

## Noncompetes in News: A Bad Bargain for Democracy

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*In early 2023, the Federal Trade Commission proposed a rule to ban noncompete agreements in employment. By the end of the comment period, the proposed rule had drawn nearly 27,000 responses. This was perhaps unsurprising, given that one in five American workers labors under a noncompete agreement. The proposed rule drew both support and criticism, and even before the FTC issued its final rule in April 2024, opponents vowed legal challenges. By July, the U.S. Supreme Court had overruled Chevron deference, setting up the FTC’s rule for an even more unsettled future. In the aftermath of Loper Bright, this Note proposes a narrower solution, tailored to a single industry in which noncompetes are pervasive: broadcast news. Far beyond simply affecting the workers in this industry—who are often paid poorly by the massive media companies that employ them—and limiting their post-employment opportunities, this Note acknowledges that when the press is restricted from fulfilling its critical societal role, we all suffer the consequences.*

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## I. INTRODUCTION

In 2021, a local television station in La Crosse, Wisconsin, hired Leah Rivard to produce newscasts.<sup>1</sup> A year later, tasked with training new and inexperienced colleagues, Rivard considered leaving.<sup>2</sup> But her contract left her stuck; the station could sue if she left before her two-year contract ended, and even if she wanted to explore new jobs in TV, a noncompete agreement barred her from doing so—both in La Crosse and 90 minutes north in Eau Claire—for a year *after* her contract expired.<sup>3</sup> Rivard—who earned just fifteen dollars an hour—stayed.<sup>4</sup> She described the experience as “absolute hell.”<sup>5</sup>

Noncompete agreements (NCAs) are contractual provisions that “restrict workers from seeking employment with certain employers or starting a competing business.”<sup>6</sup> For executives or skilled workers with access to proprietary information, NCAs may help protect intellectual property or sensitive business information.<sup>7</sup> But NCAs have spilled over into other settings. Rather than guarding trade secrets or encouraging employers to invest in employees,<sup>8</sup> NCAs often bind low-wage workers,<sup>9</sup> suppressing wages and fueling power imbalances in the workplace.<sup>10</sup>

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<sup>1</sup> Lydia DePillis, *Noncompete Clauses Get Tighter, and TV Newsrooms Feel the Grip*, N.Y. TIMES (Apr. 3, 2023), <https://www.nytimes.com/2023/04/03/business/economy/noncompete-clauses-broadcast-news.html>.

<sup>2</sup> *Id.*

<sup>3</sup> *See id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> U.S. GOV’T ACCOUNTABILITY OFF., NONCOMPETE AGREEMENTS: USE IS WIDESPREAD TO PROTECT BUSINESS’ STATED INTERESTS, RESTRICTS JOB MOBILITY, AND MAY AFFECT WAGES 1 (May 2023), <https://www.gao.gov/assets/gao-23-103785.pdf> [<https://perma.cc/8779-DAHF>] [hereinafter NONCOMPETE AGREEMENTS].

<sup>7</sup> *See generally* Lee Whitesell & Jillian Beck, *FTC Non-Compete Ban: A Right to Unfairly Compete?*, 70 FED. LAW 48 (2023).

<sup>8</sup> Rivard’s station contended NCAs benefit employers and employees alike: “We invest a lot of time and money training and publicly marketing an individual journalist, which, in turn, increases the value of that journalist in the local market.” DePillis, *supra* note 1.

<sup>9</sup> *See Non-Compete, No-Hire, and No-Poach Agreements*, TOWARDS JUSTICE, [https://towardsjustice.org/legal\\_topics/non-compete-no-hire-and-no-poach-agreements](https://towardsjustice.org/legal_topics/non-compete-no-hire-and-no-poach-agreements) [<https://perma.cc/D6WY-MD96>]; Tonya L. Brito & Kathleen Wood, *Litigating Precarity: Low-Wage Workers and Child-Support Enforcement*, 101 N.C. L. Rev. 1495, 1508 (2023).

<sup>10</sup> Brito & Wood, *supra* note 9, at 1508–09.

In broadcasting, NCAs are pervasive.<sup>11</sup> Few people would consider TV reporters low-wage workers,<sup>12</sup> but industry starting pay is low.<sup>13</sup> Often, a new job provides the only path to a higher salary or better position.<sup>14</sup> But NCAs function as “another barrier to job mobility in an increasingly precarious industry.”<sup>15</sup> And employees have no leverage: if they don’t sign, someone else will.<sup>16</sup> Because each market averages only three stations,<sup>17</sup> post-employment noncompete agreements mean employees cannot leave for new jobs in TV without moving cities.<sup>18</sup> This hurts workers but also affects communities, preventing the press from fulfilling its important First Amendment role.

In January 2023, the Federal Trade Commission (FTC) proposed a rule to ban noncompete agreements in all industries,<sup>19</sup> ultimately promulgating a final rule in April 2024.<sup>20</sup> But the rule faced legal challenges even before the U.S. Supreme Court overruled *Chevron* doctrine—the backbone of agency

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<sup>11</sup>In multiple jobs as a local TV reporter, I was contractually bound by post-employment NCAs. One barred me from working for any station within 75 miles, which meant an adjacent market was also off-limits. See DePillis, *supra* note 1 (describing broadcasting noncompetes as “ubiquitous”).

<sup>12</sup>Not unreasonable, given the widely publicized salaries of some network (not local) news anchors. See Caitlin Dickson, *Katie Couric’s CBS Salary Exceeds Two NPR Show Budgets Combined*, ATLANTIC (May 19, 2011), <https://www.theatlantic.com/culture/archive/2011/05/katie-courics-salary-was-more-yearly-budget-nprs-biggest-shows/350870> (“You could liquidate Morning Edition and All Things Considered and still be short.”).

<sup>13</sup>See Bob Papper, *The Changing and Unchanging Nature and Salary of the First Job in Local TV News*, 15 ELEC. NEWS 57, 63 (2021), <https://doi.org/10.1177/19312431211019744> [hereinafter Papper, *Changing*] (reporting minimum starting reporter salaries of \$15,500 per year).

<sup>14</sup>See Joanne Ostrow, *TV: For Anchors, Big Money. For Reporters, Less than You’d Think.*, DENVER POST (July 10, 2008), <https://www.denverpost.com/2008/07/10/tv-for-anchors-big-money-for-reporters-less-than-you-d-think> [<https://perma.cc/D6WY-MD96>] (explaining that reporters in larger markets have “usually had to hopscotch the country, climbing from smaller markets, working odd shifts and covering wee-hour traffic accidents in the sleet, appearing cheerful.”).

<sup>15</sup>Stephanie Russell-Kraft, *I Learned the Hard Way that Non-Competes are Bad for Journalists*, COLUM. JOURNALISM REV. (June 16, 2017), [https://www.cjr.org/business\\_of\\_news/non-compete-agreement-journalism.php](https://www.cjr.org/business_of_news/non-compete-agreement-journalism.php) [<https://perma.cc/9WLK-BY68>].

<sup>16</sup>See NONCOMPETE AGREEMENTS, *supra* note 6, at 21 (noting that “few people understand NCAs, and they just assume they have to sign the document if they want the job”).

<sup>17</sup>Kim Makuch & Jonathan Levy, *Market Size and Local Television News* 7 (FCC, Off. of Econ. & Analysis, Working Paper No. 52, 2021).

<sup>18</sup>DePillis, *supra* note 1.

<sup>19</sup>Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

<sup>20</sup>Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (to be codified at 16 C.F.R. pt. 910, 912); FED. TRADE COMM’N, *FTC Announces Rule Banning Noncompetes* (Apr. 23, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes> [<https://perma.cc/TB7Y-LQSQ>] [hereinafter FTC Press Release].

rulemaking—two months later.<sup>21</sup> This Note focuses on a narrower solution to address noncompetes in broadcasting. Part II explores the background of NCAs and situates the FTC rule amid existing laws. Part III explains why NCAs pose unique harms for broadcasting workers and for society. Part IV surveys states’ approaches to broadcasting noncompetes. Part V proposes national legislation to ban NCAs in broadcasting—with limited exceptions.

## II. BACKGROUND

Noncompete agreements date back to medieval English courts and apprenticeships in the trades.<sup>22</sup> By the nineteenth century, law “at the intersection of intellectual property and employment” was grappling with how to balance the interests of employers seeking to “maintain[] monopoly control over knowledge,” the “employee’s right (or obligation) to work,” and broader societal interests.<sup>23</sup> In the twenty-first century, NCAs continue to reflect the same concern: “employers’ need to protect their trade secrets or confidential information and employees’ freedom to move and make their own economic decisions.”<sup>24</sup> In the U.S., NCAs bind approximately thirty million people—nearly one in five American workers.<sup>25</sup>

The FTC’s proposed rule drew nearly 27,000 responses by April 2023, when the comment period closed.<sup>26</sup> In conjunction with its Notice of Proposed Rulemaking, the FTC described how NCAs “harm competition,” preventing workers “from pursuing better opportunities that offer higher pay or better working conditions.”<sup>27</sup> Following the comment period, the National Labor Relations Board (NLRB) issued a memo explaining that NCAs in employment are generally unlawful under the National Labor Relations Act except in “limited circumstances.”<sup>28</sup> NCAs, the NLRB counseled, “chill” workers’

<sup>21</sup> See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024).

<sup>22</sup> See, e.g., Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 629–37 (1960).

<sup>23</sup> Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800-1920* (Loyola L. Sch. Pub. L. & Legal Theory Working Paper, Paper No. 2001-2, 2001), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=262010](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=262010) [<https://perma.cc/Y8PE-GZCZ>].

<sup>24</sup> Kwan Seung Lee, *Noncompete Agreements: History, Diffusion, and Consequences* 8 (May 2019) (Ph.D. dissertation, Cornell University), <https://ecommons.cornell.edu/server/api/core/bitstreams/d7768349-f9a9-4c22-b4e7-b492359294d3/content>.

<sup>25</sup> FED. TRADE COMM’N, FACT SHEET: FTC PROPOSES RULE TO BAN NONCOMPETE CLAUSES, WHICH HURT WORKERS AND HARM COMPETITION 1 (Jan. 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/noncompete\\_nprm\\_fact\\_sheet.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete_nprm_fact_sheet.pdf) [<https://perma.cc/N6SF-2XNY>].

<sup>26</sup> Dan Papsun, *FTC Expected to Vote in 2024 on Rule to Ban Noncompete Clauses*, BLOOMBERG L. (May 10, 2023), <https://news.bloomberglaw.com/antitrust/ftc-expected-to-vote-in-2024-on-rule-to-ban-noncompete-clauses>.

<sup>27</sup> FED. TRADE COMM’N, *supra* note 25.

<sup>28</sup> *NLRB General Counsel Issues Memo on Non-Competes Violating the National Labor Relations Act*, NLRB (May 30, 2023), <https://www.nlr.gov/news-outreach/news-story/>

exercise of protected rights to “take collective action to improve their working conditions,” “threaten to resign,” or work for a competitor.<sup>29</sup> Momentum had been building to ban NCAs, with some states restricting their use in certain professions,<sup>30</sup> and others banning NCAs in employment altogether.<sup>31</sup> The FTC rule, once approved, would preempt conflicting laws, creating “a regulatory floor” beyond which states could provide additional protections.<sup>32</sup>

Although many workers, advocates, and politicians supported the proposed rule, myriad opponents—including some Republican politicians<sup>33</sup>—argued that banning NCAs violated freedom to contract.<sup>34</sup> The National Association of Broadcasters (NAB) joined other entities in signing a letter that denounced the FTC’s “blanket ban” as “vastly overbroad.”<sup>35</sup> The letter contended that noncompetes, properly used, “encourage investment in employees and help to protect intellectual property.”<sup>36</sup> It further observed that nearly all states permit NCAs, which “have traditionally been an issue of state law.”<sup>37</sup>

Indeed, others have argued that states should be free to decide whether to enforce NCAs.<sup>38</sup> But the workforce and economy have changed. People frequently change jobs,<sup>39</sup> often to increase pay or improve working conditions.<sup>40</sup> For many, noncompetes enter the picture as “standardized

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nrb-general-counsel-issues-memo-on-non-competes-violating-the-national [https://perma.cc/6XBF-8TSU].

<sup>29</sup> *Id.*

<sup>30</sup> Matthew J. Sandor, *Independent Contractors & Noncompetition Covenants: A Modified Approach*, 91 FORDHAM L. REV. 2029, 2039–41, 2051 (2023).

<sup>31</sup> See, e.g., CAL. BUS. & PROF. CODE § 16600 (2022); Lena Kempe, *California’s Noncompete Law Has Immediate Effects for Business*, BLOOMBERG L. (Feb. 6, 2024), <https://news.bloomberglaw.com/us-law-week/californias-noncompete-law-has-immediate-effects-for-business>.

<sup>32</sup> CHRIS D. LINEBAUGH & JAY B. SYKES, CONG. RSCH. SERV., LSB10905, THE FTC’S PROPOSED NON-COMPETE RULE 2 (Jan. 2023), <https://crsreports.congress.gov/product/pdf/LSB/LSB10905> [https://perma.cc/3APF-XDP7].

<sup>33</sup> Nick Evans, *The FTC Wants to Ban Non-Compete Contracts, U.S. Rep. Jim Jordan Wants to Block That Effort*, OHIO CAP. J. (Mar. 21, 2023), <https://ohiocapitaljournal.com/2023/03/21/the-ftc-wants-to-ban-non-compete-contracts-u-s-rep-jim-jordan-wants-to-block-that-effort> [https://perma.cc/FTG4-7XQY].

<sup>34</sup> Letter to the Members of the United States Congress (Feb. 28, 2023) [https://www.nab.org/documents/newsRoom/pdfs/230228\\_NoncompeteAgreements\\_Congress.pdf](https://www.nab.org/documents/newsRoom/pdfs/230228_NoncompeteAgreements_Congress.pdf) [https://perma.cc/7DJZ-JA6X].

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

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

<sup>38</sup> See, e.g., Holly E. Fredericksen, *Executive Order 14036: Promoting Competition?*, 57 U. RICH. L. REV. 1399, 1405–06 (2023) (arguing NCAs have “procompetitive advantages that make them worth keeping”).

<sup>39</sup> See Maury Gittleman, *The “Great Resignation” in Perspective*, BUREAU OF LAB. STATS.: MONTHLY LAB. REV. (July 2022), <https://www.bls.gov/opub/mlr/2022/article/the-great-resignation-in-perspective.htm> [https://perma.cc/6HAE-PTAJ].

<sup>40</sup> Kim Parker & Juliana Menasce Horowitz, *Majority of Workers Who Quit a Job in 2021 Cite Low Pay, No Opportunities for Advancement, Feeling Disrespected*, PEW RSCH.

documents provided to the worker *after* an initial oral agreement of employment has been reached.”<sup>41</sup> As a result, NCAs “strip away the worker’s ability, both at the outset and during the course of employment, to refuse to deal.”<sup>42</sup>

The FTC approved a final rule to ban noncompetes in April 2024.<sup>43</sup> But even before the rule was promulgated, opponents vowed legal challenges.<sup>44</sup> Chambers of Commerce argued that the rule went far beyond permissible agency authority.<sup>45</sup> Two months after the FTC issued its final rule, the Supreme Court overruled *Chevron*, leaving agency rulemakings even more vulnerable to judicial challenge.<sup>46</sup>

While substantive objections to restricting the use of NCAs will remain, federal legislation avoids the obstacles the FTC rule faces after *Loper Bright*,<sup>47</sup> while still creating the uniformity that is lacking in the current patchwork of state laws.<sup>48</sup> Within the last few years, Congress introduced a bipartisan bill to prohibit noncompetes: the Workforce Mobility Act.<sup>49</sup> Senators Chris Murphy (D-CT) and Todd Young (R-IN) reintroduced this legislation in 2023.<sup>50</sup> But

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CTR. (Mar. 9, 2022), <https://www.pewresearch.org/short-reads/2022/03/09/majority-of-workers-who-quit-a-job-in-2021-cite-low-pay-no-opportunities-for-advancement-feeling-disrespected> [<https://perma.cc/KD76-9XLU>].

<sup>41</sup> Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963, 966 (2006).

<sup>42</sup> *Id.* at 966–67.

<sup>43</sup> Papsun, *supra* note 26; FTC Press Release, *supra* note 20.

<sup>44</sup> Dan Papsun & Robert Iafolla, *Worker Noncompete Ban Proposal Promises FTC Authority Fight (1)*, BLOOMBERG L. (Jan. 5, 2023), <https://news.bloomberglaw.com/antitrust/legal-challenges-loom-for-ftcs-proposed-worker-noncompete-ban>.

<sup>45</sup> *The FTC’s Noncompete Rulemaking is Blatantly Unlawful*, U.S. CHAMBER OF COMMERCE (Jan. 5, 2023), <https://www.uschamber.com/finance/antitrust/the-ftcs-noncompete-rulemaking-is-blatantly-unlawful> [<https://perma.cc/SZ3N-N4ZA>].

<sup>46</sup> *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) (overruling *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984), which had held that where “Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction” but instead examines “whether the agency’s answer is based on a permissible construction of the statute”).

<sup>47</sup> See Thomas F. Harrison, *Businesses Struggle to Adjust as FTC Rule Bans Noncompete Agreements*, COURTHOUSE NEWS (May 6, 2024), <https://www.courthousenews.com/businesses-struggle-to-adjust-as-ftc-rule-bans-noncompete-agreements> [<https://perma.cc/QRD9-2EA2>].

<sup>48</sup> See *infra* Part IV.A.

<sup>49</sup> Workforce Mobility Act of 2021, S. 483, 117th Cong. (2021); H.R. 1367, 117th Cong. (2021).

<sup>50</sup> Workforce Mobility Act of 2023, S. 220, 118th Cong. (2023); Lisa Hagen, *CT, Feds Seek Limits on Non-Compete Agreements Across Industries*, CT MIRROR (Apr. 5, 2023), <https://ctmirror.org/2023/04/05/ct-non-compete-clause-contract-federal-trade-commission-legislation> [<https://perma.cc/HUK3-X277>].

given resistance to the FTC rule, described as “breathtaking in its breadth,”<sup>51</sup> the Workplace Mobility Act—which remains stalled in committee—also seems fated to fail.<sup>52</sup>

While NCAs cover one in five American workers, they are far more prevalent in broadcasting, covering more than 75 percent of some TV news employees.<sup>53</sup> These workers cannot wait for reform through the now-difficult path of agency rulemaking or through broad-strokes legislation.

### III. WHY NONCOMPETES ARE UNIQUELY BAD FOR JOURNALISM

Broadcast news is a unique industry because the harms of NCAs extend far beyond the workers themselves. As in other industries, industry consolidation and noncompete agreements contribute to suppressed wages.<sup>54</sup> These deleterious effects are amplified by geography, low starting pay, extent of consolidation, and—perhaps most important—near-ubiquitous use of NCAs.<sup>55</sup> NCAs in the broadcasting context hurt communities and raise First Amendment concerns, preventing journalists from fulfilling their critical democratic role.

#### A. *Low Pay, Consolidation, and Noncompetes: A Losing Combination*

Throw a dart at a map of the United States, and you’ll hit a Designated Market Area (DMA).<sup>56</sup> Nielsen, a longstanding TV ratings company,<sup>57</sup> uses this term to refer to any of 210 local media markets across the country that serve TV viewers.<sup>58</sup> These markets are ranked by the number of TV households they contain, from the largest (New York City) to the smallest (Glendive,

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<sup>51</sup> *Will the FTC Really Ban Non-Compete Agreements?*, MAXWELL GOSS LAW (Jan. 12, 2023), <https://www.maxwellgoss.com/post/will-the-ftc-really-ban-non-compete-agreements> [<https://perma.cc/F4CW-CLHP>].

<sup>52</sup> No action has been taken since the bill’s referral to committee. *S.220 – Workforce Mobility Act of 2023*, <https://www.congress.gov/bill/118th-congress/senate-bill/220> [<https://perma.cc/M7SZ-Z34Y>].

<sup>53</sup> DePillis, *supra* note 1 (citing a 2022 survey finding “about 90 percent of news anchors, 78 percent of reporters and 87 percent of weathercasters were bound by noncompetes”).

<sup>54</sup> See, e.g., Matthew S. Johnson, Kurt J. Lavetti & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* 17–18 (Nat’l Bureau of Econ. Rsch., Working Paper No. 31929, 2023) (“These predictions imply that average earnings among all workers would likely increase by 3.2% to 14.2% nationally if NCAs were made unenforceable.”); Elena Prager & Matthew Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals* 1–4 (Wash. Ctr. for Equitable Growth, Working Paper, 2020).

<sup>55</sup> DePillis, *supra* note 1.

<sup>56</sup> *DMA® Regions*, NIELSEN, <https://www.nielsen.com/dma-regions> [<https://perma.cc/2KP7-V7W6>].

<sup>57</sup> *About Nielsen*, NIELSEN, <https://www.nielsen.com/about-us/about> [<https://perma.cc/H4SB-XX7R>]; *Nielsen Panels*, NIELSEN, <https://www.nielsen.com/about-us/nielsen-panels/> [<https://perma.cc/3AXZ-MREK>].

<sup>58</sup> *DMA® Regions*, *supra* note 56.

Montana).<sup>59</sup> With only a few stations per market,<sup>60</sup> the number of TV newsrooms in the U.S. hovers around 700.<sup>61</sup> Entry-level journalists typically begin their careers in small markets, and many aim to advance to larger markets, where salaries and resources improve.<sup>62</sup>

The industry is notorious for low pay, especially among newer employees.<sup>63</sup> In 2022, median annual starting pay for TV news employees was \$37,000 across all market sizes.<sup>64</sup> Medians notwithstanding, wages can be shockingly low. In 2021, starting pay for new producers and reporters bottomed out at \$15,000 per year.<sup>65</sup> As one newspaper columnist succinctly put it: “The best way to make money in local television is to be hired away by the station across the street.”<sup>66</sup> But increasingly, noncompete agreements eliminate that option. A longtime requirement for on-air talent, NCAs now extend to off-air employees making near-poverty wages, blocking them from working at other stations in the area even after their contracts end.<sup>67</sup>

This dynamic contrasts with the heavily-consolidated, wealthy corporations that own most local newsrooms.<sup>68</sup> A 2017 report found that the five largest local TV companies “owned, operated or serviced 179 full-power stations” in 2004.<sup>69</sup> Ten years later, that figure had ballooned to 378; by 2016, to 443.<sup>70</sup> When the report was published, those five companies were Sinclair, Nexstar, Gray, Tegna,

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<sup>59</sup> NIELSEN, LOCAL TELEVISION MARKET UNIVERSE ESTIMATES 1, 6 (2018), [https://thevab.com/storage/app/media/Toolkit/DMA\\_Ranker\\_2019.pdf](https://thevab.com/storage/app/media/Toolkit/DMA_Ranker_2019.pdf) [<https://perma.cc/WS76-W2KY>].

<sup>60</sup> In 2019, “[t]he median market had three local news operations.” Makuch & Levy, *supra* note 17. Houston had eight; the smallest DMA (Glendive, Montana) had none. *Id.*

<sup>61</sup> BOB PAPPER & KEREN HENDERSON, RTDNA, ANOTHER RECORD YEAR FOR LOCAL TV NEWS 3 (July 2023), [https://assets-002.noviams.com/novi-file-uploads/rtdna/Research/RTDNA\\_Newhouse\\_survey\\_Business-47ba3f10.pdf](https://assets-002.noviams.com/novi-file-uploads/rtdna/Research/RTDNA_Newhouse_survey_Business-47ba3f10.pdf) [<https://perma.cc/UJ8M-S7DG>].

<sup>62</sup> See Steve Kraycik, *Does Market Size Matter?*, SURVIVE YOUR JOB IN TELEVISION NEWS (June 25, 2015), <https://www.survivetvnewsjobs.com/2015/06/25/does-market-size-matter> [<https://perma.cc/C3B5-DW9J>].

<sup>63</sup> See, e.g., Bob Papper, *TV News Burnout: The Crisis Reaches a Tipping Point*, TVNEWSCHECK (Oct. 16, 2023), <https://tvnewscheck.com/journalism/article/tv-news-burnout-the-crisis-reaches-a-tipping-point> [<https://perma.cc/37JT-B479>]; Elizabeth Djinis, *Local Journalism’s Burnout Crisis is Unsustainable*, POYNTER (June 22, 2023), <https://www.poynter.org/business-work/2023/reporters-newsroom-burnout-problem-solutions> [<https://perma.cc/Z62Q-AYQE>].

<sup>64</sup> Bob Papper & Keren Henderson, *2023 TV and Radio News Salaries*, RTDNA (June 6, 2023), <https://www.rtdna.org/news/2023-tv-and-radio-news-salaries> [<https://perma.cc/9TB7-FENG>].

<sup>65</sup> Papper, *Changing*, *supra* note 13, at 63.

<sup>66</sup> Ostrow, *supra* note 14.

<sup>67</sup> DePillis, *supra* note 1.

<sup>68</sup> See Katerina Eva Matsa, *Buying Spree Brings More Local TV Stations to Fewer Big Companies*, PEW RSCH. CTR. (May 11, 2017), <https://www.pewresearch.org/short-reads/2017/05/11/buying-spree-brings-more-local-tv-stations-to-fewer-big-companies> [<https://perma.cc/4P6Q-MW8X>].

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

and Tribune.<sup>71</sup> But in 2019, the Federal Communications Commission (FCC) approved Nexstar’s acquisition of Tribune.<sup>72</sup> In 2024, the largest four companies, or “station groups,” control even more local stations<sup>73</sup>—a fact each group emphasizes on its website.<sup>74</sup>

Commentators attribute this consolidation to loosening FCC restrictions that began in the 1980s and “accelerated” in the twenty-first century.<sup>75</sup> Those restrictions govern the number of stations a company may own relative to “the number of viewers the firm reaches through those stations or the extent of the company’s total media ownership interests in a particular market.”<sup>76</sup> Spurred in part by weakened restrictions, a few large corporations now control hundreds of local stations.<sup>77</sup> With so few companies in the mix, employee mobility is often limited except through internal channels.<sup>78</sup> NCAs make that worse by eliminating the freedom to move within markets and keeping employees stuck long after completing contracts.<sup>79</sup>

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<sup>71</sup> *Id.*

<sup>72</sup> *In re* Tribune Media, MB Docket No. 19–30, FCC-19-89, 34 FCC Rcd 8436 (10) (Sept. 16, 2019), <https://docs.fcc.gov/public/attachments/FCC-19-89A1.pdf> [<https://perma.cc/75UV-CZLT>].

<sup>73</sup> Harry A. Jessell, *Updated Top 30 Station Groups: Nexstar Retains Top Spot, Gray Now No. 2 As FCC-Rejected Standard General Drops Off*, TVNEWSCHECK, <https://tvnewscheck.com/business/article/top-30-station-groups-nexstar-retains-top-spot-after-standard-general-tegna-deal-dies> [<https://perma.cc/M3Q5-ZHPT>] (Aug. 30, 2024).

<sup>74</sup> See NEXSTAR MEDIA GRP., INC., <https://www.nexstar.tv> [<https://perma.cc/XA35-4LEU>]; GRAY TELEVISION, <https://gray.tv> [<https://perma.cc/MH9C-MZTB>]; TEGNA INC., <https://www.tegna.com/about/trustworthy-impactful-journalism> [<https://perma.cc/BZB2-Y9PZ>]; SINCLAIR BROAD. GRP., INC., <https://sbgi.net> [<https://perma.cc/YF75-2EV3>].

<sup>75</sup> Joseph Shieber, *Corporate Giants Are Coming for Your Local News. Here’s How We Fight Back.*, POYNTER (Feb. 5, 2020), <https://www.poynter.org/business-work/2020/corporate-giants-are-coming-for-your-local-news-heres-how-we-fight-back> [<https://perma.cc/ZW5W-6LK3>].

<sup>76</sup> Mary R. Hornak, *Media Consolidation & Political Polarization: Reviewing the National Television Ownership Rule*, 90 FORDHAM L. REV. 909, 919 (2021) (“A closer look at the FCC and its guiding principles of diversity and localism suggests that the current level of consolidation in local broadcast television may at least be beginning to run counter to those principles.”).

<sup>77</sup> See PEN AMERICA, LOSING THE NEWS: THE DECIMATION OF LOCAL JOURNALISM AND THE SEARCH FOR SOLUTIONS 29 (Nov. 2019), [https://pen.org/wp-content/uploads/2024/07/2019\\_Losing-the-News-The-Decimation-of-Local-Journalism-and-the-Search-for-Solutions-Report.pdf](https://pen.org/wp-content/uploads/2024/07/2019_Losing-the-News-The-Decimation-of-Local-Journalism-and-the-Search-for-Solutions-Report.pdf) [<https://perma.cc/WZ7A-V95E>] (analyzing SEC filings to find that “the four largest local TV owners and operators . . . collectively acquired 322 TV stations” between 2011 and 2017).

<sup>78</sup> Sinclair touts “Upward Mobility,” its “internal recruiting” program to promote “qualified employees” within the company. *Why Work Here*, SINCLAIR, [https://eddy.fa.us2.oraclecloud.com/hcmUI/CandidateExperience/en/sites/CX\\_2002/pages/20](https://eddy.fa.us2.oraclecloud.com/hcmUI/CandidateExperience/en/sites/CX_2002/pages/20) [<https://perma.cc/EH6K-H83C>]; see also DePillis, *supra* note 1 (“The rapid consolidation in local news . . . has further diminished the employees’ options.”).

<sup>79</sup> See Russell-Kraft, *supra* note 15 (“[NCAs] effectively ask reporters to commit to six months of unemployment to change jobs within their profession.”).

While noncompetes may be appropriate in other industries,<sup>80</sup> they do not make sense in broadcasting—especially for non-managerial positions where workers earn barely more than minimum wage and are locked into restrictive contracts.<sup>81</sup> Recall Leah Rivard, whose managers warned “that if she left for another station anywhere in the country before her contract expired this year, they could sue her.”<sup>82</sup> Even for higher-paid employees, such as anchors, NCAs can unduly restrict career opportunities, since “trust and recognition gained in one city may not transfer to another city.”<sup>83</sup> After all, a worker’s “willingness and ability to find alternate employment is not only an important escape hatch but also a potential end game maneuver that colors the entire bargaining relationship.”<sup>84</sup>

Comments to the FTC underscore how bad NCAs are for broadcasters. One executive producer wrote that NCAs “suppressed my wages for 10+ years and forced me to change careers rather than seek employment in my field,” adding:

My skills were so valuable that the company acknowledged going to one of the three other stations within the same market would have been bad for my employer. Yet instead of paying more than the other stations in the market, they relied on strong-arm tactics and oppressive terms in contracts to retain my employment.<sup>85</sup>

Another worker wrote, “In my experience, [NCAs] are part of boilerplate, multi-year employment agreements and are never a point of negotiation,” characterizing the approach of “massive media companies” that own most local stations as “take-it-or-leave-it.”<sup>86</sup> Still another described “stringent” NCAs, one of which “crossed state lines” and “covered hundreds of miles,” adding:

In another situation, I was stuck working for abusive management who fostered a toxic and abusive workplace, and I had to work there for more than a year until I could find a job in another city entirely because

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<sup>80</sup> Alexander Raskovich, Bruce H. Kobayashi, Abbott B. Lipsky Jr., Joshua D. Wright & John M. Yun, *Breaking Barriers or Breaking Bad? The FTC’s Proposed Ban on Noncompete Agreements in Employment Contracts*, 35 HARV. J.L. & PUB. POL’Y PER CURIAM 1, 8 (2023) (noting the FTC could recognize that NCAs for “highly paid high-tech workers and CEOs may have a procompetitive rationale (or involve unattractive victims”).

<sup>81</sup> See DePillis, *supra* note 1.

<sup>82</sup> *Id.*

<sup>83</sup> Carrie Brown, *Lights, Camera, Action: Why Non-Competes Should Be Banned in the Broadcasting Industry*, N.Y.U. J. INTELL. PROP. & ENT. L.: BLOG (May 5, 2021), <https://jipel.law.nyu.edu/lights-camera-action-why-non-competes-should-be-banned-in-the-broadcasting-industry> [<https://perma.cc/3ZZ9-T9TU>].

<sup>84</sup> Arnov-Richman, *supra* note 41, at 983.

<sup>85</sup> David Galloway, Comment to Non-Compete Clause Rule (NPRM), FTC-2023-0007-3259 (Jan. 18, 2023), <https://www.regulations.gov/comment/FTC-2023-0007-3259>.

<sup>86</sup> David Wietlispach, Comment to Non-Compete Clause Rule (NPRM), FTC-2023-0007-1065 (Jan. 13, 2023), <https://www.regulations.gov/comment/FTC-2023-0007-1065>.

they had threatened to sue me under the non-compete if I left and worked for another local station.<sup>87</sup>

Without leverage to leave, employees remain trapped in problematic situations with little recourse.

Within the industry, opinions on the proposed rule differed. One columnist, Paul Greeley, contended that “[b]roadcasting presents a unique case for reasonable noncompete clauses due to the substantial investments broadcasters make in promoting on-air talent.”<sup>88</sup> Arguing for NCAs’ continued use in local TV, Greeley wrote:

Losing a dedicated, talented, employee to your competition, another station right in your market, is bad business. It hurts. It looks bad. It’s damaging to morale. It’s embarrassing. Your station is wounded and the competition gets someone who knows your secrets, knows the market and can go right to work.<sup>89</sup>

But Al Tompkins—a longtime journalist, teacher, and coach at the Poynter Institute who has helped write national journalism ethics codes<sup>90</sup>—observed that “media companies, especially local TV stations, force journalists to sign” NCAs.<sup>91</sup> These are not limited to “high-profile anchors” but extend to workers “who earn \$30,000 to \$50,000 a year and want to make more dough without moving to another town.”<sup>92</sup> Tompkins added, “I can only imagine the shivers running down the spines of bosses—who are already struggling to hire people—who have to send notices to staff saying they are free to go to the higher paying competition once their contracts expire.”<sup>93</sup>

### B. *The Press, Low Trust, and the First Amendment*

Noncompetes in broadcasting are not only unfair to the workers they affect; they also disadvantage communities. In enforcing NCAs against journalists, large corporations prevent trained professionals—often deeply familiar with the markets they serve—from reporting news in their communities. Consider Amy

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<sup>87</sup> Victoria Morgan, Comment to Non-Compete Clause Rule (NPRM), FTC-2023-0007-0747 (Jan. 12, 2023), <https://www.regulations.gov/comment/FTC-2023-0007-0747>.

<sup>88</sup> Paul Greeley, *NAB Tells Congress It Opposes Ban On Noncompete Agreements*, TVNEWSCHECK: MARKETSHARE (Mar. 2, 2023), <https://marketshare.tvnewscheck.com/2023/03/02/nab-tells-congress-it-opposes-ban-on-non-compete-agreements> [https://perma.cc/M9MJ-GQHW].

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

<sup>90</sup> Al Tompkins, POYNTER, <https://www.poynter.org/author/atompkins> [https://perma.cc/AC9P-EE98].

<sup>91</sup> Al Tompkins, *The Days of Journalists Being Forced to Sign Noncompete Contracts May Soon End*, POYNTER (Jan. 9, 2023), <https://www.poynter.org/business-work/2023/ftc-ban-noncompete-agreements-journalists> [https://perma.cc/6BKQ-FXY9] [hereinafter Tompkins, *Noncompete Contracts*].

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

DuPont, a former anchor at the same Wisconsin station that employed Leah Rivard.<sup>94</sup> She eventually left the industry to work in public relations, knowing she could not work for other local stations that expressed interest: “For someone like me, who’s married and 43 years old with two children, and I own my home, it prevents me from doing my career, something I’ve spent 22 years doing.”<sup>95</sup>

Whether journalists leave the area, as Rivard planned to do, or change careers entirely, like DuPont, their communities lose out. Journalists have a unique function beyond simple newsgathering; they play an important role in safeguarding democracy.<sup>96</sup> RonNell Andersen Jones underscores how journalists have helped “preserve, stabilize, and advance” U.S. democracy: “Without newspapers and newspaper organizations at the helm—instigating, enforcing, coordinating, and financing legal change, much, if not most, of the nation’s important open-government law from the last generation simply would not have come to pass.”<sup>97</sup> Sonja R. West describes the “primary constitutional functions” of the press: “gathering and disseminating news to the public” and acting as “a check on the government and the powerful.”<sup>98</sup> West also identifies characteristics that distinguish the press from the general public, including “specialized knowledge,” investment of resources to investigate and report news, and editorial decision-making about newsworthiness.<sup>99</sup> As West notes, not only does “failure to protect newsgathering by the press” raise First Amendment concerns,<sup>100</sup> but it also results in “widespread societal costs arising out of reduced information flow and weakened government scrutiny.”<sup>101</sup>

The specter of that dystopian future could scarcely come at a worse time. Trust in the press is at historic lows.<sup>102</sup> In 2023, just thirty-two percent of Americans reported having a “great deal” or “fair amount” of trust and confidence in “mass media,” down from fifty-three percent in 1997 and sixty-eight percent in 1972.<sup>103</sup> Yet local news coverage is essential to “civic engagement” and to stanching political polarization.<sup>104</sup> This is perhaps more

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<sup>94</sup> DePillis, *supra* note 1.

<sup>95</sup> *Id.*

<sup>96</sup> See Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729, 750 (2014). *But see* Hannah Bloch-Wehba, *The Ideology of Press Freedom*, 14 U.C. IRVINE L. REV. 1, 33–35 (2024) (arguing that press institutions, often owned by corporations or “individual megabillionaires or hedge funds or wealthy families,” do not always advance public interest).

<sup>97</sup> RonNell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557, 570 (2011).

<sup>98</sup> West, *Stealth Press*, *supra* note 96, at 750.

<sup>99</sup> Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2444 (2014).

<sup>100</sup> *Id.* at 2447.

<sup>101</sup> *Id.* at 2437.

<sup>102</sup> Megan Brenan, *Media Confidence in U.S. Matches 2016 Record Low*, GALLUP (Oct. 19, 2023), <https://news.gallup.com/poll/512861/media-confidence-matches-2016-record-low.aspx> [<https://perma.cc/46GX-KYNK>].

<sup>103</sup> *Id.*

<sup>104</sup> Margaret Sullivan, *What Happens to Democracy When Local Journalism Dries Up?*, WASH. POST (Nov. 30, 2021), <https://www.washingtonpost.com/magazine/2021/11/30/>

important than ever in a “post-truth” era.<sup>105</sup> Coupled with industry consolidation, NCAs drastically limit journalists’ employment opportunities and block them from performing this crucial function.

Another fear is that NCAs create prior restraints on speech.<sup>106</sup> The Supreme Court has long observed that prior restraints “bear[] a heavy presumption against [their] constitutional validity.”<sup>107</sup> Because “U.S. law errs on the side of permitting disclosure and speech,”<sup>108</sup> it follows that NCAs, enforced against the press, introduce prior restraints. One commentator rejects this, arguing that NCAs are “voluntarily and contractually entered into by the person against whom it would be attempted to be enforced,” and that former employees are not restricted from speaking, only from working for competitors.<sup>109</sup> But given the “take-it-or-leave-it approach”<sup>110</sup> and lack of bargaining power for broadcasters subject to NCAs, these concerns are valid.

#### IV. THE LANDSCAPE OF LAWS

Without national legislation governing NCAs, states have adopted varying approaches.<sup>111</sup> The resulting patchwork is anything but uniform.<sup>112</sup> Several states have banned NCAs altogether, while others have imposed limits, such as “a compensation threshold or requiring advance notice.”<sup>113</sup> Still others have codified restrictions for certain professionals.<sup>114</sup>

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margaret-sullivan-the-local-news-crisis [<https://perma.cc/ZB2Z-EUU9>] (“[T]he demise of local news poses the kind of danger to our democracy that should have alarm sirens screeching across the land.”).

<sup>105</sup> See Morgan N. Weiland, *First Amendment Metaphors: The Death of the “Marketplace of Ideas” and the Rise of the Post-Truth “Free Flow of Information,”* 33 *YALE J. L. & HUMANS*. 366, 366 (2022).

<sup>106</sup> *But see* Paul Mersino, *Non-Competes, Restrictive Covenants, and the Media*, BUTZEL LAW (Feb. 21, 2020), <https://www.butzel.com/alert-Non-Competes-Restrictive-Covenants-and-the-Media> [<https://perma.cc/SQV9-QVP2>] (rejecting the idea that NCAs are prior restraints).

<sup>107</sup> *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1970)).

<sup>108</sup> Mersino, *supra* note 106.

<sup>109</sup> *Id.*

<sup>110</sup> Wietlispach, *supra* note 86.

<sup>111</sup> Leah Shepherd, *States Outlaw Noncompete Agreements*, SOC’Y FOR HUM. RES. MGMT. (July 10, 2023), <https://www.shrm.org/topics-tools/employment-law-compliance/states-restrict-ban-noncompetes> [<https://perma.cc/69ET-WPEY>].

<sup>112</sup> *Id.* (quoting an attorney who says this “creates difficulties for organizations that have to comply with different rules in different places”).

<sup>113</sup> *Id.*

<sup>114</sup> See, e.g., Press Release, Am. Med. Ass’n, AMA to Urge End of Noncompete Covenants in Many Physician Contracts (June 12, 2023), <https://www.ama-assn.org/press-center/press-releases/ama-urge-end-noncompete-covenants-many-physician-contracts> [<https://perma.cc/5Z34-MDSL>] (identifying Delaware, Massachusetts, New Hampshire, and Rhode Island as expressly prohibiting NCAs for physicians).

### A. State Approaches Vary, with Professional Exceptions

California, Minnesota, North Dakota, and Oklahoma ban NCAs across the board.<sup>115</sup> New York legislators passed a ban in 2023, which the governor vetoed.<sup>116</sup> Colorado has banned noncompetes for all but “highly compensated workers,” a threshold that stood at \$112,500 in 2023.<sup>117</sup>

In some industries, NCAs are nonstarters under professional ethics codes. The American Bar Association notes that “an attorney cannot draft or enter into a noncompete agreement that ‘restricts the right of a lawyer to practice after termination,’ except when retirement benefits come into play.”<sup>118</sup> This undergirds important societal values: “An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer.”<sup>119</sup> The American Medical Association has a similar ethics provision, recognizing that NCAs “restrict competition, can disrupt continuity of care, and may limit access to care.”<sup>120</sup> Affecting more than one-third of physicians, NCAs are “especially problematic for residents, fellows and young physicians”—not only limiting career opportunities but also constraining “ability to provide care in economically or socially marginalized communities.”<sup>121</sup> The policies behind prohibiting NCAs in law and medicine likewise apply to journalism, where enforcing NCAs implicates serious societal consequences.<sup>122</sup>

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<sup>115</sup> Shepherd, *supra* note 111.

<sup>116</sup> N.Y. Senate Bill S3100A (2023), <https://www.nysenate.gov/legislation/bills/2023/S3100/amendment/A> [<https://perma.cc/52ST-JZJE>]; Clifford R. Atlas, Daniel J. Doron & Mary A. Smith, *A Step Too Far? Governor Hochul Vetoes New York Non-Compete Ban*, JACKSON LEWIS (Dec. 28, 2023), <https://www.jacksonlewis.com/insights/step-too-far-governor-hochul-vetoes-new-york-non-compete-ban> [<https://perma.cc/L2E4-CD76>].

<sup>117</sup> Zachary Folk, *Which States Have Banned Non-Compete Clauses? Here’s What to Know As New York Could Be Next.*, FORBES (Dec. 6, 2023), <https://www.forbes.com/sites/zacharyfolk/2023/12/06/which-states-have-banned-non-compete-clauses-heres-what-to-know-as-new-york-could-be-next>.

<sup>118</sup> Matthew Boyle, *Work Shift: Ultimate Loophole in Noncompete Agreements? Be a Lawyer*, BLOOMBERG: WORK SHIFT (Jan. 24, 2023), <https://www.bloomberg.com/news/newsletters/2023-01-24/ultimate-loophole-in-noncompete-agreements-be-a-lawyer> [<https://perma.cc/LCQ3-2Q66>].

<sup>119</sup> MODEL RULES OF PRO. CONDUCT r. 5.6 cmt. 1 (AM. BAR. ASS’N). *But see* Glenn S. Draper, *Enforcing Lawyers’ Covenants Not to Compete*, 69 WASH. L. REV. 161, 164–65, 180 (1994) (arguing that courts should discard the rule rendering NCAs “per se invalid as contrary to public policy” and adopt a “reasonableness test”).

<sup>120</sup> AM. MED. ASS’N, 11.2.3.1 RESTRICTIVE COVENANTS 1, <https://code-medical-ethics.ama-assn.org/sites/amacoedb/files/2022-08/11.2.3.1.pdf> [<https://perma.cc/4KCE-DJHD>].

<sup>121</sup> Andis Robeznieks, *AMA Backs Effort to Ban Many Physician Noncompete Provisions*, AM. MED. ASS’N (June 13, 2023), <https://www.ama-assn.org/medical-residents/transition-resident-attending/ama-backs-effort-ban-many-physician-noncompete> [<https://perma.cc/W97H-AVDZ>].

<sup>122</sup> *See supra* Part III.B.

### B. Exploring Bans for Broadcasters

SAG-AFTRA, a large union representing about 160,000 broadcasters, actors, and other creative professionals,<sup>123</sup> has long championed banning NCAs.<sup>124</sup> The AFL-CIO has supported these efforts.<sup>125</sup> In 2021, SAG-AFTRA submitted comments to the FTC, noting that NCAs, “once limited to highly compensated, high-profile employees,” are now “‘non-negotiable’ for employees, regardless of pay, who appear in front of a camera, behind a microphone, work behind the scenes and are enforced even in cases of termination or lay-off.”<sup>126</sup> SAG-AFTRA highlighted NCAs’ extensive and coercive consequences:

We regularly speak to young professionals starting their career in TV or radio making as little as \$11.00 / hour who have had to pass up opportunities to earn more money . . . . Others have been forced to leave the industry rather than leave a city where they have started their family . . . . others . . . have been asked to pay their employer thousands of dollars in liquidated damages to leave a job to get out from under a restrictive covenant.<sup>127</sup>

In contrast, SAG-AFTRA asserts, workers in states that ban NCAs receive higher pay and enjoy more freedom to leave toxic workplaces.<sup>128</sup>

Several jurisdictions already restrict NCAs for broadcasters: Arizona,<sup>129</sup> Connecticut,<sup>130</sup> Illinois,<sup>131</sup> Maine,<sup>132</sup> Massachusetts,<sup>133</sup> New York,<sup>134</sup>

<sup>123</sup> *About*, SAG-AFTRA, <https://www.sagaftra.org/about> [https://perma.cc/7SAQ-Y2RS].

<sup>124</sup> *See, e.g.*, Press Release, SAG-AFTRA, SAG-AFTRA Applauds President Biden’s Effort to Address Anti-Competitive Employment Practices (July 9, 2021), <https://www.sagaftra.org/sag-aftra-applauds-president-bidens-effort-address-anti-competitive-employment-practices> [https://perma.cc/P9JR-6DZG].

<sup>125</sup> *Eliminating Non-Compete Agreements in the Broadcast Industry*, AFL-CIO (Aug. 1, 2001), <https://aflcio.org/about/leadership/statements/eliminating-non-compete-agreements-broadcast-industry> [https://perma.cc/J6E7-XFDW]. SAG-AFTRA is an AFL-CIO affiliate. Kenneth Quinnell, *Get to Know AFL-CIO’s Affiliates: SAG-AFTRA*, AFL-CIO (Mar. 10, 2020), <https://aflcio.org/2020/3/10/get-know-afl-cios-affiliates-sag-aftra> [https://perma.cc/K5QK-4UUP].

<sup>126</sup> SAG-AFTRA, Music Artists Coalition, and Black Music Action Coalition (2d Comment) 4, FTC-2021-0036-0276, <https://www.regulations.gov/comment/FTC-2021-0036-0276> [https://perma.cc/4VXF-XLKR] (PDF attachment).

<sup>127</sup> *Id.*

<sup>128</sup> These are generally states where SAG-AFTRA has the most members. DePillis, *supra* note 1.

<sup>129</sup> ARIZ. REV. STAT. ANN. § 23-494 (2024).

<sup>130</sup> CONN. GEN. STAT. ANN. § 31-50b (2024).

<sup>131</sup> 820 ILL. COMP. STAT. ANN.17/1 (2024).

<sup>132</sup> ME. REV. STAT. ANN. tit. 26, § 599 (West 2024).

<sup>133</sup> MASS. GEN. LAWS ANN. ch. 149, § 186 (West 2024).

<sup>134</sup> N.Y. LAB. LAW § 202-k (McKinney 2024).

Washington,<sup>135</sup> Washington, D.C.,<sup>136</sup> and Utah.<sup>137</sup> In this subpart, I survey and categorize these laws, examining how broadly each defines the industry, what employees are covered, whether enforceability hinges on other conditions, whether the state bolsters its broadcaster-specific law with a general law on NCAs, and penalties for violations.

### 1. *Highly Restrictive States*

Bans in these states sometimes extend beyond TV and radio, and each provides for damages. Connecticut prohibits NCAs requiring broadcasters under services contracts to “[r]efrain from obtaining employment in a specified geographical area for a specified period of time after termination of employment with that broadcast industry employer.”<sup>138</sup> It limits covered employers to TV and radio stations and “[a]ssociated broadcast entities” (expressly excluding cable stations) and excludes sales and management employees.<sup>139</sup> Illinois prohibits “[p]ost-employment covenants not to compete” for employees in TV, radio, and cable but similarly excludes sales and management employees.<sup>140</sup> It “does not prevent the enforcement of a covenant not to compete during the term of an employment contract or against an employee who breaches an employment contract.”<sup>141</sup> New York likewise allows enforcement of NCAs *during* contracts but not after.<sup>142</sup> It covers not only TV and radio but also cable and internet—or satellite-based stations.<sup>143</sup> Like Connecticut and Illinois, New York excludes managers; it also specifies that NCAs cannot be “a condition of employment.”<sup>144</sup> All three states provide for damages, attorneys’ fees, and costs.<sup>145</sup>

### 2. *Medium-Restrictive States*

These states omit at least one factor that highly restrictive states include. For instance, Massachusetts does not provide for damages—only attorneys’ fees

<sup>135</sup> WASH. REV. CODE ANN. § 49.44.190 (West 2024).

<sup>136</sup> D.C. bans NCAs for workers earning below \$150,000 annually. D.C. CODE ANN. § 32-581 (West 2024). Broadcasters are exempted regardless of pay. *Broadcasters Will Remain Exempt from Noncompetes in D.C.*, FAIR COMPETITION L. (July 22, 2022), <https://faircompetitionlaw.com/2022/07/22/broadcasters-will-remain-exempt-from-noncompetes-in-d-c> [https://perma.cc/D4PC-XJE3].

<sup>137</sup> UTAH CODE ANN. § 34-51-201 (2024).

<sup>138</sup> CONN. GEN. STAT. ANN. § 31-50b(b)(1).

<sup>139</sup> *Id.* § 31-50b(a)(2)–(3).

<sup>140</sup> 820 ILL. COMP. STAT. ANN.17/1, 17/5, 17/10.

<sup>141</sup> *Id.* at 17/10(b).

<sup>142</sup> N.Y. LAB. LAW § 202-k(2)(c).

<sup>143</sup> *Id.* § 202-k(1)(a).

<sup>144</sup> *Id.* § 202-k(2).

<sup>145</sup> *Id.* § 202-k(3); CONN. GEN. STAT. ANN. § 31-50b(c); 820 ILL. COMP. STAT. ANN.17/

and costs.<sup>146</sup> Arizona and D.C. do not address penalties at all. Arizona bars TV and radio employers from requiring employees to sign NCAs “[a]s a condition of employment.”<sup>147</sup> It defines noncompete clauses as those “prohibit[ing] an employee from working in a specific geographic area for a specific period of time after leaving employment.”<sup>148</sup> Massachusetts defines the industry as “television stations, television networks, radio stations, radio networks” and affiliated entities, rendering “void and unenforceable” NCAs restricting the right “to obtain employment in a specified geographic area for a specified period of time” after termination, mutual agreement to end the relationship, or contract expiration.<sup>149</sup> Maine presumes unreasonable “[a] provision that requires an employee or prospective employee to refrain from obtaining employment in a specified geographic area for a specified period of time following expiration of the contract or upon termination of employment without fault of the employee.”<sup>150</sup> It bars post-employment NCAs but does not expressly prohibit them during employment.<sup>151</sup>

D.C. repealed a broadcaster-specific law<sup>152</sup> when it enacted a general law banning NCAs.<sup>153</sup> When it amended that general law to cover only employees earning under \$150,000 annually,<sup>154</sup> the City Council recognized the broadcaster-specific law “need[ed] to be revived.”<sup>155</sup> D.C. broadcasters thus remain categorically exempt from NCAs regardless of compensation.<sup>156</sup> This includes workers in “radio, television, satellite, cable or other broadcasting (such as anchor, disc jockey, editor, producer, program host, reporter or writer)” but excludes sales employees.<sup>157</sup>

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<sup>146</sup> MASS. GEN. LAWS ANN. ch. 149, § 186.

<sup>147</sup> ARIZ. REV. STAT. ANN. § 23-494(A)–(B)(1).

<sup>148</sup> *Id.* § 23-494(B)(2).

<sup>149</sup> MASS. GEN. LAWS ANN. ch. 149, § 186.

<sup>150</sup> ME. REV. STAT. ANN. tit. 26, § 599.

<sup>151</sup> *Id.*

<sup>152</sup> See D.C. CODE § 32-571 *et seq.*, *Broadcast Industry Contracting Freedom Act of 2002* (repealed 2022).

<sup>153</sup> Amendment, B24-256, Non-Compete Conflict of Interest Clarification Amendment Act of 2021, D.C. City Council (July 12, 2022), [https://lms.dccouncil.gov/downloads/LIMS/47234/Bill\\_Amendment/B24-0256-Bill\\_Amendment\\_2.pdf](https://lms.dccouncil.gov/downloads/LIMS/47234/Bill_Amendment/B24-0256-Bill_Amendment_2.pdf) [<https://perma.cc/MVV9-ZLUR>] [hereinafter Clarification Amendment].

<sup>154</sup> D.C. CODE ANN. § 32-581.

<sup>155</sup> Clarification Amendment, *supra* note 153; Amanda Michelle Gomez, *D.C. Rolls Back Blanket Ban On Non-Compete Clauses, Focuses On Income Level*, DCIST (July 12, 2022), <https://dcist.com/story/22/07/12/dc-council-rolls-back-blanket-non-compete-ban> [<https://perma.cc/UH62-ZXRH>] (discussing competing amendments).

<sup>156</sup> Lisa E. Dayan & Roy P. Salins, *District of Columbia Limits Ban on Non-Competes to Employees Making Less Than \$150,000 Annually*, DAVIS WRIGHT TREMAINE LLP (Aug. 11, 2022), <https://www.dwt.com/blogs/employment-labor-and-benefits/2022/08/dc-non-compete-ban-limited-150000-annual-salary> [<https://perma.cc/2HR2-TYPL>].

<sup>157</sup> *Id.*

### 3. *Less-Restrictive States*

These states limit—but do not ban—NCAs, instead outlining conditions under which they are permissible and time periods after which they are unenforceable. Utah allows NCAs for “exempt broadcasting employees” in certain circumstances, enforceable for up to a year if they are part of a written “contract of reasonable duration, based on industry standards, the position, the broadcasting employee’s experience, geography, and the parties’ unique circumstances,” and if the employee is terminated for cause or breaches the contract.<sup>158</sup> Any other “post-employment restrictive covenant” is void.<sup>159</sup> Washington provides only that if employees are “terminated without just cause or laid off by action of the employer,” NCAs are “void and unenforceable.”<sup>160</sup> It does not restrict employers’ abilities “to protect trade secrets or other proprietary information by lawful means in equity or under applicable law.”<sup>161</sup> The law extends beyond over-the-air broadcasting to employers using “cable television technologies.”<sup>162</sup> It is bolstered by a general law rendering NCAs “void and unenforceable” in several circumstances, including when employees earn below a certain inflation-adjusted amount, and containing a rebuttable presumption that NCAs exceeding 18 months are “unreasonable and unenforceable.”<sup>163</sup>

## V. NATIONAL LEGISLATION: A NECESSARY SOLUTION

Proponents of noncompete agreements point to history, observing that NCAs have traditionally been governed by state laws.<sup>164</sup> But the economy has changed; employers often operate in multiple states, and employees switch jobs

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<sup>158</sup> UTAH CODE ANN. § 34-51-201. To classify employees as exempt (relieving employers of their statutory duty to pay overtime), employers follow U.S. Department of Labor requirements based on employees’ “specific job duties and salary.” U.S. DEP’T OF LAB., FACT SHEET #17A: EXEMPTION FOR EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, COMPUTER & OUTSIDE SALES EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT (FLSA), <https://www.dol.gov/agencies/whd/fact-sheets/17a-overtime> [<https://perma.cc/QB2M-AZ3P>] [hereinafter DOL FACT SHEET].

<sup>159</sup> UTAH CODE ANN. § 34-51-201.

<sup>160</sup> WASH. REV. CODE ANN. § 49.44.190(1).

<sup>161</sup> *Id.* § 49.44.190(2).

<sup>162</sup> *Id.* § 49.44.190(4)(d). For discussion of “over-the-air” television, see *What is Over-the-Air TV?*, FREE TV PROJECT, <https://www.thefreetvproject.org/what-is-over-the-air-tv> [<https://perma.cc/9CBD-MQ4E>].

<sup>163</sup> WASH. REV. CODE ANN. § 49.62.020 (West 2024). In 2024, that cutoff is approximately \$120,000 for employees and \$300,000 for independent contractors. *Non-Compete Agreements*, WASH. STATE DEP’T OF LAB. & INDUS., <https://lni.wa.gov/workers-rights/workplace-policies/non-compete-agreements> [<https://perma.cc/5UH8-GWEB>].

<sup>164</sup> See *supra* note 38 and accompanying text.

frequently.<sup>165</sup> With more remote work<sup>166</sup> and workers frequently seeking new positions to increase their pay,<sup>167</sup> national legislation on NCAs is a more appropriate solution than a hodgepodge of state laws. This is especially true in broadcasting, where drastic industry consolidation, terminally low pay, and lack of other opportunities in the same geographic area combine to create a situation ripe for abuse.<sup>168</sup> National legislation to ban broadcasting noncompetes should be modeled on the best attributes of existing state bans,<sup>169</sup> creating something that works for both broadcasters and employers. This Part analyzes the state laws described in Part IV to determine what should be included in national legislation.

### A. *Outlining Proposed Legislation*

Ideally, national legislation would ban NCAs for all broadcast employees, given journalists' vital democratic role.<sup>170</sup> At minimum, it must ban them—without exception—for nonsupervisory employees. The law should broadly cover on-air employees (including news anchors and reporters, multimedia journalists, sports broadcasters, and meteorologists) and off-air employees (including producers, photographers, digital content producers, editors, and operations employees).<sup>171</sup> But it need not extend to sales employees, who sell broadcast and digital advertising space and carry out different job functions than journalists.<sup>172</sup>

Any limited exceptions allowing NCAs for managers must be carefully defined to ensure that employers do not simply skirt classifications by revising job descriptions or promoting employees to managerial roles with minimal raises. While some laws have classified employees based on exempt status<sup>173</sup> or earnings,<sup>174</sup> these markers do not neatly track in broadcasting, where

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

<sup>166</sup> See Kara Dennison, *How the Flexible & Remote Work Debate Will Carry into 2024*, FORBES (Jan. 24, 2024), <https://www.forbes.com/sites/karadennison/2024/01/24/how-the-flexible-remote-work-debate-will-carry-into-2024>.

<sup>167</sup> See Rakesh Kochhar, Kim Parker & Ruth Igielnik, *Majority of U.S. Workers Changing Jobs Are Seeing Real Wage Gains*, PEW RSCH. CTR. (July 28, 2022), <https://www.pewresearch.org/social-trends/2022/07/28/majority-of-u-s-workers-changing-jobs-are-seeing-real-wage-gains> [<https://perma.cc/X78Z-86QR>].

<sup>168</sup> See *supra* Part III.A.

<sup>169</sup> See *supra* Part IV.

<sup>170</sup> See *supra* Part III.B.

<sup>171</sup> For discussion of newsroom roles, see DePillis, *supra* note 1, and Tompkins, *Noncompete Contracts*, *supra* note 91.

<sup>172</sup> See *What is Media Sales?*, BEONAIR NETWORK OF MEDIA SCHS., <https://beonair.com/blog-what-is-media-sales> [<https://perma.cc/G46V-MZC9>].

<sup>173</sup> See DOL FACT SHEET, *supra* note 158.

<sup>174</sup> See, e.g., *Low Wage and Employee Classification Limits on Non-Compete Agreements*, PROSKAUER ROSE LLP (Jan. 27, 2023), <https://www.proskauer.com/report/low-wage-and-employee-classification-limits-on-non-compete-agreements> [<https://perma.cc/>

managers are not always highly paid, senior workers. For positions with “recruiting crunch[es],” such as producers,<sup>175</sup> an “executive producer” might be someone with a few years’ experience who earns only a middling salary.<sup>176</sup> As a result, distinguishing among employees based only on the blurry line between workers and managers—like Illinois<sup>177</sup> and New York<sup>178</sup>—may not be adequately protective. Connecticut’s law focuses more appropriately on the employee’s main duties, including “any employee of a broadcast industry employer, except those employees whose services *primarily* include sales or management functions.”<sup>179</sup>

National legislation should not only apply to over-the-air TV and radio, but also to cable stations and networks—as laws in Illinois,<sup>180</sup> New York,<sup>181</sup> and Washington<sup>182</sup> provide—and to digital platforms.<sup>183</sup> This accounts for how audiences consume news in the digital age, ensuring that a ban covers all journalists who report and produce news on various platforms.<sup>184</sup>

Legislation need not specify that NCAs can be enforced *during* employment contracts, as laws in Illinois<sup>185</sup> and New York<sup>186</sup> do, as this issue can be addressed under common law in most states.<sup>187</sup> But legislation must specify that NCAs extending *past* the term of employment are unenforceable, as most state

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97V4-WLYL] (identifying salary thresholds across state laws, below which employees cannot be subject to NCAs).

<sup>175</sup> See DePillis, *supra* note 1.

<sup>176</sup> In 2020, the median salary for an executive producer was just \$58,000 per year across all DMAs. RTDNA (@RTDNA), X (Dec. 21, 2020, 12:16 PM), <https://x.com/RTDNA/status/1341070026414170119> [<https://perma.cc/F5YT-9NJ6>]. Medians for news directors and assistant news directors were not significantly higher: \$95,000 and \$75,000, respectively. *Id.*

<sup>177</sup> 820 ILL. COMP. STAT. ANN.17/5(b).

<sup>178</sup> N.Y. LAB. LAW § 202-k.

<sup>179</sup> CONN. GEN. STAT. ANN. § 31-50b (emphasis added).

<sup>180</sup> 820 ILL. COMP. STAT. ANN.17/5(a).

<sup>181</sup> N.Y. LAB. LAW § 202-k(1)(a).

<sup>182</sup> WASH. REV. CODE ANN. § 49.44.190(4)(d).

<sup>183</sup> See *News Platform Fact Sheet*, PEW RSCH. CTR. (Nov. 15, 2023), <https://www.pewresearch.org/journalism/fact-sheet/news-platform-fact-sheet> [<https://perma.cc/BUJ4-ZSMR>] (noting that “an overwhelming majority of Americans get news at least sometimes from digital devices”); *Broadcasting in the Digital Age: Challenges and Opportunities*, MEDIALOOKS, <https://medialooks.com/articles/broadcasting-in-the-digital-age-challenges-and-opportunities> [<https://perma.cc/D44K-R3GK>].

<sup>184</sup> See Michael Lipka & Elisa Shearer, *Audiences Are Declining for Traditional News Media in the U.S. – With Some Exceptions*, PEW RSCH. CTR. (Nov. 28, 2023), <https://www.pewresearch.org/short-reads/2023/11/28/audiences-are-declining-for-traditional-news-media-in-the-us-with-some-exceptions> [<https://perma.cc/9D47-TLV7>] (reporting shrinking audiences for newspapers and local TV, but growing audiences for podcasts).

<sup>185</sup> 820 ILL. COMP. STAT. ANN.17/10(b).

<sup>186</sup> N.Y. LAB. LAW § 202-k(2)(c).

<sup>187</sup> See, e.g., QUINN EMANUEL URQUHART & SULLIVAN, LLP, TORTIOUS INTERFERENCE: ILLINOIS (2022), <https://www.quinnemanuel.com/media/2o3pyvaz/tortious-interference-illinois-w-024-3398.pdf> [<https://perma.cc/XUP9-5EB8>].

bans do.<sup>188</sup> Maine and Massachusetts do this particularly well, addressing three critical elements that should be included in legislation: (1) post-employment agreements (2) covering specified geographic areas, (3) for specified periods of time.<sup>189</sup>

Like laws in New York and Arizona, legislation should also prohibit NCAs as a condition of employment, helping broadcasters avoid coercive practices that harm their quality of life.<sup>190</sup> As massive conglomerates increasingly control local TV markets,<sup>191</sup> this is especially important: workers leaving one company may have difficulty finding new jobs with so few other companies from which to choose.<sup>192</sup>

Any noncompete agreement that survives these stringent rules must be limited in other ways. Utah, for example, permits NCAs of limited duration, subject to other conditions,<sup>193</sup> when an employee is terminated for cause or “breaches the employment contract in a manner that results in the broadcasting employee no longer being employed by the broadcasting company.”<sup>194</sup> But it specifies that even these NCAs can be enforced only for “one year after the day on which the broadcasting employee is no longer employed by the broadcasting company; or . . . the day on which the original term of the employment contract containing the post-employment restrictive covenant ends”—whichever comes first.<sup>195</sup> Washington provides a rebuttable presumption that NCAs longer than 18 months are “unreasonable and unenforceable.”<sup>196</sup>

If an employee is terminated for cause (consider, for example, someone who funnels stories or inside information to a competitor or commits similar ethical breaches), there may be limited reasons to allow enforcement during the original contract term, as Utah’s law provides.<sup>197</sup> Outside of those circumstances, the noncompete should not survive. These contracts often contain hefty liquidated damages clauses that make it difficult for workers to leave in the first place.<sup>198</sup>

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<sup>188</sup> Utah is an exception, allowing post-employment NCAs for up to one year under certain conditions. UTAH CODE ANN. § 34-51-201.

<sup>189</sup> ME. REV. STAT. ANN. tit. 26, § 599; MASS. GEN. LAWS ANN. ch. 149, § 186.

<sup>190</sup> ARIZ. REV. STAT. ANN. § 23-494(A); N.Y. LAB. LAW § 202-k(2); *see* NONCOMPETE AGREEMENTS, *supra* note 6, at 21.

<sup>191</sup> *See supra* notes 68–78 and accompanying text.

<sup>192</sup> *See* DePillis, *supra* note 1 (“The rapid consolidation in local news, with major companies like Nexstar and Sinclair buying out smaller ownership groups, has further diminished the employees’ options.”).

<sup>193</sup> UTAH CODE ANN. § 34-51-201(2)(a)(i)–(ii); *see also supra* note 158 and accompanying text.

<sup>194</sup> UTAH CODE ANN. § 34-51-201(2)(a)(iii)(a)–(b).

<sup>195</sup> *Id.* § 34-51-201(2)(b)(i)–(ii).

<sup>196</sup> WASH. REV. CODE ANN. § 49.62.020(2).

<sup>197</sup> UTAH CODE ANN. § 34-51-201(2)(a)(iii).

<sup>198</sup> *See* Nicole Goodkind, ‘I’m Not a Slave to Sinclair Broadcasting’: ‘Trapped’ Reporters Sued for Leaving Company Speak Out, NEWSWEEK (Apr. 9, 2018), <https://www.newsweek.com/sinclair-fake-news-employee-contracts-877746> [<https://perma.cc/>

Employees should not be doubly penalized, especially if they break a contract due to low pay or toxic work environments.<sup>199</sup> As one reporter lamented, “[Y]ou end up . . . having to put up with things you’re not happy with because you’re forced to because you’re so scared of the financial penalty.”<sup>200</sup> Enforcing NCAs in addition to liquidated damages is unduly coercive and harms employees, leaving employers with all the power.

Finally, legislation should track laws in Connecticut,<sup>201</sup> Illinois,<sup>202</sup> and New York<sup>203</sup> by providing for damages. Without this safeguard, violators may chalk up attorneys’ fees and costs related to civil liability—the norm in states like Massachusetts<sup>204</sup>—as simply the costs of doing business. The threat of damages will deter employers who would flout the law. The power imbalance in broadcasting noncompetes, especially for entry-level and lower-paid workers, is otherwise unworkable.

### B. *How Companies Can Adapt*

This legislation would certainly benefit broadcasting employees, but it need not hurt media companies. Employers have other tools to protect proprietary information and substantial investments without requiring broadcasters to sign unconscionable noncompetes.

Law firms have highlighted various avenues in client alerts to media employers, issued prior to the FTC’s final rule. One summarized the NAB’s suggestions to the FTC, including an exception to allow NCAs for “broadcast executives and highly compensated staff who benefit from significant investment of training and development.”<sup>205</sup> Even the Society for Human Resources Management (SHRM), which opposed the FTC’s proposed rule, acknowledged that the agency might consider “less onerous alternatives,” as some states have.<sup>206</sup> These include restricting NCAs to executives or “employees with material access to competitively sensitive information and development,” and banning or restricting NCAs in “industries where such

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TA75-5L8Q] (quoting an employment law expert as saying Sinclair’s lawsuits for liquidated damages against reporters who broke contracts were “unprecedented” and “punitive”).

<sup>199</sup> *See id.*

<sup>200</sup> *Id.*

<sup>201</sup> CONN. GEN. STAT. ANN. § 31-50b(c).

<sup>202</sup> 820 ILL. COMP. STAT. ANN.17/15.

<sup>203</sup> N.Y. LAB. LAW § 202-k(3).

<sup>204</sup> MASS. GEN. LAWS ANN. ch. 149, § 186.

<sup>205</sup> Jamila Brinson, *The Latest on What Media Employers Should Know About the FTC’s Proposed Ban on Non-Competes*, JACKSON WALKER (May 3, 2023), <https://www.jw.com/news/insights-media-noncompetes> [https://perma.cc/Q6QW-N4FL].

<sup>206</sup> Leah Shepherd, *SHRM Objects to Banning Noncompete Agreements*, SOC’Y FOR HUM. RES. MGMT. (Apr. 26, 2023), <https://www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/pages/shrm-opposes-noncompete-ban.aspx> [https://perma.cc/SFV4-GWE3].

agreements are against public policy.”<sup>207</sup> This rationale should apply to broadcasting: noncompetes in journalism, like those in law and medicine, run contrary to the public interest and should be unenforceable.<sup>208</sup>

National legislation has the potential to be better for employers than a jumble of state laws. It allows companies operating in different states to standardize their procedures, lowering compliance costs with differing state laws.<sup>209</sup> And it may incentivize employers to do better by employees, investing in their development and compensating them more fairly.<sup>210</sup> A war for talent in a heavily consolidated industry like broadcasting can only help workers. Companies, in turn, build teams of committed, talented employees who do not want to cross the street for a better situation or higher pay.<sup>211</sup> The benefits of national legislation on NCAs in broadcasting accrue to employers and employees alike.

## VI. CONCLUSION

National legislation banning most NCAs in broadcasting addresses the particular harms that have been felt by journalists and the effects of those harms on society. And a unified approach benefits employers, who will no longer have to navigate a confusing muddle of jurisdictional approaches. In an era defined by frequent job changes, increased remote work, and “quiet quitting,”<sup>212</sup> employers cannot simply strong-arm workers into enduring low pay or difficult workplace environments. It is in everyone’s best interests for media companies to invest meaningfully in journalists and encourage them to stay without restrictive noncompetes—not to coerce them by threatening their livelihoods.

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<sup>207</sup> Allen Smith, *Will the FTC Finalize a Complete Ban on Noncompetes?*, SOC’Y FOR HUM. RES. MGMT. (Feb. 5, 2024), <https://www.shrm.org/topics-tools/employment-law-compliance/will-ftc-ban-noncompetes> [<https://perma.cc/7DMQ-VHRJ>].

<sup>208</sup> *See supra* Part IV.A; Luis Roberto Barroso & Luna van Brussel Barroso, *Democracy, Social Media, and Freedom of Expression: Hate, Lies, and the Search for the Possible Truth*, 24 CHI. J. INT’L L. 51, 62 (2023) (“[A] free and strong press . . . serves a public interest in the dissemination of facts, news, opinions, and ideas, indispensable preconditions for the informed exercise of citizenship.”)

<sup>209</sup> *See supra* note 111–112 and accompanying text.

<sup>210</sup> *See* Corinne Post, *How FTC Non-Competes Ban Could Shift Talent and Innovation Strategies*, FORBES (Dec. 14, 2023), <https://www.forbes.com/sites/corinnepost/2023/12/14/how-ftc-non-competes-ban-could-shift-talent-and-innovation-strategies>.

<sup>211</sup> *See id.* (“In contexts of intense rivalry, employees are reluctant to ‘join the enemy’ or their enemies’ allies because they feel strongly connected to their own firm.”).

<sup>212</sup> Jim Harter, *Is Quiet Quitting Real?*, GALLUP (May 17, 2023), <https://www.gallup.com/workplace/398306/quiet-quitting-real.aspx> [<https://perma.cc/95UN-PXSC>].

## VII. APPENDIX

This sample legislation synthesizes attributes of the state laws described above. It provides a template for Congress to enact a law addressing NCAs in broadcasting, without waiting for support to coalesce around more expansive legislation.

### **Noncompete Agreements in the Broadcasting Industry Act**

#### **(A) Definitions.**

- (1) “Broadcasting industry employer” means television, radio, or cable stations or networks; internet, digital, or satellite-based services similar to broadcast stations or networks; and other entities that provide broadcasting services or are affiliated with these employers.
- (2) “Broadcast employee” means any employee of a broadcasting industry employer, except those whose services primarily include sales or management functions. This includes on-air employees (including, but not limited to, news anchors, news reporters, sports broadcasters, multimedia journalists, and meteorologists) and off-air employees (including, but not limited to, producers, photographers, videographers, editors, writers, digital content producers, and operations employees).
- (3) “Broadcast manager” means any worker with primarily managerial or supervisory duties, with exempt status under the Fair Labor Standards Act, who does not otherwise qualify as a “broadcast employee” under Section (A)(2).
- (4) “Noncompete agreement” means any post-employment restrictive covenant that prohibits any broadcast employee from working in a specified geographic area for a specified period of time after termination of employment with a broadcasting industry employer.

#### **(B) Prohibitions.**

- (1) Broadcasting industry employers may not require broadcast employees or prospective broadcast employees to enter into any noncompete agreement as a condition of employment or as part of an employment contract.
- (2) Broadcasting industry employers may not require broadcast managers making less than \$150,000 per year (adjusted annually

for inflation) to enter into a noncompete agreement. Broadcast managers earning more than \$150,000 per year may enter into noncompete agreements subject to the limitations in Section (C).

**(C) Limitations.** Any noncompete agreement covering a broadcast manager that comports with Section (B)(2) may be enforced only as follows.

- (1)** A noncompete agreement may only be enforced during the original term of the employment contract if a broadcast manager is terminated for cause or breaches the contract without paying liquidated damages. A noncompete agreement is void and unenforceable if the broadcast manager is terminated without cause, laid off, or pays liquidated damages to the broadcasting industry employer for breaching an employment contract.
- (2)** Any noncompete agreement meeting the conditions of Section (B)(2) or (C)(1) that lasts longer than one year is unreasonable and unenforceable.

**(D) Penalties**

- (1)** Any person or company who violates this law is civilly liable to a broadcast employee or broadcast manager.
- (2)** A plaintiff is entitled to recover damages, reasonable attorneys' fees, and costs against a person or company who violates this law.