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How Can Federal Actors Compete on Noncompetes? Examining the Need for and Possibility of Federal Action on Noncompetition Agreements

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ABSTRACT

Employees have been frustrated by the restrictiveness of noncompete agreements and confused about their enforceability for decades. The added complication of choice-of-law provisions in employment contracts with noncompetes creates a sea of unpredictability for both employees and employers.

Each state applies its own policy to noncompete agreements. While every state treats noncompetes differently than typical contract provisions, a broad spectrum exists between the states that are friendly and those that are hostile to the enforcement of noncompetes. Employees and employers often fail to understand whether their noncompete is enforceable under the jurisdiction chosen by the contract, and courts override choice-of-law provisions in connection with noncompetes in an unpredictable manner.

This lack of clarity has caused employers and employees to disregard state law, with noncompete agreements occurring at a steady amount in all states, regardless of a state's relative stance on them. A federal policy on noncompetes would alleviate this uncertainty for both parties, protect employees from unfair or unenforceable noncompetes, and maintain employers' legitimate business interests in a reasonable noncompete.

This Comment will examine the prospects of both federal legislation and a Federal Trade Commission (FTC) rule. Federal legislation is the most effective means to address the aforementioned issues and preempt state noncompete law. In the alternative, an FTC rule, although possible with a motivated FTC, faces a number of challenges for both rulemaking and preemption of state laws. Although the FTC likely has the authority to create a

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beneficial noncompete rule and preempt state law, Congress should be the entity to regulate noncompetes because federal legislation is more likely than an FTC rule to survive legal challenges.

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I. INTRODUCTION

Christopher Ridgeway worked for Stryker, an international medical technologies corporation incorporated in Delaware with its principal place of business in Michigan.[1] Ridgeway worked for the company in Louisiana.[2] Stryker terminated Ridgeway, then sought to enforce a noncompete agreement he previously signed to prevent him from working for a competitor by suing him in the West-

1. Stone Surgical, LLC v. Stryker Corp., 858 F.3d 383, 386–91 (6th Cir. 2017).
2. *Id.*

ern District of Michigan.[3] The Western District of Michigan, and later the Sixth Circuit, applied Michigan law because the parties had selected Michigan as the forum and governing law for the employment contract.[4] The Sixth Circuit acknowledged that Louisiana law severely restricts noncompetes, but applied Michigan law instead because of the parties' choice-of-law agreement.[5] The court's decision resulted in the enforcement of Ridgeway's noncompete agreement and thereby restricted his freedom to work.[6]

Patrick Miles worked for Nuvasive, Incorporated ("Nuvasive") in California.[7] He left to join a competitor, and Nuvasive responded with a lawsuit in Delaware, where it was incorporated.[8] The parties had agreed their employment contract would be governed by Delaware law, which would enforce a noncompete provision preventing Patrick from joining a competitor.[9] Instead, the Delaware court overrode the choice-of-law provision and applied California law, invalidating the noncompete agreement and allowing Miles to join the competitor.[10] California law significantly disfavors noncompetes, and the court found the fundamental public policy of California outweighed Delaware's interest in freedom to contract.[11]

Shashi Batra lived and worked for Estee Lauder Companies in California, but a choice-of-law clause in his employment contract subjected the contract to the law of New York, the location of Estee Lauder's principal place of business.[12] In Batra's case, a New York court applied New York law to enforce the noncompete clause in Batra's employment contract, barring Batra's newfound employment with a competitor.[13] The court acknowledged that the application of New York law and the resultant enforcement of the noncompete agreement ran counter to a fundamental policy of California, but concluded that California's interest in protecting work-

3. *Id*.

4. *Id.* The Court determined that "Louisiana's interest in protecting its employee from unfair non-compete clauses is not *materially* greater than Michigan's interest in protecting its businesses from unfair competition . . . although Michigan law favors non-competes and Louisiana law severely restricts them[.]" *Id.* at 391.

5. *Id.*

6. *Id.*

7. Nuvasive, Inc. v. Miles, No. 2017-0720-SG, 2019 WL 4010814, at *2 (Del. Ch. Aug. 26, 2019).

8. *Id.*

9. *Id.*

10. *Id.* at 7.

11. Cal. Bus. & Pro. Code § 16600 (1941) (prohibiting most noncompetes); *Nuvasive*, 2019 WL 4010814, at *1.

12. Estee Lauder Co. v. Batra, 430 F. Supp. 2d 158, 161–63 (S.D.N.Y. 2006).

13. *Id.*

ers was not materially greater than New York's interest in protecting companies.[14]

Noncompete agreements, nondisclosure agreements, and nonsolicitation agreements, which are known collectively as restrictive covenants, are designed to protect the employer's business interests during and after employment, but noncompetes come at a cost for the employee and business competitors.[15] A noncompete typically restricts an employee's post-employment movement to the employer's competitors within a specific geographic area and time period.[16]

A choice-of-law provision in an employment contract is an agreement between the employer and employee selecting which state's laws will govern enforcement of their contract.[17] In many cases, these provisions require the contract to be governed by the law of a different state than the state where the employment takes place.[18] Employment contracts may also contain forum selection clauses that require the contract to be litigated in a specific state.[19]

Noncompete agreements accompanied by choice-of-law provisions yield unpredictable results.[20] Throughout the 50 states lies a

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14. *Id.* at 173.

15. *See, e.g.*, Norman D. Bishara & Evan Starr, *The Incomplete Noncompete Picture*, 20 LEWIS & CLARK L. REV. 497, 504–05 (2016) (listing the various types of restrictive covenants and noting the negative impacts noncompetes have on employees and competitors); *see also infra* Section II.A (discussing how noncompetes can be harmful to employees and business competitors).

16. *See, e.g.*, Evan Starr, JJ Prescott, & Norman D. Bishara, *Noncompete Agreements in the U.S. Labor Force*, J.L. & ECON. 1 (2021) [hereinafter *Labor Force*] (explaining that noncompetes are typically limited by time and geography).

17. *See, e.g.*, Martin v. Stassen Ins. Agency, Inc., 2008 WL 5220283, at *1 (Wis. Ct. App. Dec. 16, 2008) ("This Agreement shall be governed in all respects, whether as to validity, construction, capacity, performance, or otherwise, by the laws of the State of Illinois.").

18. *See, e.g.,* Stone Surgical, LLC v. Stryker Corp., 858 F.3d 383, 386–91 (6th Cir. 2017) (applying Michigan law in a Michigan court because of choice-of-law and forum selection clauses despite the employment occurring in Louisiana).

19. *See, e.g.*, *Martin*, 2008 WL 5220283, at *1 ("Any suit or proceeding arising out of or related to this Agreement shall be commenced only in a state court located in McHenry County, Illinois or a federal court located in Rockford Illinois, and each party to this Agreement hereby consents to the exclusive jurisdiction of such courts.").

20. Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 376 (2003) (finding that nonenforcement of choice-of-law provisions in employment contracts was most common in cases involving noncompete agreements). An Ohio judge famously referred to noncompete jurisprudence as "a sea—vast and vacillating, overlapping and bewildering. One can fish out of it any kind of strange support for anything, if he lives so long." Arthur Murray Dance Studios of Cleveland. v. Witter, 105 N.E.2d 685, 687 (Ohio C.P. Cuyahoga Cnty. 1952).

wide spectrum of laws governing noncompetes.[21] Employers, who write the noncompete provisions and tend to control the terms, including choice-of-law provisions and forum selection, will often choose a governing body of law that they expect will uphold the noncompete.[22] Sometimes, the employer's attempt to select a favorable law fails, and the forum court casts aside the choice-of-law provision to invalidate the noncompete under the law of the state where the employment took place.[23] Alternatively, courts often uphold the employment contract's choice-of-law provision, justifying the efforts of the employer, who generally controls the state chosen in a choice-of-law provision, and confusing the employee, who may not have been aware of the provision.[24] Employers take advantage of this lack of clarity by pressuring their employees to sign noncompetes regardless of whether the agreement would be enforceable in either jurisdiction.[25]

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21. *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, 778–79 (2011) (detailing the spectrum of approaches taken by states).

22. *See e.g.*, Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963, 978 (2006) (noting that employers routinely provide noncompetes after the employment has been accepted, creating the illusion for the employee that the noncompete is simple routine paperwork); Ravetto v. Triton Thalassic Tech., Inc., 941 A.2d 309, 325 (Conn. 2008) ("[T]he employer usually drafts the employment agreement."); Timothy P. Glynn, *Interjurisdiction Competition in Enforcing Noncompetition Agreements: Regulatory Risk Management and the Race to the Bottom*, 65 WASH. & LEE L. REV. 1381, 1422 (2008) ("Employers typically are the first movers in [noncompete] litigation—they sue, alleging breach of contract and related claims. Firms therefore have a much greater ability in this context . . . to control the judicial forum[.]"); *id.* at 1389 ("[In] employment law . . . management typically chooses the terms governing [the employment relationship."); *id.* at 1399 ("Managers . . . have strong incentives to control legal risks through the selection of favorable state law.").

23. *See, e.g.*, Nuvasive, Inc. v. Miles, No. 2017-0720-SG, 2019 WL 4010814 (Del. Ch. Aug. 26, 2019) (overriding a Delaware choice-of-law provision because the noncompete agreement was counter to California public policy).

24. *See, e.g.*, Curtis 1000 v. Suess, 24 F.3d 941, 948 (7th Cir. 1994) (overturning district judge's finding that a Delaware-governed noncompete would be repugnant to Illinois public policy and therefore enforcing the noncompete using the chosen Delaware law); *see also supra* note 22 and accompanying text.

25. *See* Evan Starr, J.J. Prescott, & Norman Bishara, *The Behavioral Effects of (Unenforceable) Contracts*, J.L., ECON. & ORG. 633, 665–66 (2020) (hereinafter *Behavioral Effects*) (finding that noncompetes often prevent employee movement about the workforce regardless of whether the noncompete would be enforceable in court); Rachel Arnow-Richman, *The New Enforcement Regime: Revisiting the Law of Employee Competition (and the Scholarship of Professor Charles Sullivan) with 2020 Vision*, 50 SETON HALL L. REV. 1223, 1232, n.35 (2020) (noting that many noncompetes would likely be unenforceable if taken to court); J.J. Prescott, Norman D. Bishara, & Evan Starr, *Understanding Noncompetition Agreements:*

This Comment will address the uncertainty faced by both employees and employers in the existing noncompete-choice-of-law framework and argue that the existing body of law creates an unnecessary level of unpredictability that can be costly for employers and even more costly for employees.

A federal standard for noncompetes would provide clarity and predictability to employees and employers. This federal standard should generally prohibit noncompetes except in certain limited circumstances. Federal legislation would be effective at solving the existing problems with noncompetes and would preempt state laws, while a rule issued by the Federal Trade Commission (FTC) would face significantly more hurdles that could undermine its effectiveness.[26] While an FTC rule would have the force of law and preempt state noncompete laws, a variety of legal battles could sabotage the FTC rule.[27] Because of these risks, federal legislation is the best means to reduce uncertainty and protect employees from exploitative noncompete policies without completely diminishing an employer's legitimate business interests in noncompete clauses.

II. BACKGROUND

A. Noncompetes: A Controversial Employment Contract Provision

Noncompetes harm employees by restricting their freedom to move about the workforce.[28] Without freedom of movement, em-

The 2014 Noncompete Survey Project, 2016 MICH. ST. L. REV. 369, 460–62 (2016) (finding that a state's tendency to favor or disfavor noncompetes has no impact on whether employers use noncompetes in their employment contracts).

26. *See infra* Section III (analyzing the potential effectiveness of federal legislation to provide uniformity and the potential hurdles FTC rulemaking may face).

27. *See infra* Section III.A.2 (analyzing the feasibility and potential effectiveness of an FTC rule).

28. *See* Norman D. Bishara, Kenneth J. Martin, & Randall S. Thomas, *An Empirical Analysis of Noncompete Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 51 (2015) (showing employers use noncompetes and other restrictive covenants "to impede the postemployment mobility of key employees"); Bishara & Starr, *supra* note 15, at 505 ("[Noncompetes restrict] an individual worker's otherwise free choice of leaving one employer to join another competing employer."); *see also Hearings to Examine Noncompete Agreements and American Workers, Including S.124 to Amend the Fair Labor Standards Act of 1938 to Prevent Employers from Using Non-compete Agreements in Employment Contracts for Certain Non-exempt Employees, and S.2614, to Prohibit Certain Noncompete Agreements Before the S. Small Bus. and Entrepreneurship Comm.*, 116th Cong. (2019) (statement of Keith A. Bollinger). Mr. Bollinger told the committee his story, in which he left a failing company that cut his pay twice to join a competitor offering him his dream job as an operations manager. *Id.* His previous employer used his noncompete to remove him from that position, and his career suffered for years as a result. *Id.*

ployees face limitations on their ability to pursue higher wages and better opportunities in their occupations.[29]

Despite this restriction on employee mobility, there are specific instances in which noncompete agreements make sense for the employment relationship.[30] For example, noncompetes are often used during the sale of a business or dissolution of a partnership to protect the goodwill and integrity of the sale.[31] Further, proponents of noncompetes note that employers are more willing to invest in specialized training and divest valuable information to employees without the threat of an employee moving to a competitor.[32] Others justify noncompetes as a means for employees to negotiate higher salaries and benefits in exchange for agreeing to restrict future movement.[33] However, only 10 percent of employees with noncompetes report attempting to negotiate the terms of their noncompete, and more than 30 percent learn about their noncompete only *after* they have accepted the job.[34]

In the cases of high-level employees with access to valuable trade secrets, noncompetes protect an employer's legitimate business interests in their investment in the employee's human capital, and high-wage employees generally receive a negotiated compensation boost in exchange for such a restriction on their future movement.[35] On the other end of the spectrum, noncompetes frequently appear among low-wage employees who lack protectable information that would justify the noncompete, and these employees usu-

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29. *See, e.g.*, Bishara & Starr, *supra* note 15, at 505. The authors note:

> [The advantage to the employer] comes at a cost for the individual employee and harms specific business competitors by denying them access to valuable talent, ideas, and skills. There may also be costs for the economy and harm to the creation of positive spillovers, like innovation and new venture creation.

Id.

30. *See id.* at 505 (explaining arguments in favor of certain noncompetes).

31. *Id.* at 505. California, which generally prohibits noncompetes, allows them in connection with a sale of a business. Cal. Bus. & Pro. Code § 16601 (1941); *see* Alliant Ins. Serv., Inc. v. Gaddy, 72 Cal. Rptr. 3d 259, 266–68 (Cal. Ct. App. 2008) ("The reason for this exception . . . is to prevent the seller from depriving the buyer of the full value of its acquisition, including the sold company's goodwill . . . The sold business's goodwill is the expectation of that patronage which has become an asset of the business.") (internal quotations and citations omitted).

32. *See Labor Force*, *supra* note 16, at 1 (explaining the arguments in favor of noncompete agreements).

33. *See* Jonathan M. Barnett & Ted Sichelman, *The Case for Noncompetes*, 87 U. Chi. L. Rev. 953, 1036–37 (2020) (detailing how an employee may demand compensation in exchange for the noncompete before or during the course of their employment).

34. *Labor Force*, *supra* note 16, at 8.

35. *Id.* at 15.

ally do not negotiate or receive anything of value in exchange for their noncompete.[36]

Jimmy John's sandwich chain made national news for subjecting its low-wage sandwich makers to noncompetes; after a string of lawsuits resulting in settlements with state Attorneys General, Jimmy John's agreed to notify its employees that the noncompetes were unenforceable, but low-wage workers still find themselves subjected to noncompetes in many instances.[37] Employers' motivations for these noncompetes can be anticompetitive in nature, aiming to limit industry wage growth, depress the employment market for competitors, and preempt potential competition from departing employees.[38]

B. Inconsistent State Policies Cause Unpredictable Outcomes for Employees and Employers

1. State Policies Vary Considerably, Both in Policy and Enforcement

a. Variety in Policies

State courts and legislatures recognize the potential for certain noncompetes to be contracts of adhesion that negatively impact individual workers and the greater labor market.[39] Accordingly, each

36. *Id.*; *see also* Steven Greenhouse, *Noncompete Clauses Increasingly Pop Up in Array of Jobs*, N.Y. TIMES (June 8, 2014), https://nyti.ms/2XMdNla [https://perma.cc/2P67-FL5Y] (reporting on noncompetes for camp counselors, yoga instructors, event planners, and even college interns). Low-wage noncompetes are prevalent and impactful enough that one study found Oregon's 2008 ban on hourly and low-wage noncompetes increased hourly wages for all hourly workers by "2.2-3.1 percent on average, with effects as great as 6 percent over a [7]-year period." Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Non-Compete Agreements*, MGMT. SCI., Apr. 2021, at 4.

37. Press Release, Eric T. Schneiderman, Attorney General of New York, A.G. Schneiderman Announces Settlement With Jimmy John's To Stop Including Non-Compete Agreements In Hiring Packets (June 22, 2016) (on file with the New York State Office of Attorney General); Press Release, Lisa Madigan, Attorney General of Illinois, Madigan Announces Settlement with Jimmy John's For Imposing Unlawful Noncompete Agreements (December 7, 2016) (on file with the Illinois Attorney General); Robert E. Entin, *That Was Fast: Jimmy John's Nixes Non-Competes*, NAT'L L. REV. (Dec. 14, 2016), https://bit.ly/3CE5qYR.

38. *See Labor Force*, *supra* note 16, at 2; ALAN KRUEGER, ALAN & ERIC POSNER, A PROPOSAL FOR PROTECTING LOW-INCOME WORKERS FROM MONOPSONY AND COLLUSION 1 (2018), https://bit.ly/3Bqldcl [https://perma.cc/JGP9-BTTY]; MATT MARX, REFORMING NON-COMPETES TO SUPPORT WORKERS 4 (2018), https://bit.ly/3GwnZ3s [https://perma.cc/LD3J-QMJ9].

39. *See, e.g.*, Watson v. Waffle House, Inc., 324 S.E.2d 175, 177 (Ga. 1985) ("The rationale behind the distinction [between employment noncompetes and noncompetes stemming from a sale of business] is that a contract of employment inherently involves parties of unequal bargaining power to the extent that the re-

state has a policy specific to noncompetes, but state noncompete policies vary both in form and effect.[40] Without a uniform model law for noncompete agreements, each state has been left to create its own policy, either through statutes, regulations, or common law.[41] The positions from which jurisdictions evaluate noncompete law can be grouped into four categories:[42] (1) At one extreme, California and North Dakota statutes ban traditional employment noncompete agreements.[43] (2) The next group, the largest of the four and including Illinois, New York, and Virginia, is "affirmatively hostile" to noncompete agreements by judicially disfavoring them in many instances.[44] (3) A smaller group of states strives for a neutral balance between the interests of employers and employees.[45] (4) Lastly, some states treat noncompete agreements as

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sult is often a contract of adhesion."); Cal. Bus. & Pro. Code § 16600 (1941) ("Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.").

40. *See Restrictive Covenants in Employment*, HeinOnline, https://bit.ly/2YH8osQ [https://perma.cc/VNk8-DSEL] (last visited Oct. 30, 2021) (providing an overview of each state's noncompete policies as of 2019).

41. *See id.* (listing each state's noncompete policy as of 2019).

42. Michael Selmi, *Trending and the Restatement of Employment Law's Provisions on Employee Mobility: Essay*, 100 Cornell L. Rev. 1369, 1379 (2015).

43. Cal. Bus. & Pro. Code § 16600 (1941); N.D. Century Code § 9-08-06.

44. Selmi, *supra* note 42, at 1379; *see, e.g.*, Reliable Fire Equip. Co. v. Arredondo, 940 N.E.2d 153, 165 (Ill. App. Ct. 2010) ("One of the oldest and best established of the policies developed by courts is that against restraint of trade.") (internal quotations omitted); BDO Seidman v. Hirshberg, 712 N.E.2d 1220, 1223 (N.Y. 1999) ("In general, we have strictly applied the rule [of reasonableness] to limit enforcement of broad restraints on competition."); Motion Control Sys., Inc. v. East, 546 S.E.2d 424, 425 (Va. 2001) ("Covenants not to compete are restraints on trade and accordingly disfavored . . . . The Employer bears the burden to show that the restraint is reasonable and no greater than necessary to protect the employer's legitimate business interests."). Illinois passed a new, more restrictive noncompete law that will become effective in 2022. Ill. Laws, Amendment 1 to SB 672 (2021). This Comment's analysis of Illinois focuses on its noncompete law prior to 2022.

45. Selmi, *supra* note 42, at 1379; *see, e.g.*, Cmty. Hosp. Grp., Inc. v. More, 869 A.2d 884, 896–97 (N.J. 2005). The New Jersey court said:

> [New Jersey's test] requires us to determine whether (1) the restrictive covenant was necessary to protect the employer's legitimate interests in enforcement, (2) whether it would cause undue hardship to the employee, and (3) whether it would be injurious to the public. Depending upon the results of that analysis, the restrictive covenant may be disregarded or given complete or partial enforcement to the extent reasonable under the circumstances.

Id. (internal citations omitted); *see also* KidsKare, P.C. v. Mann, 350 P.3d 1228, 1231 (N.M. Ct. App. 2015). The New Mexico court stated:

> Covenants not to compete that restrict employment present competing principles: the freedom to contract and the freedom to work . . . Covenants not to compete with reasonable restraints will be enforced when

typical agreements between two consenting parties.[46]

Courts also take a variety of approaches to an overbroad noncompete.[47] In some states, courts "blue pencil," or rewrite, illegal noncompetes to maintain them in conformance with the state's restrictions.[48] In other states, courts only enforce the reasonable parts of a noncompete if they are grammatically intact after removal of the invalid parts.[49] Other states invalidate overbroad employment noncompetes outright due to the fact that the "blue pencil doctrine" can encourage employers to write overly broad noncompetes with the knowledge that a court would merely amend them rather than striking them down.[50]

Regardless of how strongly states oppose noncompetes, most jurisdictions employ some form of a "reasonableness" test to assess noncompete agreements.[51] However, states vary widely in which

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> they are not against public policy, and any detriment to the public interest in the possible loss of the services of the convenator is more than offset by the public benefit arising out of the preservation of the freedom of contract.

Id. (internal citations omitted).

46. *Id.* at 1378; *see, e.g.*, Marsh USA Inc. v. Cook, 354 S.W.3d 764, 768–69 (Tex. 2011) (analyzing noncompete agreements in Texas with the viewpoint that they are simply another form of contract between two consenting parties); FLA. STAT. §542.335 (b)–(c) (2016) (permitting noncompete agreements that serve a legitimate business interest—including a long yet inexhaustive list of legitimate business interests—and allowing courts to blue pencil, or amend, unreasonable noncompetes into a permissible restrictive covenant). Judge Posner of the Seventh Circuit has suggested that courts should treat noncompetes like any other contract. Outsource Int'l, Inc. v. Barton, 192 F.3d 662, 669–71 (7th Cir. 1999) (Posner, J., dissenting).

47. STEVEN L. WILLBORN ET AL., EMPLOYMENT LAW 369 (6th ed. 2017).

48. *See, e.g.*, Davies & Davies Agency, Inc. v. Davies, 298 N.W.2d 127, 131 n.1 (Minn. 1980).

49. *See, e.g.*, Timenterial, Inc. v. Dagata, 277 A.2d 512, 514–15 (Conn. Super. Ct. 1971).

50. *See, e.g.*, White v. Fletcher/Mayo/Assoc., Inc., 303 S.E.2d 746, 748 n.2 (Ga. 1983) ("If severance is generally applied, employers can fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable. This smacks of having one's employee's cake, and eating it too.") (quoting Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 682–83 (1960)). Wisconsin has statutorily rejected the blue pencil doctrine. WIS. STAT. § 103.465 (2016) ("Any covenant, 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.").

51. *See* Thomas Reuters, *Non-Compete Agreements, 50 State Statutory Surveys: Employment: Private Employment*, WESTLAW, 0060 Surveys 23 (Nov. 2020) (showing many states that require a reasonableness test); *see also, e.g.*, Insulation Corp. of America v. Brobston, 667 A.2d 729, 733 (Pa. 1995) ("In order for a 'non-competition' covenant to be enforceable, it must . . . be reasonably limited in both time and territory.") (internal citations omitted); Motion Control Sys., Inc. v.

factors they consider and whether to start the analysis with a presumption in favor of or against the noncompete.[52]

b. Some States Show Unexpected Levels of Noncompete Enforcement

Inconsistencies exist between the apparent strength of a state's noncompete policy based on its language and its actual strength as enforced by courts. One might expect states with more restrictive noncompete policies to enforce noncompete agreements less often in court. This logic proves true for some states, such as California and North Dakota; their statutes ban most noncompetes, and courts accordingly almost never enforce noncompetes.[53]

Meanwhile, other states show unexpected patterns in noncompete enforcement.[54] For example, Texas grades low in enforceability of noncompetes, only surpassing ten other states, despite the fact that its policy seems relatively accepting of noncompetes at face value.[55] On the other hand, the language of Colorado's noncompete law[56] is stricter than that of most states, but Colorado grades in the

East, 546 S.E.2d 424, 425–26 (Va. 2001) ("The restraint . . . must be reasonable in light of sound public policy.").

52. *Compare* Illinois Freedom to Work Act, 820 Ill. Comp. Stat. 90 (2017) (requiring a noncompete to overcome three hurdles to be considered reasonable), *and* Reed, Roberts Assoc., Inc. v. Strauman, 353 N.E.2d 590 (N.Y. 1976) ("Generally[,] negative covenants restricting competition are enforceable only to the extent that they satisfy the overriding requirement of reasonableness."), *with* Fla. Stat. § 542.335 (b)–(c) (2016) (permitting noncompete agreements that serve a legitimate business interest, including a long yet inexhaustive list of legitimate business interests). *See also* Bishara, *supra* note 21, at 773 ("What one set of state courts deem a reasonable restriction on the employee's activities may indeed vary significantly from a court's application of the same standard in another jurisdiction. States also vary in what they consider a protectable interest.").

53. *See* Prescott, Bishara, & Starr, *supra* note 25, at 459 (reproducing Evan Starr, Consider This: Firm-Sponsored Training and the Enforceability of Covenants Not to Compete 16–17 (Nov. 5, 2015) (unpublished manuscript) (investigating the impact of noncompetes on firm investments in employee training and showing the level of enforcement in all fifty states)).

54. *See infra* Section II.B.1.b (detailing inconsistencies between perceived policy strength and actual enforcement by courts in various states).

55. *See* Prescott, Bishara, & Starr, *supra* note 25, at 459 (showing Texas's enforceability index ranks 41st out of 51 states). Starr quantified enforcement intensity using confirmatory factor analysis. *Id.*; *see also* Marsh USA Inc. v. Cook, 354 S.W.3d 764, 768–69 (Tex. 2011) (analyzing noncompete agreements with the viewpoint that they are simply another form of contract between two consenting parties).

56. *See* Colo. Rev. Stat. § 8-2-113 (2016). The statute states:

> It shall be unlawful to use force, threats, or other means of intimidation to prevent any person from engaging in any lawful occupation at any place he sees fit. . . . Any covenant not to compete which restricts the right of any person to receive compensation for performance of skilled or

top half of states for actual enforcement.[57] While Illinois's policy is perceived to be in the "hostile" group of states, Illinois's enforcement level ranked within the top ten in 2009.[58] Although there is clear inconsistency between expected enforceability based on state policy and actual enforceability, it is unclear what causes these differences.[59]

Despite this great variation in both appearance of state law and enforceability of noncompete agreements across states, the prevalence of noncompete agreements in employment contracts is remarkably consistent throughout the United States.[60] While the cause of this phenomenon cannot be definitively determined, it could be a result of employees' perceptions of enforceability having little basis in reality.[61] If employees and employers rarely understand when their noncompetes are unenforceable, the strength of a

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> unskilled labor for any employer shall be void [with four limited specific exceptions].

Id.

57. *See* Prescott, Bishara, & Starr, *supra* note 25, at 459 (showing Colorado's enforceability index ranks 22nd out of 51 states).

58. *See* Selmi, *supra* note 42, at 1379 (grouping Illinois into a group of states that are "affirmatively hostile" to noncompetes based on the wording of their policies). Illinois bans noncompete agreements for low-wage workers by statute and, at common law, uses the Restatement standard for a noncompete to satisfy three requirements to be found reasonable. Illinois Freedom to Work Act, 820 ILL. COMP. STAT. 90 (2017); Reliable Fire Equip. Co. v. Arredondo, 965 N.E.2d 393, 396 (Ill. 2011). The court stated:

> A restrictive covenant, assuming it is ancillary to a valid employment relationship, is reasonable only if the covenant: (1) is no greater than is required for the protection of a legitimate business interest of the employer-promisee; (2) does not impose undue hardship on the employee-promisor, and (3) is not injurious to the public.

Id. (internal citations omitted); *see also* Prescott, Bishara, & Starr, *supra* note 25, at 459 (showing only seven states enforce noncompetes more than Illinois).

59. Phillip D. Thomas, *Would California Survive the Move Act?: A Preemption Analysis of Employee Noncompetition Law*, 2017 U. CHI. LEGAL F. 823, 831 (2017).

60. *See* Prescott, Bishara, & Starr, *supra* note 25, at 460–62 (finding that about 18% of workers are bound by noncompete agreements across all 5 state quintiles of relative enforceability, and any variation that does exist is not statistically significant and trends in the unexpected direction).

61. *See id.* at 462–63 (noting that this phenomenon could be a result of employers misinforming employees by asking them to sign a noncompete agreement regardless of its validity); *see also Behavioral Effects*, *supra* note 25, at 665–66. Asserting:

> [A] noncompete is associated with both a longer tenure and a reduced propensity to leave for a competitor even when the noncompete in question is unenforceable under state law. . . . [I]n both enforcing and nonenforcing states—approximately 40% of employees with noncompetes identify their noncompete as a factor in turning down job offers from competitors.

Id.

state's noncompete law loses its influence over whether the parties enter into an unenforceable noncompete.[62]

Ultimately, the face-value enforceability of a state's policy on noncompete agreements does not necessarily predict the state's actual enforceability of noncompete clauses by courts, and neither state policies nor their enforceability impact the prevalence of these agreements in the labor market.[63] Noncompetes appear at a steady rate across jurisdictions, regardless of whether they would be enforceable.[64]

2. Choice-of-Law Provisions Create Uncertainty

Choice-of-law provisions add further confusion to noncompete enforcement.[65] Employees in states that are hostile to noncompetes may be surprised to find a choice-of-law provision subjecting them to a stricter noncompete law restricting their mobility in the workforce.[66] Likewise, employers might rely on a choice-of-law provision to restrict employees' post-employment mobility only for a court in their chosen state to strike down the noncompete after a conflict of laws analysis.[67]

When a contract with a choice-of-law provision becomes the subject of a lawsuit, the forum court uses its state's choice-of-law rules to determine whether to uphold the choice-of-law provision.[68] Often, a court will only reach the choice-of-law issue if it finds that there is a genuine conflict between the laws of the potentially applicable jurisdictions.[69]

State law governs how to determine which law to apply in a contract dispute with a choice-of-law provision, creating even more

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62. *Id.*

63. *See id.* at 668 ("Today, many employees may turn down a job offer they would have otherwise taken simply because they incorrectly believe their noncompete is enforceable.").

64. *See Labor Force*, *supra* note 16, at 7 (finding little differences in noncompete incidence between states that will or will not enforce them).

65. *See supra* Section II.B.2 (analyzing how choice-of-law provisions add unpredictability to noncompete enforcement).

66. *See, e.g.*, Zimmer, Inc. v. Sharpe, 651 F. Supp. 2d 840, 846–50 (N.D. Ind. 2009) (enforcing a noncompete clause from Louisiana in an Indiana court differently than a Louisiana court would have interpreted the same noncompete clause).

67. *See, e.g.*, Nuvasive, Inc. v. Miles, No. 2017-0720-SG, 2019 WL 4010814, at *7 (Del. Ch. Aug. 29, 2019) (refusing to enforce a noncompete clause from California despite its enforceability in the jurisdiction of choice).

68. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (holding that, in diversity cases, courts should apply the choice-of-law rules of the forum state).

69. *See, e.g.*, Allen v. Great American Reserve Ins. Co., 766 N.E.2d 1157, 1162 (Ind. 2002); *see also Klaxon*, 313 U.S. 487 at 497.

uncertainty for the parties.[70] In deciding which law to apply in noncompete cases with an agreed-upon choice-of-law provision, many courts apply their state's adoption of Section 187 of the Restatement (Second) of Conflict of Laws.[71] Section 187 directs the court to apply the law chosen by the contract unless, in relevant part, application of that law would be "contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of the applicable law in the absence [of a choice-of-law clause]."[72] Uncertainty also arises from employers bringing action against another employer's new hires in unexpected forums.[73]

3. Employees and Employers Need Greater Predictability and Clarity: A Federal Solution

Uncertainty permeates throughout the current noncompete landscape.[74] Presumably, many employees do not even consider the fact that their agreement might not be enforceable. While some employers may take advantage of this knowledge gap and their power over the terms of the contract by knowingly writing unenforceable noncompetes, employers may also fail to anticipate the result of

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70. *See* Anthony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 192 (2000) ("[C]urrent law is characterized by a welter of different choice-of-law approaches.") (citing Ferens v. John Deere & Co., 494 U.S. 516, 538 n.2 (1990) (Scalia, J., dissenting) (noting that ten different choice-of-law policies exist throughout the states)).

71. *See, e.g.*, *Zimmer*, 651 F. Supp. 2d at 848 ("Indiana law on the public policy exception to choice of law provisions in contracts appears to be consistent with the more detailed guidance available from Section 187 of the Restatement (Second) of Conflicts of Law.").

72. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. L. INST. 1971); *see, e.g.*, *Zimmer*, 651 F. Supp. 2d at 848 (using Section 187 for a choice-of-law analysis); Cardoni v. Prosperity Bank, 805 F.3d 573, 581 (5th Cir. 2015) (applying Texas's adoption of Section 187(2) to uphold a choice-of-law provision with respect to a nonsolicitation agreement but invalidate it with respect to a noncompete agreement).

73. *See, e.g.*, Application Grp. v. Hunter Grp., 61 Cal. App. 4th 881 (Cal. Ct. App. 1998) (holding that California law rendered a noncompete clause unenforceable despite being a contract between a Maryland employee and Maryland employer with a Maryland choice-of-law provision because a California company sought to hire the Maryland employee for remote consulting work).

74. Norman D. Bishara & David Orozco, *Using the Resource-Based Theory to Determine Covenant Not to Compete Legitimacy*, 87 IND. L.J. 979, 1006 (2012) ("[N]oncompete litigation outcomes across jurisdictions and industry contexts are largely unpredictable and appear to be guided by the court's intuitive and subjective preferences . . . [giving] an overall impression of ad hoc decision making.").

noncompete litigation layered with a choice-of-law analysis.[75] Employers and employees who enter into noncompete agreements likely have little understanding of whether their agreement is enforceable under the chosen law or whether the chosen forum would even apply that state's noncompete law.[76] This uncertainty stems, at least in large part, from the significant variation between state policies.[77] A federal noncompete policy would bring welcome clarity to the noncompete sphere.[78]

An effective federal policy would prohibit many noncompetes, increasing workers' freedom to navigate the workforce while still allowing noncompetes in some circumstances. This approach would fall somewhere between the extremes of California and Florida and provide much needed uniformity and clarity to all parties.[79] An ideal policy would also include an enforcement mechanism to prevent employers from taking advantage of unknowing employees by including unlawful noncompetes in their employment contracts.[80]

The Workforce Mobility Act, which was introduced as a bill in the U.S. Senate in 2019 and reintroduced in 2021, provides a solid blueprint for solving the unpredictability problem and addressing

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75. *See* Ribstein, *supra* note 20, at 375–76 (finding that courts generally enforce choice-of-law provisions in commercial contracts, but disproportionately fail to enforce them in noncompete cases). This unusual treatment of choice-of-law clauses in noncompete cases can result in unpredictability for employers, who are likely accustomed to courts upholding their choice-of-law provisions in other contexts. *See supra* notes 20–22 and accompanying text.

76. *See, e.g.*, DCS Sanitation Mgmt., Inc. v. Castillo, 435 F.3d 892 (8th Cir. 2006) (applying Nebraska noncompete law despite the parties' choice-of-law provision electing for Ohio law). Ohio courts are empowered to reform unreasonable noncompete agreements in order to make them enforceable, while Nebraska courts will simply invalidate unreasonable noncompetes. *Id.* at 897. The court held that the application of Ohio law would violate a fundamental policy of Nebraska law. *Id.* Employing Nebraska law, the court sided with the Defendant employees, finding the noncompete to be unreasonable. *Id.*; *see also* Zimmer, Inc. v. Sharpe, 651 F. Supp. 2d 840, 840–52 (N.D. Ind. 2009) (finding that under the law of Louisiana, where the employment took place, the noncompete might be unenforceable, but applying Indiana law and therefore upholding the noncompete because it would not be contrary to Louisiana public policy).

77. *Supra* Section II.B.

78. *See* William Constagny, *Clarion Call for a Uniform or Model Noncompete Law Act*, 48 Lab. & Emp. L. 11, 11 (2019) (arguing that uniformity is needed to solve inconsistency problems in the noncompete sphere).

79. *See supra* Section II.B.3 (advocating for a noncompete policy that protects employees and preserves employers' interests). *Compare* Cal. Bus. & Pro. Code § 16600 (1941) (prohibiting noncompetes in California), *with* Fla. Stat. § 542.335 (b), (c) (2016) (permitting noncompete agreements that serve a legitimate business interest—including a long yet inexhaustive list of legitimate business interests—and allowing courts to blue pencil, or amend, unreasonable noncompetes into a permissible restrictive covenant).

80. *See supra* notes 60–64 and accompanying text.

the fairness and economic concerns that exist in the current noncompete landscape.[81] As an alternative to legislation, the FTC has publicly considered the possibility of issuing a rule on noncompetes, and President Biden explicitly encouraged such action in an Executive Order.[82] If the FTC were to make a rule governing noncompetes, that rule should pursue a policy similar to the one envisioned by the Workforce Mobility Act.[83]

III. ANALYSIS

A. Federal Legislation or FTC Rule?

Members of Congress and FTC regulators have publicly considered how to remedy existing issues with noncompetes.[84] The U.S. Senate held a hearing on this issue and proposed specific bills to address it, while the FTC held a workshop to explore the possibility of action.[85] Congress should pass a law that prohibits unnecessary noncompetes. Such a law would preempt existing state law, bringing needed consistency to noncompete enforcement.[86] A po-

81. *See infra* Section III.A.1 (analyzing how a law like the Workforce Mobility Act would solve the unpredictability problem, help employees, and still protect employers' legitimate interests).

82. *Hearings to Examine Noncompete Agreements and American Workers, Including S.124 to Amend the Fair Labor Standards Act of 1938 to Prevent Employers from Using Non-compete Agreements in Employment Contracts for Certain Nonexempt Employees, and S.2614, to Prohibit Certain Noncompete Agreements Before the S. Small Bus. and Entrepreneurship Comm.*, 116th Cong. (2019); Exec. Order No. 14036, 86 C.F.R. 36987 (2021). The order stated:

> To address agreements that may unduly limit workers' ability to change jobs, the Chair of the FTC is encouraged to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.

Id at § 5(g).

83. *See infra* Section III.B.1 (analyzing the Workforce Mobility Act and examining why it would be an effective law).

84. *See* Workforce Mobility Act, S. 483, 117th Cong. (2021–2022); Freedom to Compete Act, S. 124, 116th Cong. (2019–2020); *see also* FTC, NONCOMPETES IN THE WORKPLACE: EXAMINING ANTITRUST AND CONSUMER PROTECTION ISSUES (2020), https://bit.ly/3ExfkM6 [https://perma.cc/DX3P-JM77] [hereinafter FTC: NONCOMPETES IN THE WORKPLACE].

85. S. 483; S. 124; FTC: NONCOMPETES IN THE WORKPLACE, *supra* note 84. The FTC also posted a Solicitation for Public Comment on contract terms that may be harmful to fair competition, including noncompete clauses. FTC, *Solicitation for Public Comments on Contract Terms that May Harm Competition* (Aug. 5, 2021), https://bit.ly/3mHKf2l [https://perma.cc/LK36-3RKV].

86. *See infra* Section III.A.1–2 (advocating for an express preemption clause and conducting a preemption analysis of a federal noncompete legislation in the absence of an express preemption clause).

tential FTC rule, if it survives legal challenges, should prohibit most noncompetes as well.

1. Federal Legislation

Although bipartisan politics has become rarer, members of Congress on both sides of the political aisle have supported various forms of noncompete legislation.[87] In 2018, Democratic Senators Chris Murphy (D-CT), Elizabeth Warren (D-MA), and Ron Wyden (D-OR) introduced the Workforce Mobility Act,[88] which sought to broadly invalidate and ban noncompete agreements. Next, Republican Senator Marco Rubio (R-FL) introduced the Freedom to Compete Act[89] in January 2019, which sought to amend the Fair Labor Standards Act[90] by banning and invalidating noncompetes for nonexempt employees.

Compromising between these two partisan bills, Republican Senator Todd Young (R-IN) joined Senator Murphy in a revamped, bipartisan Workforce Mobility Act in October 2019;[91] the bill was reintroduced in 2021 ("the Act") by Senators Young, Murphy, Kevin Cramer (R-ND) and Tim Kaine (D-VA) and Representatives Scott Peters (D-CA-52) and Peter Meijer (R-MI-3).[92] This proposal renders noncompetes invalid except in certain limited situations.[93] This limitation of noncompete agreements would restore freedom to the workforce and still preserve the legitimate interests of employers by protecting trade secrets and the goodwill of sales of businesses. In addition, the Act requires employers to post notice of the

87. *See, e.g.*, Laurel Harbridge, Is Bipartisanship Dead? Policy Agreement and Agenda-Setting in the House of Representatives 18 (2015) ("[T]he prevalence of party unity in House voting has increased . . . , bipartisan patterns of voting have declined, and . . . the resulting estimates of legislator ideology show evidence of increased polarization."); Workforce Mobility Act, S. 2782, 115th Cong. (2017–2018); Workforce Mobility Act, S. 2614, 116th Cong. (2019–2020); Freedom to Compete Act, S. 124, 116th Cong. (2019–2020).

88. Workforce Mobility Act of 2018, S. 2782, 115th Cong. (2017–2018).

89. S. 124. The Act allows employers to enter into noncompete agreements with those classified as exempt executive, administrative, professional, or outside sales employees under Fair Labor Standards Act, 29 U.S.C. § 213(a)(1). *Id.* Generally, this would apply to low-wage, hourly workers. *Id.* Further, this act would still allow employers to use restrictive covenants to protect trade secrets. *Id.*

90. 29 U.S.C. §§ 201–62 (1938).

91. Workforce Mobility Act of 2019, S. 2614, 116th Cong. (2019–2020).

92. S. 483, 117th Cong. (2021–2022); Workforce Mobility Act of 2021, H.R. 1367, 117th Cong. (2021).

93. S. 483 § 5(a). Exceptions include the sale of goodwill or ownership interest and partnership dissolution or disassociation. *Id.* § 3(b). The bill also allows employers to enter into other types of restrictive covenants to protect trade secrets. *Id.* § 4.

Act in the workplace.[94] Both the FTC and Department of Labor would have power to enforce the Act, and it provides a private right of action as well.[95] This part of the Act would keep employers from including unlawful noncompete agreements in their employment contracts. The Act would add clarity and predictability to a confusing area of law and protect employees by eliminating unfair, unnecessarily restrictive noncompetes while preserving the legitimate interests of employers that motivate them to draft noncompetes.[96] For these reasons, Congress should enact a law that is similar to the Workforce Mobility Act.[97]

As further evidence of lawmakers' interest in noncompetes, the Senate Committee on Small Business and Entrepreneurship held a hearing in connection with the latest Workforce Mobility Act bill and the Freedom to Compete Act bill "to examine noncompete agreements and American workers" in November 2019.[98] Although lawmakers have not reached an agreement on precisely how to handle noncompete agreements, recent activity in the Senate, including three proposed bills sponsored by multiple members of both parties and a committee hearing in the few years before 2021, indicates some level of motivation for federal legislation on noncompete agreements.

a. How Federal Legislation Would Change Enforcement of Noncompetes

Of the three pieces of legislation, the Workforce Mobility Act of 2021 ("The Act") is the best option to address existing noncompete issues while still protecting legitimate employer interests. It generally bans noncompetes by rendering them ineffective with certain limited exceptions.[99] The Act allows noncompete agreements for the purpose of preventing anyone who sells a business interest from carrying on a like business in a specified geographic area.[100] The Act would also permit noncompetes, limited by geography and time, between buyers or sellers of a business interest and senior

94. *Id.*
95. *Id.* § 6.
96. *Id.*
97. *See infra* Section III.A.1.a.
98. *Hearings to Examine Noncompete Agreements and American Workers, Including S.124 to Amend the Fair Labor Standards Act of 1938 to Prevent Employers from Using Non-compete Agreements in Employment Contracts for Certain Nonexempt Employees, and S.2614, to Prohibit Certain Noncompete Agreements Before the S. Small Bus. and Entrepreneurship Comm.*, 116th Cong. (2019).
99. S. 483, 117th Cong. § 3(a) (2021–2022).
100. *Id.* § 3(b)(1).

executive officials with severance agreements.[101] Partners would be permitted to enter into geographically limited noncompete agreements upon the dissolution of a partnership or dissociation of a partner from a partnership.[102] Finally, the Act permits employers to enter into other types of restrictive covenants to protect trade secrets.[103]

Most notably, this legislation eliminates the "reasonableness" test that is employed by most jurisdictions in one form or another.[104] By removing this inquiry into reasonableness and instead establishing concrete circumstances in which noncompetes are allowed, the Act would provide clarity to both employers and employees who might otherwise feel unsure about whether a court would uphold their noncompete agreement. This change would also significantly reduce the burden on state courts to determine whether a noncompete agreement is enforceable. Rather than digging into their state's respective reasonableness standard, courts would need to merely examine whether the noncompete in question meets one of the Act's enumerated circumstances.[105]

In addition to the exceptions included in the 2021 version of the Workforce Mobility Act, the final legislation should add an exception to allow noncompetes for executive-level employees. Executives are less likely to face the same bargaining power problems as low-level workers, and they negotiate the terms of their noncompetes more often.[106] Noncompetes are unnecessary and harmful for most workers, who lack sufficient knowledge of enforceability and

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101. *Id.* § 3(b)(1)(D).

102. *Id.* § 3(b)(2).

103. *Id.* § 4.

104. *See* Thomas Reuters, *Non-Compete Agreements, 50 State Statutory Surveys: Employment: Private Employment*, Westlaw, 0060 Surveys 23 (Nov. 2020) (showing many states that require a reasonableness test); *see also, e.g.*, Insulation Corp. of America v. Brobston, 667 A.2d 729, 733 (Pa. 1995) ("In order for a 'non-competition' covenant to be enforceable, it must . . . be reasonably limited it both time and territory.") (internal citations omitted); Motion Control Sys., Inc. v. East, 546 S.E.2d 424, 425–26 (Va. 2001) ("The restraint . . . must be reasonable in light of sound public policy.").

105. S. 483, 117th Cong. § 3(b) (2021–2022).

106. *See* Lipsitz & Starr, *supra* note 36 (finding that the standard freedom-to-contract and investment arguments made in favor of noncompetes apply to high-wage workers, but not low-wage workers); *see also Labor Force*, *supra* note 16, at 34 (showing that few employees consult with an attorney prior to signing a noncompete, but those that consult with attorneys are the most likely to negotiate their noncompete); Bishara, Martin, & Thomas, *supra* note 28, at 8 ("[Noncompete] concerns are largely absent for CEOs who accept restrictive covenants in their employment contracts. This is because CEOs enjoy substantial bargaining power and are routinely represented by legal counsel when they negotiate their employment contracts.").

the ability to negotiate the clause.[107] In contrast, high-level employees are more likely to negotiate higher wages or other incentives in exchange for the noncompete, which protects the employer's investment in the executive's human capital.[108]

Finally, Congress should enact noncompete legislation because a uniform noncompete policy would significantly reduce the inconsistencies and uncertainties that are caused by the existing patchwork of state laws and choice-of-law provisions.

b. Would the Legislation Preempt Existing State Laws?

The Supremacy Clause of the U.S. Constitution[109] states that the laws of the United States made in pursuance of the Constitution "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Courts begin a preemption analysis with a rebuttable presumption against preemption.[110]

Congress can preempt state laws expressly or impliedly.[111] Express preemption occurs when Congress states in the statute that the law preempts state law, while implied preemption occurs when a court decides that a federal law preempts state law notwithstanding the absence of an explicit preemption provision.[112] As of 2022, the Workforce Mobility Act does not include an express preemption clause.[113] An example of an express preemption clause relating

107. *See supra* Section II.A. (discussing the harmful impact noncompetes can have on low-wage workers).

108. *See* Bishara, Martin, & Thomas, *supra* note 28, at 18 ("[T]he CEO has greater bargaining power in the employment relationship than most employees" and therefore negotiates noncompetes more often); Mark J. Garmaise, *Ties that Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 27 J. L., ECON. & ORG., 376, 382 (2011) ("Firm investments in manager human capital . . . may take the form of training, permitting the manager . . . to engage in human-capital-improving projects or the revelation of trade secrets are highly vulnerable to the departure of the manager.").

109. U.S. CONST. art. VI, cl. 2.

110. *See* Altria Grp., Inc. v. Good, 555 U.S. 70, 77 (2008) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("When addressing questions of express or implied pre-emption, we begin our analysis 'with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'").

111. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541 (2001) ("State action may be foreclosed by express language in a congressional enactment, by implication from the depth and breadth of a congressional scheme that occupies the legislative field, or by implication because of a conflict with a congressional enactment.") (internal citations omitted).

112. *See, e.g.*, Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008) ("Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose.").

113. Workforce Mobility Act, S. 483, 117th Cong. § 3(a) (2021–2022).

to employment can be found in the Immigration Reform and Contract Act ("IRCA").[114] IRCA contains language prohibiting state or local laws from imposing civil or criminal sanctions on those who employ, recruit, or refer unauthorized aliens.[115]

Federal legislation on noncompetes should include an express preemption clause to solve the issue of unpredictability most effectively. By explicitly stating that Congress intends to create a uniform, federal standard governing noncompetes and that the law preempts state laws on noncompetes, Congress would ensure that the patchwork of state laws would no longer cause confusion to employees or employers.

In the absence of an express preemption clause, federal legislation can still preempt state law through implied preemption, which can be found in three forms: conflict preemption, obstacle preemption, and field preemption.[116] Conflict preemption occurs when "compliance with both federal and state regulations is a physical impossibility."[117] Obstacle preemption occurs if state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[118] Finally, field preemption occurs when federal law has created a scheme that is pervasive enough to "make reasonable the inference that Congress left no room for the States to supplement it."[119]

Conflict preemption would not apply to noncompete legislation because employers can comply with the federal law and their

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114. 8 U.S.C. § 1324a(h)(2) ("The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ or recruit or refer for a fee for employment, unauthorized aliens.").

115. *Id.*; *see also* Chamber of Commerce of U.S. v. Whiting, 563 U.S. 582, 600 (2011) (acknowledging that IRCA expressly preempts some state powers dealing with the employment of unauthorized aliens and expressly preserves other powers for states).

116. *See, e.g.*, Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995). The Court stated:

> We have recognized that a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law. We have found implied conflict preemption where it is impossible for a private party to comply with both state and federal requirements or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Id. (internal citations and quotations omitted).

117. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963).

118. Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

119. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

state's law by choosing not to use a noncompete clause in an employment contract.[120] Field preemption would not apply to noncompete legislation either because the federal government has not commandeered employment law; employment remains well within the traditional scope of state authority.[121]

Noncompete legislation's highest potential for implied preemption comes from obstacle preemption, in which a state law impedes a federal objective.[122] Under this analysis, the Supreme Court seeks to determine whether a state law would be "consistent with the structure and purpose" of the federal law as a whole.[123] In *Gade v. National Solid Wastes Management Association*,[124] the Supreme Court held that the Occupational Safety and Health Administration Act (OSHA) impliedly preempted state regulation of safety and health issues in the workplace because the Act's purpose and structure indicated a desire by Congress to subject employers and employees to one set of regulations.[125]

Congress's purpose for passing a noncompete law would be an increase in worker freedom and mobility and the uniform limitation of noncompete agreements to a clear, explicit set of categories. In order for those purposes to be achieved, the Act would need to serve at least as a floor, preventing states from enforcing a standard more relaxed than the federal statute. Congress's objective would be frustrated if states could continue to allow noncompetes prohibited by the Act, so the Act would need to preclude state laws that would allow for noncompetes prohibited by the federal statute. California, North Dakota, and Oklahoma, the three states that explicitly prohibit noncompetes by statute, each allow for limited exceptions in a similar vein to the proposed bill, but the final law should also include an exception for executive contracts, which is not permitted in these states.[126] If Congress were to pass the

120. Workforce Mobility Act, S. 483, 117th Cong. (2021–2022).

121. *See, e.g.*, Capron v. Off. of Att'y Gen. of Mass., 944 F.3d 9, 24 (1st Cir. 2019) (referring to employment as a "quintessentially local concern" in a field preemption analysis).

122. *See* Hines v. Davidowitz, 312 U.S. 52, 67 (1941)

123. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992).

124. *Id.*

125. *Id*.

126. CAL. BUS. & PROF. CODE § 16600 (WEST 1941) (prohibiting noncompetes in California); N.D. CENT. CODE § 9-08-06 (2019) (prohibiting noncompetes except for sale-of-business and partnership dissolution contexts); 15 OK. STAT. § 15-218–19(A) (2014) (prohibiting noncompetes in Oklahoma except for sale-of-business and partnership dissolution contexts); CAL. BUS. & PROF. CODE §§ 16601–02 (West 1997), 16602.5 (2007) (allowing for noncompetes in sale-of-business and partnership dissolution contexts in California).

Workforce Mobility Act or a similar law, it would represent a compromise between employee and employer interests, which is evidenced by the fact that an initial bill completely banned noncompetes, but the final bill would allow for limited exceptions. Any state laws that are stricter than the federal law would also be preempted because they would frustrate this compromise, but to ensure preemption of state noncompete laws, the federal law should include an express preemption clause.

2. FTC Rule

a. Could the FTC Issue a Rule?

Although a noncompete statute has some level of bipartisan support in Congress, bipartisan legislation is difficult to rely on, so President Biden and some lawmakers have called for the FTC to use its rulemaking power to address noncompetes.[127] Whether the FTC has the authority to promulgate a noncompete rule with the effect of substantive law is uncertain.[128] The FTC's authority to regulate noncompetes would come from Section 5 of the FTC Act, which empowers the FTC to prevent unfair methods of competition as well as unfair or deceptive acts or practices.[129]

The FTC Act explicitly grants the FTC rulemaking authority in Section 6(g),[130] but for a number of reasons, the FTC has never passed a rule exclusively based on the FTC Act's prohibition on methods of unfair competition.[131] The FTC has occasionally passed rules regulating unfair or deceptive acts or practices, a power that was confirmed by the D.C. Circuit in *National Petroleum Refiners Association v. FTC*.[132] In that case, the D.C. Circuit acknowledged the FTC's rulemaking authority pursuant to Section 5, which includes both unfair or deceptive acts or practices *and* unfair methods of competition.[133] Two years later, Congress passed The Magnuson-

127. *See* Harbridge, *supra* note 87 (explaining rising levels of polarization resulting in lower levels of bipartisan legislation); Exec. Order No. 14036, 86 C.F.R. 36987 (2021); Letter from Elizabeth Warren & Chris Murphy, United States Senators, to Joseph J. Simons, Chairman, Federal Trade Commission (July 21, 2020) (on file with the United States Senate).

128. *See* FTC: Noncompetes in the Workplace, *supra* note 84.

129. 15 U.S.C. § 45 (2006).

130. 15 U.S.C. § 46(g) (2006) (granting the FTC the power "to make rules and regulations for the purpose of carrying out the provisions of this subchapter.").

131. Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. Chi. L. Rev. 357, 366–68 (2020) (arguing for the FTC, which has solely relied on adjudication to address competition matters, to utilize its rulemaking authority).

132. Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973).

133. *Id.* at 697–98.

Moss Warranty-Federal Trade Commission Improvement Act ("Magnuson-Moss"),[134] which articulated the FTC's rulemaking authority and procedure for unfair or deceptive acts or practices, but left untouched unfair methods of competition rulemaking.

Magnuson-Moss introduced stronger procedural requirements for rulemaking related to unfair or deceptive acts or practices.[135] The FTC Improvements Act of 1980[136] added even more procedural requirements to Magnuson-Moss rulemaking but once again applied only to unfair or deceptive acts or practices, not unfair methods of competition.[137] The section identifies itself as the sole authority for rulemaking with respect to unfair or deceptive acts or practices but states that this restriction "shall not affect any authority of the Commission to prescribe rules (including interpretative rules), and general statements of policy, with respect to unfair methods of competition . . . ."[138] This provision preserves the FTC's rulemaking authority under Section 6(g) pursuant to its Section 5 authority over unfair methods of competition and indicates that the FTC can indeed promulgate rules based solely on its authority to prohibit unfair methods of competition.[139]

The FTC's interpretation of its rulemaking authority can strengthen its ability to survive legal challenges to a noncompete rule, as the Supreme Court extended *Chevron*[140] deference to an agency's interpretation of an ambiguity relating to the scope of its statutory authority.[141] The FTC currently interprets Section 6(g) as authorization to make rules concerning unfair methods of competition, and that position should be given deference in accordance with the decision in *City of Arlington v. FCC*.[142]

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134. Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 2301–2312 (2012)).

135. *Id.*

136. 15 U.S.C. § 57.

137. Chopra & Khan, *supra* note 131, at 378; *see also* Justin Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 PITT. L. REV. 209, 234 (2014).

138. 15 U.S.C. § 57(a)(2) (1980).

139. *Id.*; 15 U.S.C. § 56(g); *see also* Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 697–98 (D.C. Cir. 1973) (holding the FTC has rulemaking authority under §§ 45 & 46 to make rules over unfair and deceptive acts or practices and unfair methods of competition).

140. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984).

141. City of Arlington v. FCC, 569 U.S. 290, 290 (2013).

142. *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N, https://bit.ly/3mtoVh1 [https://perma.cc/63CG–W9G7] (May 2021) ("Section 6(g) continues to authorize rules concerning unfair methods of competition.").

Nevertheless, the FTC would likely face both political and legal challenges if they were to pursue substantive rulemaking pursuant to these provisions.[143] *National Petroleum* has been criticized for misinterpreting both the text and legislative history of the FTC Act.[144] Furthermore, the modern Supreme Court is more hostile to the administrative state than the 1970s D.C. Circuit, and the Supreme Court is unlikely to view the *National Petroleum* issue in the same light as the Circuit Court.[145]

A.L.A. Schechter Poultry Corp. v. United States[146] represents another roadblock for the FTC to exercise its rulemaking authority. In that case, the Supreme Court struck down Congress's delegation of the authority to approve "codes of fair competition" to the President in the National Industrial Recovery Act ("NIRA").[147] In its decision, the Court contrasted the NIRA with the FTC's Section 5 authority over unfair methods of competition, praising the FTC's adjudicative process for determining what constitutes "unfair competition" on a case-by-case basis.[148]

Specifically, the Court explained that "what constitutes 'unfair methods of competition' must be determined in particular instances, upon evidence, in light of particular competitive conditions and of what is found to be a specific and substantial public interest."[149] This dicta in *Schechter Poultry* could stand in the way of Section 5 rulemaking over unfair methods of competition because a

143. Aaron L. Nielson, *D.C. Circuit Review – Reviewed: Was National Petroleum Refiners Association v. FTC Correctly Decided?*, YALE J. ON REGUL. (Jan. 10, 2020), https://bit.ly/3pCUeba [https://perma.cc/TLM7-QH3E].

144. *See* Thomas W. Merrill & Katheryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 554–57 (2002) ("Judge Wright's opinion reflected no recognition of a central difference between the rulemaking grants given to the agencies [in cases he cited] and the FTC's general rulemaking grant: namely, that the rulemaking grants in those cases, unlike Section 6(g), were coupled with statutory provisions imposing sanctions for rule violations."). The authors argue that the legislative history of the FTC Act does not support the notion that Congress intended to grant the FTC legislative rulemaking authority. *Id.*

145. *See* Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Seige*, 131 HARV. L. REV. 1 (2017) (analyzing the modern Supreme Court's hostility toward administrative agencies' power); Reul E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1151 (2001) ("Federal courts [in the 1960s and 1970s] were not in the least bit hostile to rulemaking. They consistently upheld agency rulemaking powers, even in instances when it was unclear that Congress intended to grant an agency such powers.").

146. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

147. *Id.* at 551.

148. *Id.* at 532–34.

149. *Id.*

court may view that language as an acknowledgement that Section 5 empowers the FTC only to adjudicate unfair methods of competition on a case-by-case basis rather than create a sweeping rule.[150]

Schechter Poultry should not preclude rulemaking that regulates unfair methods of competition. *Schechter Poultry* and its sister case decided the same year, *Panama Refining Co. v. Ryan*,[151] are the only two instances of the Court using the "nondelegation doctrine" to invalidate a statute.[152] *Schechter Poultry* invalidated the NIRA as an improper delegation of legislative power because it provided no standards or guiding principles to the President in how to exercise the delegated power.[153]

Despite its dormancy, the nondelegation doctrine has survived decades of the Court choosing to not apply it, serving primarily as a reminder to Congress to include some sort of intelligible guiding principle when delegating legislative powers.[154] Justice Scalia acknowledged that the Court "has almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgement that can be left to those executing or applying the law."[155] Congressional delegation to agencies has withstood the tests of time ever since *Schechter Poultry*, and FTC rulemaking independent of Magnuson-Moss was upheld by the D.C. Circuit long after *Schechter Poultry*.[156] There is no reason to believe that, had the FTC chosen to make rules regarding unfair methods of competition over the years, it would have been the occasion for the Court to set aside its decades of deference and finally awaken the nondelegation doctrine.

In the past, a rule over unfair methods of competition would have likely survived along with every other rule that has been threatened by nondelegation concerns since 1935, but the current composition of the Supreme Court could bring new opportunities for the nondelegation doctrine to be revived.[157] In a recent case,

150. *Id.*

151. Panama Refin. Co. v. Ryan, 293 U.S. 388 (1935).

152. Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1405 (2000) ("Although the Court has not overruled them, it has not since applied them or the nondelegation doctrine to invalidate a piece of legislation."). The nondelegation doctrine prohibits private lawmaking and requires limiting standards when Congress delegates its legislative powers. *Id.* at 1401.

153. *Schechter Poultry*, 295 U.S. at 541–42.

154. Bressman, *supra* note 152, at 1405.

155. Mistretta v. U.S., 488 U.S. 361, 416 (1989) (Scalia, J., dissenting).

156. Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 697–98 (1973).

157. *See infra* Section III.A.2.a (considering the future of the nondelegation doctrine).

Gundy v. United States,[158] the Court upheld a delegation of congressional power, but JUSTICE ALITO acknowledged in a concurrence that he would support a reconsideration of the Court's approach to nondelegation.[159] JUSTICE GORSUCH, joined by CHIEF JUSTICE ROBERTS and JUSTICE THOMAS, went a step further, bemoaning the Court's approach to nondelegation as "an understanding of the Constitution at war with its text and history."[160] JUSTICE KAVANAUGH, who did not participate in *Gundy*, acknowledged that "JUSTICE GORSUCH's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases."[161] While a reimagined nondelegation doctrine could alter the trajectory of an FTC rule, the current nondelegation doctrine does not pose a threat to a theoretical noncompete rule.

Although the FTC could pursue a noncompete rule consistent with judicial precedent and the language of its enabling act, numerous legal challenges, particularly in light of modern Supreme Court justices' attitudes toward the administrative state, threaten the viability of such a rule.[162] An FTC rule would be riskier than federal legislation due to these threats, but even with the risk of invalidation, the possibility of its survival makes it an improvement over the current noncompete regime because it would bring uniformity and protect employees while preserving employers' legitimate interests.

b. Would an FTC Rule Preempt Existing State Laws?

Because there is no precedent for unfair methods of competition rulemaking, a noncompete rule's ability to preempt state noncompete law remains an open question that requires an analysis of scattered judicial precedent and the history of FTC rulemaking.[163]

Adding further uncertainty to the preemption question is the fact that the Supreme Court has never spoken to the FTC's preemption power.[164] Some guidance can be found in *City of New*

158. Gundy v. United States, 139 S.Ct. 2116 (2019).

159. *Id.* at 2131 (ALITO, J., concurring).

160. *Id.* (GORSUCH, J., dissenting).

161. Paul v. United States, 140 S.Ct. 342, 342 (Mem) (2019), *cert. denied*.

162. *See infra* notes 129–53 and accompanying text.

163. *See infra* Section III.A.2.b (conducting a preemption analysis of an FTC rule).

164. *See* Daniel A. Crane & Adam Hester, *State-Action Immunity and Section 5 of the FTC Act*, 115 MICH. L. REV. 365, 410 (2016) ([T]the Supreme Court has never decided . . . whether the [FTC] enjoys superior-preemptive authority over anticompetitive state laws.").

York v. FCC, where the Court upheld the Federal Communication Commission's preemption authority over conflicting state regulations regarding cable television standards.[165] The opinion noted that an agency can preempt state law if that preemption "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute . . . unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[166]

Magnuson-Moss delegated complete power to the FTC to regulate unfair or deceptive acts or practices.[167] The D.C. Circuit upheld the FTC's rulemaking authority in *National Petroleum Refiners Association v. FTC*,[168] but Magnuson-Moss codified that rulemaking authority with respect to unfair or deceptive acts or practices.[169] Judicial precedent, both before and after Magnuson-Moss, has generally interpreted the FTC Act's legislative history as supportive of FTC preemption authority.[170]

As for preemption relating to unfair methods of competition, an Eighth Circuit case decided shortly after the FTC Act's passing indicated a sentiment at the time that Congress intended to allow

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165. *See generally* City of New York v. FCC, 486 U.S. 57 (1988).

166. *Id.* at 64 (citing United States v. Shimer, 367 U.S. 374, 383 (1961)).

167. Tod H. Cohen, *Double Vision: The FTC, State Regulation, and Deciding What's Best for Consumers*, 59 GEO. WASH. L. REV. 1249, 1253 (1991) (citing United States v. Am. Bldg. Maint. Indus., 422 U.S. 271, 277 n.6 (1975) (stating that Congress specifically intended to make the FTC's jurisdictional power coextensive with that of Congress under the Commerce Clause).

168. Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973).

169. *Id.* at 697–98; *see* 15 U.S.C. § 57(a) (1975) (articulating the FTC's rulemaking authority and procedure for unfair or deceptive acts or practices).

170. *See* Cohen, *supra* note 167, at 1267 (arguing that Congress delegated a preemption power to the FTC with Magnuson-Moss); Am. Fin. Serv. Ass'n v. FTC, 767 F.2d 957, 989–91 (D.C. Cir. 1985) (holding that the legislative history of the FTC Act and Magnuson-Moss indicated Congress delegated preemption authority to the FTC to protect consumers from unfair or deceptive acts or practices); Peerless Prods. v. FTC, 284 F.2d 825, 827 (7th Cir. 1960) ("[The FTC] can restrain unfair business practices in interstate commerce even if the activities or industries have been the subject of legislation by a state or even if the intrastate conduct is authorized by state law.") (internal citations omitted); Royal Oil Corp. v. FTC, 262 F.2d 741, 743 (4th Cir. 1959) (holding that "[i]f the Commission determines upon a reasonable basis that certain conduct constitutes an unfair method of competition, it may order those responsible to cease and desist even if the conduct is authorized by state law"); Katharine Gibbs School, Inc. v. FTC, 612 F.2d 658, 666–67 (2d Cir. 1979) (assuming that the FTC had preemption authority but remanding for lack of specificity in which state laws were unfair acts). *But see* Cal. State Bd. of Optometry v. FTC, 910 F.2d 976, 982 (D.C. Cir. 1990) (striking down an FTC rule regarding optometry practices because "[a]n agency may not exercise authority over States as sovereigns unless that authority has been unambiguously granted to it" and "nothing in the language of the [FTC] Act clearly expresses a congressional intent to empower the FTC to regulate state action").

preemption authority for the FTC.[171] The Circuit Court went so far as to say any state law "falls blunted" if it "strikes at" the FTC's congressionally vested authority to regulate unfair methods of competition.[172]

The Supreme Court addressed preemption for anticompetitive matters in the context of the Sherman Antitrust Act[173] in *Parker v. Brown*.[174] The Court concluded that the Sherman Act did not preempt state regulation because nothing in the Sherman Act's language and history indicated it could be used to restrain state action.[175] Eventually, the Court devised a two-part test to determine whether a state action should receive immunity from the preemption envisioned in *Parker*.[176] Under this test, the Sherman Act preempts an anticompetitive state statute unless the policy is "'clearly articulated and affirmatively expressed as state policy'" and "'actively supervised' by the state itself."[177]

Because of *Parker*'s application to anticompetitive matters, some might argue that it would apply to an FTC rule against unfair methods of competition. Although the FTC has not ventured to test whether *Parker* immunity extends to its own authority over unfair methods of competition, case law and legislative history indicate that the ideas guiding the *Parker* decision do not translate to Section 5 of the FTC Act.[178] The Supreme Court has acknowledged that the Sherman Act and the FTC Act may have overlapping responsibilities, but the FTC's standard of "unfairness" stretches beyond practices that violate existing antitrust laws like the Sherman Act.[179]

The Supreme Court has even acknowledged the possibility that the FTC is not subject to *Parker* state action immunity and left the

171. Chamber of Com. of Minneapolis v. FTC, 13 F.2d 673, 684 (8th Cir. 1926) ("Congress, in the Federal Trade Commission Act, has assumed to legislate concerning unfair methods of competition . . . [and if the FTC identifies an unfair method of competition] it is certainly subject to that act, no matter what the state has or has not authorized or permitted in that respect.").

172. *Id.*

173. Sherman Antitrust Act, 15 U.S.C. § 1–7.

174. Parker v. Brown, 317 U.S. 341 (1943).

175. *Id.* at 350–52.

176. *See* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 97 (1980).

177. *Id.* at 97.

178. *See* Crane & Hester, *supra* note 164, at 376–81 (analyzing why *Parker* should not extend to Section 5).

179. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986) (extending FTC power over "unfairness" to any practice that the FTC deems to be against public policy).

matter open to future consideration.[180] Federal circuit courts have not addressed the matter in years, but they remain split on the issue.[181] The Fourth Circuit's decision on this matter raises a key point in favor of FTC preemption power by citing *FTC v. National Casualty Co.*[182] In that case, the Court concluded that the McCarran-Ferguson Act limited the FTC's authority to preempt state laws regarding insurance advertising practices.[183] The Fourth Circuit's use of this decision indicates a belief that "the FTC could regulate noninsurance advertising practices (or any business practice), even when a state is also regulating that conduct."[184]

The D.C. Circuit decision against FTC preemption in *Cal. State State Bd. of Optometry v. FTC*,[185] meanwhile, stresses that Magnuson-Moss and Section 5 of the FTC Act do not contain explicit indications of congressional intent to "alter the state-federal balance."[186] However, the *Optometry* decision came in a context substantially distinct from a potential noncompete rule. The challenged rule in that case declared certain state or local governmental acts relating to the regulation of optometrists to be unfair acts or practices.[187] The D.C. Circuit rejected this FTC rule because it found the FTC Act was intended to regulate anticompetitive conduct of businesses, not the conduct of states or localities.[188] In contrast, a noncompete rule would regulate employers, not government actors. Further, the D.C. Circuit misapplied *Parker* to the FTC.[189]

Unlike the Sherman Act, the FTC Act's history indicates a Congressional intent for the FTC to be able to preempt state ac-

180. FTC v. Ticor Title Ins. Co., 504 U.S. 621, 635 (1992) (noting that the FTC has argued that *Parker* immunity does not apply to Section 5 of the FTC Act but refusing to address it because the FTC did not assert that position in the case).

181. *Compare* Royal Oil Corp. v. FTC, 262 F.2d 741, 743 (4th Cir. 1959) (rejecting in dicta the argument that the FTC cannot nullify a state statute because "[i]f the Commission determines upon a reasonable basis that certain conduct constitutes an unfair method of competition, it may order those responsible to cease and desist even if the conduct is authorized by state law."), *and* Peerless Prods., Inc. v. FTC, 284 F.2d 825, 827 (7th Cir. 1960) (referring to the FTC's Section 5 authority as "plenary" and overriding of a local ordinance), *with* Cal. State Bd. of Optometry v. FTC, 910 F.2d 976, 980–82 (D.C. Cir. 1990) (applying *Parker*'s state action immunity to the FTC and thereby finding the FTC could not preempt state laws).

182. FTC v. Nat'l Cas. Co., 357 U.S. 560, 562–63 (1958).

183. *Id.*

184. Crane & Hester, *supra* note 164, at 378 n.80.

185. *Optometry*, 910 F.2d 976.

186. *Id.* at 982.

187. *Id.* at 979.

188. *Id.* at 980.

189. *See supra* notes 173-87 and accompanying text.

tion.[190] In the quarter-century that passed between the passing of the Sherman Act and the passing of the FTC Act, the political concerns that brought about the FTC Act centered on the failings of states to adequately address anticompetitive actions.[191]

Mere months before Congress passed the FTC Act, the Supreme Court upheld preemption of state laws by the Interstate Commerce Commission (ICC).[192] Five days after this decision, well in the midst of congressional debate on the creation of the FTC, Senator Newlands introduced Section 5 and its power to prevent unfair competition with the explicit intention of "building up a system of administrative law regarding trade as the [ICC had] been . . . ."[193] In the ensuing months of congressional debate, both supporters and critics of the bill expressed an expectation that the FTC's powers would be analogous to those of the ICC.[194]

FTC rulemaking pursuant to its power over unfair methods of competition should have preemption authority over state law. When Congress first passed the FTC Act, it did so with an understanding that the FTC would have powers analogous to the ICC, and a Supreme Court decision granting the ICC preemption power was incredibly fresh in Congress's minds.[195] The Eighth Circuit reiterated that Congress intended for the FTC to have preemption authority shortly after the FTC Act's passing.[196] Although any regulation relating to competition raises *Parker* state action immunity concerns, the Court's reasoning in *Parker* applied to the Sherman Act, and the FTC's Section 5 authority is not analogous to that of the Sherman Act in the context of that decision.

Still, unresolved legal questions surrounding the FTC's preemption authority, especially pursuant to its rulemaking authority under Sections 4(g) and 5, raise risks of ineffectiveness. Because of these potential pitfalls, federal legislation should be pursued instead

190. Crane & Hester, *supra* note 164, at 381–98.

191. *Id.* at 389.

192. Hous., E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342, 359–60 (1914). Known as the *Shreveport Rate Cases*, this decision's substantive impact has not withstood a century of Commerce Clause jurisprudence, but its impact on congressional decisionmakers at the time of the FTC Act's passing nevertheless bears relevance to legislative intent. Crane & Hester, *supra* note 164, at 393.

193. Crane & Hester, *supra* note 164, at 395 (citing 51 Cong. Rec. 10, 376 (1914) (statement of Sen. Newlands)).

194. *Id.* at 397. No distinction was made during these deliberations between the FTC and ICC's preemption powers. *Id.* During one exchange on the Senate floor, multiple Senators explicitly expressed an understanding that the Act would have preemption power over state law. *Id.* at 398.

195. *See supra* Section III.A.2.b.

196. Chamber of Com. of Minneapolis v. FTC, 13 F.2d 673, 684 (8th Cir. 1926).

of an FTC rule, as Congress's preemption authority is unquestioned, and it could therefore definitively bring nationwide predictability and fairness to noncompetes.[197]

B. Recommendation

To best address the problems posed by noncompetes, Congress should pass legislation that generally bans noncompetes with certain exceptions that are limited by time and geography.[198] The law should allow for the use of noncompetes in connection with the sale of a business or dissolution of a partnership.[199] It should also include an exception for executive-level employment contracts because they do not face the same issues of knowledge and bargaining power faced by other employees.[200] The law must include enforcement mechanisms to ensure employers do not continue to use unlawful noncompetes, and it must preempt state laws to solve the predictability problems caused by choice-of-law clauses and the variation in the current noncompete regime.[201] It should also include an express preemption clause to ensure preemption, although it would likely impliedly preempt state law because its objective would otherwise be frustrated.[202]

If federal legislation is not passed, the FTC should create a rule using its rulemaking authority granted by Section 4(g) and Section 5 of the FTC Act.[203] The rule should be identical to the law envisioned in the preceding paragraph because it would provide needed protection to employees, preserve employers' interests, and create a uniform, predictable nationwide policy on noncompetes.[204] Although the FTC likely has the legal authority to issue such a rule and preempt state laws, numerous unresolved legal questions regarding the FTC's rulemaking and preemption power could sabotage the rule, which is why federal legislation is a better option.[205]

IV. CONCLUSION

In conclusion, federal actors should pursue policy to reduce the uncertainty that results from choice-of-law clauses accompanying noncompete clauses. The existing state of the law, which is an amal-

197. *See supra* Section III.A.1.b.
198. *See supra* Section III.A.
199. *See supra* Section III.A.
200. *See supra* Section III.A.1.a.
201. *See supra* Section II.B.3; Section III.A.1.a.
202. *See supra* Section III.A.1.b.
203. *See supra* Section III.A.2.a.
204. *See supra* Section II.B.3.
205. *See supra* Section III.A.2.a–b.

gamation of different state policies, should be simplified into a uniform national standard.[206] This federal policy should generally ban noncompetes, which are harmful to employees and business competitors, and allow for limited exceptions to protect the employers' legitimate interests.[207] The federal legislation should allow for exceptions, limited by time and geography, in the contexts of the dissolution of partnerships and sales of businesses, and in employment contracts of executive-level employees.[208]

Federal legislation is the best means to add needed protection to employees, maintain adequate protection for employers, and provide clarity and predictability for both parties.[209] This legislation would also include needed enforcement mechanisms and likely preempt state noncompete laws, which is essential for the uniformity needed to safeguard predictability.[210] This legislation should also include an express preemption clause, but even without one, the legislation would likely preempt state noncompete laws so it can achieve its purpose of uniformity and fairness to employees.[211]

As an alternative, the FTC could pursue rulemaking pursuant to their Section 5 authority over unfair methods of competition, but legal challenges to its rulemaking authority and ability to preempt state laws would bring another iteration of uncertainty to the noncompete landscape.[212] Ultimately, a statute passed by Congress, which already has some level of bipartisan support, would be the best approach to reform the noncompete landscape.

206. *See supra* Section II.B.
207. *See supra* Section II.B.3.
208. *See supra* Section III.A.1.a.
209. *See supra* Section III.A.1.a.
210. *See supra* Section III.A.1.b.
211. *See supra* Section III.A.1.b.
212. *See supra* Section III.A.2.

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