Testimony of Sandeep Vaheesan, Open Markets Institute
Applauding SB 11
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My name is Sandeep Vaheesan. I am the Legal Director at the Open Markets Institute, an anti-monopoly research and advocacy group based in Washington, D.C. As part of a labor and public interest coalition, the Open Markets Institute petitioned the Federal Trade Commission in 2019 to categorically ban worker non-compete clauses through rulemaking.[1] My colleagues and I have written extensively on the evils of these contracts.[2]

We at the Open Markets Institute applaud the sponsors of SB 11 for prohibiting non-compete clauses for all workers. Importantly, instead of only preventing employers from enforcing these contracts in court, HB 22-1317 outlaws non-competes for all workers and establishes public and private enforcement of this prohibition. Making non-competes illegal—and backing this rule with effective legal sanctions—is essential for deterring employers from using these contracts and thereby protecting workers' freedom to switch jobs or to start their own businesses.

Non-competes reduce labor market mobility and generally depress wages, wage growth, and small business formation.[3] Research has found that non-competes discourage workers from leaving, even when employers cannot legally enforce them in court.[4] In states where non-competes are *unenforceable*, nearly 40% of workers reported turning down a job offer due to a non-compete clause.[5] The existence of non-competes—regardless of whether employers can, or seek to, enforce them—is enough to harm workers. Employers recognize this fact and use non-competes even when they cannot enforce them through litigation. For example, although California law has prohibited judicial enforcement of non-competes since the 1870s (without

[1] Open Markets Institute, et al., Petition for Rulemaking to Prohibit Worker Non-Compete Clauses, https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5eaa04862ff52116d1dd04c1/1588200595775/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf. *See also* Josh Eidelson, *Labor Groups Petition U.S. FTC to Ban Non-Compete Clauses*, BLOOMBERG, Mar. 20, 2019, https://www.bloomberg.com/news/articles/2019-03-20/labor-groups-petition-u-s-ftc-to-prohibit-non-compete-clauses.

[2] *See, e.g.*, Sandeep Vaheesan, *Doctors, Nurses and Patients Could Suffer If Congress Doesn't Outlaw These Contracts*, CNN, July 6, 2020, https://www.cnn.com/2020/07/06/perspectives/non-compete-clauses-health-care/index.html; Amanda Jaret & Sandeep Vaheesan, *Non-Compete Clauses Are Suffocating American Workers*, TIME, Dec. 19, 2019, https://time.com/5753078/non-compete-clauses-american-workers/; Sally Hubbard & Sandeep Vaheesan, *Noncompete Clauses Trap #MeToo Victims in Abusive Workplaces. The FTC Should Ban Them.*, USA TODAY, May 14, 2019, https://www.usatoday.com/story/opinion/2019/05/14/sexually-harassed-women-trapped-noncompetes-abusive-workplaces-column/1184622001/.

[3] *See, e.g.*, U.S. Dep't of Treasury, Non-Compete Contracts: Economic Effects and Policy Implications 20 (2016), https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Econimic_Effects_and_Policy_Implications_MAR2016.pdf; Evan Starr, Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete 17 (2018); Toby E. Stuart & Olav Sorenson, *Liquidity Events and the Geographic Distribution of Entrepreneurial Activity*, 48 ADMIN. SCI. Q. 175, 197 (2003).

[4] Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes and Employee Mobility* 3 (2019).

[5] *Id.* at 42.

making these contracts illegal),[6] in 2019 approximately 45% of workplaces imposed non-compete clauses on at least some of their employees and nearly 30% required *all* workers to assent to these restraints.[7]

Whereas the harms from non-competes are real and well documented, the justification for these contracts does not withstand scrutiny. Employers and their representatives assert that non-competes are necessary for protecting trade secrets, customer lists, and other business information. According to this theory, restricting worker departure is necessary to prevent the appropriation of knowhow by rivals or workers who want to start competing businesses. To the extent employers do need to safeguard proprietary information, they have several less restrictive alternatives for preventing unauthorized disclosures. They can use copyright and trade secret law and targeted non-solicitation agreements to ensure that their information is protected.

If employers believe that retaining workers is the only way to protect their business information, they once again have other methods. To ensure a loyal workforce, employers can offer regular raises and promotions and provide fair treatment on the job,[8] as well as bonuses tied to length of tenure. For high-level workers with regular access to sensitive business information, employers can also opt out of the default rule of at-will employment through fixed-term employment contracts that commit both parties, employer and employee, to the relationship for a period.[9] Such contracts are the norm for athletes in professional sports today.

In contrast to these methods of protecting proprietary information, non-competes are, in the words of law professor Viva Moffat, "the wrong tool for the job."[10] They are overbroad. Non-competes restrain worker mobility with the purported aim of protecting business information even if it is dated or trivial. For instance, a worker who has been with an employer for ten years and generated substantial revenues and profits for the company can be locked into place by a non-compete because the employer wants to guard job training materials provided to the worker years earlier. At the same time, non-competes are too narrow. For example, they do not prevent the unauthorized, covert disclosure of trade secrets to competitors. They are poorly targeted for their ostensible purpose.[11]

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[6] *See Edwards v. Arthur Andersen LLP*, 44 Cal.4th 937, 945 (2008) (citations omitted) ("[I]n 1872 California settled public policy in favor of open competition, and rejected the common law 'rule of reasonableness,' when the Legislature enacted the Civil Code. Today in California, covenants not to compete are void[.]").

[7] Alexander J.S. Colvin & Heidi Shierholz, Noncompete Agreements 5-6 (2019), https://files.epi.org/pdf/179414.pdf.

[8] Janet Yellen, *Efficiency Wage Models of Unemployment*, *in* ESSENTIAL READINGS IN ECONOMICS 280 (Saul Estrin & Alan Marin eds., 1995)

[9] Nickens v. Labor Agency of Metropolitan Washington, 600 A.2d 813, 816 (D.C. 1991).

[10] Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 WM. & MARY L. REV. 873 (2010).

[11] Sandeep Vaheesan, *The Bogus Justification for Worker Non-Compete Clauses*, ONLABOR, Apr. 24, 2019, https://onlabor.org/the-bogus-justification-for-worker-non-compete-clauses/.

We applaud the breadth of SB 11. In addition to prohibiting conventional non-compete clauses, SB 11 targets functional equivalents to these contractual terms, such as training repayment agreement provisions or TRAPs and liquidated damages provisions. TRAPs compel workers to reimburse employers for "training" costs if they leave before a specified period, even when the training provides little or no transferable value. Indeed, much of the training cited by employers is nothing more than basic job orientation, indistinguishable from standard job preparation that benefits the employer more than the worker. TRAPs are prevalent in industries such as healthcare and retail.[12] Liquidated damages provisions can be even more pernicious than TRAPs when they require a worker to pay their employer monetary damages should the worker decide to leave, regardless of how long they have been with the company.

By imposing a significant financial penalty for leaving, TRAPs and liquidated damages provisions achieve the same coercive effect as non-competes, locking workers in undesirable or unsafe jobs. This growing trend makes it imperative for legislation to ban these coercive provisions. SB 11's sweeping language not only expressly prohibits these agreements but also includes robust remedies and broad anti-circumvention clauses that ensure the full scope of this law is not undermined through the evasive methods of some employers.

Given their documented harms to workers and unpersuasive justifications for using them, non-compete clauses and related contractual provisions should be prohibited for all workers. We urge the Senate to maintain SB 11 as is and enact a ban that protects all workers from these coercive contracts.

Thank you for the opportunity to testify on this matter.

[12] *Trapped at Work*, STUDENT BORROWER PROTECTION CTR. (July 2022), https://protectborrowers.org/wp-content/uploads/2022/07/Trapped-at-Work_Final.pdf.