IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 19-0521

JUNKERMIER, CLARK, CAMPANELLA, STEVENS, P.C.,

Plaintiff and Appellee,

vs.

TERRY ALBORN, PAUL UITHOVEN, CHRISTINA RIEKENBERG, JOE BATESON, AND SHERM VELTKAMP,

Defendants and Appellants.

BRIEF OF AMICUS CURIAE OPPOSED TO ENFORCING EMPLOYEE NON-COMPETES BECAUSE OF THE BURDENS ON THE PUBLIC

On Appeal from the Eighteenth Judicial District Court, Gallatin County,
the Honorable Amy Eddy, Presiding

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The *amici* joining this brief include individuals and entities that have been impacted directly by litigation over employee non-competes, as well as two organizations – Open Markets Institute and Economic Innovation Group – concerned about the adverse effects on workers and macroeconomic impacts of enforcing non-competes.[1] *Amici* ask the Court to recognize that the benefits employers claim to derive by imposing covenants not to compete are outweighed substantially by the burdens those covenants impose on the "public": "[t]he people of a country or community as a whole."[2]

ARGUMENT

In 1890, this Court listed the reasons it invalidated a contract in restraint of trade:

> (1) Such contracts injure the parties making them, because they diminish their means of procuring livelihoods, and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions, and they expose such persons to imposition and oppression. (2) They tend to deprive the public of the services of men in the employment and capacities in which they may be most useful to the community as well as themselves. (3) They discourage industry and enterprise, and diminish the products of ingenuity and

[1] Two organizations and a few individuals have joined since the motion requesting leave to file this brief was presented. The current list of individual amici joining this brief is attached as Appendix A.

[2] Black's Law Dictionary (11th ed. 2019).

> skill. (4) They prevent competition, and enhance prices. (5) They expose the public to all the evils of monopoly; and this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market. Against evils like these, wise laws protect individuals and the public, by declaring all such contracts void.[3]

Five years later, Montana adopted § 28-2-703, MCA. By its plain language, the statute voids all restraints on trade, which certainly includes employee non-competes. This Court adhered to the statute's plain language for ninety years until, in 1985, it changed course. In *Dobbins, De Guire & Tucker, P.C. v. Rutherford, MacDonald & Olson*, the Court announced that determining whether a covenant is a restraint "requires a balancing of the competing interests of the public as well as the employer and employee."[4]

Since then, non-competes have been imposed on increasing numbers of workers. Yet the interests of those workers and other members of the public have received little more than lip service from Montana's courts. In this case, for example, the District Court simply concluded "there is no evidence before the Court there has been any burden on the public."[5] In fact, evidence was presented at trial that employees and clients of the Defendants (who certainly are part of the

[3] *Newell v. Meyendorff*, 9 Mont. 254, 260, 23 P. 333, 334 (1890) (*quoting Alger v. Thacher*, 36 Mass. 51, 19 Pick. 51, 31 Am. Dec. 119 (Mass. 1837).
[4] 218 Mont. 392, 397, 708 P.2d 577, 580 (1985).
[5] FOFCOL, COL, ¶ 17.

public) were harmed by actions the Plaintiff ("JCCS") took to enforce the non-competes.

Amici requested leave to file this brief to highlight that evidence and the growing body of social science research confirming that court enforcement of employee non-competes harms workers and burdens the public. *Amici* submit that court enforcement of employee non-competes: (1) imposes unacceptable burdens on workers, customers, and small businesses, (2) harms the economy and society at large, and (3) affords only questionable benefits for employers.

I. Employee Non-Competes Place Unreasonable Burdens on People and Businesses.

When employers restrain their employees from changing jobs to work for a competitor, there are negative consequences not just for the affected employees, but also for all other workers who have signed non-competes, as well as for customers who are eager for other options, and for businesses in need of talented employees.

A. When Non-Competes Are Enforced, Many Employees Get Trapped.

This Court "strongly disfavors" non-competes and said in *Montana Mountain Products v. Curl* courts will not enforce covenants that prohibit employees from earning a living in their chosen profession in the community

where they choose to live.[6] Even so, employers in Montana and elsewhere routinely use non-competes to deny employees the opportunity *Curl* tried to assure to them.

Between 36 and 60 million Americans are now bound by non-competes.[7] Although non-competes were once confined to executives and employees who handled sensitive business information, today, non-competes pervade the entire American workforce from fast-food workers to CEOs. Approximately 50% of workers who earn more than $150,000 per year, 21-33% of workers earning between $40,000 and $150,000, and 15% of workers earning less than $40,000 are bound by non-competes.[8] Workers have little or no ability to refuse non-competes or negotiate their terms.

There has been a 60% rise in non-compete litigation over the past decade; still, the majority of signed non-competes never find their way into the courts.[9] Few workers have the resources to hire lawyers, much less to marshal evidence

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[6] *Montana Mountain Products v. Curl*, 2005 MT 102, ¶ 17, 327 Mont. 7, 12, 112 P.3d 979, 982.
[7] Alexander J.S. Colvin and Heidi Shierholz, *Noncompete Agreements*, Economic Policy Institute (Dec. 10, 2019) https://www.epi.org/publication/noncompete-agreements/.
[8] Evan Starr, *The Use, Abuse, and Enforceability of Non-Compete and No-Poach Agreements: A Brief Review of the Theory, Evidence, and Recent Reform Efforts*, Economic Innovation Group, (Feb. 2019), p. 5.
[9] Ruth Simon and Angus Loten, *Litigation Over Noncompetes Clauses is Rising*, Wall St. J. (Aug. 14, 2013); Jane Flanagan and Terri Gerstein, *Welcome Developments on Limiting Non-Compete Agreements*, Am. Constitution Society (Nov. 7, 2019) https://www.acslaw.org/expertforum/new-developments-on-non-competes-new-state-laws-potential-ftc-rulemaking-and-a-bipartisan-senate-bill-that-gets-it-right-for-workers-and-businesses/.

proving a non-compete they signed places an unreasonable burden both on them and on the public. Those costs and the impossibility of predicting how courts will apply the reasonableness test discourages them from challenging non-competes.[10] Thus, few employees seek to void their agreements.[11]

Some continue working for their employer. Their job tenure may be longer, but they earn less than unbound employees.[12] They also are more at risk for discrimination, harassment, unsafe working conditions, or other mistreatment.[13] Thus, non-competes add another hurdle for African Americans, 57% of whom report being denied equal treatment and pay,[14] and woman, over 40% percent of whom report sexual discrimination or harassment.[15]

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[10] *See, e.g.*, Steven Kayman and Lauren Davis, *A Call for Nationwide Consistency on Noncompetes*, Law360 Employment (Nov. 27, 2018).
[11] Matt Marx, *The Firms Strikes Back: Non-compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOC. REV. 695, 708 (2011).
[12] Evan Starr, J.J. Prescott and Norman Bishara, *Noncompetes and Employee Mobility 3* (2019); White House, *None-Compete Agreements: Analysis of the Usage, Potential, Issues, and State Responses* (May 2016) https://obamawhitehouse.archives.gov/sites/default/files/ non-competes_report_final2.pdf.
[13] Marx, *The Firms*, supra note 11, at 706.
[14] NPR, et al., *Discrimination In America: Experiences And Views Of African Americans 6* (Oct. 2017), https://www.npr.org/assets/img/2017/10/23/discriminationpoll-african-americans.pdf.
[15] Kim Parker and Cary Funk, *Gender Discrimination Comes in Many Forms for Today's Working Women*, Pew Research Center (Dec. 14, 2017) http://www.pewresearch.org/fact-tank/2017/12/14/gender-discrimination-comes-in-many-forms-for-todays-working-women/; Marist Poll, *11/22: More than One in Three Women Report Sexual Harassment in the Workplace*, Marist Poll (Nov. 22, 2017) http://maristpoll.marist.edu/1122-more-than-one-in-three-women-report-sexual-harassment-in-the-workplace/#sthash.5qBGru84.dpbs.

Another alternative is to walk away from their jobs.[16] Some take a "career detour," finding a job in a line of work that does not put their skills or education to full use.[17] Workers bound by non-competes are far more likely to take work in a different industry than workers without non-competes.[18] And workers who leave their career fields see "reduced compensation, atrophy of [] skills, and estrangement from [] professional networks."[19]

Others "wait out" the non-compete by remaining unemployed. Of course, most Montanans cannot afford a significant period of unemployment. The median household income here is among the lowest in the country, even though the cost of living is higher than average.[20] Even if supplemented by unemployment benefits, prolonged unemployment is unsustainable for most Montanans.

Another way workers escape non-competes is by relocating beyond the geographical bounds of their non-competes, which imposes financial and social burdens on them and their families.

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[16] Heather McLaughlin, Christopher Uggen and Amy Blackstone, *The Economic and Career Effects of Sexual Harassment on Working Women*, 31 Gender & Soc. 333, 344 (2017).
[17] Marx, *supra* note 11, at 696.
[18] Starr, Prescott and Bishara, *supra* note 12, at 3.
[19] Matt Marx and Lee Fleming, *Non-Compete Agreements: Barriers to Entry . . . and Exit?*, 12 Innov. Pol'y & Econ. 39, 48 (2012).
[20] Grant Suneson, *Wealth in America: Where are the richest and poorest states based on household income?* USA Today (Oct. 8, 2018); Affordability Rankings, U.S. News (2019) https://www.usnews.com/news/best-states/rankings/opportunity/affordability.

How many Montanans choose to relocate, "wait out," "career detour," or tolerate less-than-ideal work rather than taking legal action to void their non-competes is impossible to know, much less prove in court. Two individual *Amici* who made that choice worry that disclosing their situation could damage their careers, but their stories are important so they are identified anonymously. Brenda and Ellen are recent graduates whose first employers made them sign non-competes. But Brenda's office manager started allocating her clients to other employees, which reduced her income, and her boss did nothing to stop it, so she quit. She had to find work in a different community and take a pay cut because she could not afford litigation with an uncertain outcome.

Ellen told her boss about sexual harassment by a co-worker, but her report was ignored. Rather than tolerate the harassment, she found work in the same industry but in a different city. Even so, her former employer threatened to sue and demanded damages. She hired a lawyer to respond and the threats stopped.

Ellen and Brenda represent the silent majority of workers who decide the burdens of litigation outweigh the burden of non-competes. They made a reasonable decision, as the experiences of the five individual *Amici* who pursued litigation illustrate.

Ernie Olness and his brother left a large accounting firm to open their own practice focused on government audits. The audits are awarded by bid, so they

took no "book of business" with them. Even so, the firm sued them, lost, and filed an appeal. Rather than continue the fight, the brothers paid a settlement.

Kenton DeVries was not being paid what he was owed and wanted to look for other work. He had signed a non-compete when he joined a small company, which was then bought by a company that did business around the world and insisted Kenton's non-compete applied world-wide. Kenton sued to void the non-compete but eventually settled. He gave up his job and a portion of compensation due him.[21]

Cathy Allen was sued by the accounting firm she had worked for and had to defend herself through a motion for summary judgment, a trial, and an appeal.[22]

Phil Hastings and Tom Jacques worked for large multinational corporations that required them to sign non-competes governed by the laws of Missouri and Pennsylvania and also specified those states as the venue for litigation. They sued their employers to void the non-competes. Phil won on summary judgment.[23] Tom survived motions for summary judgment and ultimately prevailed at trial.[24]

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[21] *See* record in *DeVries v. Pioneer Wireline Services, LLC*, et al., U.S. District Court, District of Montana, Billings Division, Cause No. 1:14-cv-123.
[22] *See* record in *Joseph Eve & Co. v. Allen*, Montana Supreme Court, Case No. DA 97-405 (Opinion issued July 29, 1998).
[23] *See* Amicus Brief of Phil Hastings filed in *Montana Mountain Products v. Curl*, et al., Montana Supreme Court, Case No. DA 04-654 (11/22/2004).
[24] See record in *Jacques v. Haas Group International, LLC*, U.S. District Court, District of Montana, Billings Division, Cause No. 1:14-cv-135.

These workers all endured years of uncertainty and spent thousands of dollars on legal fees. And though they eventually won or settled, they were burdened by the experience. Like any employee who has signed a non-compete and decides for whatever reason to change jobs, they were forced to decide whether to hire a lawyer, negotiate a settlement, change careers, move to another community, accept less than the agreed pay, take other work at lower pay, tolerate inappropriate behavior, or spend years in litigation in order to escape the non-compete. Regardless of which option they chose, they were prevented from "practice[ing their] trade in the vicinity of where [they] reside[]," which is exactly what this Court defined as an unlawful restraint of trade in *Curl*.[25]

B. Enforcing Non-Competes Limits the Choices for Clients, Customers, and Patients.

Employees are not the only members of the public burdened by non-competes and the uncertainty of the *Dobbins* test. The people those employees serve – whether they are called clients, customers, or patients – are also burdened, both directly and indirectly.

In the case at hand, the District Court surmised the clients of Defendants were not burdened because Defendants' firm, Amatics, satisfied their accounting needs.[26] But the Defendants satisfied the clients' needs without knowing they

[25] 2005 MT 102, ¶ 17.
[26] FOFCOL, ¶¶ 108-109, 151.

would be liable individually for twice the amount of their combined earnings over the next three years. Had they anticipated the District Court's ruling, they almost certainly would not have provided the services.

The District Court's finding also ignores unrefuted evidence from William Dabney, who is a party to this brief. He testified JCCS withheld his files from his accountant – who he had relied on for decades as his most trusted business and personal adviser – during the time he was preparing for mediation and trial in his dissolution proceeding.[27] The Court also ignored Defendants' testimony about clients who were unable to get timely payroll services.[28] Late paychecks and untimely tax payments undoubtedly are burdensome.

Any time a non-compete requires a trusted accountant, physician, plumber, chef, mechanic, jeweler, dentist, counselor, or lawyer to make a choice between serving a client and taking a draconian cut in pay, the client almost certainly will be harmed, either by having to pay someone new and possibly less experienced or suitable to get up to speed or by having to accept services from a provider who lives in fear of the financial repercussions. A worker who is worried about how she will pay a year's revenue to a former employer has to be concerned about her own finances, and that concern may trump her clients' needs. To protect clients

[27] Tr., pp. 493-500.
[28] Tr., pp. 605-07 & 710-25.

from that risk, legislatures in some states have banned non-competes in certain professions.[29] For the same reason, the American Bar Association Rules of Professional Conduct promulgated Rule 5.6, which categorically prohibits law firms from attempting to limit competition, including by imposing financial disincentives for taking firm clients.[30] That rule has been adopted in Montana.[31]

There is no principled reason that prohibition should apply to law firms but not to other professions or industries. Clients have the same right to expect their best interests will be protected and advanced by any professionals they hire.[32] Of course, clients of medical clinics, auto repair shops, fine restaurants, and even fast food joints also expect their best interests to be served. People who purchase from any business should have the right to choose who prescribes and sells their medicines, fixes their cars and meals, and prepares their tax returns, just as they can choose who represents them in court or writes their will. Fair competition among workers ensures there are more options available to consumers. The benefits are not easily quantified, but they are real for everyone.

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[29] *See, e.g.*, N.M. Stat. § 24-1l-1 *et seq*; Colo. Rev. Stat. § 8-2-113; R.I. Gen. Laws §5-37-33.
[30] ABA Model Rules of Professional Conduct, Rule 5.6; *see, also, People v. Wilson*, 953 P.2d 1292 (Colo. 1998).
[31] M.R.Prof. Conduct 5.6.
[32] *See, e.g.*, Board of Accountants Rule 24.201.708(1) ("obligation to perform professional activities with concern for the best interest of those for whom the activities arc performed and consistent with the profession's responsibility to the public) and 24.2-1.718(2)(d) (incorporating AICPA Code, which requires an accountant to subordinate her/his personal gain to the interest of those she/he serves (Code 0.300.020.01)).

C. Enforcing Non-Competes Deprives Other Employers of Good Employees.

For businesses looking to hire employees, non-competes shrink the pool of qualified applicants unless the business is willing to risk being sued by former employers for tortious interference with contract, as Dawn Curl's employer was sued by Montana Mountain Products.[33] And as MGA Entertainment was sued after its employee who had worked for Mattel designed a Barbie competitor – the Bratz doll.[34] Although Mattel's years-long suit was ultimately unsuccessful, some businesses have recovered enormous verdicts against competitors that hired key former employees.[35]

Rather than risk being sued, prospective employers may refuse to consider applicants who are bound by non-competes. And, of course, there is no way to know what innovations might have been unleashed and what synergy was possible if the non-compete had not been enforceable. The loss to any specific business cannot be measured.

Fortunately, though, there are ways to assess how the opportunities lost by individual businesses and employees impact the larger economy.

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[33] 2005 MT 102, ¶ 7.
[34] *See generally* Orly Lobel, *You Don't Own Me: The Court Battles that Exposed Barbie's Dark Side* (2018).
[35] *See, e.g., Nova Consulting Group, Inc., v. Engineering Consulting Services, Ltd.*, 2008 WL 3889995 (5th Cir.) ($2 million verdict); *Conseco Finance Servicing Corp. v. North American Mortgage Co.*, 381 F.3d 811 (8th Cir. 2004) ($7 million judgment).

II. Enforcement of Non-Competes Burdens the Economy and the Public Generally.

When a state opts to enforce employee non-competes, the effects are far-reaching, impacting the public by stalling economic growth and reducing standards of living. Research suggests enforcement to any degree depresses wages, innovation, new business, and market competition.[36]

Across the country, wage stagnation and income inequality are at an all-time high.[37] For the bottom 90% of earners, wage growth has slowed dramatically relative to inflation – only 0.4% per year.[38] The bottom 10% of workers fare even worse, having experienced a 5% declines in wages in the past four decades.[39] Stagnant wage growth and falling wages are directly correlated with a lower standard of living.[40]

In a 2016 report, the U.S. Treasury Department concluded increased enforcement of non-competes leads to lower wages and lower wage growth over time.[41] The Department compared maximal and minimal enforcement states and

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[36] White House, *supra* note 12, at p. 5.
[37] Drew Desilver, *For Most U.S. workers, Real Wages Have Barely Budged in Decades*, Pew Research Center (Aug. 7, 2018) https://www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades/; *see also* Elise Gould, *State of Working America Wages 2018*, Economic Policy Institute (Feb. 20, 2019).
[38] Starr, *The Use, Abuse, and Enforceability*, *supra* note 8.
[39] *Id*.
[40] Library of Congress, Congressional Research Service, *Real Wage Trend, 1979 to 2018*, R45090, p.1 (July 23, 2019) https://www.hsdl.org/?view&did=827842.
[41] U.S. Dep't of Treasury, *Non-Compete Contracts: Economic Effects and Policy Implications 6* (2016).

found wage growth slows with greater enforcement of non-competes[42]: for workers that are 25 years old, there is a 5% difference in wages between a maximal and minimal enforcement state[43]; at age 50, there is a difference of 10%.[44] An increase of just one standard deviation in non-compete enforcement reduced wages by about 1.4 percent.[45]

A study based on Hawaii's 2015 ban of non-competes in the tech industry found wages in that industry rose relative to other industries and relative to tech industries in other states.[46] The explanation is simple. When non-competes are banned, employees have greater bargaining power during employment and more mobility post-employment, thereby increasing competition in the industry and prompting employers to offer higher pay to new hires.[47] Enforcing non-competes, on the other hand, limits employees' earning potential and depresses wages for all workers.

Enforcing non-competes also hinders new business and innovation. Since the 1980s, while non-competes have become more common, startups have declined by half.[48] Because people are the starting point for new ideas, and new ideas

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[42] *Id*. at 20.
[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] *See* Evan Starr, *Are Noncompetes Holding Down Wages?* Harvard Law School (2018); Haw. Rev. Stat. § 480-4(d).
[47] Starr, *Are Noncompetes Holding Down Wages?*, *supra* note 47, at 28-29.
[48] Starr, *The Use, Abuse, and Enforceability*, *supra* note 8.

require access to knowledge and experience, non-competes inhibit innovation at its roots by preventing workers from taking their knowledge and experiences to other employers and depriving the market of competition. A highly competitive market spurs innovation as businesses contend to offer the newest and best goods and services at the lowest price. The result is more and better options for consumers. By impeding worker mobility, non-competes put a damper on the interactions that generate creativity.

Similar consequences occur when employees move outside of the jurisdiction to avoid non-competes. "Brain drain," or the movement of talent outside a jurisdiction, has been linked to enforcement of non-competes[49] as employees have an incentive to relocate to states where non-competes do not hinder their careers.[50] As an example, in the 1980s, Michigan opened the door to enforcement of non-competes. An exodus of workers followed, and Michigan has struggled to regain its competitive edge ever since.[51]

Attracting and retaining talent is imperative to ensuring a local economy remains competitive both nationally and globally. Failure to retain talent slows

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[49] *See* Matt Marx, Jasjit Singh, and Lee Fleming, *Regional Disadvantage? Non-compete Agreements and Brain Drain*, 44 Research Policy 2, (March 2015), pp. 393-404.
[50] *Id*. at 395.
[51] *See* Orly Lobel, *Talent Wants to be Free: Why We Should Learn to Love Leaks, Raids, and Free Riding*, Yale University Press (2013), pp. 70-71; *see also* Matt Marx, Deborah Strumsky and Lee Fleming, *Mobility, Skills, and the Michigan Non-Compete Experiment*, 55 MGMT. SCI. 875, 887 (2009).

economic growth, which in turn threatens fiscal stability and reduces the standard of living.[52]

Evidence shows that enforcing covenants not to compete burdens economies. There is every reason to believe *Dobbins* has burdened Montana's economy.

III. Justifications Employers Offer for Enforcing Non-Competes Are Unsupported.

Proponents of non-competes argue the free movement of workers from one employer to another allows rival companies to "free ride" on the investments employers make in intangibles, including trade secrets, customer lists, and employee training.[53] In this case, the District Court found that the non-compete "serves the legitimate business purposes of JCCS by helping maintain the client base."[54] That finding assumes JCCS owned the client base; however, that assumption makes no sense because JCCS did not buy the book of business when it merged with Veltkamp, Stannebein and Bateson, and the firm's clients always had the right to change accountants.[55]

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[52] *See* Chad Stone, *Economic Growth: Causes, Benefits, and Current Limits, in Small Business: The Key to Economic Growth*, Hearing before the Subcomm. on Economic Growth, Tax and Capital Access of the Comm. on Small Business, U.S. H.R., 115th Cong., 1st Session (April 27, 2017) (available at https://www.govinfo.gov/content/pkg/CHRG-115hhrg25204/pdf/CHRG-115hhrg25204.pdf) at 11, 39-46.
[53] *See, e.g.*, Edmund W. Kitch, *The Law and Economics of Rights in Valuable Information*, 9 J. Legal Stud. 683, 691 (1980).
[54] FOFCOL, ¶ 97.
[55] FOFCOL, ¶ 47.

The Court's finding also presumes free riding is categorically bad, but what is disparaged as free riding is often the broad dissemination of knowledge that contributes to economic growth and innovation.[56] This sharing contributes to the growth of new firms and new industries as workers are free to combine their knowledge with knowledge possessed by other workers and firms.[57] Excess protection for knowledge through contractual restraints such as non-compete clauses can frustrate this iterative dynamic.[58]

JCCS has not claimed its non-compete protects intellectual property, but even when that justification is raised, it makes little sense because the laws defining copyrights, patents, trademarks, and trade secrets also provide tools for protecting those interests. Employers can further protect their intangible property through non-disclosure agreements or by providing incentives for the employee to stay with the company – using a carrot rather than a stick. Employers need not deprive employees of their right to compete.

Some advocates for non-competes claim employers will invest more in training employees if they can use non-competes to lengthen employees' tenure.

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[56] Brett M. Frischmann and Mark A. Lemley, *Spillovers*, 100 Colum. L. Rev. 101, 111-14 (2006); *see also* Alan Hyde, *Intellectual Property Justifications for Restricting Employee Mobility: A Critical Appraisal in Light of the Economic Evidence*, In Research Handbook on the Economics of Labor and Employment Law 357 (Cynthia L. Estlund & Michael L. Wachter eds., 2012).
[57] *Talent Wants to be Free*, *supra* note 52.
[58] *Id*. at 76-97.

But non-competes also discourage self-training by employees.[59] Deprived of the freedom to leave, workers are disincentivized to invest in training and other self-improvement because they have less power to obtain higher salaries and wages at their current firm or elsewhere.

"[I]f the walls meant to protect human capital diminish the quality of that capital," are those walls worth keeping?[60] The answer is no. It is time to restore the meaning of Montana's statute voiding restraints on trade.

IV. The Best Reform for Montana Is to Read the Statute as Written.

In Montana's first year as a state, this Court recognized that "[t]he rule that contracts that are in restraint of trade shall be void, as against public policy, is among our most ancient common-law inheritances."[61] Five years later, the Legislature codified the rule that was articulated in *Newell* when it followed California's lead by adopting the Field Code.

California has never wavered about interpreting its statute to void all employment non-competes,[62] and its refusal to restrict employee mobility through

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[59] *Id*. at 175-178.
[60] Orly Lobel, *How Noncompetes Stifle Performance*, Harvard Business Review (Jan.-Feb. 2014).
[61] *Newell v. Meyendorff*, 9 Mont. 254, 259, 23 P. 333, 333 (1890).
[62] Cal. Bus. & Prof. Code § 16600 ("[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."); s*ee, also, e.g.*, *Edwards v. Arthur Andersen LLP*, 44 Cal.4th 937, 955 (2008) ("Noncompetition agreements are invalid under section 16600 in California, even if narrowly drawn, unless they fall within the applicable statutory exceptions of [Cal. Bus. & Prof. Code] sections 16601, 16602, or 16602.5.").

enforcing non-competes has been linked to the rise and success of Silicon Valley.[63]

Sparked by California's success and the negative consequences associated with non-competes, states are moving away from the reasonableness-standard and prohibiting or severely restricting non-competes. Illinois, Maine, Maryland, Massachusetts, New Hampshire, Oregon, Rhode Island, Florida, Utah, Connecticut, and Washington have all recently banned employee non-competes or made them unenforceable for certain income levels or professions.[64] And several other states have legislation pending, including the District of Columbia, New Jersey, Hawaii, Pennsylvania, Missouri, and Indiana.[65] North Dakota and Oklahoma ban employee non-competes outright.[66]

At the federal level, a bipartisan bill, the Workforce Mobility Act of 2019, seeks to invalidate non-competes save for narrow exceptions involving the sale of business.[67] The bill would also impose a $5,000 per week civil fine and allow for a private cause of action for damages and attorney fees. Additionally, the Federal

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[63] Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants not to Compete*, 74 N.Y.U. L. Rev. 575 (1999); *Talent Wants to be Free*, *supra* note 52, at 40; Marx, Singh and Fleming, *supra* note 50, at 403; Lee Fleming and Koen Frenken, *The Evolution of Inventor Networks in the Silicon Valley and Boston Regions*, 10 Adv. Complex Sys. 53 (2007).
[64] Flanagan, *supra* note 9.
[65] *Id*; Emily Grannon Fox and Natalie M. Cappellazzo, *Multiple States Join Emerging National Trend Banning Noncompete Agreements for Low-Wage Workers*, Nutter McClennen & Fish Non-Compete Law Blog (Aug. 12, 2019) https://www.nutter.com/non-compete-law-blog/multiple-states-join-emerging-national-trend-banning.
[66] N.D. Cent. Code Ann. § 9-08-06; Okla. Stat. Ann. tit. 15, § 217.
[67] S. 2614, 116th Cong. (2019).

Trade Commission is reviewing a petition signed by numerous organizations and individuals requesting the FTC invalidate non-competes,[68] and it held a full-day workshop last month on limiting or prohibiting non-competes.[69]

Montana would have been far ahead of this growing trend of reform if not for *Dobbins*. It can get back on the path by reversing *Dobbins.* Taking an absolute position against enforcing non-competes will not only benefit Montanans, it will also ensure that the law governing employees working here is Montana law. Employers who try to impose choice of law and forum selection provisions will discover those clauses cannot be enforced when Montana has an unwavering policy stance against non-competes.[70]

The reasons this Court recited in 1890 for invalidating contracts in restraint of trade remain valid, as the evidence presented in this case and the social science research summarized in this brief confirm.

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[68] Re: Petition for Rulemaking to Prohibit Worker Non-Compete Clauses, Federal Trade Commission, https://openmarketsinstitute.org/wp-content/uploads/2019/03/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf

[69] *Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues*, Federal Trade Commission (Jan. 9, 2020) https://www.ftc.gov/news-events/events-calendar/non-competes-workplace-examining-antitrust-consumer-protection-issues.

[70] *See, e.g., Application Group Inc. v. Hunter Group Inc.*, 61 Cal 4th App 881, 72 Cal. Rptr. 2d 73 (1st Distr. 1998) (non-compete violated California law despite Maryland choice of law provision); see also *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 20 Cal. App. 3d 668, 97 Cal. Rptr. 811 (Ct. App. 1971) (forbidding cherry-picking non-compete enforcement regime).

CONCLUSION

Whatever justifications are offered for using employee non-competes cannot outweigh the adverse impacts non-competes have on workers, customers, competitors, and society as a whole. Because employee non-competes are never reasonable, Montana's law invalidating restraints on trade should be read as intended – to make all employee non-competes unenforceable.

DATED this 11th day of February, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed in double-spaced, proportionately-spaced, 14-point, Times New Roman typeface, and the word count calculated by WordPerfect is 4,851 words, excluding the table of contents, table of authorities, certificate of service and certificate of compliance.

DATED this 11th day of February, 2020.

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