

RECOGNIZING AN OVERCORRECTION: A PROPOSAL FOR NEVADA’S POLICY ON NON-COMPETE AGREEMENTS

*Kristopher Kalkowski**

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INTRODUCTION

Nevada recently underwent significant changes to its laws on non-compete agreements between an employer and an employee. In 2016, the Nevada Supreme Court in *Golden Road Motor Inn v. Islam* affirmed its traditional practice of refusing to modify any non-compete agreement that the court found unreasonable.¹ There, the Justices on the Court split in a close four to three decision, with the majority deciding in favor of voiding unreasonable non-compete agreements at the benefit of the employee, but to the detriment of the employer. However, the effects of that decision did not last long. One year after *Islam*, the Nevada legislature enacted Assembly Bill 276 (“AB 276”), which amended Chapter 613 of Nevada’s Revised Statutes governing non-compete agreements and added that “the court shall revise” an unreasonable non-compete agreement so that it is reasonable and enforceable.² That amendment effectively superseded *Islam*. It also pushed the pendulum for Nevada’s stance on non-compete agreements in an entirely different direction.

While the Nevada legislature’s actions show a desire to help employers, their actions pose more questions than answers. For example, the legislature’s changes fail to provide any set guidelines for courts to modify non-compete agreements. Their changes also fail to recognize the dissenting Justices’ recommendation in *Islam* to limit the circumstances in which a court could modify a non-compete agreement.³ Thus, courts are now charged with navigating a new venture—one that goes against the judiciary’s traditional stance—without direction.

To combat the deficiencies in Nevada’s new law, this Note proposes two changes. First, this Note proposes a legislative amendment to AB 276. The amendment would limit a court’s ability to reform an overly-broad or otherwise unreasonable non-compete agreement to only limited situations where the employer provides the following evidence: that it did not intentionally overreach in

¹ *Golden Rd. Motor Inn, Inc. v. Islam*, 376 P.3d 151, 156 (Nev. 2016).

² Assemb. B. 276, 2017 Leg., 79th Sess. (Nev. 2017). When this assembly bill goes into effect, it will replace the language of Nevada’s prior law regarding non-compete agreements: NRS 613. *See id.* (“Chapter 613 of NRS is hereby amended by adding thereto a new section to read as follows. . .”).

³ *See Islam*, 376 P.3d at 162 (Hardesty, J., dissenting) (explaining that the court should only elect to pick up the blue-pencil when equities run in favor of modification).

drafting the terms to the non-compete agreement; and, that it did not use its greater bargaining power to force the employee into accepting the restrictive terms of the non-compete agreement. Second, this Note proposes a process that courts can use to interpret that amendment: a burden-shifting analysis where the employer bears the initial burden of showing that it attempted to draft a fair, reasonable non-compete agreement.

Although these proposals place a large limitation on Nevada's newly enacted law, they are necessary to limit an employer's overreach in drafting a non-compete agreement that burdens modern society's mobile workforce and globally competitive industries.⁴ This policy also serves the long-held legal principle of honoring two parties' freedom to contract when the equities run in favor of such action.⁵

To explain the need for Nevada to amend its recent legislative action, this Note will first provide a historical background to non-compete agreements to show the gradual growth and acceptance of such agreements. Next, the Note will explore the different methods that states use to modify unreasonable non-compete agreements. It will then explain the Supreme Court of Nevada's decision in *Islam*, followed by the legislature's superseding amendment, AB 276. Last, this Note will outline a practical procedure that Nevada should adopt to modify unreasonable non-compete agreements—one that requires an amendment to Nevada's newly passed legislation as well as a burden-shifting analysis for the courts.

I. THE NON-COMPETE AGREEMENT

The non-compete agreement is a contractual obligation where an individual agrees that he or she will not compete in a certain market after an employment relationship ends.⁶ The purpose of the non-compete agreement is to protect the employer rather than harm the employee.⁷ That is, when the employer gives cer-

⁴ See Chiara F. Orsini, *Protecting an Employer's Human Capital: Covenants Not to Compete and the Changing Business Environment*, 62 U. PITT. L. REV. 175, 179 (2000) (discussing the "issues in drafting and enforcing these covenants, particularly with respect to the time and geographic restraints" because of the increased reach of online companies and the technological expansion in employment industries).

⁵ U.S. CONST. art. I, § 10, cl. 1 ("[N]o State shall . . . pass any . . . law impairing the Obligation of Contracts."); James W. Ely, Jr., *The Protection of Contractual Rights: A Tale of Two Constitutional Provisions*, 1 N.Y.U. J.L. & LIBERTY 370, 383 (2005) ("Like jurisprudence under the Contract Clause to safeguard existing agreements, the notion of contractual freedom had deep roots in the legal culture.").

⁶ Gerald T. Laurie & David A. Harbeck, *Balancing Business Protection with Freedom to Work: A Review of Noncompete Agreements in Minnesota*, 23 WM. MITCHELL L. REV. 107, 108 (1997).

⁷ Norman D. Bishara & Evan Starr, *The Incomplete Noncompete Picture*, 20 LEWIS & CLARK L. REV. 497, 506 (2016); see Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 676 (2008).

tain benefits to the employee, such as specialized knowledge of the field, an opportunity to earn the good will of customers, and specialized skills, the non-compete agreement then ensures that the employee will not use those benefits to assist any future employers that compete with the previous employer.⁸ Thus, the employer often exerts a restriction on the employee's future employment in terms of geographical scope, time, and post-employment activity.⁹

A. *History of the Non-Compete Agreement*

The practice of restricting an individual following the end of an employment relationship originated in fifteenth century England.¹⁰ The first case to specifically address the issue of non-compete agreements was *Dyer's Case*.¹¹ There, an employer agreed to train an individual to dye fabric, and that individual in turn agreed that he would not compete against his employer's trade in his employer's town for a period of six months after he completed his apprenticeship.¹² The employer later charged the employee with violating this initial agreement, and brought an action to enforce the terms of the non-compete agreement.¹³ The judge presiding over the case disagreed, however, and refused to honor the agreement at all.¹⁴ In fact, the presiding judge expressed such outrage to the restraint on the trainee that if the master had been present in court, the judge would have imprisoned him until he paid a fine to the king.¹⁵ This strong stance laid the groundwork for later courts to view non-compete agreements as per se invalid.¹⁶

This per se invalidity gained more strength roughly 200 years later in *Colgate v. Bachelier*, where a court held that even though a restriction was limited in its duration and geographic scope and could be removed by a monetary payment, it was nonetheless invalid as a matter of law.¹⁷ The court stated that such restrictions were "against the benefit of the commonwealth," and regardless of the scope of the restriction, the defendant "ought not to be abridged of his trade and living."¹⁸

The courts' rigid stance toward non-compete agreements eventually weakened, however. The agreements gained legal recognition in the seminal case of

⁸ Reddy v. Cmty. Health Found. of Man, 298 S.E.2d 906, 912 (W. Va. 1982).

⁹ See Pivateau, *supra* note 7.

¹⁰ Cathy Packer & Johanna Cleary, *Rediscovering the Public Interest: An Analysis of the Common Law Governing Post-Employment Non-Compete Contracts for Media Employees*, 24 CARDOZO ARTS & ENT. L.J. 1073, 1078 (2007).

¹¹ See *Dyer's Case*, YB 2 Hen. 5, fol. 5, pl. 26 (1414) (Eng.).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*; see Packer & Cleary, *supra* note 10.

¹⁶ See Maureen B. Callahan, Comment, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703, 707 (1985).

¹⁷ *Colgate v. Bachelier*, (1602) 78 Eng. Rep. 1097 (K.B.), 1079; see Callahan, *supra* note 16, at 708.

¹⁸ *Colgate*, 78 Eng. Rep. at 1097.

Mitchel v. Reynolds in 1711.¹⁹ In *Mitchel*, the court balanced the social utility of certain types of economic restraints against the undesirable effects on both parties to the agreement.²⁰ The *Mitchel* court's decision stood for the standard that "a man may, upon a valuable consideration, by his own consent, and for his own profit, give over his trade; and part with it to another in a particular place."²¹

The principal reasons for a non-compete agreement discussed in *Mitchel* still remain the standard used by courts today: (1) employers have a legitimate interest in retaining their customer bases; and, (2) an employer has a legitimate interest in protecting trade secrets and confidential information.²² But the *Mitchel* court did not entirely reject past courts' focus on the disadvantages of non-compete agreements. Instead, the court simply opened the door to such agreements yet retained a skeptical eye toward them, as shown by the court's language that the agreements are subject to "great abuses . . . from masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom, when they come to set up for themselves."²³ This balance between honoring the social utility of non-compete agreements and recognizing the potential social harm effectively paved the way for the modern-day recognition of non-compete agreements in the United States.

B. *The Modern Non-Compete Agreement*

The progressive outlook of *Mitchel* in non-compete agreements still stands in our modern-day employment sector. Non-compete agreements are often formed in two instances: when hiring a new employee, or when purchasing an established business.²⁴ There are many growing issues in this area of law, however. For instance, employers are utilizing non-compete agreements more often due to the increased mobility of the average worker.²⁵ Indeed, the past employment structure of limited positions of entry, hierarchical job ladders, and long-

¹⁹ *Mitchel v. Reynolds*, (1711) 24 Eng. Rep. 347 (Q.B.), 347.

²⁰ Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 630 (1960).

²¹ *Mitchel*, 24 Eng. Rep. at 349. In regard to the employer's protection of trade secrets and confidential information, employers often use non-disclosure agreements, which bar an employee from sharing trade secrets. See Matt Marx et al., *Regional Disadvantage? Employee Non-Compete Agreements and Brain Drain*, 44 RES. POL'Y 394 (2015). But non-compete agreements also assist an employer to protect that information by simply eliminating an ex-employee's opportunity to disclose that information in the first place. See *id.*

²² T. Leigh Anenson, *The Role of Equity in Employment Noncompetition Cases*, 42 AM. BUS. L.J. 1, 13–14 (2005).

²³ *Mitchel*, 24 Eng. Rep. at 350; see Blake, *supra* note 20, at 626.

²⁴ See Piveteau, *supra* note 7, at 675.

²⁵ Jeanne Meister, *The Future of Work: Job Hopping Is the 'New Normal' for Millennials*, FORBES, (Aug. 14, 2012, 8:58 AM), <http://www.forbes.com/sites/jeannemeister/2012/08/14/job-hopping-is-the-new-normal-for-millennials-three-ways-to-prevent-a-human-resource-nightmare/#50b11d765508> [<https://perma.cc/Q396-AJB7>] (stating the average worker stays with one employer for only four-and-a-half years before moving to another).

term employment is quickly changing into short-term employment, lateral mobility, general training, and skill development.²⁶ That leaves employers at a continued disadvantage in trying to both heavily invest in specialized training and retain any advantage in an increasingly volatile and competitive industry.²⁷ As a result, states have articulated their own standards for how to deal with non-compete agreements while balancing those restraints against the need for a free market.²⁸

II. THE DIFFERING APPROACHES THAT STATES TAKE TO NON-COMPETE AGREEMENTS

There are two general ways that states deal with non-compete agreements: (1) statutory regulation; and (2) common law. Currently, only three states generally prohibit the agreements (California, North Dakota, Oklahoma).²⁹ Conversely, twenty-six states now have state statutes that permit non-compete agreements.³⁰ Those states commonly enforce durational limitations, occupation/industry-specific exemptions, wage thresholds, enforcement doctrines, and prior notice requirements.³¹ Likewise, states that utilize common law rather than statutory framework generally mirror the Restatement (Second) of Contracts, which provides that:

1. A promise to refrain from competition that imposes a restraint that is ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade if (a) the restraint is *greater than is needed* to protect the promisee's legitimate interest, or (b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public.
2. Promises imposing restraints that are ancillary to a valid transaction or relationship include the following: (a) a promise by the seller of a business not to compete with the buyer in such a way as to injure the value of the business sold; (b) a promise by an employee or other agent not to compete with his employer or other principal; (c) a promise by a partner not to compete with the partnership.³²

²⁶ Anenson, *supra* note 22, at 15.

²⁷ See John Dwight Ingram, *Covenants Not to Compete*, 36 AKRON L. REV. 49, 60 (2002) ("The employee would go to the competitor with full knowledge of the former employer's 'products, its development strategies, its marketing plans, its customers and other significant business information which can[not] be set aside. . . . what he knows about [the former employer] is bound to influence what he does for [the competitor],' and that will disadvantage the former employer.").

²⁸ Pivateau, *supra* note 7, at 677.

²⁹ *Id.* This assertion is based on those state's general tendencies; it does not claim that the states honor that position in all disputes.

³⁰ *Non-Compete Reform: A Policymaker's Guide to State Policies*, WHITE HOUSE 1 (2016) https://obamawhitehouse.archives.gov/sites/default/files/competition/state-by-statenoncompetesexplainer_unembargoedfinal.pdf [<https://perma.cc/BN3N-73ZT>].

³¹ *Id.* at 2.

³² RESTATEMENT (SECOND) OF CONTRACTS § 188 (AM. LAW. INST. 1981) (emphasis added).

Not all courts enjoy the ease of a black-letter definition for non-compete agreements, however, because the general outlines of a “reasonable” agreement are constantly changing. That is, our current markets are increasingly globalized, and technology is rapidly changing.³³ This constant instability drastically extends or rescinds a court’s previous definition of what terms are reasonable in any specific market.³⁴ Further, this instability is not just limited to high-tech companies; rather, the growing expansiveness of companies now heads inescapable interstate competition at nearly all levels of the market.³⁵ So courts that deal with either statutory or common law regulation of non-compete agreements are faced with a growing dilemma: how to deal with increasingly mobile employees on both an international and national level while also ensuring a consistent baseline for reasonable non-compete agreements. That question is largely dictated by whichever state’s law the court must apply.

A. *Jurisdictional Approaches to Non-Compete Agreements*

Whichever court holds jurisdiction over an employer’s attempt to enforce a non-compete agreement largely dictates exactly when and in what circumstances the non-compete agreement will be honored or eliminated. Courts ultimately hold the power to modify or eliminate a non-compete agreement through the “blue-pencil doctrine,”³⁶ which arises from the equitable powers possessed by the judiciary—a system of relief built on flexibility and fairness based on the specific facts of any case.³⁷ This doctrine allows a court to either (1) strike unreasonable clauses from a non-compete agreement, or (2) modify the agreement to reflect the terms that the parties could have—and should have—agreed to.³⁸

³³ Ann C. Hodges & Porcher L. Taylor, III, *The Business Fallout from the Rapid Obsolescence and Planned Obsolescence of High-Tech Products: Downsizing of Noncompetition Agreements*, 6 COLUM. SCI. & TECH. L. REV. 3, 9, 24, & 25 (2005); see Orsini, *supra* note 4, at 179 (“With the rapid advancement in Internet-related technologies, not only is knowledge becoming out-of-date in increasingly shorter periods of time, but high technology products are also becoming obsolete in shorter periods of time. This changes the dynamics of the customer base and of the employer interest that is being protected by these covenants.”).

³⁴ See Orsini, *supra* note 4, at 180 (discussing decisions by the Eleventh Circuit and the Georgia Supreme Court that reflect courts adaptations to the ever-changing scope of non-compete agreements).

³⁵ See generally *id.*

³⁶ Pivateau, *supra* note 7, at 673.

³⁷ See *Timenterial, Inc. v. Dagata*, 277 A.2d 512, 514 (Conn. Super. Ct. 1971) (discussing the courts’ equitable powers); see also *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) (“The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.”); Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 541 (2016); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 539 (2012).

³⁸ See Robert J. Orelup & Christopher S. Drewry, *Judicial Review and Reformation of Non-compete Agreements*, CONSTRUCTION LAW., Summer 2009, at 29, 30–31. But courts also gen-

B. The Blue-Pencil Doctrine

In looking to the two methods of blue-penciling stated above, the first method allows courts to simply remove unreasonable terms from the agreement and leave the remaining terms to be applied.³⁹ This method's advantage is that it retains the non-compete agreement's original wording, which presumptively keeps the original intent of the agreement largely intact.⁴⁰ But it also runs the strong risk of rendering a non-compete agreement incomprehensible.⁴¹ For example, if the court were to strike an unreasonable portion in a paragraph, that alteration could essentially change the meaning of the entire paragraph by taking away a defining term used later in the agreement or by lessening the strength of the intended language.⁴² This means that the method of striking terms can only be used when an agreement is "divisible";⁴³ that is, the court can only strike unreasonable terms when it can clearly separate the reasonable parts of the agreement from the unreasonable.⁴⁴

The second approach to blue-penciling an agreement allows the court to replace an agreement's unreasonable terms with reasonable ones.⁴⁵ For example, a court may rewrite a five-year non-compete agreement into a one-year restriction.⁴⁶ One of the benefits of this approach is that employers retain the agreement in some form while only altering the original extent of the restrictions. However, this method runs the risk of destroying the parties' original intent by eliminating the specific restrictions that the parties believed were most important.⁴⁷ For instance, an employer may have drafted a non-compete agreement with the focus of restricting the employee in terms of time because that was most important to a unique, temporary business practice. But if the court were to rewrite the agreement and make that time restriction reasonable, the modified

eralize the term blue-penciling to refer to both striking and modifying agreements. For consistency, this Note will use the term "blue-penciling" as a reference to both striking and/or modifying a non-compete agreement.

³⁹ Kenneth R. Swift, *Void Agreements, Knocked-Out Terms, and Blue Pencils: Judicial and Legislative Handling of Unreasonable Terms in Noncompete Agreements*, 24 HOFSTRA LAB. & EMP. L.J. 223, 247 (2007).

⁴⁰ See *Deutsche Post Glob. Mail, Ltd. v. Conrad*, 292 F. Supp. 2d 748, 754 (D. Md. 2003) (explaining that the practice of striking the terms to an over-broad agreement "would not involve any rewriting or reorganizing of the remaining language.").

⁴¹ See *A.N. Deringer, Inc. v. Strough*, 103 F.3d 243, 247 (2d Cir. 1996) (observing that the form of striking provisions is only practicable "to the extent that a grammatically meaningful reasonable restriction remains after the words making the restriction unreasonable are stricken.").

⁴² See *Clark's Sales & Serv., Inc. v. Smith*, 4 N.E.3d 772, 785 (Ind. Ct. App. 2014) (stating that removing certain portions of a non-compete agreement would change "the entire meaning and import of each paragraph.").

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Swift, *supra* note 39, at 245.

⁴⁶ See *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127, 131 (Minn. 1980).

⁴⁷ See generally *id.*

agreement could then lessen the temporal restriction to a period not long enough to actually allow the business to benefit from its unique practice.⁴⁸ So, courts that adopt this method must balance honoring the purpose of the agreement and effectively restricting an employee.

III. NEVADA'S APPROACH TO THE NON-COMPETE AGREEMENT

The advantages of blue-penciling discussed above illustrate how courts can effectively hold an employee accountable to a contract while also keeping an employer from overreaching. Nonetheless, Nevada historically stood strong as a state that voided a non-compete agreement when the court deemed any portion of the agreement unreasonable.⁴⁹ Stated differently, Nevada neither struck nor modified unreasonable terms in an unreasonable non-compete agreement, opting instead to eliminate an unreasonable agreement altogether. This changed, however, in the 2017 Nevada legislative session. But before discussing that change, it is important to first examine the reasoning behind the Nevada judiciary's original refusal to modify unreasonable non-compete agreements.

The Nevada judiciary outlined the rationale for its traditional practice of refusing to modify unreasonable non-compete agreements in two cases: *Ellis v. McDaniel*⁵⁰ and *Jones v. Deeter*.⁵¹ In *Ellis v. McDaniel*, the appellant, Dr. Charles T. Ellis, was an orthopedic surgeon employed with Collett, Hood, Moren and Read, Ltd. ("Elko Clinic"), beginning in September of 1978.⁵² Both parties entered into a non-compete agreement, which stated that when Ellis's employment at the Elko Clinic ended, he would not compete with the Elko Clinic for a period of two years within a radius of five miles from the city of Elko.⁵³ If Ellis were to violate the agreement, the Elko Clinic reserved the right to obtain a permanent injunction from the Fourth Judicial District Court of the State of Nevada.⁵⁴

About a year after Ellis started working for the Elko Clinic, he expressed his intent to form his own orthopedic surgery office in Elko.⁵⁵ The Elko Clinic then filed a complaint with the Fourth Judicial District Court of the State of Nevada.⁵⁶ The Elko Clinic also moved for a preliminary injunction against Ellis, alleging that Ellis violated his covenant not to compete by taking steps to enter into a

⁴⁸ See Swift, *supra* note 39, at 233.

⁴⁹ See *Jones v. Deeter*, 913 P.2d 1272, 1275 (Nev. 1996) (stating an unreasonable non-compete agreement is per se unreasonable and therefore, unenforceable).

⁵⁰ *Ellis v. McDaniel*, 596 P.2d 222, 225 (Nev. 1979) (discussing the modification of an injunction placed on a terminated employee).

⁵¹ *Deeter*, 913 P.2d at 1272 (discussing the refusal to modify a non-compete agreement between a past employee and employer).

⁵² *Ellis*, 596 P.2d at 223.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

private practice in competition with the Elko Clinic.⁵⁷ The district court granted the request, and entered an injunction against Ellis that mirrored the geographic and durational terms stated in the original non-compete agreement between Ellis and the Elko Clinic.⁵⁸ Ellis then appealed the district court decision to the Supreme Court of Nevada.⁵⁹

On appeal, the Supreme Court of Nevada evaluated the district court's preliminary injunction to determine whether the terms of the agreement were reasonable. The court stated:

[T]he test . . . for determining the validity of the covenant as written is whether it imposes upon the employee (a) greater restraint than is reasonably necessary to protect the business and goodwill of the employer. A restraint of trade is unreasonable, in the absence of statutory authorization or dominant social or economic justification, if it is greater than is required for the protection of the person for whose benefit the restraint is imposed or imposes undue hardship upon the person restricted.⁶⁰

The Supreme Court of Nevada ultimately concluded that the terms of the agreement were reasonable.⁶¹ The court found that the agreement could not be enforced, however, because the agreement did not protect a legitimate interest of the Elko Clinic since the Elko Clinic did not offer services dealing with orthopedic surgery—Ellis's specialty practice.⁶² Ellis and the Elko Clinic were thus not competitors in the same market, and the agreement was beyond the scope of any legitimate protectable interest of the Elko Clinic.⁶³ But rather than strike the preliminary injunction as unenforceable, the Nevada Supreme Court elected to modify it.⁶⁴ The court enforced the geographical and territorial restraints, but removed the portion that prohibited Ellis from practicing his specialty of orthopedic surgery.⁶⁵ In doing so, the Supreme Court of Nevada expressed a willingness to change non-compete agreements *during the course of a trial* through a preliminary injunction. However, the decision did not speak to whether Nevada would extend the practice of modifying agreements to permanent injunctions.⁶⁶

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 224 (citing *Hansen v. Edwards*, 426 P.2d 792 (Nev. 1967)).

⁶¹ *Id.*

⁶² *Id.* at 224–25.

⁶³ *Id.* at 224.

⁶⁴ *Id.* at 225.

⁶⁵ *Id.*; see also *Hansen*, 426 P.2d at 794 (modifying a preliminary injunction that initially prevented an individual from competing with a past employer within a 100-mile radius and without any durational limit to the limits of the city of Reno and a time interval of one year).

⁶⁶ Permanent injunctions begin at the end of a trial and extend indefinitely or until a court defines an end date. Shane K. Blank, *Preliminary Versus Permanent Injunctions: A Focused Look at the Distinctions Between Them*, 72 J. MO. B. 254, 256 (2016) (“A permanent injunction, on the other hand, is designed to indefinitely enjoin unlawful conduct that would otherwise cause irreparable harm. Said differently, a preliminary injunction is best viewed as a

After its decision in *Ellis*, the Supreme Court of Nevada in *Jones v. Deeter*⁶⁷ refused to modify a non-compete agreement between an employer and employee. In *Jones*, Larry Jones was an assistant at Deeter Lighting (a supplier of lighting equipment).⁶⁸ At the beginning of Jones and Deeter's employment relationship, Deeter drafted an employment agreement, which contained a non-compete agreement that prohibited Jones from working with a competitor in the lighting and retrofitting business for five years and within a 100-mile radius of the Reno/Sparks area after the employment relationship ended.⁶⁹

Three months after Jones started his position, Deeter terminated Jones.⁷⁰ Without wasting any time to find new employment, Jones reached out to a competitor in the lighting and retrofitting business the next day to establish an employment relationship.⁷¹

When Deeter learned of this employment relationship, it filed a complaint against Jones to enforce the non-compete agreement.⁷² Ultimately, the District Court of Nevada enforced the non-compete agreement in its full terms, among other damage awards.⁷³

Jones then appealed the district court's enforcement of the non-compete agreement, arguing that the agreement was unenforceable as a matter of law.⁷⁴ Although the Supreme Court of Nevada rejected that argument, it nonetheless found that the non-compete agreement was unenforceable because the agreement's five-year duration imposed an unreasonable and unnecessary restriction against Jones.⁷⁵ But rather than modify the agreement as the court did in *Ellis* with a preliminary injunction, the Supreme Court of Nevada did not take any further action.⁷⁶ Instead, the court declared the agreement void as unreasonable, and, therefore, unenforceable.⁷⁷

Together, *Ellis* and *Jones* demonstrated Nevada's divergence in modifying restraints in the employment context. The cases showed that Nevada courts were unwilling to invade contractual relations between two parties when that invasion would result in a *permanent restraint*; yet the Nevada Supreme Court was per-

function of *preservation*, whereas permanent injunctions are functions of long-term protection.").

⁶⁷ *Jones v. Deeter*, 913 P.2d 1272, 1272 (Nev. 1996).

⁶⁸ *Id.* at 1273.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* Notably, Deeter's complaint sought enforcement of the non-compete agreement rather than allowing the district court to create its own preliminary injunction as was done in *Ellis*. See *Ellis v. McDaniel*, 596 P.2d 222, 223 (Nev. 1979).

⁷³ *Deeter*, 913 P.2d at 1274.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 1276.

⁷⁷ *Id.* at 1275.

fectly content with modifying a court-imposed temporary preliminary injunction.⁷⁸ Essentially, this shows that Nevada employed the modification of a non-compete agreement to simply buy time for the court to further evaluate the agreement. That way, Nevada courts could err on the side of caution to prevent any further irreparable harm to the defendant during litigation—a central purpose of a preliminary injunction.⁷⁹

In line with its decisions in *Ellis* and *Jones*, the Nevada Supreme Court recently affirmed its long-held tradition of voiding unreasonable non-compete agreements in the 2016 decision of *Golden Road Motor Inn v. Islam*. In that case, the Nevada Supreme Court Justices narrowly rejected any attempt to modify an unreasonable non-compete agreement in a four to three decision.⁸⁰ But that narrow decision highlighted the fact that Nevada's strict practice of voiding unreasonable non-compete agreements was at a tipping point. Moreover, the recent retirement of Justice Nancy Saitta—one of the majority justices in the court's *Islam* opinion—revitalized the issue of whether Nevada's all-or-nothing approach to non-compete agreements should change.⁸¹ Even further, the *Islam* decision brought the issue to the forefront of the legislative agenda.⁸²

With these recent events in mind, the remaining discussion will evaluate the *Islam* decision and Nevada's recent statutory amendment on the issue. It will then explore a different path that the court should take in future cases: a path that aligns with the dissent in *Islam*, and one that elects to modify non-compete agreements in limited circumstances.

A. *The Nevada Supreme Court Continues Its Tradition of Voiding Over-Broad Non-Compete Agreements in the Decision of Golden Road Motor Inn v. Islam*

In *Islam*, Sumona Islam was a casino host at the Atlantis Casino in Reno, Nevada.⁸³ As a part of Islam's employment with the Atlantis Casino, she signed several documents—one of those documents being a covenant not to compete.⁸⁴ The covenant restricted Islam from employment at, association with, or service

⁷⁸ See *Golden Rd. Motor Inn, Inc. v. Islam*, 376 P.3d 151, 156 (2016).

⁷⁹ See ELAINE W. SHOBE ET AL., REMEDIES, CASES AND PROBLEMS 65 (6th ed. 2016) (citing *Zeringue v. St. James Parish Sch. Bd.*, 130 So.3d 356 (La. Ct. App. 2013)).

⁸⁰ *Islam*, 376 P.3d at 156.

⁸¹ Jeff German, *Nevada Supreme Court Justice Nancy Saitta is Stepping Down*, L.V. REV. J. (June 27, 2016, 3:59 PM), <http://www.reviewjournal.com/politics/government/nevada-supreme-court-justice-nancy-saitta-stepping-down> [https://perma.cc/VU9F-Q8L7].

⁸² Patrick Hicks & Timothy Roehrs, *Tectonic Shift Affecting Enforcement of Noncompetition Agreements Emanates from the 2017 Nevada Legislative Session and Passage of AB 276*, LITTLER PUBLICATIONS (June 22, 2017), <http://www.jdsupra.com/legalnews/tectonic-shift-affecting-enforcement-of-39639/> [https://perma.cc/JD7A-2ZVV] (“That case sent shockwaves affecting noncompetition agreements employers already had in place. . .”).

⁸³ *Islam*, 376 P.3d at 153.

⁸⁴ *Id.*

in any other gaming establishment within 150 miles of the Atlantis Casino for one year following the end of her employment.⁸⁵

Following three years at the Atlantis Casino, Islam resigned after she became dissatisfied with her work.⁸⁶ Islam did not leave quietly. Rather, she altered and concealed the contact information to eighty-seven players in the Atlantis electronic database—information that she gathered and learned solely because of her employment at the Atlantis Casino.⁸⁷ She also hand-wrote casino player’s names, contact information, level of play, game preferences, credit limits, and other proprietary information from the database in a personal notebook.⁸⁸

Following Islam’s resignation from Atlantis, she received a position as a casino host at the Grand Sierra Resort (“GSR”) in Reno, Nevada.⁸⁹ Once employed at the GSR, Islam placed the information that she copied from the Atlantis into the GSR database.⁹⁰ Believing that information was from Islam’s prior employment relationships, GSR marketed their hotel to the Atlantis players.⁹¹ Atlantis learned of this, and filed a complaint against both Islam and the GSR.⁹²

After a bench trial, the district court found Islam liable for breach of contract and violation of Nevada Uniform Trade Secrets Act.⁹³ The court imposed a permanent injunction on Islam to cease further use of any Atlantis trade secrets, and awarded Atlantis both compensatory and punitive damages.⁹⁴ The court held, however, that it would not enforce the non-compete agreement in Islam’s employment contract with Atlantis because it found the non-compete agreement unreasonable.⁹⁵ Thereafter, all parties appealed the decision; among other issues on appeal, Atlantis challenged the court’s refusal to honor the non-compete agreement.⁹⁶

1. A Majority of Justices Find the Agreement Unreasonable and Refuse to Modify or Alter the Terms of the Agreement.

In its decision, the Supreme Court of Nevada affirmed the district court’s finding that Atlantis’s non-compete agreement was unreasonable.⁹⁷ The court

⁸⁵ *Id.*

⁸⁶ *Id.* at 154.

⁸⁷ *Id.* A “player” is a casino patron that is a member of the casino’s players-club. Casinos regularly keep a client-list of wealthy, consistent players at the casino. *See Types of Casino Players*, BEST NETENT CASINO, <http://bestnetentcasino.info/en/mind/types-of-players-at-the-casino> [https://perma.cc/F3T4-BUG5] (last updated Feb. 27, 2017).

⁸⁸ *Islam*, 376 P.3d at 154.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*; NEV. REV. STAT. § 600A.030(2) (1987).

⁹⁴ *Islam*, 376 P.3d at 154.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 155–56.

stated that although there is no “inflexible formula for deciding the ubiquitous question of reasonableness,” the court will rely on case law to determine when a non-compete agreement “extends beyond what is necessary to protect [a company’s] interest.”⁹⁸ In doing so, the court found Atlantis’s non-compete agreement unreasonable for two reasons: first, the agreement’s terms prohibiting Islam from employment, affiliation, or service with any gaming business or enterprise extended beyond what was necessary to protect Atlantis’s interest, and, second, it presented an undue hardship on Islam because it limited Islam’s ability to be gainfully employed.⁹⁹

Alongside the Nevada Supreme Court’s finding that Atlantis’s non-compete agreement was unreasonable, the court also refused to adopt any new practice of modifying or striking terms from an unreasonable agreement.¹⁰⁰ The court stated, “Rightfully, we have long refrained from reforming or blue-penciling” private parties’ contracts.¹⁰¹ In supporting its refusal to adopt a blue-penciling practice based on public policy reasons, the court looked to the argument made by the Georgia Supreme Court in *Richard P. Rita Pers. Servs. Int’l, Inc. v. Kot* as a starting point.¹⁰² In *Richard*, the Georgia court cringed at the potential negative result of a court’s modification of a non-compete agreement and warned that “if severance is generally applied, employers can fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable. . . .”¹⁰³ The Nevada Supreme Court also provided three reasons for its long-held practice: (1) modifying a contract holds a strong possibility of “trampling the parties’ contractual intent”; (2) preservation of judicial resources; and (3) protecting the employee from the employer’s far superior bargaining position.¹⁰⁴

In the court’s first reason, it prevented any chance that a future decision may take liberty with even a small modification. Instead, the court established a firm ground to limit the judiciary’s ability to draft their own terms in any agreement. The court supported that decision by stating, “Drafting would simply be inappropriate public policy as it conflicts with the impartiality that is required of the bench.”¹⁰⁵ In the court’s discussion of the second reason, the court emphasized judicial restraint; and the court aligned with the position that any sense of doubt or ambiguity in a contract should be construed against the drafter.¹⁰⁶ This practice ensures that a court does not waste valuable time and resources re-drafting a contract when an employer could have drafted a proper agreement in the first place.

⁹⁸ *Id.* at 155.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 156.

¹⁰¹ *Id.* (citing *Reno Club, Inc. v. Young Inv. Co.*, 182 P.2d 1011, 1016 (Nev. 1947)).

¹⁰² *Id.* at 157.

¹⁰³ *Id.* (citing *Richard P. Rita Pers. Servs. Int’l, Inc. v. Kot*, 191 S.E.2d 79, 81 (Ga. 1972)).

¹⁰⁴ *Id.* at 157–58.

¹⁰⁵ *Id.* at 157.

¹⁰⁶ *Id.* at 158.

The court's third reason was the principal policy behind the decision in *Islam*. The court emphasized that a strict test of reasonableness must be applied to restrictive covenants in employment cases based on the nature of the employee-employer relationship.¹⁰⁷ In other words, "one who has nothing but his labor to sell, and is in urgent need of selling that, cannot well afford to raise any objection to any terms of the contract of employment offered to him, so long as the wages are acceptable."¹⁰⁸ And when faced with an employer bringing a lawsuit, many employees simply acquiesce with unreasonable non-compete agreement terms rather than risk the expense of litigation.¹⁰⁹ The court further stated that in the context of an agreement for a restraint of trade, "a good-faith presumption benefitting the employer is unwarranted."¹¹⁰ Additionally, the court argued that a strict rule of refusing to modify any unreasonable agreement encourages employers to not "free-ride" on the knowledge that a court will correct their wrongs in the future.¹¹¹

2. *The Dissenting Justices Agree That the Agreement Is Unreasonable, but Argue That the Court Should Elect to Modify the Agreement to Make It Enforceable.*

The three policy reasons discussed by the majority did not entirely resonate with the dissenting Justices in *Islam*. Rather, the dissenting Justices argued that the court should have recognized that its refusal to modify non-compete agreements did not need to be a black-and-white, all-or-nothing rule. Instead, the dissent argued for a narrow exception:

[A]bsent some showing of bad faith on Atlantis' part, of which there was none, I would follow the approach taken by this court and a majority of other courts and preserve the non-compete agreement by modifying or severing the overly broad provision and thereby maintain the restriction on Islam's future employment in a competing casino host position.¹¹²

And this exception came in sharp contrast to the majority's public policy rationales.

To the majority's first argument, the dissent responded that the intent of the parties would be central to a court's modification of the agreement.¹¹³ Moreover, a court could look to evidence surrounding the actual agreement, and then apply some objective criteria to modify any terms.¹¹⁴ In this specific case, the dissent argued it could easily look to the parties' contract as a whole to decipher their intent—for example, by looking to the ethics and code of conduct agreement,

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (quoting *Menter Co. v. Brock*, 180 N.W. 553, 555 (Minn. 1920)).

¹⁰⁹ *Swift*, *supra* note 39, at 255.

¹¹⁰ *Islam*, 376 P.3d at 158.

¹¹¹ *Id.*

¹¹² *Id.* at 162–63 (Hardesty, J., dissenting in part).

¹¹³ *Id.* at 163.

¹¹⁴ *Id.* at 165.

which discusses the disclosure of confidential information, including the exact issue in dispute: customer lists.¹¹⁵ The dissent argued that “[a]pplying the wholesale invalidation rule completely ignores, rather than violates, the parties’ intent in this case.”¹¹⁶

Turning to the majority’s second point, the dissent argued that modifying an agreement does not actually waste judicial resources.¹¹⁷ The court explained that not only would modification be the next logical step in determining whether an agreement is unreasonable, but a court could always exercise its discretion to refuse to modify an agreement if it found any evidence of bad faith, intentional overreach by the employer, or exertion of the employer’s bargaining power over the employee.¹¹⁸ That way, potential litigation would limit employers by requiring evidence of good-faith efforts in negotiating non-compete agreements. Additionally, an entire contract would not be thrown away after the fact-intensive and highly unpredictable process of determining reasonability—thus, maximizing the use of already stretched judicial resources.¹¹⁹

The dissent also emphasized the importance of non-compete agreements to Nevada businesses that rely heavily on protecting confidential information, such as the client lists at issue in *Islam*.¹²⁰ The dissent argued that, by adopting such a strict measure, the majority effectively puts the employer at an extreme disadvantage.¹²¹ Modification, to combat that disadvantage, would encourage a more even-handed approach while still favoring the employee by continuing to firmly limit restrictions in the end.

Altogether, the arguments by the majority and the dissent highlighted the single driving force behind the blue-penciling debate: public policy. But the pivotal question is whether that public policy is truly best served by a strict all-or-nothing approach to unreasonable non-compete agreements.

B. *The Nevada Legislature Changes Course*

The court’s freedom to refuse to modify an unreasonable non-compete agreement in *Islam* stemmed from the fact that the Nevada legislature had never taken a stance on the issue before that decision. In fact, prior to the *Islam* decision, Chapter 613 of the Nevada Revised Statutes only stated:

The provisions of this section do not prohibit a person, association, company, corporation, agent or officer from negotiating, executing and enforcing an agreement with an employee of the person, association, company or corporation which, upon termination of the employment, prohibits the employee from:

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *See id.*

¹²⁰ *Id.* at 166.

¹²¹ *Id.*

- a. Pursuing a similar vocation in competition with or becoming employed by a competitor of the person, association, company or corporation; or
- b. Disclosing any trade secrets, business methods, lists of customers, secret formulas or processes or confidential information learned or obtained during the course of his or her employment with the person, association, company or corporation, if the agreement is supported by valuable consideration and is otherwise reasonable in its scope and duration.¹²²

But the court's strict refusal to modify in *Islam* did not sit well with the current Nevada legislature.¹²³ Thus, the Nevada legislature decided to change course and supersede the *Islam* decision by amending NRS 613 through AB 276. AB 276 now explicitly *requires* courts to revise non-compete agreements and changes Nevada law so that it reads:

5. If an employer brings an action to enforce a noncompetition covenant and the court finds the covenant is supported by valuable consideration but contains limitations as to time, geographical area or scope of activity to be restrained that are not reasonable, impose a greater restraint than is necessary for the protection of the employer for whose benefit the restraint is imposed and impose undue hardship on the employee, the court *shall revise the covenant to the extent necessary and enforce the covenant as revised*. Such revisions must cause the limitations contained in the covenant as to time, geographical area and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than is necessary for the protection of the employer for whose benefit the restraint is imposed.¹²⁴

These combative changes raise the question: which policy generally offers the most beneficial effects for Nevada?

IV. EMPIRICAL EVIDENCE ON THE PUBLIC POLICY BEHIND NON-COMPETE AGREEMENTS

The public policy rationales that supported Nevada's initial refusal then acceptance to modify non-compete agreements are largely based on the court's and legislature's personal preference.¹²⁵ This preference, however, has a commanding effect on Nevada's most prominent industry: leisure and hospitality.¹²⁶ The leisure and hospitality industry continues to be one of the state's fastest growing

¹²² NEV. REV. STAT. § 613.200 (2017).

¹²³ *Minutes of the Senate Committee on Commerce, Labor and Energy: Hearing on Assemb. B. 276 Before the S. Comm. on Com., Lab., & Energy*, 2017 Leg., 79th Sess. 15 (Nev. May 24, 2017) (statement of Misty Grimmer, Nev. Resort Ass'n) ("We are asking the Legislature to clarify in statute something that had been the practice of the courts for decades. However, a specific lawsuit came forth in which an entire noncompete agreement was thrown out because one portion of it was excessive.").

¹²⁴ Assemb. B. 276, 2017 Leg., 79th Sess. (Nev. 2017) (emphasis added).

¹²⁵ See discussion *supra* Part IV.

¹²⁶ Nev. Resort Ass'n, *Economic Impacts of the Hospitality Industry: Employment*, 2015 NEV. GAMING FACT BOOK 1, 6 (2015), <http://www.nevadaresorts.org/about/factbook/NRA-2015-Factbook.pdf> [<https://perma.cc/8KBT-F3HH>].

employment sectors,¹²⁷ currently employing roughly 337,000 employees, and accounting for nearly 27.7 percent of Nevada's workforce.¹²⁸ Further, hotel-casinos make up twelve of the twenty largest employers in the state.¹²⁹ And one of the major priorities in this industry is, and will always be, a stable customer base—something that depends largely on customer relations and consistent contact with past customers.¹³⁰ As a result, one of the major focuses for Nevada should be the state's enforcement of non-compete agreements in the leisure and hospitality industry—a highly competitive, yet established field.¹³¹ Further, the public policy behind Nevada's decision to reject or allow any modification of non-compete agreements must be supported by concrete evidence. Fortunately, one central public policy concern that can be measured based on empirical studies is whether employees are disproportionately harmed by non-compete agreements when compared to the benefit to employers.

In a fairly recent study, Matt Marx and Lee Fleming examined the effect of non-compete agreements on employees.¹³² To do so, they analyzed the changes in Michigan's non-compete policy in the 1980s.¹³³ At that time, Michigan inadvertently overhauled its enforcement of non-compete agreements by eliminating antitrust laws that prevented the city from enforcing those agreements.¹³⁴ Thus, by looking to the effects of the inadvertent reversal and its effect on individuals, firms, and regions, the study aimed to find whether non-compete agreements do in fact have a considerable, negative effect on the employee.¹³⁵

In its findings, the study concluded that non-compete agreements do have a considerable and detrimental effect on the employee in the following situations: when employers surprise an individual with a non-compete agreement at the signing of the employment contract when such an agreement was not discussed in initial employment negotiations; when employers use the non-compete agreement to threaten employees with future litigation, deterring employees from ever violating the agreement even if the terms are blatantly unreasonable; and, when employers present the non-compete agreement as an ultimatum, thereby forcing

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Kye-Sung Chon & William P. Whelihan, *Changing Guest Preferences and Marketing Challenges in the Resort Industry*, 10 HOSPITALITY REV. 9, 12 (1992).

¹³¹ See Kelvin King, *The Value of Intellectual Property, Intangible Assets and Goodwill*, 7 J. INTEL. PROP. RTS. 245, 245 (2002), (discussing the importance of “intangibles such as . . . customer lists”).

¹³² Matt Marx & Lee Fleming, *Non-compete Agreements: Barriers to Entry . . . and Exit?*, 12 INNOVATION POL'Y & ECON. 39, 39 (2012). Matt Marx is a professor at the Massachusetts Institute of Technology Sloan School of Management, and Lee Fleming is a professor at the Harvard Business School and Institute for Quantitative Social Science. *Id.*

¹³³ *Id.* at 41.

¹³⁴ *Id.* at 44.

¹³⁵ *Id.*

the employee to choose between accepting the agreement or losing the employment offer entirely.¹³⁶ Specifically, the study discovered that:

[T]he negative consequences of non-competes for individual careers are not inadvertent byproducts of a desire to protect trade secrets; rather, firms strategically manage the process of obtaining non-compete signatures. This suggests that firms are aware of these deleterious outcomes. [As stated in one survey] barely 3 in 10 workers reported that they were told about the non-compete in their job offer. In nearly 70% of cases, the worker was asked to sign the non-compete after accepting the offer—and, consequently, after having turned down (all) other offers. Nearly half the time, the non-compete was not presented to employees until or after the first day at work.¹³⁷

The study also found that the mobility of employees with specialized skills—a group that is often subject to strict non-compete agreements—is disproportionately affected by non-compete agreements.¹³⁸ Notably, Marx and Fleming’s article states “Michigan workers with highly specialized skills were twice as likely to remain loyal to their employers following the implementation of non-compete enforceability.”¹³⁹ The study found that “[t]his result is likely due to the difficulty workers with specialized skills experience in finding work within their industry, as opportunities to use those skills are explicitly foreclosed by non-compete agreement.”¹⁴⁰

But this study also recognized that not every non-compete agreement should be treated equally.¹⁴¹ That is, the study focused on the negative effects of agreements that employers thrust on employees with little to no prior discussion.¹⁴² But when discussing those negative effects on employees that had a clear opportunity to negotiate the agreement—thereby mitigating the bargaining power of the employer—the study stated that those situations “ameliorate[] the aforementioned negative consequences for workers.”¹⁴³ Essentially, an employer’s clear effort to draft a reasonable agreement—and to include the employee in that effort—balances the protection of an employer’s expense in training the employee and retaining competitive business practices with the limited mobility, freedom, and economical use of the employee’s skills.

Like Marx and Fleming’s study, other professionals researching the economic effects of non-compete agreements also agree that a fairly bargained for and clearly explained non-compete agreement might effectively balance the benefits to an employer with the restrictions to an employee’s mobility.¹⁴⁴ Moreover,

¹³⁶ See *id.* at 49.

¹³⁷ *Id.*

¹³⁸ See *id.* at 48.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 59.

¹⁴² See *id.* at 49.

¹⁴³ *Id.* at 59.

¹⁴⁴ See Duarte Geraldino, *What You Should Know About Noncompete Agreements*, PBS NEWSHOUR (July 14, 2016, 6:11 PM), <http://www.pbs.org/newshour/making-sense/know->

according to Russel Beck, an attorney who specializes in business and intellectual property litigation, “over 50 percent of [employees] admit to taking information when they leave.”¹⁴⁵ And for an industry focused on larger, established businesses—such as Nevada’s, where casinos and hotels fuel the state’s highly competitive economy—non-compete agreements are more favorable because they protect employers’ legitimate business interests from debilitating dispersals to established competitors.¹⁴⁶

Additionally, in an industry where subtle price changes and unique business practices can spell the success or failure of large businesses, a non-compete agreement is instrumental in preserving even a slight competitive edge.¹⁴⁷ And even though non-compete agreements pose disadvantages to a quickly growing entrepreneurial or small-business focused economy, that speedy growth and mobility would not be a primary focus in an economy centered on large, established companies.¹⁴⁸ Thus, an employer in an established industry—one that exercised all caution in trying to draft a reasonable non-compete agreement but narrowly missed the target—is essentially left helpless even to an employee who intentionally steals information and uses his or her training and skills from the past-employer to assist a clear competitor. Further, in that limited situation of reasonable efforts toward negotiation and drafting,¹⁴⁹ the clear benefit to a blameworthy employee’s mobility comes at a dramatically imbalanced harm to a competitive employer in an established industry.

non-compete-agreements/ [<https://perma.cc/4GA9-7K9U>] (interviewing attorney Russell Beck, who specializes in business and intellectual property litigation and has an influential blog on the subject, to discuss why businesses use non-competes).

¹⁴⁵ *Id.*

¹⁴⁶ *See id.* (stating that non-compete agreements are “used and seen as more favorable if the state is trying to encourage larger companies to thrive,” but explaining that the agreements may harm small, entrepreneurial environments).

¹⁴⁷ *See* *Everett J. Prescott, Inc. v. Ross*, 383 F. Supp. 2d 180, 190 (D. Me. 2005), *amended by*, 390 F. Supp. 2d 44 (D. Me. 2005) (explaining how it is detrimental for an employer to lose an employee to a competitor if that employee knows how to “distinguish between [the employer’s] core and occasional customers, between those who negotiate for price and those who do not, [and] between the quick and slow pays.” Moreover, without any restriction on an employee’s future employment, the employee can presumably use this information to undercut the previous employer and affect the employer’s relationships with vendors or customers at large).

¹⁴⁸ *See id.*; *see generally*, OFFICE OF ECON. POL’Y, U.S. DEP’T OF THE TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 23, 26 (2016) (stating that “more stringent enforcement [of non-compete agreements] is negatively related to both employment growth and entrepreneurship,” but “[e]nhancing the transparency of non-competes, better aligning them with legitimate social purposes like protection of trade secrets, and instituting minimal worker protections can all help to ensure that non-compete contracts contribute to economic growth without unduly burdening workers.”).

¹⁴⁹ *See* OFFICE OF ECON. POLICY, U.S. DEP’T OF THE TREASURY, *supra* note 148, at 13 (explaining that only “10 percent of workers with non-competes report bargaining over [those agreements].”).

Overall, studies such as the one by Marx and Fleming highlight the potential disadvantages of non-compete agreements that lack any clear negotiation between the employer and employee. But they also show that those few non-compete agreements that involve considerable discussion between the employer and employee—including a focused effort to protect the employer’s interest in balance with the restriction to the employee—could reduce those disastrous effects. Accordingly, the remaining portions of this Note will present Nevada with necessary changes to perfect its current law, AB 276. These changes recognize that the employer must not have the luxury of knowing that its non-compete agreement will be revised if found unreasonable;¹⁵⁰ but the employee must not have the ability to break from all unreasonable non-compete agreements.

V. AN ARGUMENT FOR NEVADA TO AMEND ITS LEGISLATION ON REVISING NON-COMPETE AGREEMENTS

The central downfall of AB 276 is that it neglects the dissenting Justices’ argument in *Islam* that Nevada should only modify non-compete agreements in limited circumstances.¹⁵¹ AB 276 also dismisses numerous studies that illustrate the harms of an all-encompassing revision standard for unreasonable non-compete agreements,¹⁵² and it removes the courts’ discretionary ability to refuse modification if the facts of a case do not warrant any leniency to the employer.¹⁵³ But the legislature is not without recourse. Nevada can amend the language that AB 276 added to NRS 613 so that it reads (the proposed changes being shown below as crossed out or italicized language):

5. If an employer brings an action to enforce a noncompetition covenant and the court finds the covenant is supported by valuable consideration but contains limitations as to time, geographical area or scope of activity to be restrained that are not reasonable, impose a greater restraint than is necessary for the protection of the employer for whose benefit the restraint is imposed and impose undue hardship on the employee, the

¹⁵⁰ Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127, 1151–52 (2009) (explaining that when an employer intentionally drafts an unreasonable non-compete agreement, knowing that it will be reformed by the courts, it has a dramatic effect on other employers, employees, “and, potentially, on the market.”).

¹⁵¹ *Golden Rd. Motor Inn, Inc. v. Islam*, 376 P.3d 151, 162–63 (Nev. 2016) (Hardesty, J., dissenting) (“Reformation is an equitable remedy, and here, the equities run in favor of Atlantis and against the employee who admittedly stole trade secret information from her employer to use in her new casino host job for a competitor.”). Essentially, the dissent argued that Nevada should elect to modify non-compete agreements in a limited circumstance: where there is no evidence of bad faith on the part of the employer, and the facts of the case show that the equities run in favor of enforcing the agreement under reasonable terms.

¹⁵² See Pivateau, *supra* note 7, at 689 (stating that a wide-open practice of blue-penciling “permits employers to overreach, and in so doing, harms employees.”).

¹⁵³ The language in AB 276 states that the courts “shall revise,” which courts interpret as a command; as opposed to the “may revise” language. Assemb. B. 276, 2017 Leg., 79th Sess. (Nev. 2017); 82 C.J.S. § 498 (2017) (“In a statute, ‘shall’ is a mandatory, directory term that does not afford discretion in fulfilling its command.”).

court ~~shall~~ may revise the covenant to the extent necessary and enforce the covenant as revised if the employer provides evidence that:

- a. It did not intentionally overreach in drafting the terms to the non-compete agreement; and
 - b. It did not use its greater bargaining power to force the employee into accepting the restrictive terms of the non-compete agreement;
6. If the court decides to revise a covenant, any revisions as to time, geographical area and scope of activity must cause the limitations contained therein to be reasonable and to impose a restraint that is not greater than is necessary for the protection of the employer for whose benefit the restraint is imposed.

This amendment to Nevada’s newly enacted legislation balances the legislature’s policy to protect employers with the judiciary’s policy to only revise non-compete agreements when the equities of a case merit such action.¹⁵⁴

Looking to the text of this Note’s proposed amendment, the demand for evidence of a fairly negotiated agreement in proposed Subsections 5(a) and (b) ensures that an employer is never rewarded for intentionally overreaching in the terms of the agreement. This recognizes the harmful effects on the employee when an employer knows an unreasonable agreement will always be reformed.¹⁵⁵ Further, the change in language from “shall revise” to “may revise” in Section 5 allows courts to use their own discretion to modify an agreement—thereby following the appeal of the dissenting Justices in *Islam* that courts evaluate the facts of each case to determine whether it deserves the courts’ equitable power to reform.¹⁵⁶

The proposed amendment is not enough by itself, however. While its language tells courts what evidence to look for in each case, it does not provide any method for the courts to accomplish that task. Thus, the following discussion will outline two other states’ perfected methods for revising non-compete agreements. The discussion will then explain how Nevada courts should adopt similar procedures.

A. Nevada’s Employment Demographics Are Better Served by Limited Instances Where Courts Can Modify Non-Compete Agreements

Several states have found success in modifying non-compete agreements by searching for evidence of “good faith” through a burden-shifting analysis where the parties must prove that the employer did or did not attempt to overreach and

¹⁵⁴ See Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J., 107, 175–76 (2008), for a detailed discussion on the harm of a standard that allows courts to reform all unreasonable non-compete agreements. In line with that discussion, the limited instances in this proposed amendment mitigate those harms by preventing any employer’s attempt to intentionally overreach in drafting a non-compete agreement.

¹⁵⁵ *Id.* at 176.

¹⁵⁶ See discussion *supra* Section IV(a)(ii).

disadvantage the employee in drafting the agreement.¹⁵⁷ That is, some courts essentially request specific facts from the parties that show the employer drafted an agreement with the intent to include only fair, reasonable terms for their employee.¹⁵⁸ If a court were to find this effort, it can then modify the agreement to make it reasonable by blue-penciling the agreement through either modification or striking of unreasonable terms.¹⁵⁹

An example of a practical good-faith method comes from the United States District Court for the Southern District of New York's decision in *Estee Lauder Companies Inc. v. Batra*.¹⁶⁰ In *Estee Lauder*, Batra was the "Global General Brand Manager" responsible for overseeing all aspects of a branch of Estee Lauder.¹⁶¹ At the beginning of Batra's employment, Batra signed an agreement that contained confidentiality, non-solicitation, and non-compete provisions.¹⁶² The non-compete portion of the employment agreement stated:

[D]uring your employment with the Company, and for a period of twelve (12) months after termination of you [sic] employment with the Company, regardless of the reason for the termination, you will not work for or otherwise actively participate in any business on behalf of any Competitor in which you could benefit the Competitor's business or harm the Company's business by using or disclosing Confidential Information. This restriction shall apply only in the geographic areas for which you had work-related responsibility during the last twelve (12) months of your employment by the Company and in any other geographic area in which you could benefit the Competitor's business through the use or disclosure of Confidential Information.¹⁶³

The principal issues before the court were whether the terms of the non-compete agreement were unreasonable, and, if the terms were unreasonable, whether the court could modify the terms under New York state law.¹⁶⁴

At the time of the dispute, New York state law allowed a court to modify an unreasonable agreement if "the employer demonstrate[d] an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct, but has *in good faith* sought to protect a legitimate business interest, consistent with reasonable standards of fair dealing."¹⁶⁵ Specifically, New York law required the employer to show that the particular terms in the agreement guarded precisely the information needed, and only covered the actual ways that the employee could disseminate that information; an employer could not simply

¹⁵⁷ See RESTATEMENT (SECOND) OF CONTRACTS § 184 (AM. LAW INST. 1981) (reformation is permitted "if the party who seeks to enforce the term obtained it in good faith and in accordance with reasonable standards of fair dealing.").

¹⁵⁸ See *id.*

¹⁵⁹ See Pivateau, *supra* note 7, at 673.

¹⁶⁰ *Estee Lauder Cos. Inc. v. Batra*, 430 F. Supp. 2d 158 (S.D.N.Y. 2006).

¹⁶¹ *Id.* at 161.

¹⁶² *Id.* at 162.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 177.

¹⁶⁵ *Id.* at 180 (emphasis added).

create an expansive non-compete agreement that the employer would use to generally restrain the employee in the future.¹⁶⁶

In analyzing the non-compete agreement, the *Estee Lauder* court held that the agreement seemed to be reaching farther than necessary because the agreement called for a global restraint on Batra's future employment.¹⁶⁷ However, when the court examined the potential harms to Estee Lauder that the agreement protected, it found that the geographical provision was closely tailored to the widespread, international reach of Estee Lauder's competition.¹⁶⁸ But the non-compete agreement was unreasonable in its twelve-month temporal duration.¹⁶⁹ The district court stated three reasons for its conclusion that the temporal duration was unreasonable: (1) other agreements against Estee Lauder with the same twelve-month duration had previously been found unreasonable; (2) when other employees were in similar positions, courts reduced the non-compete agreement from six months to between four and five months; and (3) Estee Lauder offered Batra a reduction in the duration of the agreement from twelve months to four months after his employment ended.¹⁷⁰

Altogether, the district court faced an agreement that was both reasonable and unreasonable. This partial reasonability suggested that the agreement was in fact made in good faith, and was therefore eligible for modification.¹⁷¹ Consequently, the court modified the agreement to last five months, not the original twelve months as previously contracted.¹⁷²

Looking at the *Estee Lauder* decision as a whole, the District Court for the Southern District of New York provided the basic groundwork for any court to analyze a contract for both reasonability and good faith. Namely, the court's initial determination concerns what business interests the employer must protect, which provides a baseline for which interests the non-compete agreement should encompass. Then, if a court finds the non-compete agreement aligns with those specific interests, the remaining inquiry is whether any provisions of the contract are reasonable or whether any specific facts show that the employer otherwise exercised good faith in drafting the agreement.¹⁷³ Once a court establishes good faith, it may then modify the agreement as necessary.

The *Estee Lauder* decision also highlights a consistent procedure that allows a court to remain skeptical toward non-compete agreements while also respecting

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 180–81.

¹⁶⁸ *Id.* at 181.

¹⁶⁹ *Id.* (“[I]t is determined that the period of time set forth in the agreement and advanced here is greater than necessary to adequately protect Estee Lauder's trade secrets and to protect the interests of Batra.”).

¹⁷⁰ *Id.* at 181.

¹⁷¹ *See id.* at 180–82.

¹⁷² *Id.* at 182.

¹⁷³ *Id.* at 180 (stating that partial enforcement may be justified if “the employer . . . has in good faith sought to protect a legitimate business interest. . .”).

the parties' intent to contract. Additionally, *Estee Lauder* is not the only case that demonstrates the good-faith requirement's beneficial and simplistic approach to non-compete agreements. The Supreme Court of Appeals of West Virginia in *Reddy v. Community Health Foundation of Man* also provided a detailed, structured opinion discussing the advantages of the good-faith analysis when an agreement does not contain certain reasonable provisions.¹⁷⁴

Reddy v. Community Health Foundation of Man dealt with a physician, Yasa J.M. Reddy, M.D., who came to the community of Man, West Virginia in 1977 to practice medicine.¹⁷⁵ In 1979, Reddy entered into several contracts with the Community Health Foundation of Man (the "Foundation"), a nonprofit corporation providing medical services in the city area.¹⁷⁶ The case focused particularly on the fourth employment contract between Reddy and the Foundation, which stated:

The physician covenants and agrees that he will not practice medicine within a radius of thirty (30) air miles of Man, West Virginia, for a period of three (3) years, after the termination of said agreement with the Foundation, which restrictive covenant shall be effective regardless of whether this agreement is terminated by action of either the Foundation or the physician or the expiration of the period provided for therein.¹⁷⁷

The contract posed several major issues, however, because of Reddy's previous employment as a physician in Man before he agreed to work with the Foundation.¹⁷⁸ That is, Reddy was not an employee of the Foundation; he was a doctor retained to supplement its regular staff. Further, he worked as an emergency room doctor both before and during the period that the non-compete agreement remained in effect.¹⁷⁹ Thus, the Supreme Court of West Virginia needed to determine the legitimate interests at issue in the agreement, and lay out a procedure to evaluate the reasonableness, and thereby enforceability, of the non-compete agreement.¹⁸⁰

The Supreme Court of West Virginia in *Reddy* began its analysis by explaining its highly skeptical approach toward non-compete agreements. The decision stated that courts should "approach restrictive covenants with grave reservations, and take a strict view of them on first impression."¹⁸¹ The court evaluated the agreement at issue in *Reddy* with that skepticism by first looking to the terms of the agreement on their face.¹⁸² That is, the court initially looked for whether the agreement was excessively broad in regards to time or area, or if the agreement's

¹⁷⁴ *Reddy v. Cmty. Health Found. of Man*, 298 S.E.2d 906, 911 (W. Va. 1982).

¹⁷⁵ *Id.* at 908.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 909.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 911.

¹⁸¹ *Id.* at 915.

¹⁸² *Id.*

true purpose appeared to merely harm the employee rather than serve the employer's legitimate interests in protecting valuable information.¹⁸³ And in this first step, the court expressed its lack of hesitation to strike the agreement as utterly void and unenforceable.¹⁸⁴ But the court also expressed its leniency for agreements that ultimately survive this initial evaluation. The court explained that when an agreement is facially reasonable, the parties have demonstrated a sign of good faith.¹⁸⁵ With that initial sign of good faith, moreover, the court could then proceed with additional analytical steps with the assumption that the employer has likely not attempted to over-reach at the employee's disadvantage.¹⁸⁶

After evaluating the facial reasonableness step, the court in *Reddy* then addressed the issue of tailoring the agreement.¹⁸⁷ The court found that judicial molding of the agreement was a remedy available to the parties in an attempt to find the "rule of best result."¹⁸⁸ With the rule of best result, the court could look to the non-compete agreement and narrow the terms so that it conformed to reasonable requirements.¹⁸⁹ Further, this analysis of the "best result" was largely a product of assigned burdens on the parties.¹⁹⁰ That is, the analysis involved a balancing test where the court first turned to the employer, who held the burden to explain how each term in the agreement related to a legitimate protectable interest.¹⁹¹ Thereafter, the employee had his or her turn to show that either (1) the agreement covers interests that belong to the employee rather than the employer, or (2) that the agreement will unnecessarily overprotect the employee because the agreement favors the employer much more than it favors the employee.¹⁹²

Altogether, the *Reddy* decision outlined the three-step analysis that West Virginia courts follow with non-compete agreements:

- (1) The court must determine that the covenant is reasonable, and is being used reasonably by the employer. If not, the covenant is set aside. If the covenant is inherently reasonable the inquiry continues.
- (2) The employer must show, under the circumstances, what legitimate interests of his are implicated. When these are established, the reasonable covenant is presumptively enforceable in its entirety.
- (3) The employee is then given the chance to rebut the presumptive enforceability of the covenant by showing either that he has no company trade assets to abuse,

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *See id.* at 915–16 (“If the reviewing court is satisfied that the covenant is reasonable on its face, hence within the perimeter of the rule of reason, it may then proceed with analysis leading to a ‘rule of best result.’”).

¹⁸⁶ *Id.* at 917.

¹⁸⁷ *Id.* at 916–17.

¹⁸⁸ *Id.* at 916.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 916–17.

or that the assets made available to him properly belong to him, or that the interests asserted by the employer may be protected by a partial enforcement of the covenant. If the employee prevails in this latter regard then the covenant may be tailored by the court to comport with the equities of the case.¹⁹³

In the end, however, the *Reddy* court did not tailor the terms of the agreement.¹⁹⁴ Instead, the court remanded the decision for further fact finding by the lower court.¹⁹⁵ The Supreme Court of Appeals instructed the lower court to determine whether enforcing the non-compete agreement was essential to the successful operation of the Foundation as well as other businesses that provide medical services.¹⁹⁶

B. A Practical Burden-Shifting Framework to Invoke Limited Instances of Modification

The *Estee Lauder* and *Reddy* decisions demonstrate practical approaches that Nevada courts could adopt to decide when to pick up the blue-pencil under this Note's proposed amendment to AB 276. And combining those approaches with the dissenting Justices' argument in *Islam* provides a modern analysis directly tailored to the concerns of Nevada courts. Accordingly, Nevada should adopt the following two-step procedure to modify any future unreasonable non-compete agreements that fall into the limited circumstances of this Note's proposed legislative amendment.

In the first step, the employer has the initial burden to prove to the court that the disputed non-compete agreement possesses two qualities: (a) that the terms of the agreement are nearly reasonable on their face when compared to recent, prior cases in the same industry as the present matter;¹⁹⁷ and (b) that the agreement's restrictions actually protect the employer's important interests. Then, in a second step, the employer must prove that it proactively engaged in an open, balanced discussion on the terms of the non-compete agreement with the employee early on in negotiations.¹⁹⁸ If the employer did carry that second-step burden, the employee would then have a chance to rebut that evidence by offering additional evidence or directly disputing the employer's offered evidence.

¹⁹³ *Id.* at 917.

¹⁹⁴ *Id.* at 920.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ A court would determine whether the employer satisfied this prong by looking solely to the four-corners of the agreement in accord with the court's practice in *Reddy*. *Id.* What a court would find as "nearly reasonable" would be at the discretion of the court in line with the court's equitable power.

¹⁹⁸ This second step would align with the court's practice in *Estee Lauder*, which requires the employer to show that the specific terms in the agreement guard precisely the information needed and only covered the actual ways that the employee could disseminate his or her unique skill or knowledge. *See Estee Lauder Cos. Inc. v. Batra*, 430 F. Supp. 2d 158, 180 (S.D.N.Y. 2006).

To explain this process in more detail, part (a) of the first step of the analysis would involve a comparison of the present terms of an agreement with past precedent from both Nevada courts and similarly situated jurisdictions—a process that a court would have to go through to consider an agreement’s reasonableness in any case challenging a non-compete agreement. Similarly, part (b) of the first step would involve a court’s analysis of the business at issue and how the non-compete agreement protects the interests of that business—again, a process that a court would have to go through to consider an agreement’s reasonableness in any case challenging a non-compete agreement. The second step would then require the employer to provide evidence of a clearly negotiated, equally bargained for agreement (e.g., periodic meetings with the employee; a clear discussion of the non-compete agreement’s terms with the employee; an explanation of the benefits that the employer will gain at the expense of the employee; an opportunity for the employee to object to any terms). Further, the employee would have the chance in this step to dispute that evidence through, for example, evidence of: an employer’s insincere negotiations before the ultimate signature of the non-compete agreement; the lack of an opportunity to consult independent counsel; the absence of an opportunity to ask questions; any denial of the employee’s suggestions; or any attempt by the employer to force the employee to agree to the original terms without change. This highly skeptical and demanding step would ensure that the facts of each case eliminate any suggestion that the agreement was thrust on the employee or agreed to because of imbalanced positions—thereby extinguishing the potential harms to the public that are discussed in Marx and Fleming’s above-mentioned article.¹⁹⁹

These stages of scrutiny would also involve considerable discretion by the court to declare an agreement void or enforceable in accordance with the dissent’s argument in *Islam*.²⁰⁰ That is, if the terms were far outside any reasonable limit in the first step, courts could immediately scrap the agreement and declare it void. Likewise, even if the agreement were close to reasonable, a court could exercise its discretion to pick up the blue pencil or not. The ultimate decision to protect the employer in each specific situation would lie with the court’s consideration of the defendant’s culpability, the ultimate balance of hardships between the parties, the public interest in limiting the employee in an industry, and the need for the advancement of an entrepreneurial and innovation-friendly industry.²⁰¹ This discretionary-fueled action, paired with the burden-shifting schemes

¹⁹⁹ See discussion *supra* Part V.

²⁰⁰ *Golden Road Motor Inn, Inc. v. Islam*, 376 P.3d 151, 165 (Nev. 2016) (Hardesty, J., dissenting).

²⁰¹ The culpability of the defendant was a substantial reason that the dissent in *Islam* advocated for the court to modify the non-compete agreement in that particular case. See *id.* at 163 (“Reformation is an equitable remedy, and here, the equities run in favor of Atlantis and against the employee who admittedly stole trade secret information from her employer to use in her new casino host job for a competitor.”).

discussed in *Reddy*, would then guide Nevada courts to consistently yet equitably resolve disputes over non-compete agreements.²⁰²

C. *The Benefits to Nevada's Public Policy from the Proposed Statutory Amendment and Burden-Shifting Framework*

If the Supreme Court of Nevada were to adopt the process outlined above,²⁰³ the burden-shifting framework would serve the central public policy concerns of the Nevada judiciary expressed in *Islam*. For instance, one of the Nevada judiciary's primary concerns from *Islam* in revising non-compete agreements was the potential increase of intentional overreach by employers; but this process satisfies that concern because each step incorporates the judiciary's discretion to refuse to revise based on the facts of the case—ensuring that no party can absolutely predict the outcome.²⁰⁴ Similarly, the court's decisions under this process allow a court to evaluate an agreement by following strict procedural requirements: a showing of facial reasonability based on provisions of an agreement; an initial burden on the employer to show the agreement covers only necessary interests; and a final burden on the employee to show that the agreement runs against the equities and in favor of unenforceability.²⁰⁵ Therefore, this burden-shifting framework will almost certainly smoke out any intentional overreach by an employer because every stage of the framework charges the employer will proving such overreach *didn't* exist, meaning it has to overcome a presumption of overreach.

These procedural requirements, mixed with the discretionary actions of the judiciary, would also have the added effect of addressing the Nevada judiciary's concerns of judicial resources because it would utilize the time, effort, and research already spent litigating the reasonableness of an agreement. That is, the court would craft a final, reasonable agreement based on the hours already spent defining what reasonable terms are in the first stage of analysis. That use of already expended resources, paired with the fact that only roughly 10 percent of employees with non-compete agreements report bargaining for the agreement,²⁰⁶ suggests that the potential influx of cases that may require the judiciary to go through the full process of modification would likely be insubstantial—especially since most cases would be dismissed at the first stage of the burden-shifting framework based on clear overreach by the employer.

²⁰² See *Reddy v. Cmty. Health Found. of Man*, 298 S.E.2d 906, 916–17 (W. Va. 1982).

²⁰³ See discussion *supra* Sections V(a)–(b).

²⁰⁴ See *Garrison & Wendt*, *supra* note 154, at 130–31 (“The policy concern about overreaching by employers is resolved by refusing to permit reformation where employers have deliberately drafted unreasonable provisions.”).

²⁰⁵ See Viva R. Moffat, *Making Non-Competes Unenforceable*, 54 ARIZ. L. REV. 939, 949 n.43 (2012) (explaining how the *Reddy* decision highlights how a quick-look analysis of facial reasonability provides a manageable in-or-out procedure for modifiable non-compete agreements).

²⁰⁶ OFFICE OF ECON. POL'Y U.S. DEP'T OF THE TREASURY, *supra* note 148, at 13.

In sum, an employer would simply have no clear answer whether its agreement would be modified if found unreasonable under the proposed burden-shifting analysis.²⁰⁷ Although the process may be somewhat inconsistent based on its case-by-case analysis, it is this case-by-case analysis that is the essence of an equitable remedy—to bring the fairest result in a specific situation as opposed to a rigid, technical process.²⁰⁸ Even further, this burden-shifting procedure would not trample the parties' intent to form the non-compete agreement because it would allow a court to fashion the best possible terms of the agreement—terms that cleanly align with the employer's expectations, the employee's rights, and public interest.²⁰⁹

CONCLUSION

The legislature's recent passing of AB 276 is a move toward the protection of Nevada's competitive industries. But this movement should have been a step, not a leap. Nevada should not have forced courts to revise *every* unreasonable non-compete agreement. Rather, Nevada should have enacted an amendment that *allowed* courts to modify unreasonable non-compete agreements in only limited circumstances: where the non-compete agreement was the product of a fair, even-powered negotiation between the employer and their employee. Courts could then interpret that amendment through a burden-shifting analysis, where courts place the burden on the employer to prove that the negotiations surrounding the agreement were fair and evenly bargained. This process would retain the vital role of skepticism toward the employer, while also safeguarding confidential practices, expenses, and resources that are pivotal to the development of Nevada's central industries.

²⁰⁷ See *supra* discussion Part VI (“Likewise, even if the agreement were close to reasonable, a court could exercise its discretion to pick up the blue pencil or not.”).

²⁰⁸ See Doug Rendleman, *The Trial Judge's Equitable Discretion Following Ebay v. Mercexchange*, 27 REV. LITIGATION 63, 73 (2007) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (“Once a [plaintiff's] right and a [defendant's] violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.”)).

²⁰⁹ See *Cent. Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 37 (Tenn. 1984).