keep the daycare center open.[76]

The District of Maryland held in a separate case that enforcing an agreement that prevented a doctor from working in nanomedicine at other companies would harm the public interest because that doctor was the "driving force" behind the specific technological development he was prohibited from partaking in.[77] As a result, an injunction could delay developments in the fight against cancer and was therefore denied.[78] Beyond Maryland, other jurisdictions have denied injunctions because granting the injunctions would not align with broader public interest goals.[79]

Some jurisdictions use the sequential method of analyzing the four factors.[80] In these cases, the movant failed to satisfy a different factor of the preliminary injunction analysis and necessarily could not satisfy the public interest factor.[81] Some courts even treat the public interest factor differently between non-compete *franchise* agreements and non-compete *employment* agreements.[82]

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76. *See id.*

77. *See* Cytimmune Scis., Inc. v. Paciotti, No. PWG-16-1010, 2016 WL 4699417, at *5 (D. Md. Sept. 8, 2016).

78. *Id.*

79. *See, e.g.*, Fromhold v. Insight Glob., LLC, 657 F. Supp. 3d 880, 889 (N.D. Tex. 2023) (explaining that because the defendant likely violated Title VII's prohibition on religious discrimination, and the public interest supports "federal law like Title VII," the employer had an "unlawful scheme" and it was therefore not in the public interest to grant the injunction); Katecho, Inc. v. Cont'l Mfg. Chemist, Inc., No. 4:18-cv-00314, 2018 WL 9814656, at *9 (S.D. Iowa Oct. 16, 2018) (finding that the public interest is broad and includes promoting national defense, protecting constitutional rights, and enforcing agencies' obligations).

80. *See, e.g.*, Payne, *supra* note 54, at 18.

81. *See* GXO Logistics, Inc. v. Cunningham, No. 3:23-CV-000199, 2023 WL 3470894, at *8 (W.D.N.C. May 15, 2023) (detailing that the movant company's motion for a temporary restraining order and preliminary injunction was denied because the company failed to show a likelihood of success on the merits of its breach of contract claim).

82. *Compare* HouseMaster SPV LLC v. Burke, No. 21-13411, 2022 WL 2373874, at *10 (D.N.J. June 30, 2022) (finding that the public interest favored granting an injunction because "[u]nlike traditional employer-employee noncompete covenants, under New Jersey law, covenants 'not to compete in franchise agreements are closer to agreements ancillary to the sale of a business ... [as] [t]he franchisee and franchisor are in a more equitable bargaining situation'.... [T]his is not a case where the public interest lies in protecting low-level employees with no real bargaining power" (second and third alterations in original) (citation omitted)), *with* JTH Tax LLC v. Gause, No. 3:21-CV-00543, 2021 WL 5085347, at *1 (W.D.N.C. Nov. 1, 2021) (making no reference to the franchisor-franchisee relationship when finding that the public interest is furthered by "enforcing valid restrictive covenants and avoiding customer confusion").

### *B. When the Public Interest Favors Non-Competes: Reasonableness, Business Interests, and Freedom of Contract*

Some jurisdictions are much more clear-cut in their approach to non-competes and will grant an injunction wherever there is a valid, enforceable contract.[83] The Western District of Texas acknowledged in *Proofpoint, Inc. v. Boone* that while non-competes are disfavored as restraints on trade, enforcing "reasonable" non-competes is within the public interest.[84] Remaining aligned with the Fifth Circuit and state court precedent was also a strong factor in the *Proofpoint* court's decision. The court noted that "both the Fifth Circuit and Texas state courts routinely uphold such clauses; the same courts grant injunctions enforcing the clauses when doing so is appropriate."[85]

Other jurisdictions consider how business interests will be impacted. This has resulted in defining "public interest" as a business interest. In *JTH Tax LLC v. Gause*, the defendant, a franchisee of a tax preparation business, was under a non-compete that prevented him from performing tax returns and disclosing confidential information.[86] The defendant was fired, and he subsequently opened a competing tax preparation business out of the same office where a former franchisee was located.[87] The defendant's former employer sought to enforce the non-compete and prevent the defendant from operating a competing business using confidential information he gained from the company.[88] The Western District of North Carolina granted the employer's motion and enforced the non-compete

83. *See, e.g.*, Core Progression Franchise LLC v. O'Hare, No. 21-1151, 2022 WL 1741836, at *4 (10th Cir. May 31, 2022) (holding that the injunction was in the public interest because Colorado law expressly states that enforceable non-competes "further state policy"); VRC Cos. v. Rodriguez, No. 2:22-cv-02461, 2022 WL 4537899, at *10 (W.D. Tenn. Sept. 28, 2022) (noting that Tennessee law requires the enforcement of reasonable non-competes).

84. No. A-21-CV-667, 2021 WL 5194724, at *7 (W.D. Tex. Sept. 21, 2021) (quoting McKissock, LLC v. Martin, No. EP-16-CV-400, 2016 WL 8138815, at *13 (W.D. Tex. Nov. 10, 2016)); *cf.* Audio-Video Grp., LLC v. Green, No. 1:14cv169, 2014 WL 793535, at *6 (E.D. Va. Feb. 26, 2014) (granting a motion for a temporary restraining order in part because the public interest favored protecting confidential business information, but also denying in part because the employer "[sought] to enforce a non-solicitation agreement that [did] not exist").

85. *See Proofpoint*, 2021 WL 5194724, at *7.

86. 2021 WL 5085347, at *1.

87. *Id.*

88. *See id.* at *1-2.

because it was in the public interest to protect legitimate business interests and avoid customer confusion.[89]

Other courts have enforced non-compete agreements on more specific grounds. The Eastern District of Pennsylvania has held that there is an important public interest in enforcing freely contracted obligations, particularly between "knowledgeable and experienced business persons."[90] Because the plaintiff in that case knowingly entered into her non-compete agreement, the court reasoned that the public interest would be served by enforcing her agreement.[91]

For the jurisdictions that favor injunctions, enforcing legitimate non-competes serves the public interest by protecting companies' confidential information, preserving parties' contractual obligations and expectations, and avoiding the destruction of incentives for companies to innovate. The public interest in these jurisdictions is inherently focused on protecting businesses and business owners, potentially at the expense of workers.

## III. The Role of Federal Courts in Striking Down Non-Competes

Finding that non-competes harm the public interest is not a new trend.[92] Finding that non-competes harm the public interest in light of evolving national or state attitudes, however, *is* a recent phenomenon. Only two courts have considered the impact of the FTC's rule and national attitudes on the public interest factor, both of which were decided while the rule was still a proposal.[93]

This Part examines how the FTC's rule has already impacted the public interest analysis in two courts and argues that more courts should follow suit by finding that non-competes are no longer in the public interest. The relatively new trend of courts finding that non-competes cut against the public interest seems to suggest that the FTC's rule is impacting courts' decisions to strike down non-

89. *Id.*
90. *See* Fisher Bioservices, Inc. v. Bilcare, Inc., No. Civ.A. 06-567, 2006 WL 1517382, at *21 (E.D. Pa. May 31, 2006).
91. *Id.*
92. *See, e.g.*, Eaton Corp. v. Appliance Valves Corp., 526 F. Supp. 1172, 1182 (N.D. Ind. 1981).
93. *See infra* Part III.A.

competes as a form of injunctive relief. As non-competes continue to dominate news cycles, more courts may find themselves unable to look away from the headlines and unable to continue allowing non-competes to survive the preliminary injunction's "extraordinary remedy" standard.[94]

### *A. Courts Should Find Non-Competes Are No Longer in the Public Interest*

After the FTC announced its proposed rule, one court found that the public interest disfavored non-competes while another found that the public interest was neutral. Both courts cited the FTC's then-proposed rule as an indication that the public no longer favors non-competes.[95] It is therefore necessary to take a closer look at each court's public interest analysis to understand what the public interest is in light of the FTC's rule and how more courts can emulate what was done in two disparate jurisdictions to strike down non-competes.

The District of Arizona cited the FTC's then-proposed rule just three months after it was announced when analyzing the public interest in enforcing non-solicitation clauses.[96] In *JPMorgan Securities LLC v. Vallery*, James Vallery left his job at JPMorgan Securities to work for "a competitor in the same industry."[97] JPMorgan moved for a preliminary injunction to prevent Vallery from soliciting clients and to require Vallery to return customer information, despite Vallery disputing having ever taken such information.[98] Vallery also argued that all his contacts with former clients had been permissible under the terms of the non-solicitation clause.[99]

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94. *See* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008).

95. *See infra* text accompanying notes 105, 114.

96. *See* JPMorgan Secs. LLC v. Vallery, No. CV-23-00651, 2023 WL 3160988, at *4 (D. Ariz. Apr. 28, 2023). A non-solicitation clause is a form of a non-compete agreement that, for a set time period, prevents former employees (similar to the defendant in *JPMorgan*) from working with or soliciting the business of clients whom they met through their former employer. *See id.* at *3.

97. *Id.* at *1.

98. *Id.*

99. *Id.* at *2.

The court found that the public interest neither favored nor disfavored an injunction requiring Vallery to return his former employer's customer information.[100] When considering the public interest, the court weighed the macro effect of an injunction against the micro impact of an injunction in this case.[101] In other words, an injunction broadly promotes the enforcement of contracts and protects trade secrets from employees leaving the company, but clients should also have "unencumbered freedom to use the financial advisor of their choice."[102] The court reasoned that restraining that choice "is not the best public policy for these particular clients."[103] An injunction enforcing the non-solicitation clause could also both help and hurt commerce because an injunction might allow an "employer to thrive in [their] industry" while also "not allowing the employee to thrive."[104]

Then, the court found that while the FTC's proposed rule is not binding, it "would ban many restrictive covenants in employment," showing that, on a national level, these covenants are disfavored.[105] The court ultimately came out neutral on whether the public favored the injunction.[106] However, while ultimately not moving the needle in the court's decision here, the FTC's proposed rule helped push the public interest factor further away from favoring the enforcement of non-competes.

The second case to take up the FTC's rule came out of the Eastern District of Virginia. In *Globus Medical, Inc. v. Jamison*, Globus Medical (Globus), a medical device company, sought a preliminary injunction to enforce the non-compete, non-disclosure, non-solicitation agreements (NCNDA) it had with sales representatives of Sky Surgical, a distributor of Globus's spinal products.[107] The NCNDAs prohibited the sales representatives from soliciting, "attempting to divert," or selling to any of Globus's customers—namely, surgeons and hospitals—for twelve months after their relationship with

100. *Id.* at *4.
101. *See id.*
102. *See id.*
103. *Id.*
104. *See id.*
105. *Id.*
106. *See id.* ("[T]he public policy both favors and disfavors an injunction.").
107. No. 2:22-cv-282, 2023 WL 5826908, at *1 (E.D. Va. Aug. 15, 2023).

Globus ended.[108] After the agreements went unrenewed, the representatives started working for a different company that distributed spinal products for a direct competitor of Globus.[109] As part of its action alleging breach of contract against the representatives, Globus requested a preliminary injunction enforcing the representatives' compliance with their NCNDAs.[110]

Globus's request for an injunction was ultimately unsuccessful.[111] The company could not establish three of the four elements of the preliminary injunction analysis—it could not demonstrate a clear likelihood of success on the merits of its underlying breach of contract claim, that the balance of equities tipped in its favor, or that an injunction was in the public interest.[112] Of relevance to this Note is the court's analysis of the various public interest considerations. The court acknowledged that the established precedent in the Eastern District of Virginia was to "protect companies' confidential information, enforce and uphold valid contracts," and protect contracting parties' legitimate expectations.[113] But the court departed from this precedent by pointing to the FTC's proposed rule as an indication that non-compete clauses are "no longer in the public interest."[114] Ultimately, the "national discussion" around non-competes was enough to suggest to the court that the public interest may no longer be in favor of enforcing non-competes.[115]

More courts should follow suit and find that the public interest no longer favors enforcement of non-competes. What the FTC did—pass a sweeping ban on almost all non-competes—reflects a broader, nationwide concern that the non-compete is an inequitable employment agreement; the FTC merely brought that concern to light. The courts in *JPMorgan Securities* and *Globus Medical* picked up on that trend and adjusted their public interest analysis accordingly. This is what the public interest analysis is designed for: as activities become more and more socially disfavored, they no longer warrant

108. *Id.* at *4.
109. *Id.* at *1, *5-6.
110. *Id.* at *1.
111. *Id.* at *20-21.
112. *See id.* at *10, *16, *18, *20.
113. *Id.* at *19.
114. *See id.* at *20.
115. *See id.*

the extraordinary protection of the preliminary injunction. The non-compete should not be treated any differently. In light of a growing number of states passing restrictions on non-competes, the FTC's rule banning them outright, and public outcry at the harmful effects of entering into one, more courts should find that the public interest no longer favors enforcing non-competes.

## IV. COUNTERARGUMENTS ADDRESSED

This Part addresses four potential counterarguments to federal judicial intervention in striking down the non-compete agreement. The first argument is that courts should opt to modify or "blue pencil" a non-compete instead of outright rejecting it. The basis for this argument is that existing state rules on blue penciling provide sufficient alternatives for courts to prevent non-competes from unreasonably restricting workers. The second argument arises from a similar preoccupation with state-initiated action and proposes that states, not federal courts, should be responsible for striking down non-competes in the form of amended legislation. Third, some argue that the preliminary injunction should be maintained in the context of non-competes because injunctions preserve the status quo while the court considers the merits of the case. Fourth and finally, there is the argument that the public interest factor already carries little weight in the preliminary injunction analysis. This Part rebuts these arguments in order.

### *A. No More Blue Penciling*

One alternative that courts take to striking down entire non-compete agreements is to cross out only "unreasonable provisions ... while keeping in place the [remaining] enforceable language," also known as the "blue pencil" approach.[116] As a result, in jurisdictions that take up the blue pencil, the language of a non-compete agreement becomes a mere starting point rather than a final reflection of the contracting parties' terms.

116. *See* Steiner v. Am. Friends of Lubavitch (Chabad), 177 A.3d 1246, 1256 (D.C. 2018).

While some jurisdictions follow the blue pencil approach, others adopt broader discretion and rewrite the unreasonable provisions to reflect more reasonable terms for all parties.[117] For example, if the underlying non-compete is unreasonable but the requested injunction is too broad, a court may restructure the non-compete so as to give effect to both parties' interests.[118] A court might also modify a non-compete agreement instead of rejecting it due to a lack of evidence available at that stage of litigation. Because a preliminary injunction is requested while the court considers the merits of the underlying claim[119]—usually closer to the beginning or middle of litigation—the court might not have enough information to conclude that the requested relief is appropriate.[120]

While these are perfectly legitimate reasons for modifying a non-compete instead of striking it down as unenforceable, modification is, in practice, more harmful than simply rejecting the entire agreement. For one, the blue pencil harms employees. Courts' willingness to amend unreasonable non-compete agreements encourages employers to draft broad agreements, secure in the knowledge that any overly restrictive provisions can be corrected during litigation.[121] This effectively permits employers to overreach, and overreaching puts employees in a costly and uncomfortable position of deciding whether to accept a job with an overly restrictive non-compete or litigate the non-compete in court.[122] Of course, this assumes that the employee is even aware of the harmful restrictions in their non-compete. For those employees unaware of the overly

117. *See, e.g.*, Ferrofluidics Corp. v. Advanced Vacuum Components, Inc., 968 F.2d 1463, 1469 (1st Cir. 1992) (describing the various approaches that courts take when presented with restrictive covenants containing unenforceable provisions).

118. *See, e.g.*, Advoc. Holdings, Inc. v. Clevinger, No. 23-1176, 2023 WL 4744156, at *2 (D.D.C. May 19, 2023) (finding that the requested injunction was "too broad given the irreparable harm" alleged and enforcing the non-compete on narrower terms); JPMorgan Secs. LLC v. Vallery, No. CV-23-00651, 2023 WL 3160988, at *4-5 (D. Ariz. Apr. 28, 2023) (narrowing the scope of the non-compete to limit the meaning of "solicitation" instead of outright granting the employer's requested injunction).

119. *See supra* text accompanying note 48.

120. *See, e.g.*, *Clevinger*, 2023 WL 4744156, at *2 ("It is too early in this action for the Court to conclude that it is appropriate to shut down Clevinger's business entirely.").

121. *See* Pivateau, *supra* note 34, at 690-91.

122. *See id.* at 690 (describing this problem as the "in terrorem effect," which forces an employee to try to interpret ambiguous provisions and determine the "possible legal liability" of accepting a job or challenging the employer in court).

restrictive nature of their contract, their problems are arguably worse: the unenforceable agreement may prevent them from changing jobs, starting a new business, or getting more compensation elsewhere.

The blue pencil also causes unnecessary confusion and stress for employers, employees, and the legal system. Rewriting an agreement instead of striking it down for unenforceability leaves employers guessing as to how broadly they can draft an agreement before a court will modify it. The opportunity for rewrites also confuses employees, who may not understand what their non-compete prohibits without first going to court.[123] Courts must then not only determine the underlying reasonability of the non-compete but also rewrite the agreement in a way that is reasonable for both parties, ultimately turning courts into attorneys after the fact.[124] This not only creates confusion in our legal system but also undermines parties' freedom to contract by imposing provisions that were not part of the original bargained-for agreement.

For these and other reasons,[125] the blue pencil approach is not a welcome alternative to striking down a non-compete at the preliminary injunction stage of litigation. Even if applied strictly, simply excising certain provisions from a non-compete and enforcing the rest does not address the inherent inequity of the non-compete.[126] Additionally, just like the non-compete, the blue pencil approach is falling out of favor with courts across the country.[127] Some courts do

123. *See* Dearborn v. Everett J. Prescott, Inc., 486 F. Supp. 2d 802, 816 (S.D. Ind. 2007) (describing the employee's dilemma when courts rewrite contracts, explaining that an employee "could not secure meaningful legal advice because he could not know what the employer might want to enforce").

124. *See* Unlimited Opportunity, Inc. v. Waadah, 861 N.W.2d 437, 441 (Neb. 2015) (criticizing the use of the blue pencil doctrine as "against public policy" and stating that "it is not the function of the courts to reform a covenant not to compete in order to make it enforceable").

125. For more in-depth discussions of the blue pencil approach, see generally Griffin Toronjo Pivateau, *An Argument for Restricting the Blue Pencil Doctrine*, 7 BELMONT L. REV. 1 (2019), and Miranda B. Nelson, *Sharpening South Carolina's Blue Pencil: An Argument for Codifying a Strict Interpretation of the Blue-Pencil Doctrine*, 70 S.C. L. REV. 917 (2019).

126. *See* Kenneth R. Swift, *Void Agreements, Knocked-Out Terms, and Blue Pencils: Judicial and Legislative Handling of Unreasonable Terms in Noncompete Agreements*, 24 HOFSTRA LAB. & EMP. L.J. 223, 247 (2007) (pointing out that employees often do not have "legitimate bargaining power" in non-competes).

127. *See, e.g.*, *Waadah*, 861 N.W.2d at 441 ("Severability of noncompete covenants is against public policy because it creates uncertainty in employees' contractual relationships

not take up the blue pencil, instead either enforcing the non-compete as written or not enforcing it at all.[128] Other courts have cautioned against the overuse of the blue pencil, emphasizing that courts should not rewrite faulty non-compete agreements and should only strike unreasonable terms when it would preserve the grammatical integrity of the contract.[129] Wisconsin has even mandated against modifying non-competes by statute.[130]

### *B. Why We Cannot Leave It Up to the States*

Some argue that non-compete law has historically been left to the states to govern and should continue to be governed by state law instead of the FTC.[131] A natural extension of this argument might be that the federal judiciary has no business striking down non-competes on the basis of the public interest factor and that, instead of focusing on judicial intervention, states should pass legislation that addresses the harm of non-competes.

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with franchisors, increases the potential for confusion by parties to a contract, and encourages litigation of noncompete clauses in contracts.").

128. *See, e.g.*, Turnell v. CentiMark Corp., 796 F.3d 656, 663 (7th Cir. 2015) (acknowledging that "[t]here is a limit ... to Pennsylvania courts' willingness to reform a restrictive covenant"); *Dearborn*, 486 F. Supp. 2d at 809 (explaining that "the price of over-reaching" under Indiana law is that the restriction is unenforceable, "even if it would have been possible to draft and enforce a narrower, more reasonable restriction").

129. *See* Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC, 784 S.E.2d 457, 460-61 (N.C. 2016) (reaffirming North Carolina's strict interpretation of the blue pencil doctrine, permitting a court to only strike overbroad restrictions but not create new ones in their place); InfoArmor, Inc. v. Ballard, No. CV-21-01844, 2021 WL 5416618, at *4 (D. Ariz. Nov. 19, 2021) (clarifying that the blue pencil rule does not allow courts to "'add terms or rewrite provisions' to save a restrictive employment covenant" (quoting Valley Med. Specialists v. Farber, 982 P.2d 1277, 1286 (Ariz. 1999))).

130. *See* WIS. STAT. § 103.465 (2016). According to the statute, "[a]ny covenant [not to compete], described in this section, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint." *Id.*

131. *See* Dawn Mertineit, *Non-Compete Regulation Should Be Left to the States, Not the FTC*, BLOOMBERG LAW (Feb. 3, 2023, 4:00 AM), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/non-compete-regulation-should-be-left-to-the-states-not-the-ftc [https://perma.cc/L88E-YYFA]. Additionally, Commissioner Christine Wilson, the only FTC Commissioner to dissent from the proposed rule, called the commissioners "unelected technocrats" who are proposing law that conflicts with "several hundred years of precedent." *See* U.S. Fed. Trade Comm'n, Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule (Jan. 5, 2023), at 3.

Unfortunately, the status of non-compete law nationwide does not provide much hope of a strong, state-by-state effort to address the growing disfavor around non-competes.[132] This is because non-compete law is a mess nationwide.[133] Only four states have laws banning most non-competes,[134] and data shows that employers continue to use non-competes in those states despite restrictions that make them clearly unenforceable.[135] Every other state permits non-competes in at least some fashion.[136] Some of these states have statutes governing the enforceability of non-competes, while the rest have left the question of enforceability to common law development.[137] These differences add up to significantly different legal rights among states and unpredictability in the enforcement of non-competes state-to-state.[138]

Despite a wave of new bills addressing restrictive covenants in the past couple years, these laws do not go far enough to protect an employee's right to earn a living. Many of the current laws on non-compete enforceability implement a wage threshold in which non-competes are unenforceable for those earning below a certain

132. This Part does not argue that state law is completely ineffective at regulating non-competes, but rather that state law on its own is insufficient to deal with the uneven landscape of non-compete law across the country. The intervention of a legal authority beyond state legislatures is especially important in states where non-competes are permitted.

133. *See supra* notes 33-35 and accompanying text (discussing the variety of approaches that states take in enforcing non-competes).

134. *See supra* note 33.

135. *See* Evan P. Starr, J.J. Prescott & Norman D. Bishara, *Noncompete Agreements in the US Labor Force*, 64 J.L. & ECON. 53, 81 (2021) ("[E]mployers use noncompetes virtually as often in states where such restrictions are clearly unenforceable.").

136. For a comprehensive overview of how permissive each state is with non-competes, see *50 State Noncompete Chart*, BECK REED RIDEN LLP (June 20, 2024), https://beckreedriden.com/50-state-noncompete-chart-2/ [https://perma.cc/WQD9-DLZP].

137. Eighteen states regulate non-competes by common law: Alaska, Arizona, Connecticut, Delaware, Indiana, Kansas, Mississippi, Nebraska, New Jersey, New Mexico, New York, Ohio, Pennsylvania, South Carolina, Tennessee, Vermont, West Virginia, and Wyoming. *See id.*

138. *See* Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends, and Implications for Employee Mobility Policy*, 13 U. PA. J. BUS. L. 751, 756 (2011) (describing a "national status quo" where state law on non-competes "varies such that the enforceability of a post-employment restriction on an employee's mobility will be uncertain"); Timothy P. Glynn, *Interjurisdictional Competition in Enforcing Non-competition Agreements: Regulatory Risk Management and the Race to the Bottom*, 65 WASH. & LEE L. REV. 1381, 1420 (2008) (describing the variety of state approaches to enforcing non-competes and concluding that "in practice, state treatment lies along a wide spectrum from near-certain nonenforcement to frequent enforcement").

amount.[139] While these thresholds protect low earners, who may be more vulnerable to the harms that a non-compete can cause, they can nonetheless miss a broad swath of workers.[140] For example, both Maine and Rhode Island's non-compete laws tie the salary threshold to the federal poverty line—implying that the minimum salary required to get protection depends in part on the size of the worker's household.[141]

State laws also face practical hurdles to enforcement that judicial intervention avoids. Political disagreement and slow-acting legislatures mean that it may take months before a bill is signed into law, leaving workers in the interim impatient for state action.[142] Additionally, splits among state courts in how to enforce new legislation only add to the unpredictability of non-compete law across the nation. The Nevada courts dealt with this issue after the state's non-compete law was amended in 2021.[143] Based on the split in

139. These thresholds work by imposing minimum wage or salary levels for workers that sign non-competes, effectively prohibiting their use on lower earning workers. *See, e.g.*, 820 ILL. COMP. STAT. 90/10(a) (2023) (prohibiting non-competes for employees making $75,000 or less per year); MD. CODE ANN., LAB. & EMPL. § 3-716(a)(1)(i)(1) (West 2024) (prohibiting non-competes for employees earning equal to or less than 150 percent of the state minimum wage); WASH. REV. CODE § 49.62.020(1)(b) (2023) (setting an annual salary limit of $100,000).

140. *See* NEV. REV. STAT. § 613.195(3) (2023) (banning non-competes outright only for hourly workers). All other non-competes for Nevada workers are subject to the law's reasonableness determination. *See id.* § 613.195(1)-(2), (6) (2023).

141. *See* ME. STAT. tit. 26, § 599-A (2023); 28 R.I. GEN. LAWS § 28-59-3 (2023). In Rhode Island, a "low-wage employee" is defined as someone whose annual earnings are not more than 250 percent of the federal poverty line. 28 R.I. GEN. LAWS § 28-59-2(7) (2023).

142. The New York Legislature was recently embroiled in a form of negotiations with Governor Kathy Hochul over the state's bill that would have banned all non-competes. It was reported in December 2023 that Governor Hochul had not signed the legislation since it was sent to her in June 2023, and it had been reported that Hochul's stall was due to her wanting to see an exemption for high earning workers integrated into the bill. *See* Kelly M. Cardin, *New York Governor Supports Changes to Non-Compete Legislation*, OGLETREE DEAKINS (Dec. 11, 2023), https://ogletree.com/insights-resources/blog-posts/new-york-governor-supports-changes-to-non-compete-legislation/ [https://perma.cc/4NXM-WYCK]. The New York Senate then offered to exempt incomes above $300,000 and re-sent the bill for Hochul's signature. *See* Zach Williams, *NY Senate Sweetens Offer to Hochul to Sign Non-Compete Ban*, BLOOMBERG LAW (Dec. 21, 2023, 5:24 PM), https://news.bloomberglaw.com/daily-labor-report/n-y-senate-sweetens-offer-to-hochul-to-sign-non-compete-ban [https://perma.cc/RC2U-LXPL]. Despite the back-and-forth negotiations, Governor Hochul eventually vetoed the bill on December 22, 2023. *Senate Bill S3100A*, N.Y. STATE SENATE, https://www.nysenate.gov/legislation/bills/2023/S3100/amendment/A [https://perma.cc/X28A-7VQA].

143. *See* Arthur Zorio, *Should Nevada Employers Revise Non-Compete Agreements in Light of Amendment to NRS 613.195?*, BROWNSTEIN (June 7, 2022), https://www.bhfs.com/insights/

Nevada courts on whether state law could apply retroactively to covenants entered into before the law's enactment, it became unclear if courts would even allow the 2021 amendment to have a retroactive effect, leaving many workers out of the amendment's intended reach.[144]

Despite some agreed-upon principles of how non-competes are reviewed by most state courts and the four-factor preliminary injunction analysis used in federal court, there nonetheless exists no uniform approach across jurisdictions in fashioning non-compete legislation. This variance among states in their enforcement of non-competes means that state regulation alone is not enough to see a change in the protection given to employees.

### *C. Upholding Non-Competes Does Not Preserve the Status Quo*

Historically, courts have posited that a central purpose of the preliminary injunction is to preserve the status quo while the court considers the merits of the case.[145] Therefore, there is an argument that courts should continue issuing injunctions that uphold non-competes because an injunction is necessary to preserve the status quo—namely, the statuses that the parties were in prior to litigation.[146]

This argument is more convincing in cases involving public law than it is when made in the context of private litigation. In cases involving challenges to public law and government action, the preliminary injunction can have far-reaching consequences. It can give courts time to carefully consider important public policy issues that

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alerts-articles/2022/should-nevada-employers-revise-non-compete-agreements-in-light-of-amendment-to-nrs-613-195- [https://perma.cc/8Z8Y-ENDL].

144. *See id.*

145. *See, e.g.*, Benisek v. Lamone, 585 U.S. 155, 161 (2018) (per curiam) ("[T]he 'purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.'" (quoting Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981))); Ferry-Morse Seed Co. v. Food Corn, Inc., 729 F.2d 589, 593 (8th Cir. 1984) ("The primary function of a preliminary injunction is to preserve the status quo until, upon final hearing, a court may grant full, effective relief.").

146. *See* Stryker Emp. Co. v. Abbas, 60 F.4th 372, 382 (6th Cir. 2023) (noting the district court's injunction "used broad language to maintain the status quo").

affect broad swaths of people, not just the parties to litigation.[147] This is an especially important feature of the preliminary injunction, as these cases can implicate serious public policy issues like abortion access and gerrymandering.[148] But in private litigation, the effect of a preliminary injunction is specific to a particular party. The issues implicated in private litigation, such as whether a contract was breached, do not convincingly justify the need to preserve the status quo because they lack the same urgency and sweeping effect as the issues implicated in public law challenges.

Additionally, an injunction that enforces a non-compete can do more harm than good when it comes to maintaining the status quo. Courts have previously found that issuing an injunction and enforcing a non-compete would *not* maintain the status quo, especially in cases where the movant has failed to demonstrate that they would suffer irreparable injury without an injunction.[149] Especially in light of states passing and amending legislation to ban non-competes,[150] it is no longer convincing to say that injunctions enforcing non-competes preserve parties' positions. The new reality is that non-competes disrupt employees' lives by impeding movement between jobs and suppressing wages.[151]

### *D. The Public Interest Still Matters*

Another counterargument to this Note's proposal is that the public interest factor is relatively unimportant in the preliminary injunction analysis. As recently as December 2023, courts have held that the public interest factor carries little weight relative to the

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147. *See* Kevin J. Lynch, *Preliminary Injunctions in Public Law: The Merits*, 60 HOUS. L. REV. 1067, 1103 (2023).

148. *See* Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting) ("I would grant preliminary relief to preserve the status quo ante—before the law went into effect—so that the courts may consider whether a state can avoid responsibility for its laws in such a manner."); *Benisek*, 585 U.S. at 161 (per curiam) (noting that an injunction might have needlessly disrupted the electoral process rather than preserve the parties' relative positions until trial).

149. *See, e.g.*, Kiddie Acad. Domestic Franchising LLC v. Faith Enters. DC, LLC, No. WDQ-07-0705, 2008 WL 11363662, at *3 (D. Md. June 18, 2008) (explaining that denying the injunction would "[maintain] the status quo until the merits of Kiddie Academy's claims can be fully resolved").

150. *See supra* note 36.

151. *See* Ferré-Sadurní, *supra* note 8.

other three factors.[152] However, these courts are in circuits that employ a sliding scale test when analyzing a preliminary injunction.[153] The result of this approach is that the public interest factor does not need to be met in order for a court to grant a preliminary injunction.[154] But in jurisdictions that employ the sequential test, such as the Fourth, Fifth, Tenth, and Eleventh Circuits, the public interest factor *must* be met.[155] In these jurisdictions, the outcome of the motion depends on a strong showing of all four factors.[156] This means that the public interest factor alone carries significant weight in the jurisdictions that follow the sequential approach: the movant *must* prove that enforcing a noncompete is in the public interest in order for the court to grant the preliminary injunction.

While the sequential approach is not taken in all circuits, the idea that the public interest factor is unimportant is simply not true in every jurisdiction. The jurisdictions that follow the sliding scale approach may ascribe little weight to the public interest if there is a strong showing on other factors, but the jurisdictions that follow the sequential approach treat the public interest factor as an indispensable element of the movant's claim to a preliminary injunction. Additionally, where the effect of the injunction will be limited to just the parties, some courts presume that the public interest is a neutral factor.[157] For the courts that follow this rule, it becomes extremely important that parties articulate a specific public interest implicated by the injunction.[158]

But the importance of the public interest factor is not simply tied to which jurisdictional approach is taken. It is the only factor in the preliminary injunction test that explicitly considers the extralegal effects of the injunction. Social, political, and even constitutional

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152. *See, e.g.*, Quest Car Care Prods., Inc. v. Titus, No. 1:23-CV-1066, 2023 WL 9472302, at *4 (W.D. Mich. Dec. 27, 2023) (noting that the public interest factor "may be the least compelling of the four").

153. *See* Payne, *supra* note 54, at 50.

154. *See id.* at 19.

155. *See id.* at 47.

156. *See id.* at 47-48.

157. *See, e.g.*, Stormans, Inc. v. Selecky, 586 F.3d 1109, 1138-39 (9th Cir. 2009).

158. *See* Gov't of the Lao People's Democratic Republic v. Baldwin, No. 2:20-cv-00195, 2021 WL 3056871, at *10 (D. Idaho July 20, 2021) (finding that the public interest factor was neutral since neither party pointed to a particular public interest at stake).

considerations that could not fit neatly in the other three factors can subsequently be brought up and examined by the court during its public interest analysis.[159] Especially when an injunction enforcing a non-compete can result in shutting a business down and forcing people to forego employment for an indefinite amount of time, the importance of the public interest factor in capturing *all* issues at play cannot be overstated.[160]

## CONCLUSION

The often-stated purpose of the preliminary injunction is to preserve the status quo.[161] But what happens when the status quo is in flux? What should we do when non-competes no longer seem like fair, bargained-for agreements between employers and employees?[162] This Note has argued that federal courts should stop the enforcement of non-competes by denying injunctive relief. Supported by the vast literature on the harms of non-competes (including the FTC's own research to support its rule) and the growing number of states banning them, courts should reconsider whether enforcing a non-compete through a preliminary injunction truly satisfies the public interest factor. Courts are in a better posture now more than ever to find that non-competes are not worthy of the "extraordinary and drastic remedy" of a preliminary injunction, especially when it comes at the cost of workers' right to earn a living and freely seek employment.[163]

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159. *See supra* notes 78-79 and accompanying text.

160. *See* Advoc. Holdings, Inc. v. Clevinger, No. 23-1176, 2023 WL 4744156, at *2 (D.D.C. May 19, 2023) (denying a preliminary injunction that would have "shut down [defendant's] business entirely").

161. *See supra* note 145 and accompanying text.

162. *See* Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 392 (2006) ("[A]s firms' profits have come increasingly to depend on information that is carried around in the heads of employees, non-compete covenants have filtered down to lower-level employees with relatively little sophistication, bargaining power, or economic wherewithal.").

163. *See* Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per curiam).

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