To: Ohio Senate Judiciary Committee
From: Mike Pierce, Executive Director, Student Borrower Protection Center
Date: March 4, 2025

Subject: Written Testimony on Senate Bill 11

Chair Manning, Vice Chair Reynolds, and Ranking Member Hicks-Hudson, thank you for the opportunity to submit written testimony today in support of Senate Bill 11, a bill to prohibit post-employment agreement restraining career or business.

My name is Mike Pierce and I am the executive director of the Student Borrower Protection Center. We are a nonprofit organization focused on protecting students, borrowers, workers, and their families from the negative effects of debt across their economic lives. In Ohio and across the country, employers use debt and the threat of debt collection as a "functional non-compete" agreement—tying workers to their employers, suppressing wages and limiting mobility in the labor market.

Our organization has spent more than three years studying the effects of employer-driven debt on workers, honest businesses, and the broader economy. What we have found is shocking. Across the economy, employers use contract clauses known as Training Repayment Agreement Provisions ("TRAPs") to put workers—including low-wage, entry level, and retail workers—on the hook for thousands of dollars in debt to repay employers' so-called "training" costs.[1] In some cases these debts purport to compensate employers for the cost of employers' orientation programs or training videos required by local, state, or federal laws and regulations. In all cases, TRAPs have the same effects as non-competes—employers use the chilling threat of debt collection to lock workers in place, creating conditions that allow employers to suppress wages, punish union activity, and limit worker mobility.[2]

SB-11 would prohibit any agreement "that requires a worker who terminates the work relationship to reimburse the employer for an expense incurred by the employer during the relationship for training, orientation, evaluation, or other service intended to provide the worker with skills to perform the work or to improve performance."

This is a complete ban on TRAPs that is transparent and easily enforceable—and is precisely the correct policy remedy to the market failures we have identified in our research and litigation. Narrowing this ban to, for example, limit protections only to lower-wage workers or exempting certain classes of employers or workers from this legislation would have the opposite of its intended effect—making enforcement challenging for all workers and giving employers a

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[1] For further discussion, see Student Borrower Protection Center, *Trapped At Work: How Big Business Uses Student Debt to Restrict Worker Mobility* (July 2022), https://protectborrowers.org/wp-content/uploads/2022/07/Trapped-at-Work_Final.pdf.
[2] *Id.*, see also Student Borrower Protection Center et. al., *Stay-or-Pay: Federal Actions to End Modern-Day Indentured Servitude Across the Economy* (December 2023), https://protectborrowers.org/stay-or-pay-compendium/.

roadmap to further perpetuate the harms caused by TRAPs across significant segments of the Ohio economy. Only a clean, categorical ban will ensure all workers are protected.

Attached, please find for the record an article by law Professor Jonathan Harris, who also serves as a Senior Fellow at the Student Borrower Protection Center.[3] In this article, Professor Harris further explains why TRAPs and other stay-or-pay contracts harm workers and competition, making the case for action to ban these harmful contracts.

Professor Harris and I are both available to answer any questions the Ohio Senate may have in the future on these issues and applaud your effort to address this critical problem. Workers and honest businesses across Ohio will immediately benefit from this legislation and we strongly encourage the Ohio Legislature to quickly pass SB-11 in its current form.

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[3] Appendix A

ANTITRUST ✦ BLOG ESSAY JANUARY 5, 2025

History Absolves the FTC: A Defense of the Rule on Non-Competes and Functional Non-Competes

JONATHAN F. HARRIS

The Federal Trade Commission's (FTC's) Non-Compete Clause Rule (the "Rule"), finalized in spring 2024, effectively bans all non-compete clauses and "functional" non-compete clauses based on their anti-competitive effects on labor markets. The FTC issued the Rule under its Unfair Methods of Competition (UMC) authority under Section 5 of the FTC Act. Employers and their trade groups immediately filed legal challenges, and the Rule was subsequently enjoined by two federal judges but upheld by a third. The injunctions were generally based on disagreement with the FTC's ability to issue substantive rules and on the major questions doctrine. This blog post offers a historical overview of FTC actions to argue that the injunctions were improper, especially with regard to the Rule's prohibition of "functional" non-competes that operate to prohibit or penalize workers for obtaining other work. This history belies opponents' arguments that the Rule implicates the major questions doctrine and that the

FTC is only now beginning to exercise its UMC authority against anticompetitive practices affecting workers.

For close to a century, the FTC has intervened in employment and job training practices in ways consistent with the Rule. Specifically, the FTC has exercised its UMC authority to rein in anti-competitive practices in job training by shuttering correspondence schools and in-residence courses that falsely claimed to place enrollees in government jobs, be university or government affiliated, train for in-demand careers or civil service examinations, or match enrollees with quality careers. The FTC has also pursued for-profit colleges and universities that inflated employment numbers for graduates. The justification for these actions has been the practices' harm to competitors and labor markets.

The FTC's most recent exercise of authority in this area is through the Rule's prohibition of functional non-competes including Training Repayment Agreement Provisions (TRAPs) that function to prohibit or penalize workers for obtaining other work or starting a business after their employment ends. TRAPs require workers to repay the supposed costs of their training if they leave work or are terminated within a set period of time. They are commonly used as workarounds to non-competes but can have even more harmful effects on workers than traditional non-competes.

Just as employers routinely devise new anti-competitive job training schemes, so too must the FTC respond to those new schemes consistent with its authority and obligations as delegated by Congress. The history recounted in this piece underscores that the Rule is squarely in line with the FTC's tradition of reining in novel anticompetitive practices affecting workers.

I. The Rule is supported by close to a century of FTC regulation of labor markets, specifically regarding anti-competitive job training schemes.

Since the 1930s, the FTC has exercised its authority under Section 5 of the FTC Act — including its authority over "unfair methods of competition" — to pursue firms that deceive workers and trainees. This history includes the FTC's frequent targeting of correspondence schools that falsely promised robust training, jobs, or affiliations with government agencies in a period lasting through the 1960s. For example, in 1935, the Sixth Circuit in *Federal Trade Commission v. Civil Service Training Bureau, Inc.* upheld an FTC order against a correspondence school for its use of UMCs. The court agreed with the FTC that the correspondence school was improperly using the words "Civil Service" and "Bureau" in its name, which had "a tendency to create, and . . . actually created, the belief that [the correspondence school] represented or ha[d] an official connection with the United States

Civil Service Commission, or that it [wa]s a bureau or agency of the United States government." Additionally, few if any of the positions the correspondence school supposedly trained applicants for actually had a required examination. Likewise, the private correspondence school implied that there were government jobs available and that it was an agent of the government.

In discussing these findings, the court dismissed the correspondence school's contention that the FTC's UMC authority extended only to instances where companies' conduct "result[s] in a practical monopoly in the trade." Instead, the court affirmed that the FTC's UMC authority extends to any instance where the Commission can identify "the existence of three prerequisites: (1) That the methods complained of are unfair; (2) that they are methods of competition in interstate commerce; and (3) that the proceeding by the commission to prevent the use of the methods appears to be in the interest of the public." Moreover, the court affirmed that the FTC Act applied to the case precisely because the Act "applies to unfair methods of competition."

Similarly, the Seventh Circuit in 1943 affirmed an FTC order against an electronics training provider that operated both correspondence and in-residence classes based on the school's assurances that its graduates would obtain jobs in the television field. At that point, the commercial development of televisions was not sufficiently advanced to assure immediate employment despite the school's advertising.

A year later, the Seventh Circuit declared that the FTC had jurisdiction to pursue another correspondence school, the "Joseph G. Branch Institute of Engineering and Science," under UMC and other authorities on the grounds that the school targeted trainees in Latin America. In particular, the Commission found that the private company mailed textbooks, instructions, and written examinations to trainees and deceptively used the name "Institute" to imply that it was a university or other higher education institution recognized by a United States governmental entity. Moreover, the correspondence school had "no entrance requirements, no resident students, no library, no laboratory, and no faculty." The court upheld that this conduct violated the FTC Act, and that the FTC's action against the school was valid to the extent that it "was aimed at compelling the [Institute] to use fair methods in competing with his fellow countrymen."

In yet another case in 1955, the Ninth Circuit upheld an FTC cease and desist order against Tractor Training Service for falsifying job prospects for trainees enrolled in its correspondence school. The training involved forty-six home study assignments on diesel engines and tractor equipment. Company officials falsely represented that employers in the diesel and tractor industries were backing the training program and that graduates of the program were in demand. Moreover, the company falsely claimed it had a job placement service, that applicants to the program were screened based on qualifications, that on-the-job training was available, and that refunds were available to those who failed examinations or did not finish the course or secure employment. According to those in the industry, the correspondence school did not provide the qualifications necessary to obtain employment.

Likewise, the Ninth Circuit in 1957 upheld an FTC order restraining the operator of a correspondence school from representing that it had been approved for training by the Bureau of Education of California and the United States Veterans' Administration. In this case, the operator had its salespeople show prospects photos of those agencies' approvals of the operator's former in-residence course, thereby deceptively implying that the correspondence course was also approved. The court in that case noted that addressing the school's conduct "accords with the policy of the [FTC] Act to stop unfair methods of competition in their inception."

And, in 1963, the Fifth Circuit sustained an FTC order that a correspondence school targeting trainees preparing for civil service examinations cease and desist from making a wide range of dubious representations. Those representations included that examinations for specific positions were upcoming and that one would pass the examination by completing the training, that applicants were screened for qualifications prior to purchasing the course, that the school would continue training individuals until they passed an examination and obtained jobs, or that the school was affiliated with a governmental agency.

This history of the FTC using its tools to hold unscrupulous companies accountable in the worker training space has continued. Almost a decade ago, for example, the FTC entered into a settlement with DeVry University related to claims that the for-profit college chain misled those aiming to enter the workforce. In particular, the FTC alleged that DeVry had falsely claimed in a range of advertisements that "90%" of DeVry graduates had "careers in their field in six months," and that DeVry graduates generally earned 15% more than graduates of other peer institutions. The FTC noted that hundreds of thousands of DeVry students had been subject to these misrepresentations regarding the employment prospects DeVry could offer. The FTC took similar action to address misstatements about career training opportunities and worker outcomes at institutions including Ashworth College, the University of Phoenix, Sollers Education, and Career Step, LLC.

II. Functional non-competes such as TRAPs are at least as harmful as traditional non-competes.

Non-competes, by their nature, block competition in labor markets, and the FTC is correct in banning them outright. Experience has shown, however, that employers switch to functionally equivalent restraints when specific restrictions on labor mobility are banned. For the Rule to have its intended effect of preventing UMCs, it includes a prohibition of "functional" non-competes. Functional non-competes are those terms that function to prohibit or penalize a worker for "seeking or accepting other work or starting a business after their employment ends." The Rule properly characterizes TRAPs that have such an effect as an example of a functional non-compete that would violate the rule. For instance, a TRAP is a functional non-compete if it burdens employees with "significant out-of-pocket costs" for leaving a job and effectively prevents them from switching jobs. The inclusion of the functional non-compete prohibition helps to ensure that regulators do not play a game of whack-a-mole with inventive employers and their attorneys.

Employers have most recently expanded TRAPs among entry-level workers, including those in the transportation, cosmetology, health care, retail, technology, and finance sectors. Many employers do not hide the fact that they use TRAPs primarily to keep workers from leaving their jobs rather than to recover costs for providing useful general skills training to workers. In fact, some employers and trade groups have openly recommended TRAPs as workarounds to traditional non-competes to accomplish the same goal of forced employee retention in a way that will face less scrutiny than a traditional non-compete.

Many TRAPs can be even worse for workers than traditional non-competes because "preventing workers from working for a competitor may be less onerous to workers than requiring them to pay the employer a substantial sum to quit." For example, a worker with a traditional non-compete might be prohibited from or penalized for working for a competitor but could still work for a non-competitor. With a TRAP, however, the worker must pay regardless of the nature of the next job or even if the worker remains unemployed. These functional non-competes have been deployed against low and low-middle wage workers like pet groomers earning close to the minimum wage, foreign-recruited healthcare workers claiming underpayment and exploitation, cosmetologists claiming to have received no training, and truckers enduring grueling conditions, among others. For these reasons and others, two federal judges have likened TRAPs to indentured servitude, and at least one academic has drawn comparisons with debt peonage.

Calling to mind the FTC cases from almost a century ago, some employers use TRAPs as part of their for-profit training centers and academies for potential and current employees. For instance, according to a recent lawsuit against tech-training and employee staffing agency Smoothstack, Inc., the company "relies on TRAPs to compel its employees to spend '4,000 hours' performing work that Smoothstack can bill to [its] 'Fortune 500' [clients], which do not employ Smoothstack employees directly but instead contract out projects to Smoothstack." "To get new workers to sign up, Smoothstack allegedly sold the 'false hope' of a permanent career at one of these firms — a tactic reminiscent of the recruiting practices used by failed for-profit colleges like Corinthian Colleges, Devry University, and ITT Technical Institute." The TRAP allegedly required entry-level workers who at times earned minimum wages — and sometimes no pay — during their training periods to pay over $20,000 if they failed to complete a certain number of billable hours.

For these reasons, including functional non-competes like TRAPs is essential to ensuring the Rule's effectiveness at eliminating the UMCs that the FTC seeks to prevent.

III. The Rule's prohibition of TRAPs that act as functional non-competes is supported by precedent and does not pose a major question.

The Rule's prohibition of TRAPs that function as non-competes should be viewed as part of the FTC's decades-long history of exercising its authority against training providers and employment agencies that engage in UMCs, as elaborated earlier. In light of this, the Rule is not categorically unprecedented and does not pose a major question as articulated by the Supreme Court of the United States.

In *West Virginia v. EPA*, the Supreme Court explained that the major questions doctrine reflects the principle that Congress does not delegate extraordinary powers to agencies without speaking clearly. But the doctrine comes into play only when there is an "unprecedented" exercise of authority that deals with a matter of "vast economic and political significance" when "an agency [] make[s] a 'radical or fundamental change' to a statutory scheme." Moreover, the doctrine is implicated if the agency purports "'to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in its regulatory authority' . . . in the vague language of 'an ancillary provision' . . . [that] allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself."

The Rule is neither unprecedented nor transformative. As discussed above, since at least 1935, the FTC has carried out enforcement actions against unscrupulous training providers using its UMC authority. Therefore, the Rule is by no means the first time that the FTC has regulated in this area.

Moreover, even if this were the FTC's first time regulating job training schemes, the major questions doctrine does not prevent such an action if the FTC can "point to 'clear congressional authorization' for the power it claims." This clear authorization lies in Section 6(g) of the FTC Act, which empowers the FTC to "make rules and regulations for the purpose of carrying out the provisions of this subchapter." Section 6(g)'s delegation to the FTC of authority to write substantive rules has been emphasized by the U.S. Court of Appeals for the D.C. Circuit. In *National Petroleum Refiners Association v. FTC*, the court confirmed that the "Commission is authorized to promulgate rules defining the meaning of the statutory standards of the illegality the Commission is empowered to prevent." This case remains good law and confirms Congress's unequivocal mandate to the FTC to make rules to rein in UMCs.

CONCLUSION

The century-long story of the FTC's involvement in regulating job training programs shows that the Rule is well-grounded in its prohibition of "functional" non-competes like TRAPs. While the injunctions of the Rule are primarily based in administrative law reasoning, this piece aims to offer a yet unexplored substantive accounting of the FTC's track record of promoting competition in labor markets. This accounting provides support for the Rule in the face of the injunctions.

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* Jonathan F. Harris writes about worker mobility and is an associate professor at LMU Loyola Law School Los Angeles and a senior fellow at the Student Borrower Protection Center (SBPC). SBPC fellow and Harvard Law student Ben Kaufman provided tremendous research and editing support.

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