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REVIVING COMPETITION, PART 4: 21ST CENTURY ANTITRUST REFORMS AND THE AMERICAN WORKER

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTEENTH CONGRESS

FIRST SESSION

TUESDAY, SEPTEMBER 28, 2021

Serial No. 117–40

Printed for the use of the Committee on the Judiciary



Available via: *http://judiciary.house.gov*

U.S. GOVERNMENT PUBLISHING OFFICE
48–614 WASHINGTON : 2022

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REVIVING COMPETITION, PART 4: 21ST CENTURY ANTITRUST REFORMS AND THE AMERICAN WORKER

Tuesday, September 28, 2021

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW

COMMITTEE ON THE JUDICIARY

Washington, DC

The Subcommittee met, pursuant to call, at 10:04 a.m., in Room 2141, Rayburn House Office Building, Hon. David Cicilline [Chair of the Subcommittee] presiding.

Present: Representatives Cicilline, Nadler, Jones, Raskin, Demings, McBath, Dean, Johnson of Georgia, Jordan, Buck, Issa, Gaetz, Johnson of Louisiana, Bishop, Fischbach, Spartz, Fitzgerald, Bentz and Owens.

Staff Present: David Greengrass, Senior Counsel; Moh Sharma, Director of Member Services and Outreach and Policy Advisor; Cierra Fontenot, Chief Clerk; John Williams, Parliamentarian and Senior Counsel; Gabriel Barnett, Staff Assistant; Joseph Van Wye, Professional Staff Member and Legislative Aide; Slade Bond, Chief Counsel; Phillip Berenbroick, Counsel; Ella Yates, Minority Member Services Director; Douglas Geho, Minority Chief Counsel for Administrative Law; Elliott Walden, Minority Counsel; and Kiley Bidelman, Minority Clerk.

Mr. CICILLINE. This Subcommittee will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time.

Good morning, and welcome to today's hearing, the fourth in the Subcommittee's series focused on the development of legislative proposals to strengthen and modernize the antitrust laws. This hearing is an opportunity to examine competition in labor markets, as well as ways to promote the economic opportunity of hard-working Americans through robust enforcement of our antitrust laws.

Before we begin, I would like to remind Members that we have established an email address and distribution list dedicated to circulating exhibit, motions, or other written materials that Members might want to offer as part of our hearing today. If you would like to submit materials, please send them to the email address that

has been previously distributed to your offices, and we will circulate the materials to Members and staff as quickly as we can.

I now recognize myself for an opening statement.

Across the political spectrum, Americans know that the economy is not working for them. They feel it in every paycheck, every surprise medical bill, and every credit card payment. Nobel Laureate George Stigler described this as, and I quote, "a widespread sense of powerlessness, both in our economic and political life. We seem no longer to control our own destinies." That is because wage consolidation in recent decades has led to the rise in market power among employers, decimating jobs and wages, and weakening the economy against the American worker, independent businesses, and entrepreneurs. In the midst of this trend, corporations are earning monopoly profits that are not being reinvested in higher wages or our economy, threatening the financial security of working people.

As Professor Ioana Marinescu testified last Congress, the economic concentration of labor laws across the country has given employers market power over their workers. Employers with market power, also called monopsonies, have the incentive and ability to pay lower wages than they would in the competitive market. It is nearly impossible to overstate how harmful this is to the American worker.

In the absence of competition, employers have virtually no incentive to pay fair wages to retain workers or track new talent. Workers are trapped in low-paying jobs. Many workers aren't able to escape low-paying jobs or find new jobs after being laid off simply because there are fewer alternatives than would exist in the competitive marketplace.

As Professor Eric Posner will testify today, because employers push down wages by hiring fewer workers, fewer people end up working. That means there is less output which also results in higher prices for consumers.

While the effects of economic concentration have been devastating for nearly all workers, it most severely harms workers in vulnerable groups, such as women and people of color, who have less bargaining power against wage discrimination and other forms of workplace inequality. This economic catastrophe has been compounded by the ubiquitous presence of noncompete and no-poach agreements in employment contracts.

As Professor Evan Starr testified last congress, these restraints have become, and I quote, "so pervasive that even volunteers in nonprofit organizations in states that do not even enforce them are asked to sign away their post-employment freedom."

Unfortunately, these trends have only worsened in the wake of the pandemic. Last year, despite record levels of unemployment, employers continued to go to court to enforce noncompete clauses that prevented workers they had laid off from taking new positions. For example, as Bloomberg Law reported, in Pennsylvania, a sports retailer laid off a salesman who had worked there for 31 years and then tried to keep him and other sales staff from taking new positions. A medical provider sued to keep a Houston doctor from opening new offices.

This, of course, is bad for business. From engineers to healthcare workers, the presence of noncompete clauses in employment contracts has undoubtedly contributed to labor shortages that have weakened America's economic recovery from the pandemic. There's also no shortage of examples of collusion among employers to fix wages or agree not to hire workers in competing firms. Even though these restraints are criminally illegal, noncompete clauses appear in everyday employment contracts including nearly 60 percent of agreements among major franchises in the United States, driving down wages and preventing workers from moving to better job opportunities.

Finally, nearly a third of jobs require licensure, including many jobs that have little impact on public health or consumer safety. Although there are many benefits associated with establishing credentials for professions, particularly those with important public health and safety considerations, excessive licensing can create barriers to entry in the workplace, impose additional costs on workers, and result in job losses. Moreover, because these standards differ by State, licensing barriers can disproportionately harm military families which are ten times more likely to relocate across State lines than other working families.

As the late economist, Alan Krueger, has explained, and I quote, "the most common jobs for military spouses are nurses and teachers who often have to get licensed in the new State when they move, pay a licensing fee, and by the time they're committed to working in those states, they often move again."

Although some States have eased the burdens of interstate compacts on healthcare workers, this continues to be a problem today. In recent years antitrust enforcers under both Republican and Democratic leadership have begun paying more attention to the effects of economic concentration on labor and producers.

Under the Obama Administration, the antitrust agencies issued joint guidelines, clarifying that no-poach agreements and wage fixing could be criminally prosecuted. This important work continued under the prior Administration and continues to be a priority of the Biden Administration.

In July, President Biden issued Executive Order 14036 which outlines a pro-worker, anti-monopoly agenda for the 21st century. As the order states, excessive market concentration threatens the economic welfare of workers, a while competitive marketplace creates more high-quality jobs and the economic freedom to switch jobs or negotiate a higher wage.

Earlier this month, Vanita Gupta, the Associate Attorney General of the Justice Department, said that the Antitrust Division will make ending collusion among employers a top priority. As she said, and I quote, "American workers who are struggling to make ends meet may not always be able to stand up to their employer, but the department can and will."

Congress also has an important role to play. Although more vigorous enforcement in competition rulemaking can address some of these concerns, the antitrust agencies cannot change the law on their own. Moreover, in recent years courts have shown hostility to bold enforcement activity in this area in the absence of legislative guidance. As Professor Posner will testify today, legislation that

more clearly lays out the elements of labor's antitrust claims would help push the courts in a positive direction.

As I've said before, I firmly believe that we must explore every path to create economic opportunity for all working Americans as we Build Back Better. This must be a national priority. With that in mind, today's hearing is an opportunity to examine these concerns and explore potential legislative solutions.

I look forward to hearing testimony from our esteemed panel of witnesses on these matters, as well as potential paths forward for fixes these problems.

I now recognize the distinguished gentleman from Colorado, the Ranking Member of the Antitrust Subcommittee, Mr. Buck, for his opening statement.

Mr. BUCK. I thank the Chair.

I have to admit to the Chair that I'm a little baffled by this hearing. I'm not sure what specific legislation we're going to take up today or in the future based on the opening statements and the nature of this hearing. Certainly, those of us on this side of the aisle have done our best to work with the Chair and others on this Committee when it comes to big tech and when it comes to reforms in the pharmaceutical industry. This, frankly, is baffling to me.

We do know that the Biden Administration has taken a number of steps that have hurt workers in the economy. For example, we've learned through the Obama Administration and the really measly economic growth that occurred during the Obama Administration is that you offer individuals unemployment benefits, and they can stay home and make a living off of unemployment benefits and other benefits, they won't go into the workplace. We've seen that. We saw also that when we have millions upon millions of illegal immigrants in this country and they are driving down wages for all American workers, it is significant.

When we look at what's happening on the border with the Biden Administration, we see an open border. We see a really a sad situation, a humanitarian situation where we are inviting people into this country by sending all the wrong signals. We have as a result this crisis. We have a Border Patrol that's overwhelmed. We have a country that is now accepting tens of thousands, if not hundreds of thousands, of people into our country on top of the millions who are already here illegally. We don't deal with an immigration issue. We don't deal with the unemployment benefits and their effect on our economy.

We also saw from the Trump Administration that if we really want to raise workers' wages and we want to help our economy, we lower taxes. This week we may very well be taking a step towards raising corporate taxes, raising other taxes. When we lowered taxes, what we saw was a significant investment from overseas coming into this country. Even companies and individuals in this country that had their money on the sidelines were willing to invest that money because there was a climate and an optimism about our economy that doesn't exist anymore.

We also saw the Trump Administration reduce regulations significantly. We saw at one point in time there were 27 regulations repealed for every one new regulation that was enacted. The Biden

Administration's going the exact opposite direction. We're seeing the effects of that on our economy.

We also know that it's important to have strong trade agreements, and those trade agreements lift American workers' wages and create a robust economy. The disastrous surrender, not withdrawal but surrender, from Afghanistan has put the U.S. in a situation where we are weak or we are perceived as being weak by our allies and, frankly, adversaries also. So, the idea that we will strengthen workers' positions with noncompete agreements or changing the nature of noncompete agreements or tinkering around the edges of antitrust is laughable when you look at how far this Administration has gone in the wrong direction.

Last but certainly not least, by spending the trillions of dollars, $6 trillion on COVID alone, what we see is inflation. If there's one thing that eats away at workers' ability to improve their life, it's inflation. We see inflation. It's going to be with us, and it's going to be part of the new reality of this Biden economy. I think it's terribly sad.

I have faith that the Chair is holding this hearing in good faith and wants to accomplish some worthy goals. I really think that our time would be much better spent battling against the $1.2 trillion infrastructure bill, the $3.5 trillion reconciliation bill, dealing with the immigration crisis at our border, talking about how we need to get people back to work and stop giving them unemployment benefits. I think we have to make sure that we lower taxes, not raise taxes, that we reduce regulations, and that we do everything we can to improve our trade agreements.

With that, Mr. Chair, I yield back.

Mr. CICILLINE. I thank the gentleman for yielding back.

Before I recognize our next Witness, I should have done this at the beginning. I would remind everyone on the current guidance of the Office of the Attending Physician it is this Committee's policy that Members and staff in the room wear face coverings at all times, except when they've been recognized to speak.

I now recognize the Chair of the Full Committee, the gentleman from New York, Mr. Nadler, for his opening statement.

Chair NADLER. Thank you, Mr. Chair.

Mr. Chair, as we all well know, America's economy has become highly concentrated in recent decades. A small number of firms dominate a variety of markets that Americans rely on including pharmaceuticals, airlines, broadband, online platforms, and meatpacking. Just as consolidation in other markets tend to result in higher prices and lower quality in the goods we buy, consolidation has led to high levels of concentration in labor markets.

As in any other market, when a lack of competition gives employers excessive power over workers, employers have the incentives and the ability to abuse that power. In many industries, these dynamics have led to depressed wages and opportunity, limited worker mobility, misclassification of workers, and discrimination against the most vulnerable.

Employers of market power can abuse their power over workers in several ways. Some have imposed anticompetitive terms in employment contracts such as noncompete agreements that ban workers from finding a better job or starting a competing firm. Others

collude with rivals to fix wages to prevent workers from changes jobs. With the rise of the gig economy, we see a rising number of employers misclassifying employees as independent contractors. These practices harm workers. They exacerbate wealth inequality. They frustrate the ability of workers to earn a living wage and to support their families. These practices have no place in a free and fair economy.

For decades, the antitrust agencies have been too weak or too timid to vigorously enforce the antitrust laws to stop and deter abuses across the economy. As Professor Eric Posner will testify today, these trends have been worse in labor markets where enforcement has been virtually nonexistent until very recently. These failures have undermined opportunity in the financial security of American families and small businesses. In the wake of the pandemic, the impacts of these developments have hit our frontline workers the hardest. Healthcare workers, delivery drivers, grocery workers, meatpackers, and other frontline workers have been heroes, keeping us safe and keeping our economy going under the most challenging of circumstances.

Unfortunately, where these workers have saved us during the pandemic, all too often our society has failed them. Many of these workers, where many industries are overwhelmingly made up of women or people of color, often work for wages that are too low and in conditions that are unsafe. In many cases, they are stuck working for corporations that have cornered the market, undermining their ability to find better jobs or higher wages in their field because they simply do not exist.

For example, as Ms. Payton will testify today, consolidation in the hospital and physician market in western Pennsylvania has led to lower wages and fewer choices for employment. As she notes, there is almost nowhere else to work if you're a healthcare worker. Moreover, as other Witnesses will testify today, many of these workers are subject to anticompetitive restrictions on their mobility, such as noncompete and no-poach agreements. These abusive contracting practices have become ubiquitous in the workforce, further entrenching the power of employers over workers, and preventing the unemployed from getting a new job.

This must change, and I am encouraged by recent steps by the Biden to address this problem meaningfully through all available tools. In July, President Biden issued Executive Order 14036, a sweeping and historic approach to building an economy that works for everyone through the benefits of competition. As this order States, quote, "consolidation has increased the power of corporate employers, making it harder for workers to bargain for higher wages and better working conditions."

In response to this concern, the President's order encourages the antitrust agencies to undertake a series of actions that will protect workers and promote competition in labor markets. These include adopting rules to curtail the use of noncompete and other agreements that unfairly limit worker mobility, as well as policing collusive behavior among employers such as wage fixing. This is a critical effort, and I look forward to updates from the Federal Trade Commission and the Antitrust Division at the Department of Jus-

tice on their work to combat market concentration and abuses to market power that harm workers.

Congressional action is also necessary. There is a pressing need to update the antitrust laws to ensure the antitrust agencies have the necessary tools to stop and deter anticompetitive conduct and mergers that harm workers.

As I have said before, it will also take a comprehensive set of reforms to recover economic opportunity and dignity for working people. These problems must be addressed with lasting solutions like guaranteeing equal pay for equal work, prohibiting forced arbitration agreements in employment contracts, establishing a living wage, stopping worker misclassification, and strengthening unions. The legislation that will revive competition in labor markets competition is a critical part of this agenda.

I want to thank all our Witnesses for testifying this morning, and I especially want to thank Ms. Payton and Mr. Gross for appearing today and for sharing their testimony. We appreciate that working, in the healthcare and logistics and delivery industries, you have been on the front lines during the COVID–19 pandemic. Without you and workers in other frontline professions, our economy and our society cannot function. So, I thank you.

I also thank the Chair for holding today's hearing on this very important topic.

With that, I yield back the balance of my time.

Mr. CICILLINE. I thank the gentleman.

I now recognize the Ranking Member of the Full Committee, the gentleman from Ohio, Mr. Jordan, for his opening statement.

Mr. JORDAN. Thank you, Mr. Chair.

Before President Biden, before Democrats controlled all of government, there was never a better time for American workers. Manufacturing was on the rise. According to one estimate, President Trump's first 30 months, manufacturing jobs were up 314,000 over where they were under President Obama. We had low employment, In fact, the lowest in 50 years. Wages were booming across the board, and we saw massive job growth across all sectors of our economy. Anyone paying attention knows that, even with the virus, our job market is resilient.

Drive through any town in America, anywhere. You will see dozens of hiring signs, with many offering high starting wages and signing bonuses. Talk to any employer right now, and their biggest problem is actually getting people to come to work.

So, the biggest threat to the American worker is not any of the things you brought up in your opening statement. Frankly, the biggest threat to the American workers are far left Democrat policies.

Democrats are using the pandemic to have a government takeover of our economy. They want to make permanent the extraordinary welfare programs enacted in the last 18 months. On top of that, they want to ram through trillions of dollars more of spending. We have seen an eviction moratorium, vaccine mandates, paying people not to work, not to mention higher taxes, rampant inflation, and undoing much of the Trump Administration's regulatory reform.

I mean, the Democrats' economic plan seems to be lock down the economy, spend like crazy, pay people not to work, tell them they

can't be evicted. Then for everyone who is working and is paying their rent, oh, they're going to raise your taxes. Such a deal. Maybe the dumbest economic plan I've ever heard of, but that's their plan. Make no mistake, the Biden economy is not helping American workers unless these workers are Federal bureaucrats in Washington.

The radical Democrat policies are leading to higher prices for American consumers in the short run, and in the long run they will only increase the already crushing debt burden we're placing on our children and grandchildren. That's not even to mention what Democrats on this Committee have imposed doing, including empowering the Biden Administration's radical Federal Trade Commission to attack our freedom-in-price system by overhauling antitrust laws and upsetting precedent that applies to the economy as a whole.

You thought corporate America was in bad shape now. Just wait until Lina Khan and other Biden bureaucrats get more power. The chair of the FTC is already abusing the power she does have and is ruling the FTC in an authoritarian compassion in a total departure from the way the commission has worked for the last half century. In fact, I look forward to hearing from Commissar Wilson on some of these concerns.

This Committee ought to be conducting far more oversight of the FTC and how it has moved away from its original mission. The best thing we can do for the American worker is getting were wash off their back. I look forward to today's discussion, and I want to thank all our Witnesses for being here today.

Mr. Chair, I yield back.

Mr. CICILLINE. The gentleman yields back.

It's now my pleasure to introduce today's Witnesses.

Our first Witness is Eric Posner, the Kirkland and Ellis Distinguished Service Professor of Law and the Arthur and Esther King Research Chair at the University of Chicago Law School. He's been a member of the faculty at the University of Chicago since 1988.

Before teaching in Chicago, Professor Posner spent five years as a Professor of Law at the University of Pennsylvania and one year as an Attorney Advisor at the Office of Justice's Office of Legal Counsel. He's written a number of highly-regarded books including "Law and Social Norms" and "How Antitrust Failed Workers." Professor Posner is a fellow at the American Academy of Arts and Sciences and a member of the American Law Institute. Mr. Posner received his bachelor's and master's degree from Yale University and his J.D. from Harvard Law School.

Today's second Witness is Brian Callaci, the Chief Economist at Open Markets Institute. He's a leading expert in worker's rights issues and has served as senior research analyst for both the Service Employees International Union and the Change to Win Strategic Organizing Center, as well as a consultant for the Communications Workers of America.

Additionally, Dr. Callaci has extensive experience as a union leader, having held multiple leadership posts with the Graduate Employee Organization and the *Washington-Baltimore Newspaper Guild*. His work has been featured in journals including the *Journal of Law & Political Economy* and the *Labor Studies Journal*.

Dr. Callaci received his bachelor's degree from Franklin & Marshall College and both his master's and Ph.D. from the University of Massachusetts Amherst.

Our third Witness, Dan Gross, is a feeder driver at the United Parcel Service and a member of Teamsters Local 177 in New Jersey. Mr. Gross has been an active union member since he began his employment at UPS 22 years ago. Mr. Gross knows firsthand how important collective bargaining, direct action, and organization are to the American worker.

Because of his Membership in the teamsters, Mr. Gross has been able to build a career with an upward trajectory at UPS and to earn a stable living. Mr. Gross is a prominent leader in his union community, serving as shop steward for Local 177.

Our fourth Witness is Nila Payton, a medical administrative assistant at the University of Pittsburgh Medical Center. She's worked at UPMC for almost 16 years and is the primary breadwinner for her family.

Since 2015, Ms. Payton has been a vocal advocate for improved pay and benefits, expanding workers' rights and unionization at UPMC. She helped to organize Hospital Workers Rising, an organization of hospital workers in western Pennsylvania dedicated to improving their working conditions.

Ms. Payton has spoken at multiple rallies and panels, submitted testimony to her wage review board, and organized her colleagues to build support for forming a union at the medical center. In 2017, she was included on The Incline's "Who's Next" list of community leaders and activists working to build a better Pittsburgh.

Our fifth Witness, the Honorable Christine Wilson, is a Commissioner at the Federal Trade Commission. She was sworn in by former President Donald Trump in 2018. Before her nomination to the FTC, Commissioner Wilson served as the Senior Vice President of Legal, Regulatory, and International at Delta Airlines. She also practiced antitrust law at Kirkland Ellis, LLP, and O'Melveny & Myers, LLP.

During the Bush Administration, Commissioner Wilson served at the FTC as Chair Tim Muris' Chief of Staff. Commissioner Wilson received her bachelor's degree from the University of Florida and her JD from the Georgetown University Law Center.

Today's last Witness, Bruce Kobayashi, is the Paige V. and Henry N. Butler Chair in Law and Economics at George Mason University's Antonin Scalia Law School. Most recently Professor Kobayashi served as the director of the Federal Trade Commission's Bureau of Economics. Additionally, he's worked as an economist with the FTC, a senior research associate with the United States Sentencing Commission, and an economist at the Department of Justice.

He's widely published, with works appearing in highly regarded publications including Competition Policy International and the Journal of Competition Law & Economics. Professor Kobayashi received his bachelor's and master's degrees, as well as his Ph.D., at the University of California—Los Angeles.

We welcome all our distinguished Witnesses, and we thank them for their participation.

I will begin by swearing in our Witnesses. I would ask our Witnessing testifying in person to rise and ask our Witnesses testifying remotely to turn on their audio and make sure I can see your face and you raise your right hand while I administer the oath.

Do you swear or affirm, under penalty of perjury, that the testimony you're about to give is true and accurate to the best of your knowledge, information, and belief, so help you God?

Let the record show the Witnesses answered in the affirmative.

Thank you and you may be seated.

Please note that your written statements will be entered into the record in their entirety. Accordingly, I ask that you summarize your testimony in five minutes. To help you stay within that timeframe, there's a timing light in WebEx. When the light switches from green to yellow, you have one minute to conclude your testimony. When the light turns red, it signals that your five minutes have expired.

I now recognize Professor Posner for five minutes.

TESTIMONY OF ERIC A. POSNER

Mr. POSNER. Thank you, Mr. Chair. It is truly an honor to be invited to speak to you. I am sorry not to be there in person. Unfortunately, for pandemic-related reasons I was asked to stay here, although I'm perfectly fine.

As you mentioned, I recently published a book called "How Antitrust Failed Workers." The book is the result of several years of research into this topic, and I'll spend a couple of minutes telling you what I found.

Let's start with the simple example which I'm sure other people will talk about as well. Imagine that we have in a small town, two hospitals. The hospitals would like to merge. Now, traditionally, if the hospitals want to merge in America, they may need to obtain the consent of the government, the FTC, or the DOJ.

The FTC and DOJ will look at whether the merger will have negative effects on what's called the product market, that is, the price and quantity of medical services to the surrounding population. If the two hospitals are very large, the government may well try to block the merger. The merger would be illegal because it would predictably raise prices and reduce medical services.

What the government agencies have virtually never done, I guess literally never done, is look and see whether the merger might have negative effects on labor markets. If two hospitals merge, they employ, most of them, nurses and doctors, medical technicians, and other specialists in the area.

According to economic theory, if the hospitals are very large, one would expect the merger to result in lower wages, less employment of the professionals, less output, and so ultimately higher prices.

Labor market-oriented anticompetitive behavior is just as bad as product market-oriented anticompetitive behavior. It's also a violation of the antitrust laws. I'm not just talking about mergers. I'm talking about conventional forms of collusion. There's price-fixing on the product market side, wage fixing on the labor market side. There are market divisions on the product market side.

There are no-poaching agreements on the labor market side. These are all equally harmful types of conduct, harmful for work-

ers, and harmful for consumers. Of course, workers and consumers are the same people.

Now, antitrust law, just as it is on the books and as it has been recognized by the courts, applies in the same way to labor markets as it does to product markets. Yet—and this is what my book is about—there have been virtually no labor market cases.

There have been a handful in this country. Yet, there have been no merger reviews that resulted in a merger being blocked because of the labor market effects. In fact, there's been virtually no consideration at all the labor market effects of mergers.

Similarly, there's been very, very little antitrust litigation that deals with no-poaching agreements, wage-fixing agreements, covenants not to compete, and other forms of anticompetitive behavior by employers.

There literally are zero cases involving true monopsonies where you have a very large employer who uses its monopsony power, its market power over the labor market to suppress wages, to prevent competition.

This is a puzzle, given that the law applies equally. The puzzle is not easily answered. This probably is the result of certain historical traditions including the primary responsibility of unions to protect workers.

Of course, union density has declined significantly over the last 50 years. So, they're no longer able to do that to the same extent as they did in the past.

The explanation for this difference, what I call litigation gap, between antitrust litigation focused on product markets and antitrust litigation focused on labor markets does not have anything to do with market structure. This is the conclusion of research by Ioana Marinescu and her colleagues and, by now, dozens and dozens of labor economists who have found with complete consistency that many labor markets in this country are extremely highly concentrated.

Other economists have found that anticompetitive arrangements like noncompetes and no-poaching agreements are extremely common. So, there does seem to be a problem with labor markets that antitrust law should be used to address, and yet until very recently this has not been done.

The FTC to its credit, by the way, during the Trump Administration issued a public comment on a merger in Abilene, Texas, where they did point out that, as a result of the merger, the merged entity, the hospital, would control 94 percent of the labor market for nurses. So, there has been some movement recently.

I see that I'm out of time, but I'd be happy to answer questions and provide my ideas about what Congress can do about this.

[The statement of Mr. Posner follows:]

Testimony on Antitrust and Labor Markets
Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker
Subcommittee on Antitrust, Commercial and Administrative Law
U.S. House Committee on the Judiciary
September 28, 2021

Eric A. Posner
University of Chicago Law School

Thank you for inviting me to testify on the role of antitrust law in labor markets. I have recently published a book on this topic called *How Antitrust Failed Workers*. As the title suggests, antitrust law could be, and should be, used to improve the wages and working conditions of workers. But for various reasons, government agencies—the Department of Justice and the Federal Trade Commission—and private litigants have rarely used antitrust law to challenge anticompetitive practices by employers against their workers. I will spend a few minutes of your time to explain why, and what can be done about it.

As you all know, antitrust law is used to protect competition in markets. Almost all cases that have gone to court involve product markets—markets for goods and services. When we worry about cartels or monopolists blocking competition in markets for search, social media, telecommunications, or retail sales, we are talking about product markets. But there is another kind of market, the labor market. Large firms—called labor monopsonists rather than monopolists—can also harm competition in labor markets.

When firms monopolize or cartelize product markets, the result is higher prices and less output.[1] As everyone understands, this hurts consumers. When firms monopsonize or cartelize labor markets, the result is lower wages. This result is less well known, but it has been understood at least since Adam Smith.[2] Another effect of labor market cartelization is lower output, just as in the case of product markets. When employers suppress wages, fewer people will work for them. That means that there is less output, which ultimately should result in higher prices for consumers as well.

Cartelization of labor markets and product markets is thus symmetrical. Both undermine economic output, resulting in stagnant economic growth. Both harm people—in their capacity as workers or consumers—and both harm lower-income people more than higher-income people, as lower-income people depend more on their wages and are more price-sensitive. Liberals and conservatives, Democrats and Republicans, should thus be united in thinking that antitrust law should be used to protect labor market competition as well as product market competition.

And, indeed, antitrust law does apply to labor markets. The Supreme Court recognized that it does as early as 1926, when it ruled that sailors in California could bring a claim against ship owners who had fixed their wages.[3] Many courts have since then acknowledged that workers, in

[1] The White House Office of the Press Secretary. "Fact Sheet: The Obama Administration Announces New Steps to Spur Competition in the Labor Market and Accelerate Wage Growth" (October 25, 2016).
[2] Adam Smith, The Wealth of Nations (1776).
[3] Anderson v. Shipowners Assn., 272 U.S. 359 (1926).

theory, can bring an antitrust claim against employers who form labor market cartels or create monopsonies in labor markets.

Yet, while thousands of antitrust cases have been brought over the years, hardly any have addressed labor market cartelization. The Justice Department and the Federal Trade Commission have reviewed thousands of mergers, approving some and rejecting others, but have not even once analyzed the labor market effects of a merger. The famous blockbuster monopoly cases—like Standard Oil, AT&T, and Microsoft—are not matched by famous, or any, monoposony cases. There have been hundreds of successful cases against sellers for fixing prices and agreeing not to compete, while only a handful of cases have been brought against employers for fixing wages and agreeing not to poach each other's workers.

In my book, I call this difference in litigation outcomes for labor-market cases and product-market cases the "litigation gap."[4] And I try to account for it. The explanation has to do with various factors: the historical reliance on labor law to protect workers; a tendency among economists to assume that labor markets are competitive; the difficulty of forming classes of workers for class action cases; and problems of proof that are unique to employment relationships. It has also become clear that worker class actions are much more difficult than consumer class actions. A class action needs a lead plaintiff: a consumer has nothing to lose from adding his or her name to the complaint; workers are terrified of retaliation.[5] And because pricing practices are more public than wages and working conditions, regulators and lawyers can more easily detect antitrust violations that harm consumers than antitrust violations that harm workers.

But there is no basis in antitrust law for treating labor-market cases more skeptically than product-market cases. The law is the same regardless of the type of market it is applied to. Nor is there any reason to think that anticompetitive behavior is less common in labor markets than in product markets. Recent academic work suggests that, if anything, anticompetitive behavior is more common in labor markets.[6] Labor markets are highly concentrated as a result of unreviewed mergers as well as organic growth. Anticompetitive clauses like covenants not to compete are ubiquitous.[7] Things haven't changed much from the late eighteenth century when Adam Smith observed that labor market cartelization was "the natural state of things which nobody ever hears of."[8]

Fortunately, in just the last few years increasing efforts have been made by the FTC, the Justice Department, state attorneys general, and private litigants to ferret out labor market cartels. Let me offer a few examples.

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[4] Eric A. Posner, How Antitrust Failed Workers (Oxford, 2021).
[5] Congress recognized this risk in 2019, and sought to address it by enacting a law protecting workers from retaliation in the Criminal Antitrust Anti-Retaliation Act of 2020.
[6] José Azar, Ioana Marinescu, and Marshall Steinbaum. "Labor market concentration." *Journal of Human Resources* (2020); Efraim Benmelech, Nittai K. Bergman, and Hyunseob Kim. "Strong employers and weak employees: How does employer concentration affect wages?" *Journal of Human Resources* (2020); Anna Sokolova and Todd Sorensen. "Monopsony in labor markets: A meta-analysis." *ILR Review* 74, no. 1 (2021).
[7] Michael Lipsitz and Evan Starr. "Low-wage workers and the enforceability of noncompete agreements." *Management Science* (2021).
[8] Adam Smith, The Wealth of Nations (1776).

In 2010, the Justice Department sued and settled a case with large tech companies including Apple and Google.[9] According to the complaint, these companies agreed not to hire away one another's software engineers.[10] This is called a no-poaching agreement. It is analogous to an agreement among sellers not to poach each other's customers, which is a criminal act. But rather than prosecute Steve Jobs and the other tech CEOs, the Justice Department dropped its case in return for a promise by the techcompanies to stop the no-poaching arrangement. This was not even a slap on the wrist, but subsequent private litigation secured a settlement of over $400 million representing lost wages.[11]

In 2016, Jimmy John's, the sandwich chain, settled lawsuits brought by a pair of state attorneys general over its use of covenants not to compete.[12] Low-skill sandwich makers were required as a condition of employment to agree not to work for any other sandwich shops within three miles of a Jimmy John's franchise for two years after leaving employment with the Jimmy John's restaurant that they worked for. Because thousands of Jimmy John's locations are scattered across the United States, the effect of the clause was to prevent former employees for working for any sandwich restaurant virtually anywhere in the United States.

This abuse of the covenant not to compete to reduce the employment options of low-skill workers is extremely common in the United States, according to the research of economist Evan Starr and his coauthors.[13] A covenant not to compete, as its name suggests, is an anticompetitive agreement, one that prevents employers from competing for workers. The common law tolerated noncompetes in narrow circumstances, for example, when workers were given access to trade secrets. But Jimmy John's use of noncompetes had no justification and simply intimidated workers, who could not afford lawyers to challenge the noncompetes under the common law, preventing them from moving to better jobs, and restricting labor markets around the country.

Meanwhile, in 2018, the economists Alan Krueger and Orley Ashenfelter released a study that reported that 58% of large, brand-name franchises, including McDonald's and Burger King, for example, incorporated no-poach clauses in the franchise contracts.[14] This meant that a worker at one McDonald's restaurant could not quit and go to work for another McDonald's restaurant that offered higher pay and more generous benefits. The different restaurants in a franchise are independent companies, and so a no-poach clause, even if administered by the franchisor, is effectively a horizontal agreement to restrict competition for labor—a clear violation of the antitrust laws. In response to state attorney general lawsuits, most franchises have dropped these clauses. But follow-on private litigation for lost wages has been met with pretty significant hostility from the courts and even the Justice Department, which has intervened to express opposition to per se treatment of no-poach clauses when they are used in vertical relationships.

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[9] David Streitfeld. "Tech Giants Settle Antitrust Hiring Suit." *The New York Times* (April 24, 2014).
[10] U.S. Department of Justice. "Complaint, US v. Adobe Systems Inc., et al." (2010)
[11] David Streitfeld. "Bigger Settlement Said to Be Reached in Silicon Valley Antitrust Case." *The New York Times* (January 14, 2015).
[12] Daniel Wiessner. "Jimmy John's settles Illinois lawsuit over non-compete agreements." *Reuters* (December 7, 2016).
[13] Evan Starr, James J. Prescott, and Norman Bishara. "Noncompete agreements in the us labor force." Journal of Law and Economics, forthcoming (2020).
[14] Alan B. Krueger and Orley Ashenfelter. "Theory and evidence on employer collusion in the franchise sector." No. w24831. National Bureau of Economic Research (2018).

No-poaching agreements occur outside of franchises, of course, as the tech scandal showed. More recently, Duke University and the University of North Carolina settled a case challenging a no-poaching agreement aimed at university faculty.[15] The agreement came to light only because a recruiter from one of the universities inadvertently disclosed to an applicant from the other university that he could not hire her despite her qualifications because of the deal made between the two universities. Needless to say, most organizations that enter illegal agreements will be more careful about revealing their existence to job applicants.

More conventional types of wage-fixing have also been identified. In 2019, workers at major meat-processing companies, including Tyson and Perdue, sued them for wage-fixing, based on allegations that the companies and others as well exchanged wage information through an organization.[16] An important feature of this case was that the wage-fixing claim grew out of an earlier price-fixing claim. Plaintiffs' lawyers were able to detect the price-fixing because prices are public, and suspicious pricing patterns were publicly available. Wages, by contrast, tend to be private or at least difficult to learn about. The wage-fixing claim was brought only after discovery in the price-fixing case revealed that the organization that the defendants allegedly established for price-fixing was also used for wage-fixing.[17]

Another area of concerns is mergers. Several studies have found that when companies merge operations in concentrated labor markets, wages decline.[18] Last year, the FTC, to its credit, submitted a comment on the proposed merger of two hospitals in Texas in which it analyzed the labor market effects of the merger. It noted that the merger would result in a hospital system that employed 96.2% of registered nurses in the relevant labor market area, which would normally result in an extreme suppression of wages.[19] Texas nonetheless approved the merger under state law. Mergers of hospitals in many other parts of the country have resulted in highly concentrated markets for medical professionals.

Finally, the Justice Department has begun to bring criminal indictments. In the last year, it has indicted executives at several health care companies for agreeing not to poach each other's senior employees.[20] This is a long time coming. In product-side antitrust cases, the Justice Department routinely indicts executives who knowingly agree to fix prices or divide markets. The year 2020, 130 years after enactment of the Sherman Act, marked the first time that the Justice Department has indicted any executives for criminal labor-side violations of antitrust law.

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[15] Brent Kendall, "Duke University Moves to Settle No-Poach Case for $54.5 Million." *Wall Street Journal* (May 20, 2019).
[16] David Yaffe-Bellany. "Why Chicken Producers Are Under Investigation for Price Fixing." *NY Times* (June 25, 2019).
[17] Claire Kelloway, "Judge Affirms Poultry Worker Wage-Fixing Claims But Demands More Details for Largest Offenders." *Food and Power* (September 23, 2020).
[18] Elena Prager and Matt Schmitt. "Employer consolidation and wages: Evidence from hospitals." *American Economic Review* 111, no. 2 (2021).
[19] Federal Trade Commission. "Submission to Texas Health and Human Services Commission Regarding the Certificate of Public Advantage Applications of Hendrick Health System and Shannon Health System" (2020).
[20] U.S. Department of Justice. "DaVita Inc. and Former CEO Indicted in Ongoing Investigation of Labor Market Collusion in Health Care Industry." (July 15, 2021).

Let me conclude. While antitrust law prohibits cartelization of labor markets, there remains a large gap between the potential of the law and its accomplishments. A major question remains as to whether the courts will be receptive to these cases. I've read the cases from the last few years, and I can't say I am terribly optimistic. The courts have little guidance, and often seem skeptical or even hostile. Legislation that more clearly laid out the elements of labor-side antitrust claims would help push the courts in a positive direction.

What kind of legislation? In my book and elsewhere, I have laid out a number of proposals. I will not repeat them all here. But there are various ways, some simple and others more complex, to strengthen antitrust enforcement in labor markets. More money and direction for the FTC and the DOJ would be a good start. These agencies should be sure to employ labor economists as well as traditional experts in antitrust economics. And Congress can facilitate private litigation by easing the rules for class actions, identifying presumptive anticompetitive actions like noncompetes, and incorporating into merger review the requirement that agencies take into account the labor market effects of mergers.

Mr. CICILLINE. Thank you, Professor Posner. Although you're not in the room, I want you to know you're here in spirit because I have your book.

I do want to, before I introduce our next Witness, I do want to ask unanimous consent to place into the record a *Fortune Magazine* article to respond to Mr. Jordan's representations that is entitled, "Trump to Leave Office With the Worst Job Record Since Herbert Hoover."

Without objection.

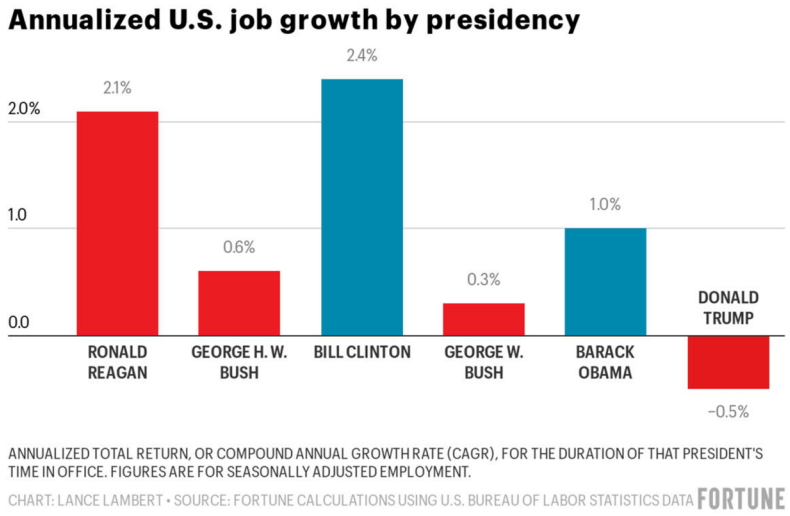
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MR. CICILLINE FOR THE RECORD

Trump to leave office with the worst jobs record since Herbert Hoover

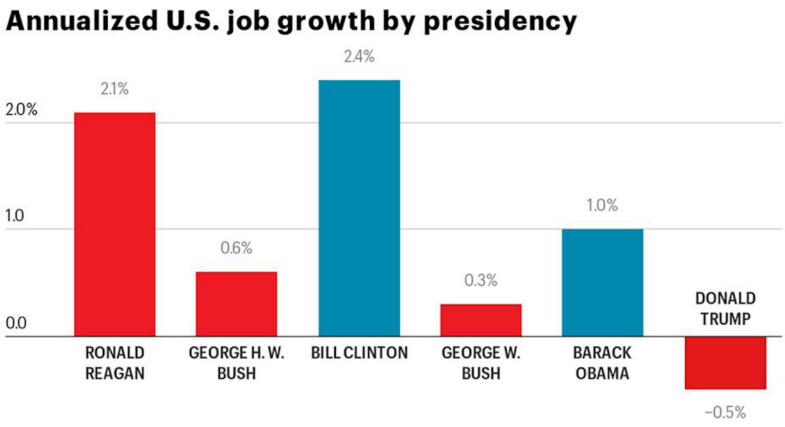
yahoo.com/video/trump-leave-office-worst-jobs-030044152.html

Lance Lambert



Lance Lambert

January 11, 2021, 9:00 PM·2 min read



During the first three years of Donald Trump's presidency, the economy did quite well. The unemployment rate hit a 50-year low, income growth doubled, and the economic expansion he inherited grew into the longest in American history.

But that all came to a shrieking halt when COVID-19 hit.

In a two-month period, February to April 2020, the unemployment rate soared to an 80-year high and the number of employed Americans fell from 152.5 million to 130.3 million. Those 22.2 million job losses set U.S. employment back to 1999 levels.

Since, the economy has moved from contraction to expansion and seen 12.3 million jobs return. However, it hasn't been enough to offset the job losses that occurred during the pandemic.

That means that Trump will become the first post–World War II president to see employment fall during his presidency. It last occurred when Herbert Hoover left office in 1933 amid the early years of the Great Depression.

When Trump took office in Jan. 2017, U.S. employment was at 145.6 million. On Friday, the U.S. Bureau of Labor Statistics released its final jobs report before the Jan. 20 inauguration of President-elect Joe Biden. It shows in December there were 142.6 million employed Americans, down 3 million from Trump's own inauguration.

For comparison purposes, *Fortune* annualized the job gain rates under all the past leaders since Reagan. During Obama's eight years at the helm of the nation, U.S. employment maintained a 1% annualized return. That growth level did start to climb during the Trump years; as of February 2020 employment was increasing on a 1.5% annualized basis during his presidency. Yet in the final tally Trump will leave office having overseen a -0.5% annualized job growth rate.

Simply put: The historic jobs boom that candidate Trump promised on the campaign trail in 2016 was yet another victim of COVID.

This story was originally featured on Fortune.com

Mr. CICILLINE. I now recognize Dr. Callaci for five minutes.

TESTIMONY OF DR. BRIAN CALLACI

Mr. CALLACI. Thank you.

My name is Brian Callaci. I'm Chief Economist at the Open Markets Institute. I want to thank Chair Cicilline, Ranking Member Buck, and the other Members of the Subcommittee for the opportunity to participate in this hearing. I will just say at the beginning I feel a little bit at home here.

I grew up in Cranston, Rhode Island just outside of Chair Cicilline's district. Just yesterday, I was in Crowley, Colorado, visiting my in-laws in Ranking Member Buck's district, these problems are happening all across the country.

So many of the issues we're discussing today have been around really as long as there have been markets for labor, as long as there have been labor markets. Back in 1776, Adam Smith argued that there was a baseline power imbalance between employers and workers.

Furthermore, Smith was outraged that parliament, the British parliament, put its thumb on the scales in favor of the employer, for example, by authorizing employers to get together and lower wages, while prohibiting workers from getting together, what we now call unionizing, to attempt to raise wages.

Now, since that time, our laws have evolved quite a bit to address some of the issues that troubled Smith we left the United Kingdom and Great Britain, for example. Congress passed antitrust laws specifically to prevent and restrain combinations of capital. Then it passed laws allowing, and even encouraging, workers to legally combine into unions. Congress also legislated specific labor protections to regulate wages and working conditions.

However, over the past few decades, antitrust has unfortunately taken a step backwards toward the conditions that so outraged Adam Smith. In particular, antitrust has largely missed the boat as large corporations have consolidated buyer power over both local labor markets and entire supply chains, suppressing wages and worsening working conditions throughout the supply chain.

Recent research shows that local labor market concentration is high, has been increasing over time, and is especially damaging to works lacking a union's protection. Meanwhile, recent research has also found that buyer power in supply chains accounts for about 10 percent of wage stagnation since the 1970s. Even with these facts, no merger has ever been blocked for its effects on labor markets.

Second, antitrust has also been relatively absent as employers have supercharged their baseline monopsony power over employees through restrictive contracts like noncompete clauses, mandatory arbitration, and no-poaching agreements that artificially suppress wages. The effects from this course of contracts, as the Chair pointed out, have been doubly large for women and nonwhite workers.

Finally, in a series of court decisions since the late 1970s, antitrust courts have facilitated large corporations' use of restrictive contracts to dominate and control nonemployee independent contractors and small business.

For example, Amazon outsources local deliveries to so-called independent delivery service partners. Amazon sets the rates that

these independent businesses can charge, the routes they have to drive, even their labor practices. This kind of domination and control hurts workers, too.

Small businesses with no control over their own prices, costs, and profits have little room to improve the wages of working conditions they offer workers, while employees of these firms lack legal rights against the corporation that actually controls their working conditions.

Even worse is the so-called gig economy where similar restrictive contracts are used to misclassify workers as independent businesses, stripping workers of all employment rights. These workers risk treble damage and trust prosecutions and lawsuits if they try to unionize.

So, to return balance to the economy, action is urgently needed to disburse concentrated power and prevent the abuse of workers. In recent months Congress and the Executive Branch have taken important steps in this direction. The July Executive Order on promoting competition in the American economy contains a number of positive components by including a directive to the USDA to consider issuing new rules under the Packers and Stockyards Act to combat buyer power in food supply chains, and the directive to the FTC to consider issuing rules banning noncompete clauses.

The FTC should further consider, however, using its section 5 rulemaking powers to restrict the use of exclusionary contracts and other vertical restraints and restrictive contracts by dominant firms to control nonemployee independent contractors.

The package of bills that the House Judiciary Committee passed out of Committee in June, addressed to competition issues posed by dominant tech platforms, are a vitally important step in the right direction to restraining corporate power.

However, since problems of economic concentration and coercive contracts extend well beyond tech platforms, general antitrust legislation is needed as well. Such legislation should explicitly protect workers and suppliers from monopsony power, prevent judges from allowing wage suppression in the name of consumer welfare, expand labor exemptions from antitrust prosecution to independent contractors, and finally close those loopholes allowing corporations to enjoy a control over their business empires but without employment responsibilities through the use of these restrictive contracts.

I see that I'm about out of time. So, thank you. I look forward to answering any questions.

[The statement of Mr. Callaci follows:]

TESTIMONY BEFORE THE COMMITTEE ON THE JUDICIARY, SUBCOMMITEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW

UNITED STATES HOUSE OF REPRESENTATIVES

September 28, 2021

Hearing on Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker

Brian Callaci
Chief Economist, Open Markets Institute

My name is Brian Callaci. I am Chief Economist at the Open Markets Institute. I want to thank Chairman Cicilline, Ranking Member Buck, and the other members of the Subcommittee for the opportunity to participate in this hearing.

Many of the issues we're discussing today are as old as the capitalist system itself. In 1776, Adam Smith wrote about employers and workers:

> It is not…difficult to foresee which of the two parties must, upon all ordinary occasions, have the advantage in the dispute, and force the other into a compliance with their terms. The masters, being fewer in number, can combine much more easily; and the law, besides, authorizes, or at least does not prohibit their combinations, while it prohibits those of the workmen. We have no acts of parliament against combining to lower the price of work; but many against combining to raise it.[1]

Smith expressed two ideas in this passage. First, he stated the common-sense fact that employers have power over workers. If you've held a job, you know which side of the exchange holds the upper hand. It's more burdensome for a worker to lose a job than for an employer to lose a single worker. When you get a job, it's often a cause for celebration. When you lose a job, it can plunge an entire family into crisis. Second, after describing the baseline power imbalance, Smith blamed Parliament for putting its thumb on the already uneven scales on behalf of employers against workers.[2]

Since Adam Smith's time, our laws have come to recognize the baseline level of employer power in the labor market. Congress made it more difficult for capital to combine against workers and consumers, starting with the 1890 Sherman Antitrust Act. Congress also recognized that the ability to collectively bargain was the best way for workers to gain fair wages in the face of employer power. Accordingly, Congress legislated labor exemptions to the Sherman Antitrust Act with the Clayton, Norris-LaGuardia, and National Labor Relations Acts, allowing workers to legally combine into unions. Congress also legislated specific labor protections to regulate wages and working conditions, including the Fair Labor Standards Act, the Occupational Safety and Health Act, and so on. The purpose of these laws was to balance out that power disparity and put workers on more equal footing.

However, over the past few decades, while attacks on unions and the declining value of the minimum wage have removed key countervailing forces to monopsony power, antitrust jurisprudence and policy have taken us a step backwards towards the conditions that so outraged Adam Smith centuries ago. In particular, antitrust has:

- Looked the other way as large corporations have consolidated buyer, or monopsony, power over both local labor markets and entire supply chains;
- Allowed employers to supercharge their power over employees through restrictive contracts like noncompete clauses, mandatory arbitration, and no-poaching agreements; and
- Facilitated large corporations' efforts to deny their workers employment rights, by sanctioning the use of restrictive contracts to dominate non-employee independent contractors and small business owners, subjecting them to tight corporate control virtually equivalent to that of employees. This has led to the creation of a so-called "gig economy" of workers without rights, and of "fissured workplaces" where workers have some rights, but not against the company that really pulls the strings controlling their working conditions.

To return balance to the economy, Congress should act to make it harder for corporations to merge and abuse their dominant position, ban coercive contracts like noncompetes, expand the antitrust labor exemption to independent contractors, and close the loopholes allowing corporations avoid labor and employment obligations by substituting restrictive contracts for employment relationships.

1. **Monopsony**

Labor market concentration has increased since 1977.[3] The majority of US labor markets are currently highly concentrated according to traditional antitrust criteria. The government's Horizontal Merger Guidelines assess market concentration according to a number called the Herfindahl-Hirschman Index (HHI), calculated as the sum of the squares of the market shares of each firm in the market. According to the guidelines, a market is "moderately concentrated" if the HHI is above 1,500, and "highly concentrated" if above 2,500. Recent research has found that the *average* labor market HHI in the US is 3,953, equivalent to just 2.5 firms hiring at equal market shares. Rural areas are especially likely to have highly concentrated labor markets.[4]

High concentration is associated with lower wages for job postings and lower job quality. On average, a 10 percent increase in concentration is associated with a 0.3 percent to 1.3 percent decrease in wages.[5] Labor market concentration is also associated with violations of labor rights.[6] Unfortunately, antitrust enforcement has all but ignored the effects of decreases in competition on workers. No court has ever blocked a merger because of its effects on labor markets.

It's not just direct employees who are affected by increasing concentration. Since 1981, concentration across economic sectors has increased.[7] Horizontal concentration has increased the power of large buyers, like Walmart and Amazon, over supply chains.[8] Buyer power not only

squeezes the profits of small businesses upstream from the large buyer,[9] it also reduces the wages of workers at upstream suppliers.[10]

In many instances monopsonistic wage suppression is associated with lower output and higher prices, and would be condemned under a consumer welfare standard. However, that is not always the case. In some cases monopsony leads to a reduction in labor's share without shrinking the size of the overall pie. Antitrust enforcement should expand its focus beyond harm to consumers or output, to take into account effects on workers and suppliers as well.[11]

2. **Coercive Contracts Imposed on Employees**

Not content with increased monopsony power over workers through concentration, or with decreased worker bargaining power through deunionization and the declining value of the minimum wage, employers have gone further and imposed restrictive contracts on workers that restrict their mobility, creating artificial monopsony power.

A particularly egregious example of these restrictive contracts is what is known as a noncompete clause. These contracts prevent workers from leaving their job for another employer in the same industry. In 2016, eighteen percent of workers were bound by noncompete clauses, and forty percent had been bound by one at some point in their careers. Only ten percent of employees actually negotiated over their noncompete, and one-third were presented with their noncompete after having already accepted their job offer.[12]

These contracts suppress wages. A recent study found that an Oregon law making noncompetes unenforceable for hourly workers raised wages for *all* hourly workers—not just those subject to noncompetes—by two to three percent.[13] Another, more comprehensive study found that stricter enforceability reduced earnings for female and for non-white workers by twice as much as for white male workers.[14] The Open Markets Institute, along with over sixty signatories, has petitioned the Federal Trade Commission to ban these restrictive contracts.[15]

In addition to noncompete clauses, companies impose other types of coercive contracts on workers, including mandatory arbitration agreements, which deny workers access to the courts for redress against their employers, and training repayment agreements, which prohibit workers from leaving their jobs until they have "repaid" their employer for job-training expenses.[16]

3. **Workplace Fissuring and Misclassification**

In addition to imposing restrictive contracts on employees, businesses have also used restrictive contracts known as vertical restraints to dominate and control non-employee independent contractors and small businesses. Vertical restraints are contractual restrictions imposed by one business on another across levels of competition—for example, an oil company dictating the price an independent gas station franchisee charges for gasoline, or Amazon prescribing the routes and rates for its "independent" delivery companies. A key advantage of vertical restraints is that they allow corporations to maintain the same or nearly the same level of control they would have over direct employees, while avoiding the duties and responsibilities that legally correspond to employment.[17]

Antitrust jurisprudence once condemned attempts by large corporations to control and dictate business decisions to non-employee independent contractors through contract. For example, in *Standard Oil Co. v. United States* in 1949 the Supreme Court, applying the Clayton Act, invalidated contracts between Standard Oil and gas stations that restricted the stations from purchasing and reselling the fuel of Standard Oil's rivals.[18] The protection of independent business autonomy was a major theme in vertical restraint cases of this era, as the courts sought to uphold the right of independent businesses to exercise effective independence.[19] They recognized the inequality in common business relationships between distributors and manufacturers,[20] gas station owners and oil companies,[21] and delivery workers and newspapers,[22] and the potential for economic coercion.

Beginning in 1977, the Supreme Court initiated a fundamental remaking of antitrust rules concerning vertical restraints. The Court relaxed antitrust restrictions on non-price vertical restraints and subsequently rules on price restraints. In *Continental T.V. Inc. v. GTE Sylvania Inc.*, the Court held that territorial and other non-price restraints would no longer be per se illegal, and would instead be evaluated under the rule of reason.[23] The Court subsequently put vertical price restraints under the rule of reason as well. In *State Oil Co. v. Khan*, it overturned the per se rule for maximum vertical price fixing and ruled these contracts are subject to the rule of reason.[24] In *Leegin Creative Leathers Products, Inc. v. PSKS, Inc.*, the rule of reason was extended to minimum vertical price fixing or resale price maintenance.[25] In practice, the rule of reason, with its stringent requirements on showing market power and adverse consumer effects, has functioned as a rule of de facto legality.[26]

The proliferation of vertical restraints today means that many small firms subject to them operate under contracts where their prices, most of their nonlabor input costs, and their methods of doing business are outside their control, and another, more powerful firm closely surveils their operations and even labor practices.[27] These intrusive contract terms affect wages and working conditions.[28] For example, when McDonald's franchisees complained that franchisor control over their prices squeezed their profits, a franchisee reported that McDonald's told her to "just pay your employees less."[29] Meanwhile two Amazon Delivery Service Partner (DSP) contractors in Portland, Oregon, shut down in June, complaining that Amazon did not allow them to raise wages high enough to attract workers.[30]

Vertical restraints help employers distance themselves from workers by creating what the economist David Weil calls "fissured workplaces." These are workplaces where the economic employer that actually controls wages and working conditions does not employ workers directly, but rather outsources employment to an intermediary like a franchisee or subcontractor.[31] For example, local delivery drivers for Amazon DSPs deliver Amazon packages in Amazon-branded cargo vans along Amazon-dictated routes, at Amazon-dictated rates, surveilled by Amazon's GPS and AI-enabled cameras, with everything down to the drivers' fingernail grooming dictated by Amazon. And yet Amazon has none of the legal responsibilities of an employer. Rather, the drivers' employer—on paper at least—is an "independent" trucking company operating under an exclusive contract with Amazon. Amazon is even able to ensure these drivers remain non-union through a contractual mandate that they be at-will employees. If the workers unionize Amazon

can terminate the contract and find a new contractor—much easier than fighting a union campaign itself.[32]

At the extreme of the fissured workplace are so-called "gig economy" firms like Uber or DoorDash, which control workers through vertical contracts, sophisticated algorithmic management, and digital surveillance methods. Despite this intense control, these companies claim that each worker is not an employee, but actually an entrepreneur running an independent business. These workers lack all employment rights, and risk treble-damage antitrust prosecutions if they try to unionize.

Workers and unions recognized the game being played with restrictive vertical restraints early on. A representative from the International Brotherhood of Teamsters told a congressional subcommittee in 1963 that oil companies were using vertical restraints to create a loophole between antitrust and labor laws. He alleged that oil companies classified franchised retail dealers as independent contractors, denying them collective bargaining rights, while at the same time using vertical restraints to reduce dealers to the functional status of employees.[33] To dealers, franchisees, and independent contractors, vertical restraints functioned as a kind of "legal arbitrage" that put them outside the protection of the laws that should have protected them.[34]

4. Policy Recommendations

While antitrust prosecutions of monopolists have ground to a virtual halt, antitrust agencies have vigorously pursued independent contractors and self-employed workers for attempts at collective action.[35] Moreover, in recent years, the antitrust agencies have interpreted antitrust laws in ways that exacerbated the control-without-responsibility problem of vertical restraints and workplace fissuring. For example, the Department of Justice endorsed legal standards that would empower corporate franchisors to collude against employees at their franchised locations, arguing that "no-poaching arrangements" should be judged under the rule of reason rather than banned outright.[36] No-poaching agreements are more common for franchises in low-wage and high-turnover industries, and function as tools of monopsony to limit worker mobility.[37] At the same time, the National Labor Relations Board made it easier for franchisor corporations to avoid joint employment duties to employees at franchised establishments.[38] Workers at franchised establishments were allowed to fall through the cracks, prevented from effectively contesting the mechanisms suppressing their wages as employees under the National Labor Relations Act or under the antitrust laws.

Meanwhile, partnering with the FTC, the DOJ argued against the ability of ride-hailing drivers to bargain collectively with ride-hailing corporations[39] while a few years later, the National Labor Relations Board[40] and the Department of Labor made it easier for employers to misclassify drivers as independent contractors.[41] As a result, these misclassified drivers were not only excluded from protection under wage and hour and laws, but also prevented from engaging in any concerted activity to improve their working conditions. They currently risk a treble-damage lawsuit should they seek to collectively improve their working conditions.

We live in an age of monopoly. Antitrust has an important role to play in protecting consumers, small businesses, and workers from monopoly power. To return balance to the economy, action

is urgently needed to disperse concentrated power and prevent the abuse of workers. In recent months, Congress and the executive branch have taken important steps in this direction.

The July Executive Order on Promoting Competition in the American Economy contains a great many positive components, including the directive to the USDA to consider issuing new rules under the Packers and Stockyards Act to combat buyer power in food supply chains, and the directive to the FTC to consider issuing rules banning non-compete clauses. The FTC should further consider using its Section 5 rulemaking powers to restrict the use of exclusionary contracts and other vertical restraints to control non-employee independent contractors, and to ban misclassification of employees as independent contractors.

Meanwhile, the package of bills that the House Judiciary Committee passed in June, addressed to competition issues posed by dominant tech platforms, are a vitally important start. However, since problems of economic concentration and coercive contracts extend well beyond tech platforms, general antitrust legislation is needed too. Such legislation should explicitly protect workers and suppliers from monopsony power, prevent judges from allowing wage suppression in the name of consumer welfare or balancing worker harms against consumer gains, expand the labor exemption from antitrust laws to independent contractors, and close loopholes allowing corporations to enjoy control without employment responsibilities through vertical restraints.

In particular, Congress should pass legislation to:

- Make it easier to block mergers that create buyer power in labor markets and supply chains, and break up corporations that currently have this power, by setting out clear, bright-line rules and definitions.
- Reduce the incentives to misclassify workers by extending the labor exemption to antitrust laws to all independent contractors.
- Ban noncompete and related coercive contracts.
- Protect the autonomy of small business and prevent corporations from reducing independent contractors to the status of virtual employees by reforming the treatment of vertical restraints under *Leegin*, *State Oil*, and *Sylvania*.
- Clarify definitions of employer and joint employer under labor and employment law to restore rights to workers denied their rights through misclassification and overly restrictive vertical restraints.

Thank you for your time.

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[17] Callaci, Brian. "Control without responsibility: The legal creation of franchising, 1960–1980." *Enterprise & Society* 22, no. 1 (2021): 156-182.
[18] 337 U.S. 293, 314 (1949).
[19] *See, e.g.*, *Simpson v. Union Oil Co.*, 377 U.S. 13, 16 (1964) ("If the 'consignment' agreement achieves resale price maintenance in violation of the Sherman Act, it and the lease are being used to injure interstate commerce by depriving independent dealers of the exercise of free judgment whether to become consignees at all, or remain consignees, and, in any event, to sell at competitive prices.").
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[21] FTC v. Texaco, Inc., 393 U.S. 223 (1968)..
[22] Albrecht v. Herald Co., 390 U.S. 145, 152 (1968).
[23] 433 U.S. 36 (1977).
[24] 522 U.S. 3 (1997).
[25] 551 U.S. 877 (2007).
[26] *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 837 (2009) ("In the first decade of the twenty-first century, courts have continued their use of a burden-shifting framework in applying the rule of reason. They almost never balance. And they dispose of 97% of rule of reason cases on the grounds that the plaintiff cannot show an anticompetitive effect.")
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[39] Brief for the United States et al. as Amici Curiae In Support of Appellant and In Favor of Reversal, Chamber of Commerce v. City of Seattle, 890 F.3d 769 (2017), (No. 17-35640).

[40] https://www.nlrb.gov/news-outreach/news-story/nlrb-returns-to-long-standing-independent-contractor-standard

[41] https://www.dol.gov/newsroom/releases/whd/whd20210106

Mr. CICILLINE. Thank you, Dr. Callaci.

No surprise that you're bragging about your Rhode Island roots. So, thank you for being here today.

I now recognize Mr. Gross for five minutes.

TESTIMONY OF DANIEL GROSS

Mr. GROSS. Thank you, Chair Cicilline, Vice Chair Jayapal, and Ranking Member Buck. My name is Dan Gross, Madison, New Jersey. I'm 49 years old, husband and father of four. I drive a tractor-trailer in the feeder network for United Parcel Service. I'm also a proud union member and been active in Teamsters Local Union 177 since I started with UPS 22 years ago. I'm honored to speak with you today about why reforming our antitrust laws is important to me and my fellow American workers.

My career at UPS started in June of 1999. Like most of us at UPS, I started as a part-timer. I transferred into a full-time combination job in 2000. These combo jobs were the direct result of our national negotiations and the three-week strike with UPS in 1997, which created tens of thousands of full-time jobs by combining multiple part-time jobs.

After two years in the combination job, my seniority enabled me to transfer to a package car driver position where I delivered packages to businesses and homes in one of those familiar brown trucks.

In October of 2005, again using my seniority, I was able to transfer to my current job as a feeder driver. As a feeder driver, I drive tractor-trailers, transporting trailers full of packages between UPS delivery hubs to and from other large UPS customers.

I've seen firsthand what large corporations try to get away with due to corporate greed when workers don't have a collective voice to demand decent pay and working conditions. My union has provided that collective voice at UPS for nearly 100 years.

Unfortunately, our standards and those of hundreds of thousands of United States postal workers are also under attack by a new type of company, a company that uses its dominant presence in e-commerce to exert power over its contractors and workers. The threat to the industry I work for is Amazon.

I know that this Committee has passed bills that are trying to take on the special threats of Amazon and other tech companies. I'm not here to speak to those businesses. I want to use Amazon as one example of why you should pass antitrust laws to address how the largest, most powerful companies have too much power over their workers and how those effects and directs employees and all the other workers in the industry.

As a feeder driver, it's common practice for us to be offered access to the customers' facilities while we're waiting for our loads. Amazon stopped this practice to limit our interaction with direct Amazon drivers and drivers working for Amazon subcontractors or independent contractors. It seems clear to us feed drivers that Amazon did this to exert control over the information the employers and contractors can share with each other about route deliveries, but also paying working conditions.

In addition, Amazon uses drivers that are paid varying rates that are below industry standards, possibly by as much as half, even be-

fore benefits are factored in. I have even been told that sometimes Amazon restricts the ability of so-called independent contractors to carry backhaul loads, forcing them into nonpaying empty loads on their return trip. Amazon's dominant position as an e-retailer enables Amazon to exert its power in business relationships in ways that encroach upon the teamster's collective bargaining agreement with UPS and directly impact my working conditions.

The constant threat of losing or diminishing delivery volume has forced UPS to comply with Amazon's demand to utilize subcontractors and independent operators who are now subject to the collectively bargained rules that are designed to keep drivers in the public safe.

Collective bargaining is the antidote to corporate dominance. My Local Teamsters 177 has won grievance settlements to address the above subcontracting, and similar contract violations against UPS currently has multiple pending grievances.

However, we have limited ability to impact Amazon's continuing demands that UPS modify its procedure to retain the Amazon business.

Similarly, also based on my experience as a package car driver and shops throughout UPS, I notice the growth of Amazon's last-mile delivery network. While the drivers are in Amazon-branded vehicles and now wear Amazon colors, they are not Amazon employees but employees of more than nearly 1,000 deliver service partner contractors.

These DSPs work solely for Amazon. Amazon set this system up to exert total control, while shifting all their risk and responsibility onto smaller businesses and, of course, workers.

A direct impact of Amazon's demands can be seen in the creation of classifications of workers to sacrifice Amazon's insistence that its contractors provide service on the weekends.

In 2012, the contract that the USPS negotiated with Postal Service unions created a noncareer letter carrier position to do Amazon package delivery on the weekends. In our UPS national agreement in 2018, a new delivery job classification was also created to accommodate the demands of Amazon for weekend delivery.

If Amazon has the ability to dictate terms to entities like the United States Postal Service and UPS, imagine the control it has over small businesses like DSPs.

I feel fortunate to be working in a field where workers have fought for and won industry-leading pay and benefits standards through collective bargaining. I encourage you to consider antitrust policy reforms that help to rebalance the power that corporations like Amazon have over labor markets.

If we don't do something now, workers will be forced into dead-end, unsafe, and high-turnover jobs instead of enriching careers that allow our families to thrive.

Thank you, and I look forward to your questions.

[The statement of Mr. Gross follows:]

September 23, 2021

Written Testimony of Daniel Gross, Tractor Trailer "Feeder" Driver for United Parcel Service, House Judiciary Committee, Antitrust, Commercial, and Administrative Law Subcommittee "Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker"

Thank you, Chairman Cicilline; Vice Chair Jayapal and Ranking Member Buck.

My name is Dan Gross from Edison, New Jersey. I'm 49 years old, husband, and father of four. I drive a tractor trailer in the feeder network for United Parcel Service. I'm also a proud union member and have been active in Teamsters Local Union 177, since I started with UPS 22 years ago.

I am honored to speak with you today about why reforming our antitrust laws is important to me and my fellow American workers.

My career at UPS started in June 1999. Like most of us at UPS, I started as a part timer, in my case in a classification called air driver, working five days a week, three hours a day picking up overnight packages. I started making $11.50 an hour in 1999, with fully paid family health insurance and pension contributions. That was over 20 years ago.

I transferred into a fulltime "combination job" in 2000. These combo jobs were the result of our national negotiations with UPS in 1997. That contract was only resolved after a three-week strike by the 190,000 Teamster members that worked for UPS at the time. The theme of the strike was "Parttime America Won't Work". The strike ended and the contract was ratified after language was added that created tens of thousands of fulltime jobs by combining multiple parttime jobs.

My combo job rate in 2001 was $17 an hour, again with full health insurance and pension benefits. In that job I continued pm air package pickup and then worked the other part of my night inside sorting packages. After two years in a combination job, my seniority enabled me to transfer to a package car driver position where I delivered packages to businesses and homes in one of those familiar brown trucks you see in your neighborhoods. I did that work for three and half years. My hourly rate of pay as a package car driver in 2002 was roughly $23.

In October of 2005, again using my seniority, I was able to transfer to my current job as a feeder driver. As a feeder driver, I drive tractor trailers, transporting trailers full of packages between UPS delivery hubs and to and from other large UPS customers.

I've worked hard my entire life. I'm proud that the work my co-workers and I do was proven to be essential during the COVID pandemic – we did not miss a day during the most dangerous and uncertain times, making sure goods and packages were getting to people's homes and helping keep people safe.

I've seen firsthand what large corporations try to get away with due to corporate greed when workers don't have a collective voice to demand decent pay and working conditions. My union has provided that collective voice at UPS for nearly a hundred years. Unfortunately, our standards and those of the hundreds of thousands of United States Postal Service workers are also under attack by a new type of company, a company that uses its dominant presence in e-commerce to exert power over its contractors and its workers. The threat to the industry I work in is Amazon.

I know that this Committee has passed bills that address the unique competitive issues and monopolistic practices posed by Amazon and the other tech companies. I am not here to speak to those bills. I want to use Amazon as one example of why I am urging you to consider general antitrust reforms that address the power dominant companies have over workers and how that power impacts not only their direct employees; but all workers in that industry or geography.

As a feeder driver, it's common practice for us to be offered access to a customer's facilities while we are waiting for our loads. That used to be the case when picking up Amazon deliveries, but within the past few years, Amazon stopped that practice to limit our interaction with direct Amazon drivers and drivers working for Amazon's subcontractors or independent contractors. It seems clear to us feeder drivers that Amazon did this to exert control over the information their employees or contractors can share with each other.

I know from conversations with drivers in the industry, that the drivers Amazon uses are paid varying rates that are below industry standards, possibly by as much as half, even before benefits are factored in. I have even been told that sometimes Amazon restricts the ability of the so-called independent contractors to carry backhaul loads, forcing them into non-paying empty loads on their return trip.

Amazon's monopolistic demands have even encroached upon the Teamsters Collective Bargaining Agreement with UPS. For example, instead of using feeder drivers within its existing network, UPS has succumbed to Amazon's demand to utilize subcontractors and independent operators who are not subject to the collectively bargained for rules that are designed to keep drivers and the public safe. My Local, Teamsters 177, has won grievance settlements to address this and similar contract violations but it is an ongoing uphill battle. We also have unsettled grievances scheduled for arbitration in which, unbelievably, UPS is allowing Amazon to do our work.

Similarly, also based on my experience as a package car driver and as a shop steward in my UPS hub, I've noticed the growth of Amazon's last mile delivery network. While the drivers are in Amazon-branded vehicles and now wear Amazon colors, they are not Amazon employees but employees of one of the nearly 1,000 Delivery Service Partner contractors. Amazon set up this system to exert total control while shifting all their risk and responsibility onto the smaller businesses and of course workers.

In my facility (which is close to the rate in the national UPS contract), a UPS package car driver makes approximately $38.35 an hour. When I looked up job postings for Amazon DSP drivers in my area this week they are advertising as low as $17.50 as a starting wage, which is about what I was making at UPS 20 years ago. The hourly contributions UPS makes for my health insurance and pension are more than that!

Amazon's dominant position as an e-retailer, enables Amazon to exert its dominance in business relationships with its third-party last mile carriers, including larger firms like UPS, USPS, DHL, and its DSPs, on terms such as hours of operation and days of delivery.

Two examples I am aware of are with the USPS and UPS. In 2012, the contract that the USPS negotiated with the postal service unions, created a non-career letter carrier position to do Amazon package delivery on the weekends. In our national agreement in 2018, a new delivery job classification was also created to accommodate the demands of Amazon for weekend delivery. If Amazon has the ability to essentially dictate terms to entities like the United State Postal Service and UPS, imagine the control it has over small businesses like the DSPs.

I feel fortunate to be working in a field where workers have fought for and won industry-leading pay and benefit standards through collective bargaining. However, I am worried that large corporations with dominance in product markets or retail markets are exerting power over workers and threatening wages and standards across many industries like mine. I encourage you to consider antitrust policy reforms that help to rebalance the power that corporations like Amazon have over labor markets. If we don't do something now, workers will be forced into dead-end, unsafe, and high turnover jobs, instead of enriching careers that allow our families to thrive.

Thank you, and I look forward to your questions.

Mr. CICILLINE. Thank you very much, Mr. Gross, for being here and for your testimony.

I now recognize Ms. Payton for five minutes.

TESTIMONY OF NILA PAYTON

Ms. PAYTON. Good morning. My name is Nila Payton. I'm an administrative assistant in the pathology department at UPMC Presbyterian hospital. I want to start by thanking the Committee for inviting me to testify today.

I live in Pittsburgh with my two children. My older son, Ty-Jahn, goes to a Pittsburgh public school. My youngest, Roman, goes to a Pittsburgh public preschool. I do my best to keep up with school announcements and participate in school board meetings because I want them to have a great, quality education.

I have worked at my job for almost 16 years. I trained for it at the Bidwell Training Center where a lot of administrative assistants and UPMC workers can get their training. The pathology department is important to everything we do at UPMC. I make sure test requests and results get to the right place.

So, I have to understand medical terminology. I also make sure that our department remains HIPAA compliant. I'm really good at my job, I have good relationships with everyone, and I bring a positive attitude to work. I like knowing that my work helps sick people.

My job does not pay as it should, and I'm not treated with the dignity and respect I deserve. After 15 years on the job and several promotions, I make $19 an hour. That might sound like a lot, but a living wage for my family type in Pittsburgh is $28 as hour. People just starting in my position or in a service position make $15.

Every service worker I know struggles to make ends meet. Our medical insurance is very high, and we have to use UPMC facilities. I have medical debt to my employer, and so do many of my coworkers. That mean we skip or postpone treatment because copays and bills are just too high.

Management knows we are struggling. They sometimes send us tips for stretching our budget. One time they told us to save on transportation costs by riding our bikes to work, something I don't plan to do in the snow, especially with a small child. They direct us to apply for government assistance, which some of us workers make just too much to qualify for. We also have an internal UPMC food bank. Where is the dignity in that?

As for respect, here's an example. In the last big wave of the pandemic, I told my manager that workers wanted better PPE and information so we could stay safe in the hospital. When I expressed that I thought we should get hazard pay, my employer told me that because we work in healthcare that we signed up for this and I should stop complaining. I'm sorry. Nowhere in my orientation did it mention putting my life on the line.

I understand that we have to make a hospital run in a pandemic, but "you signed up for this" is not the right answer. The right answer is your life is valuable. Let's do everything in our power to make sure you are informed and safe. UPMC did not even apply for the hazard pay that the State was offering.

Sometimes people ask, "Why don't you just get another job if you don't like the one you have?" I love what I do, and this is where you need to understand just how big UPMC is. Two decades ago, there was no UPMC. Pittsburgh had many independent hospitals. Over the past 20 years UPMC has grown from one hospital, Western Psych, to become a $23 billion company. It now owns Mercy, Presbyterian, Montefiore, Shadyside, Children's, Magee, McKeesport, East, and St. Margaret's. That's just in the Pittsburgh area.

We all have the same corporate policies. So, what's the point of going from Presby to Magee? There's almost nowhere else to work if you're a healthcare worker. UPMC is so big that they actually affect the whole labor market, even outside of healthcare.

Last week I looked at administrative assistant jobs not at UPMC. There were 800 of them in our region. I eliminated the part-time jobs. I eliminated the part-time jobs, then all the jobs that paid the same or less than mine. There were 40 left. Then I eliminated the nightshift jobs, because I have children, and the jobs so far where you need to have a car. There were just two jobs left.

UPMC employs 92,000 workers. Nobody else has enough jobs to force them to compete for our time and our skills. Instead UPMC sets the ceiling for everybody. That's why leaving UPMC is not a better—not a realistic path to a better life. Leaving just means that we have to start all over again.

I do not want to waste time, looking for something that does not exist. I want to work to improve the job that I have. I want to improve all the jobs that thousands of my UPMC coworkers have.

Two generations ago, Pittsburgh has an employer as big and impactful as UPMC. It was called U.S. Steel. Workers at U.S. Steel had their union. So, instead of a worker starting at $15, a worker started their first day at over $21 an hour in today's money and went up from there. A steelworker with my years of service would be vested in a pension and making $33 an hour.

Steel jobs lifted up every other job around because, if employers wanted workers, they had to compete with U.S. Steel. If we create good jobs for workers at UPMC, we can do the same thing and create good jobs for everyone. That's what I want to do.

Thank you for listening and have a great day.

[The statement of Ms. Payton follows:]

September 28, 2021

Oral Testimony of Nila Payton, Administrative Assistant in a pathology lab at the University of Pittsburgh Medical Center, House Judiciary Committee, Antitrust, Commercial, and Administrative Law Subcommittee "Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker"

Good Morning.

My name is Nila Payton. I'm an Administrative Assistant in the Pathology Department at University of Pittsburgh Medical Center's (UPMC) Presbyterian Hospital. I want to start by thanking the Committee for inviting me to testify today.

I live in Pittsburgh with my two children. My older son, Ty-Jahn, goes to a Pittsburgh public school and my youngest, Roman, is in preschool. I do my best to keep up with school activities and participate in school board meetings because I want them to have a great, quality education.

I have worked at my UPMC job for almost 16 years. I trained for my job at the Bidwell Training Center where a lot of UPMC workers get the training they need to work in healthcare.

The pathology department is important to everything we do at UPMC. I make sure test requests and results get to the right place and I also make sure that our department remains HIPPA compliant. I have to understand the medical and legal terminology that my doctors use so I can be a strong part of the team in a busy medical department. I'm really good at my job and I love what I do. I have good relationships with everyone and I bring a positive attitude to work. I like knowing that my work helps sick people.

But my job does not pay what it should and I am not treated with the dignity and respect I deserve.

After 15 years on the job and several promotions, I make $19.00 an hour. That might sound like a lot but the living wage for my family type in Pittsburgh is $28.00/hour. People just starting in my position – or in similar roles such as patient care techs, environmental techs or transporters – make $15.00 an hour.

Most UPMC workers I know struggle to make ends meet. Our medical insurance is very expensive – and we are required to use UPMC medical facilities. I have medical debt to my employer, and so do many of my coworkers. Most of us make just too much to qualify for medical assistance. That means we skip or postpone treatment because the bills are just too high.

Management knows we are struggling. They sometimes send us tips for stretching our budget. One time they told us to save on transportation costs by riding our bikes to work, something I

do not plan to do in the snow. We also have an internal UPMC foodbank. Where is the dignity in that?

As for respect, here's an example of how little UPMC thinks we are worth: In the last big wave of the pandemic, I told my manager that workers wanted better PPE and information so we could stay safe in the hospital. I also thought we should get hazard pay. My manager told me that because I work in healthcare, I signed up for this and I should stop complaining. I'm sorry, but nowhere in any of my orientation did it mention putting my life on the line. I understand that we have to make the hospital run even in a pandemic, but "You signed up for this." is not the right answer. The right answer is, "Your life is valuable. Let's do everything in our power to make sure you are informed and safe." UPMC did not even apply for the hazard pay that the state was offering to employers.

Sometimes people ask me "Why don't you just get another job if you don't like the one you have?"

This is where you need to understand just how big UPMC is.

Two decades ago, there was no UPMC. Pittsburgh had many independent hospitals and those hospitals competed for workers, so potential employees could pick the best place for them based on salary, location, treatment etc. But over the past 20 years, UPMC has grown from one hospital – Western Psych – to become a 23 billion dollar company. It now owns Mercy, Presbyterian, Montefiore, Shadyside, Children's, Magee, McKeesport and St Margaret's and that's just in the Pittsburgh area. We all work for the same corporation so what's the point of going from Presbyterian to Magee? There is almost nowhere else to work if you are a healthcare worker.

But UPMC is so big that they actually affect the whole labor market even outside of healthcare.

Last week, I looked at administrative assistant jobs offered not at UPMC. There were 800 of them in our region. I eliminated the part-time jobs and then all the jobs that paid the same or less than mine. There were 40 left. Then I eliminated the night shift jobs because I have children and also the jobs that are so far away you'd need to have a car. There were just two jobs left.

UPMC employs 92,000 workers. Nobody else has enough jobs to force UPMC to compete for employees. Instead, UPMC sets the ceiling for everybody.

That's why leaving UPMC is not a realistic path to a better life in Pittsburgh. Leaving UPMC just means we have to start all over again and maybe have to leave the city and my community. Instead, I want to work to improve the job I have. I want to improve all the jobs that thousands of my UPMC coworkers have.

Two generations ago, Pittsburgh had an employer that was as big and impactful as UPMC. It was called US Steel. Instead of a worker starting at $15.00, a worker started their first day at

over $21.00 (in today's money) and went up from there. A steelworker with my years of service would be vested in a pension and be making $33.00/hour. The difference was that workers at US Steel had a union. And so US Steel - even though it was big - could not make all the decisions on its own about pay and working conditions. When a big employer has to bargain with workers, they can't use their size to keep pay down.

But UPMC knows that it can keep pay down and disrespect its workers because we have few employment alternatives. That is why I am fighting for a union. I am fighting to make UPMC jobs good jobs for everyone.

Thank you for listening.

Mr. CICILLINE. Thank you, Ms. Payton.

I now recognize Commissioner Wilson for five minutes.

TESTIMONY OF THE HONORABLE CHRISTINE S. WILSON

Ms. WILSON. Chair Nadler, Ranking Member Jordan, Chair Cicilline, Ranking Member Buck, and Members of the Committee, thank you for the opportunity to testify.

I will first provide context for the labor issues we're discussing today. Then I will address antitrust issues pertaining to labor markets. Finally, I'll touch on procedural irregularities at the FTC that regrettably have precluded a robust dialogue on these and other policy issues.

Our antitrust laws are more than 100 years old. Periodically we ask: Are they capable of addressing new industries and dynamic markets? Previous periods of reflection have led us to answer yes. Many ask the same question now, but the current version of the question is notably different.

First, concerns about the dynamic tech industry are not limited to antitrust. Some focus on the collection and use of consumer data. Federal privacy legislation, I believe, is the solution. Others are concerned about content curation and censorship. Reforms to section 230 may be appropriate.

These concerns merit discussion, but just because we hold the hammer of antitrust law in our hands does not mean we should treat every concern as a nail, or we risk bludgeoning our entire economy. Each concern deserves the appropriate tool. For antitrust law, the many enforcement actions and investigations against big tech confirm that process has begun. We should let those cases play out before overhauling our antitrust laws.

The second difference is that current concerns about antitrust extend beyond the dynamic tech industry. Today's hearing on labor in monopsony highlights one of those broader goals. The antitrust laws as they exist today embody concepts like monopsony and prohibit no-poach agreements and unreasonable noncompetes. Antitrust enforcement as it exists today reaches anticompetitive conduct that harms labor and middlemen, not just the end customer.

Today's antitrust reformers propose changes that would transform not just our antitrust laws but our economy. Substituting our sound economic-based approach from one that picks winners and losers will incentivize rent-seeking and regulatory gamesmanship instead of competition and innovation. Everyone including American labor will suffer.

Turning to monopsony and labor issues, let's start with occupational licensing. Licensing regimes may advance legitimate health and safety goals, but frequently those who are already licensed use those regimes to insulate themselves from competition. The FTC has sued when incumbents suppressed competition through State boards. The FTC has also submitted hundreds of comments and amicus briefs, urging policymakers to consider the impact of licensing restrictions on competition, especially in the healthcare sector.

Federal and State restrictions were relaxed during the pandemic to boost the availability of scarce healthcare personnel. I hope policymakers assess the impact of those changes and permanently eliminate unnecessary restrictions, and I thank America's health-

care workers like Ms. Payton for their service to us during the pandemic.

Regarding monopsony, the FTC and DOJ have prevailed in monopsony cases and so have private litigants. Both mergers and business practices may create unlawful monopsony power, even when ultimate downstream markets are not impacted. I would welcome the opportunity to discuss the FTC's scrutiny of mergers from monopsony issues in recent years including a challenge to a merger involving the sale of blood plasma by donors.

With respect to noncompete provisions, State jurisprudence and common law provide rich guidance on noncompetes. Some States have laws explicitly prohibiting employee noncompetes, and other States like Pennsylvania are considering laws on this topic. States AGs have had notable successes in this area. For now, given that economic evidence is mixed regarding the impact of noncompetes on employees and the ancillary impact of noncompetes like investments in employee training in R&D are relevant as well, I believe we should listen to Justice Brandeis and let the states continue acting as laboratories of democracy.

The final labor issues pertain to no-poach agreement. FTC–DOJ guidance warrants that wage fixing and no-poach agreements may be prosecuted criminally. Both Federal and State enforcements have been active in this area, and the FTC brought a case involving home health staff in 2018.

Turning to my third topic, the issues we'll discuss today and other potential antitrust reforms merit thoughtful discussion. Traditionally, the FTC has played a leading role in the antitrust policy debate largely because of its strong bipartisan dialogue which has benefited from the vibrant input from stakeholders. Regrettably new FTC leadership has made meaningful dialogue among commissioners and between the commission and its stakeholders difficult.

In closing, I thank the Committee for this opportunity to testify. I look forward to answering your questions.

[The statement of Ms. Wilson follows:]

United States of America

Federal Trade Commission

Hearing on Reviving Competition Part 4

21st Century Antitrust Reforms and the American Worker

Christine S. Wilson*

Commissioner, U.S. Federal Trade Commission

September 28, 2021

Testimony Before the House Judiciary Committee

Subcommittee on Antitrust, Commercial and Administrative Law

* The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

Chairman Nadler, Ranking Member Jordan, Chairman Cicilline, Ranking Member Buck, and distinguished members of the Committee, thank you for the opportunity to testify. In recent years, this Committee has played a pivotal role in spurring a rich dialogue on our antitrust laws. It is an honor to appear before you today.

In my opening remarks, I will first provide context for the monopsony and labor issues we will discuss today. Then, I will address antitrust enforcement and proposals that impact labor markets, including occupational licensing, monopsony, and non-compete and no-poach agreements. These issues are important, and worthy of the time we are devoting to them today. Finally, I will briefly touch on procedural irregularities at the Federal Trade Commission that have precluded a robust dialogue on these and other key policy issues among Commissioners, and between Commissioners and stakeholders.

The Big Picture

The U.S. antitrust laws were enacted more than a century ago. The Sherman Act was passed in 1890 and the Clayton Act, which supplemented the Sherman Act, was passed in 1914. Periodically, given the time that has passed since their enactment, commentators question whether those Acts remain capable of addressing issues that arise in new industries and dynamic markets. This question was asked in the 1990s when commentators wondered whether the antitrust laws were suited to address rapidly evolving technology markets. The D.C. Circuit made clear in the *Microsoft* case that the antitrust laws were sufficiently flexible to support a holding that the dominant technology firm of that time had violated the antitrust laws.[1]

Congress asked the question again in 2002 when it created the Antitrust Modernization Commission. As described in the first chapter of the Antitrust Modernization Commission's Report issued in 2007:

> The term 'new economy' can describe a diverse array of markets in which new information, communication, and other technologies have produced significant changes in recent decades. For purposes of this Report, the key question is whether antitrust analysis can properly account for the economic characteristics of these markets. Those characteristics include innovation, intellectual property, and technological change.[2]

Following an extensive inquiry, the Antitrust Modernization Commission concluded:

> Commenters and witnesses largely agree that antitrust analysis has sufficient grounding in solid economic analysis, openness to new economic learning, and flexibility to enable the courts and the agencies properly to assess competitive issues in new economy industries. Most importantly, commenters

[1] United States v. Microsoft Corp., 253 F.3d 34, 65-67 (D.C. Cir. 2001).

[2] ANTITRUST MODERNIZATION COMMISSION REPORT AND RECOMMENDATIONS 31 (April 2017), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

> noted, the economic principles on which antitrust is based do not require revision for application to those industries. As one economist [Carl Shapiro] noted, basic economic principles do not become 'outdated' simply because industries become highly dynamic.[3]

In other words, previous periods of reflection have concluded that the antitrust laws are sufficiently broad and flexible to address the issues of the day, including rapidly evolving tech markets.

In recent years, the same question again has arisen: are our antitrust laws capable of addressing the concerns that have been raised about so-called Big Tech? This time, though, the discussion differs in notable ways.

First, while antitrust issues contribute to this question, the concerns about Big Tech are many and varied. Some observers are concerned about the seemingly limitless collection of consumer data by tech platforms, and the ways in which those data are used, shared, and monetized. Others are concerned about content curation and censorship. And still others are concerned about traditional antitrust issues, including serial acquisitions by large tech companies and refusals to deal with competitors.

Each of these concerns is worthy of discussion. But just because we hold the hammer of antitrust law in our hands does not mean we should treat every concern as a nail, lest we risk bludgeoning our entire economy. The better approach is to disaggregate the varied concerns about the tech sector and address each concern with the appropriate tools. For example, privacy concerns require federal privacy legislation, which I heartily support. And Congress may conclude that content curation concerns require reforms to Section 230.

That leaves the competition concerns. I believe the antitrust laws as currently written are sufficiently broad and flexible to address the competition issues in the dynamic and rapidly evolving tech sector. As noted above, the Department of Justice in the 1990s won its antitrust case against Microsoft, the dominant tech firm of that era. In December 2020, the FTC launched an antitrust challenge against Facebook.[4] Even before that, the FTC initiated an antitrust case against Surescripts, a multi-sided platform that facilitates electronic prescribing, alleging monopolization of two markets.[5] In October 2020, the DOJ and 11 State Attorneys General

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[3] *Id.*

[4] Complaint, FTC v. Facebook, Inc., No. 1:20-cv-03590 (D.D.C. Jan. 13, 2021), https://www.ftc.gov/system/files/documents/cases/051_2021.01.21_revised_partially_redacted_complaint.pdf.

[5] Press Release, Fed. Trade Comm'n, FTC Charges Surescripts with Illegal Monopolization of E-Prescription Markets (Apr. 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/04/ftc-charges-surescripts illegal monopolization-e-prescription ("The FTC alleges that Surescripts intentionally set out to keep e-prescription routing and eligibility customers on both sides of each market from using additional platforms (a practice known as multihoming) using anticompetitive exclusivity agreements, threats, and other exclusionary tactics.").

brought an antitrust case against Google;[6] State Attorneys General subsequently filed three additional cases against Google.[7] The press has covered reportedly ongoing investigations into other Big Tech companies.[8] The FTC is analyzing transactions made by Amazon, Apple, Facebook, Microsoft, and Google owner Alphabet that fell below pre-merger notification filing thresholds.[9] And the District of Columbia sued Amazon in May.[10] Prudence would dictate allowing these cases and investigations to play out before implementing sweeping legislative reforms.

The second way in which today's iteration of the question differs is this: the doubts that have been raised about the adequacy of our antitrust laws are not limited to dynamic and rapidly evolving markets. Instead, would-be reformers propose sweeping changes to our antitrust laws that would result in a fundamental transformation of our economy. The breadth of their aspirations is confirmed by the sweeping range of topics covered in President Biden's recent Executive Order on competition.[11] The topic of today's hearing – labor and monopsony – highlights just one of those broader goals.

To be clear, the issues we will discuss today are important ones. But we should keep two points in mind during this discussion. First, the antitrust laws ***as they exist today*** embody concepts like monopsony and prohibit anticompetitive agreements like no-poach agreements and unreasonable non-competes. Second, antitrust enforcement ***as it exists today*** supports challenges to anticompetitive conduct that harms labor, middlemen, and other entities beyond the end consumer.

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[6] Complaint, United States et al. v. Google, No. 1:20-cv-03010 (D.D.C. Oct. 20, 2020), https://www.justice.gov/opa/press-release/file/1328941/download.

[7] Complaint, Utah et al. v. Google, No. 3:21-cv-05227 (N.D. Cal. July 7, 2021), https://ag.ny.gov/sites/default/files/utah_v_google.1.complaint_redacted.pdf; Complaint, Colorado et al. v. Google LLC, No. 1:20-cv-03715-APM (D.D.C. Dec. 17. 2020), https://ag.ny.gov/sites/default/files/redacted_complaint_-_colorado_et_al._v._google.pdf; Complaint, Texas et. al v. Google LLC, No. 4:20-cv-00957-SDJ (E.D. Tex. Dec. 16, 2020), https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/20201216%20COMPLAINT_REDACTED.pdf.

[8] Margaret Harding McGill, *Fall antitrust forecast: Biden raises hammer on Big Tech*, AXIOS (Aug. 30, 2021), https://www.axios.com/antitrust-big-tech-apple-google-amazon-facebook-2e619cf6-2fd9-48be-bc72-0e36cb7fdcfb.html.

[9] Press Release, Fed. Trade Comm'n, FTC to Examine Past Acquisitions by Large Technology Companies (February 11, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies. *See also* Press Release, Fed. Trade Comm'n, FTC Staff Presents Report on Nearly a Decade of Unreported Acquisitions by the Biggest Technology Companies (September 15, 2021), https://www.ftc.gov/news-events/press-releases/2021/09/ftc-report-on-unreported-acquisitions-by-biggest-tech-companies.

[10] Complaint, District of Columbia v. Amazon, No. 2021 CA 001775 B (D.C. Super. Ct. May 25, 2021), https://oag.dc.gov/sites/default/files/2021-05/Amazon-Complaint-.pdf.

[11] Exec. Order No. 14,036, 86 Fed. Reg. 36, 987 (July 9, 2021), https://www.govinfo.gov/content/pkg/FR-2021-07-14/pdf/2021-15069.pdf.

I am deeply troubled by proposals to replace modern antitrust enforcement and market forces with government micromanagement. Attempting to regulate the economy into competition, instead of engaging in antitrust enforcement based on sound economic principles, has harmed Americans in the past.[12] This approach will undermine the American economy at the very moment it is struggling to recover from the COVID-19 pandemic. In addition, abandoning fact-based enforcement and sound economic principles for a highly interventionist competition policy that picks winners and losers will create incentives for rent-seeking and regulatory gamesmanship instead of competition and innovation. This result will harm everyone, including American labor.

Today's Antitrust Standards Address Monopsony and Labor Issues

I will discuss occupational licensing, monopsony, and non-compete and no-poach agreements in turn.

Occupational Licensing

States have a legitimate interest in protecting the health, safety, and welfare of their residents, and occupational licensing regimes may help advance these goals. But all too frequently, occupational licensing regimes are used by incumbents – those already licensed in a state – to erect barriers to entry and insulate themselves from competition.[13] Rent-seeking by incumbents limits consumer choice, drives up prices, and may decrease quality.[14]

The FTC has challenged attempts by market incumbents to suppress competition through state boards. For instance, the Commission challenged actions by the North Carolina State Board of Dental Examiners that excluded non-dentist providers of teeth whitening goods and services from selling their products to consumers in North Carolina.[15] In a similar vein, the FTC challenged actions by the South Carolina Board of Dentistry that restricted the delivery of

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[12] Christine S. Wilson and Keith Klovers, *The growing nostalgia for past regulatory misadventures and the risk of repeating these mistakes with Big Tech*, 8 J. OF ANTITRUST ENFORCEMENT 10 (discussing railroad and airline regulations once administered by the Interstate Commerce Commission and the Civil Aeronautics Board and the stunning amnesia regarding the enormous harm those regulations caused to consumers).

[13] *See* Maureen K. Ohlhausen and Greg Luib, *Brother, May I?: The Challenge of Competitor Control Over Market Entry*, 4 JOURNAL OF ANTITRUST ENFORCEMENT 111 (2016).

[14] Paul J. Larkin, Jr., Public Choice Theory and Occupational Licensing, 39 HARVARD J. OF LAW & PUBLIC POLICY 209, 235-238 (2010) (surveying studies that find occupational licensing does not lead to quality improvements or other benefits that offset price increases).

[15] *See* North Carolina State Bd. Dental Examiners v. FTC, 574 U.S. 494 (2015). *see also* National Association of Social Workers, 116 F.T.C. 140 (March 3, 1993) (charging professional association of social workers with engaging in unlawful concerted action by adopting rules to restrain competition within the profession).

preventive dental services by licensed dental hygienists to economically disadvantaged children in South Carolina schools.[16]

In addition to bringing enforcement actions, the FTC has a rich history of analyzing, and seeking to inform policymakers of, the impact of occupational licensing restraints.[17] The agency provides input to courts, legislatures, agencies, and self-regulatory entities on initiatives that may raise barriers to entry, limit choice, or otherwise hinder competition. It is of course appropriate for government bodies to promote goals other than competition, including public health, safety, and security. But through Commission-authorized comments, FTC staff seek to identify the potential harms to competition so that policymakers can weigh those harms against other benefits to consumers and the public interest.

The FTC has submitted literally hundreds of comments and amicus briefs to policymakers across a wide range of industries.[18] For example, the FTC staff consistently has urged state and federal agencies to avoid imposing restrictions on the scope of practice for advanced practice registered nurses and physician assistants unless those restrictions are necessary to address well-founded patient safety concerns.[19]

Developments during the COVID-19 pandemic demonstrated that easing restrictions on occupational licensing can increase the availability of professionals to the benefit of consumers. In particular, the pandemic highlighted the pitfalls of occupational licensing regimes that restrict the mobility of medical professionals and preclude them from providing services within their scope of medical expertise. Both state and federal agencies waived or repealed regulations that

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[16] Complaint, South Carolina State Board of Dentistry, FTC File No. 0210128 (September 15, 2003), https://www.ftc.gov/sites/default/files/documents/cases/2003/09/socodentistcomp.pdf.

[17] Recently, the Commission examined questions of occupational licensing in detail. In 2017, Acting Chairman Maureen Ohlhausen created an Economic Liberty Task Force to renew the Commission's efforts to address occupational licensing regulations. In 2018, the Economic Liberty Task Force released its report. FTC Staff Paper, Policy Perspectives: Options to Enhance Occupational License Portability (Sept. 2018), https://www.ftc.gov/system/files/documents/reports/options-enhance-occupational-license-portability/license_portability_policy_paper.pdf.

[18] For an overview of the advocacy efforts involving occupational licensing and regulation, *see* Prepared Statement of Fed. Trade Comm'n on Competition and the Potential Costs and Benefits of Professional Licensure, before the H. Comm. on Small Bus., 113 Cong. 14 (July 16, 2014), https://www.ftc.gov/system/files/documents/public_statements/568171/140716professionallicensurehouse.pdf.

[19] *See, e.g.*, FTC Staff Paper, Policy Perspectives: Competition and the Regulation of Advanced Practice Nurses (March 2014), https://www.ftc.gov/system/files/documents/reports/policy-perspectives-competition-regulation-advanced-practice-nurses/140307aprnpolicypaper.pdf; FTC Staff Comment to the Dep't of Veterans Affairs (July 25, 2016), https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-ftc-office-policy-planning-bureau-competition-bureau-economics-department-veterans/v160013_staff_comment_department_of_veterans_affairs.pdf (supporting proposed rule that would allow APRNs to provide services required by the VA without the oversight of a physician); FTC Staff Comment to the Iowa Dep't of Public Health (Dec. 20, 2016), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-professional-licensure-division-iowa-department-public-health-regarding-proposed/v170002_ftc_staff_comment_to_iowa_dept_of_public_health_12-21-16.pdf (regarding the appropriate level of supervision of physician assistants).

constrained the mobility and supply of health care professionals, reducing delays and restrictions on the availability of care.[20]

It was gratifying to see these changes, although unfortunate that a global pandemic was necessary to prompt them. As a society, we can choose to focus on the positive and preserve, even after the pandemic subsides, the enhanced levels of choice and competition in health care now emerging. Legislators and regulators should consider which laws and rules are truly necessary for patients' safety, and which ones create unnecessary barriers to market entry. Specifically, changes made to address COVID-19 give policymakers the opportunity to observe how the absence of these restraints has impacted patients. Moreover, the fact that states have responded differently during the pandemic will enable comparative analyses, highlighting the benefit of states as laboratories of democracy.

Monopsony Resulting From Mergers or Collusive Agreements

A monopoly arises when a market has only one seller but many buyers; conversely, a monopsony arises when a market has many sellers but only one buyer.[21] Both the FTC and DOJ have brought cases premised on monopsony concerns, and litigants in private antitrust cases have prevailed on monopsony allegations. As the following examples demonstrate, monopsony power may serve as the basis for violations of the Clayton Act and the Sherman Act, even when ultimate downstream markets are not impacted. In other words, existing antitrust standards do not preclude cases based on monopsony harms to labor and middlemen.[22]

In the merger context, the 2010 Horizontal Merger Guidelines devote a section to explaining that "[m]ergers of competing buyers can enhance market power on the buying side of the market, just as mergers of competing sellers can enhance market power on the selling side of the market."[23] Notably, the 2010 Horizontal Merger Guidelines provide that monopsony

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[20] Christine S. Wilson & Pallavi Guniganti, *Deregulating Health Care in a Pandemic—and Beyond*, 43 Antitrust 14 (Summer 2020), https://www.ftc.gov/system/files/documents/public_statements/1579079/summer_2020_wilson_deregulating_health_care_in_a_pandemic-_and_beyond.pdf (discussing the ways in which both federal and state authorities waived, suspended, and repealed occupational licensing restrictions during the pandemic).

[21] Robert S. Pindyck and Daniel L. Rubinfeld, MICROECONOMICS 349 (7th edition), Instructor's Review Copy (2009).

[22] In *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, the Supreme Court vacated a jury verdict finding a Sherman Act Section 2 violation, but made it clear that a monopsony claim did not require a showing of increased prices in a downstream market or even any harm to consumers. 127 S. Ct. 1069, 1076 (2007). ("case does not present . . . a risk of significantly increasing concentration in . . . the market for finished lumber"); *id.* at 1078 ("Even if output prices remain constant, a predatory bidder can use its power as the predominant buyer of inputs to force down input prices and capture monopsony profits."). Antitrust analysis and guidance does at times speak generally using specific harms for "simplicity of exposition," but proponents of reform are incorrect to imply the antitrust only evaluates prices effects on a narrow group of downstream consumers. *See, e.g.*, U.S. DEP'T OR JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1 (Aug. 19, 2010) ("For simplicity of exposition, these Guidelines generally discuss the analysis in terms of such price effects.").

[23] *See* U.S. DEP'T OR JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 12 (Aug. 19, 2010).

concerns may arise "even if the merger will not lead to any increase in the price charged by the merged firm for its output."[24]

Applying the Guidelines, the antitrust agencies examine proposed mergers to identify potential monopsony issues. For instance, the FTC recently required global health care company Grifols S.A. to divest blood plasma collection centers in three U.S. cities to resolve charges that Grifols' acquisition of Biotest US Corporation would be anticompetitive.[25] The FTC's analysis stated that Grifols and Biotest were the only two buyers of human source plasma in three U.S. cities, and that these three cities constituted relevant geographic markets because plasma donors typically do not travel more than twenty-five minutes to donate plasma.[26] Absent divestitures, Grifols likely would have been able to exercise monopsony power by unilaterally decreasing donor fees in the three cities.[27]

Also applying the 2010 Horizontal Merger Guidelines, the DOJ filed a complaint against the proposed acquisition by Aetna Inc. of the Prudential Insurance Company of America.[28] The complaint alleged that the acquisition would eliminate head-to-head competition between the parties for the sale of health maintenance organization and HMO-based point-of-service health plans in two relevant geographic markets (Houston and Dallas).[29] This claim rested on the merging parties' role as *sellers* of HMO and HMO-POS services. But for today's purposes, it is notable that the complaint also alleged that the acquisition would enable Aetna to unduly depress physicians' reimbursement rates in those same cities, resulting in a reduction in quantity or a

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[24] *Id.* at Ex. 24.

[25] Press Release, Fed. Trade Comm'n, FTC Requires Grifols S.A. to Divest Assets as Condition of Acquiring Biotest US Corporation (August 1, 2018), https://www.ftc.gov/news-events/press-releases/2018/08/ftc-requires-grifols-sa-divest-assets-condition-acquiring-biotest.

[26] Analysis of Agreement Containing Consent Orders to Aid Public Comment at 2, Grifols S.A., File No. 181-0081 (Aug. 1, 2018), https://www.ftc.gov/system/files/documents/cases/181_0081_c4654_grifols-biotest_analysis.pdf.

[27] The complaint and remedy also addressed the U.S. market for hepatitis B immune globulin ("HBIG"), a plasma-derived injectable medicine that provides hepatitis B antibodies for preventing hepatitis B infections. The proposed acquisition included a significant ownership stake in ADMA Biologics ("ADMA"), which would have allegedly eliminated substantial competition between ADMA, the largest supplier of HBIG, and Grifols, the third-largest supplier. The consent agreement prohibited Grifols from obtaining ownership or control of any ADMA stock. Analysis of Agreement Containing Consent Order to Aid Public Comment, Grifols S.A., File No. 181-0081 (Aug. 1, 2018), https://www.ftc.gov/system/files/documents/cases/181_0081_c4654_grifols-biotest_analysis.pdf.

[28] Complaint, United States v. Aetna Inc., No. 3-99-CV-398-H (N.D. Tex. June 21, 1999), https://www.justice.gov/atr/case-document/complaint-1. Monopsony concerns outside of labor have also been addressed in merger enforcement. In DOJ's challenge of the Charter/Time Warner merger, DOJ alleged that the parties competed as buyers of video content and the merger enhanced the parties' ability to restrain access to these critical inputs for new entrants. Accordingly, the proposed combination was alleged to substantially lessen competition in video programming distribution because of the buying power that could prevent nascent competition from emerging. The settlement prohibited the merged entity from entering into or enforcing any agreement with a programmer that limited or created incentives to limit the programmer's provision of content to certain potential competitors of the parties. United States v. Charter Communications, Inc. et al., Competitive Impact Statement, No. 1:16-cv-00759 (D.D.C. May 10, 2016), https://www.justice.gov/atr/file/844831/download. https://www.justice.gov/atr/file/850161/download.

[29] Complaint ¶ 26, United States v. Aetna Inc., No. 3-99-CV-398-H (N.D. Tex. June 21, 1999), https://www.justice.gov/atr/case-document/complaint-1.

degradation in quality of physicians' services.[30] This allegation focused on the role of the merging parties as *buyers* of physicians' services – in other words, the ability of the entity to exercise monopsony power. The proposed settlement required divestitures of certain assets sufficient to preserve competition both for the sale of HMO and HMO-POS plans and for the purchase of physicians' services in the relevant geographic markets.[31]

Agency challenges premised on monopsony concerns are not limited to mergers. For instance, in 2018, the FTC obtained a settlement with two companies that provided therapist staffing services to home-health agencies. According to the FTC's complaint, the two owners agreed to lower their therapist pay rates to the same level, and they also invited several of their competitors to lower their rates in an attempt to keep therapists from switching to staffing companies that paid more.[32] The complaint charged the staffing agency and the two owners with violating Section 5 of the Federal Trade Commission Act by "unreasonably restraining competition to offer competitive pay rates to therapists," "fixing or decreasing pay rates for therapists," and "depriving therapists the benefits of competition among therapist staffing companies."[33] And the DOJ brought an action against firms that procure billboard leases that had agreed to refrain from bidding on former leases for a year after a conspirator lost or abandoned the space.[34] The challenged agreement was limited to the input market—the procurement of billboard leases—and did not extend to downstream sales where the parties also competed.[35]

Non-Compete Provisions

Non-compete agreements that are unreasonable as to temporal length, subject matter, and/or geographic scope will be found to violate both federal[36] and state antitrust laws. Moreover, state and common law provide rich guidance on this topic. And to date, the economic evidence regarding the impact of non-competes in the labor arena is mixed. For these reasons, I believe we should heed the wise guidance of Justice Brandeis, who noted that "a single

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[30] *Id.* at ¶ 33.

[31] Revised Competitive Impact Statement, United States v. Aetna Inc., No. 3-99-CV-398-H (N.D. Tex. June 21, 1999), https://www.justice.gov/atr/case-document/revised-competitive-impact-statement.

[32] *See* Complaint at 3–5, Your Therapy Source, LLC, F.T.C. File No. 171–0134 (2018), https://www.ftc.gov/system/files/documents/cases/1710134_your_therapy_source_complaint_7-31-18.pdf.

[33] *Id.* at 5.

[34] *See* United States v. Brown, 936 F.2d 1042, 1044–45, 1044 n.1, 1050 (9th Cir. 1991) (affirming jury verdict convicting defendants of conspiring to restrain trade in violation of Section 1 of the Sherman Act).

[35] *Id.* at 1045.

[36] Although not involving labor, the FTC recently required merging parties to strike an overly broad non-compete provision from the purchase agreement to remedy concerns regarding the anticompetitive consequences of that provision. Analysis of Agreement Containing Consent Orders to Aid Public Comment, DTE Energy Company et al., No. 191-0068 (Sept. 13, 2019), https://www.ftc.gov/system/files/documents/cases/07_dte-enbridge_aapc_redacted.pdf ("Under the terms of the proposed Consent Agreement, and to maintain competition in the affected market post-merger, Respondents are required to strike the Non-Compete from the purchase agreement and are prohibited from entering similarly anticompetitive agreements with their pipeline competitors in this market.").

courageous state may, if its citizens choose, serve as a laboratory" and "[d]enial of the right to experiment may be fraught with serious consequences to the nation."[37]

Studies analyzing the impact of non-competes in the labor arena have revealed mixed results. Some studies have found that non-competes suppress employee wages and mobility. For example, one study found that a ban on non-competes for technology workers increased mobility by 11 percent and new-hire wages by four percent.[38] Another study concluded that moving from the 10th to the 90th percentile in enforceability on non-competes decreased earnings by three to four percent.[39] For low-wage workers, the group that has received the most attention,[40] Michael Lipsitz (of the Federal Trade Commission) and Evan Starr found that Oregon's 2008 ban on non-competes for low-wage workers increased hourly wages by up to roughly three percent.[41]

Other studies have found that non-competes have a beneficial impact on employee wages and other employee benefits. For example, one study concluded that physicians who sign non-competes tend to earn more money.[42] Another study found that non-competes increase incentives for firm-sponsored employee training.[43] And other research has revealed that employee awareness of non-competes before offers are accepted generates higher wages relative to employees without non-competes.[44]

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[37] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) ("To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment.").

[38] Natarajan Balasubramanian, Jin Woo Chang, Mariko Sakakibara, Jagadeesh Sivadasan & Evan P. Starr, *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers* (U.S. Census Bureau Center For Econ. Studies Paper No. CES-WP-17-09, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2905782.

[39] Matthew S. Johnson et al., *The Labor Market Effects of Legal Restrictions on Worker Mobility* 2 (Working Paper, Feb. 17, 2020).

[40] Glenn Kessler, *Biden once again bungles a story about low-wage noncompete agreements*, WASH. POST (July 14, 2021) (quoting President Biden at the competition executive order stating "Or there were clauses in McDonald's contracts: You can't leave Burger King to go to McDonald's. Come on. Is there a trade secret about what's inside that patty?").

[41] Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Non-Compete Agreements* (Dec. 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3452240.

[42] Kurt Lavetti et al., *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians*, 55 J OF HUMAN RES.. 1025 (Feb. 7, 2019), http://kurtlavetti.com/UIPNC_vf.pdf ("Using three years of longitudinal earnings data per physician, we estimate that NCAs increase the annual rate of earnings growth by an average of 8 percentage points in each of the first 4 years of a job, with a cumulative effect of 35 percentage points after 10 years on the job.").

[43] Mark J. Garmaise, *Ties that Truly Bind: Non-competition Agreements, Executive Compensation and Firm Investment*, 27 J. OF LAW, ECON., AND ORG. 2, at 376-425 (August 2011).

[44] Evan Starr, J.J. Prescott & Norman D. Bishara, *Noncompetes in the U.S. Labor Force* (Univ. of Michigan Law & Econ Research Paper No. 18-013, 2019), http://dx.doi.org/10.2139/ssrn.2625714.

It is also important to consider the impact of non-competes on stakeholders other than employees. Non-compete agreements can facilitate innovation by assuring firms that trade secrets and other firm know-how will not be transferred to a rival.[45] One study compared high and low non-compete enforceability regimes and concluded that enforceability facilitates riskier research and development investments.[46] Another study of financial advisors found that ending enforcement of non-competes lowered prices to consumers, but also led to a larger than 40 percent increase in incidents of misconduct because firms were more reluctant to discipline advisors.[47] Non-competes can also help firms and workers match more appropriately based on separation costs.[48]

States have or are moving to adopt laws in this area. In California,[49] North Dakota,[50] and Oklahoma,[51] non-competes are prohibited. And several states have considered or passed legislation that limit non-competes for certain types of employees (e.g., Hawaii,[52] New Mexico,[53] and Oregon[54]). Many states are considering bills or adjusting already passed legislation to address employee non-competes.[55]

Despite mixed evidence on the impact of non-competes and the growing number of states with not just common law but legislation, some commentators continue to advocate for a federal solution. They assert that even when non-competes violate state law, employees who cannot

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[45] OFFICE OF ECON. POLICY, U.S. DEP'T OF THE TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS, 9 (March 2016) https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf ("[N]on-competes can encourage additional economic activity and broader information sharing when trade secrets are significant.").

[46] Raffaele Conti, *Do Non-Competition Agreements Lead Firms to Pursue Risky R&D Projects?*35 STRATEGIC MGMT.. J. 1230 (Oct. 17, 2012).

[47] Umit G. Gurun et al., *Unlocking Clients: Non-Compete Agreements in the Financial Advisory Industry*, (Kelley School of Bus. Research Paper No. 18-29, 2019).

[48] OFFICE OF ECON. POLICY, U.S. DEP'T OF THE TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS, 9 (March 2016), https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf ([I]f firms with unusually high separation costs are able to match more appropriately with workers, both worker and firm are better off.).

[49] Cal. Business & Professions Code § 16600.

[50] N.D. Cent. Code § 9-08-06.

[51] OK Stat. § 15- 219A.

[52] Haw. Rev. Stat. § 480-4 (technology business employees).

[53] N.M.S.A. 1978, §§ 24-1I-1-5 (healthcare practitioners).

[54] Or. Rev. Stat. § 653.295 (income threshold).

[55] *What Employers Need to Know About New Non-Compete Legislation in Illinois*, The National Law Review (June 8, 2021), https://www.natlawreview.com/article/what-employers-need-to-know-about-new-non-compete-legislation-illinois ("Following a nationwide trend, Illinois has proposed significant legislation affecting employee restrictive covenants, such as non-compete agreements.").

afford a lawyer may experience an *in terrorem* effect.[56] But state attorneys general are well-positioned to take an active role in this arena, as the New York Attorney General did in its heavily publicized settlement with Jimmy John's.[57]

As Justice Brandeis wrote, "[t]o stay [state-by-state] experimentation in things social and economic is a grave responsibility."[58] The elected officials in each state are best situated to weigh the costs and benefits of non-competes and make decisions tailored to the unique circumstances in their jurisdictions. And as with occupational licensing suspensions during the pandemic, state-by-state changes will provide beneficial opportunities for research in this area. A federal solution at this time is premature.

No-Poach Agreements

Antitrust laws prohibiting price-fixing and market allocation apply to labor markets, including no-poach and similar agreements among competitors to constrain labor. Guidance published jointly by the FTC and the DOJ states clearly that wage-fixing and no-poach agreements may be prosecuted as criminal antitrust violations. Enforcement in this area, including by the state attorneys general, underscores the message to the business community that these agreements will not be condoned.

In 2016, the FTC and the DOJ issued guidance for human resources professionals.[59] The guidance explains that "[n]aked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws."[60] The guidance then warns that "the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements. These types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct."[61] According to the guidance, criminal charges can be brought against both the individuals and the companies involved.[62]

Beyond clear warnings to the business community, the federal antitrust agencies have a history of challenging no-poach and related agreements that harm labor. The FTC's history in

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[56] Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARVARD L. REV. 536, 545 (2018).

[57] Press Release, A.G. Schneiderman Announces Settlement With Jimmy John's To Stop Including Non-Compete Agreements In Hiring Packets (June 22, 2016) https://ag.ny.gov/press-release/ag-schneiderman-announces-settlement-jimmy-johns-stop-including-non-compete-agreements.

[58] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

[59] DEP'T OF JUSTICE, ANTITRUST DIV. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

[60] *Id.* at 3.

[61] *Id.* at 4.

[62] *Id.*

this area dates back to at least the 1990s. In 1992, the FTC reached a consent with Debes Corp. for entering into agreements to boycott temporary nurses' registries in order to eliminate competition among the nursing homes for the purchase of nursing services, which depressed the price of those services.[63] In 1995, the FTC reached a consent with the Council of Fashion Designers of America and the organization that produces the fashion industry's two major fashion shows for attempting to reduce the fees and other terms of compensation for models.[64] In 2007, the DOJ reach a consent with the Arizona Hospital & Healthcare Association for acting on behalf of most hospitals in Arizona to set a uniform bill rate for temporary and per diem nurses.[65] And in 2010 and 2014, the DOJ filed civil complaints and reached consents in three cases against eight technology companies – including Apple and Google – for agreeing not to cold call each other's employees and in two of the cases outright agreeing to limit hiring current employees from certain competitors.[66]

More recently, in 2018, the FTC obtained a consent with two companies – including an owner and former owner – that provided therapist staffing services to home-health agencies.[67] The complaint alleged that the companies agreed to lower their therapist pay rates to equal levels and invited several competitors to do the same, all to prevent therapists from switching to staffing companies that paid more.[68] The complaint charged the staffing agency and the two owners with violating Section 5 of the FTC Act by "unreasonably restraining competition to offer competitive pay rates to therapists," "fixing or decreasing pay rates for therapists," and "depriving therapists the benefits of competition among therapist staffing companies."[69] The

[63] In re Debes Corp., 115 F.T.C. 701 (1992), https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-115/ftc_volume_decision_115_january_-_december_1992pages_670-773.pdf.

[64] Press Release, Fed. Trade Comm'n, Council of Fashion Designers of America (June 9, 1995), https://www.ftc.gov/news-events/press-releases/1995/06/council-fashion-designers-america.

[65] Competitive Impact Statement, Arizona Hospital and Healthcare Association, No. CV07-1030-PHX (Sept. 12, 2007), ("As an immediate consequence of reducing bill rates below the competitive level, AzHHA has also caused the wages paid to temporary nurses to decrease below competitive levels.").

[66] *See* Competitive Impact Statement, United States v. Adobe Sys., Inc., 1:10-cv-01629 (D.D.C. 2010) https://www.justice.gov/atr/case-document/competitive-impact-statement-0; Competitive Impact Statement, United States v. Lucasfilm Ltd., 1:10-cv-02220 (D.D.C. 2010) https://www.justice.gov/atr/case-document/competitive-impact-statement-141; Competitive Impact Statement, United States v. eBay., Inc., 12-CV-05869-EJD-PSG (N.D. Cal. 2014) https://www.justice.gov/atr/case-document/file/494656/download.

[67] Press Release, Fed. Trade Comm'n, Therapist Staffing Company and Two Owners Settle Charges that They Colluded on Rates Paid to Physical Therapists in Dallas/Fort Worth Area (July 31, 2018), https://www.ftc.gov/news-events/press-releases/2018/07/therapist-staffing-company-two-owners-settle-charges-they.

[68] Complaint, Your Therapy Source, LLC, FTC No. C-4689 (Oct. 26, 2019).

[69] *Id.* at ¶ 29.

DOJ followed by indicting one of the former owners as part of this conspiracy and charged him with obstruction of the FTC's proceedings for false and misleading statements.[70]

State attorneys general have also played a key role in challenging unlawful no-poach agreements. Notably, Washington State investigated and reached settlements with seven fast-food corporations (Arby's, Auntie Anne's, Buffalo Wild Wings, Carl's Jr., Cinnabon, Jimmy John's, and McDonald's) to remove "no-poach provisions" from their franchise agreements that acted as restrictions on low-wage workers.[71] This work caused the companies to end these practices in thousands of locations nationwide.[72] Washington State Attorney General Ferguson continued his efforts against no-poach agreements, which at the time of his June 2020 report on the initiative, had resulted in more than 200 companies at over 197,000 locations nationwide ending these no-poach provisions.[73] The guidance and enforcement history in this area shows that the FTC, the DOJ, and state attorneys general take this conduct and resulting harms to labor markets seriously.

Procedural Irregularities at FTC Preclude Robust Dialogue on Key Policy Issues

The issues that we are discussing today, together with other antitrust reforms under consideration, merit a thoughtful discussion. Traditionally, the FTC has played a significant role in the antitrust policy debate, and has long enjoyed strong bipartisan dialogue on cases and policy issues. Moreover, this dialogue among Commissioners has benefited from the input of stakeholders obtained through hearings, workshops, notice and comment, and 6(b) studies. New agency leadership unfortunately has made meaningful dialogue among Commissioners, and between the Commission and its stakeholders, difficult by:

- Muzzling staff internally and externally;[74]

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[70] Press Release, Dep't of Justice, Antitrust Div., Former Owner of Health Care Staffing Company Indicted for Wage Fixing (Dec. 10, 2020), https://www.justice.gov/opa/pr/former-owner-health-care-staffing-company-indicted-wage-fixing.

[71] Press Release, Wash. State Office of the Attorney General, AG Ferguson announces fast-food chains will end restrictions on low-wage workers nationwide (July 12, 2018), https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-restrictions-low-wage-workers.

[72] *Id.*(Arby's estimated 3,283 locations nationwide, Auntie Anne's estimated 1,229 locations nationwide, Buffalo Wild estimated 1,214 locations nationwide, Carl's Jr. estimated 1,168 locations nationwide, Cinnabon estimated 836 locations nationwide, Jimmy John's estimated 2,774 locations nationwide, and McDonald's estimated 16,193 locations nationwide.).

[73] WASHINGTON STATE ATTORNEY GENERAL'S OFFICE, NO-POACH INITIATIVE 3 (June 2020), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/NoPoachReport_June2020.pdf.

[74] *See, e.g.*, Leah Nylen & Betsy Woodruff Swan, *FTC staffers told to back out of public appearances*, POLITICO (July 6, 2021), https://www.politico.com/news/2021/07/06/ftc-staffers-public-appearances-498386 ("'For the time being I am putting a moratorium on staff participating in external events,' [FTC Chief of Staff] Howard wrote. The message was sent to the head of the FTC's major offices, including those who oversee all of the agency's economics, antitrust lawyers and consumer protection attorneys. In a follow-up message two days later, Howard said that any staff who were scheduled for public events should cancel those appearances. 'I want to make clear that for any situations where staff are currently scheduled to do a public event and thus need to contact event organizers to withdraw their participation, the message they should convey is that they are sorry they can no longer participate due

- Stifling the flow of agency records and information from staff to the Commission;[75]
- Largely abandoning the tradition of comprehensive staff recommendations discussing legal and economic issues, prudential considerations and litigation risks for matters before the Commission;[76]
- Giving minimal notice to Commissioners (and the public) of sweeping policy changes;[77]

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to pressing matters at the FTC,' she wrote. … The temporary moratorium on public appearances may hamper efforts to portray the agency as newly transparent."); Christine S. Wilson, Comm'r, Fed Trade Comm'n, Oral Remarks at the Open Commission Meeting (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf ("I benefit greatly from a process that facilitates full consultation with staff, through oral briefings and comprehensive memoranda, as well as a robust dialogue among the Commissioners. News reports have revealed that FTC staff has been muzzled externally – agency personnel are forbidden from appearing at any public events. Unfortunately, it appears that staff is being silenced internally, as well.").

[75] *See, e.g.*, Letter from Commissioner Christine S. Wilson to Clarivate Plc (Sept. 3. 2021), https://www.ftc.gov/system/files/documents/public_statements/1595685/wilson_second_request_copy_letter_clarivate.pdf ("I regret any imposition this request may cause. Unfortunately, I have been unable to obtain a copy of the Second Request from internal sources. As you will understand, as a Commissioner, I am obligated to exercise due oversight of Commission business. Absent receipt of the Second Request issued to your client, I cannot fulfill this role.").

[76] *See, e.g.*, Dissenting Statement of Commissioner Christine S. Wilson on the Open Commission Meeting of July 1, 2021, 9 (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf (regarding the omnibus resolutions, "I have not had the benefit of expert staff input on the legal and economic rationales for undertaking these sweeping measures, let alone their potential impacts and consequences."); *id.* at 6 (regarding rulemaking changes: "Additionally, rulemaking efforts are enhanced when the public has the input from expert staff at agencies overseeing the rulemaking process. The FTC has built transparency into our Rules of Practice by requiring that rulemaking staff publish a staff report containing their analysis of the rulemaking record and recommendations as to the form of the final rule. But the new rules eliminate the staff report requirement."); *id.* at 1 ("With sufficient notice, advance planning, input from our knowledgeable staff, and a robust dialogue among my fellow Commissioners, open Commission meetings could facilitate that goal. Unfortunately, today's meeting falls short on all accounts. In fact, I only learned last Thursday of the Chair's intention to hold this meeting. At the same time, I was informed of her intention to hold votes to rescind the Section 5 Policy Statement and to pass several Omnibus Resolutions that would remove from Commission oversight large swaths of Commission business.").

[77] *See, e.g.*, Dissenting Statement of Commissioner Christine S. Wilson on the Open Commission Meeting of July 1, 2021, 9 (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf. ("I received this set of resolutions last Friday, giving me fewer than five business days to assess their scope, content, and interaction with other existing Commission resolutions and initiatives."); NetChoice Comment for the Record: FTC Open Meeting (September 15, 2021), https://netchoice.org/testimony/netchoice-comment-for-the-record-ftc-open-meeting-september-15-2021/ ("Before we discuss the issues at hand we must again express our disappointment in the Commission's seeming lack of effort in soliciting public input. Previously public comment was allowed for as little as fifteen days -- again without providing the actual text of the underlying changes. For the Sept 15, 2021 open meeting this window for public comment was less than three business days and only five days total. Moreover, this notice and comment period fell during the Jewish Holy Week. This continued diminution in public comment periods, whether intentional or otherwise, gives the impression that the Commission and its new Chair are not seriously interested in comments from the public.") (internal citation omitted).

- Giving no written explanations for sweeping policy changes until after those changes are implemented;[78]
- Evading meaningful dialogue at the Commission level;[79]
- Voting against notice and comment on major policy changes;[80] and
- Short-circuiting public input by adopting policy statements during ongoing rulemakings that address precisely the topics at issue.[81]

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[78] Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Commission's Rescission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary on Vertical Merger Enforcement 1 (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596388/p810034phillipswilsonstatementvmgrescission.pdf ("Today the FTC leadership continues the disturbing trend of pulling the rug out under from honest businesses and the lawyers who advise them, with no explanation and no sound basis of which we are aware"); Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson on the "Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act," (July 9, 2021) ("Last week, with next to no notice or public input, the majority withdrew the Commission's 2015 Statement …. Hinting at the prospect of dramatic new liability without any guide regarding what the law permits or proscribes is bad for consumers and bad for our economy—the opposite of what Congress intended when it created the FTC.").

[79] *See, e.g.*, Oral Remarks of Commissioner Christine S. Wilson at the Open Commission Meeting on July 21, 2021, 1 (July 21, 2021), ("The value of these open meetings for Commission decision making, though, is a different matter. To avoid waiver of the Commission's deliberative process privilege, we must avoid both staff input and a dialogue among the Commissioners. Instead, the Chair and Commissioners are limited to delivering monologues with no interaction. The format makes these events more akin to theatre than to the reasoned decision making that should characterize our institution.").

[80] At the September 15, 2021 open meeting Commissioner Phillips made a motion, which failed on a party line vote 3-2, to seek public comment on the proposal to rescind the Vertical Merger Guidelines. At the July 21, 2021 open meeting Commissioner Wilson made a motion, which failed on a party line vote 3-2, to seek public comment on the proposal to rescind the 1995 Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions. At the July 1, 2021 open meeting Commissioner Wilson made a motion, which failed on a party line vote 3-2, to publish the proposed changes to Parts 0 and 1 of the Commission's Rules of Practice in the Federal Register to allow for public comment for 45 days and to have the proposed changes to Parts 0 and 1 of the Commission's Rules of Practice become final only after consideration of comments submitted in response to the Federal Register notice. At the July 1, 2021 open meeting Commissioner Wilson made a motion, which failed on a party line vote 3-2, to solicit public comments for a 45-day period and consider the comments submitted in response to the Federal Register notice before rescinding the Statement of Enforcement Principles Regarding Unfair Methods of Competition under Section 5 of the FTC Act.

[81] *See, e.g.*, Oral Remarks of Commissioner Christine S. Wilson on the Open Commission Meeting of September 15, 2021, 2 (Sept . 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596380/cw_remarks_open_commission_meeting_9_16_2021.pdf ("Moreover, the majority advances this policy U-turn while the agency has an open rulemaking that covers not just this Rule, but precisely the topics addressed by their Policy Statement. Specifically, at least three of the questions in our federal register notice ask the public for their thoughts on the topics in the Policy Statement. Rather than taking public input into account, though, the majority today apparently will take the matter into its own hands. Unfortunately, this is not the first time that our new leadership has made a policy U-turn during the pendency of a directly relevant rulemaking. Last month, the FTC withdrew guidance on a specific aspect of our merger notification requirements. But we have an open rulemaking on our merger notification requirements, and we solicited public comment on that very aspect of our reporting regime. It's a nuanced issue, so we posed two

These major changes represent a departure from decades of tradition at the agency. The result?

- Stakeholders are deprived of clarity and guidance regarding the FTC's enforcement intentions in both conduct investigations[82] and merger cases.[83] A lack of clarity regarding what constitutes lawful and unlawful behavior harms honest businesses that seek to comply with the law.

- The FTC is diverging from the DOJ with respect to its enforcement intentions, the antithesis of good government.[84] This widening gap gives fodder to those who support the One Agency Act.[85]

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questions with 11 sub-parts. The public's input on that issue, though, is apparently irrelevant.") (internal citations omitted); Dissenting Statement of Commissioner Christine S. Wilson Policy Statement on Breaches by Health Apps and Other Connected Devices (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596356/wilson_health_apps_policy_statement_dissent_combined_final.pdf ("I am concerned that the Policy Statement issued by the majority today not only short-circuits our ongoing rulemaking, but seeks to improperly expand our statutory authority – and to do so unilaterally, rather than in concert with other federal agencies with related jurisdiction.") (internal citation omitted).

[82] *See, e.g.*, Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson on the "Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act," (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591710/p210100phillipswilsondissentsec5enforcementprinciples.pdf ("In so doing, the majority removed clarity for honest businesses that seek to follow the law, which today's statement addresses only with vague promises that, later, it will 'consider' new guidance or rules. Hinting at the prospect of dramatic new liability without any guide regarding what the law permits or proscribes is bad for consumers and bad for our economy—the opposite of what Congress intended when it created the FTC.").

[83] *See, e.g.*, Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Commission's Rescission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary on Vertical Merger Enforcement (September 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596388/p810034phillipswilsonstatementvmgrescission.pdf ("The uncertainty the Majority creates today is particularly troubling in light of the administration's promises to increase merger enforcement, and to impose punitive penalties on parties proposing mergers that the Majority believes are anticompetitive. The majority could have waited to rescind the 2020 Guidelines until they had something with which to replace it. It appears they prefer sowing uncertainly in the market and arrogating unbridled authority to condemn mergers without reference to law, agency practice, economics, or market realities. The public and Congress should be alarmed by the majority's repeated withdrawal of existing guidance and transparency in favor of an amorphous bureaucratic fog that will provide cover for those who seek to politicize antitrust.") (internal citations omitted).

[84] *Id.* at 5 ("The Majority's decision to withdraw the Vertical Merger Guidelines also adds to the divide between enforcement at the FTC and the Department of Justice. There have long been concerns about different procedures at the agencies and perceived differences in the standards for an injunction, leading to repeated calls to modify the procedures for the FTC's merger enforcement program. More recently the concerns have led members of Congress to discuss transferring the FTC's competition authority to DOJ. Unless the DOJ similarly eschews the 2020 Guidelines, a new schism will appear") (internal citations omitted).

[85] One Agency Act, S. 633, 117th Cong. § 4 (2021); One Agency Act, H.R.2926, 117th Cong. § 4 (2021) (Chairman Jim Jordan, co-sponsor). *See also* The House Judiciary Republican Agenda for Taking on Big Tech (July 6, 2021), https://republicans-judiciary.house.gov/wp-content/uploads/2021/07/2021-07-06-The-House-Judiciary-Republican-Agenda-for-Taking-on-Big-Tech.pdf ("The current system of splitting antitrust enforcement between the Department of Justice and the Federal Trade Commission is inefficient and counterproductive. The arbitrary division

- The majority is making fundamental substantive errors in areas in which the Commission supposedly holds expertise.[86] In other words, faulty processes lead to substantive mistakes.

- The FTC's rich bipartisan tradition – which is so important, given our broad statutory mandate, and which took decades to build – has been torn down in a few short months. Unfortunately, I fear that our successors at the agency will have a terrible time restoring the agency's reputation with Congress and the public.

In closing, I thank the Committee for this opportunity to testify, and look forward to answering any questions you may have.

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of labor empowers radical Biden bureaucrats at the expense of Americans. This proposal will consolidate antitrust enforcement within the Department of Justice so that it is more effective and accountable.").

[86] Carl Shapiro & Herbert Hovenkamp, *How Will the FTC Evaluate Vertical Mergers?*, PROMARKET (Sept. 23, 2021), https://promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp/ (describing the FTC majority's description of EDM in its statement repealing the Vertical Merger Guidelines, leading antitrust scholars Herbert Hovenkamp and Carl Shapiro wrote, "[t]his statement is flatly incorrect as a matter of microeconomic theory. EDM applies (a) to multi-product firms, (b) regardless of whether the firms at either level have monopoly power or charge monopoly prices, and (c) regardless of whether the downstream production process involves fixed proportions. All of this has been included in economics textbooks for decades, building on a seminal 1950 paper by Joseph Spengler. None of the conditions cited by the majority are required for EDM to apply, although they are clearly relevant when one is measuring EDM in a specific vertical merger. While EDM does not save every vertical merger, it should be part of any vertical merger inquiry and is not nearly as limited as the majority's statement suggests. In drafting its statement, the majority appears not to have consulted with the FTC's own Bureau of Economics. As a result, we have the spectacle of a federal agency basing its policies on a demonstrably false claim that ignores relevant expertise. Perhaps we are naïve, but we had been hoping that would stop when Donald Trump left office."); *id* (describing Chair Khan's description of antitrust law, the two leading antitrust scholars wrote, "[t]his is baffling. The statutory text prohibits mergers whose effect 'may be substantially to lessen competition, or to tend to create a monopoly.' Consider a merger between two of the smaller firms in a concentrated market. In the absence of any efficiencies, such a merger could well be illegal, by eliminating the direct competition between those two firms (unilateral effects) or by making it easier for the remaining firms to collude (coordinated effects). Suppose, however, that the merger would enable these two smaller firms to achieve economies of scale, with the result that output is higher and prices lower than without the merger. There is no logical sense in which that merger would 'lessen competition,' so the merger cannot violate the statute. The legality of the merger thus must hinge on those efficiencies, yet the new FTC would ignore them. Inexplicably, the Chair also categorically dismisses 'procompetitive effects' in merger analysis. How can that make any sense? If a merger will generate procompetitive effects and thus will promote competition, on what basis can the Chair claim that the merger will substantially lessen competition, a requirement that is explicit in the text of the statute? Indeed, if mergers never produced procompetitive effects they could be condemned under a per se rule, but neither the statutory language nor a century of enforcement history permits that.").

Mr. CICILLINE. Thank you, Commissioner.

I now recognize Professor Kobayashi for five minutes.

TESTIMONY OF BRUCE H. KOBAYASHI

Mr. KOBAYASHI. Thanks. I thank the Committee for inviting me to testify today.

I want to say at the outset that ensuring that the antitrust laws protect both workers and consumers from the effect of monopsony should be an important goal of antitrust. The effects of classical monopsony results in harm to both workers, consumers by simultaneously reducing output, decreasing workers' wages, and increasing prices to consumers.

My testimony today will focus on proposals to use the Federal antitrust laws to control the use of noncompete agreements, irrespective of the context in which they are used. Any suggestions should be based on robust and systematic evidence of the negative effect and ubiquitous effect of NCAs on both workers and consumers.

While there certainly is some evidence that the application of noncompete agreements in some settings harm workers—and Evan Starr has done great work in this area—there is also evidence that noncompete agreements, especially when accompanied by notice and consideration, result in benefits that both workers and firms achieve. In addition, noncompete agreements can simultaneously increase worker mobility and wages but also harm consumers.

There's a recent article by Gurun, Stoffman, and Yonker published this year in the *Journal of Financial Economics* which studies Membership in the Broker Protocol. Protocol member firms agree not to enforce post-employment restrictions by promising not to sue departing brokers for taking their client information with them to other member firms. One effect was that the brokers were happy.

They had increased mobility, and they achieved higher wages. Consumers were harmed. The authors present evidence that consumers paid higher prices to protocol firms and suffered higher levels of broker misconduct.

Second, to the extent that problematic uses of noncompete agreements and other restrictive employment agreements have been identified, the preferred solution would be to address these identified problems specifically, rather that enact a widespread ban through the use of the Federal antitrust laws.

Legislative solutions to specific issues should be identified by robust and credible research based on the well-developed body of State law, as Commissioner Wilson just said, actually follows an approach that recognizes the mixed and potentially beneficial use of NCAs.

I think that the Committee should pause and make sure that it is not going to interfere with the robust and widespread approach of the States where the vast majority of States allow the reasonable use of NCAs but ban the unreasonable use. The Uniform Law Commission just passed at the end of July a uniform law which would take many of the protections in the majority of States and apply them in a uniform law, if enacted.

Just as it would be wrong for antitrust policies solely to focus on output markets and monopoly and ignore the effect of monopsony, it is also wrong to base antitrust policy only on the effect on workers without considering the downstream effects.

I think that what—one example that Eric mentioned was hospital mergers. There's actually a great article by Prager and Schmitt that I think was just published in the *American Economic Review* that shows that hospital mergers that occurred from 2000–2010 caused wage stagnation for skilled hospital workers.

You have to sort of understand the context of the data they have. The period right before their dataset, the 1990s, was a period in which the Federal agencies challenged but lost seven straight hospital mergers. In response to that, then Chair Yaris in 2002 convened a task force.

The task force looked at the causes of these losses including problems with market definition and got the Bureau of Economics to produce retrospective studies to show that these mergers caused double-digit price increases. As a result of this, things were turned around. It's not surprising that these mergers which were allowed to harm consumers also harmed workers.

I look for to your questions.

[The statement of Mr. Kobayashi follows:]

Written Testimony of Bruce H. Kobayashi
Paige V. and Henry N. Butler Chair in Law and Economics
Antonin Scalia Law School at George Mason University

Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker
The Subcommittee on Antitrust, Commercial and Administrative Law
September 28, 2021, at 10:00 a.m. in room 2141 of the Rayburn House Office Building

I thank Chairman Nadler, Subcommittee Chairman Cicilline, Ranking Member Buck, and the members of this sub-committee for having me to testify on the important issue of Antitrust Reforms and the American Worker. Ensuring that the antitrust laws protect both workers and consumers from the effects of monopsony should be an important goal of antitrust. The effects of classical monopsony results in harm to both workers and consumers by simultaneously reducing output, decreasing workers' wages, and increasing prices to consumers.[1]

My testimony focuses on proposals to use the federal antitrust laws to ban or significantly curtail the use of Non-Compete Agreements (NCAs) irrespective of the context in which they are used. The first point is that any such action should be based on robust and systematic evidence of the negative and ubiquitous effect of NCAs on both workers and consumers. While there is some evidence that the application of NCAs in some settings harm workers, there is also evidence that NCAs, when accompanied by notice and consideration, result in benefits to both workers and the firms that employ them. In addition, NCAs can simultaneously reduce worker mobility or wages and produce consumer benefits by decreasing prices and increasing output, quality, and innovation. Because NCAs can benefit both consumers and workers, a broad ban on the use of NCAs would potentially harm workers, firms, and consumers. Thus, the conditions that would support use of the federal antitrust laws to ban the use and enforcement of NCAs irrespective of the context in which they are used do not exist.

Second, to the extent that problematic uses of NCAs and other restrictive employment agreements have been identified, the preferred solution is to address these identified problems specifically rather than enact a widespread ban on the use and enforcement of NCAs. Moreover, legislative solutions to specific issues identified by robust and credible research are better addressed through state law rather than through the federal antitrust laws. The existing and well-developed body of law in many states reflects the economic reality that NCAs can have a positive effect on both workers and the firms that employ them in some settings. This approach sensibly allows the use and enforcement of reasonable NCAs, and limits the enforcement of NCAs when their terms are unreasonable. In addition, the information produced by the staggered adoption of varied state approaches over time will continue to be a critical input for shaping rational policies in this area going forward.

To illustrate the first point, consider the results from an article by Gurun, Stoffman and Yonker, published this year in the Journal of Financial Economics.[2] This article examines the effect of financial advisory firm membership in the Broker Protocol. Protocol member firms agreed not to enforce post-employment restrictions, promising not to sue departing brokers for taking client information with them to other member firms. One effect was that the firms would save on litigation expenses associated with such actions. Another effect is that both the earnings and mobility of brokers working for firms in the protocol increased. And consumers also

[1] In a classical monopsony, an employer facing an upward sloping supply curve of labor drives wages below the value of the marginal product of labor by restricting employment below the equilibrium level in a competitive labor market.

[2] Umit G. Gurun, Noah Stoffman, & Scott E. Yonker, *Unlocking Clients: The Importance of Relationships in the Financial Advisory Industry*, 141 Journal of Financial Economics 1218 (2021).

followed departing brokers at a high rate. However, they present evidence that consumers were made worse off. Clients of firms in the Broker Protocol paid higher fees and experienced higher levels of broker misconduct.

Just as it would be wrong for antitrust policies solely to focus on output markets and monopoly and ignore the effects of monopsony, it is also wrong to base antitrust policy on the effect on workers without considering the downstream effects on consumers. Despite the growing and robust empirical literature on the effect of NCAs, there are many outstanding questions that remain unresolved. There are some recent studies of the former that use credible and causal research designs to examine the effects of NCAs in particular settings.[3] However, more research like this is needed, in my opinion, before one can reliability predict the effect of NCAs on worker wages and mobility in the many different settings where they are used. And setting aside the Gurun et al. article discussed above, there is almost no evidence of the downstream effect of restricting the enforcement of post-employment agreements on consumer prices, product quality, and innovation.[4]

Second, it is far from clear that limits on the enforceability of NCAs and other post-employment restrictions are best achieved through the federal antitrust laws. Currently, the legality and enforceability of NCAs are determined by state law. A few states have passed statutes that ban enforcement of NCAs as a matter of public policy, and a few more have challenged the use of NCAs or passed statutes that prohibit the use of NCAs in specific settings, such as when NCAs are applied to low wage workers.[5] However, the majority approach in the states reflects the economic reality that can NCAs have a positive effect on both workers and the firms that employ them in many settings.[6] A national survey by Starr et al. that found a lack of awareness and consideration for low-wage workers found the opposite in high-wage settings.[7] And reported market outcomes also were different. In particular, for surveyed employees who are aware of the NCA prior to accepting the job, Starr et al. report that these workers have 9.7% higher earnings, are 4.3% more likely to have information shared with them, are 5.5% more likely to have received training in the last year, and are 4.5% more likely to report satisfaction with their job when compared to employees that did not have NCAs. If informed high-wage

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[3] *See, e.g.,* Evan Starr, Are Noncompetes Holding Down Wages? (Dec 20, 2019) (unpublished manuscript), https://ssrn.com/abstract=3223659; Michael Lipsitz & Evan Starr, Low-Wage Workers and the Enforceability of Non-Compete Agreements (August 22, 2020) (unpublished manuscript), https://ssrn.com/abstract=3452240 (difference in difference evidence based on Oregon's 2008 ban on NCAs for low wage workers); Natarajan Balasubramanian et al., Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers, J. HUM. RES. (forthcoming 2020), https://ssrn. com/abstract=2905782 (Cross Sectional difference in differences study based on 2015 Hawaii Ban on NCAs for technology workers).

[4] John M. McAdams, Non-Compete Agreements: A Review of the Literature (December 31, 2019). Available at SSRN: https://ssrn.com/abstract=3513639.

[5] For an up to date description of state laws, see Russell Beck, Beck Reed Riden LLP, 50 State Noncompete Chart (June 27, 2020) [hereinafter 50 State Chart], https://beckreedriden.com/50-state-noncompete-chart-2/.

[6] Bruce H. Kobayashi, Non-Competes & No Poach Agreements in Technology Markets, GAI Report on the Digital Economy (2021) available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733724.

[7] See Evan Starr, J.J. Prescott & Norman D. Bishara, Noncompetes in the U.S. Labor Force 64 J.L. & Econ. 53 (2021), https://ssrn.com/abstract=2625714.

workers benefit from signing NCAs, then allowing enforcement of reasonable NCAs for higher wage workers to protect legitimate business interests is a sensible approach that avoids interfering with efficient and mutually beneficial uses of NCAs.

Consistent with this evidence, the majority of states allow the use and enforcement of reasonable NCAs, but limit enforcement of NCAs when their terms are deemed to be unreasonable. For example, state courts decline to enforce NCAs that lack a legitimate business interest or contain prohibitions that are unreasonably broad or lengthy, and state statutes restrict the scope, duration, and circumstances under which an NCA can be included in an employment contract and enforced post-employment. These approaches are based on labor, contract and consumer protection law principles rather than antitrust law principles. In particular, enforcement of reasonable NCAs in many states is conditioned, either through statute or via court enforcement, on the existence of adequate disclosure, limits on the breadth and duration of any agreement, and a narrow focus tailored to protect legitimate business interests, including the protection of trade secrets, confidential information, or the employer's goodwill. Some states also protect investments in skills training and client lists. In addition to limiting enforcement in specific settings, state approaches to NCAs also include requirements for consideration, for "garden" leave that requires firms asserting enforcement of NCAs to compensate workers post-enforcement, and consumer protection remedies aimed at reducing informational asymmetries can serve to mitigate the wage effects of NCAs.

There are also alternatives to federal law designeed to make this area of law more uniform. The uniform law commission recently passed the Uniform Restrictive Employment Agreement Act.[8] The ULC approach adopts many of the approaches taken by the majority of the states, including provisions that require notice and consideration for enforceability. It also adopts a red/purple pencil approach that limits courts' ability to enforce NCAs that contain unenforceable terms and would impose liability and civil penalties or damages on those who attempt to impose and enforce unreasonable and unenforceable NCAs. And it also goes beyond the law of most states to make NCAs applied to low-wage workers unenforceable.

Imposition of a uniform federal approach based on antitrust law principles that made NCAs broadly unenforceable would likely interfere with the balanced and reasonable approaches to the use and enforceability of NCAs currently taken by making unenforceable NCAs that benefit workers, firms, and consumers. Moreover, the existence of variation in state laws, or the fact that adoption of Uniform Acts tend to be slow and incomplete, does not provide a compelling rationale for an immediate federal response.[9] State variation and the staggered adoption of restrictions on NCAs and other restrictive employment agreements are a critical input into the

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[8] *See* Uniform Law Commission, Restrictive Employment Agreement Act, available at https://www.uniformlaws.org/committees/community-home?CommunityKey=f870a839-27cd-4150-ad5f-51d8214f1cd2.

[9] *See generally*, Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. Leg. Stud. 131 (1996).

process through which the states serve as "laboratories of democracy".[10] A uniform federal approach will eliminate the generation of critical economic evidence needed to evaluate the causal effects of different policies, evidence necessary to the formation of informed policies for the regulation of NCAs.

Finally, I would like to briefly address the broad argument and supporting evidence that antitrust law, and in particular merger policy, has systematically failed workers. Many cite empirical work that demonstrates an association, but not a causal link, between increased employer concentration and lower wages.[11] Because these studies do not identify the causal effect of employer concentration on wages, it is difficult to translate this association into prescriptions for policy generally, or for antitrust policy in particular. For example, the observation of a negative correlation between employer concentration and wages can be generated in competitive markets, or though underlying causes that increase economic efficiency. Consider a case where falling demand causes a firm to exit a competitive industry with numerous other firms. Decrease in the demand will also cause factor prices, including wages, to fall. Measured over time, concentration will be negatively correlated with wages despite the absence of monopoly or monopsony power.[12] These and other problems with an approach based on correlations between industrial concentration and prices, including factor prices such as worker wages, caused industrial organization economists to abandon this approach as a useful guide to antitrust policy long ago. These failed approaches were replaced by approaches that allow causal inferences about the effects of specific regulatory policies or firm conduct.

A recent example of a credible and causal study showing that anticompetitive mergers have generated negative outcomes for workers is an article by Prager and Schmitt, published this year in the American Economic Review. They present causal evidence that anticompetitive hospital mergers caused wage stagnation for skilled health care workers.[13] And it is clear that during the time period of their study, there was a failure of antitrust law to prevent these harms to workers as well as harms to consumers. Immediately prior to the period covered by

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[10] The phrase "laboratories of democracy" was popularized by U.S. Supreme Court Justice Louis Brandeis in New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) to describe how a "state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country".

[11] *See, e.g.*, José Azar, Ioana Marinescu, & Marshall I. Steinbaum, *Labor Market Concentration*, National Bureau of Economic Research Working Paper 24147 (2017). Their measured effects are small. According to their estimates, a 10% change in Herfindahl Hirshmann Index (HHI) of a employer geographic based on commuting zones (e.g., a change in the HHI from 2000 to 2200) would result in a .3% to 1.4% decrease in wages depending on which empirical specification was used.

[12] These types of analyses also suffer from the fact that the measure of market concentration is endogenous and from the potential for omitted variable bias. Solution to these problems, such as the use of instrumental variables to deal with the endogeneity of the concentration measure, are often imperfect solutions, and thus do not allow one to make a causal inference about the effect of deconcentration policies on wages. See generally, Joshua D. Angrist & Jörn-Steffen Pischke, *The Credibility Revolution in Empirical Economics: How Better Research Design is Taking the Con out of Econometrics*, 24 J. Econ. Persp. 3 (2010).

[13] Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 Am. Econ. Rev. 397 (2021).

Prager and Schmitt's study, the FTC, DOJ, and the state of California lost eight consecutive hospital merger challenges.[14] The underlying failures of antitrust law that caused these effects, a flawed approach to market definition and the differential treatment of non-for-profit hospitals, were identified by the federal agencies. Economists at the FTC also documented the negative effects these mergers in retrospective studies of these mergers. These studies produced credible and causal evidence of the negative effects these mergers had on consumers, including higher prices and negative health outcomes. As a result of these efforts, the agencies altered their approach to hospital mergers to focus on an effects-based analysis, and the courts accepted them and abandoned their harmful approach. The result has been a long stretch of successful merger challenges by the FTC since the mid 2000's.

To close, I would like to amplify three points illustrated by this episode and by the Prager and Schmitt study. First, this episode is an example of a successful evidence-based change to antitrust enforcement based on credible causal research and should serve as a model for rational and informed evidence-based policymaking. Second, the insurer/consumer focused analyses used by the agencies to determine whether to challenge mergers often identify mergers that would simultaneously harm sellers. The type of mergers that harmed workers in Prager and Schmitt's study also harmed consumers, were challenged by the federal agencies, and today would not be cleared by the agencies nor approved by the courts. Moreover, such mergers are unlikely to be considered by firms today. The fact that these cases may not explicitly contain monopsony counts is not proof that merger policy failed to protect workers in addition to consumers. Of course, there are cases where it is possible that firms may have monopsony power in the absence of monopoly power, and the agencies should ensure that their screening processes adequately protect sellers, including labor, in such cases. The agencies should continue to developed tools that identify cases where these monopsony issues arise.[15] Finally, while there is causal evidence of wage stagnation caused by mergers in highly concentrated markets, Prager and Schmitt do not find that these mergers produced corresponding reductions in employment, suggesting that the observed wage stagnation was not caused by the forces of classical monopsony.[16] While ample causal evidence was produced showing antitrust harm from higher prices to payers and consumers in the output market, the evidence that these mergers resulted in the exercise of antitrust relevant monopsony power is much less compelling.

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[14] Prager and Schmitt examine hospital mergers taking place between 2000 and 2010. For a list of the hospital mergers in the 1990s that were unsuccessfully challenged by the federal antitrust agencies, *see* Orley Ashenfelter, Daniel Hosken, Michael Vita & Matthew Weinberg, *Retrospective Analysis of Hospital Mergers*, 18 International Journal of the Economics of Business, 5 (2011).

[15] *See, e.g.*, Keith Brand & Ted Rosenbaum, *A Review of the Economic Literature on Cross-Market Health Care Mergers*, 82 Antitrust Law Journal 533 (2019).

[16] Id. at 423: Prager and Schmitt find that employment of skilled workers actually increased faster than in control markets, and conclude that "nothing in the estimates suggests reductions in employment growth following mergers, which would be expected to arise if classical monopsony were the sole mechanism."

Mr. CICILLINE. Thank you, Professor.

We'll now proceed under the five-minute rule with questions. I'll begin by recognizing the Chair of the Full Committee, Mr. Nadler, for five minutes.

Chair NADLER. Thank you, Mr. Chair.

Ms. Payton, I was particularly struck by your testimony. You told your manager that workers in your hospital needed more information and better personal protective equipment to stay safe during the pandemic. Your manager said that you signed up for this because you work in healthcare, and you should stop complaining.

Do you think your employer could be so dismissive about providing PPE if there was more competition for healthcare employees in Pittsburgh, and did you and your colleagues sign up for an unsafe work environment?

Ms. PAYTON. No, we did not sign up for an unsafe work environment. We signed up to provide quality patient care. If we had a union at UPMC, we would be able to voice our opinion about getting better PPE and we would have that option.

Chair NADLER. Thank you.

Mr. Gross, in your testimony, you mentioned that changes in the logistics and delivery industry are putting pressure on employers to reduce pay and benefits and make other changes that reduce standards that make these jobs safe. What are the changes in your industry that are having a negative effect on wages, benefits, and working conditions, and are these changes endangering workers' safety? Are they endangering the public?

Mr. GROSS. Thank you, Congressman Nadler. I think the biggest change right now in our industry is large corporations like Amazon being allowed to use third-party workers and subcontractors instead of actually utilizing their own employees. So, it's putting downward pressure on wages, industry standards, and benefits.

Chair NADLER. Are these changes endangering workers' safety and endangering the public?

Mr. GROSS. I believe that it does endanger workers' safety because they hold them to such high levels of productivity that it forces the workers to rush and cut corners, and they don't follow the same safety and training that we receive at UPS or at other unionized corporations.

I'm also aware of some of the dangers to the public would be the DSP third-party providers that they utilize. Amazon leans on them, pushes them, and wants them to perform. They cut corners as far as like vehicle safety maintenance, things of that nature, because it's under constant pressure to get out there on the road and deliver, deliver, deliver. They're scared of losing their business. I do believe that, in that effect, it does cause a safety hazard to the public.

Chair NADLER. Thank you.

Mr. Posner, you wrote an op-ed last week in the *New York Times* in which you explained that monopolists use their market power in labor markets they hire fewer workers, leading to unemployment and lower economic growth. Because there are fewer workers, these firms supply fewer goods resulting in higher prices for consumers.

Other than higher prices, are there nonprice effects that harm consumers, and how are the antitrust enforcers responding to evi-

dence of the highly concentrated labor markets harming workers and consumers?

Mr. POSNER. Yes. Well, one will expect that if its employers want to save labor costs, they can do so by reducing—sorry, if they want to save money in the product market, they can do so by producing lower quality goods as well as more expensive goods. There is economic evidence of that, but I wouldn't be able to cite off the top of my head

Now, in antitrust law, there tends to be a rule that you only look at the market directly affected by the defendant's behavior. So, if workers bring an antitrust case, you look at the impact of workers; if consumers bring an antitrust case, you look at the impact on consumers.

So, normally, if workers brought an antitrust case, you would not look at the impact to consumers. In a way it doesn't matter, because, generally speaking, if monopolists reduce employment, as they appear to do, then you would expect lower output and higher prices and, as you say, lower-quality goods.

Chair NADLER. Thank you.

Mr. Callaci, mergers that enhance market power can have non-price effects on worker safety. For example, Ms. Payton and Mr. Gross testified about worker and workplace safety issues. Do antitrust enforcers typically consider non-price effects in labor markets as part of an agency's merge review, and if not, why not?

Mr. KOBAYASHI. When I was bureau director, we did have a focus on—

Mr. CICILLINE. Excuse me, sir, I believe this question was for Mr. Callaci.

Mr. KOBAYASHI. Oh, Callaci, sorry.

Mr. CICILLINE. Yes. My fault, but also the time of the gentleman has expired, but I'll give the Chair just a—the Witness a few seconds to answer the question.

Mr. CALLACI. Yes. Just very briefly, there is a new paper relatively new from Aaron Sojourner, Ioana Marinescu, and I forget their coauthors, showing that monopsony has effects on non-wage aspects of work, including violations of safety laws.

There was also a report in the *Washington Post* that the Amazon subcontracted delivery service partners have higher injury rates than even Amazon itself, so that would seem to back up what Mr. Gross was saying.

As my knowledge, effects on worker health and safety of mergers have not been considered. I'd have to do a deeper check, but I don't think that's been considered but it should be.

Mr. CICILLINE. Thank you.

Chair NADLER. Thank you. I yield back.

Mr. CICILLINE. Thank you. The Chair yields back.

I now recognize the gentleman from Colorado, Mr. Buck.

Mr. BUCK. With Chair's permission, I defer to Mr. Gaetz from Florida.

Mr. CICILLINE. Mr. Gaetz is recognized.

Mr. GAETZ. Thank you, Mr. Chair.

This is my favorite Subcommittee in my half decade in Congress and in no small part because of the way you've lead it. I am incred-

ibly proud of the work we've done to address some of these anti-competitive practices of these monopolistic entities.

I was primarily persuaded by the testimony of Mr. Gross regarding how that market power of big businesses like Amazon can limit the ability of workers to have any type of meaningful negotiation.

Congresswoman Jayapal led legislation that the Chair of the Committee, the Chair of the Subcommittee, Mr. Buck and me supported that would force the breakup of companies like Amazon into smaller entities. I wanted Mr. Gross' perspective on that. Do you believe, as a negotiator, that would improve the position of workers to break up companies like Amazon and other big tech companies into smaller entities?

Mr. GROSS. Well, I'm not an expert on this field. Obviously, I'm just a driver at UPS and a shop steward for my union. What I would say though is that it might not necessarily be necessary to break up the size of the company but just to allow or force the company or encourage the company to employee the workers that it's utilizing.

So, instead of using third-party individuals and leaning on them and chewing them up and spitting them out, have real employees give them real wages, allow them to have a collective bargaining unit agreement, and I think that way you would get more productivity out of them in the long run and still be able to run a successful business.

Mr. GAETZ. I appreciate that perspective. My concern is that if they're able to stay so big, even if we used the awesome powers of the Federal government to force these relationships out of independent contractor relationships into employment relationships, they're still so big that they could reduce the contributions of those employees with the strength that they have.

It is one of the reasons why we had bipartisan support on this Committee for those bills. Mr. Chair, I'm deeply disappointed that those bills haven't been called up for a vote. It seems a bit odd to be here talking about positive impacts of legislation the Subcommittee has passed when the Full House has had the opportunity in prior weeks to take up these bills and they haven't, and I have to wonder why that has happened.

So, Mr. Chair, I seek unanimous consent to enter into the record a piece from the *New York Times* entitled, "Tech Giants, Fearful of Proposals to Curb Them, Blitz Washington With Lobbying."

So, that could be a reason, the power of lobbyists in this town to make things tougher for workers. I guess there could be other reasons too.

Mr. Chair, I would seek to enter into the record a piece from Yahoo News entitled, "Tim Cook Reportedly Called Pelosi to 'Deliver a Warning' About Congress' Antitrust Bills."

So, maybe it's the lobbyists, maybe it's the power of these very powerful CEOs making personal calls, but it could even be something more sinister.

Mr. Chair, I seek unanimous consent to enter into the record a *Fortune.com* piece entitled, "Speaker Nancy Pelosi's Husband Cashed in on Big Tech Just As Congress Was Set to Pounce."

Mr. CICILLINE. Without objection.

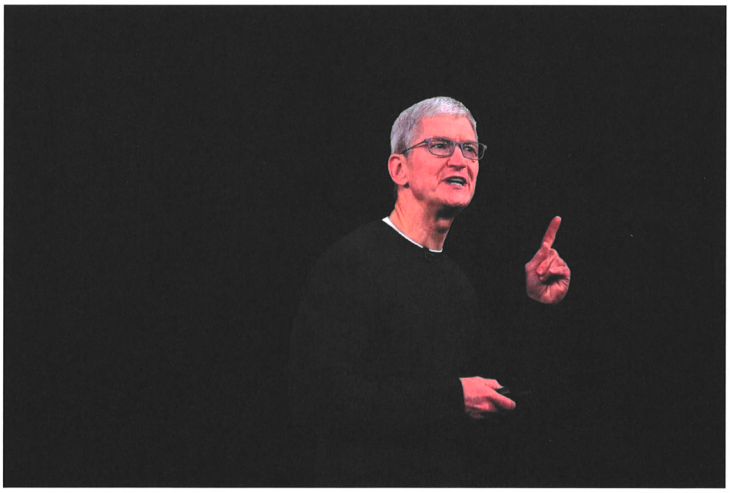
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Tech Giants, Fearful of Proposals to Curb Them, Blitz Washington With Lobbying

Executives, lobbyists, and more than a dozen groups paid by Big Tech have tried to head off bipartisan support for six bills meant to undo the dominance of Amazon, Apple, Facebook and Google.



Tim Cook, the chief executive of Apple, asked Nancy Pelosi, the speaker of the House, for a delay in considering the bills, according to a person with knowledge of the conversation. Josh Edelson/Agence France-Presse — Getty Images

By Cecilia Kang, David McCabe and Kenneth P. Vogel

June 22, 2021, 7:13 p.m. ET

WASHINGTON — In the days after lawmakers introduced legislation that could break the dominance of tech companies, Apple's chief executive, Tim Cook, called Speaker Nancy Pelosi and other members of Congress to deliver a warning.

The antitrust bills were rushed, he said. They would crimp innovation. And they would hurt consumers by disrupting the services that power Apple's lucrative iPhone, Mr. Cook cautioned at various points, according to five people with knowledge of the conversations.

The calls by Mr. Cook are part of a forceful and wide-ranging pushback by the tech industry since the proposals were announced this month. Executives, lobbyists, and more than a dozen think tanks and advocacy groups paid by tech companies have swarmed Capitol offices, called and emailed lawmakers and their staff members, and written letters arguing there will be dire consequences for the industry and the country if the ideas become law.

The bills, the most sweeping set of antitrust legislation in generations, take aim at Amazon, Apple, Facebook and Google by trying to undo their dominance in online commerce, advertising, media and entertainment. There are six bills in total, and if passed, they would empower regulators, make it harder for the tech giants to acquire start-ups and prevent the companies from using their strength in one area to form a grip in another.

Amazon's top lobbyist, Brian Huseman, rarely speaks publicly about bills before there is a vote. But with the House Judiciary Committee expected to vote on the bills on Wednesday, he warned in a statement on Tuesday that the legislation "would have significant negative effects on the hundreds of thousands of American small- and medium-sized businesses that sell in our store and tens of millions of consumers who buy products from Amazon."

Google's senior vice president for global affairs, Kent Walker, has also made calls to lawmakers in recent days, and the company's top lobbyist, Mark Isakowitz, has weighed in on how the bills would alter how people use the internet. "American consumers and small businesses would be shocked at how these bills would break many of their favorite services," he said in a statement. A spokesman for Facebook, Christopher Sgro, said that antitrust laws "should promote competition and protect consumers, not punish successful American companies."

Thirteen nonprofits, most of which have received funding from the tech giants, wrote a letter to lawmakers decrying two of the bills. NetChoice, one of the groups, hosted a public panel on Tuesday featuring Senator Mike Lee, Republican of Utah and a leading member of the Senate antitrust subcommittee, to cast skepticism on the proposals. A prominent Republican lobbyist and fund-raiser, Jeff Miller, has been trying to stanch the support for the bills within his party, reaching out to members of Congress on behalf of his tech company clients.

"In a way I've never seen before, they are fighting tooth and nail," said Gigi Sohn, a distinguished fellow at Georgetown University's Institute for Technology Law and Policy. "They consider these bills existential for them because they get at their business models."

Apple declined to comment on Mr. Cook's calls to lawmakers, including to Ms. Pelosi.

The companies, which have long faced accusations of holding too much power, are now scrambling to find their footing with Democrats in control of Congress and the White House. The administration has picked aggressive critics of Big Tech as top antitrust regulators, including Lina Khan, the new chair of the Federal Trade Commission whose work as a legal scholar laid the foundation for the current antitrust push.

Kevin McCarthy, the House minority leader, has criticized the bills as empowering Biden appointees like Lina Khan, the new chair of the Federal Trade Commission, to crack down on companies. Pool photo by Saul Loeb

In Congress, progressive Democrats focused on the market power of the companies have united with some Republicans accusing social media companies of political bias and censorship.

Representative Ken Buck of Colorado, the ranking Republican of the Judiciary Committee's antitrust subcommittee, co-sponsored some of the bills being considered and has brought along other Republican members to support the legislation.

But the antitrust issue — even with some agreement between parties — has created new fault lines.

Within the Republican Party, there are deep divides on the antitrust bills. Tucker Carlson, the influential Fox News host, has praised the bills and has pushed for the breakup of Big Tech companies. But Representative Jim Jordan, an Ohio Republican, and Mark Meadows, who was chief of staff to President Donald J. Trump, wrote in an opinion piece on Fox News's website that the bills would give the Democratic administration more control over the tech companies.

"Democrats are weaponizing legitimate Republican anger about Big Tech's abuses to encourage Republicans to support these bills," they wrote. "But Republicans should read the fine print."

A similar argument is being made directly to Republican members of Congress by Mr. Miller, the Republican lobbyist, according to a person familiar with his efforts. Mr. Miller, whose firm has been paid a total of more than $1 million over the last two years by Amazon and Apple, has been a top fund-raiser for many Republicans, including Mr. Trump and Representative Kevin McCarthy, the House minority leader, who has criticized the bills as empowering Biden appointees like Ms. Khan to crack down on companies.

The tech companies have tried to navigate the complicated new political landscape by focusing their lobbying efforts in part on the Democrats from California who have seats on the Judiciary Committee.

That group includes Representative Zoe Lofgren of California, a longtime member of Congress whose district includes parts of the tech hub of San Jose. She is concerned that some of the bills could expose the tech giants to unnecessary lawsuits and imperil the engine of the state's economy, said one Democratic congressional staff member, and is planning to propose amendments to the bills on Wednesday that could address some of those issues.

Ms. Pelosi pushed back on Mr. Cook's concerns about the bills, according to two people with knowledge of the conversations. When Mr. Cook asked for a delay in the Judiciary Committee's

process of considering the bills, Ms. Pelosi pushed him to identify specific policy objections to the measures, said one of the people.

Morgan Reed, the president of the App Association, a trade organization sponsored by Apple and other tech and telecom companies, said in a letter to lawmakers on Tuesday that breaking up platforms and "limiting the services they can provide for our member companies would harm your constituents."

Another outspoken critic is the Chamber of Progress, a left-leaning trade group formed in March by a former Google executive, Adam Kovacevich.

"Tech had a very long political honeymoon," Mr. Kovacevich said. "Many politicians and policymakers think that maybe they were too easy on tech for a long time, and now there is a countervailing desire to punish tech through either new laws or through regulatory action. And that is at odds with what consumers want."

He drafted and organized support for a letter that was sent this week urging members of the Judiciary Committee to oppose two of the bills. It warned that the bills would hurt consumers, resulting in Amazon without Prime, the iPhone without text or phone capabilities preinstalled, and Google without Maps. The letter was signed by Mr. Kovacevich's group and an unusual mix of 12 other organizations, including tech associations, free-market conservative outfits and consumer groups, most of which have received funding from Amazon, Apple, Facebook or Google.

Eli Lehrer, the president of the fiscally conservative think tank the R Street Institute, which signed the letter, criticized Republican supporters of the bills for turning their backs on their free market principles by "calling on the government to use its power to intervene directly against some of the most successful companies in our country's history."

The institute has received funding from Google, but Mr. Lehrer said the funding did not affect its stance on the legislation, as did representatives from other signatory groups.

Representative Pramila Jayapal, a Democrat from Washington and a co-sponsor of the bills, said the lobbying is "making our case that they have way too much power in terms of monopoly power and in terms of money and politics."

"Small business and consumers have no hope of competing with this amount of money and power," she said.

Nicholas Fandos contributed reporting.

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Tim Cook called Nancy Pelosi to warn her against disrupting the iPhone with impending antitrust bills

Big Tech lobbyists are fighting "tooth and nail" against regulation

By Sean Hollister | @StarFire2258 | Jun 22, 2021, 9:12pm EDT



Tech giants have repeatedly said they would welcome government regulation — if it's the right regulation, of course. But faced with five antitrust bills that could unwind what the House Judiciary Committee described as Apple, Amazon, Google and Facebook's "monopoly power," Big Tech is bringing out the big lobbying guns.

Apple CEO Tim Cook himself called Speaker Nancy Pelosi to “deliver a warning” that the “rushed” antitrust bills could disrupt the iPhone, according to *The New York Times*, and that’s not all:

“Executives, lobbyists, and more than a dozen think tanks and advocacy groups paid by tech companies have swarmed Capitol offices, called and emailed lawmakers and their staff members, and written letters arguing there will be dire consequences for the industry and the country if the ideas become law,” the NYT wrote.

There’s a growing sense that the current administration has a genuine interest in combating tech monopolies — a point perhaps made most clearly when Biden chose prominent antitrust scholar and Amazon critic Lina Khan to lead the Federal Trade Commission. She was sworn in last week.

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It’s not unusual for tech companies to dive deeper into lobbying these days, as you’d expect now that they’re the most valuable companies in the world, and we’ve seen their outsize influence overwhelm voters and legislators at the local level before. Uber and Lyft won big after backing the most expensive measure in California history, using their own apps as an unfair advantage, and Arizona’s controversial app store bill mysteriously disappeared after tech companies stepped in. An Apple lobbyist managed to scare California legislators away from a right-to-repair bill in 2019, too.

Pelosi apparently wasn’t having it, though, at least not on the call. She pushed back against Cook, according to the *Times*’ sources.

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POLITICS · NANCY PELOSI

House Speaker Nancy Pelosi's husband cashed in on Big Tech just as Congress was set to pounce

BY **SOPHIE MELLOR**

July 8, 2021 8:26 AM EDT

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The week before the House Judiciary Committee voted on reigning in big tech, Speaker Nancy Pelosi's husband exercised a bullish bet on Google-parent Alphabet, in a timely transaction that netted him $5.3 million.



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The antitrust bill was advanced as a push by the government to curb the "unregulated power" of big tech firms Google, Amazon, Apple and Facebook. It was the final part of a six-part package called "Ending Platform Monopolies Act" aimed at restricting how big tech companies offer their products to ensure they don't use their size to dominate the market.

However, despite its good intentions, the market reaction to the judiciary panel approving the legislation was muted—shares in big tech companies in fact rose after investors found the House proposal to be no real threat.

Paul Pelosi, who bought 4,000 shares of Alphabet on June 18 (as revealed in a financial disclosure signed by Nancy Pelosi and filed on July 2), made an initial $4.8 million gain from Alphabet's rising share price, and has since seen his gain grow to $5.3 million.

buy a stock at a later date at a promised price. The upshot: a call option is a good tool for an investor who believes the stock price will go up in the future. In Pelosi's case, the call options he'd previously bought for Alphabet (which were due to expire the day of his purchase) allowed him to buy it at $1,200 a share while the shares closed that day just over $2,500, a difference that accounted for his profit.

Paul Pelosi also reported buying call options for Amazon, Apple and NVIDIA, but he did not report exercising them.

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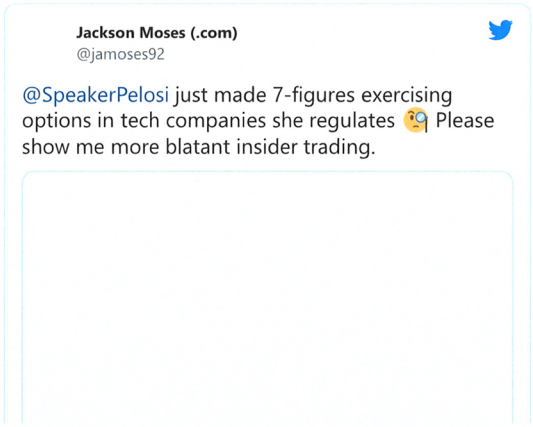
Nancy Pelosi's spokesperson said "The speaker has no involvement or prior knowledge of these transactions," in an emailed statement on Wednesday, adding that Speaker Pelosi doesn't own any stock.

Capitol gains

Great stock timing in DC isn't exactly novel. Republican senators Richard Burr and Kelly Loeffler had inside knowledge of the impending COVID-19 crisis when they sold shares in January 2020.

It is illegal for Congress members to trade based on non-public information gathered during their official duties, but it is hard to charge members of Congress with insider trading. Neither Burr not Loeffler faced any charges following inquiries.

But while it is hard to prosecute politicians over such stock sales, Twitter is less forgiving. 'Nancy Pelosi Insider Trading' began to trend on the social media service and people have called for her removal from office.



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June 24, 2021

BY ASSOCIATED PRESS

TECH

House panel proposes largest antitrust reforms in decades to rein in Big Tech



October 7, 2020

Mr. GAETZ. In that article, there is discussion of the spouse of the Speaker of the House making a $6 million call on stocks that netted $5.3 million while we're not moving these bills. So, I thought that was a little odd. I thought that was weird. We move bipartisan legislation out of this Subcommittee, and just as we're considering it and it might be bad for big tech, the Speaker's spouse goes and buys all this big tech stock.

Then lo and behold, here we are with the bills not called up. It just makes you wonder, did somebody know something? Is somebody acting on information? It could have been the power of the lobbyists and all the money that they donate to Members of Congress on both sides. It could've been people like Tim Cook calling.

Here's what we know, these bills aren't coming to the floor. If they were coming to the floor, they would have been on the floor in prior weeks. So, now we sit here with this great work likely extinguished in its tracks for one of these unfortunate reasons.

Mr. Chair, I know we have got Chair Nadler's MORE Act coming up soon. One thing we learned in the marijuana movement is sometimes you've got to lose votes on the floor. Sometimes you've got put up the votes, you've got to lose, and then year after year you make a little progress, you get further down the road.

Even if these tech bills can't pass, I would encourage you to talk to the Speaker and put them up for a vote. I know she said she won't put up votes that don't pass, but if it could at least give us a measuring tool to be able to come back and work to persuade our other Members.

I thank the Chair for his indulgence for going over time and I yield back.

Mr. CICILLINE. Yeah. I want to reassure the gentleman that I am working very closely with the Ranking Member of the Subcommittee to be sure that our colleagues who have not had the benefit of the 16-month study that we conducted where we learned a lot about this marketplace, understood what these complicated bills do.

We want to be sure that our colleagues are fully briefed up, and we are committed to making certain these bills come to the floor, not just for a vote but for a vote that prevails because of the hard work that's been done. We are grateful for your ongoing and strong support.

This is an important priority for me, I know for all the Democrats in our caucus, and certainly for the Chair of the Full Judiciary Committee and working very closely with Mr. Buck to be sure we get to that point. Thank you again for your support of our investigation and the legislation.

With that, I now go to the gentleman from New York, Mr. Jones, for five minutes.

Mr. JONES. Thank you, Mr. Chair, and to the Chair of the Full Committee, Nadler, for holding this important hearing.

Thanks as well to our Witnesses and especially to Ms. Payton and Mr. Gross for your courageous testimony.

It's about time that we confronted the power the biggest corporations wield over workers, monopsony power. Just as monopoly power enables corporations to dictate the prices and quality of the things that we buy and the services that we rely on, so monopsony

power enables corporations to set our wages and our working conditions dominating the job market.

Today's testimony makes one thing clear, that restoring competition in the labor market is essential to restoring economic and democratic power to the American people, to making sure that everyone gets their fair share of pay and say.

As to Commissioner Wilson's concerns about the FTC's process, let me just say this, the Subcommittee only received the commissioner's testimony around 8:00 p.m. last night even though this hearing was postponed by a week. So, it's somewhat surprising to hear complaints about the process at the FTC at a hearing on protecting the economic liberty of American workers. We have frontline workers who have taken time off to testify about their experiences today, and that is what we should be focusing on in this hearing.

Professor Posner, as you have testified, mergers are a central cause of corporations' tremendous power over workers. Ms. Payton has experienced that firsthand. Yet, the DOJ and the FTC have never challenged a merger to protect workers, not even once. How should we strengthen merger review to empower workers and prevent corporate power from consolidating even further?

Mr. POSNER. The example of UPMC, which Ms. Payton provided, is truly an amazing story. As she mentioned, the current hospital is the result of dozens and dozens of mergers. The single company controls 40 hospitals, more than 40 hospitals in the Pittsburgh area and thousands of clinics. It's a true monopolist and a monopsonist. How all those mergers could've gone through when we nominally have a merger review process is a mystery to me.

So, to answer your question, I think the answer is actually straightforward. The Justice Department and the FTC currently have what are called merger guidelines where they provide certain rules or guidelines that regulate when mergers are permitted and when they're forbidden. The guidelines are probably too weak at the moment even with respect to product markets, but they say nothing about labor markets.

So, if Congress were to direct the FTC and the DOJ to add a section on labor market or Congress could just legislate this directly, and what it could do is it could provide certain thresholds when certain mergers occur that have major labor market effects and this connection be quantified to be very precise.

A merger will be presumptively blocked and would be only permitted if the merging companies can prove to the satisfaction of a court that as a result of the merger efficiencies would be produced that would result in higher wages and better working conditions than if the merger did not take place.

There is a lot of experience on the product market side with this type of analysis. I think it would be fairly simple for regulators to use this type of analysis for the labor market effects of mergers.

Mr. JONES. Thank you so much.

Dr. Callaci, in your written testimony you said that we should set out clear, bright line rules that make it easier to block harmful mergers. Would you please elaborate?

Mr. CALLACI. Sure. So, actually this is a great follow-up to Dr. Posner's point. A lot of those sort of fact-intensive demonstrations

of efficiency allow both parties to hire economic consultants, to hire law firms. Judges are not specialists in economics, so those sorts of processes allow the consultants can muddy the waters, make it very difficult for judges to reach a clear decision.

So, I would say it would be better to have very clear rules and clear guidelines that apply to these situations rather than relying on—allowing defendants to make the case for the deficiencies that tend not to really arise. So, the product market, to me, actually shows how the labor market should not follow the product market case.

Mr. JONES. Thank you, Doctor.

Mr. Chair, I yield back.

Mr. CICILLINE. The gentleman yields back.

I now recognize the gentleman from California, Mr. Issa, for five minutes.

Mr. ISSA. Thank you, Mr. Chair. I'd now ask unanimous consent that two articles be placed in the record, one that's entitled, "California's Occupational Licensing Laws Shouldn't Kick People When They're Down"; the second one is from the Mercatus Institute, and it says, "California Occupational Licensing: Barriers to Opportunity in the Golden State."

Mr. CICILLINE. Without objection..

[The information follows:]

MR. ISSA FOR THE RECORD

Feb
18
2020

California's Occupational Licensing Laws Shouldn't Kick People When They're Down

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It's become somewhat of a banality to say that occupational licensing has run amok. As studies pile up showing that licensure has virtually no effect on quality---yet drives prices up, stifles innovation, and keeps people out jobs---a bi-partisan coalition has emerged in favor of rolling back licensure and restoring economic opportunity. But one thing that's often lost in these discussions is the especially pernicious effect occupational licensing laws have on people with criminal records. Even after releasing people from jail, states often continue to punish former prisoners for life by enforcing licensure policies that deny them the opportunity to earn an honest living. Given that

these people have served their time, the situation is deeply unfair, and it's a travesty to a society that cares about economic opportunity, preventing recidivism, and offering second chances.

Employment greatly reduces the likelihood that a person with a criminal record will return to crime, yet licensure stands as a significant barrier to employment. The problem is not just the sheer number of professions that require an occupational license---California is the most broadly licensed state in the nation figure----it's the utter difficulty of getting a license to work in even a relatively safe, entry-level profession. California requires a license for more low-income jobs than almost any other states. Locksmiths, travel agents, make-up artists, tree trimmers, and court reporters are just some of the occupations that require a license, and on average it takes 827 days of education and experience, $486, and passage of two exams to get it. .

But even where those with criminal records can afford the time, training, and costs necessary to get a license, the state sometimes makes automatic disqualifications from licensure based on criminal histories. One of the starkest examples is the way California treated prisoners after they helped fight the state's wildfires in 2018. Despite asking prisoners to risk their lives for just over $1 an hour in order to save people's homes from destruction, the state actually prevented those same prisoners from becoming firefighters once released from jail. Most counties require an EMT license to serve as a firefighter, but they also make virtually anyone with a criminal record ineligible for that license. The result is that the state was spending significant resources to train prisoners to firefight while in jail, only to deny them the opportunity to enter that profession once the prisoners were released. (The legislature recently addressed this particular example by passing a law that allows CAL-FIRE to certify former prison firefighters as "emergency medical responders," which they may then use to qualify for certain firefighter jobs.)

The fact that 1 in 3 adults in California have a criminal history, combined with the fact that nearly 30% of California jobs require licensure, may help explain why California has one of the highest recidivism rates in the nation. The overall unemployment rate for people with criminal records is over 27%, which is higher than the Great Depression. If we want people who have left jail to find work and avoid repeat offenses, we must reduce barriers to their entry.

Fortunately, important reforms are going into effect this year. As of July, 2020, licensing boards will no longer be able to deny a license solely due to a conviction unless the crime was committed in the previous seven years and is "substantially related" to the qualifications, functions, or duties of the job in question (though some felonies and other serious crimes are excluded from the seven year limitation). Boards also must promulgate and publish criteria for determining whether a crime is substantially related to the job, and consider "rehabilitation" evidence.

That's an important reform, but there's more California can do. Compared to other states, this change was modest. Many other states allow prospective applicants to seek a preliminary determination of whether their criminal record is disqualifying before spending time and money on the potentially futile application process. Others have a "wash out" period that's shorter than 7 years. Still others require the licensing body to demonstrate an even closer connection between the crime, the job, and protecting the public before denying an applicant a license.

Most obviously, California could also cut out the red tape that keeps *all* people from getting a job and cut down the number of jobs that require an occupational license---which is the most onerous form of regulation. In many cases, the public would be adequately protected by mandatory certification or a mere bond requirement rather than full blown licensure. There's simply no way, for example, to justify requiring 1,500 hours of training and passage of two exams to get a license to wash someone's hair except as a handout to the cosmetology

industry, which enjoys decreased competition. Such burdensome requirements lock people with fewer resources and skills from employment without any benefit to public health or safety.

California should endeavor to be the land of first *and* second economic chances. Occupational licensure stands as a barrier to both, needlessly keeping economic opportunity from people who need it.



Anastasia P. Boden

California Occupational Licensing: Barriers to Opportunity in the Golden State

mercatus.org/print/269523

August 13, 2019

Authors:

Matthew D. Mitchell

Chair Allen, Chair Glazer, and distinguished members of the Senate Select Committee on Aerospace and Defense and the Senate Standing Committee on Business, Professions, and Economic Development:

My name is Matthew Mitchell. I am an economist and a senior research fellow at the Mercatus Center at George Mason University, where I direct the Equity Initiative. Mercatus scholars working on the Equity Initiative study public policies that favor particular firms, industries, or occupations. In recent years, my colleagues and I have been studying occupational licensing laws, and I am grateful for the opportunity to discuss our findings with you.

Attached is a report that my colleagues and I submitted to the Federal Trade Commission, "The Effects of Occupational Licensure on Competition, Consumers, and the Workforce." The report details the now-voluminous economic literature on the deleterious effects of occupational licensure and suggests a blueprint for reform.

In my testimony, I wish to focus on three points:

1. Licensing is a substantial barrier to employment, particularly for certain populations such as lower-income Americans or the spouses of active-duty military personnel.
2. Licensing does little to enhance either consumer safety or the quality of services; it does, however, increase prices for consumers.
3. Successful reform is difficult, but not impossible. Policymakers must be able to cast conspicuous votes in the general interest while special interest power must be limited.

Licensure Is a Substantial Barrier to Employment, Especially for Certain Populations

Licensing represents a significant and growing barrier to work. Nationally, the share of the workforce that is required to have an occupational license has increased more than fourfold in the past 50 years. As of 2015, more than one in five working Californians—20.7 percent of the state's workforce—was required to be licensed. As licensing burdens have increased nationwide, they seem to have depressed interstate migration of those in licensed

professions. Economists Janna Johnson and Morris Kleiner estimate that between-state migration of those who are licensed is 36 percent lower than that of members of other professions. And in separate research, Kleiner and Evgeny Vorotnikov estimate that licensure may cost between 1.8 and 1.9 million jobs, result in between $6.2 billion and $7.1 billion in lost output, and create a misallocation of resources that costs the economy between $183.9 and $197.3 billion each year. In California alone, they estimate that licensure has eliminated almost 196,000 jobs, has resulted in $840.4 million in lost annual output, and has created a $22.1 billion annual misallocation of resources. By their estimates, California's licensing regime is costlier than that of any other state in the nation.

Aspiring entrants to a large number of professions—ranging from travel guide and door repair contractor to cosmetologist—are now required by the state of California to obtain a government-issued license to work. It can take months and hundreds or even thousands of dollars to obtain these licenses. Among 76 low- to moderate-income occupations licensed by California, the average aspiring worker is required to spend 827 days in training and pay $486 in fees before he or she may obtain a license. This does not count either the cost of the education or the income that people forgo when they spend months in often-unnecessary training. According to the Institute for Justice, California's licensing laws are the most broad and onerous in the country.

Licensure is often arbitrary. As shown in table 1, licensing requirements often don't match the risk posed to the public by certain professions. Compared with emergency medical technicians, aspiring cosmetologists in California must undergo *10 times* as many months of training; would-be animal trainers (who are unlicensed in 41 states) must complete more than *30 times* as much training; and commercial door repair contractors (unlicensed in 26 states) must complete more than *39 times* as much training.

TABLE 1. OCCUPATIONAL TRAINING MISMATCHES IN CALIFORNIA

Occupation	States That License This Profession	Fees	Days of Education/Experience
Commercial drywall installation contractor	25	$579	1,460
Commercial floor sander contractor	22	$579	1,460
Commercial painting contractor	22	$579	1,460
Residential painting contractor	28	$579	1,460
Commercial door repair contractor	24	$579	1,460
Tree trimmer	7	$529	1,460
Animal trainer	9	$250	1,095
Psychiatric technician	5	$349	357
Cosmetologist	51	$125	373
Emergency medical technician	51	$129	37

Source: Dick M. Carpenter II et al., *License to Work: A National Study of Burdens from Occupational Licensing*, 2nd ed. (Arlington, VA: Institute for Justice, November 14, 2017), 52–3.

Licensing boards are often dominated by members of the professions they oversee. About half of California occupational licensure boards are required by law to have a majority of their members work in the professions they oversee. See table 2 for board composition data in a sample of California boards. Owing to vacancies or a lack of specificity, some boards may be composed entirely of industry insiders, while on other boards, industry insiders have a governing majority. This presents a legal concern in light of the US Supreme Court's decision in *North Carolina State Board of Dental Examiners v. FTC*, which held that states may be liable for antitrust violations when boards are dominated by members of the professions they oversee and when elected officials fail to actively supervise these boards. It also creates a practical concern that boards will tend to act as industry cartels, controlling entry of new members rather than ensuring public safety.

TABLE 2. COMPOSITION OF SELECT CALIFORNIA BOARDS

Board or Council	Occupations Covered	Industry Members	Total Members	Percent Industry
Board of Accountancy[a]	Accountants	7	15	47%
Veterinary Medical Board[b]	Veterinarians, veterinary technicians	5	8	63%
Dental Assisting Council[c]	Dentists, dental hygienists, dental assistants	10	15	67%
Structural Pest Control Board[d]	Pest control professionals	unspecified	7	potentially 100%
Landscape Architects Technical Committee[e]	Landscape architects	unspecified	5	potentially 100%

[A] Cal. Bus. & Prof. Code § 5000 (Lexis 2019).
[B] Cal. Bus. & Prof. Code § 4800 (Lexis 2019).
[C] Cal. Bus. & Prof. Code § 1601.1 (Lexis 2019).
[D] Cal. Bus. & Prof. Code § 8520 (Lexis 2019).
[E] Cal. Bus. & Prof. Code §§ 5620, 5510 (Lexis 2019).

Licensing reduces employment opportunities, especially among certain communities. High barriers to employment pose particular difficulties to lower-skilled, lower-educated populations, to immigrants, to those with criminal records, and to those who move frequently, such as military spouses. Eighty percent of the studies Mercatus scholars reviewed found that licensure has a disparate impact on minorities. Recent research suggests that barriers to entry are associated with greater income inequality and that licensure is negatively associated with absolute income mobility.

Licensure presents an especially steep employment barrier for military spouses. About 35 percent of working military spouses are either licensed or certified. And compared with the broader population, military spouses are 10 times more likely to have moved across a state line in the past year. When military spouses were asked to name the biggest challenges to employment, 22 percent identified the inability to transfer their professional licenses from one state to another. This helps to explain why, in 2017, the military spouse unemployment rate was 16 percent, nearly four times the national average.

Licensure Does Not Seem to Increase Quality or Safety, but It Does Raise Prices

There is little evidence that licensure increases either the quality of services or the public's safety. Theoretically, licensure might increase quality if it acts as a well-designed screening system. On the other hand, it might decrease quality by limiting competition. Reviews of the academic literature by scholars at the Mercatus Center and by officials in the Obama administration suggest that the two effects roughly cancel each other out (though more studies find that licensure reduces quality than find that it enhances it).

There is abundant evidence that licensure raises prices. Economic theory is unambiguous: supply restrictions such as licensure tend to raise prices. And the evidence supports this theory. A Mercatus assessment of 19 peer-reviewed studies found that licensure was associated with higher prices in all 19. Reviewing many of the same studies, Obama administration officials similarly concluded that the association between licensing and higher prices is "unequivocal."

Successful Reform is Difficult but Not Impossible

Licensing reform efforts are difficult to implement successfully. The consumers and the aspiring professionals who suffer from anticompetitive licensing regimes are numerous and typically politically unorganized. On the other hand, the industry insiders who benefit from these regimes are comparatively few in number and typically well organized. Economists and political scientists have long blamed this pattern of diffuse costs and concentrated benefits for the persistence of inefficient and inequitable policy. And this pattern has made licensing reform an uphill battle, even though experts across the political spectrum tend to agree that current licensing laws are inefficient and anticompetitive.

Drawing lessons from successful reform. Despite the advantages enjoyed by special interests, history affords a number of examples in which the general interest has prevailed. In areas as varied as trade, race-based policies, and airline policy, special interests have occasionally lost their privileges while general and diffuse interests have benefitted from a more level and open playing field.

There are a number of important lessons to draw from these cases. But perhaps the most important is that institutional reforms must permit policymakers to cast conspicuous votes in the general interest and limit the power of special interests to dominate the process.

In the case of occupational licensing, some potential reforms follow this pattern:

1. *An independent commission.* One potential reform would be to establish an independent commission. It should be comprised of experts familiar with the economic literature on licensure and with no financial stake in the current regime. It should be charged with identifying and eliminating burdensome and anticompetitive licensing laws. And, ideally, lawmakers should be bound to take its advice in whole or not at all. This type of structure can ensure that state licensing regimes serve the general interests of the public and not the special interests of protected industries. More details on this approach can be found in the attached report.

2. *Requiring less restrictive means of regulation.* The state of Nebraska recently adopted a reform that highlights a different approach. There, the Occupational Board Reform Act of 2018 requires legislative committees to review 20 percent of licenses under their jurisdiction each year and all licenses under their jurisdiction every five years. The review process requires committees to gather information on the number of licenses boards have "issued, revoked, denied, or assessed penalties against" and the reasons for these actions. It also requires committees to review board composition, assess board activities, and to compare these activities with the way other states regulate occupations. Most importantly, the act stipulates that licenses are warranted only when they address "present, significant, and substantiated harms," and if such a harm is found to exist, the legislation requires policymakers to use the "least restrictive" regulation necessary to protect consumers from undue risk. Finally, the act establishes the following hierarchy of regulations, from least restrictive to most restrictive:
    1. Market competition
    2. Third-party or consumer-created ratings and reviews
    3. Private certification
    4. Specific private civil cause of action to remedy consumer harms
    5. Deceptive trade practices under the Uniform Deceptive Trade Practices Act
    6. Mandatory disclosure of attributes of the specific goods or services
    7. Regulation of the process of providing the specific goods or services to consumers
    8. Inspection
    9. Bonding or insurance
    10. Registration
    11. Government certification
    12. Occupational licensure
3. *Reversing the burden of proof.* Arizona has taken a third approach. There, the recently-passed Right to Earn a Living Act strengthens existing law, which had declared that "the right of individuals to pursue a chosen business or profession, free from arbitrary or excessive government interference, is a fundamental civil right," and had directed courts to "apply heightened judicial scrutiny to cases involving occupational licenses and the right to earn a living." The new act stipulates that "any person may file an action in a court of general jurisdiction to challenge an occupational regulation" and creates a presumption *against* a state agency's authority unless the regulation is "demonstrated to be necessary to specifically fulfill a public health, safety, or welfare concern." The law clarifies that "health, safety or welfare . . . does not include the protection of existing businesses . . . against competition." These new provisions provide an avenue of relief to individuals harmed by occupational licensing and create a new accountability mechanism for regulators.

4. *Recognition of out-of-state licensure for active duty and military spouses.* Because licensure imposes particularly steep burdens for peripatetic military personnel and their spouses, a number of states have moved to recognize the out-of-state licenses of these individuals. Utah, for example, recently permitted active duty military and their spouses to operate without a Utah license so long as they hold a current license from another state or jurisdiction and are in good standing with that other state or jurisdiction. While this approach is certainly beneficial for this population, it fails to alleviate the burden borne by most licensed workers.
5. *Universal licensing recognition.* Another approach—also pioneered in Arizona—allows any state resident who is currently licensed by another state to obtain an occupational license in their state of residence. While economists and antitrust officials have long recommended licensure portability, this proposal takes the idea a few steps further than other proposals. Typically, licensure portability reforms have focused on particular professions, such as nursing, and have required multiple states to agree to an interstate compact. That type of reform may still be susceptible to the sort of regulatory capture problems that have long dominated state-level licensure. Universal licensure recognition, however, would allow legislators to serve the general public by easing licensure burdens while it would mitigate the sort of special-interest pleading that so often dominates regulatory reform. Interestingly, the previously-mentioned reform may be a stepping-stone to this reform. In Arizona, the universal recognition bill simply amended previous statutory language that had recognized the out-of-state licenses of active duty military and their spouses so that all Arizona residents with out-of-state licenses could operate.

None of these approaches are mutually exclusive. Indeed, they all reinforce one another and aim to correct for a natural imbalance that tends to favor concentrated and organized interests over diffuse and unorganized interests. Policymakers who value consumer protection, lower prices, and greater opportunities for employment—especially among lower-skilled and lower-educated populations—would do well to consider these reforms.

Thank you for the opportunity to share my research with you today. I look forward to answering any questions you may have.

Mr. ISSA. Thank you, Mr. Chair. Mr. Chair, I want to thank you for your opening remarks that also touched on the need to reign in the inevitable growth by government of regulating and wanting a license for everything.

My home State has managed to reduce the number of entrepreneurs, reduce the number of people who get to work for themselves, and increase the number of people waiting to work for anybody based on licensing.

At a time of COVID they managed to have a situation in which you could go to school, you could get the education, but you couldn't get your license because people who were being paid full pay by the State were not granting testing for more than a year. This does create an opportunity for a bipartisan effort to define when and how particularly private entities can require licensing. I look forward to working with you on that.

I'd like to now shift to Commissioner Wilson. Commissioner, you, in your opening remarks, did talk about, and in your written statement, about the North Carolina State Board Dental Examiners where dentists conspired to exclude—or to include teeth whitening under their purview to the detriment of people being able to do something that you and I could go to the drugstore and buy the same materials but would not be able to have it done for us. Could you expand on that case and why it begs for the kind of reform that I think we're talking about here today?

Ms. WILSON. Thank you for the question. So, that case is one notable case in which incumbents, the dentists on the dental board—I believe six of the eight people on the dental board were dentists—erected barriers to entry to keep competitors out of the market.

We also at the Federal Trade Commission brought a similar case against South Carolina dentists who actually interfered with the delivery of preventative dental services to economically disadvantaged children in public schools.

The hygienists had been going to public schools and providing teeth cleaning for economically disadvantaged children, and the dentists decided that they were going to enter a regulation that said that hygienists could not practice without having basically a dentist looking over their shoulder, and the Federal Trade Commission challenged that as well.

So, you are absolutely right to focus on these issues. Absolutely, States have an interest in protecting the health and safety of their constituents, but sometimes incumbents actually use those regimes to insulate themselves from competition as opposed to protecting consumers, and that's where the FTC gets involved.

Mr. ISSA. Well, I appreciate that. Commissioner Wilson, you may not be prepared to opine on this, but in California where AB5 became law it dramatically reduced competition because it eliminated the ability for massive classes of individuals to form their own sole proprietorships or small companies. Isn't that another example, at least in principle, where competition is reduced anytime government limits the ability of people to essentially start companies?

Ms. WILSON. So, you are right, sir, that I am not familiar with that legislation. Traditionally the Federal Trade Commission has been very interested in economic liberty type issues ensuring that people, who are interested in practicing a trade or moving across

State lines or practicing to the full extent of services for which they're licensed, have the opportunity to do that so that they can have the dignity of earning a living wage. Anything that inhibits that, unless it is directly tied to protecting health and safety, would be and should be suspect.

Mr. ISSA. Well, and finally, many of the comments made here today are about moving—that the Federal Trade Commission and other Federal organizations move the bias from the government proving that competition is somehow hurt to the individual company proving that it is enhanced, whether in labor or in other competition. Do you think that is a dangerous trend or direction?

Ms. WILSON. I do. That does not comport with our innocent-until-proven-guilty approach to law in this country.

Mr. ISSA. Thank you. I yield back.

Mr. CICILLINE. I thank the gentleman. I look forward to working with you on the licensure issue also hope that the example of California that bans noncompetes in its entirety might also inform our work together.

Now, I'll yield to the gentleman from Maryland, who has been a leader on the impact of excessive licensure on American workers, Mr. Raskin, for five minutes.

Mr. RASKIN. Mr. Chair, thank you so much. Thanks for calling this important hearing.

I'm concerned about the rampant misclassification of employed workers as independent contractors to evade and undermine worker protections, especially in the so-called gig economy. Even though section 6 of the Clayton Act shields the, quote,

> ... labor of a human being from general antitrust scrutiny, courts have narrowly construed the exemption so that it doesn't include independent workers, ranging from independent doctors and lawyers to for-hire drivers.

Mr. Callaci, can you explain how the rampant misclassification of employees as independent contractors exposes working people to attack under the antitrust laws?

Mr. CALLACI. Sure. So, basically, yes, section 6 of the Clayton Act and the Norris-La Guardia Act and the National Labor Relations Act all attempted to exempt workers from antitrust prosecutions for coming together to collectively bargain.

So, of course, there is an incentive for companies to misclassify their employees as independent contractors, so those workers don't have access to those rights, and they can, in fact, be prosecuted for collusion.

So, if we were able to get the labor law side get those workers classified properly as the employees that they are and on the antitrust side stop going after these small players, church organists, independent contractors, that would remove the incentive to misclassify.

Mr. RASKIN. Over the last few years, antitrust enforcers over both Democratic and Republican leadership have committed to policing anticompetitive conduct in labor markets. How can the antitrust agencies bolster enforcement in labor markets under current law?

Mr. CALLACI. So, we can revise the merger guidelines to more explicitly take into account effects on workers.

Mr. RASKIN. Earlier this year, Judge Diane Woods testified that Congress intended the antitrust laws to apply to the harmful effects of concentrated economic power and not just short-term reductions in consumer welfare or economic output. How has the shift in recent decades away from this legislative purpose of the antitrust laws towards the goal of just narrowly promoting consumer welfare harmed workers and small businesses in the political economy generally?

Mr. CALLACI. Yeah, so it makes it more difficult to get at anticompetitive conduct, unfair methods of competition, unfair conduct that harms workers. So, you can get at harms to workers indirectly if the monopsony power results in a decline in output, but that is not always the case, right.

There are times when—particularly there's an excellent recent paper by Hemphill and Rose showing that there are cases where monopsony power may not result in a decrease in output but rather a redistribution from employers to employees.

So, we need to be able to take those into account, and the current application of the antitrust laws does not allow us to do that because we're so wedded to this idea of either—we call it either consumer welfare or output maximization. It does not allow us to address these harms to workers.

Mr. RASKIN. Well, then how are you recommending that Congress amend the antitrust laws to reassert the primacy of protecting against abuses of concentrated economic power including in the labor markets themselves?

Mr. CALLACI. Gotcha. Sorry for not getting so directly to your point the first time. So, one way to do that is to not allow offsets, right. So, if workers' wages decline, if their injury rates decline or—as a likely result of a merger or because of employer collusion, that could be the—I lost my train of thought. Hold on. Yeah, so not allowing that to be offset against gains to consumers or to another party, counter party in the market.

Mr. RASKIN. You've noted that the narrow lens for antitrust policy over the last few decades has loosened restraints on franchising to the detriment of workers. How could changes to the antitrust laws address the harmful consequences of this franchising model on small businesses and on employees?

Mr. CALLACI. Sure. So, that gets to Representative Issa's point about entrepreneurship. So, what antitrust has allowed since basically the 1970s is allowed large corporations to control and really dominate nonemployee independent contractors and small businesses through contract.

So, rather than having a chain of McDonald's, each restaurant is owned by a so-called independent contractor who has no control over their business practices. That means that they can't raise the prices. That means they can't control—choose their own suppliers. So, they have no room to raise wages.

In fact, the McDonald's franchisee told, I think it was, the *Washington Post* that McDonald's told her to just pay your workers less when she complained about these kinds of vertical restraints.

Mr. RASKIN. Gotcha. Thank you very much for your testimony. I yield back to you, Mr. Chair.

Mr. CICILLINE. The gentleman yields back.

I now recognize the gentleman from Louisiana, Mr. Johnson, for five minutes.

Mr. JOHNSON of Louisiana. Thank you, Mr. Chair. Appreciate that. Grateful to the Witnesses for sharing their insights today.

My colleagues on the left often talk about how consolidation and corporate concentration are bad for American workers, but they sometimes seem to miss the point that increasing regulations on businesses actually leads to consolidation of industry power in these big mega companies.

Professor Kobayashi, what do you think of the proposition that unnecessary regulatory hurdles create barriers to entry and reduces competition?

Mr. KOBAYASHI. Thank you for the question, Congressman. Certainly it is a reality that often large firms are better able to deal with onerous regulations or regulations that are just costly. A good example is Catherine Tucker's work on privacy regulation. Who best is able to deal with that type of cost and complexity? It's Google, and it makes Google stronger, and it also makes it harder for small firms to compete.

That's not saying that Google has done anything wrong, but—I use it all the time because I think it's the best search engine. It does, in many cases, cause asymmetric abilities to deal with cost and promotes larger firms over smaller ones.

Mr. JOHNSON of Louisiana. Often government has good intentions, but when you have to actually apply it in practicality it is counterproductive.

Instead of focusing our discussion today on implementing more regulations, shouldn't we be focusing on real reforms, and if so, what would be the primary focus? I mean, where should we put our attention first?

Mr. KOBAYASHI. Well, one thing that is important in my years being the bureau director at the FTC the problems—we would get problems. We would see research. We would get questions from Congress. The Chair would ask us to deal with these issues. Even before I got to the FTC. Joe Simons, who was the Chair when I was there, we had many conversations in the period before we both got to the FTC about labor monopsony. He very concerned about it.

One of the things we did to address labor monopsony in mergers was we put specs in the Hart-Scott-Rodino questions to sort of deal with labor monopsony issues, not just looking at product markets but actually making the firms give us data about commuting zones and labor wages and the like.

We also continued to do retrospectives. When I was there, there's a State—a bunch of States have these certificate of public advantage programs which we want to block mergers, but they say that, no, we're going to allow the merger that you think is anticompetitive under our COPA laws.

What we do is we study them. What one of my economists at the time actually then went to CMS and asked for data on labor wages just so we can actually have some idea of what the effects were in having an evidence-based basis for antitrust policy changes that we're going to make.

Mr. JOHNSON of Louisiana. Those are good ideas. I've got just a little over a minute left. Let me just ask you quickly, how will a

top-down arbitrary regulation, such as President Biden's vaccine mandate on businesses with a 100 or more employees, affect the marketplace?

Mr. KOBAYASHI. Well, a bit out of my expertise, but my guess is that the use of top-down mandates are often well intentioned, but you'd want to know what the unintended consequences might be. There are some people who would not want to take those into account, and there are some who will have a hard time dealing with it. I think the marketplace is—my university has vaccine mandates, and we have to wear masks, so—

Mr. JOHNSON of Louisiana. Well, what we're seeing in practice across the country is large-scale resignations and we have any number of industries that are really struggling right now at the worst possible time the mandate hits, and so it's a real problem. I'm out of time. I'll yield back.

Mr. CICILLINE. The gentleman yields back.

I now recognize the gentlelady from Florida, Ms. Demings, for five minutes.

Ms. DEMINGS. Well, thank you so much, Mr. Chair. Thank you to all our Witnesses for joining us today for this very, very important hearing.

Dr. Posner, you said that there is no consideration at all of merger's effect on labor. Let me just say, that's a powerful statement that—that's a powerful realization and one that I certainly believe is sad but true.

Do you believe that non-compete agreements are freely entered into by workers, and do many workers have the bargaining power to negotiate these agreements?

Mr. POSNER. Thank you for the question. Research suggests that certainly for lower-income, less-educated workers who are required by their employers to enter noncompetes, those workers do not understand what the noncompetes mean. Often, they don't even learn about the noncompetes until they show up at work. They're not in a realistic position to say, okay, but you have to pay me more. I mean, that's just not how the world works, and that's been confirmed by academic research.

For quite sophisticated people, like executives who can hire lawyers to advise them, they appear to be informed about these noncompetes and may very well be compensated for the restrictions that they impose on them.

I do want to add that even when people voluntarily consent to noncompetes and receive wage premium as a result, that can have serious anticompetitive effects, and I'll give a quick example. Imagine a hospital in a small town, it ties up all the physicians and nurses with noncompetes and compensates them. Now, a new hospital or clinic wants to enter the town and needs workers. Well, it can't compete for those workers because they're tied up for a year or two, and they would have to quit and not work in their profession for a couple of years before they could work for the new employer. So, these noncompetes, even when voluntarily consented to, can have serious, negative effects on competition.

Ms. DEMINGS. Thank you so much, Professor.

Mr. Gross, you said something at the beginning of your testimony too, and it was maybe viewed as small, but I thought it was

also powerful. As you talked about the workers, you said fellow American workers. It was just something that was good to hear in this political climate where we tend to like to pick and choose winners and losers. I think our responsibility on this Committee is to leave no American worker behind, and so I just thank you for being here and testifying today.

You mentioned the stark difference in prevailing wages between unionized UPS drivers and Amazon drivers. Why do you think there is such a big difference in the wages? I know you talked a little bit about that, but if you could just drive that home, that point home for us, please.

Mr. GROSS. Thank you, Congresswoman. I think one of the biggest differences is that unionized workers, we are employees of the corporation, and where Amazon is using these DSP delivery drivers, they're not actually Amazon's employees. So, in that essence, it allows Amazon to save money and not share in its profits with the people that are actually making the money for Amazon. So, that's definitely one of the ways.

Ms. DEMINGS. How would you respond to people who would say that consumers really like Amazon and they want two-day delivery, and that Amazon's practices are reducing prices for consumers, and workers who dislike it should just find a different line of work? How would you respond to that?

Mr. GROSS. Well, I don't think there's anything wrong with consumers liking Amazon and liking two-day service. We provide second-day air at UPS. We were the ones that were providing the service behind the scenes for Amazon for a long time. What was the question again?

Ms. DEMINGS. What would you say to people who seem to want to ignore, you know, the differences in wages, working conditions, and all those things because they like the service that Amazon gives?

Mr. GROSS. Oh, yeah, right. Yeah.

Ms. DEMINGS. I think it goes back to the way you do business matters too.

Mr. GROSS. Yes, the way you do business matters. I would say, there's nothing wrong with liking Amazon, but you would like them a lot more if they had employees that were unionized and that were able to provide excellent service that unionized workers are able to provide.

Ms. DEMINGS. Thank you so much, Mr. Gross.

Mr. GROSS. You're welcome.

Ms. DEMINGS. Thank you to all our Witnesses. Mr. Chair, I yield back.

Mr. CICILLINE. The gentlelady yields back.

I now recognize the gentlelady from Minnesota, Ms. Fischbach, for five minutes.

Ms. FISCHBACH. Thank you, Mr. Chair.

I've got just a couple of questions for Commissioner Wilson. Commissioner Wilson, in this Subcommittee there's been quite a bit of talk about the proper focus for and the limits of antitrust law. One premise of this hearing seems to be that antitrust is responsible for and can solve many of the issues that American workers are facing. I just wonder if you could take just a couple of minutes to talk a

little bit about what antitrust focus has been in the past and what it is today.

Ms. WILSON. Thank you for the question. So, I would start by saying that the analytical framework that we use is called the consumer welfare standard. So, in our analysis, at the forefront of our mind certainly is how consumers will be impacted by conduct or by mergers that is not limited to an analysis of short-term price effects. In fact, we also think about innovation. We think about quality. We think about choice. We think about whether barriers to entry will be erected that will inhibit new entrants from coming in and further lowering prices.

So, even though it's called the consumer welfare standard, it is—and is characterized as being focused on short-term price effects, that is actually incorrect.

First, as I've described, we do think about innovation and quality and choice.

Second, in the Weyerhaeuser case, I think it's a great example of how we actually do look at impacts of monopsony power even if there is no impact on output. So, I just wanted to respond to Dr. Callaci's statement that, in fact, he said we can only challenge monopsony power under existing antitrust laws if there is a decline in output, but, in fact, in the Weyerhaeuser case that was not true.

Also, in the Horizontal Merger Guidelines, section 12 explicitly says that we can look at monopsony power even if there is no impact on output or an effect downstream. So, to package all this together, I would say that we look at the impact on consumers, but we also need to remember, of course, that consumers are employees and consumers are sometimes shareholders. I think it is perhaps an arbitrary and artificial approach to impose these silos.

That said, as Dr. Kobayashi mentioned, during the Trump Administration, for three years we looked long and hard for labor monopsony issues particularly in hospital mergers and the impact on nurses. So, within the existing analytical framework, without setting up special separates goals for antitrust, we actually do consider all these issues.

What we find, in fact, is that typically when you address the underlying anticompetitive issues of a merger you resolve both potential harms to consumers and potential harms to labor. In certain circumstances where that's not the case, the Federal Trade Commission has actually gone directly after harms—monopsony harms, including in our Griffold case that was brought just recently where there was a merger of human-source plasma companies.

The Federal Trade Commission challenged the merger in part because it was going to create monopsony power for blood plasma donors in various cities. In other words, donors of blood were going to get lower fees because of monopsony power until the Federal Trade Commission challenged that.

Also, in the healthcare field, the Federal Trade Commission in a conduct case challenged an agreement between therapists staffing service providers for home health agencies where they agreed to set prices for therapists, in other words suppressing wages.

So, while I think it is important for us to focus on the economically based consumer welfare standard that we have, it is actually

a rich and robust analysis that allows us to look at a variety of different factors including labor.

Ms. FISCHBACH. Thank you very much, Commissioner. I appreciate your input.

Given that I've only got a few seconds left, I will yield back, Mr. Chair. Thank you.

Mr. CICILLINE. The gentlelady yields back. Thank you.

I now recognize the gentlewoman from Georgia, Ms. McBath, for five minutes.

Ms. MCBATH. Thank you so much, Mr. Chair.

Ms. Payton, I just want to thank you so much for your work as part of our healthcare system. As a cancer survivor, and I'm a two-time cancer survivor, I know well that behind the many doctors and nurses there are also dozens of technicians and clerks and administrative assistants and sanitation staff that are making sure that everything always runs smoothly, and patients get the care that they need.

You are all frontline workers, so I want to thank you, first and foremost, for your really hard work. I find your experience really, really troubling. So, how do the wages and working conditions that you've experienced affect morale among you and all of your coworkers?

Ms. PAYTON. Working for UPMC, it's one of those with two-edged swords. It's good because I actually have a job to go to, but it's bad because it's like my coworkers and I, we can't afford to feed our families when we need to, pay all our bills when we're scared of the medical debt.

UPMC controls the labor market in Pittsburgh, and we need a union that gives some of that power back to the workers. They have too much power in fact, and we need the union to balance that power. That way we'll be able to afford to live comfortably and sustain our families.

Ms. MCBATH. Thank you for that.

Mr. Gross, thank you also for being here. Your employer, UPS, is headquartered in my district, which is Georgia's 6th Congressional District, so I'm so pleased to hear of your positive experiences as a UPS employee and also member of your union.

Like hospital staff Ms. Payton, you work in an industry where accidents can cause real harm. You mentioned that your union worked to secure rules that were beneficial to drivers and also promote public safety. Can you expand on that, please?

Mr. GROSS. Thank you, Congresswoman. I mean, UPS puts us through an extensive training program as far as driving and our workers inside the hub. So, I think that's one of the ways that UPS helps keep its workers safe, unionized workers safe. I don't think that workers that are at Amazon or other part-time non-employees, subcontractors, they don't get the opportunity to have that same training and safety.

Ms. MCBATH. So, do you think you would have been able to get these rules that keep you and the public safer if you were bargaining with your employer or by yourself?

Mr. GROSS. I think that the collective bargaining agreement is what levels the playing field with companies, and I think that

would definitely allow workers to have an opportunity to have a voice and a say and to be safer on the job.

Ms. MCBATH. Thank you.

Ms. Payton—I'm running out of time—you testified that you asked your employer to provide you with more PPE and that they told you that this is what you signed up for. Did you feel like you had any recourse whatsoever, any other actions that you could have taken at that point?

Ms. PAYTON. Being that we're not a union at UPMC, it was kind of difficult to even go further in that. We do deserve better PPE and more information because we are putting our lives on the line. We're putting our family's lives on the line. If we had a union, it would just make our lives essentially better. Like instead of feeling expendable we should feel essential, like the essential workers that we are.

Ms. MCBATH. Ms. Payton, you testified—excuse me, Mr. Gross, your testimony mentioned that Amazon no longer lets drivers like you come into the facility, and that you and your fellow drivers think this is about controlling the information that Amazon employees and contractors get. Can you tell us more about what led you to that conclusion, and what would you tell an Amazon driver based on these experiences that you have had?

Mr. GROSS. I would just say that Amazon doesn't want us talking to those employees because they don't want them to understand the power of our collective bargaining agreement. They don't want them to understand the rights and the wages and the standards that we enjoy in the industry. I don't think they want them to know their worth in the industry. So, I would tell them that—be open minded and learn and strive to have a collective bargaining agreement.

Ms. MCBATH. I think I'm just about out of time but thank you so much to each of you for being here today, and thank you so much for being so candid and honest with us. I yield back the balance of my time.

Mr. CICILLINE. The gentlelady yields back.

I now recognize the gentleman from Ohio, Mr. Jordan, for five minutes.

Mr. JORDAN. Thank you, Mr. Chair.

Mr. Gross, do higher prices hurt workers? I notice in your testimony you said you are married, four children. When The price of eggs, bread, milk, gas, when that goes up, does that hurt workers?

Mr. GROSS. Thank you, Congressman. I'm not an economist, but I know the higher prices hurt everyone—

Mr. JORDAN. Yeah.

Mr. GROSS. —everyone from workers—

Mr. JORDAN. Union workers? Non-union workers?

Mr. GROSS. Workers, consumers, and everyone.

Mr. JORDAN. You've got less purchasing power, so even if your wages go up but you've got—in real terms you've got less purchasing power, that's going to hurt. I mean, my dad was a union worker. He worked—I appreciate what you do. My dad worked 30 years for General Motors International Union of Electrical Workers. My mom cleaned houses. When the price of goods and services goes up, it's tough on families. Isn't that true?

Mr. GROSS. I believe that it's tough on everyone, yes.

Mr. JORDAN. How about higher taxes? Democrats are getting ready to—they're going to try to pass a huge spending bill, $3.5 trillion. They're going to have a bunch of tax increases in there. When your taxes go up, not to mention we've got inflation at a 40-year high, so the price of everything you purchase as a family has gone up, now they are going to raise your taxes. Is that going to hurt families? Is that going to hurt workers?

Mr. GROSS. Well, to that I would like to defer to one of the economists.

Mr. JORDAN. No, I'm just asking in simple terms. If you have to give more of your hard-earned money to the government in the form of taxes, is that going to be tough on families especially when you couple with it the fact that we're now at a 40-year high inflation rate?

Mr. GROSS. I understand what you are saying, Congressman, but I don't feel comfortable with that because I'm not an expert.

Mr. JORDAN. How about COVID lockdowns? Did that hurt workers when the economy was locked down, typically done by Democrat governors, Democrat mayors? Does that hurt families?

Mr. GROSS. Well, again, Congressman, I appreciate your question, but I'm not qualified to answer that.

Mr. JORDAN. I think you are very qualified as someone who had your union and working hard for your family. How about mandates? We have got the State of New York, the Chair's home State, the governor announced last night that they're going to fire healthcare workers because they won't comply with the mandate. The same healthcare workers, by the way, who a year ago were heroes for all the hard work they've done over the last year. Do these kind of mandates, do you think those harm workers, Mr. Gross?

Mr. GROSS. I appreciate your confidence in me, Congressman, but I would have to get back to you with a response on that.

Mr. JORDAN. I appreciate your answers, Mr. Gross.

Ms. Wilson, let me switch subjects—excuse me, I'm sorry, Commissioner Wilson. In your written testimony, Commissioner, near the end, I don't think you said this in your oral testimony, but in your written testimony you said new agency leadership—I'm reading from I think one of the last paragraphs. Then you give a bunch of examples—new agency leadership unfortunately has made meaningful dialogue among commissioners and between the Commission and its stakeholders difficult by—and then you list a bunch of things—muzzling staff internally and externally, stifling the flow of agency records and information from staff to commission, and there's lack of transparency, giving minimal notice to commissioners and the public of sweeping policy change—you go on giving no written explanation of sweeping policy changes—until those changes are actually implemented by the Trade Commission, evading meaningful dialogue at the Commission level, voting against notice and comment of all other policy, and on and on it goes. Tell me about this, if you would, Commissioner. What's going on at the FTC?

Ms. WILSON. Thank you, Congressman. I appreciate the opportunity to address this issue. I have served at the Federal Trade Commission on three different occasions. This is my third stint at

the FTC, and what has always made the Federal Trade Commission special and powerful is its long bipartisan tradition of collegiality, observing norms and traditions, carrying on a rich dialogue at the Commission but also with stakeholders.

As I enumerated in my written submissions with extensive footnotes to other statements that I've made, this observance of norms and traditions that facilitates bipartisanship and a robust and rich dialogue, not just within the Commission, but also with all our stakeholders—my cat is coming into the picture—has taken a huge hit under new leadership.

I'd like to note the distinction here. When Acting Chair Slaughter was serving as the chair of the FTC, she continued to absorb the norms and traditions that allowed for a bipartisan discussion. It is only with the arrival of Chair Khan that decades of tradition have been thrown out the window to the detriment of our and consumers.

Mr. JORDAN. So, this is new. We all know we function in a body where process matters. Process impacts policy. If you don't have the right process in place, sometimes you can lead to serious mistakes and serious, serious problems. Should we give the Commission more power?

Ms. WILSON. I am very concerned about giving the Agency more power under current leadership. A system can only withstand the force that it is designed to channel, and right now we are seeing the limits of the force that we can withstand.

Mr. JORDAN. Thank you, Mr. Chair.

Mr. CICILLINE. The time of the gentleman is expired.

Mr. Gross, just so you are not left with a misimpression, the proposal that's before the Congress will actually cut your taxes because you have four children, provide lower costs of healthcare, prescription drugs, paid family leave, and a number of other—childcare, et cetera. So long as you don't make more than $400,000, you are getting a big, gigantic tax cut. So, I didn't want you to leave this hearing worried about a tax increase based on Mr. Jordan's question.

Mr. JOHNSON of Louisiana. Mr. Chair? That's fake news. No, I'm just—

Mr. CICILLINE. The Chair now recognizes the gentlelady from Pennsylvania, Ms. Dean, for five minutes.

Ms. DEAN. I thank Chair Cicilline and Chair Nadler for bringing forth this hearing that centers on complex nuance antitrust law, but it centers on the impact—I'm over here, sorry—on everyday Americans.

Mr. Gross, I'm from neighboring Pennsylvania. My nephew, one of my nephews was a proud Teamster for more than a decade with Pepsi. Pennsylvania, like New Jersey, has been a leading voice in organized labor dating back to the 18th century.

I appreciate your focus, and I won't hit you again on this because you've spoken so well about it, but we often focus on the financial benefits of collective bargaining, higher wages, health insurance, pension contributions, and the like, and we don't talk enough about safety and the hazard implications to workers and to the rest of us on the roads or whatever it happens to be. So, thank you for your eloquent testimony on that.

So, if I could, I'd like to move to Dr. Callaci. You also talked about workplace safety and workplace conditions. Can you explain, from your work, how the lack of collective bargaining impacts safety in the day-to-day of the average American worker in other industries?

Mr. CALLACI. Sure. So, I would imagine, I don't know, I haven't seen the contract, but that Mr. Gross has a health and safety Committee at his workplace with joint representation from labor and management to talk over these issues and come to solutions.

So, when workers don't have a lot of options for alternative employers because of concentration and when they're otherwise restrained and employers are restrained from competing for their jobs by these kinds of contracts we've been talking about, that really limits their bargaining power to be able to gain wages. Even an individual worker, of course, can't get those safety committees without a union. That is a really key element that collective bargaining brings to the table.

Ms. DEAN. How does that trickle down to the safety for you and for me?

Mr. CALLACI. Well, I mean, who is more affected? Who is going to notice a safety hazard first, especially in the healthcare sector where we have these externalities, as economists call them, of how pathogens move around from the workplace to the patients to throughout the community.

So, yeah, absolutely, workers are the first to notice when there's a safety problem. They're the first harmed. So, they really need to be empowered, and collective bargaining is the best institution we have to empower workers to bring those concerns to the floor and not be afraid to speak up.

Ms. DEAN. Thank you, and I wanted to ask you another question in a different area. Are women and people of color more likely to face negative effects of labor monopsony and why?

Mr. CALLACI. Yeah. So, we do see—I'm trying to remember if I can—because I want to make sure I'm sticking to the empirical evidence. In terms of certainly noncompetes, we have very good evidence through a couple of papers now that non-White and women workers are more harmfully affected by these agreements, because basically it's workers that are more vulnerable with lower bargaining power to begin with are more harmed by these kinds of restraints.

We saw, also, the Krueger and Ashenfelter study on no poaching agreements in franchising which show that those agreements were more common with low-wage, high-turnover workforces where the employer was—I've been talking about sort of this notion of baseline monopsony where basically almost every employer has some level of control and power over their workers, but this stuff gets supercharged by these agreements by things like noncompeting agreements.

So, it would stand to reason that if workers are more negatively affected by—if the evidence shows that for non-compete agreements, that monopsony would also have a more harmful effect.

Ms. DEAN. Thank you.

Ms. Payton, I was struck by your testimony, I think, as everyone here was. What shines through is your pride in your work, your

pride in earning, working hard for an organization, doing worthwhile work, and, of course, the pride in raising a family. You are hampered in that, 15 years and not making even north of $20 an hour.

I wondered, is there anything else you wanted to add to your story that has not come out, and also, are you able to talk to us about how your aspirations for organizing are coming along?

Ms. PAYTON. I just want to add that we have been talking to elected officials about this for a long time, and we are hopeful that there will be action. Having a union is definitely the way to go because UPMC has too much power, and we definitely need the union to give some of that worker—the power back to us workers.

Ms. DEAN. That's terrific. With that, Mr. Chair, I thank you and I yield back.

Mr. CICILLINE. The gentlelady yields back.

I now recognize the distinguished gentleman from North Carolina, Mr. Bishop.

Mr. BISHOP. Thank you, Mr. Chair.

Mr. Gross, I was listening to your description about the Amazon workers. You said that they—I wrote it down—lower wages. They have to do weekend work. Then you say they cut corners on safety. You said that there's a lot of pressure. Why do folks choose, drivers choose to go to work there instead of, say, UPS?

Mr. GROSS. Well, I mean, drivers have an opportunity to go straight into driving with Amazon. So, with UPS, it's a good place to work. It's a solid place to work. You can raise a family there. You can pay your bills. You can be a homeowner, follow the American dream, you know.

That's what everybody wants. There's a process that you have to follow. You can't just jump right up into the driver's seat. So, a lot of people don't want to take the time to follow the process to get to where they want to go. I think that's really one of the main reasons.

Mr. BISHOP. Okay. So, do you think they ought to be able to make a choice like that, or should that choice just not really be available?

Mr. GROSS. I don't really think they're aware of the choice they're making when they originally become an employee for the DSP. I don't think they really understand.

You see Amazon as this big corporation with these boxes with smiley faces and everyone's happy and everyone enjoys getting stuff online and shopping. That's euphoric, but I don't really think they understand what they're getting into.

There are certain things about our industry. It's a tough job. It's a worthwhile job, and it's a tough job.

Mr. BISHOP. No doubt about it.

Mr. GROSS. One of my coworkers once coined the phrase we're industrial athletes. So, I think it's—you need to be compensated as such.

Mr. BISHOP. Yeah. Okay, sir. Thank you.

Ms. Payton, I was struck by something that you said and it's interesting. The place I come from, Charlotte, North Carolina, and also is a case there that the healthcare system is the largest employer. I think you said that about UPMC, University of Pittsburgh

Medical Center, that you work for. In your testimony you made the point that—and, unfortunately, we got your—all these—the testimony got passed out, I think, to everybody late last night or at least to me. So, I didn't get to read it all in full.

Ms. Payton, I was struck. You said that—how did you put it—I can't remember exactly. You were talking about U.S. Steel and that there—it's no longer as big and impactful an employer as UPMC that you work for and that it was unionized and it promised and paid a lot of benefits that people liked and gave a good standard of living.

Why do you think that is that U.S. Steel's no longer around but now the hospital system is the biggest employer rather than a company that's making stuff?

Ms. PAYTON. U.S. Steel was big and impactful, but slowly the eds and med started taking over the city of Pittsburgh. The U.S. Steel tower now has UPMC at the top of that tower which goes to show that UPMC is one of the biggest factors in this city.

Mr. BISHOP. Ms. Payton, I was just curious. Given a lot of the discussion lately, Has UPMC ordered employees to take vaccines against COVID?

Ms. PAYTON. No, they have not.

Mr. BISHOP. Do you think the employer should have the power to impose that decision on you and your fellow employees?

Ms. PAYTON. I think a worker should have a choice, but I also do believe that everyone getting the vaccine will help people stay safe.

Mr. BISHOP. Thank you, ma'am. That's very sensible to me.

It's interesting and more broadly and to some of the academics that are in the hearing. Seems to me that the majority fails—the Democratic majority fails to reconcile or even to apparently to recognize inconsistency in their own policies.

Back in 2009, I guess it was, the Congress adopted the Affordable Care Act, also known as Obamacare. As experts widely recognize, it promoted consolidation among insurance companies. It's no surprise really that then led to consolidation among hospital systems, and that led to consolidation in the ownership of physician practices. Now, we're talking about—but then hospital consolidation became an enforcement priority for FTC.

Isn't much of this—and I think maybe I'll direct this to Professor Posner. Isn't much of this the result of inconsistent policymaking by the Congress that would tend to promote consolidation, at the same time punish other entities for consolidating?

Mr. POSNER. Well, I think one would have to look at it case by case. Broadly speaking, I don't agree. Congress has a lot of legitimate different policy goals, and in some cases certain policies will benefit larger companies. You also need a very strong antitrust law at the same time to prevent excessive consolidation from occurring and from the large companies abusing their monopoly power.

Mr. BISHOP. Thank you, sir.

My time has expired, Mr. Chair.

Mr. CICILLINE. The time of the gentleman has expired.

I now recognize myself for five minutes.

Before going to my questioning, I ask unanimous consent to include in the record an article from Open Markets Institute entitled,

"Eyes Everywhere: Amazon Worker Surveillance Continued," without objection, and also a letter from the chair of the Federal Trade Commission, Lina Khan, dated September 28th, 2021, without objection.

[The information follows:]

MR. CICILLINE FOR THE RECORD

Report Update | Eyes Everywhere: Amazon's Worker Surveillance Continued

openmarketsinstitute.org/publications/report-update-eyes-everywhere-amazons-worker-surveillance-continued

September 23, 2021



This research paper, authored by Daniel Hanley, serves as an update to Open Markets' September 2020 report, "Eyes Everywhere: Amazon's Surveillance Infrastructure and Revitalizing Worker Power." It details Amazon's attempts to amplify and widen its ability to spy on workers from September 2020 to September 2021.

In analyzing the corporation's extensive employee monitoring tactics, this paper also notes that those most impacted by Amazon's increased worker surveillance are the lowest-paid employees, who are mostly Black, brown and other people of color.

The paper also reasserts a set of reforms that antitrust enforcers, regulators, and state and federal lawmakers should utilize to remedy these abuses.

EYES EVERYWHERE: AMAZON'S SURVEILLANCE INFRASTRUCTURE AND REVITALIZING WORKER POWER — AN UPDATE

Daniel A. Hanley
Senior Legal Analyst, Open Markets Institute
September 2021

In September 2020, the Open Markets Institute published a report detailing Amazon's extensive worker surveillance practices.[1] Since then, Amazon has continued to radically expand its capacity for spying on its own employees and contractors. Below is a short update detailing the corporation's latest attempts to amplify and widen its worker surveillance practices over the past 12 months.[2] Amazon's worker surveillance practices continue to be a critical aspect of the corporation enhancing and fortifying its market dominance as well as to controlling and exploiting its workers.[3]

As with many of its practices, Amazon continues to force the adoption of its surveillance policies as a condition of employment — making these technologies mandatory and unavoidable for workers. Brutal stories of workers being punished for failing to meet Amazon's breakneck working speeds and performance metrics continue to be published and demonstrate the role of surveillance in allowing the corporation to ensure its workers remain under its constant control.[4]

With more than 1.3 million part-time and full-time workers, Amazon continues to exert an extraordinary amount of dominance over geographic labor markets and the workers subjected to its power.[5] If Amazon is allowed to continue to expand its surveillance practices, as we explained in our first report, its workers will be forced to endure ever more dangerous and exploitative working conditions that threaten their health and safety as well as the existence of democracy in the workplace.[6]

Additionally, as revealed in Amazon's April 2021 workforce demographic report,[7] the workers occupying Amazon's lowest-paid jobs (such as its warehouse and call center workers) are highly diverse — meaning the effects of its harsh workplace surveillance tactics adversely impact mostly Black, brown, and other people of color. These individuals also continue to endure extremely precarious employment conditions since many jobs are classified as independent contractors and are thus prohibited from unionizing and obtaining other corporate benefits. This allows Amazon to avoid incurring a significant amount of liability for its harsh practices.[8]

Furthermore, Amazon frequently markets its jobs as high paying, but reports confirm that many of its workers still require food stamps to get by.[9] Even when Amazon does raise pay, other benefits provided to workers are routinely cut.[10] Amazon's surveillance tactics, therefore, not only disproportionately target people of color, but also affect many of the most economically vulnerable.

Smartphone Applications Monitoring Employees and Contract Drivers

According to a February 2021 news report, Amazon has built its own mobile application called Mentor, which tracks the location and rates the performance of contract drivers. Combined with the data collected from its new camera system, Amazon uses the Mentor application to rank drivers according to their performance, giving them what it calls a "FICO Safe Driving Score."[11] Drivers receive weekly report cards detailing their score.[12]

Amazon claims the program is predominantly about driver safety.[13] But the application can get triggered by seemingly innocuous events such as "hard braking," "hard acceleration," "low impacts," and "U-turns."[14] Because many of these triggering situations are also vague and imprecise, the system can also record many false infractions. According to one worker, "If [I] went over a bump, the phone would rattle, the Mentor app would log that I used the phone while driving, and boom, I'd get docked."[15] Another driver stated that he got a distracted driver notification from the application after he drank water or changed the radio station in his vehicle.[16]

Drivers claim that if their score falls below certain levels, Amazon can reprimand them by removing them from the work schedule or removing their access to bonuses and other perks.[17] Recently revealed corporate documents obtained by *The Information* affirmed that the drivers' claims are correct.[18]

Amazon's policies will almost surely create perverse incentives for workers to take shortcuts and other measures that threaten health and safety. As we explained in our September 2020 report, "Delivery drivers often speed to meet Amazon's rigorous delivery demands, harming both drivers and bystanders. Investigations conducted by *ProPublica* and *BuzzFeed* discovered that Amazon delivery drivers had been involved in more than 60 crashes that led to serious injuries, including at least 13 deaths, between 2015 and 2019."[19]

Cameras in Third-Party Delivery Vans

In February 2021, Amazon announced that delivery vans owned and operated by Amazon contractors must be equipped with cameras for monitoring driving activities.[20] Amazon forces contract drivers to have the installed camera system take their picture and collect biometric information and also "tracks vehicle location and movement, including miles driven, speed, acceleration, braking, turns, and following distance[.]"[21] These cameras subjugate drivers to near-constant surveillance because as long as the vehicle remains on, the cameras cannot be turned off.[22] If workers refuse to consent to this monitoring, they will lose their job.[23] Amazon has cut relations with companies that do not accept its demands. After contract drivers in Portland pleaded with Amazon to implement fairer working conditions, Amazon terminated the contract with the company that employed them.[24]

Currently, 45% of delivery vans are already equipped with cameras.[25] Five U.S. senators wrote a letter in March 2021 to the corporation condemning its practices. In the letter, the senators state that Amazon's implementation of these monitoring cameras could "threaten the safety and wellbeing" of the company's delivery service providers.[26]

In August 2021, *The Information* revealed that Amazon is also developing its own tracking device for its delivery tractor-trailers called Relay ELD (electronic logging device). The device, similar to Amazon's Mentor Application and surveillance cameras for its delivery van drivers, will monitor a truck's exact location and constantly surveil its movements.[27] While the device is currently installed on trucks for only six companies, Amazon plans to install its Relay ELD technology on hundreds of its tractor-trailers by the end of 2021.[28]

Using of Human Spies

In September 2020, Amazon advertised for two new employment opportunities, with the titles "Intelligence Analyst" and "Senior Intelligence Analyst," which the company described as involving the tracking and monitoring of "labor organizing threats," as well as other "activist groups [and] hostile political leaders."[29] While Amazon eventually relented to public pressure and removed the listings, the corporation's ambitions are clear — to maintain internal control by preventing the formation of unions through constant and pervasive surveillance over all employees, despite the adverse impact on their health and safety.

Vice News published a report in November 2020 detailing internal corporate documents that revealed the company had hired Pinkerton, the agency infamous for spying on workers, to gather information and disrupt workers' union-organizing activities.[30] The documents also showed that Amazon's worker surveillance practices extend globally and that the corporation pays particular attention to union organizing activities and which workers attend union meetings.

Monitoring the Activity of Employees and Contractors on Social Media

The news outlet *Motherboard* reported in September 2020 that Amazon uses online tools to spy on its workers in Facebook groups and monitors communications related to its workers' labor organizing efforts.[31] The publication revealed that Amazon corporate employees regularly receive reports containing social media posts of complaints from Amazon Flex drivers — delivery drivers whom Amazon classifies as independent contractors and who are not company employees.[32] The *Motherboard* journalists reporting the story bluntly stated that Amazon designs its operations to "systematically monitor[], categoriz[e], and analyz[e]" worker communications.[33]

Installing Monitoring Software on Computers

Motherboard announced in August 2021 that Amazon has plans to install software that will monitor some of the "keyboard stroke and mouse movements" of its customer service employees.[34] The company is currently considering plans to install software that will monitor all of a user's computer actions.[35]

Similarly, NBC reported in August 2021 that Amazon, along with other technology companies, is pressuring call center companies hired to manage some of its customer relations to install cameras in workers' homes for those who choose to work remotely.[36]

Selling Worker Surveillance Tools to Third Parties

Amazon announced in December 2020 that it would be selling tools that would allow factories around the world to monitor workers.[37] The service, called AWS Panorama, analyzes security footage to monitor worker movements throughout the day. The service can also be modified, via machine learning, to track any type of worker behavior, such as when and where workers are gathering and speaking to one another. Amazon boasted on its website that its Panorama service is able to "track how long it takes for an associate to complete each task in the assembly of a guitar so that we're able to optimize efficiency and track key metrics."[38] Like many of Amazon's surveillance practices, the company justifies its tactics under the auspices of worker safety and adherence to strict company policies.[39] However, Amazon can and will likely use the service to track and ultimately deter worker-organizing efforts.[40]

Amazon's surveillance tactics and its other practices continue to harm workers. A recent investigation by *The New York Times* detailed conditions so harsh that many of Amazon's workers remain employed with the company only for a few days or weeks.[41] In fact, according to a recent report by the Strategic Organizing Center, Amazon's fervor to extract as much value as possible and to force its workers to move at breakneck speeds creates an exceptionally dangerous working environment. The report found that Amazon's rates of injury in its warehouses are more than 50% higher than other comparable companies with extensive warehouse operations (like Walmart) and more than twice the rate as all U.S. employers.[42] Delivery drivers also face strict standards and time constraints by being required to deliver upward of 400 packages a day in a span of 10 hours.[43]

Solutions

To remedy these abuses, the Open Markets Institute continues to advocate for the reforms we asserted in our first report:

- Congress must enact a statute that bans certain forms of invasive worker surveillance practices.
- The National Labor Relations Board should promulgate a rule prohibiting forms of surveillance that presumptively interfere with unionization efforts.
- Federal and state legislatures and administrative agencies must enact prohibitions on invasive forms of worker surveillance.
- Congress must enact a statute that legalizes the unionization of independent contractors, secondary boycotts, and other solidarity actions.
- The Federal Trade Commission and Department of Justice must amend their merger guidelines to enact bright-line rules to prohibit mergers above a certain size.
- The FTC must ban worker noncompete agreements and class-action waivers.

Endnotes

[1] Daniel A. Hanley and Sally Hubbard, *Eyes Everywhere: Amazon's Surveillance Infrastructure and Revitalizing Worker Power,* Open Markets Institute, September 2020, https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5f4cffea23958d79eae1ab23/1598881772432/Amazon_Report_Final.pdf.

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[4] Spencer Soper, "Fired by Bot at Amazon: 'It's You Against the Machine," *Bloomberg,* June 28, 2021, https://www.bloomberg.com/news/features/2021-06-28/fired-by-bot-amazon-turns-to-machine-managers-and-workers-are-losing-out?sref=ZvMMMOkz.

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[7] Kathrine Anne Long, "New Amazon data shows Black, Latino and female employees are underrepresented in best-paid jobs," August 14, 2021, https://www.seattletimes.com/business/amazon/new-amazon-data-shows-black-latino-and-female-employees-are-underrepresented-in-best-paid-jobs/.

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EYES EVERYWHERE: AMAZON'S SURVEILLANCE INFRASTRUCTURE AND REVITALIZING WORKER POWER — AN UPDATE

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September 2021

In September 2020, the Open Markets Institute published a report detailing Amazon's extensive worker surveillance practices.[1] Since then, Amazon has continued to radically expand its capacity for spying on its own employees and contractors. Below is a short update detailing the corporation's latest attempts to amplify and widen its worker surveillance practices over the past 12 months.[2] Amazon's worker surveillance practices continue to be a critical aspect of the corporation enhancing and fortifying its market dominance as well as to controlling and exploiting its workers.[3]

As with many of its practices, Amazon continues to force the adoption of its surveillance policies as a condition of employment — making these technologies mandatory and unavoidable for workers. Brutal stories of workers being punished for failing to meet Amazon's breakneck working speeds and performance metrics continue to be published and demonstrate the role of surveillance in allowing the corporation to ensure its workers remain under its constant control.[4]

With more than 1.3 million part-time and full-time workers, Amazon continues to exert an extraordinary amount of dominance over geographic labor markets and the workers subjected to its power.[5] If Amazon is allowed to continue to expand its surveillance practices, as we explained in our first report, its workers will be forced to endure ever more dangerous and exploitative working conditions that threaten their health and safety as well as the existence of democracy in the workplace.[6]

Additionally, as revealed in Amazon's April 2021 workforce demographic report,[7] the workers occupying Amazon's lowest-paid jobs (such as its warehouse and call center workers) are highly diverse — meaning the effects of its harsh workplace surveillance tactics adversely impact mostly Black, brown, and other people of color. These individuals also continue to endure extremely precarious employment conditions since many jobs are classified as independent contractors and are thus prohibited from unionizing and obtaining other corporate benefits. This allows Amazon to avoid incurring a significant amount of liability for its harsh practices.[8]

Furthermore, Amazon frequently markets its jobs as high paying, but reports confirm that many of its workers still require food stamps to get by.[9] Even when Amazon does raise pay, other benefits provided to workers are routinely cut.[10] Amazon's surveillance tactics, therefore, not only disproportionately target people of color, but also affect many of the most economically vulnerable.

Smartphone Applications Monitoring Employees and Contract Drivers

According to a February 2021 news report, Amazon has built its own mobile application called Mentor, which tracks the location and rates the performance of contract drivers. Combined with the data collected from its new camera system, Amazon uses the Mentor application to rank drivers according to their performance, giving them what it calls a "FICO Safe Driving Score."[11] Drivers receive weekly report cards detailing their score.[12]

Amazon claims the program is predominantly about driver safety.[13] But the application can get triggered by seemingly innocuous events such as "hard braking," "hard acceleration," "low impacts," and "U-turns."[14] Because many of these triggering situations are also vague and imprecise, the system can also record many false infractions. According to one worker, "If [I] went over a bump, the phone would rattle, the Mentor app would log that I used the phone while driving, and boom, I'd get docked."[15] Another driver stated that he got a distracted driver notification from the application after he drank water or changed the radio station in his vehicle.[16]

Drivers claim that if their score falls below certain levels, Amazon can reprimand them by removing them from the work schedule or removing their access to bonuses and other perks.[17] Recently revealed corporate documents obtained by *The Information* affirmed that the drivers' claims are correct.[18]

Amazon's policies will almost surely create perverse incentives for workers to take shortcuts and other measures that threaten health and safety. As we explained in our September 2020 report, "Delivery drivers often speed to meet Amazon's rigorous delivery demands, harming both drivers and bystanders. Investigations conducted by *ProPublica* and *BuzzFeed* discovered that Amazon delivery drivers had been involved in more than 60 crashes that led to serious injuries, including at least 13 deaths, between 2015 and 2019."[19]

Cameras in Third-Party Delivery Vans

In February 2021, Amazon announced that delivery vans owned and operated by Amazon contractors must be equipped with cameras for monitoring driving activities.[20] Amazon forces contract drivers to have the installed camera system take their picture and collect biometric information and also "tracks vehicle location and movement, including miles driven, speed, acceleration, braking, turns, and following distance[.]"[21] These cameras subjugate drivers to near-constant surveillance because as long as the vehicle remains on, the cameras cannot be turned off.[22] If workers refuse to consent to this monitoring, they will lose their job.[23] Amazon has cut relations with companies that do not accept its demands. After contract drivers in Portland pleaded with Amazon to implement fairer working conditions, Amazon terminated the contract with the company that employed them.[24]

Currently, 45% of delivery vans are already equipped with cameras.[25] Five U.S. senators wrote a letter in March 2021 to the corporation condemning its practices. In the letter, the senators state that Amazon's implementation of these monitoring cameras could "threaten the safety and wellbeing" of the company's delivery service providers.[26]

In August 2021, *The Information* revealed that Amazon is also developing its own tracking device for its delivery tractor-trailers called Relay ELD (electronic logging device). The device, similar to Amazon's Mentor Application and surveillance cameras for its delivery van drivers, will monitor a truck's exact location and constantly surveil its movements.[27] While the device is currently installed on trucks for only six companies, Amazon plans to install its Relay ELD technology on hundreds of its tractor-trailers by the end of 2021.[28]

Using of Human Spies

In September 2020, Amazon advertised for two new employment opportunities, with the titles "Intelligence Analyst" and "Senior Intelligence Analyst," which the company described as involving the tracking and monitoring of "labor organizing threats," as well as other "activist groups [and] hostile political leaders."[29] While Amazon eventually relented to public pressure and removed the listings, the corporation's ambitions are clear — to maintain internal control by preventing the formation of unions through constant and pervasive surveillance over all employees, despite the adverse impact on their health and safety.

Vice News published a report in November 2020 detailing internal corporate documents that revealed the company had hired Pinkerton, the agency infamous for spying on workers, to gather information and disrupt workers' union-organizing activities.[30] The documents also showed that Amazon's worker surveillance practices extend globally and that the corporation pays particular attention to union organizing activities and which workers attend union meetings.

Monitoring the Activity of Employees and Contractors on Social Media

The news outlet *Motherboard* reported in September 2020 that Amazon uses online tools to spy on its workers in Facebook groups and monitors communications related to its workers' labor organizing efforts.[31] The publication revealed that Amazon corporate employees regularly receive reports containing social media posts of complaints from Amazon Flex drivers — delivery drivers whom Amazon classifies as independent contractors and who are not company employees.[32] The *Motherboard* journalists reporting the story bluntly stated that Amazon designs its operations to "systematically monitor[], categoriz[e], and analyz[e]" worker communications.[33]

Installing Monitoring Software on Computers

Motherboard announced in August 2021 that Amazon has plans to install software that will monitor some of the "keyboard stroke and mouse movements" of its customer service employees.[34] The company is currently considering plans to install software that will monitor all of a user's computer actions.[35]

Similarly, NBC reported in August 2021 that Amazon, along with other technology companies, is pressuring call center companies hired to manage some of its customer relations to install cameras in workers' homes for those who choose to work remotely.[36]

Selling Worker Surveillance Tools to Third Parties

Amazon announced in December 2020 that it would be selling tools that would allow factories around the world to monitor workers.[37] The service, called AWS Panorama, analyzes security footage to monitor worker movements throughout the day. The service can also be modified, via machine learning, to track any type of worker behavior, such as when and where workers are gathering and speaking to one another. Amazon boasted on its website that its Panorama service is able to "track how long it takes for an associate to complete each task in the assembly of a guitar so that we're able to optimize efficiency and track key metrics."[38] Like many of Amazon's surveillance practices, the company justifies its tactics under the auspices of worker safety and adherence to strict company policies.[39] However, Amazon can and will likely use the service to track and ultimately deter worker-organizing efforts.[40]

Amazon's surveillance tactics and its other practices continue to harm workers. A recent investigation by *The New York Times* detailed conditions so harsh that many of Amazon's workers remain employed with the company only for a few days or weeks.[41] In fact, according to a recent report by the Strategic Organizing Center, Amazon's fervor to extract as much value as possible and to force its workers to move at breakneck speeds creates an exceptionally dangerous working environment. The report found that Amazon's rates of injury in its warehouses are more than 50% higher than other comparable companies with extensive warehouse operations (like Walmart) and more than twice the rate as all U.S. employers.[42] Delivery drivers also face strict standards and time constraints by being required to deliver upward of 400 packages a day in a span of 10 hours.[43]

Solutions

To remedy these abuses, the Open Markets Institute continues to advocate for the reforms we asserted in our first report:

- Congress must enact a statute that bans certain forms of invasive worker surveillance practices.
- The National Labor Relations Board should promulgate a rule prohibiting forms of surveillance that presumptively interfere with unionization efforts.
- Federal and state legislatures and administrative agencies must enact prohibitions on invasive forms of worker surveillance.
- Congress must enact a statute that legalizes the unionization of independent contractors, secondary boycotts, and other solidarity actions.
- The Federal Trade Commission and Department of Justice must amend their merger guidelines to enact bright-line rules to prohibit mergers above a certain size.
- The FTC must ban worker noncompete agreements and class-action waivers.

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https://web.archive.org/web/20200901125940/https://www.amazon.jobs/en/jobs/1026060/intelligence-analyst.

[30] Lauren Kaori Gurley, "Secret Amazon Reports Expose the Company's Surveillance of Labor and Environmental Groups," *Vice*, November 23, 2020, https://www.vice.com/en/article/5dp3yn/amazon-leaked-reports-expose-spying-warehouse-workers-labor-union-environmental-groups-social-movements.

[31] Lauren Kaori Gurley, "Inside Amazon's Secret Program to Spy On Workers' Private Facebook Groups," *Vice*, September 1, 2020, https://www.vice.com/en_us/article/3azegw/amazon-is-spying-on-its-workers-in-closed-facebook-groups-internal-reports-show.;
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[32] Ibid.

[33] Ibid.

[34] Joseph Cox, "Amazon to Monitor Customer Service Workers' Keyboard and Mouse Strokes," *Vice*, August 12, 2021, https://www.vice.com/en/article/dyvejq/amazon-monitor-employees-keyboard-mouse.

[35] Ibid.

[36] Olivia Solon, "Big Tech call center workers face pressure to accept home surveillance," *NBC*, August 8, 2021, https://www.nbcnews.com/tech/tech-news/big-tech-call-center-workers-face-pressure-accept-home-surveillance-n1276227.

[37] Dave Lee, "Amazon to roll out tools to monitor factory workers and machines," *ArsTechnica*, December 1, 2020, https://arstechnica.com/information-technology/2020/12/amazon-to-roll-out-tools-to-monitor-factory-workers-and-machines/.

[38] Sarah O'Connor, "Workplace surveillance may hurt us more than it helps," *Financial Times*, January 11, 2021, https://www.ft.com/content/27faa953-1723-4597-a5a0-2ff9e617feab.

[39] Jonathan Shieber, AWS Announces Panorama, a device adds machine learning technology to any camera, *Tech Crunch*, https://techcrunch.com/2020/12/01/aws-announces-panorama-a-device-adds-machine-learning-technology-to-any-camera/.

[40] Ibid;
Daniel A. Hanley and Sally Hubbard, *Eyes Everywhere.*

[41] Jodi Kantor, Karen Weise and Grace Ashford, "The Amazon That Customers Don't See," *The New York Times*, June 15, 2021, https://www.nytimes.com/interactive/2021/06/15/us/amazon-workers.html.

[42] *Primed for Pain: Amazon's Epidemic of Workplace Injuries*, Strategic Organizing Center, May 2021, https://thesoc.org/wp-content/uploads/2021/02/PrimedForPain.pdf.

[43] Lauren Kaori Gurley, "Amazon Delivery Drivers."

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chair

September 28, 2021

The Honorable David Cicilline
Chair
Subcommittee on Antitrust, Commercial, and Administrative Law
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Ken Buck
Ranking Member
Subcommittee on Antitrust, Commercial, and Administrative Law
U.S. House of Representatives
Washington, D.C. 20515

Dear Chair Cicilline and Ranking Member Buck:

Thank you for the opportunity to provide my views as part of the Subcommittee's hearing entitled "Reviving Competition Part 4: 21st Century Antitrust Reforms and the American Worker" and for your leadership on this critical issue.

Empirical research today shows that labor markets across the United States have grown highly concentrated, resulting in lower wages and less bargaining power for workers.[1] Dominant firms, meanwhile, exploit current laws to exert significant control over workers even while classifying them as non-employees.[2] These asymmetric relationships often enable firms to impose take-it-or-leave-it contract terms that disfavor workers, including, for example, noncompete clauses. Recent lawsuits have also highlighted no-poach agreements among employers, which can further restrict workers and depress wages.[3]

The Federal Trade Commission is charged with rooting out unfair methods of competition and unfair or deceptive practices in the economy, a mandate that protects all Americans, including workers. In service of this goal, the FTC is taking a series of steps to adjust its approach.

First, I have instructed staff to investigate potentially unlawful mergers or conduct that harm workers. Although antitrust law in recent decades generally has neglected monopsony concerns and harms to workers, we must scrutinize mergers that may substantially lessen competition in labor markets. As part of this effort, the FTC will work with the Department of Justice to update the agencies' merger

[1] *See, e.g.*, Jose Azar, Ioana Marinescu, and Marshall Steinbaum, *Labor Market Concentration*, J. HUMAN RESOURCES (2020).
[2] *See, e.g.*, Marshall Steinbaum, *Monopsony and the Business Model of Gig Economy Platforms*, ORG. ECON. CO-OPERATION & DEV. (Sept. 17, 2020), https://one.oecd.org/document/DAF/COMP/WD(2019)66/en/pdf.
[3] *See, e.g.*, Press Release, Dept. of Just., DaVita Inc. and Former CEO Indicted in Ongoing Investigation of Labor Market Collusion in Health Care Industry (July 15, 2021), https://www.justice.gov/opa/pr/davita-inc-and-former-ceo-indicted-ongoing-investigation-labor-market-collusion-health-care.

guidelines, looking to provide guidance on how to analyze a merger's impact on labor markets.[4] Illegal restraints on worker pay or opportunity can also significantly harm workers, and employers must not get a free pass. The FTC's complaint earlier this year alleging that Amazon misled its Flex drivers when diverting their tips additionally highlights how deceptive conduct that cheats workers may be unlawful.[5]

Second, the FTC is scrutinizing whether certain contract terms, particularly in take-it-or-leave-it contexts, may violate the law. Workers are at a significant disadvantage when they are unable to negotiate freely over the terms and conditions of their employment. The FTC has heard concerns about noncompete clauses at its open meetings, and the Commission recently opened a docket to solicit public comment on the prevalence and effects of contracts that may harm fair competition.[6] As we pursue this work, I am committed to considering the Commission's full range of tools, including enforcement and rulemaking.

Third, the FTC should be judicious in its use of scarce resources, focusing its antitrust enforcement on tackling monopolization or mergers involving dominant firms. Although Section 6 of the Clayton Act exempts labor organizing from the Act's purview,[7] federal courts have held that these protections apply only to workers formally classified as employees.[8] As a result, collective action and organizing by certain workers—including those who have the terms of their work dictated by a firm yet are classified as non-employees—may be susceptible to prosecution under the antitrust laws.[9] Private plaintiffs can pursue these lawsuits even in the absence of action by the U.S. agencies, and in these instances I will work with the DOJ to consider providing guidance to the courts on how the Clayton Act is designed to exempt worker organizing activities from antitrust.

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[4] Statement of Chair Lina M. Khan, Comm'r Rohit Chopra, and Comm'r Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines, File No. P810034 (Sept. 15, 2021), https://www.ftc.gov/public-statements/2021/09/statement-chair-lina-m-khan-commissioner-rohit-chopra-commissioner-rebecca.

[5] Press Release, Fed. Trade Comm'n, Amazon To Pay $61.7 Million to Settle FTC Charges It Withheld Some Customer Tips from Amazon Flex Drivers (Feb. 2, 2021), https://www.ftc.gov/news-events/press-releases/2021/02/amazon-pay-617-million-settle-ftc-charges-it-withheld-some.

[6] Request for Public Comment Regarding Contract Terms That May Harm Fair Competition, Docket No. FTC-2021-0036, https://www.regulations.gov/docket/FTC-2021-0036/document (last visited Sept. 28, 2021).

[7] 15 U.S.C. § 17.

[8] *L.A. Meat & Provision Drivers Union, Local 626* v. United States, 371 U.S. 94 (1962); *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460 (1949); *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143 (1942). *See also* Robert Pitofsky, Chairman, Fed. Trade Comm'n, Concerning H.R. 1304: The "Quality Health-Care Coalition Act of 1999," Prepared Statement of the Federal Trade Commission Before the Committee on the Judiciary, United States House of Representatives 3 (June 22, 1999), https://www.ftc.gov/sites/default/files/documents/public_statements/preparedstatement-federal-trade-commission-quality-health-care-coalition-act/healthcaretestimony.pdf ("[P]hysicians who are employees (for example, of hospitals) are already covered by the labor exemption under current law. The labor exemption, however, is limited to the employer-employee context, and it does not protect combinations of independent business people.").

[9] *See Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143, 145 (1942) ("That a dispute among businessmen over the terms of a contract for the sale of fish is something different from a controversy concerning terms or conditions of employment, or concerning the association of persons seeking to arrange terms or conditions of employment calls for no extended discussion. This definition and the stated public policy of the Act — aid to the individual unorganized worker commonly helpless to obtain acceptable terms and conditions of employment and protection of the worker from the interference, restraint, or coercion of employers of labor — make it clear that the attention of Congress was focussed upon disputes affecting the employer-employee relationship, and that the Act was not intended to have application to disputes over the sale of commodities.") (internal citations and quotation marks omitted); *see also L.A. Meat & Provision Drivers Union, Local 626 v. United States*, 371 U.S. 94, 102-03 (1962) ("Here, as in *Columbia River Co.,* the grease peddlers were sellers of commodities, who became 'members' of the union only for the purpose of bringing union power to bear in the successful enforcement of the illegal combination in restraint of the traffic in yellow grease.").

Congress could also pursue legislative reforms that grant workers greater protections under the antitrust laws. For example, legislation clarifying that labor organizing by workers regarding the terms and conditions of their work is outside the scope of the federal antitrust statutes, regardless of whether the worker is classified as an employee, would remove the threat of antitrust liability resulting from such coordination. This type of clarification could have far-reaching effects, especially given the prevalence and expansion of "gig economy" firms that rely heavily on workers classified as non-employees. As federal lawmakers consider antitrust legislation to better protect labor, state efforts with similar aims could also provide a useful model.[10]

Thank you for your leadership on promoting fair competition and protecting workers. If you have any questions, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,

Lina Khan

Lina M. Khan
Chair, Federal Trade Commission

[10] *See, e.g.*, Twenty-First Century Anti-Trust Act, S. 933, Reg. Sess. (N.Y. 2021).

Mr. CICILLINE. Mr. Callaci, in a letter to the Subcommittee, which I just introduced for today's hearing, FTC Chair Lina Khan explains that in recent decades the agency has largely neglected monopsony concerns and harm to workers. She underscores that this will change and that under her leadership the agency will scrutinize mergers that lessen competition in labor markets and restraints in worker pay and mobility may violate the law.

How do you respond to that? Are there additional steps our antitrust enforcement should take?

Mr. CALLACI. So, yeah, I fully applaud that effort to take a closer look at competition and to look at course of contract. Yeah, I think in terms of—I have this in my testimony.

A couple of other additional steps we need to look at are the effective buyer power not just directly on employees, but actually sort of the case that Mr. Gross referenced where you have buyer power in a supply chain, whether that's Amazon putting the squeeze on the parcel delivery companies or those kinds of things. We do have evidence that also affects wages, so taking into account those down or upstream effects.

Then, dealing with these coercive contracts that try to control and dominate nonemployee independent contractors. We have employment law, labor employment law, because we know that workers are at a disadvantage in the bargaining with employers. We have tons of labor laws, labor regulations, because we recognize that. Companies being able to get that same control, that same just have an employment relationship with an Uber driver or with a delivery service partner without incurring those duties and responsibilities an employer is meant to burden, is that another area, getting at those course of contracts that are sort of substitutes for employment.

Mr. CICILLINE. Thank you.

Mr. Posner, in your testimony you explained you are not optimistic that courts would be receptive to antitrust enforcement to address labor market harms. Why are courts skeptical of labor-sought antitrust claims, and how do you propose we update the antitrust laws to address harms to labor competition including nonpricing effects?

Mr. POSNER. To emphasize, I think they're skeptical under current law. I'm not arguing that courts don't like workers or anything like that. If law were updated, I think that it would be more receptive to claims by workers against employers.

So, what can be done? I think, for starters, updating the laws that regulate mergers, because there's merger litigation in, ways that make clear that rules restricting mergers apply to mergers that affect labor markets.

I also think that some of the technical detail, which I discussed in various places, but the courts have been unreceptive to some of the no-poaching cases against franchises because of these kinds of silly doctrines that have developed in antitrust law about the difference between vertical and horizontal relationships. There can certainly be technical legislation that would correct that error.

Then, lastly, I would suggest that section 2, the provision of antitrust law that applies to monopolies, I think that could be improved so that certain types of antilabor practices would be explic-

itly identified as anticompetitive practices including the use of noncompetes, misclassification, perhaps unfair labor practices.

I'm not saying that employers would never have defenses. If courts saw this kind of codification of these ideas, they would be much more receptive to this type of important litigation.

Mr. CICILLINE. Thank you.

Mr. Posner, Commissioner Wilson and Dr. Kobayashi argue that there's not enough evidence on the effect of noncompete agreements on wages and workers, worker mobility to support restrictions on these types of post-employment restrictions. It seems clear to me that noncompete agreements hurt workers, especially low-income workers. What is the effect of these agreements on workers and on consumers?

Mr. POSNER. Well, as I think Professor Kobayashi acknowledged, there's been substantial evidence now that noncompetes harm lower-income workers. The evidence is a little more ambiguous for higher-income workers. There's a study that looks at workers in Hawaii who are low-paid, and they were harmed as a result of noncompetes.

I tend to agree with critics that we probably don't have enough evidence yet to completely abolish noncompetes under all circumstances. My more limited claim is that they should certainly be the subject of antitrust litigation. There are, after all, called covenants not to compete. Right? They're areas of trade, and yet there have been a total of zero cases in the history of this country where people tied up by noncompetes have successfully challenged them on antitrust grounds.

So, whatever the proper role is, we need to move rapidly in a more restrictive direction.

Mr. CICILLINE. Thank you.

Finally, Ms. Payton and Mr. Gross, I know you both took the day off to be with us. Thank you very much for being here. We often talk about these issues in the abstract. Your testimony helps us recognize what the impact is of an absence of competition in labor markets and how it affects actual people and their lives. So, thank you for that.

If there's anything that hasn't been said that you'd like to say in response, I'd like to give you both an opportunity to do that. I know we're going over a little, but my Republican friend will indulge me. I'll give him a little additional time, too.

Mr. GROSS. Thank you, Chair Cicilline. I would just like to thank you for having us and giving us the opportunity to tell our story. So, thank you.

Ms. PAYTON. Yes. I'd also like to thank you for having me. It has been an honor to be able to share my story.

Mr. CICILLINE. It's an honor to hear both of you, of course.

I now recognize the gentleman from Wisconsin for five minutes and 30 seconds.

Mr. FITZGERALD. Thank you, Mr. Chair.

I just wanted to revisit—I know some of this might be a little redundant, but I just wanted to revisit labor and labor markets related to the merger stuff.

So, Ms. Wilson, you can comment.

Mr. Kobayashi, again, feel free to chime in.

There have been reports regarding FTC sending companies questions that are kind of far outside what you would expect traditional inquires to be about as a result of the merger investigations.

An example is—and I know this could be kind of dismissed as, boy, I've never heard about that before. So, I'm trying to raise the profile of it. The FTC staff has inquired about how mergers would affect unionization, as well as some environmental and social issues. This is—it's my understanding this is a departure from typically what you may see as what we would consider traditional questions. Some of the other Witnesses on the panel have discussed the need to change antitrust laws so that the effects on labor markets are considered. It seems to make sense to me.

You both served at the FTC and understand the relationship between the mergers and demand in the labor markets. Can either of you discuss how current antitrust laws and enforcement considerations already account for this issue?

Ms. Wilson, would you like to?

Ms. WILSON. Sure. So, so thank you and I'm sure that Dr. Kobayashi will also have interesting comments here. So, to be clear, the horizontal merger guidelines actually do say right now that monopsony power should be investigated within the course of merger analysis. So, as Bruce outlined, for at least three years under Chair Simons, we did look for labor monopsony issues in mergers. So, we included specs, specifications in the so-called second request for information of merging parties, that sought to analyze the impact of mergers on hiring.

What is happening now, I believe, is going further afield and looking not at what happens for competition for labor but for other social values. I disagree with expanding the scope of antitrust beyond competition which is a load that it is designed to carry. We are not equipped to evaluate the other factors that are now being shoehorned into antitrust analysis.

Mr. FITZGERALD. Thank you.

Professor.

Mr. KOBAYASHI. Yeah, I want to comment maybe on some of the comments saying that we ought to do something to maybe make thresholds for labor market.

If you go back to the Prager and Schmitt article, which is a very good article, I want to make two points. One, if you look at what mergers—and they base their concentration numbers on commuting zones. So, it's not a product market. It's a commuting zone. You have to go into sort of the extreme quartile. That's Herfindahl's of about 6,000s with changes to about 2,000s of the mergers that sort of generate the wage stagnation.

The other thing that you have to look at is that there are no—they test for output effects and the effects of classical monopsony. They don't find anything. It might be that there are bargaining effects. It's not sort of classical monopsony where you have independent decreases in employment, and then it's limited to skilled workers.

If you were based it on the evidence, you would basically put those thresholds at 6,000s which are basically a three-to-two merger. Those mergers probably will get blocked on product market grounds or on the standard tools that we have.

As I said and as Commissioner Wilson just reiterated that we have adjusted our enforcement procedures including the HSR specs where we get information to actually look at product market and labor market issues. I don't know what else you do if you want an evidence-based enforcement of the antitrust laws. We try to get the evidence.

Mr. FITZGERALD. Very good.

Thank you. I would yield back.

Mr. CICILLINE. The gentleman yields back.

I would like to now ask unanimous consent to introduce into the record a letter from Greg Nowak, director of the Brewery and Soft Drink Workers, to Amy Greenberg, Director of Regulations and Rulings Division, Tobacco Tax Trade Bureau without objection; a statement, for the record, from the International Brotherhood of Teamsters, the Service Employees International Union, and the Strategic Organizing Center, without objection; and a statement for the record from the Uniform Law Commission, without objection.

[The information follows:]

MR. CICILLINE FOR THE RECORD

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

JAMES P. HOFFA
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KEN HALL
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August 16, 2021

Amy Greenberg
Director
Regulations and Rulings Division
Alcohol and Tobacco Tax and Trade Bureau
1310 G Street NW, Box 12
Washington, DC 20005

Dear Director Greenberg:

We write to respond to the recent Request for Information from the Department of the Treasury's Alcohol and Tobacco Tax and Trade Bureau (TTB) on Notice No. 204, Promoting Competition in the Beer, Wine, and Spirits Markets. We would like to provide you with some information about Teamsters employed in the brewing industry in the United States and competition in the beer industry. Additionally, we write to urge you to continue to work with Congress and industry stakeholders on policies that will allow the beer industry to continue to thrive and create good-paying jobs for years to come. We would like to be consulted as the Biden Administration considers potential changes to regulations impacting beer manufacturers, who employ thousands of our members.

The Teamsters Brewery and Soft Drink Conference represents more than 60,000 workers employed by America's beverage manufacturers. These workers help to brew, bottle, package, deliver, and merchandise a wide range of products enjoyed by Americans from coast to coast.

Despite being one of the most highly regulated industries in the United States, the last decade has seen significant growth of new beer and other alcohol beverage manufacturers thereby providing consumers with more choice than ever before. This high degree of growth and competition among all these alcohol beverage manufacturers has caused large brewers, including those that employ Teamsters, to lose market share in recent years. The beer industry is extremely competitive, and your review of regulations in this area should take this into account.

The Biden Administration has expressed a strong commitment to pursuing policies which would create good-paying union jobs that help America compete in the future. We look forward to reviewing any proposals that may emerge from this process to determine if they are helpful to our Teamsters Brewery and Soft Drink Conference members.

Sincerely,

Greg Nowak

Greg Nowak
Director and Secretary-Treasurer
Brewery and Soft Drink Workers Conference

Statement of the International Brotherhood of Teamsters, Service Employees International Union, and the Strategic Organizing Center to the House Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law for the "Reviving Competition, Part 4: Twenty-first Century Antitrust Reforms and the American Worker" Hearing,
September 28, 2021

Founded in 1903 by the merger of the two leading team driver associations, the International Brotherhood of Teamsters is one of America's largest and most diverse unions and proudly represents 1.4 million hard-working men and women employed as public defenders, sanitation workers, brewers, newspaper workers, healthcare workers, and secretaries, in addition to delivery and warehouse workers, throughout the United States, Canada and Puerto Rico. Service Employees International Union unites 2 million diverse members working in the healthcare industry, in the public sector, and in property services in the United States, Canada, and Puerto Rico. The Strategic Organizing Center is a democratic federation of labor unions representing millions of working people. The SOC strives to ensure that every worker has a living wage, benefits to support their family and dignity in retirement, and SOC advocates not just for jobs, but for good jobs: safe, equitable workplaces where all employees meaningfully participate in the decisions affecting their employment.

We commend the Subcommittee for taking on the vitally important task of antitrust reform for a new era, and we support the six Big Tech bills being considered in Congress as a good first step. However, Congress must also recognize the key role that the neglect of workers and lack of attention to labor markets have played in the erosion of economic opportunity in the last several decades. There are epidemics of high labor market concentration and accompanying employer abuses in a range of areas such as wage stagnation, worker misclassification, increasing employment violations, and a rise in the use of worker restraints such as non-compete restrictions and forced arbitration. Thus, for any antitrust reform to be effective – to reshape the tools needed to address increased corporate concentration, including labor market concentration and related employer abuses, and level the economic playing field for everyone – workers and labor markets must be at the center of solutions and reform going forward.

Labor market concentration is a growing problem

Corporation concentration has grown significantly over the last several decades, with troubling effects on the economic health of businesses, workers, and consumers. In terms of product markets, over the last two decades approximately 75 percent of U.S. industries have become more concentrated.[1] Since 1980, in a variety of sectors across the economy, the four largest firms have significantly increased their

[1] Gustavo Grullon, Yelena Larkin, and Roni Michaely, *Are U.S. Industries Becoming More Concentrated?*, Rev. of Fin., Swiss Fin. Inst. Res. Paper No. 19-41, Oct. 25, 2018, at 1 https://ssrn.com/abstract=2612047.

share of sales.[2] With respect to efficiency and innovation, this is a cause for concern. The entry rate of new firms into the U.S. market has fallen sharply, particularly since 2007,[3] while firm exit rates have remained relatively flat.[4] In other words, the number of firms in various industries is declining, and existing producers are gaining share while new entrants find it increasingly difficult to challenge the established dominant players. This implies a lack of economic dynamism and increased market concentration.

Over the past decade, empirical evidence has demonstrated that the majority of local labor markets in the U.S. is also overly concentrated.[5] Research indicates that 20 percent of all U.S. workers work in highly-concentrated labor markets,[6] and that, across all U.S. labor markets, the average measurement of concentration well exceeds the Federal Trade Commission and Department of Justice's own guidelines.[7] Using the 6-digit Standard Occupational Category to define occupation and the USDA's commuting zone to define the geographic labor market, sixty percent of U.S. labor markets are highly concentrated.[8] In fact, in markets defined according to these criteria, labor supply elasticity – a measure of whether workers will quit if employers lower wages – is actually negative, meaning even if wages go down, workers will not quit.[9] Even in labor markets one would expect to be highly competitive, such as online platforms that offer at-home work, studies show employers have "considerable monopsony power."[10]

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[2] Ufuk Akcigit and Sina Ates, *Slowing Business Dynamism and Productivity Growth in the United States,* Fed. Reserve Bank of Kansas City, Oct. 8, 2020, at 4, 31 n.31, 45 https://www.kansascityfed.org/documents/4952/aa_jh_201008.pdf. The sectors are manufacturing, retail trade, wholesale trade, services, utilities and transportation, and finance. *Id. See also* David Dayen, *Monopolized: Life in the Age of Corporate Power* at 3 (2020) (noting that in the markets for airlines, commercial banking, and phone, wireless, cable and internet services, four companies control the market).

[3] John Haltiwanger, *Entry, Innovation and Productivity Growth in the U.S. Economy,* Fed. Reserve Bank of Dallas, May 31, 2018, at 9, https://www.dallasfed.org/-/media/Documents/research/events/2018/18ted-haltiwanger.pdf.

[4] *Id.*

[5] *E.g.*, Suresh Naidu, Eric A. Posner and Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L.R. 536, 546 & N.38-39 (2018) (studies of potential monopsonies in labor markets were sparked by a study showing an increase in New Jersey's minimum wage had no discernable impact on employment levels, thus showing labor markets affected were not competitive, which was followed by many studies confirming those results and the more general point that labor markets are much more concentrated than was previously thought, especially for low wage workers) (citing David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania*, 84 AM. ECON. REV. 772 (1994) and other sources).

[6] José Azar, Ioana Elena Marinescu, Marshall Steinbaum, and Bledi Taska, *Concentration in US Labor Markets: Evidence from Online Vacancy Data,* Nat'l Bur. of Econ. Rev., Aug. 10, 2018, at 2, https://www.nber.org/system/files/working_papers/w24395/w24395.pdf.

[7] José Azar, Ioana Elena Marinescu, and Marshall Steinbaum, *Labor Market Concentration,* Nat'l Bur. of Econ. Rev., Dec. 10, 2018, at 2, https://www.nber.org/system/files/working_papers/w24147/w24147.pdf. These results are according to the Herfindahl-Hirschman Index (HHI); as discussed below, the HHI was developed for product markets but substantial research indicates firms possess market power in labor markets at much lower levels of market concentration than in product markets.

[8] José Azar et al, *supra* note 6 at 2.

[9] *Id.* at 12.

[10] Alan Manning, *Monopsony in Labor Markets: A Review*, ILR REV., 2021;74(1):3-26 at 2, https://journals.sagepub.com/doi/10.1177/0019793920922499; *id.* at 4 (citing studies). *See also* Arindrajit Dube, Jeff Jacobs, Suresh Naidu, and Siddharth Suri, *Monopsony in Online Labor Markets*, AER: INSIGHTS 2(1): 33–46 (2020), https://doi.org/10.1257/aeri.20180150.

Labor monopsony – the corollary of monopoly in the labor market – may significantly impact the wages and working conditions of workers. Labor monopsony power, alongside persistent trends including declining labor mobility,[11] can lead to negative outcomes for U.S. workers. A range of studies have shown that workers in highly-concentrated labor markets experience suppressed wages,[12] lower non-wage compensation in the form of health benefits,[13] and are more likely to be subject to labor rights violations.[14] Further, such negative impacts fall much more heavily on workers of color, so labor market concentration also exacerbates the existing problems of inequality and ongoing racism in our economy.

As discussed below, recent antitrust jurisprudence has disregarded competitive harms to workers and focused on harms to consumers; but research also indicates that monopolizing employers do not actually pass on cost savings they receive from reduced wages to consumers.[15] Instead, dominant employers tend to retain savings from lower wages.[16] At the same time, lower wages can increase consumer prices because employers purchase less of the input (labor), which results in higher marginal costs per product, and thus higher prices.[17]

Labor market dominance occurs at market share levels of 20 percent or lower

Compared to monopolists in product markets, employers are able to exercise outsized labor market power at lower levels of market concentration. Substantial academic research identifies several reasons labor markets are more susceptible to dominance at lower levels of concentration than product markets. For example, there are certain "search frictions" involved in looking for jobs, or circumstances that make changing jobs or finding new jobs difficult. Search frictions include the time and effort to search for a new job,[18] and factors that differentiate jobs but are extremely difficult to assess before working somewhere (quality of supervisors or colleagues for example).[19] These search frictions exist even in unconcentrated labor markets.[20] In addition, individualized needs of workers, such as location/transportation requirements, availability of child care near work and similar factors further

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[11] Damien Azzopardi, Fozan Fareed, Mikkel Hermansen, Patrick Lenain, Douglas Sutherland, *The decline in labour mobility in the United States: Insights from new administrative data*, OECD (December 14, 2020), https://www.oecd-ilibrary.org/docserver/9af7f956-en.pdf?expires=1615398612&id=id&accname=guest&checksum=19D81A08C345C32998FCE5FBCBBBE60B.

[12] Azar et al, *supra* note 6.

[13] Yue Qiu and Aaron J. Sojourner, *Labor-Market Concentration and Labor Compensation,* IZA INST. OF LABOR ECON. (January 8, 2019), https://ssrn.com/abstract=3312197.

[14] Ioana Elena Marinescu, Yue Qiu, and Aaron J. Sojourner, *Wage Inequality and Labor Rights Violations,* IZA INST. OF LABOR ECON., (August 13, 2020), https://ssrn.com/abstract=3673495.

[15] *See* Alan James Devlin, *Questioning the Per Se Standard in Cases of Concerted Monopsony,* 3 HASTINGS BUS. L.J., 223, 224 (July 6, 2009) (citing statements by DOJ antitrust division officials regarding the consumer price impact of monopolies), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1106&context=hastings_business_law_journal.

[16] *Id*. at 231.

[17] *Id*.

[18] Naidu et al, *supra* note 5 at 553.

[19] *Id*. at 554.

[20] Manning, *supra* note 10 at 4.

limit job mobility.[21] Such factors "may explain why low-skill workers may be as or even more vulnerable to monopsony than high-skill workers."[22] Importantly, these search frictions are inefficiencies that shift power from workers to employers,[23] and thus explain in part why employers have dominant labor market power at lower market shares than in product markets.

The most important difference between labor markets and product markets may be the two-sided nature of employment decisions.[24] Current models used for product markets assume products are indifferent to who purchases them, whereas in labor market both employers (buyers of labor) and prospective employees (suppliers of labor) have preferences.[25] This makes intuitive sense: the shampoo is indifferent to who purchases it, hence, it is much easier to switch shampoo brands, for example, than to switch jobs. Thus the two-sided nature of employment creates significant additional friction in labor markets, which further lowers the market share level at which employers can be expected to be dominant in labor markets. For these reasons current analyses, such as the DOJ/FTC Horizontal Merger Guidelines, which do not account for the two-sided nature of labor markets, underestimate the power over workers firms can yield at lower levels of labor market concentration.[26]

In its report, adopted by Congress, the Subcommittee recommended adopting a threshold of 30 percent market share as indicative of market power, but indicated a lower threshold might be appropriate for monopsony claims.[27] In one of the rare cases to consider outsized buyer power, the Seventh Circuit concluded that toy retailer Toys R Us was able to constrain competition in the national toy market with only 20 percent of that market.[28] The research discussed above also supports the conclusion that an employer that holds a market share level of 20 percent in a specific labor market is extraordinarily likely to possess sufficient market power to exercise dominance over its workers. Thus, antitrust reform should recognize that firms have market power in labor markets at lower levels of concentration than in product markets. Thus, we believe a reasonable threshold for labor market power is 20 percent.

Additional employer actions that unfairly restrain on workers

As corporations have benefitted from concentrated labor markets, employers have also increasingly placed restraints on workers that exacerbate the power disparity between workers and employers. These restraints further distort the labor market in ways that increase competitive harm in labor

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[21] Naidu et al, *supra* note 5 at 555. *See also* Manning, *supra* note 10 at 5-6, who explains the variety of individualized needs and job-seeking criteria as heterogeneity of tastes that adds an additional dimension to job searches beyond search frictions.
[22] Naidu et al, *supra* note 5 at 555.
[23] *Id.* at 541.
[24] *Id.* at 554-555, 584.
[25] *Id.*
[26] *Id.* at 584-85.
[27] *Investigation of Competition in Digital Markets*, Subc. on Antitrust, Comm'l & Admin. Law of the H. Comm. of the Judiciary, at 393 (2020) ("It is the view of Subcommittee staff that the 30% threshold established by the Supreme Court in *Philadelphia National Bank* is appropriate, although a lower standard for monopsony or buyer power claims may deserve consideration by the Subcommittee.") (citing *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963)).
[28] *Toys "R" Us, Inc. v. Fed. Trade Comm'n,* 221 F.3d 928 (7th Cir. 2000).

markets. These restraints include non-compete restrictions, no-poach agreements, and nondisclosure restrictions, which are direct anticompetitive restraints on workers that should be banned outright.

Non-compete restrictions prevent workers from seeking certain jobs in similar professions or geographic markets, or both, for a certain time after their employment ends, and no-poach agreements are agreements by employers, quite literally, not to compete for each others' workers. Both restrictions directly interfere with workers' mobility and limit their ability to compete for different jobs with better wages or other terms of employment. They are direct restraints on competition, and exacerbate inequality and the imbalance between corporate and worker power in labor markets.

Non-disclosure restrictions placed on many workers by employers similarly impede workers' ability to bargain and compete fairly for better wages and working conditions by preventing workers from even learning about pay and working conditions. Prohibiting the exchange of wage and benefit information among employees exacerbates existing information asymmetries, a quintessential labor market distortion, and keeps workers from having the information needed to make informed decisions about their own economic futures. Research shows many of these measures have contributed to the gap between productivity growth and wages observed during the last several decades.[29]

These specific restraints are in addition to new models of employment that have fissured the workplace and further enhanced employer power at the expense of workers. These models include gig platforms such as Uber and Instacart, through which one central company sets prices and wages for an entire network of supposedly independent businesses and their customers – arrangements that in early years of antitrust enforcement would have been viewed as illegal vertical business arrangements.[30] They also include rampant and systematic misclassification of workers as independent businesses which, again, permits a firm to control workers outside its corporate boundaries, currently without antitrust liability for these arrangements.[31] Workers – who lack not only job security but also the protection of wage and hour laws, labor laws, and other on-the-job protections as well as individual and collective bargaining power – suffer the most under these models. But fissuring models also have competitive implications, not only due to their widespread use, but because they represent such a dramatic and systematic shift in power from workers to employers. Antitrust law is concerned with who –which firms, employers or workers – controls the structure of markets,[32] and was intended to mitigate the accumulation of power by large firms at the expense of smaller players.[33] Fissuring models in which firms control external parties, including workers, through vertical arrangements present a disturbing challenge that current antitrust jurisprudence does not address, but should.

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[29] Larry Mishel & Josh Bivens, *Identifying the policy levers generating wage suppression and wage inequality* at 47-49, Economic Policy Institute (May 13, 2021), *available at* https://www.epi.org/unequalpower/publications/wage-suppression-inequality/.

[30] *See, e.g., United States v. Richfield Oil Corp.,* 99 F. Supp. 280 (S. D. Cal., 1951), aff'd, 343 U.S. 922 (1952).

[31] Marshall Steinbaum, *Antitrust, the Gig Economy and Labor Market Power*, 82 L. & Contemp. Probs. 45, 48 (June 12, 2019), http://dx.doi.org/10.2139/ssrn.3347949; Brian Callaci, *Control Without Responsibility: The Legal Creation of Franchising, 1960-1980,* Feb. 28, 2020, at 7, https://doi.org/10.1017.eso.2019.58.

[32] Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 745 (2016).

[33] Sanjukta Paul, "Hearing on Antitrust and Economic Opportunity: Competition in Labor Markets," Testimony Before the Comm. on the Judiciary, Subc. on Antitrust, Comm'l, and Admin. Law, Oct. 29, 2019, at 4.

Workers know the effects of labor market domination by large firms first-hand. The workers who are bringing their stories before the Subcommittee today vividly illustrate what the research above confirms, the power of large, dominant employers and the human cost of that dominance.

Nila Payton works in the pathology department of Presbyterian Hospital, which is owned by the University of Pittsburgh Medical Center (UPMC). UPMC has absorbed at least eight hospitals in the Pittsburgh area alone, and has such a hold on the labor market for medical jobs in that area that Nila feels trapped. Not only does Nila work for UPMC, but as an employee she must purchase UPMC medical insurance and use UPMC for medical care. Like many of her coworkers, Nila owes medical debt to her employer. And she knows – because she has checked – that UPMC has a significant impact on wages and benefits at smaller area hospitals but also across the service sector. Under the thumb of UPMC, she is earning far below a living wage for Pittsburgh – she is making $19 per hour when the living wage for her family is $28 per hour – and her hospital feels little pressure to react to health care workers' demands for additional PPE or for hazard pay made available by the state for front-line health care workers. In addition, UPMC imposes non-compete restrictions on some employees, like doctors, which lock them into their jobs because they are prohibited from working for any UPMC-affiliated office or UPMC's main competitor in the entire county for a substantial period of time after leaving UPMCs employ. If they try to leave for another such job in the area, they may owe UPMC significant damages. The experience of UPMC workers are powerful examples of why we need antitrust reform that includes workers.

Similarly, Dan Gross's experience working for UPS points to how the unchecked growth and dominance of a company like Amazon threatens middle class American jobs. Mr. Gross has moved up the ranks over the last 22 years into different driver positions and has earned a solid, middle class living that has supported his family. His middle class job and those like it are threatened, however, by companies like Amazon that have grown through leveraging their power in one market, e-commerce in Amazon's case, to exert power and gain market share unfairly in many other markets, including in logistics. As the Subcommittee reported, Amazon leverages its e-commerce power to require sellers to use its fulfillment and delivery services, which has unfairly enabled Amazon to grow its presence in logistics. At the same time, Amazon's approach to employment in its delivery operations – where the company utilizes a large network of drivers it controls but does not employ – is undermining the working standards that Mr. Gross and millions of skilled truck drivers have fought for and maintained over decades. These standards are threatened when a behemoth like Amazon can utilize its power to expand unfairly into multiple lines of business and then undermine the wages and working standards in those businesses without facing consequences under antitrust law.

Antitrust law has failed workers since at least the 1970s

In spite of the problems caused by labor market concentration, labor market antitrust litigation against employers is extremely rare. Since 1960, there have been fewer than 100 labor market cases compared to over 2,300 product market antitrust cases.[34] Fully half the labor market cases that have been brought under Section 1 of the Sherman Act have addressed only the niche employment setting of sports

[34] Eric A. Posner, *Why the FTC Should Focus on Labor Monopsony, Pro Market* (November 5, 2018), *available at* https://promarket.org/2018/11/05/ftc-should-focus-labor-monopsony/.

leagues.[35] At the same time, not a single labor market case brought under Section 2 of the Sherman Act has survived summary judgment.[36] This "litigation gap" is exacerbated by the lack of attention to labor market effects in the Department of Justice and Federal Trade Commission's current Horizontal Merger Guidelines.[37] No merger has ever been blocked based on increased labor market concentration.

There is broad agreement that the Clayton Act provides for review of the effects of mergers on labor markets as well as on product markets. Indeed, Congress's intention to protect labor markets from the harms of monopsony power has been clear since the inception of U.S. antitrust policy: One of the reasons Senator John Sherman gave for legislating against monopoly was that "[i]t commands the price of labor without fear of strikes, for in its field it allows no competitors."[38]

Yet in the 1970s, courts and enforcement agencies embraced the "Law and Economics" theory espoused by the University of Chicago School and Robert Bork. The results are clear: corporate concentration and labor market concentration have soared, while innovation, new business formation, and wage growth are stagnating. Vertical mergers, integration, and restraints have been tolerated, if not encouraged, as "efficient" during this recent era of antitrust jurisprudence. And the centerpiece of this philosophy has been consumer welfare as the sole barometer of potential competitive harm. The consumer welfare standard, which focuses solely on whether consumers experience measurable changes in welfare, usually by looking primarily at whether prices have increased, has left out many, especially workers. Under a consumer welfare-focused view of competition, courts have often required harm to consumers even where workers are the parties who have claimed – and shown – harm.[39] Similarly, courts have required that even where a party has shown competitive harm in a labor market, a showing of pro-competitive benefits (even speculative benefits) to consumers may offset or justify the harm to labor markets.[40]

Reform that includes workers

There is a growing consensus that the long-reining Law and Economics ideology evident in antitrust jurisprudence since the 1970s has not served most participants in the economy well, and that antitrust law should be revitalized to hew more closely to its original purpose of mitigating the power of the largest corporations and protecting smaller economic participants from that power. At the federal level alone, the Biden administration recently issued an Executive Order announcing a policy of reinvigorating antitrust policy, including regulation and enforcement, with directives to include workers and labor markets in this effort. And just two weeks ago, the Federal Trade Commission rescinded the 2020 Vertical Merger Guidelines in part because the Guidelines "adopted a flawed economic theory" which

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[35] Ioana Elena Marinescu and Eric A. Posner, *Why Has Antitrust Law Failed Workers?,* 105 CORNELL L. REV. 1343, 1365 (2020), https://ssrn.com/abstract=3335174.
[36] *Id*. at 1371.
[37] *Horizontal Merger Guidelines,* U.S. Dep't of Justice & Fed. Trade Comm'n (Revised April 8, 1997), https://www.justice.gov/atr/horizontal-merger-guidelines-0.
[38] Congressional Record 2457 (1890), https://appliedantitrust.com/02_early_foundations/3_sherman_act/cong_rec/21_cong_rec_2455_2474.pdf.
[39] *E.g.*, *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig*., 958 F.3d 1239, 1266 (9th Cir. 2020) (M. Smith, Cir. J., concurring).
[40] *Id*.

suggested that procompetitive effects can cure a vertical merger that is otherwise illegal, an approach that "has no basis of support in law or market reality."[41] Congress, led by this Subcommittee, has been at the forefront of efforts to reinvigorate antitrust law to confront challenges presented by today's economy – starting with the so-called "Big Tech" bills voted out of the Judiciary Committee in June.

These initiatives are encouraging, but Congress must take on broader reform of the antitrust laws to address more fundamental concerns regarding how courts have misinterpreted antitrust laws and imported theories and standards found neither in those statutes nor consistent with their original purpose. Further, such reform must include provisions that unambiguously and rigorously protect labor markets, on par with protecting competition in product markets.

Labor law reform, while also vital, cannot provide the entire solution to the dominance that most workers experience in today's economy. Workers – and labor markets – are the driving force of work, production, value – in short, the backbone of the economy. Laws that shape how power is dispersed in the economy impact workers just as fully as they impact owners of capital in society.[42] While collective bargaining is a potent counterweight to concentrated corporate power in labor markets, the relentless weakening of antitrust law has allowed the rise of corporate concentration and significant shifts in the balance of power between employers and workers, issues that labor rights alone cannot mitigate. These problems concern the overall structure of the economy and the ways that corporate power is distributed, the very subject that antitrust law was meant to address. In short, labor issues must be at the center of any antitrust reform effort.

For these reasons, we urge the Subcommittee to undertake reform legislation that includes the following key labor-related provisions to clarify and strengthen antitrust law:

1. Establish bright line rules and eliminate unsupported recognition of so-called efficiencies: Establish clear, simple rules against abuse of market power, to prevent courts from misinterpreting the law or imposing additional barriers to antitrust protections in the future. Piecemeal or partial rules that permit pro-competitive justifications, or that leave it for courts to define abuse of market power, provide too great an opening for continued judicial law-making and subversion of antitrust protections. This should include, at minimum, that:
   i) parties should be permitted to prove an antitrust violation by showing anti-competitive harm from a dominant firm's conduct in a labor or product market. Firms should not be able to defend, or rebut, evidence of abusive conduct by offering a pro-competitive justification;
   ii) parties should not be required to show an antitrust violation through indirect evidence of market share if they are able to show a violation through direct evidence of illegal conduct; and
   iii) harm to consumers should not be required in order to show an antitrust violation, particularly where competition in labor markets is involved.

[41] *Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary*, Press Release, Fed. Trade Comm'n, Sept. 15, 2021, https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines.
[42] Paul, *supra* note 33 at 4 (examining how antitrust law coordinates rights among economic actors); Khan, *supra* note 32 at 745 ("Whether a market is competitive is inextricably linked to…how that market is structured.").

2. Provide bright line rules prohibiting firms from engaging in specific types of conduct known to be exclusionary or anticompetitive: Such conduct should include exclusive dealing arrangements, exclusionary contracts or payments, and tying arrangements. The law should provide these rules expressly rather than leaving it to courts to determine whether these types of anticompetitive acts are harmful on a case by case basis. With respect to workers, such exclusionary and anticompetitive acts would include, at least, non-compete and nondisclosure restrictions, and horizontal and vertical no poach agreements.

3. Provide for labor monopsony claims clearly and expressly: Provide for labor monopsony claims under antitrust laws by including and defining abuse of labor market power and exclusionary conduct in labor markets in antitrust laws and legal standards. These changes should be expressed in clear and unambiguous language so that courts may not refuse to apply antitrust laws to labor monopsony or with respect to labor markets.

4. Establish an appropriate threshold for labor market power: Establish an appropriate market share threshold at which a firm is presumed to have market power. Evidence suggests that a special feature of labor markets is that they become significantly less competitive at lower levels of concentration than product markets; we thus urge a 20 percent threshold for labor markets.

5. Expand antitrust exemption to include gig workers and other independent contractors: Organizing activity by workers is pro-competitive activity that counters employer power, especially over workers who are already deprived of the protections and power of being directly employed. Workers classified as independent contractors should be exempt from antitrust laws just as employee organizing is exempt to enable these workers to engage in collective activity to improve their wages and working conditions and to balance the power of employers.

We believe that the structure of our economy matters. In order to have a reasonable chance at a good job, family-supporting wages, and the ability to negotiate these conditions, it matters who has power in our economy and in our system. In all of these areas, as discussed above, we believe the power of individuals has been declining, and the power of large corporations has increased. And it is increasingly clear that corporate concentration of power harms consumers, workers and other market participants as well as the economy itself in a multitude of ways – from wage inequality to corporate influence on politics to innovation.

Antitrust laws – and how those laws are interpreted, applied, and enforced – have a tremendous role to play in how corporate power is allocated, exercised, and manifested in our system. Those laws have quite simply failed for far too long. This failure is particularly problematic at a time when the economy and the very nature of work itself face substantively new challenges, from digital platform companies to fissured workplaces. We urge this Subcommittee to undertake substantial – and lasting – revisions of our antitrust laws that will protect and enhance fair competition for our country's workers going forward.

Uniform Law Commission
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

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September 28, 2021

The Honorable David Cicilline
Chair
Subcommittee on Antitrust, Commercial and Administrative Law
U.S. House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Ken Buck
Ranking Member
Subcommittee on Antitrust, Commercial and Administrative Law
U.S. House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chair Cicilline and Ranking Member Buck:

We appreciate the committee's invitation to submit a letter summarizing the Uniform Restrictive Employment Agreement Act for the Subcommittee hearing on Proposals to Strengthen the Antitrust Laws and Restore Competition Online scheduled for October 1, 2021. A copy of the Act and supporting materials can be found at http://www.uniformlaws.org/ureaa/finalact.

The Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws), is a state supported organization that was established in 1892, and provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

At its July 2021 annual meeting held this year in Madison, Wisconsin, the Uniform Law Commission adopted the Uniform Restrictive Employment Agreement Act. The act is now ready for adoption by individual state legislatures and can become the centerpiece in a cooperative federalism effort to promote efficiency, mobility, and fairness in labor markets.

The Need for Reform

The danger of noncompetes is that they restrict workers from moving to more productive opportunities, potentially harming not only the worker but also social productivity. The social cost to other firms or workers is what economists call an externality, in that the contracting employer and worker don't necessarily consider the harm of their agreement on outsiders.

The dangers for low-wage workers are especially significant because those noncompetes are often

used simply to constrain workers without serving a countervailing legitimate business interest. An individual low-wage worker rarely has significant access to trade secrets and the rarely is the decisive factor in a customer's choice of firm.

Widespread use: Survey evidence from several sources suggests that approximately one in five U.S. workers is subject to a noncompete agreement, and nearly 40 percent of all workers have had a noncompete at some point in their career.[1] Higher-skilled and higher-paid workers are more likely to sign a noncompete, but even low-paid workers sign them. Indeed, hourly paid workers comprise the majority of noncompete signers.

Lack of Notice: Scholars have also empirically studied the contracting process of noncompetes. Noncompete agreements are rarely negotiated over or rejected outright. Workers often have no notice of a noncompete. Between 33 percent and 46 percent of the time, a noncompete is entered after the individual has accepted the job offer (but not with any sort of promotion or change in responsibilities).

Chilling Effect of Unenforceable Agreements: Another study by Starr and colleagues shows that noncompetes used in states that will not enforce them (e.g., California) have similar effects on employee mobility.

Broad Consensus for Reform

A broad consensus is developing across the political spectrum that reform is necessary in this field. Eighteen states enacted some noncompete legislation in 2018-21. Most focus on low-wage workers rather than more comprehensive reform, and most focus only on noncompetes rather than all post-employment restrictions. Some 36 bills in 18 different states are currently before a state legislature in some form. Despite this legislative activity, most states still rely on common law to regulate noncompetes.

Press reports suggest that the Biden Administration may seek federal legislation to adopt a California style prohibition on noncompetition agreements. The Federal Trade Commission is considering regulatory action.

The American Enterprise Institute has prepared a report arguing that noncompete agreements hinder mobility of the American workforce and reduce the overall dynamism in our economy. The AEI author declares that "the prospects of federal legislation ... have never looked better" and concludes:

"The momentum is unmistakable—and likely irreversible, as each new legislative success makes the next one easier to achieve. The challenge now is to evolve to a more coherent and comprehensive approach to reform that delivers stronger benefits to workers, entrepreneurs, and the broader economy. In any event, the rising tide of reform means this is one area of policy that is almost certain to become friendlier to workers, more embracing of competition, and more conducive to economic dynamism in the years ahead."

A Uniform Act can Harmonize the Law, While Maintaining Flexibility to Address Local Circumstances

This Uniform Act can supply a comprehensive approach to reform that helps workers,

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[1] Starr, Evan and Prescott, J.J. and Bishara, Norman D, Noncompete Agreements in the U.S. Labor Force (May 7, 2020). Journal of Law and Economics, Forthcoming, Available at SSRN: https://ssrn.com/abstract=2625714 or http://dx.doi.org/10.2139/ssrn.2625714

entrepreneurs, and competition in an area that is traditionally a matter of state law. Federal legislation or regulation can complement the Uniform Act by encouraging its adoption by the states.

The Uniform Restrictive Employment Agreement Act regulates restrictive employment agreements, which are agreements that prohibit or limit an employee or other worker from working elsewhere after the work relationship ends. The act does not regulate what a worker can or cannot do while working for the original employer. A noncompete agreement (also called a noncompetition agreement, covenant not to compete, CNC, DNC, or do-not-compete agreement) is the most stringent of the restrictive employment agreements. A noncompete expressly prohibits the worker, upon termination of employment, from creating, joining, or working for a competing firm. A typical modern noncompete specifies the time, geographic area, and scope of business that the worker may not engage in.

While noncompete agreements get the most attention, they are part of a family of restrictive employment agreements. Others include *nonsolicitation agreements* prohibiting the solicitation of former customers; *no-business agreements* prohibiting doing business with former customers whether solicited or not; *no-recruit agreements* prohibiting the recruitment or hiring of former co-workers; *confidentiality agreements* (also known as nondisclosure agreements) prohibiting the use or disclosure of trade secrets or other confidential information; *payment-for-competition agreements* to pay the employer if the employee competes, solicits, recruits, or does business; and *training-repayment agreements* to pay back training expenses if the employee leaves early. All these agreements are covered by this act. *No-poach agreements* are cousins to restrictive employment agreements: while a restrictive employment agreements is an agreement between an employer and its worker, a no-poach is an agreement between two employers (perhaps joint venturers or franchisees of the same brand) not to hire each other's workers. No-poach agreements are not covered by this act.

Uniform Restrictive Employment Agreement Act -- Core Elements

The Act recognizes that noncompetes and other restrictive agreements can serve valid purposes in enhancing value during the sale of a business, as well as in protecting trade secrets and customer relationships. But these agreements can be abused, unduly limiting competition and worker mobility with few offsetting advantages.

In striking the appropriate balance, the Uniform Act prohibits most restrictive agreements for low-wage workers, requires advance notice to other workers, sets maximum durations and other requirements for a valid restrictive employment agreement, and creates penalties for prohibited agreements.

- *Wide scope*: Regulates all restrictive post-employment agreements, including noncompetes, confidentiality agreements, no-business agreements, nonsolicitation agreements, no-recruit agreements, payment-for-competition agreements, and training reimbursements agreements.
- *Low-Wage Workers*: Prohibits noncompetes and all other restrictive agreements except confidentiality agreements and training-reimbursement agreements for low-wage workers, defined as those making less than the state's annual mean wage.
- *Notice*: Requires advance notice and other procedural requirements for an enforceable noncompete or other restrictive agreement.
- *Penalties*: creates penalties and enforcement by state departments of labor and private rights of action, to address the chilling effect of unenforceable agreements.

Value of a Uniform Act

A Uniform Restrictive Employment Agreement Act provides real value to legislatures and stakeholders. Business-community and employee-advocate groups are frustrated both with the lack of

clarity within most states on when noncompetes are enforceable or unenforceable and with the diverse approaches among states. State-to-state and within-state variations make it difficult for national employers to adopt consistent policies for the various jurisdictions in which they do business and for workers to know their rights and obligations under a noncompete. The same is true of employees who need predictability in our increasingly mobile society.

Unlike most employment-law topics, stakeholders do not divide cleanly on pro-employer/pro-employee lines. Employers want both to keep current workers from leaving and to hire experienced workers from other firms.

Noncompetes and other restrictive employment agreements may serve valid purposes in the right circumstances but are too often used in ways that limit worker mobility and hinder overall economic growth. State legislatures understand this and will continue to act. The time is ripe for the states to adopt a uniform approach. The federal government can play a useful role as a catalyst for reform, without occupying a field that has traditionally been a matter of state law.

The ULC welcomes the opportunity to work with Congress on a federal-state solution to reform the law of restrictive employment agreements to make our economy more competitive and strike a better balance between the interests of employer and employees.

Respectfully submitted,



Richard T. Cassidy
Rich Cassidy Law, Burlington VT
Chair, ULC Drafting Committee for
Uniform Restrictive Employment Agreement Act

s/Stewart J. Schwab

Stewart J. Schwab
Professor, Cornell Law School
Reporter, ULC Drafting Committee

Mr. CICILLINE. I now recognize the gentleman from Oregon, Mr. Bentz, for five minutes.

Mr. BENTZ. Thank you, Mr. Chair.

Commissioner Wilson—and thanks to all the Witnesses. Incredibly interesting conversation.

Commissioner Wilson, the standard—I would like to go back to your comments about going beyond competition and trying to apply other standards. This sounds like a kind of a step backwards in what your FTC had been doing in the fifties and sixties. I just was looking at an article that was commenting on the policies in those years, and someone called it an incoherent mess.

I think maybe that's what you were getting at when you were talking about trying to shoehorn some of these new standards concerning labor into whatever the standard—well, the consumer standards.

So, could you comment on that just a little more? Because what I'm interested in knowing is if you're asked as the FTC to bring labor standards into this, what are you going to use as the proper measure of success?

Ms. WILSON. You raise a fantastic question.

If we introduce additional goals into antitrust enforcement, we are going to have a situation in which the current system, which is predictable, administrable, incredible, is undermined. So, if we are pursuing one goal which is the preservation of competition, whether it be for the sale of services or for the purchase of services including labor, that is an assessment that can be done rigorously with evidence, with the assistance of people like Professor Kobayashi who can crunch the numbers and look at the data.

If we introduce additional goals, we are then in a situation where we have to decide which goals to prioritize. In different circumstances we may be pushed to prioritize different goals. Antitrust loses its predictability, its credibility, and its administrability. It becomes very subject to politicization and to rent seeking, and I submit to you that is not a good way to run the government.

Mr. BENTZ. Just a bit of a follow-up. I was trying to—you guys go into this in great detail and incredible complexity. So, forgive the shallowness of this question. It seems to me that the price concept that you would—that you do apply now, consumer benefit standards, would be in conflict with trying to drive up the prices by helping those who are working for these companies get greater job benefits.

So, how would you the balance those two competing goals if, indeed, you were charged with this challenge of bringing labor into the conversation?

Ms. WILSON. So, you're absolutely right. That is the problem with multiple and potentially competing goals. If the goal of antitrust is to prevent any job loss through merger, then we are going to have difficulty assessing that impact and at the same time balancing the impact on consumers. So, it is better to focus antitrust on a single goal competition which also includes the wages that labor is being paid.

So, if there is monopsony power, if a merger is going to involve, say, the only two hospitals in a city that will suppress wages, then

we step in. We prevent that merger which benefits both consumers and the nurses and others who work at a hospital.

Let me just add to what Professor Kobayashi said about hospital mergers. He indicated that there was significant focus on figuring out why the FTC and DOJ were losing so many hospital mergers, and I had the privilege of serving as Chief of Staff to Tim Muris when he launched the hospital merger retrospective to figure out why.

The economists and the lawyers at the Federal Trade Commission study the issue, figured out how to try cases in a way that launched us on many, many wins. Over the last 17 years we have had only one loss when we challenge a hospital merger.

The problem with hospital mergers is so many are below the age threshold. So, we are very interested in identifying hospital mergers that do not need to be notified to Federal Trade Commission and assessing whether those are causing anticompetitive effects including suppressing wages for nurses and physicians and others who work for those hospitals.

Mr. BENTZ. Thank you, Commissioner.

Mr. Chair, I yield back.

Mr. CICILLINE. The gentleman yields back.

I now recognize the gentleman from Utah, Mr. Owens, for five minutes.

Mr. OWENS. Thank you, Mr. Chair. I thank you. I thank all the Witnesses for joining us today.

I, like so many of my colleagues here, deeply concerned about the Biden Administration's general approach to regulations and economic policies and particularly the impact that those policies are having on businesses and workers back in my home district. I also share concerns expressed today on both sides of the aisle regarding monopoly on organizations like Amazon.

Mr. Gross and I have different backgrounds—his with the union, mine as a small business owner. We probably would respectfully disagree, agree to disagree on some of the solutions how to get there. We both emphatically have the same end game, that is, the protection of the small business, the small middle class—I mean, sorry—protection of the middle class.

Only through the free-market competition can that happen. As we see the big tech and other monopolies across many industries, there's absolutely no tolerance for small business innovation, service, and the drive to reach the middle class.

I'm thankful for the leadership of the Ranking Member, Mr. Buck, and for taking on the big tech monopolies and others that we are addressing as we come to become aware of in 2020.

Commissioner Wilson, on page 5 of your written testimony you mention how the American economy is struggling to recover from the COVID–19 pandemic. You also suggested adopting a highly interventionist competition policy at this time will harm everyone including American workers.

What about the Biden Administration's general approach to regulations and economic policies and particularly the impact on those, again, workers and businesses from my own district? Today in this hearing we're not simply talking about proposals that would

impact a particular sector or industry. We're talking about broad policy changes that would even override some State law.

Do you have any reaction to these concerns, especially as they relate to labor markets?

Ms. WILSON. I completely agree with your concerns about regulation and the cost that those impose and the chilling effect that they have on innovation. I would note, with respect to emerging from the economic devastation of COVID, one step that the Federal Trade Commission has taken is throwing out the vertical merger guidelines with essentially no notice, no opportunity for input. It's expressed intent to take a much stronger enforcement approach for vertical mergers.

Here's the problem. Supply chain vulnerabilities were exposed during COVID. To shore up the supply chain, many companies are seeking to bring the vulnerable aspects of the supply chain in-house so that they have control. Now, we have a situation in which there's an express intent to enforce vertical merger law much more aggressively, and at the same time there's no guidance.

People don't understand what the new policy is with respect to vertical mergers, and we have been told by the majority of the commission that there will be onerous penalties for bringing what they perceive as any competitive deals to our doorstep.

So, we have removed guidance from the business community which is seeking to emerge from the COVID economic devastation but we're going to double the penalties if they cross the line, but they don't know where the line is. So, it's problematic.

Mr. OWENS. Can you describe the role of State attorney generals in challenging unlawful no-approach agreements and whether they have been successful in that role?

Ms. WILSON. I think the State AGs have been very successful. The Washington State AG has, I believe, brought cases that have affected close to 200,000 locations across the country, not just in Washington. This goes back to the point I made in my written testimony, in particular, that there is a very rich, robust set of State law and common law that governs noncompetes and no-approach agreements. The State AGs are active.

My understanding is that in the same State, Pennsylvania is looking to pass a law on noncompetes. These State legislatures are very responsive to the needs of their constituents and the facts on the ground. They are very active.

Mr. OWENS. Thank you. Thank you so much.

I yield back.

Mr. CICILLINE. The Chair yields back.

This concludes our hearing. I think we've covered everyone.

Just as a reminder that Members will have five legislative days to submit additional materials for the record.

I want to again thank our Witnesses for their really helpful testimony that I think will allow this Committee to move forward in a very productive way to make certain we can really promote competition in labor markets that will benefit American workers. Thank you again to everyone for their testimony.

With this, the hearing is now concluded.

[Whereupon, at 12:29 p.m., the Subcommittee was adjourned.]

APPENDIX

32BJ SEIU
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MANNY PASTREICH
Secretary Treasurer

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Stamford 203.674.9965

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Florida District
305.672.7071

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914.328.3492

Mid-Atlantic District
215.226.3600

National Conference of Firemen and Oilers
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Western Pennsylvania District
412.471.0690

www.seiu32bj.org

September 28, 2021

Chairperson Rep. David Cicilline
House Subcommittee on Antitrust, Commercial, and Administrative Law
2141 Rayburn House Office Building
Washington, D.C. 20515

Re: Testimony submitted to the Subcommittee on Antitrust, Commercial, and Administrative Law; Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker

Dear Chairperson Cicilline,

32BJ SEIU is the largest building service worker union in the country with approximately 165,000 members in 11 states and Washington D.C. We write to urge the House Judiciary Committee to pursue legislation that addresses the various sorts of anti-competitive practices that are harming American workers, consumers, and businesses. We wish to highlight the issue of no-poach/no-hire agreements in the building services sector. This sector includes workers employed as doorpersons, concierge, cleaners, security officers, and other building maintenance workers. These workers may be employed directly by the commercial or residential building owner ("in-house" employment) or may be employed by building service contracting companies ("contracted out" employment). No-poach/no-hire agreements come into play when a building owner or manager seek to terminate a building service contractor. These agreements prohibit the building owner from hiring the incumbent workers directly or from reemploying them at the building through a successor contractor unless the building pays substantial damages to the incumbent contractor. No-poach/no-hire agreements in building service harm the employees and the building owners, residents and tenants while stifling competition.

Generally, when a contractor loses work, workers seek to remain at the same place of employment where they have transportation to work, have a suitable shift, are familiar with their coworkers and tenants and know the peculiarities of the building. Generally, buildings want to retain the experienced, reliable and trusted workers who have often developed a personal relationship with the residents/tenants. In Eastern Essential Services, 363 NLRB No. 176, slip op. (2006), Jeffrey Edelstein, a consultant with 45 years for experience in the field of janitorial services , testified that a new cleaning contractor would want to hire the incumbent employees. Such reasons include (a) the benefit of having an experienced work crew familiar with the building and its tenants already at the site ready to begin work immediately (b) the belief that a crew of long tenure is honest and trustworthy (c) the benefit of having a system in place to transport the workers to the building, and (d) the benefit of not

having the additional expense of training and doing background checks for new employees.

Case law supports the logic of hiring the incumbents. The employer in *Systems Management,* 292 NLRB at 1096, *enf'd in relevant part* 901 F.2d 297 (3rd Cir. 1990), conceded "the objective advantage of retaining predecessor employees particularly because of their familiarity with the building which was a totally new account." In *Pressroom Cleaners,* the employer admitted that it normally hires the predecessor's employees and it would have been "easier" to do so. 361 NLRB at 29.

A no-poach/no-hire incentivizes the building owner to deny employment to these workers to avoid paying damages to the incumbent contractor. For example, Planned Companies, a subsidiary of the publically traded, multi-national corporation First Service, is a dominant residential building service contractor in New Jersey. Planned includes a no-poach/no-hire agreement in its service contracts with its building owners and building management companies, which it calls a "restrictive covenant." This restrictive covenant requires a building to pay Planned three months of salary for each Planned employee who works at the building, whether as an in-house or contracted out employee. Remarkably, this restriction continues for six months after Planned's contract terminates. As a result, building managers face a difficult choice if they wish to terminate Planned. The building must either lose its entire staff or pay Planned a ransom. Some buildings are no doubt discouraged from terminating Planned.

First, Planned's restrictive covenant discourages competition among contractors. Even if a building wishes to terminate Planned, it may be decide not to face the choice of losing its staff or paying damages to Planned. Limiting competition clearly harms the building owners/managers.

Second, workers are harmed by no-poach agreements. Workers' ability to switch employers and leave dangerous, discriminatory or low paying jobs is diminished. These agreements are particularly insidious because workers lose their ability to choose employers and seek higher wages even though they are not a party to the contract. They may not even know of the no-poach/no-hire agreement prior to accepting a position. Since the industry is dominated by contracted out employment, no-poach/no-hire can workers their long-term, stable employment.

Employers often defend non-compete clauses claiming that the worker freely chose to accept the clause. Supposedly employees could negotiate to avoid non-compete clauses. However, this is not possible for a no-poach agreement that is entered into between employers where employees are unaware of it.

For example, a residential building at 1111 River Road in Edgewater, N.J., switched security officer contractors from Planned Security Services, a division of Planned Companies, to Adamas Building Services. As is Adamas' normal procedure, it asked the property manager if there were any incumbent employees that Adamas should hire. At first, the property manager indicated it wanted two of the five officers to continue working at the property. But then the manager realized that hiring those two would expose the building to a claim by Planned under its restrictive covenant. So the building gave up having two experienced, good security officers, and those officers lost their jobs---all due to the mere presence of the restrictive covenant in Planned's contract with the building.

In another example, a residential condominium board in New York City chose to terminate its contract

with Planned in 2020 and directly employ the service staff. However, the board decided it could hire only some but not all of the incumbent workers because of the cost of the restrictive covenant.

A restrictive covenant in building service contracts suppresses wages. A restrictive covenant, such as Planned's, is a disincentive for a building owner to either bring the work in-house or to bring in another contractor if it is dissatisfied with Planned and wants to retain much or all of its incumbent workforce. This disincentive reduces competition among potential employers for the workers. Reduced competition among employers removes upward pressure on wages, leaving them with lower wages than they would be without the covenant. In particular, the covenant makes it less likely that work will go in-house. Yet, in-house workers generally make considerably more than contracted out employees. Buildings might be willing to eliminate Planned's overhead and share some of the savings as higher salaries/benefits, but the covenant imposes an extra cost that interferes with such a choice.

Finally, many cities and states have adopted worker retention laws in order to preserve and protect the stability of the labor and product markets when building service contracts turn over. These laws, which cover more than 25 jurisdictions across the country, create job stability and security for workers as well as ensuring clients uninterrupted service by experienced workers. But Planned's no-poach/no-hire clauses in its building service contracts undermine state and local laws since it is impossible for a building to retain the existing workforce when a change in contractor occurs.

We recognize that the Justice Department has pledged to criminally prosecute naked no-poach agreements and has issued specific anti-trust guidance for human resource professionals. However, these actions have not dissuaded certain employers such as Planned Companies from obtaining and maintaining no-poach/no-hire agreements as the Justice Department must spend substantial time and resources showing that the no-poach agreement does not meet the rule of reason test. Congress should specifically address no-poach agreements such as Planned's restrictive covenant and so do away with employers' reasonable beliefs that they are unlikely to face enforcement action when they use no-poach agreements. A belt and suspenders approach to enforcement may be what it takes to get recalcitrant employers to cease using no-poach/no-hire agreements.

Respectfully submitted,



Kyle Bragg
President, Service Employees International Local 32BJ

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STOCKS · Published September 3

Nancy Pelosi's husband up $700K on CrowdStrike stock purchase

Paul Pelosi bought 5,000 shares of cybersecurity firm on Sept. 3, 2020

By Jonathan Garber | FOXBusiness

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House Speaker Nancy Pelosi's husband is cashing in on his bet on cybersecurity firm CrowdStrike Holdings Inc.

Paul Pelosi, who runs a real estate and venture capital investment and consulting firm, purchased 5,000 CrowdStrike shares on Sept. 3, 2020, according to regulatory filings.

Shares of the company, which closed at $129.25 apiece on the day of Pelosi's purchase, have soared 111% over the past year, meaning he has a paper gain of more than $700,000. The profit was first reported by CongressTrading.com.

Stock Symbol	**CRWD**
Stock Name	CROWDSTRIKE HOLDINGS, INC.
Stock Price	241.86
Stock Change	-11.48
Change %	-4.53%

Paul Pelosi did not violate the STOCK Act unless he acted on nonpublic information. Members of Congress and their families are required to disclose any assets purchased

or sold, the dates of such transactions and the dollar amount.

A spokesperson for Nancy Pelosi told FOX Business the House Speaker has never met with CrowdStrike officials regarding government business.

CrowdStrike was hired by the Democratic National Committee to look into the breach of its servers in 2016. The company blamed the incident on Russia but never handed its servers over to the FBI. The hack was used as part of the Trump-Russia collusion narrative that ultimately led to Robert Mueller's investigation and the first impeachment of former President Donald Trump.

AOC BLASTS CONGRESS STOCK TRADES ... AGAIN

Paul Pelosi's investments have been the subject of public scrutiny in recent months.

In June, he netted $4.8 million buying call options in Google-parent Alphabet. The investment has increased in value since the options were exercised.

A month earlier, Paul Pelosi bought up to $6 million of call options in Apple and Amazon before a powerful House committee moved forward with bills designed to rein in the powers of Big Tech. The bills passed through the committee on a slim margin and have not yet been voted on by the full House of Representatives.

Other trades that have drawn scrutiny include the exercising of $1.95 million worth of Microsoft Corp. call options less than two weeks prior to the tech company securing a highly sought-after $22 billion U.S. Army contract, and the purchase of up to $1 million in Tesla Inc. calls before the Biden administration unveiled its plans to incentivize the shift toward electric vehicles.

Trades by Paul Pelosi aren't the only ones made by members of Congress or their family members that have recently made headlines.

Kentucky Republican Sen. Rand Paul's wife, Kelley Paul, purchased shares of drugmaker Gilead Sciences in February 2020, but a disclosure was not filed until last month. The STOCK Act requires filings to be made within 45 days of the transaction date.

Trades made by Sens. Richard Burr, R-N.C., Dianne Feinstein, D-Calif., Jim Inhofe, R-Okla., and former Sen. Kelly Loeffler, R-Ga., or their significant others in the early days of the COVID-19 outbreak led to a Department of Justice investigation that was later dropped.

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Bills have been introduced in both the House of Representatives and the Senate to prevent members of Congress from trading stocks.

"It is absolutely wild that members of Congress are still allowed to buy and sell individual stock," Rep. Alexandria Ocasio-Cortez, D-N.Y., tweeted last month. "It shouldn't be legal."

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INVESTING

6 Stocks Nancy Pelosi's Husband Is Buying

Chris Lange

August 18, 2021 8:20 am

For a time, many thought speculating in the market or trading stocks was reserved for the elite few, but this has been turned on its head recently. With the advent of cryptocurrency, Robinhood and even zero-trading-fee brokerage services, now the little guy has a shot.

Investors and traders just getting into the game may not have the experience of Wall Street pros, but the data and strategies are out there. Many look to the likes of Jim Cramer, a host at CNBC, or Wall Street analysts for tips to get ahead in the market, but there are still some untapped sources for returns on investment that most might overlook; namely, politicians.

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The salary for a sitting member of Congress is $174,000 annually. While this isn't anything to sneeze at, it begs the question of why there are so many millionaires in Congress. Investing in the stock market is sometimes the answer. And they seem to be pretty good at it.

About 51% of **Congress members were millionaires** in 2018. Comparatively, the United States had 17.4 millionaires, out of the total population of 243 million. That is roughly 7% of the population. It is hard to believe the difference is from salary alone, but considering the stock market is the greatest tool for wealth creation in the history of the world, things start to make sense.

Members of Congress are **required by The STOCK Act to publicly file and disclose** any financial transactions they make. According to Wikipedia:

> The STOCK Act requires a one-year study of the growing political intelligence industry, and requires every Member of Congress to publicly file and disclose any financial transaction of stocks, bond, commodities futures, and other

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> securities within 45 days on their websites, rather than once a year as they do now.

This bill was introduced and passed by Congress in early 2012. However, not everyone has followed the rules on this, and a few members of Congress **failed to report up to $22 million worth of trades** earlier this year, according to Forbes.

Here, 24/7 Wall St. has a look at the current Speaker of the House, Nancy Pelosi, and what trades are going on around her. Important disclaimer: these trades were executed by her spouse, Paul Pelosi. When reached for comment about some of these trades earlier this year, Nancy Pelosi's spokesperson said, "The speaker has no involvement or prior knowledge of these transactions," adding that Speaker Pelosi does not own any stock.

Some data is not available for some of these trades, but we do have the rough numbers. So here's a look at Pelosi's last six months of trading:

Nvidia Corp. (**NASDAQ: NVDA**): A block of 50 call options with a strike price of $400 and an expiration date in June 2022 were purchased on June 3. Important to note here is that there was a 4 for 1 stock split on July 20, which would make the new strike price $100, and the options would control 20,000 shares post-split as opposed to the original 5,000 shares. Nvidia last closed at $194.58, and the stock is up 14.7% from June 3 ($169.66 on a split-adjusted basis). The 52-week range is $115.67 to $208.75.

Apple Inc. (**NASDAQ: AAPL**): 50 call options with a $100 strike price and a June 2022 expiration date were purchased on May 21. Apple stock recently closed at $150.19 and is up 19.9% from May 21 ($125.24). The 52-week range is $103.10 to $151.68.

Alphabet Inc. (**NASDAQ: GOOGL**): Roughly $5 million worth of Alphabet was bought through exercising options on May 21. On June 18, 4,000 shares were purchased. Alphabet recently closed at $2,733.23, and the stock is up about 56% year to date, or 19.1% higher since May 21 ($2,294.13). It has a 52-week range of $1,402.15 to $2,767.25.

Amazon Inc. (**NASDAQ: AMZN**): A block of 20 call options with a strike price of $3,000 were purchased on May 21 and have an expiration date of June 2022. The closing price on May 21 was $3,203.08, and the stock is up about 1.2% since then. Amazon recently closed at $3,241.96, in a 52-week range of $2,871.00 to $3,773.08.

Microsoft Corp. (**NASDAQ: MSFT**): Call options were exercised and paid $1.95 million to buy 15,000 shares of Microsoft at a strike price of $130 on March 19. The very same day, Pelosi paid $1.4 million for 10,000 shares valued at $140 apiece. With a closing price of $229.82 on March 19, the stock is up about 27.5% since the purchase. Microsoft stock most recently closed at $293.08 and has a 52-week trading range of $196.25 to $294.82.

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Roblox Corp. (**NYSE: RBLX**): 10,000 shares of Roblox were purchased on March 10, the day of the initial public offering. With a closing price of $69.50 on March 10, the stock is up about 13.2% since the purchase. Shares most recently closed at $78.68 and have a post-IPO range of $60.50 to $103.87.

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