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Testimony in Support of
Senate Bill 11

My name is Rachel Arnow-Richman and I am the Rosenthal Chair in Labor and Employment Law at the University of Florida. I have been a professor of law for nearly twenty-five years and have taught, researched, and written extensively about the law of noncompete enforceability. Prior to entering academica I was a management-side attorney, representing business clients in labor and employment law. I support SB 11.

1. **Noncompetes are restraints of trade that harm workers, businesses and the economy.**

Noncompetes impose three harms: (1) they impede the mobility of the restrained worker; (2) they limit competitor firms' access to necessary labor; and (3) they deprive the public of the benefit of the restrained worker's services. For this reason, noncompetes were once voided outright. Current common law, however, permits so-called "reasonable" noncompetes. The historical basis for this exception was the belief that noncompetes were used only in exceptional situations involving high-level employees with unique access to proprietary information. It was thought they were too rare to have measurable impact on the economy.

These assumptions, however, have been debunked by extensive empirical research revealing that noncompetes are ubiquitous and have demonstrable negative effects. First, noncompetes are more common than expected: forty percent of workers have signed a noncompete at some point, including many who do not hold a college degree and are unlikely to have access to proprietary information. These noncompetes adversely affect the restrained employees' ability to bargain for and seek employment matches that maximize their earnings and career potential. Second, noncompetes stagnate labor markets. Because they impede mobility, noncompetes depress wages both for workers who sign them *and those in the relevant labor market*. This stagnation reduces employee motivation and incentives to invest in their human capital. It also impedes the correction of gender and racial pay gaps. Third, noncompetes reduce innovation and impede development. These restraints deter would-be entrepreneurs from starting new companies and cause "brain drain" as restrained workers leave the state or their fields. Noncompetes reduce firm entry and prevent the flow of knowledge between firms that supports regional development. The result is increased industry concentration and reduced innovation and growth.

2. **Nothing short of a complete ban on noncompete agreements will adequately address these harmful anticompetitive effects**.

An all-out ban on noncompetes is the appropriate legislative response. Ohio, like many other states, already applies a "rule of reason" that voids noncompetes that lack a legitimate purpose or are unduly harmful to the employee or the public. But that rule has not prevented the documented anticompetitive effects described above. This is because the lawfulness of a noncompete under any version of a reasonableness test is inherently uncertain and requires individualized judicial assessment.

(1) Determining legitimate interest. Existing law in theory permits companies to restrain only unfair competition, not ordinary competition. But in practice it can be difficult to distinguish the between the two. This makes it easy for companies to use noncompetes for unlawful purposes like retaining personnel or limiting legitimate competition. Companies necessarily depend on the human capital of their workforce. They can easily conflate the value they place on a worker's knowledge, experience and skill (which may not be restrained) with the proprietary interests that the law requires.

(2) Assessing reasonableness. Determining the reasonableness of a noncompete is a similarly complex. The restraint must be assessed on multiple dimensions—its duration, geographic range, and scope of prohibited competition—and its effects must be weighed against competing harms. These determinations can only be made based on the individual circumstances that exist at the time the worker departs and the business seeks to enforce the noncompete. There is no way to predict in advance whether a particular restraint, applied at a particular time in a specific context, will be reasonable or not.

(3) The risks and costs of litigation. For these reasons, judicial adjudication is necessary to determine whether a particular noncompete is enforceable. But litigation is costly and the uncertain, risks that bear more heavily on workers than on companies. A worker subject to a noncompete who leaves work risks being sued and prevented from taking a new job, having just resigned from the prior employment. Even if the employee is ultimately successful in the suit, it will take time to adjudicate. In the meantime the worker will have to manage without a source of income while shouldering the cost of the litigation. By the time the matter is resolved, the new employment opportunity will likely be lost.

(4) Chilling effects on employees. The result of these dynamics is that employees are understandably deterred from searching for or accepting new positions. They are also deterred from leaving their jobs to start new ventures. This is true even if the noncompete is overbroad and might be found unenforceable or of limited enforceability by a court. Similarly other companies are reluctant to hire workers who have signed a noncompete due to the mere possibility of litigation by the former employer.

(5) Third party effects. If a noncompete does go to court, the judge will assess only the legality of that particular restraint in the context of that particular dispute. A court does not and cannot consider the external effects of these agreements in the aggregate. This means that even if individual noncompetes were regularly litigated, they would continue to have anticompetitive effects in the relevant markets.

For all of these reasons, legislation that merely tightens the current common law approach is inadequate. Only a full ban will address these concerns.

3. Business interests will not be unduly harmed by a noncompete ban and ultimately stand to gain.

Business arguments against SB 11 are not convincing. Under a ban, employers retain several methods currently available for protecting information and retaining employees:

(a) Adopting lesser restraints. The bill affects only noncompetes and their functional equivalents. It allows employers full use of other types of restrictive covenants, including nondisclosure and non-solicitation clauses.

(b) Pursuing trade secret law claims. Employers can continue to pursue relief for any misappropriation of trade secrets through state and federal statutory law. Trade secret law directly prohibits a worker from using proprietary information without preventing that worker from competing with a prior employer and provide employers adequate remedies for violations.

(c) Offering competitive terms of employment. Even under existing law, noncompetes may not be used merely to retain workers, but only to protect proprietary business interests. Employers can continue to fairly compete for and retain talent by offering attractive wages and benefits, opportunities for training and advancement, and other positive terms and conditions of employment that will enable it to attract and keep quality employees.

Moreover, the bill *positively* impacts business in several ways:

(a) Benefits to individual employers. Limiting noncompetes will give businesses greater ability to hire experienced talent by freeing some workers who would otherwise have been precluded from employment as a result of a noncompete.

(b) Benefits to broader business interests. Limiting noncompetes encourages economic growth, increases firm entry, and promotes innovation, among other economic benefits. While a particular employer may have incentives to restrain its own employees, the economy as a whole is better off when employees and information can move freely between firms.

(c) The benefits of a clear rule. The current legal regime is intricate and unpredictable. This creates significant compliance costs and a high risk of litigation. A straight forward ban will eliminate those costs for business.

For all of these reasons, I urge the adoption of SB 11.