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## Effectively Using the Sherman Act to Address the Anticompetitive Use of Non-Compete Clauses in Tennessee Labor Contracts

Rob Meyer

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## ARTICLE

### EFFECTIVELY UTILIZING THE SHERMAN ACT TO ADDRESS THE ANTICOMPETITIVE USE OF NON-COMPETE CLAUSES IN TENNESSEE LABOR CONTRACTS

*Rob Meyer\**

#### INTRODUCTION

Non-compete contracts are labor contracts barring workers from transferring from one firm to a competing firm within a proscribed period of time after leaving the original firm.<sup>1</sup> Non-competes restrict worker mobility and exacerbate the already unequal bargaining power between employees and employers. Thus, policymakers, scholars, and worker advocates have increasingly expressed concern over the anticompetitive effects of these agreements in recent

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\* Rob Meyer is 2021 graduate of The University of Tennessee College of Law. He expresses profound thanks to Professor Maurice Stucke for his steadfast guidance and thoughtful feedback throughout the lifespan of this paper. He also expresses thanks to the editors at the *Tennessee Journal of Leadership, Law, and Policy* for their editing assistance.

<sup>1</sup> The White House, *Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses* 2 (May 2016) [hereinafter White House Report], [https://obamawhitehouse.archives.gov/sites/default/files/non-competes\\_report\\_final2.pdf](https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf); Office of Economic Policy, *Non-Compete Contracts: Economic Effects and Policy Implications*, U.S. DEP'T TREASURY 1, 3 (Mar. 2016) [hereinafter Treasury Report], [https://home.treasury.gov/system/files/226/Non\\_Compete\\_Contracts\\_Economic\\_Effects\\_and\\_Policy\\_Implications\\_MAR2016.pdf](https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Economic_Effects_and_Policy_Implications_MAR2016.pdf) (“Non-compete agreements are contracts between workers and firms that delay employees’ ability to work for competing firms.”).

years. The Obama administration raised the alarm in 2016, and now the Biden administration is seeking to curtail the anticompetitive effects of non-competes on workers, entrants, consumers, and competition in the U.S. labor market itself.<sup>2</sup>

Non-competes arise in numerous different contexts such as partnership dissolutions, severance agreements with high-ranking business executives, and sales of businesses.<sup>3</sup> In these contexts, non-competes raise unique issues such as ensuring that a business purchaser maintains the goodwill of the purchased business.<sup>4</sup> However, this paper is solely focused on non-competes in labor contracts between employers and employees. In particular, this paper is focused on how non-competes have proliferated in low-wage labor industries and how that proliferation has produced anticompetitive effects on the wider market.

While some states restrict the enforcement of non-competes by statute,<sup>5</sup> Tennessee relies almost entirely on the common law reasonableness test.<sup>6</sup> Because the reasonableness doctrine focuses only on whether a particular non-compete is enforceable, there is, in Tennessee and most states, no body of law to deter firms from including non-competes in their labor contracts. State and federal antitrust law could fulfill this deterrence role by imposing the threat of treble damages on any defendant who utilizes a non-compete violating the Sherman Act. Yet, because non-competes are evaluated under the rule-of-reason standard, which imposes a high evidentiary burden on plaintiffs, antitrust challenges to non-competes have always failed.<sup>7</sup> Given that most non-competes will not be challenged, and the remedy for

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<sup>2</sup> President Biden promised to “work with Congress to eliminate all non-compete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets.” See *The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions*, BIDEN HARRIS: A PRESIDENCY FOR ALL AMERICANS, <https://joebiden.com/empowerworkers/> (last visited Jan. 12, 2021). See generally PRESIDENT-ELECT JOE BIDEN: OFFICIAL TRANSITION WEBSITE, <https://buildbackbetter.gov> (last visited Jan. 12, 2021). Since taking office, President Biden has directed the Federal Trade Commission to use its rulemaking authority “to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.” Exec. Order No. 14036, 85 Fed. Reg. 36987, 36992 (July 9, 2021). Despite the President’s directive, however, the extent to which the Commission will regulate non-competes—through rulemaking and enforcement—remains uncertain. See Aaron Bibb, *Noncompetes: What to Expect from the FTC*, AM. BAR ASS’N (Mar. 21, 2022), [https://www.americanbar.org/groups/labor\\_law/publications/labor\\_employment\\_law\\_news/newsletter-lel-winter2022/noncompetes-what-to-expect-from-the-ftc/](https://www.americanbar.org/groups/labor_law/publications/labor_employment_law_news/newsletter-lel-winter2022/noncompetes-what-to-expect-from-the-ftc/).  
<sup>3</sup> See Workforce Mobility Act of 2019, S. 2614, 116th Cong. § 3(b) (2019).

<sup>4</sup> See *id.*

<sup>5</sup> See, e.g., CAL. BUS. & PRO. CODE § 16600 (West 2020) (prohibiting—with narrow exceptions—non-competes in California).

<sup>6</sup> See *Sugar Creek Carriages v. Hat Creek Carriages*, No. M2017-00963-COA-R3-CV, 2018 WL 1882903, at \*3 (Tenn. Ct. App. Apr. 19, 2018) (citing *Murfreesboro Med. Clinic, P.A. v. Udom*, 166 S.W.3d 674, 678 (Tenn. 2005)) (reiterating that the common law reasonableness test, as summarized in *Udom*, controls the enforcement of non-competes in Tennessee).

<sup>7</sup> See Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 ANTITRUST L.J. 165, 173 (2020).

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those that are successfully challenged is merely to void the non-compete entirely or to modify the restrictiveness of the non-compete, employers have an incentive to include highly restrictive non-competes in their labor contracts.<sup>8</sup>

As the current labor shortage may further incentivize firms to use non-competes to retain workers, there is greater urgency to use federal antitrust law to more effectively address non-competes. Given the plainly anticompetitive nature of many non-competes, the “quick look” analysis is the proper standard for evaluating these “contract[s] . . . in restraint of trade.”<sup>9</sup> A tailored quick look standard is needed, however, because the current quick look standard shifts to a full rule-of-reason analysis when a defendant can provide some recognizable procompetitive justification for the restraint. Under the tailored quick look standard proposed in this paper, a non-compete will be presumptively illegal and the burden will shift to the defendant to not only assert a procompetitive interest but also to show a compelling justification for using a non-compete to protect that interest. To establish a compelling justification, the defendant seeking to justify the use of a non-compete will have to demonstrate that utilizing the restraint is necessary to protect his procompetitive interest.

Part I of this paper identifies some of the anticompetitive effects of non-competes on the U.S. labor market. Part II addresses the legal system’s current response to the non-compete problem with a specific focus on Tennessee. Part III identifies the benefits and limitations of a potential federal statute banning non-competes, examines the shortcomings of the current antitrust response to non-competes, explains the need for a tailored quick look standard, and applies that proposed standard to *Baker v. Hooper*<sup>10</sup>—a Tennessee Court of Appeals non-compete case. Finally, Part IV addresses potential counterarguments and defenses of the status quo.

**I THE ANTICOMPETITIVE EFFECTS OF NON-COMPETES ON THE U.S. LABOR MARKET**

Non-competes restrict employment opportunities for an estimated one in five American workers.<sup>11</sup> In 2014, approximately 28 million American laborers

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<sup>8</sup> See, e.g., *Hasty v. Rent-A-Driver, Inc.*, 671 S.W.2d 471, 474 (Tenn. 1984).

<sup>9</sup> 15 U.S.C. § 1.

<sup>10</sup> 50 S.W.3d 463 (Tenn. Ct. App. 2001).

<sup>11</sup> Office of the Press Secretary, *Fact Sheet: The Obama Administration Announces New Steps to Spur Competition in the Labor Market and Accelerate Wage Growth*, THE WHITE HOUSE (Oct. 25, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/10/25/fact-sheet-obama-administration-announces-new-steps-spur-competition>.

were subject to non-competes,<sup>12</sup> and that number rose to 30 million by 2016.<sup>13</sup> Traditionally justified based on the need to protect intellectual property and other “trade secrets” from transfer to rival sophisticated firms,<sup>14</sup> non-competes are now applied to restrict the inter-firm movement of low-wage, unspecialized workers.<sup>15</sup> In fact, an estimated 15% of workers without a college degree are restricted by non-competes, and 14% of laborers making under \$40,000 per year are subject to non-competes.<sup>16</sup> Non-competes continue to restrict this group of American laborers despite the fact that “workers without four-year degrees are half as likely to possess trade secrets as those with four-year degrees, and workers earning less than \$40,000 possess trade secrets at less than half the rate of their higher-earning counterparts.”<sup>17</sup> Thus, the restrictive effects of non-competes—whether arising from actual enforcement or from the fear of enforcement<sup>18</sup>—apply to specialized and unspecialized workers alike.<sup>19</sup>

Describing non-competes as “blunt instruments that crudely protect employer interests and place a drag on national productivity,” Congress has recently taken note of the detrimental effects of these agreements in a proposed bill.<sup>20</sup> Data-analytics studies in states where non-competes are permitted demonstrate that workers are less likely to change jobs where the prospect of non-

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<sup>12</sup> Evan Starr et al., *Noncompetes in the U.S. Labor Force*, 64 J.L. & ECON. 53, 60 (2021) (relying on both survey data and data from the U.S. Bureau of Labor Statistics).

<sup>13</sup> See Council of Economic Advisers, *Labor Market Monopsony: Trends, Consequences, and Policy Responses*, THE WHITE HOUSE 1, 5 (Oct. 2016) [hereinafter “White House: Labor Market Monopsony Report”], [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025\\_monopsony\\_labor\\_mrkt\\_cea.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf); Treasury Report, *supra* note 1, at 6.

<sup>14</sup> See Treasury Report, *supra* note 1, at 7–8; Posner, *supra* note 7, at 166 (“[N]on competes were traditionally understood to be justified only for specialized and well-compensated employees . . .”).

<sup>15</sup> See, e.g., Posner, *supra* note 7, at 165–66 (explaining, as an example, the non-competes applied to Jimmy John’s sandwich makers across the United States).

<sup>16</sup> White House Report, *supra* note 1, at 3; Starr et al., *supra* note 12, at 64 (“For example, among those without a bachelor’s degree, 34.7 percent of our respondents report having entered into a noncompete at some point in their lives, while 14.3 percent report currently working under one. Similarly, of those earning less than \$40,000 per year, 13.3 percent are currently subject to a noncompete, with 33 percent reporting that they have acquiesced to one at some point.”).

<sup>17</sup> Treasury Report, *supra* note 1, at 4.

<sup>18</sup> Ruth Simons & Angus Loten, *Litigation over Noncompete Clauses is Rising*, WALL ST. J. (Aug. 13, 2013, 8:06 PM), <https://www.wsj.com/articles/SB10001424127887323446404579011501388418552> (noting a 60% rise in non-compete enforcement lawsuits brought by former employers against departing employees); see Posner, *supra* note 7, at 166 (noting that non-competes are frequently enforced and “may deter workers from quitting even when [the non-compete at issue is] unenforceable.”).

<sup>19</sup> See Starr et al., *supra* note 12, at 67–68 figs. 6 & 7 (detailing the incidence of non-competes by industry and protectable interest).

<sup>20</sup> Workforce Mobility Act of 2019, S. 2614, 116th Cong. § 2 (2019).

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compete enforcement exists.<sup>21</sup> But, while non-compete enforcement litigation is trending upward, the impact that non-competes have on aggregate worker mobility is significantly higher than the number of non-compete lawsuits.<sup>22</sup> This data suggests that non-competes have a “chilling effect” on worker mobility that exists regardless of whether employers are diligent in enforcing non-competes.<sup>23</sup> In fact, in their paper *Noncompetes in the U.S. Labor Force*, Professors Evan Starr, J.J. Prescott, and Norman Bishara compiled data showing that non-competes are used “virtually as often in states [like California] where they are clearly unenforceable” as in states where they are enforceable.<sup>24</sup> The 2016 Obama administration report, *Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses*, found that 22% of California workers admitted to signing a non-compete despite the fact that these agreements are unenforceable under California law.<sup>25</sup> As a result, workers stay with an employer not due to the employment benefits associated with the employer, but out of either fear of non-compete enforcement, reluctance to break the non-compete promise made to the employer, or both.<sup>26</sup>

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<sup>21</sup> See Matt Marx, *Policy Proposal 2018-04: Reforming Non-Competes to Support Workers*, BROOKINGS: THE HAMILTON PROJECT, at 8–9 (Feb. 2018) [hereinafter “Marx Policy Proposal”], [https://www.hamiltonproject.org/assets/files/reforming\\_noncompetes\\_support\\_workers\\_marx\\_policy\\_proposal.pdf](https://www.hamiltonproject.org/assets/files/reforming_noncompetes_support_workers_marx_policy_proposal.pdf) (explaining the results of scholarly studies seeking to “identify the causal effects of non-competes and non-compete enforcement on job-hopping”).

<sup>22</sup> See *id.* at 9 (“[I]f one were to assume that non-competes have their impact primarily via lawsuits, the results [of the aforementioned studies] are surprising [because] with only a small number of non-compete lawsuits, the observed mobility impact of non-competes should not occur.”).

<sup>23</sup> See *id.* at 5, 9.

<sup>24</sup> Starr et al., *supra* note 12, at 81; see also J.J. Prescott et al., *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, 2016 MICH. ST. L. REV. 369, 370 (2016) (“We find little evidence that the incidence of noncompetition agreements in a state (after controlling for potentially confounding factors) has any relationship to the level of enforcement of such agreements in that state. In other words, an employee in California (where noncompetes are prohibited) appears to be just as likely to labor under a noncompete as an employee in Florida (where noncompetes are much more likely to be enforced).”).

<sup>25</sup> White House Report, *supra* note 1, at 3; see Catherine L. Fisk, *Reflections on the New Psychological Contract and the Ownership of Human Capital*, 34 U. CONN. L. REV. 765, 782–83 (2002) (“In California, covenants not to compete have been unenforceable against employees since 1872. Employers have nevertheless sought to restrict their employees from working for competitors. Employers ask their employees to sign such contracts anyway, presumably counting on the *in terrorem* value of the contract when the employee does not know that the contract is unenforceable.” (footnotes omitted)).

<sup>26</sup> Matt Marx & Ryan Nunn, *Blog Post: The Chilling Effect of Non-Compete Agreements*, BROOKINGS: THE HAMILTON PROJECT (May 20, 2018), [https://www.hamiltonproject.org/blog/the\\_chilling\\_effect\\_of\\_non\\_compete\\_agreements](https://www.hamiltonproject.org/blog/the_chilling_effect_of_non_compete_agreements); see also Posner, *supra* note 7, at 184 (“A non-compete creates a cost for the employee by requiring her to continue working with the incumbent employer despite a superior offer from an outside employer . . .”).

The prevalence of non-competes is evidence of a deeper problem of unequal bargaining power between firms and low-wage laborers.<sup>27</sup> In his paper, *Antitrust, the Gig Economy, and Labor Market Power*, Professor Marshall Steinbaum analyzed the decline in worker bargaining power over the past forty years.<sup>28</sup> Professor Steinbaum attributed the increasingly unequal bargaining power between laborers and employers to a lack of competition in concentrated labor markets and a growing separation between laborers and the centers of economic power.<sup>29</sup> The low inter-firm competition for laborers described by Professor Steinbaum is a form of “monopsony power”—an economic condition where the “market is controlled by one buyer”<sup>30</sup>—because the labor market is dominated by only a few firms in particular industries.<sup>31</sup> Where “fewer firms compete for a given type of worker, each firm” becomes “more likely to exercise monopsony power.”<sup>32</sup> Furthermore, this condition becomes “self-reinforcing” as “employers can use their monopsony power to impose non-price vertical restraints [like non-competes] that limit workers’ outside options, thus enhancing this same monopsony power.”<sup>33</sup> Therefore, a labor market already characterized by a lack of competition between firms provides the conditions necessary to further reduce worker options through non-competes<sup>34</sup> and no-poaching agreements.<sup>35</sup>

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<sup>27</sup> See Marshall Steinbaum, Public Comment to the Federal Trade Commission: Evidence and Analysis of Monopsony Power, Including but Not Limited to, in Labor Markets, ROOSEVELT INSTITUTE 3 (Aug. 2018), [https://www.ftc.gov/system/files/documents/public\\_comments/2018/08/ftc-2018-0054-d-0006-151013.pdf](https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0054-d-0006-151013.pdf).

<sup>28</sup> See Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 LAW & CONTEMP. PROBS. 45, 45–64 (2019).

<sup>29</sup> *Id.* at 48 (emphasizing that workers are less able to benefit from economic growth today than three decades ago).

<sup>30</sup> *Cable Line v. Comcast Cable Communs. of Pa.*, 767 Fed. Appx. 348, 351 (3d Cir. 2019) (citation omitted).

<sup>31</sup> See White House: Labor Market Monopsony Report, *supra* note 13, at 10 (finding that “evidence suggests both that industries have become more concentrated and that the labor market has become less mobile.”).

<sup>32</sup> *Id.*

<sup>33</sup> Steinbaum, *supra* note 27, at 1.

<sup>34</sup> *Id.* at 3.

<sup>35</sup> See *Antitrust Guidance for Human Resource Professionals*, U.S. DEP’T OF JUST. & FED. TRADE COMM’N 3 (Oct. 2016) (“Naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under antitrust laws.”). The Department of Justice has become increasingly interested in litigation related to the anticompetitive effects of these “no-poaching” agreements. See, e.g., *In re Ry. Indus. Empl. No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464, 472 (W.D. Pa. 2019) (noting DOJ interest in the litigation); Corrected Statement of Interest of the United States, *Harris v. CJ Star, LLC*, 2:18-cv-00247 (E.D. Wash. Mar. 8, 2019); Corrected Statement of Interest of the United States, *Richmond v. Bergey Pullman Inc.*, 2:18-cv-00246 (E.D. Wash. Mar. 8, 2019); Corrected Statement of Interest

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Notably, in addition to “reduc[ing] job mobility for workers,”<sup>36</sup> non-competes also “impose harms on third parties.”<sup>37</sup> Because non-competes “make it easier to retain employees and to pay them less,” they hinder the ability of entrants to break into new markets.<sup>38</sup> In a market already characterized by fewer entrants than in previous decades, the additional barrier of non-compete agreements has the potential to amplify both the burden faced by new businesses and the resulting effects on consumers.<sup>39</sup> Furthermore, due to their competition stifling effects, non-competes harm consumers by reducing consumer choice.<sup>40</sup> With fewer firms competing for the same consumers, consumers overpay for goods and services.<sup>41</sup>

Lastly, current economic conditions may lead to further proliferation of non-competes. Rising inflation is placing low-wage laborers in an increasingly precarious financial position, making them more likely to switch firms in search of higher wages.<sup>42</sup> At the same time, the United States is experiencing a labor shortage.<sup>43</sup> This shortage provides workers with greater bargaining power to

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of the United States, *Stigar v. Dough Dough, Inc.*, 2:18-cv-00244 (E.D. Wash. Mar. 8, 2019). The Department of Justice filed a consolidated brief for the aforementioned statements of interest that can be found at: <https://www.justice.gov/atr/case-document/file/1141726/download>.

<sup>36</sup> Posner, *supra* note 7, at 176.

<sup>37</sup> *Id.* at 185.

<sup>38</sup> Marx Policy Proposal, *supra* note 21, at 10; *see also* White House Report, *supra* note 1, at 2 (noting that non-competes can further reduce the number of entrants into markets by “constricting the labor pool from which to hire” and “prevent[ing] workers from launching new companies”).

<sup>39</sup> *See* Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, ROOSEVELT INST. 23–25 (Sept. 2018), <https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Effective-Competition-Standard-201809.pdf> (noting the reduced amount of entrants in U.S. markets and the fact that having fewer entrants harms consumers); Posner, *supra* note 7, at 186–87 (explaining how non-competes harm entrants using an example of a hospital hiring more nurses than it needed in order to block entrant hospitals from hiring nurses).

<sup>40</sup> *See* White House Report, *supra* note 1, at 2.

<sup>41</sup> *See* Posner, *supra* note 7, at 187; Steinbaum & Stucke, *supra* note 39, at 24 (noting that higher market power among firms leads to higher prices for consumers).

<sup>42</sup> *See* BUREAU OF LAB. STAT., U.S. DEP’T OF LAB., CONSUMER PRICE INDEX 2 (2022) (showing an 8.5% increase in the price of goods and services in the United States from July 2021 through July 2022); Lorie Konish, *High Inflation Leads Federal Minimum Wage to Reach Lowest Value Since 1956, Report Finds*, CNBC (July 15, 2022, 3:15 PM), <https://www.cnbc.com/2022/07/15/inflation-leads-federal-minimum-wage-to-reach-lowest-value-since-1956.html>.

<sup>43</sup> *See* Rachel Greszler, *An Unprecedented Labor Shortage*, THE HERITAGE FOUND. (July 22, 2022), <https://www.heritage.org/jobs-and-labor/commentary/unprecedented-labor-shortage> (noting that there are 755,000 fewer people employed today than at the start of the COVID-19 pandemic); Dany Bahar & Pedro Casas-Alatríste, *Who are the 1 Million Missing Workers that Could Solve America’s Labor Shortage*, BROOKINGS INST. (July 14, 2022), <https://www.brookings.edu/blog/up-front/2022/07/14/who-are-the-1-million-missing-workers-that-could-solve-americas-labor-shortages/> (emphasizing the hundreds of thousands of open jobs in the retail and food services industries).



demand the higher wages they need to survive the rising cost of consumer goods.<sup>44</sup> Therefore, firms face a dilemma: retain workers by continuously providing higher wages and better benefits or use non-competes to freeze laborers in their jobs without having to constantly raise wages in order to retain workers.<sup>45</sup>

As the proliferation of pernicious non-competes is restricting the mobility of unspecialized and specialized workers alike, the legal system must develop a workable solution to address the aggregate effects of non-competes rather than focusing merely on the enforceability or unenforceability of individual non-competes. That has not happened in many jurisdictions, including Tennessee, as the next Part explores.

## II. THE CURRENT RESPONSE TO NON-COMPETES UNDER TENNESSEE LAW AND FEDERAL ANTITRUST LAW

As explained in Part I, non-competes pose a nationwide problem with significant anticompetitive consequences. Historically, however, the legal system has addressed non-competes almost entirely under state common law.<sup>46</sup> Tennessee exemplifies the traditional state-law framework for dealing with non-competes.<sup>47</sup> Some states have passed statutes restricting the use of non-competes to certain industries or banning the agreements entirely.<sup>48</sup> But, as this Part explains, federal antitrust law remains an underutilized tool for addressing this nationwide problem.<sup>49</sup>

Non-competes are generally disfavored under Tennessee law but will be enforced if reasonable.<sup>50</sup> In determining reasonableness, the reviewing court must

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<sup>44</sup> See Ben Finley & Tom Krisher, *Labor Shortage Leaves Union Workers Feeling More Emboldened*, PBS (Sept. 6, 2021, 12:06 PM), <https://www.pbs.org/newshour/economy/labor-shortage-leaves-union-workers-feeling-more-emboldened> (explaining how union workers in Virginia were able to leverage the labor shortage to negotiate for better pay and benefits).

<sup>45</sup> See U.S. DEP'T OF THE TREASURY, *THE STATE OF LABOR MARKET COMPETITION* 16 (2022) ("By design, non-compete agreements limit employees' outside options, which, in turn, weakens workers' bargaining power and raises hiring costs for other firms.").

<sup>46</sup> See Posner, *supra* note 7, at 200 ("[I]n practice, [non-competes] are treated by the law exactly as they were in 1889—subject to the old common law test with no antitrust supplement whatsoever."). See generally Brian K. Krumm, *Covenants Not to Compete: Time for Legislative and Judicial Reform in Tennessee*, 35 U. MEM. L. REV. 447 (2005) (providing an overview of state and federal law regarding non-competes and advocating for reform).

<sup>47</sup> See *supra* note 6 and accompanying text.

<sup>48</sup> See, e.g., CAL. BUS. & PROF. CODE § 16600 (West 2020) (prohibiting—with narrow exceptions—non-competes in California).

<sup>49</sup> See Posner, *supra* note 7, at 200 ("[I]n practice, [non-competes] are treated by the law exactly as they were in 1889—subject to the old common law test with no antitrust supplement whatsoever.").

<sup>50</sup> See *Columbus Med. Servs., L.L.C. v. Thomas*, 308 S.W.3d 368, 384 (Tenn. Ct. App. 2009) (quoting *Allright Auto Parks, Inc. v. Berry*, 409 S.W.2d 361, 363 (Tenn. 1966)).

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focus on the legitimacy of the business interest sought to be protected by the non-compete along with the durational and territorial scope of the non-compete.<sup>51</sup> This reasonableness analysis is guided by the following factors: “(1) the consideration supporting the [non-compete]; (2) the threatened danger to the employer in the absence of the [non-compete]; (3) the economic hardship imposed on the employee by the [non-compete]; and (4) whether the [non-compete] is inimical to public interest.”<sup>52</sup>

Because the common law analysis focuses on the contract law enforceability of non-competes rather than any anticompetitive harm caused by the widespread use of non-competes,<sup>53</sup> there is usually no threat of damages to deter Tennessee firms from freely using restrictive non-competes.<sup>54</sup> For example, in *Hasty v. Rent-A-Driver, Inc.*,<sup>55</sup> the Tennessee Supreme Court found that the non-compete between the employer and the employee was unreasonable because “the [employee] . . . was privy to no trade or business secrets or confidential information . . . of the type ordinarily used to attempt to justify a non-compet[e] clause.”<sup>56</sup> As a result, the court held that the non-compete was unenforceable under Tennessee law and reversed the lower court decision granting damages to the employer for breach of contract.<sup>57</sup> But, with no penalty incurred by the employer for attempting to enforce an unreasonable non-compete,<sup>58</sup> there was nothing deterring the employer from attempting to include a similarly unreasonable non-compete in future labor contracts.

While Tennessee primarily addresses non-competes under the common law reasonableness test,<sup>59</sup> other states have adopted statutes barring the enforcement of non-competes entirely or banning non-competes in specific professions or

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<sup>51</sup> *Murfreesboro Med. Clinic, P.A. v. Udom*, 166 S.W.3d 674, 678 (Tenn. 2005) (citing *Hasty v. Rent-A-Driver, Inc.*, 671 S.W.2d 471, 472 (Tenn. 1984)).

<sup>52</sup> *Id.* (citing *Hasty*, 671 S.W.2d at 472–73).

<sup>53</sup> *See, e.g., id.* at 684 (“For these reasons, we hold that except for restrictions specifically provided for by statute, covenants not to compete are unenforceable against physicians [in Tennessee].”).

<sup>54</sup> *See* Posner, *supra* note 7, at 175 (“Employers face virtually no legal consequences under the antitrust laws if they use [non-competes] for anticompetitive purposes.”).

<sup>55</sup> 671 S.W.2d 471 (Tenn. 1984).

<sup>56</sup> *Id.* at 473.

<sup>57</sup> *Id.* at 474.

<sup>58</sup> *Id.* (“We are not persuaded that Rent-A-Driver [the employer] has shown a need for the covenant which can justify it in the face of the resulting restraint and hardship on the employee.”).

<sup>59</sup> In 2008, the Tennessee legislature passed Tennessee Code Annotated section 63-1-148 to reverse, in part, *Murfreesboro Med. Clinic* by providing conditions under which non-competes are enforceable against healthcare professionals. *See* *Thomas v. Pediatrix Med. Grp. of Tenn., P.C.*, No. E2009-01836-COA-R3-CV, 2010 WL 3564424, at \*5 (Tenn. Ct. App. Sept. 14, 2010) (citing TENN. CODE ANN. § 63-1-148 (2008)). But the Tennessee legislature retained the prohibition on non-compete enforcement with respect to “physicians who specialize in the practice of emergency medicine.” TENN. CODE ANN. § 63-1-148(d) (2017).

industries.<sup>60</sup> For example, California, Montana, and North Dakota statutorily ban non-competes—with narrow exceptions—as contracts in restraint of trade and lawful profession or business.<sup>61</sup> Maryland prohibits non-competes for employees earning \$15 or less per hour or \$31,200 or less annually.<sup>62</sup> Although statutory restrictions on non-competes are becoming increasingly popular across the United States, most states still permit non-competes with little regulation besides the common law’s “reasonableness” standard.<sup>63</sup>

#### **A. Challenging Non-Competes Under Section 1 of the Sherman Act**

As agreements in restraint of trade, non-competes fall within the ambit of federal and state antitrust laws and may be illegal under either Section 1 or Section 2 of the Sherman Act.<sup>64</sup> But, as Professor Eric Posner emphasized,<sup>65</sup> lawsuits challenging non-competes based on federal antitrust law are almost non-existent.<sup>66</sup> There are several reasons for the dearth of antitrust cases challenging employee non-competes, including the difficulty of proving that individual non-competes affect an entire market and substantial judicial receptiveness to the need to protect trade secrets.<sup>67</sup> But the most obvious obstacle to bringing antitrust challenges to non-competes is that—like other vertical restraints—employee non-competes are evaluated under the deferential rule of reason standard rather than the per se illegal or quick look standard.<sup>68</sup>

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<sup>60</sup> See generally Michael Wexler et al., *50 State Desktop Reference: What Businesses Need to Know About Non-Competes and Trade Secrets Law*, Seyfarth Shaw L.L.P. (2019-2020), [https://www.seyfarth.com/dir\\_docs/publications/2019-20\\_50\\_state\\_non-compete\\_reference.pdf](https://www.seyfarth.com/dir_docs/publications/2019-20_50_state_non-compete_reference.pdf) (explaining how every state in the United States addresses non-competes).

<sup>61</sup> N.D. CENT. CODE § 9-08-06 (2019); MONT. CODE ANN. § 28-2-703 (2021); CAL. BUS. & PROF. CODE § 16600 (West 2020).

<sup>62</sup> MD. CODE ANN., LAB. & EMPL. § 3-716 (West 2019).

<sup>63</sup> See Wexler et al., *supra* note 60.

<sup>64</sup> Posner, *supra* note 7, at 172 (citations omitted) (“[Non-competes] can be illegal under Section 1 as an agreement between the employer and employee to restrain trade, or under Section 2 if the employer uses [non-competes] to obtain or maintain a monopoly.”).

<sup>65</sup> *Id.* at 165.

<sup>66</sup> *Id.* at 172 (“A search in the Westlaw database yielded a grand total of zero cases in which an employee [non-compete] was successfully challenged under the antitrust laws.” (citation omitted)).

<sup>67</sup> *Id.* at 172–74.

<sup>68</sup> *Id.* at 173. Under the per se standard, the court will presume that the challenged restraint is unreasonable if the plaintiff proves that the restraint belongs to a class of “agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.” *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). Thus, if the plaintiff can prove that per se treatment is appropriate, the plaintiff “avoids the necessity for an incredibly complicated and prolonged economic investigation into the

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Under the rule of reason, “the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”<sup>69</sup> The rule balances a given practice’s anticompetitive effects against its potential “beneficial business justifications.”<sup>70</sup> But a plaintiff challenging a non-compete under the rule of reason cannot prevail unless she can prove that “the defendant possesses market power and that the non-compete measurably reduces competition.”<sup>71</sup> It cannot be overstated how difficult it is for a single plaintiff defending against the enforcement of one non-compete to (1) show market power—the power “to force a purchaser [or employee] to do something that he would not do in a competitive market”<sup>72</sup>—and (2) show that the non-compete at issue measurably reduces competition in the particular market.<sup>73</sup> As Posner aptly summarized, “when a single employee challenges a single [non-compete], the effect of the [non-compete] on wages [and employee mobility in the labor market] will be lost in statistical noise.”<sup>74</sup>

While these challenges could, hypothetically, be overcome through bringing class action claims, the confidential nature of employment contracts makes it exceedingly difficult to gather enough plaintiffs to form a putative class.<sup>75</sup> And, in *Brunner v. Liautaud*—the one class action challenging non-competes cited by Posner—the court dismissed the plaintiffs’ claim on lack of standing because

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entire history of the industry involved . . . in an effort to determine at large whether a particular restraint has been unreasonable . . . .” *Id.* The quick look standard is an “abbreviated” or “intermediary” standard between full rule-of-reason review and *per se* illegality. *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993). “It applies in cases where *per se* condemnation is inappropriate, but where ‘no elaborate industry analysis is required to demonstrate the anticompetitive character’ of an inherently suspect restraint.” *Id.* (quoting *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 109 (1984)). “Because competitive harm is presumed, the defendant must promulgate ‘some competitive justification’ for the restraint, ‘even in the absence of detailed market analysis’ indicating actual profit maximization or increased costs to the consumer resulting from the restraint.” *Id.* (citations omitted). “If no legitimate justifications are set forth, the presumption of adverse competitive impact prevails and ‘the court condemns the practice without ado.’” *Id.* (quoting *Chi. Pro. Sports P’ship v. Nat’l Basketball Ass’n*, 961 F.2d 667, 674 (7th Cir. 1992)). But “[i]f the defendant offers sound procompetitive justifications, [] the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis.” *Id.*

<sup>69</sup> *Cont’l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977).

<sup>70</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 909 (2007) (Breyer, J., dissenting) (citations omitted).

<sup>71</sup> Posner, *supra* note 7, at 192 (citing *United States v. Topco Assocs.*, 405 U.S. 596, 606 (1972)).

<sup>72</sup> *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 464 (1992) (internal quotation marks omitted) (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14 (1984)).

<sup>73</sup> *Id.*

<sup>74</sup> Posner, *supra* note 7, at 192.

<sup>75</sup> *Id.* at 174 (citing *Brunner v. Liautaud*, No. 14-C-5509, 2015 WL 1598106 (N.D. Ill. Apr. 8, 2015)) (explaining the difficulties facing lawyers seeking to bring class action suits and noting that, to Posner’s knowledge, there is only one class action lawsuit related to non-competes pending in the federal court system).

the defendant franchise owners submitted affidavits expressing their intention not to enforce non-competes “in the future.”<sup>76</sup> The court held that, because the non-competes at issue had not been enforced against the plaintiffs in the past, the defendants’ promise to refrain from enforcement in the future was enough to find that the plaintiffs could not establish a sufficient likelihood of future injury to meet the requirements of Article III standing.<sup>77</sup> Notably, the *Brunner* class of plaintiffs did not include any federal antitrust claims in their action against Jimmy John’s and the franchise owners.<sup>78</sup> Instead, the plaintiffs sought “declaratory and injunctive relief prohibiting the enforcement of [the non-competes] based on their invalidity” under the traditional common law reasonableness test.<sup>79</sup>

## **B. State-Law Solutions Alone are Inadequate to Address Non-Competes**

While non-competes are generally disfavored under Tennessee law, the state-law reasonableness framework—as implemented by Tennessee courts—is ineffective in deterring pernicious non-compete usage, as there is no threat of damages accompanying an unfavorable judgment against a defendant.<sup>80</sup> Because there is generally no penalty associated with attempting to enforce an unreasonable non-compete,<sup>81</sup> and because most employees are unlikely to challenge a non-compete, employers have an incentive to include these clauses in their labor contracts.<sup>82</sup>

State statutes are too varied in their restriction of non-competes, and as noted in Part I, non-competes persist even in states like California where they are illegal.<sup>83</sup> Therefore, given that non-competes have anticompetitive effects that transcend state boundaries, there must be a federal solution to address this growing problem. Furthermore, this solution must operate to penalize the anticompetitive use of non-competes rather than merely hold these non-competes unenforceable or void.<sup>84</sup> Because the Sherman Act could provide the threat of treble damages and

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<sup>76</sup> *Brunner v. Liautaud*, No. 14-C-5509, 2015 WL 1598106, at \*10 (N.D. Ill. Apr. 8, 2015).

<sup>77</sup> *Id.* at \*10–11.

<sup>78</sup> *See id.* at \*2 (listing the various labor law claims brought by the class of plaintiffs).

<sup>79</sup> *Id.* at \*10.

<sup>80</sup> *See supra* notes 53–58 and accompanying text.

<sup>81</sup> *See Posner, supra* note 7, at 175 (“Employers face virtually no legal consequences under antitrust laws if they use [non-competes] for anticompetitive purposes.”).

<sup>82</sup> *See supra* notes 22–24 and accompanying text.

<sup>83</sup> *See supra* note 24 and accompanying text.

<sup>84</sup> As Professor Posner aptly explains, antitrust law already penalizes firms who use “no-poaching” agreements, which operate similarly to non-competes. *See Posner, supra* note 7, at 198–99. As such, when firms agree not to poach each other’s employees, they engage in conduct that the Department of Justice prosecutes as a *per se* violation of Section 1 of the Sherman Act. *See Posner, supra* note

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the plaintiff's recovery of legal fees,<sup>85</sup> this antitrust law could deter the use of restrictive, anticompetitive non-competes. To accomplish such deterrence, the way in which courts interpret the 1890 law must evolve, as the next Part explains.

**III. THE NEED FOR A TAILORED QUICK LOOK STANDARD OF REVIEW**

Instead of subjecting all non-competes to the burdensome rule of reason review, federal antitrust law must develop a standard of review that condemns the unjustifiable non-competes without imposing an unmanageable burden on plaintiffs. At the same time, the new standard must provide an avenue for defendants to assert the need for justifiable non-competes. A tailored quick look standard provides this flexible solution.<sup>86</sup>

All non-competes are not created equal. Some non-competes serve procompetitive business objectives, such as protecting highly technical trade secrets in competitive business markets. Other objectives are simply anticompetitive, in that they primarily restrict the mobility of low-wage, unspecialized workers who will never be exposed to trade secrets. There is no procompetitive business rationale to justify these non-competes in the first place. Therefore, it is inequitable to subject all plaintiffs challenging non-competes to the same rule of reason standard. While the rule of reason may be adequate for evaluating challenges to non-competes in highly specialized fields where non-competes are traditionally justified, a less onerous standard is necessary to account for disparities in business justifications and anticompetitive effects between

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7, at 198. Pursuant to this position regarding no-poaching agreements, the DOJ has brought numerous enforcement actions against firms using such agreements. *See, e.g., Expect Continued Law Enforcement Focus on No-Poach Agreements in 2022*, SULLIVAN & CROMWELL L.L.P.: LEGAL DEVS. AFFECTING THE WORKPLACE (Jan. 26, 2022), <https://www.sullcrom.com/expect-continued-law-enforcement-focus-on-no-poach-agreements-in-2022>. Despite the similarity between no-poaching agreements and non-competes, however, firms utilizing non-competes in an anticompetitive way have yet to face the same consequences as those using no-poaching agreements. *See* Posner, *supra* note 7, at 198–99. *But see* Benjamin Holt et al., *Department of Justice Suggests that Employee Non-Competes Could be Criminally Prosecuted*, HOGAN LOVELLS (Mar. 3, 2022), <https://www.engage.hoganlovells.com/knowledgeservices/news/departments-of-justice-suggests-that-employee-non-competes-could-be-criminally-prosecuted/> (explaining that criminal enforcement of the Sherman Act against firms using employee non-competes could be on the horizon).

<sup>85</sup> *See* 15 U.S.C. § 15(a).

<sup>86</sup> Courts apply the “quick look” standard of review where “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.” *Cal. Dental Ass’n v. F.T.C.*, 526 U.S. 756, 770 (1999). Such circumstances arise where a restraint “fall[s] between the type of conduct typically labeled *per se* anticompetitive and that which is analyzed under a ‘full-blown’ rule of reason analysis.” *1-800 Contacts, Inc. v. F.T.C.*, 1 F.4th 102, 115 (2d Cir. 2021) (citation omitted).

different non-competes. Courts should adopt a tailored quick look standard to strike a more equitable balance.

**A. Absent Expanded Antitrust Options, the Legal System Inadequately Addresses the Aggregate Anticompetitive Effects of Non-Competes**

Where no statutory non-compete ban applies, the primary system for challenging non-competes is still the common law reasonableness framework.<sup>87</sup> Since rescission or modification are the only remedies for a plaintiff challenging a non-compete under this framework, there is no threat of damages to deter a firm from attempting to include a non-compete in contracts with its employees. For the employer, the best-case scenario is that the employee will not challenge the non-compete—even if the employee has a strong case to do so—and will remain employed by the employer. The worst-case scenario is that the employee successfully challenges the non-compete and the court will refuse to enforce the non-compete. Therefore, the common law reasonableness framework is insufficient to create the widespread deterrence necessary to address the “chilling effect” that non-competes have on the labor market in particular industries.<sup>88</sup>

State statutory bans on non-competes present one potential solution for addressing the aggregate “chilling effect.”<sup>89</sup> If non-competes are necessarily unenforceable, the incentive to add these provisions to employment contracts would be reduced. But, as explained in Part I, research data suggests that non-competes are regularly included in labor contracts even where the state statutorily bans the provisions,<sup>90</sup> and—even if statutory bans were fully effective—the emergence of equally rigid statutory bans across fifty different states is highly unlikely.<sup>91</sup> Even if every state were to adopt some form of statutory ban on non-competes, these bans are unlikely to cover the same industries.<sup>92</sup> Therefore, it is likely that the anticompetitive effects of non-competes will persist in certain industries even if those industries differ between states.

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<sup>87</sup> See, e.g., *Vantage Tech., L.L.C. v. Cross*, 17 S.W.3d 637, 644 (Tenn. Ct. App. 1999).

<sup>88</sup> Marx, *supra* note 21, at 5, 13.

<sup>89</sup> *Id.*

<sup>90</sup> See, e.g., Prescott et al., *supra* note 24, at 370.

<sup>91</sup> See Posner, *supra* note 7, at 175 (“[Non-competes] are prohibited for tech workers in Hawaii, physicians in Massachusetts, security guards in Connecticut, and broadcasters in Illinois.” (citations omitted)).

<sup>92</sup> Wexler et al., *supra* note 60 (illustrating that—even in states with statutory bans—significant variation persists regarding the industries covered); see also Russell Beck, *Employee Noncompetes: A State by State Survey*, BECK REED RIDEN L.L.P. (2016), <https://www.beckreedriden.com/wp-content/uploads/2019/01/Noncompetes-50-State-Survey-Chart-20190113.pdf>.

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A federal ban on non-competes could solve the inconsistency problem posed by reliance on state statutes. Congress has recently examined several bills that would ban non-competes for low-wage workers or simply ban non-competes entirely.<sup>93</sup> In 2019, Senators Todd Young (R-Indiana) and Chris Murphy (D-Connecticut) sponsored a bill that would broadly ban non-competes in any labor contract where the employee “is engaged in commerce or in the production of goods for commerce . . . .”<sup>94</sup> Due to its breadth, provision for up to \$5,000 per week in civil fines, and creation of a private right of action, the proposed statute could be an effective first-step in reducing the anticompetitive effects of non-competes.<sup>95</sup> The bill, however, saw no action after a committee hearing in November 2019 and was subsequently revised and reintroduced in January 2020 as the Workforce Mobility Act of 2020.<sup>96</sup> Thus, unless barring non-competes becomes a more pressing priority for Congress, there is a slim chance of this bill becoming law.

The proposed statute utilizes section 18(a)(1)(B) of the Federal Trade Commission Act as the vehicle for enforcing the non-compete ban.<sup>97</sup> This section gives the Federal Trade Commission the ability to establish “rules which define with specificity acts or practices which are unfair or deceptive acts or practices and to include requirements prescribed for the purpose of preventing such acts or practices.”<sup>98</sup> The proposed statute would make it an “unfair or deceptive” trade practice to create, enforce, or threaten to enforce a non-compete.<sup>99</sup>

In addition to the Commission, the proposed statute would also assign investigatory and enforcement responsibility to the U.S. Secretary of Labor.<sup>100</sup> It would permit the Secretary of Labor to “bring an action in any court of competent jurisdiction to obtain the legal or equitable relief against the person described in subparagraph (A) on behalf of an individual aggrieved by the violation . . . .”<sup>101</sup> If a court finds a violation of the non-compete ban, the court is to “impose a civil fine . . . in an amount not to exceed \$5,000 for each week the person is in such

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<sup>93</sup> See Posner, *supra* note 7, at 176 n.64 (listing the various bills that have been introduced in recent years).

<sup>94</sup> Workforce Mobility Act of 2019, S. 2614, 116th Cong. § 3 (2019).

<sup>95</sup> See *id.* § 6.

<sup>96</sup> S. 2614 – *Workforce Mobility Act of 2019*, U.S. CONGRESS, <https://www.congress.gov/bill/116th-congress/senate-bill/2614/related-bills> (last visited Nov. 23, 2020). In 2021, Senator Marco Rubio introduced a similar bill in the United States Senate. See Freedom to Compete Act, S. 2375, 117th Cong. (2021). Like its predecessors, however, the bill stalled in committee. See S. 2375 – *Freedom to Compete Act*, U.S. CONGRESS, <https://www.congress.gov/bill/117th-congress/senate-bill/2375/actions>.

<sup>97</sup> S. 2614 § 6(a)(1) (citing 15 U.S.C. § 57a(a)(1)(B)).

<sup>98</sup> *Am. Fin. Servs. Assoc. v. F.T.C.*, 767 F.2d 957, 983 (D.C. Cir. 1985) (internal quotation marks omitted).

<sup>99</sup> S. 2614 § 6(a)(1).

<sup>100</sup> *Id.* § 6(b)(1).

<sup>101</sup> *Id.* § 6(b)(1)(B).



violation.”<sup>102</sup> In addition to the Commission and the Secretary of Labor, the proposed statute would create a private right of action for any individual “aggrieved by a violation of [the] Act.”<sup>103</sup> The recovery for any plaintiff bringing a claim pursuant to the proposed statute, however, would be limited to “actual damages sustained” and “reasonable attorney’s fees.”<sup>104</sup> Therefore, unlike with an individual claim brought under the Sherman Act, the defendant will not face the threat of treble damages.<sup>105</sup> Treble damages are important for deterring the anticompetitive use of non-competes as “[o]ptimal deterrence is achieved when damages equal the harm done by the wrong divided by the probability of detecting the injury and prosecuting the claim.”<sup>106</sup> Because the likelihood of an employer being caught for using an anticompetitive non-compete is relatively low,<sup>107</sup> the penalty must be high in order to achieve maximum deterrence under Professor Gary Becker’s “widely used” theory.<sup>108</sup>

Undoubtedly, the threat of \$5,000 per week in civil fines, in addition to individual claims and Commission action, would be a significant deterrent for any firm contemplating the use of a non-compete. However, the proposed statute’s reliance on the “aggrieved” individual standard raises ambiguity regarding who fits within this category.<sup>109</sup> The proposed statute’s emphasis on impermissible entry into and enforcement of a non-compete indicates that an employee burdened by a non-compete would almost certainly qualify as an “aggrieved” individual.<sup>110</sup> But the anticompetitive effects of non-competes transcend the employer-employee relationship.<sup>111</sup> Despite the measurable harm non-competes pose to entrants and consumers, as explained in Part I, it is unclear whether either would fall within the proposed statute’s “aggrieved” individual classification. Therefore, while employees restricted by non-competes may be able to bring claims under the

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<sup>102</sup> *Id.* § 6(b)(2).

<sup>103</sup> *Id.* § 6(d)(1).

<sup>104</sup> *Id.* § 6(d)(2).

<sup>105</sup> See *Pfizer, Inc. v. Gov’t of India*, 434 U.S. 308, 314 (1978) (noting that Congress included the Sherman Act provision for treble damages to “deter violators” and “deprive them of the fruits of their illegality” (internal quotation marks omitted) (citations omitted)).

<sup>106</sup> *Perez v. Z Frank Oldsmobile, Inc.*, 223 F.3d 617, 621 (7th Cir. 2000) (citing Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968)).

<sup>107</sup> See Marx Policy Proposal, *supra* note 21, at 9 (noting that non-compete lawsuits are relatively uncommon).

<sup>108</sup> *DirecTV, Inc. v. Barczewski*, 604 F.3d 1004, 1010 (7th Cir. 2010) (citation omitted); see also A. Mitchell Polinsky, *Detrebling Versus Decoupling Antitrust Damages: Lessons from the Theory of Enforcement*, 74 GEO. L.J. 1231, 1232 (1986) (citing Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 191–93 (1968)).

<sup>109</sup> See S. 2614 §§ 6(b)(2), 6(d)(1).

<sup>110</sup> See *id.* § 3(a)(1).

<sup>111</sup> See *id.* § 2(2) (acknowledging that non-competes place a “drag” on the nationwide economy).

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proposed statute’s private right of action, consumers and entrants likely will not have standing to bring similar claims.<sup>112</sup>

Because the purpose of antitrust law is to protect competition itself, rather than merely the individual rights of competitors, it may offer a better vehicle for a broader array of plaintiffs to challenge non-competes.<sup>113</sup> Evidencing this characteristic of antitrust law, Posner notes that “virtually all antitrust class actions are brought by consumers or commercial buyers rather than employees.”<sup>114</sup> But, despite its broader aim of protecting competition as opposed to individual competitors, the antitrust status quo provides little ground for plaintiffs to challenge non-competes due to the burdensome rule-of-reason standard of review.<sup>115</sup>

**B. Courts Must Apply a Higher Presumption of Illegality to  
Non-Competes**

As explained in Part II, the rule-of-reason framework creates an insurmountable burden for plaintiffs seeking to challenge non-competes.<sup>116</sup> But not all plaintiffs bringing claims under Section 1 must surmount the rule-of-reason hurdle. For example, any agreement to fix prices is per se illegal regardless of whether the defendants possessed power to “control the market.”<sup>117</sup> Because horizontal price fixing agreements strike at the heart of what Congress sought to prevent in passing the Sherman Act, courts afford defendants no avenue for justifying their conduct.<sup>118</sup> Thus, because non-competes serve legitimate interests in certain industries, this category of agreement likely will never be viewed with

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<sup>112</sup> Under the Supreme Court’s recent Article III standing cases, a private individual will not be able to bring a federal lawsuit under this proposed statute unless she can show that she was “*concretely harmed*” by the defendant’s violation of the statute. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021). To be sufficiently concrete, moreover, the plaintiff’s asserted harm must bear “a ‘close relationship’ to a harm traditionally recognized as providing a basis for a lawsuit in American courts.” *Id.* at 2200 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340–41 (2016)). And even if consumers and entrants can plead facts sufficient to show the “irreducible constitutional minimum” of Article III standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), a federal court will still scrupulously examine whether the harm alleged by these plaintiffs falls within the “zone of interests protected or regulated by the statutory provision . . . invoked in the suit.” *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (citation omitted). If the reviewing court determines that the statute was not intended to provide redress for “the class of persons” seeking to bring suit—here entrants and consumers—then the court will likely dismiss the case. *See id.* at 161.

<sup>113</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007) (internal quotation marks omitted) (quoting *Atl. Richfield Co. v. USA Petrol. Co.*, 495 U.S. 328, 338 (1990)).

<sup>114</sup> Posner, *supra* note 7, at 174.

<sup>115</sup> *Id.* at 192.

<sup>116</sup> *See supra* notes 69–74 and accompanying text.

<sup>117</sup> *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940).

<sup>118</sup> *Id.* at 221–22 (explaining that Congress afforded no room for a rule-of-reason review of horizontal price fixing agreements).

the judicial scorn afforded to horizontal price fixing agreements.<sup>119</sup> Nonetheless, the disparate procompetitive justifications and anticompetitive effects among non-competes make it inequitable to evaluate all non-competes under the rule of reason.<sup>120</sup>

The quick look standard of review may provide a workable middle ground for evaluating non-competes under Section 1.<sup>121</sup> Importantly, the bookend categories of *per se* illegality and rule-of-reason review imply a spectrum of evaluation where the presumption of illegality varies based on the “circumstances, details, and logic of a restraint.”<sup>122</sup> The rule of reason may be modified to require only a brief inquiry into the anticompetitive effects of a challenged restraint where “the experience of the market has been so clear . . . that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.”<sup>123</sup> This “intermediate standard”<sup>124</sup> applies where “even a person with a rudimentary understanding of economics could conclude that the arrangement in question [will] have an anticompetitive effect on customers and markets.”<sup>125</sup>

In applying the quick look standard, a court presumes the anticompetitive harm, and the defendant bears the burden of producing some procompetitive justification for the restraint.<sup>126</sup> If the defendant is unable to provide any legitimate justification for the restraint, the court condemns the agreement, and the plaintiff prevails.<sup>127</sup> But, if the defendant provides “sound procompetitive justifications” for the restraint, the court will apply a full-scale rule-of-reason analysis.<sup>128</sup> Therefore, the quick look eases the initial burden on the plaintiff, but still provides an avenue for the defendant to explain the procompetitive justifications that may or may not support the agreement under review.

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<sup>119</sup> See Posner, *supra* note 7, at 177–84 (identifying the potential procompetitive benefits of non-competes); see also *Consultants & Designers, Inc. v. Butler Serv. Grp., Inc.*, 720 F.2d 1553, 1560 (11th Cir. 1983) (noting that, to qualify for *per se* treatment, a restraint of trade must have “no purpose except stifling competition and that the non-compete at issue did not meet this limitation because it had a “legitimate and valid business purpose.” (quoting *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963))).

<sup>120</sup> See Posner, *supra* note 7, at 192–94 (noting that employee non-competes “are on average anticompetitive” and contrasting non-competes with other agreements typically evaluated under the rule of reason).

<sup>121</sup> See *id.* at 194 (citations omitted).

<sup>122</sup> *Cal. Dental Ass’n v. F.T.C.*, 526 U.S. 756, 781 (1999).

<sup>123</sup> *Id.*

<sup>124</sup> *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993).

<sup>125</sup> *Cal. Dental Ass’n*, 526 U.S. at 770.

<sup>126</sup> *Brown Univ.*, 5 F.3d at 669 (citations omitted).

<sup>127</sup> *Id.* (citation omitted).

<sup>128</sup> *Id.*

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As the Supreme Court famously noted in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,<sup>129</sup> “easy labels do not always supply ready answers.”<sup>130</sup> Despite the reduced initial burden on the plaintiff, the quick look standard of review—as it exists in caselaw today—will not fully solve the doctrinal hurdle faced by plaintiffs seeking to challenge non-competes under the Sherman Act. While defenseless non-competes will be struck down under the current quick look standard, in cases where the defendant can offer some “sound procompetitive justifications” for the non-compete, the quick look analysis will shift to full-scale rule-of-reason review.<sup>131</sup> The plaintiff will almost certainly lose where there is a shift to full rule-of-reason review.<sup>132</sup> Even if lesser restrictive alternatives to the non-compete exist, the plaintiff will not be able to reach this final step of rule-of-reason review without first proving: (1) that the employer possesses market power and (2) that the non-compete at issue “has a substantial anticompetitive effect that harms consumers in the relevant market.”<sup>133</sup> As plaintiffs have historically been unable to surmount this initial rule-of-reason hurdle in challenging non-competes,<sup>134</sup> the survival of non-compete challenges under the current quick look standard will rest on whether the reviewing court deems the justification for the non-compete to be a “sound procompetitive” one.<sup>135</sup>

Because courts have historically been “receptive to the defense” that non-competes are necessary for protecting business interests,<sup>136</sup> courts are likely to find these assertions to be legitimate justifications in all but the most egregious non-compete cases.<sup>137</sup> Therefore, a tailored quick look standard is needed. Under this tailored quick look standard, the non-compete will be presumptively illegal unless the defendant can establish a *compelling* justification for using a non-compete.<sup>138</sup>

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<sup>129</sup> *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

<sup>130</sup> *Id.* at 8.

<sup>131</sup> *Brown Univ.*, 5 F.3d at 669.

<sup>132</sup> See Posner, *supra* note 7, at 192–94.

<sup>133</sup> *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (citation omitted).

<sup>134</sup> See Posner, *supra* note 7, at 192.

<sup>135</sup> *Brown Univ.*, 5 F.3d at 669.

<sup>136</sup> Posner, *supra* note 7, at 174.

<sup>137</sup> *Am. Express Co.*, 138 S. Ct. at 2284.

<sup>138</sup> See *N.C. State Bd. of Dental Exam’rs v. F.T.C.*, 717 F.3d 359, 374 (4th Cir. 2013) (citation omitted) (acknowledging that the quick look standard of review may be modified to require a “compelling justification” for a plainly anticompetitive restraint); see also *Cal. Dental Ass’n v. F.T.C.*, 526 U.S. 756, 779 (1999) (“The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like ‘per se,’ ‘quick look,’ and ‘rule of reason’ tend to make them appear.”); Posner, *supra* note 7, at 194 (arguing for some level of presumptive illegality in the standard of review applied to non-competes).

A compelling justification is a particularized assertion of a fundamental need for a non-compete.<sup>139</sup> To meet this burden, the party seeking to withstand tailored quick look scrutiny must provide facts demonstrating that, absent the use of the particular non-compete, the firm will be unable to achieve the procompetitive purpose behind the non-compete, such as the dissemination of trade secrets to employees.<sup>140</sup> As this analysis will require an inquiry into whether “a less restrictive alternative [to the non-compete] is available,” the compelling justification standard of the tailored quick look will subsume the less restrictive alternative prong of the rule-of-reason test.<sup>141</sup> Additionally, because the court will presume that the non-compete is unreasonable, the defendant will bear the burden of demonstrating that *no* “reasonable, less restrictive alternative to the [non-compete] exists that would provide the same benefits as the current restraint.”<sup>142</sup>

By requiring a defendant to provide a compelling justification for the non-compete, the tailored quick look standard will strike down non-competes that are unjustly anticompetitive while still allowing a narrow avenue for employers to justify the use of a non-compete where there may be a significant need for one.<sup>143</sup> Like under Posner’s proposed standard, the employer will bear the burden of proving that a “procompetitive business justification [for the non-compete] outweighs any adverse effects on” workers and the competitive market.<sup>144</sup> The compelling justification requirement of the tailored quick look, however, goes one step further than Posner’s proposed standard. Instead of merely requiring a burden-shifting balancing test, the compelling justification requirement will not be met unless the defendant proves that no less restrictive alternative to the non-compete will be sufficient to protect its procompetitive interest.<sup>145</sup> Application of the tailored quick look standard to an actual Tennessee non-compete case illustrates the utility of this doctrine.

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<sup>139</sup> See, e.g., *United States v. Corbitt*, 879 F.2d 224, 239–40 (7th Cir. 1989) (explaining that the First Amendment does not require disclosure of a confidential presentence report to the press unless the press puts forth a particularized and compelling need for the information contained in the specific report).

<sup>140</sup> For example, an employer seeking only to keep workers from switching firms would not be able to meet the compelling need standard because competition for employees is an ordinary part of business in the competitive market. See Posner, *supra* note 7, at 197–200. But if an employee has been consistently exposed to trade secrets that allow the firm to compete in a particular market, the employer may be able to show a compelling need for using a non-compete to protect those trade secrets. See White House: Labor Market Monopsony Report, *supra* note 13, at 5.

<sup>141</sup> *Barry v. Blue Cross of California*, 805 F.2d 866, 871 (9th Cir. 1986).

<sup>142</sup> *Sullivan v. Nat’l Football League*, 34 F.3d 1091, 1103 (1st Cir. 1994) (citation omitted).

<sup>143</sup> See Posner, *supra* note 7, at 196 (identifying interests such as “protect[ing] an investment in training” and “preserv[ing] goodwill, trade secrets, or customer lists” as examples of legitimate interests that may be protected by non-competes).

<sup>144</sup> *Id.* at 195.

<sup>145</sup> See *Sullivan*, 34 F.3d at 1103.

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**C. Evaluating *Baker v. Hooper* Under the Tailored Quick Look Standard**

There are not many nail salons in McMinn, Monroe, and Meigs County, Tennessee.<sup>146</sup> Therefore, an employment non-compete barring employees Tiffany Moates and Julie Ellison from working at any other nail salon in McMinn County within six months of leaving their former employer pushed the plaintiffs to look only at salons in Monroe and Meigs counties.<sup>147</sup> Of course, neither Moates nor Ellison would have chosen to commute to a surrounding county but for the terms of the non-compete.<sup>148</sup> In fact, plaintiff Patricia Baker enforced the non-compete due to the fact that Moates and Ellison left her salon and started working at a competing salon within McMinn County, in violation of the express terms of the non-compete.<sup>149</sup>

Because Baker entered into a non-compete agreement with her employees and proceeded to enforce that agreement, and because the non-compete does not fall within any of the exceptions listed in section (b) of the proposed statute, Baker would be operating in violation of section 3(a)(1) of the Workforce Mobility Act of 2019 if it were binding law at the time of this case.<sup>150</sup> Furthermore, as both Moates and Ellison would likely fall within the aggrieved individual classification, either could have brought a counterclaim under the proposed statute (assuming each could establish Article III standing) and, as a defense to non-compete enforcement, asserted that the non-compete is illegal and therefore unenforceable.<sup>151</sup> Additionally, the proposed statute would give the Federal Trade Commission the ability to bring an enforcement action against Baker and give the Secretary of Labor the ability to sue Baker on behalf of Moates or Ellison.<sup>152</sup> Finally, Baker could be slapped with \$5,000 per week in civil fines along with being liable for any damages actually sustained and reasonable attorney's fees incurred by Moates or Ellison.<sup>153</sup>

Even without the enactment of the proposed statute, Moates and Ellison could also have brought a federal antitrust counterclaim in response to the state-

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<sup>146</sup> See *Baker v. Hooper*, 50 S.W.3d 463, 469 (Tenn. Ct. App. 2001).

<sup>147</sup> *Id.*

<sup>148</sup> See *id.*

<sup>149</sup> *Id.* (“It is not disputed that these defendants violated the third provision of their employment contract, i.e., working as a nail technician in another salon or store within six months of the termination date in McMinn County.”).

<sup>150</sup> Workforce Mobility Act of 2019, S. 2614, 116th Cong. § 3(a)(1) (2019).

<sup>151</sup> *Id.* § 3(a)(2) (asserting that “[e]xcept as provided in subsection (b),” non-competes falling within “paragraph (1) shall have no force or effect”); see *Christenberry Trucking & Farm, Inc. v. F&M Mktg. Servs.*, 329 S.W.3d 452, 462 (Tenn. Ct. App. 2010) (“[A]s a general rule, illegal contracts are not enforceable.”).

<sup>152</sup> S. 2614 §§ 6(a), 6(b).

<sup>153</sup> *Id.* §§ 6(b)(2), 6(d)(2).

court enforcement of Baker's non-compete. Baker and Moates would assert, as a defense to enforcement, that the non-compete between Baker, Moates, and Ellison is a "contract . . . in restraint of trade"<sup>154</sup> and, therefore, falls "cleanly under Section 1 [of the Sherman Act]"<sup>155</sup> and is unenforceable.<sup>156</sup> But this defense would have likely failed. As the Sherman Act only prohibits "unreasonable" restraints of trade,<sup>157</sup> Moates and Ellison would have needed to demonstrate that the non-compete was unreasonable, which would require them "to prove that the challenged restraint has a substantial [anticompetitive] effect that harms consumers in the relevant market."<sup>158</sup> Therefore, if the relevant legal standard was the rule of reason, Moates and Ellison's antitrust defense would fail, and Baker would not be deterred from including a non-compete in labor contracts with future nail technicians.

On the other hand, the reviewing court could, with only a quick look at the facts of the case, determine that it is "clear[ly] anticompetitive" to insulate one's business from competition by requiring departing employees to move their talents out of the local market for an arbitrary six-month duration.<sup>159</sup> The anticompetitive character of such restriction would be amplified, moreover, by the rapidly growing consumer demand for personal care services like nail salons.<sup>160</sup> Because nail salon services are highly desired by consumers, restricting the availability of local services directs the growing consumer demand to Baker's firm and thereby reduces the options consumers have for where to obtain nail salon services.<sup>161</sup> As such, after including the effects of rising consumer demand as part of the "circumstances" and "details" of the non-compete restricting Moates and Ellison, a court would be even more likely to apply the quick look standard.<sup>162</sup>

Under the traditional quick look, the non-compete would be considered presumptively illegal and the burden would shift to Baker to provide "sound

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<sup>154</sup> 15 U.S.C. § 1.

<sup>155</sup> Posner, *supra* note 7, at 192.

<sup>156</sup> See *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 321 (1961) (explaining that the respondents raised illegality under federal antitrust law as a defense to breach of contract); *Christenberry Trucking & Farm, Inc.*, 329 S.W.3d at 462 ("[A]s a general rule, illegal contracts are not enforceable.").

<sup>157</sup> *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396 (1927).

<sup>158</sup> *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (citations omitted).

<sup>159</sup> *Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756, 781 (1999).

<sup>160</sup> See Stanislava Ilic-Godfrey, *Recovering from the Pandemic: A Bright Outlook for the Personal Care Service Industry*, BEYOND THE NUMBERS: EMPLOYMENT & UNEMPLOYMENT (U.S. Bureau of Lab. Stat., May 2022).

<sup>161</sup> See generally Statement of Interest of the United States, *Beck v. Pickert Med. Grp., P.C.*, Case No. CV21-0292, (2d Jud. Dist. Nev. Feb. 25, 2022) (arguing that the Nevada state court should consider whether the non-compete agreements at issue in the state lawsuit violated federal antitrust principles.).

<sup>162</sup> *Cal. Dental Ass'n.*, 526 U.S. at 781.

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procompetitive justifications” for the non-compete.<sup>163</sup> She could attempt to make this showing by asserting, as she did in the actual Tennessee case, that the non-compete was necessary “to protect her business” from competition by Moates and Ellison.<sup>164</sup> But this conclusory argument against increased competition would not be enough to shift the standard to full rule-of-reason analysis because, after all, the goal of antitrust law is to protect competition itself.<sup>165</sup> However, if Baker was able to provide a sound procompetitive business justification—like arguing that the non-compete was necessary to enable her to disseminate trade secrets among employees and optimize resources—the court would be more likely to find that full-scale rule-of-reason analysis was appropriate.<sup>166</sup>

The issue then would become whether the reviewing court deemed this justification to be a legitimate one.<sup>167</sup> Given Baker’s inability to provide the court with any reasonable calculation of damages flowing from Moates and Ellison breaching the non-compete,<sup>168</sup> and because Baker remained “fully booked” with clients and did not attempt to hire any replacement employees “for at least three months” after Moates and Ellison left her salon,<sup>169</sup> a court is likely to look at Baker’s alleged need to “protect her business” as a conclusory procompetitive justification without factual support.<sup>170</sup> Thus, the reviewing court may have condemned the non-compete, even under the traditional quick look analysis, if it found that Baker’s alleged procompetitive justification was illusory and the only effect of the non-compete was to further the illegitimate interest of preventing “ordinary competition.”<sup>171</sup>

Nevertheless, there is no guarantee that a reviewing court would dispense with Baker’s procompetitive justification so easily. As Posner noted, “courts have been receptive to the defense that [non-competes] are needed to protect the interests of employers.”<sup>172</sup> In *Consultants & Designers, Inc. v. Butler Service Group, Inc.*, the Eleventh Circuit determined that the defendant had a “legitimate interest” in using a non-compete to protect the investment of training and resources “necessary to carry on its business.”<sup>173</sup> Undoubtedly, there are differences between the nail

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<sup>163</sup> *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993).

<sup>164</sup> *Baker v. Hooper*, 50 S.W.3d 463, 469 (Tenn. Ct. App. 2001).

<sup>165</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007) (internal quotation marks omitted) (quoting *Atl. Richfield Co. v. USA Petrol. Co.*, 495 U.S. 328, 338 (1990)).

<sup>166</sup> *See Brown Univ.*, 5 F.3d at 669.

<sup>167</sup> *Id.*

<sup>168</sup> *Baker*, 50 S.W.3d at 470–71.

<sup>169</sup> *Id.* at 470–71.

<sup>170</sup> *Id.* at 469.

<sup>171</sup> *Consultants & Designers, Inc. v. Butler Serv. Grp., Inc.*, 720 F.2d 1553, 1558 (11th Cir. 1983); *see Chi. Pro. Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 961 F.2d 667, 674 (7th Cir. 1992).

<sup>172</sup> Posner, *supra* note 7, at 174.

<sup>173</sup> *Butler Serv. Grp.*, 720 F.2d at 1559; *see* Posner, *supra* note 7, at 174.



salons in *Baker* and the technical service industry firms in *Butler Service Group*. But, after showing that she lost fifty-two clients when Moates and Ellison left her salon, Baker could claim that she needed a non-compete to protect her investment in nail technician training.<sup>174</sup> Baker could assert that, without a non-compete, her salon would become a training ground where nail technicians gain skills and a client base before quitting and going elsewhere to service those clients. Of course, this argument would have little merit in the legal profession or other professions where non-competes are forbidden by professional ethics rules because they inhibit client freedom of choice.<sup>175</sup> However, if a court reviewing the facts of *Baker* followed the *Butler Service Group* reasoning and found that Baker had a legitimate interest in protecting her investment in training nail technicians, the court could hold that a full-blown rule-of-reason analysis is warranted, and Moates and Ellison would almost certainly lose.

Therefore, instead of adhering to the traditional quick look, the court should apply a tailored quick look approach where the mere assertion of a legitimate interest is insufficient to open the rule-of-reason gate. Under such standard, Baker would not only have to assert a procompetitive interest, but also show that the non-compete was necessary to protect such interest.<sup>176</sup>

It is unlikely that Baker could meet such standard, as she could not demonstrate that she was actually damaged by the breach of the non-compete.<sup>177</sup> Because Baker was “fully-booked” with clients even after Moates and Ellison breached the non-compete and transferred salons, and because Baker “would not have been able to service all of the clients that left [when Moates and Ellison left] if they had remained,” Baker would not be able to demonstrate that using the non-compete to protect her investment in nail technician training was the least restrictive means of protecting such interest.<sup>178</sup> Indeed, Baker’s lack of any measurable harm from the breach of the non-compete underscores the fact that existing legal remedies for theft of trade secrets and interference with business relationships may be sufficient to protect her investment in training her employees.<sup>179</sup> As such, the

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<sup>174</sup> *Baker*, 50 S.W.3d at 470.

<sup>175</sup> See *Spiegel v. Thomas, Mann & Smith, P.C.*, 811 S.W.2d 528, 529–30 (Tenn. 1991) (citation omitted) (explaining that a lawyer violates the Tennessee Rules of Professional Conduct if she enters into an agreement that “restricts the right of a lawyer to practice law” after termination of employment with a particular employer).

<sup>176</sup> See *Butler Serv. Grp.*, 720 F.2d at 1559–60.

<sup>177</sup> See *Baker*, 50 S.W.3d at 471.

<sup>178</sup> *Id.* at 470–71; cf. *Butler Serv. Grp.*, 720 F.2d at 1559 (“There is some optimal investment for society in the resources required to find and place technical workers at places such as TVA.”).

<sup>179</sup> See THE STATE OF LABOR MARKET COMPETITION, *supra* note 45, at 16 & n.58 (identifying the criminal penalty for theft of trade secrets under 18 U.S.C. § 1832 as a less restrictive alternative to non-compete use); see also *Watson’s v. McCormick*, 247 S.W.3d 169, 176–77 (Tenn. Ct. App. 2007) (providing the elements of “the tort of intentional interference with existing or prospective business relationship”).

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reviewing court would likely determine that enforcing the non-compete would only allow Baker to reduce the number competing nail technicians in McMinn County, and—as a result—reduce the number of consumers who have access to nail salon technicians in that county.

Because non-competes affect the health and well-being of the entire U.S. labor market, reliance upon state common law or state statutes alone is insufficient. A nationwide solution providing a threat of significant damages is necessary. Even if the Workforce Mobility Act of 2019 or a comparable bill is passed into law, it is unclear whether all those who suffer from non-competes will have standing to bring claims under this type of statute in federal court. If a tailored quick look standard is developed, the Sherman Act may be able to fulfill the role that state common law, state statutes, and proposed federal statutes have all failed to accomplish.

**IV. ADDRESSING DEFENSES OF THE STATUS QUO**

Viewed in isolation, non-competes—like most other contracts—may be dealt with exclusively under state law. Yet, as demonstrated in Part I, because non-competes have proliferated to such a significant extent, the volume of these contracts must be reduced to protect the vitality of the U.S. labor market. While the Sherman Act rule-of-reason framework theoretically provides an appropriate balancing approach, the standard has proven insurmountable for a plaintiff seeking to challenge a non-compete. By transitioning from the rule of reason to per se illegality where a horizontal price-fixing agreement is at issue, the Sherman Act has demonstrated the ability to deter other types of pernicious contracts. Thus, the current rule-of-reason framework applied to non-competes must be modified if the Sherman Act is to be useful for addressing America's non-compete problem.

Because non-competes have almost exclusively been addressed under state law, the utilization of more aggressive federal antitrust enforcement may be viewed as superfluous or even improper.<sup>180</sup> After all, the existing state-court reasonableness framework does balance important factors such as the legitimacy of the firm's protectable business interest, the purpose of the non-compete, the temporal and territorial scope of the restraint, and "the potential harm to the employee and the public."<sup>181</sup> And states are increasingly passing statutes to ban non-competes or supplement the common-law reasonableness framework.<sup>182</sup> Thus, why must the

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<sup>180</sup> Prescott et al., *supra* note 24, at 370 ("[N]oncompete enforcement policy has always been considered a state-law domain.").

<sup>181</sup> Randall S. Thomas et al., *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 14 (2015) (footnote omitted) (citations omitted).

<sup>182</sup> See *supra* section II.

federal government and the federal courts play a greater role in addressing non-competes?

The proliferation of non-competes in recent decades indicates that relying upon exclusively state-law solutions to a nationwide problem is insufficient. With the number of Americans laboring under a non-compete rising from approximately 28 million in 2014<sup>183</sup> to 30 million by 2016,<sup>184</sup> the empirical evidence indicates that the current reliance on state-law has done little to deter the use of non-competes. Furthermore, even in states that statutorily deem non-competes unenforceable, employers still include non-competes in their labor contracts to discourage unadvised workers from switching firms.<sup>185</sup> Without the threat of damages or civil fines, firms contemplating including highly restrictive non-competes in their labor contracts have nothing to fear except contract rescission or “blue pencil” modification.<sup>186</sup> While the common law reasonableness framework and state statutory bans are a helpful first step and may prove sufficient to address non-competes in the sale of businesses or in partnership dissolutions, these state-law solutions inadequately address the “drag” that non-competes place on the U.S. labor market.<sup>187</sup>

As there is an “unbroken line” of U.S. Supreme Court and U.S. Circuit Court cases “holding that the validity of covenants not to compete under the Sherman Act must be analyzed under the rule of reason,”<sup>188</sup> departure from the rule-of-reason framework may also be met with criticism. Furthermore, because economic data on the anticompetitive effects of non-competes is relatively new, courts may find too much ambiguity to apply a per se illegal or quick look standard to non-competes.<sup>189</sup> This argument is sound in that some non-competes do protect legitimate business interests and may even provide a consumer benefit when enforced.<sup>190</sup>

But the existence of procompetitive justifications—including consumer benefit—in some instances of non-compete enforcement does not mean that a plaintiff should be required to show market power to contest even the most plainly anticompetitive non-competes. Due to the insurmountable burden on the plaintiff under the status quo framework, the rule-of-reason standard effectively becomes a

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<sup>183</sup> Starr et al., *supra* note 12, at 60.

<sup>184</sup> See White House: Labor Market Monopsony Report, *supra* note 13, at 5; Treasury Report, *supra* note 1, at 6.

<sup>185</sup> See *supra* notes 24–26 & accompanying text.

<sup>186</sup> See Cent. Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28, 36–37 (Tenn. 1984).

<sup>187</sup> Workforce Mobility Act of 2019, S. 2614, 116th Cong. § 2 (2019).

<sup>188</sup> Consultants & Designers, Inc. v. Butler Serv. Grp., Inc., 720 F.2d 1553, 1561 (11th Cir. 1983) (citation omitted).

<sup>189</sup> *Id.* at 1562 (citing N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4–5 (1958)) (noting that the per se illegality doctrine “should not be extended to restraints of trade that are of ambiguous effect”).

<sup>190</sup> See *id.* at 1560.

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standard of presumptive legality for non-competes. It is possible to protect employer interests and maintain the legality of some non-competes while deterring the malicious use of most others. The solution is a tailored quick look standard where the court presumes the anticompetitive harm, and therefore removes the market power hurdle for the plaintiff, but still ensures that a defendant can utilize a non-compete where *necessary* to protect a procompetitive business interest.

The legal system's classic approach to non-competes—as exemplified in *Baker v. Hooper*—might be adequate if these agreements were not so popular across American industries. But, because non-competes are proliferating even when the employees lack trade secrets, and even in states where they are void, the common law has not addressed the significant anticompetitive effects of non-competes on laborers, entrants, consumers, and the market itself. The Sherman Act was designed to address precisely the type of problem posed by non-competes.<sup>191</sup> Thus, if a tailored quick look is adopted, the Sherman Act could become the most helpful tool for all types of plaintiffs seeking to challenge non-competes.

## CONCLUSION

Despite Congressional recognition of the problem and an increasing number of statutory restrictions passed at the state level, non-competes continue to proliferate. Because non-competes are evaluated under the burdensome rule-of-reason standard, plaintiffs seeking to challenge non-competes under the Sherman Act have historically lost.<sup>192</sup> Employers have an incentive to include highly restrictive non-competes in their labor contracts as most will not be challenged, and the remedy for those that are successfully challenged is merely to void the non-compete or to reform it to meet the reasonableness standards of that state's law.

Antitrust law could evolve to forcefully address plainly anticompetitive non-competes while maintaining a route for defendants to provide procompetitive justifications for those non-competes that serve a compelling purpose. The inflexible rule-of-reason framework, however, has prevented plaintiffs from bringing non-compete challenges even in situations—like *Baker v. Hooper*—where

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<sup>191</sup> See *United States v. Am. Linseed Oil Co.*, 262 U.S. 371, 388 (1923) (“The Sherman Act was intended to secure equality of opportunity and to protect the public against evils commonly incident to monopolies and those abnormal contracts and combinations which tend directly to suppress the conflict for advantage called competition—the play of the contending forces ordinarily engendered by an honest desire for gain.”); *A. Ramsay Co. v. Assoc. Bill Posters*, 260 U.S. 501, 512 (1923) (“The fundamental purpose of the Sherman Act was to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade.”); Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L.J. 1509, 1530 n.125 (2012) (explaining the legislative intent behind the Sherman Act).

<sup>192</sup> See Posner, *supra* note 7, at 173.

defendants appear to have no purpose besides restricting competition itself. Therefore, courts must move away from strict adherence to the rule-of-reason framework in addressing non-competes.

Given the plainly anticompetitive nature of many non-competes, the quick look analysis is the proper reference point. But a tailored quick look is needed because the current standard shifts to a full rule-of-reason analysis where a defendant can provide some recognizable procompetitive justification for the restraint. Under the tailored quick look, a court will treat a non-compete as presumptively illegal and the burden will then shift to the defendant to not only assert a protectable interest but to show a compelling need for using a non-compete to protect that interest.

As the aim of antitrust law is to effectively protect competition,<sup>193</sup> policymakers, lawyers, and courts must embrace the tailored quick look approach to make the Sherman Act a workable tool for addressing a nationwide non-compete problem burdening American workers, entrants, consumers, and competition itself.

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<sup>193</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007) (internal quotation marks omitted) (quoting *Atl. Richfield Co. v. USA Petrol. Co.*, 495 U.S. 328, 338 (1990)).

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